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Assessing Economic Damages in Personal Injury and Wrongful Death Litigation: the State of Kansas

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I. Introduction[1]

The purpose of this paper is to present the statutes, rules, and case law that govern the practice of forensic economics for personal injury (PI) and wrongful death (WD) in the state courts of Kansas. Following the format of previous articles in this *Journal of Forensic Economics* series, Section II provides a listing of the controlling statutes, pattern jury instructions, and general case law pertaining to economic damages in PI and WD. Section III discusses the concept of earning capacity which appears in PI and WD case law in Kansas. Section IV discusses discounting to present value. Section V discusses the treatment of income taxes in PI cases. Services are discussed in Section VI, and the personal consumption deduction is discussed in Section VII. Section VIII discusses the handling of medical expenses, and Section IX covers hedonic damages. Section X addresses special issues in WD. Section XI presents concluding summary remarks including guidance on the admissibility of forensic economic testimony in the State of Kansas.

II. Controlling Statutes, Case Law, Court Rules and Pattern Jury Instructions

Damages in Kansas for PI, WD and medical malpractice actions are controlled by both statute and case law. In this section, we present Kansas pattern jury instructions, statutes, and general case law related to the compensable items within PI and WD damages. In the following sections of the paper, we provide case law discussion of the compensable economic loss items within PI and WD damages.

A. PI Jury Instructions

The Kansas Supreme Court suggests the use of Kansas' pattern jury instructions which are titled *Pattern Instructions Kansas Civil 3d* or PIK.[2] The

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[1]These papers are part of a series being prepared on economic damages in personal injury and wrongful death cases by state. A description of this series appeared as Robert A. Male and James D. Rodgers, "Introduction," *Journal of Forensic Economics*, Vol. 15, No. 3, Fall, 2002, pp. 317-18. Prospective authors of a paper for the series should consult that introduction and contact Male and Rodgers for information about the sequence of steps in the development and submission process, and also about papers already being developed or reviewed.
[2]*Pattern Instructions Kansas 3d, Civil*, Kansas Judicial Council, West Publishing, 2005.

following are the controlling PIK for PI cases (the pattern instructions for PI and medical malpractice actions are the same):

> **PIK 171.02 Types of Damages Allowed—Personal Injury**
> In determining the amount of damages sustained by the plaintiff, you should allow the amount of money which will reasonably compensate plaintiff for plaintiff's injuries and losses resulting from the occurrence in question including any of the following shown by the evidence:
> 1. Medical expenses. This type of damage includes the reasonable expenses of necessary medical care, hospitalization and treatment received by reason of plaintiff's injuries to date (and those which plaintiff is reasonably expected to receive in the future) [reduced to present value].
> 2. Economic loss. This type of damage includes loss of time or income and losses other than medical expenses incurred by reason of plaintiff's injuries to date (and those which plaintiff is reasonably expected to incur in the future) [reduced to present value].
> 3. Non-economic loss. This type of damage includes pain, suffering, disabilities and disfigurement and any accompanying mental anguish suffered by reason of plaintiff's injuries to date (and that plaintiff is reasonably expected to suffer in the future).
>
> In determining the amount of damages you should consider plaintiff's age, condition of health before and after, and the nature, extent and duration of the injuries. For such items as pain, suffering, disability, and mental anguish, there is no unit value and no mathematical formula the court can give you.
>
> You should allow such sum as will fairly and adequately compensate plaintiff. The amount to be allowed rests within your sound discretion.
>
> You will be given a verdict form in which you must itemize the amounts of damages awarded in this case.
>
> **PIK 171.06 Loss or Impairment of Services**
> If you find for the plaintiff, you may allow a sum which will constitute fair and reasonable compensation for the loss or impairment of plaintiff's ability to perform services as a (husband) (wife) resulting from injury sustained by (him) (her).
>
> In arriving at the amount of recovery, you should consider the loss or impairment of plaintiff's ability to perform services in the household and in the discharge of (his) (her) domestic duties, and the loss or impairment of plaintiff's companionship, aid, assistance, comfort and society.
>
> **PIK 171.45 Mortality Table—Life Expectancy**[3]
> According to life expectancy tables, a person of plaintiff's age has a remaining life expectancy of ___ years.

[3]PIK 171.45 uses the latest life expectancy table as published by the U.S. National Center for Health Statistics.

This figure is to assist you in determining the probable life expectancy of plaintiff as it bears on (*his*) (*her*) futures losses and damages. It is not conclusive proof of (*his*) (*her*) life expectancy, and you are not bound by it. It is only an estimate based on average experience. You may find that plaintiff probably will live a longer or shorter period than that given in these tables. This figure should be considered by you along with evidence of the health, physical condition, habits, occupation, and other circumstances bearing upon (*his*) (*her*) life expectancy.

B. WD Jury Instructions

PIK 171.30 Wrongful Death of Spouse

In determining the amount of damages sustained by the plaintiff, you should allow the amount of money which will reasonably compensate plaintiff for plaintiff's injuries and damages resulting from the occurrence in question. The amount of damages you determine should include any of the following shown by the evidence:

1. Non-economic loss. This type of damage includes: (a) mental anguish, suffering, or bereavement, and (b) loss of society, comfort, or companionship which you find has been and will be sustained by plaintiff because of the wrongful death of (*his*) (*her*) spouse. For these items of damage there is no unit value and no mathematical formula the court can give you. You should allow an amount which you find to be fair and just under all of the facts and circumstances.
2. Expenses for the care of the deceased caused by the injury.
3. Economic loss. This type of damage includes:
   (a) Loss of (*services*) (*attention*) (*marital care*) (*advice*) and (*protection*).
   (b) Loss of earnings you find the deceased would have provided.
   (c) Funeral expenses.

For items 3 (a) and (b) you should allow an amount which you believe to be equivalent to the monetary benefits or compensation plaintiff could reasonably have expected to receive from the continued life of the deceased.

You will be given a verdict form in which you must itemize the amount of non-economic damages, expenses for care, and economic damages awarded to date and those non-economic damages and economic damages awarded for future injuries and losses.

PIK 171.31 Wrongful Death of Parent

In determining the amount of damages sustained by the plaintiff, you should allow the amount of money which will reasonably compensate plaintiff for plaintiff's injuries and damages resulting from the occurrence in question. The amount of damages you determine should include any of the following shown by the evidence:

1. Non-economic loss. This type of damage includes: (a) mental anguish, suffering, or bereavement, and (b) loss of society, comfort, or companionship which you find has been and will be sustained by plaintiff because of the wrongful death of (*his*) (*her*) (*their*) par-

ent. For these items of damage there is no unit value and no mathematical formula the court can give you. You should allow an amount which you find to be fair and just under all of the facts and circumstances.

2. Expenses for the care of the deceased caused by the injury.
3. Economic loss. This type of damage includes:
   (a) Loss of (*services*) (*attention*) (*parental care*) (*advice*) and (*protection*).
   (b) Loss of earnings you find the deceased would have provided.
   (c) Funeral expenses.

For items 3 (a) and (b) you should allow an amount which you believe to be equivalent to the monetary benefits or compensation plaintiff could reasonably have expected to receive from the continued life of the deceased.

You will be given a verdict form in which you must itemize the amount of non-economic damages, expenses for care, and economic damages awarded to date and those non-economic damages and economic damages awarded for future injuries and losses.

PIK 171.31 Wrongful Death of a Child

In determining the amount of damages sustained by the plaintiff, you should allow the amount of money which will reasonably compensate plaintiff for plaintiff's injuries and damages resulting from the occurrence in question. The amount of damages you determine should include any of the following shown by the evidence:

1. Non-economic loss. This type of damage includes: (a) mental anguish, suffering, or bereavement, and (b) loss of society, comfort, or companionship which you find has been and will be sustained by plaintiff because of the wrongful death of (*his*) (*her*) (*their*) child(ren). For these items of damage there is no unit value and no mathematical formula the court can give you. You should allow an amount which you find to be fair and just under all of the facts and circumstances.
2. Expenses for the care of the deceased caused by the injury.
3. Economic loss. This type of damage includes:
   (a) Loss of (*services*) (*attention*) (*filial care*) and (*protection*).
   (b) Loss of earnings you find the deceased would have contributed to the (parent) (parents) during the remainder of (*his*) (*her*) (*their*) lifetime.
   (c) Funeral expenses.

For items 3 (a) and (b) you should allow an amount which you believe to be equivalent to the monetary benefits or compensation plaintiff could reasonably have expected to receive from the continued life of the deceased.

You will be given a verdict form in which you must itemize the amount of non-economic damages, expenses for care, and economic damages awarded to date and those non-economic damages and economic damages awarded for future injuries and losses.

PIK 171.31 Wrongful Death of Person other than Spouse, Parent or Child

In determining the amount of damages sustained by the plaintiff, you should allow the amount of money which will reasonably compensate plaintiff for plaintiff's injuries and damages resulting from the occurrence in question. The amount of damages you determine should include any of the following shown by the evidence:

1. Non-economic loss. This type of damage includes: (a) mental anguish, suffering, or bereavement, and (b) loss of society, comfort, or companionship which you find has been and will be sustained by plaintiff(s) because of the wrongful death of the deceased. For these items of damage there is no unit value and no mathematical formula the court can give you. You should allow an amount which you find to be fair and just under all of the facts and circumstances.
2. Expenses for the care of the deceased caused by the injury.
3. Economic loss. This type of damage includes:
   (a) Loss of (*services*) (*attention*) (*advice*) and (*protection*).
   (b) Loss of earnings you find the deceased would have contributed to the plaintiff(s) during the remainder of (*his*) (*her*) (*their*) expected lifetimes.
   (c) Funeral expenses.

For items 3 (a) and (b) you should allow an amount which you believe to be equivalent to the monetary benefits or compensation plaintiff could reasonably have expected to receive from the continued life of the deceased.

You will be given a verdict form in which you must itemize the amount of non-economic damages, expenses for care, and economic damages awarded to date and those non-economic damages and economic damages awarded for future injuries and losses.

C. FELA Jury Instructions[4]

PIK 132.32 Wrongful Death—Measure of Damages

If you find that the plaintiff is entitled to recover, you must then compensate the amount of recovery that will fairly and justly compensate the survivors of the decedent for all pecuniary losses that they have suffered and for all pecuniary losses they are reasonably certain to suffer in the future by reason of the death of the decedent, reducing all such future pecuniary losses to their present cash value.

PIK 132.33 Wrongful Death—Determination of Pecuniary Loss

To determine the pecuniary loss suffered by the survivor(s) as a result of the death of the decedent, you shall consider the following:

1. The benefits of a money value, including money, goods, and services that the decedent customarily contributed to the survivor(s);
2. The decedent's earnings and (*his*) (*her*) probable future earnings;

[4]There is not a specific PIK for personal injury FELA damages. See the later section on FELA in the paper for the modification to the general personal injury PIK 171.02 for use in FELA cases.

3. The decedent's habits of industry and thrift, (*his*) (*her*) health, (*his*) (*her*) age, and (*his*) (*her*) life expectancy at the time of (*his*) (*her*) death;
4. The personal expenses of the decedent;
5. The length of time the survivor(s) would probably have received benefits of money value from the decedent had (*he*) (*she*) lived;
6. Any other facts that may aid you in determining the pecuniary loss;
7. The value of any loss of care, attention, instruction, training, advice, and guidance that the decedent would probably have given to (*his*) (*her*) surviving minor children.

The benefits that you may consider must be only those upon which a money value can be placed. You are not permitted to award any amount for the grief or loss of society and companionship caused any survivor by the death of decedent.

PIK 132.34 Income Taxes—Effect on Damages (given with PIK 132.33)
In calculating damages for loss of earnings of the deceased, you should consider net earnings after income taxes rather than gross earnings.

You are also instructed that the amount of your award will not be subject to income taxes.

D. PI and Medical Malpractice Statutes

Kansas Statute[5] (Kan. Stat.) §23-205 specifies that in the case of a married person with injuries causing the loss or impairment of his or her ability to perform services, the right of action to recover damages for such loss or impairment vests solely in such a person so far as it is based upon the loss or impairment of his or her ability to perform services in the household and in the discharge of his or her domestic duties even if some of those services are for the benefit of such person's spouse.

Kan. Stat. §60-19a01 and §60-19a02 specify in both PI and WD actions that the damages verdict must be itemized into the categories shown in PIK examples above and the total amount recoverable by each party from all defendants for all claims for pain and suffering or non-economic damages shall not exceed a sum total of $250,000.

Under medical malpractice liability, Kan. Stat. §60-3406 defines "current economic loss" as the costs of medical care and related benefits, lost wages and other economic losses incurred prior to the verdict and "future economic loss" as the costs of medical care and related benefits, lost wages, loss of earning capacity or other economic losses to be incurred after the verdict. Also, "medical care and related benefits" is defined in this statute as the reasonable expenses of necessary medical care, hospitalization and treatment required due to the negligent rendering of or failure to render professional services by the

[5]Kansas Statutes can be found on the Internet at http://www.kslegislature.org/legsrv-statutes/index.do.

liable health care provider. Kan. Stat. §60-3408 states that in every medical malpractice liability action in which the verdict awards damages for future economic losses, the verdict shall specify the period of time over which payment for such losses will be needed. However, Kan. Stat. §60-3408 has been rendered meaningless (and is not included in PIK) because its companion Kan. Stat. §60-2609 stating that the court may require that the damages awarded be paid in whole or in part by installment or periodic payments was repealed in light of the Supreme Court of Kansas finding that statute unconstitutional (*Kansas Malpractice Victims Coalition v. Bell* (1988).

E. WD Statutes

Kan. Stat. §60.1902 allows wrongful death actions to be commenced by any one of the heirs at law of the deceased who has sustained a loss by reason of the death. The claim for wrongful death is brought neither on behalf or for the benefit of the estate, but only on behalf and for the benefit of the heirs; a survival action may be brought only by the estate administrator pursuant to Kan. Stat. §60-1901, and only for the purpose of recovering damages suffered by the decedent prior to death (*Tank v. Chronister*, 1998).

In any wrongful death action, Kan. Stat. §60.1903 states that the verdict shall be itemized by the trier of fact to reflect the amounts, if any, awarded for: (1) nonpecuniary damages; (2) expenses for the care of the deceased caused by the injury; and, (3) pecuniary damages other than those itemized under (2). This statute also caps nonpecuniary damages to $250,000.

Kan. Stat. §60.1904 specifies the WD damage items to be considered: (1) Mental anguish, suffering or bereavement; (2) loss of society, companionship, comfort or protection; (3) loss of marital care, attention, advice or counsel; (4) loss of filial care or attention; (5) loss of parental care, training, guidance or education; and, (6) reasonable funeral expenses for the deceased. As we will later discuss (and as already evidenced in the WD PIK), case law separates the damage items in Kan. Stat. §60.1904 into their respective economic and non-economic loss categories.

F. Pre- and Post-Judgment Interest Statute

According to Kan. Stat. §16-204, since July 1, 1996, it shall be presumed that applying interest at the rate of 10% per annum will result in the correct total of interest accrued on any judgments, regardless of when the judgments accrued. The burden of proving that a different amount is the correct total shall lie with any person contesting the presumed amount. Under the provisions of Kan. Stat. §16-204, the Supreme Court of Kansas ruled in *Hamilton v. Netherton* (1965) that there can be no compounding of the statutory simple rate of interest.

G. Collateral Source Rule

At common law, the collateral source rule prevents the jury from hearing evidence of payments made to an injured person by a source independent of the tortfeasor as a result of the occurrence upon which the personal injury action is based. Kansas follows the "collateral source rule" in all PI and WD cases by holding that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer does not diminish the damages otherwise recoverable from the wrongdoer (*Thompson v. KFB Ins. Co.*, 1993).

H. Punitive Damages

Kansas allows punitive damages in PI and WD cases where the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice. Under Kan. Stat. §60-3701, the trier of fact or jury only determines whether punitive damages should be allowed or not. If the trier of fact or jury believes punitive damages should be allowed, then a separate proceeding is conducted by the court alone (absent the jury) to determine the amount of punitive damages using statutory guidelines which include the profitability of the defendant's misconduct and the financial condition of the defendant.

I. Burden of Proof and Mitigation of Damages

In Kansas, the burden of proving the damages incurred rests on the plaintiff and it is the function of the trier of fact to determine the amount of damages that should be awarded based upon evidence of the loss suffered. A reasonable basis for computation and the best evidence obtainable under the circumstances should enable the trier of fact to make an estimate which provides an adequate recovery of damages (*Short v. Wise*, 1986).

The jury is not obligated to give credence to an economist's testimony, even where such expert testimony on extent of future loss is admitted, the trier of fact will not be bound by the expert's testimony and may accord the testimony as little or as much weight as it deems appropriate (*Cerretti v. Flint Hills Rural Electric Coop. Ass'n*, 1992).

Mitigation is the minimization of damages by the reasonable efforts of the plaintiff. In Kansas, the defendant has the burden of proving the plaintiff failed to mitigate his/her damages (*Rockey v. Bacon*, 1970). Where a person has been physically injured by the fault of another, which injury can be minimized or cured by a surgical operation not attended with undue suffering or serious hazard to life, and the injured person refuses to undergo such operation, he/she cannot recover for the consequent prolongation or aggravation of their disability which would be avoided by the needed operation (*Merrick v. Missouri-Kansas-Texas R.R. Co.*, 1935).

J. Federal Employers Liability Act

The actions created by the Federal Employers Liability Act, 45 U.S.C.A. §51-60, (FELA) are not Kansas causes of action, but are often brought in Kansas state court in preference to being in federal court; therefore, usual Kansas case law does not apply to FELA cases in every aspect of damages computation.[6] However, when working in Kansas courts, the forensic economic expert should be aware of specific Kansas case law relating to FELA damages computation.

When personal injuries are involved, the PIK 171.02 damage instruction is modified to reflect that the dollar value of damages for loss of future earning capacity and future medical expenses should be reduced to present cash value (*Koser v. Atchison, Topeka & Santa Fe Ry. Co.*, 1996). Recognizing income taxes in FELA litigation (see *Norfolk & Western Ry. Co. v. Liepelt*, 1990), in Kansas FELA personal injury cases, PIK 171.02 is modified to include the income tax deduction language from WD PIK 132.34 (above) by replacing the word "deceased" with the word "plaintiff."

K. Per Diem

The "per diem" argument reduces the calculation of general non-economic damages down to a mathematical formula based on time units and a dollar value of each time unit. In *Wilson v. Williams*, (1997), the court allowed a per diem argument by plaintiff's counsel in order for a jury to place a value on pain and suffering.

III. Earning Capacity

A. Loss or Impairment of Earning Capacity

In PI PIK 171.02, economic loss includes loss of time or income. In *Shirley v. Smith* (1997), the Kansas Supreme Court stated that impaired earning ability is compensable whether measured in time or actual earnings and that "loss of time" is tied to earning capacity.[7] The Kansas Supreme Court wrote extensively about loss and impairment of earning capacity in *Morris v. Francisco*, (1985):

> All damages … are subject to uncertainties and contingencies, especially those that seek to compensate for future injuries. To warrant a recovery for impairment of earning capacity in personal injury actions, the impairment of earning capacity must be shown with reasonable certainty or reasonable probability, and there must be evidence which will permit the jury to arrive at a pecuniary value of the loss.

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[6]The elements of damages recoverable in FELA cases are a matter of federal law. However, the method of proof of the present value of future damages, like other questions of procedure and evidence, is to be determined by the law of the forum (*Gannaway v. Missouri-Kansas-Texas R. Co.*, 1978).

[7]It was also stated in this case that "loss of time" is relevant in the past and in the future.

> There is no fixed rule for estimating the amount of damages to be recovered for loss or diminution of earning capacity. The jury should award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would have lasted, and all the contingencies to which it was liable. As bearing on these matters, the nature and extent of the plaintiff's business, profession, or employment, his skill and ability in his occupation or profession, the loss or diminution of his capacity to follow it, as a consequence of the injury, and the damages he has sustained by reason of such loss or diminution may be shown and taken into consideration. The plaintiff's position in life may be taken into consideration, and the jury may consider the possibility of future increases in income, based upon plaintiff's character, intelligence, ability, and work record. The extent and seriousness of the plaintiff's injury may be shown, and as a basis for comparison, proof as to his condition since the injury is admissible.
>
> Thus, we see the extent of the diminution or impairment of earning capacity is a relevant consideration and is arrived at by comparing what the injured party was capable of earning at or before the time of the injury with what the party is capable of earning after the injury. This is recovery for injury to the capacity to earn and is relevant in calculating a party's loss of earnings.
>
> In determining the amount to be awarded for decreased earning capacity, the jury should consider the health of the injured party and the party's physical ability to maintain herself before the injury as compared with the injured party's condition in to do so afterward. (pp. 17-19)

In *Slocum v. Kansas Power & Light Co.* (1963), the Kansas Supreme Court addresses a plaintiff without a work record and quoted that

> If proof of actual earnings before and after an injury were required, then an injured child, as in this case, could not recover for loss of future earning capacity, which, of course, would be neither equitable nor just. The plaintiff's permanent injuries, as related, stand as sufficient proof of his inability to adequately compete in any respect in the open market in future years. (p. 29)

Similarly, in *Ladd v. Chicago, R. I. & P. R. Co.* (1916), the Supreme Court of Kansas quoted that

> ...a person whose capacity to labor has been permanently diminished by physical injury wrongfully inflicted upon him by another can recover damages therefore, notwithstanding there may have been no proof as to what such person's earnings were before or after the injury. (p. 9)

B. Earning Capacity of the Self-Employed

Kansas courts have recognized that the earnings of a self-employed person consist of a return from both labor efforts and a return on capital invested. For

example, in *Chicago, R. I. & P. R. Co. v. Posten* (1898) the injured plaintiff was a farmer whose income fluctuated year-to-year. The court stated that it is necessary for the jury to separate loss of time from being unable attend to his business and to award him as damages the value of his lost time and labor to himself in the transaction of his own business, but not to award any loss of profits on his invested capital in the business.

In the case of loss of self-employed earning capacity in WD, the Kansas Supreme Court stated in *Missouri, K. & T. R. Co. v. McLaughlin* (1906), that the lost income to survivors must be that which was derived from the personal exertions of the deceased in his business or occupation, as distinguished from income arising from property owned or investments of capital. Here, the court reasoned that "those who inherit from the deceased acquire his property and investments, and are enabled to secure for themselves the ordinary income therefrom."

C. Worklife Expectancy and Fringe Benefits

The concept of worklife expectancy is not developed within Kansas case law, but is mentioned in *Wentling v. Medical Anesthesia Services* (1985), where the court advises that while the expert economist's projection of worklife expectancy, career advancement, and accumulation of fringe benefits involves matters which lie beyond the competency of average jurors, the trier of fact will not be bound by the expert's testimony and may accord the testimony little or as much weight as it deems appropriate. A plaintiff's worklife expectancy is also mention in *Cott v. Peppermint Twist Management Co.*, (1993) and *Bridges v. Bentley* (1989).

IV. Discounting to Present Value

In all PI and WD cases, a defendant is allowed to have amounts provided for future damages reduced to present worth when there are reasonable grounds to expect the amount awarded may be safely and profitably invested (*Gannaway v. Missouri-Kansas-Texas R.R. Co.*, 1978). Evidence demonstrating how to compute present worth, either by way of expert testimony, or appropriate mathematical tables or formulae is admissible in any action in which substantial future damages are claimed (*Gannaway v. Missouri-Kansas-Texas R.R. Co.*, 1978).

In the case of a annuitant expert giving the present value of future damages in the form of a quote on an annuity from Allstate insurance, that annuitant's testimony was disallowed because Allstate's quote for the annuity was not based on fact or data perceived or personally known or made known to him and was outside the knowledge, skill, experience, and training possessed by the witness (*Gregory v. Carey*, 1990). It is presumed that this case would not disallow annuitants from giving general damages testimony that did not include quotes on annuities from insurance companies.

V. Income taxes in PI and WD Cases

In all non-FELA PI actions, the incidence of federal or state income taxation is not a proper factor to be considered by the jury in making an award of damages in a personal injury suit and it is improper to instruct the jury that an award for damages for impairment of earning capacity, whether past or future, is exempt from such taxation (*Spencer v. Eby Construction*, 1960). In a 1981 WD case, a Kansas Appellate Court cited *Spencer* regarding that is improper for a jury to consider federal or state income taxes in making a damage award (*Cornejo v. Probst*, 1981). In 1990, a Kansas Appellate court stated that a trial court did not err in preventing cross-examination of an economist regarding the effect of income tax in a PI case (*Ryder v. Black & Veatch Consulting Engineers*, 1990).

VI. Services

Kansas courts have ruled extensively on the loss of services in PI and WD. The division of service loss into economic and non-economic categories by the court is an important part of service loss determination. In *Cleveland v. Wong* (1985), the Kansas Supreme Court held that the terms "services" and "domestic duties" as used in K.S.A. §23-205 (see above) include "not only the performance of acts of manual labor about the house—taking out the trash, making repairs, drying dishes, and the like—but the performance of matrimonial, conjugal and connubial acts and duties, including social obligations, affection, and sexual relations." The Kansas WD case *Wentling v. Medical Anesthesia Services* (1985), involved the death of a homemaker and provides much of the case law standards of loss of services in WD. In *Wentling*, the Kansas Supreme Court stated that when a plaintiff has shown an actual loss of services, care, advice, training, and guidance, and the extent thereof, a jury is not precluded from considering such items in determining economic damages even though no dollar evidence was presented by the plaintiff or expert economist. Through *Wentling* and *Cleveland*, the Kansas Supreme Court has held that economic losses include: services, attention, marital care, parental care, filial care, advice, protection, moral training, social training, educational assistance, nurturing, guidance, counseling, and matrimonial, conjugal and connubial acts and duties, including social obligations, affection, and sexual relations. Non-economic losses include: mental anguish, suffering, bereavement, society, comfort, and companionship.

In *Wentling*, the Kansas Supreme Court acknowledged the difficulties in placing a monetary value on all of the economic compensable damage items. The court commented regarding the testimony of an economist was "relevant and admissible to aid the jury in its deliberations if it is available and presented. However, failure to present such expert testimony does not convert what are otherwise admitted pecuniary losses into nonpecuniary losses as contended by defendant." The *Wentling* decision was cited favorably in *Cerretti v. Flint Hills Rural Electric Co-op Ass'n.* (1992), where the court specifically

stated that a jury is not bound by expert economic testimony—the trier of fact need only estimate the loss.

The division of daily activities within a family into economic and non-economic loss categories can be problematic because some of the economic and non-economic activities might be performed or given concurrently. Well before *Wentling*, the Kansas Supreme Court addressed the concurrency of services and companionship in *Clark v. Southwestern Greyhound Lines* (1936). The *Clark* case involved the plaintiff husband bringing an action for loss of services and companionship from his injured wife. Albeit in this case different legal rules applied regarding how a husband and wife could separately claim damages for loss of services and companionship, the analysis of the court is relevant with the required modern separation of services (economic) and companionship (non-economic) losses:

> The position taken by plaintiff would require courts and juries to distinguish between services and companionship. That is, when a dutiful wife arose in the morning and prepared breakfast for her husband, that would be services, and the husband could not maintain an action for loss of that, but while this happy couple were eating breakfast and the wife had surrendered the morning papers and during a lull in the efforts necessary to induce the children to eat their cereal she laughed at an occasional stale joke or offered a comment on some passing news of the day, that would be companionship, and the husband could maintain an action for loss of that. Then when the time came to go to the office and the wife drove the husband to work in the family car, that would be work that might be performed by a chauffeur and would be called services, and the husband could not maintain an action for loss of it. If, however, on the way down there was gay laughter and happy conversation while this happy couple planned a picnic for the evening, that would be companionship and the husband could maintain an action for the loss of that. It seems that the mere statement of the proposition is a refutation of it. The fact is that the wife owes the duty to observe the little amenities and attentions that tend to keep the matrimonial bark riding at an even keel as much as she does the duty to look after the more material tasks of the household. By way of dicta it may be said that the husband owes the same duty. They are all services as dealt with by R. S. 23-205. To hold otherwise would require the installation of a time sheet in every home and devolve upon courts and juries the impossible task of deciding where services left off and companionship began. We are loath to think that the legislature intended to place upon the courts such a task. (pp. 7-8)

The above passage from *Clark* recognizes the concurrency of services and companionship within the family's daily activities. While the law at the time of *Clark* was different than today regarding how spouses claim damages, and hence the husband's claims for loss could be put aside, the case does point out the modern realities faced by *Wentling* genre case law demands for the separation of services and companionship into economic and non-economic categories of loss. The usefulness of *Clark* is its conclusion that services are likely performed during much of the time spent together by husbands and wives while at

the same time non-economic categories of loss such as companionship are also present.

Lastly, Kansas allows recovery of services performed gratuitously for the benefit of others. For example, see *Shattuck v. Pickwick Stages Corp.* (1932) which allows the recovery of a husband's nursing services provided to his injured spouse.

VII. Personal consumption

Kansas, as a survivor's action state, requires that pecuniary loss or damages to survivors in a WD case be equivalent to those pecuniary benefits or compensation to them that reasonably could have been expected to have resulted from the continued life of the deceased (*Laterra v. Treaster*, 1992). The guidelines for evaluating the capacity for the deceased to provide pecuniary benefits to his survivors include a consideration of: the age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor; the probable increase or diminution of that ability with the lapse of time; and, the deceased's earning power, rate of wages and the care and attention the deceased may be expected to give his family. From the amount determined the personal expenses of the deceased should be deducted, and the balance, reduced to its present value, should be the amount of the verdict (*Missouri, K. & T. R. Co. v. McLaughlin*, 1906).

VIII. Medical expenses

The reasonable expense of treatment is a proper element of economic damages and the jury may consider the impact that inflation may have on the future cost of medical care necessary to treat a medical condition arising out of an injury. Expert testimony is not necessary to establish the impact of inflation on future medical costs (*Shirley v. Smith*, 1997).

In *Shirley v. Smith* (1997), the Kansas Supreme Court allowed the plaintiff to claim economic damages for the amount of time spent by the plaintiff in medically necessary self-catheterization. The court held that this loss of time was compensable as a reasonable medical expense (not loss of earning capacity) and measurable by the plaintiff's hourly wage rate from her employer. As a medical expense, the amount awarded for self-catheterization was not subject to the $250,000 cap on non-economic damages.

In *Lewark v. Parkinson* (1906), the court approved an award which included expenses incurred by reason of the injuries sustained by Mrs. Parkinson when she attempted to get out of a runaway horse-drawn cab. The value of the time spent by Mrs. Parkinson's sons in nursing and caring for her was allowed as part of her medical expenses. From *Lewark*, the reasonable compensation for nurse hire and attendance was a proper item of recovery, notwithstanding the persons who performed the services were relatives who might have been bound to take care of her without compensation, if she paid or became liable for the expense and the service was required.

IX. Hedonic damages

In Kansas, the loss of enjoyment of life (also directly referred in Kansas case law as Hedonic damages) is not a separate category of non-economic damages (*Leiker v. Gafford*, 1989; *Gregory v. Carey*, 1990). Since loss of enjoyment is a part of non-economic damages and non-economic damages are capped to $250,000, Hedonic damages testimony by an economist in Kansas has been nonexistent.

X. Special issues in WD

In the case of a wrongful death of a spouse, the fact that a spouse had remarried was not a factor for the jury to consider in assessing either pecuniary or nonpecuniary damages of the surviving spouse (*Pape v. Kansas Power & Light Co.*, 1982).

A child's pecuniary damages are not limited to the loss of financial support his decedent parent would have provided during his minority (*Laterra By and Though Commercial Nat. Bank v. Treaster*, 1992).

In an action for the WD of a child, damages do not include lost investment in raising the deceased child (*Howell v. Calvert*, 2000). In the case of a WD of a child, it is not necessary to prove with certainty the exact value of the services which would have been rendered had the child lived nor fix the amount of financial support that the child would have provided to his or her parents (*Atchison, T. & S. F. R. Co. v. Fajardo*, 1906; *Bartlett v. Heersche*, 1969). Kansas courts have long recognized that parents may recover pecuniary damages for the death of their majority age children (*Railway Co. v. Fajardo*, 1906).

XI. Summary

In this paper, we set forth the controlling statutes, pattern jury instructions, and general case law pertaining to economic damages in PI and WD in the State of Kansas. While much of Kansas' case law is similar to other states' regarding typical forensic economic subjects such as earning capacity and discounting to present value, we exhibited Kansas' large amount of case law regarding service loss in PI and WD.

While Kansas law contains support for the use of expert economists in quantifying elements of damages outside the normal purview of lay persons, the case law is short on the standards of admissibility of economic expert testimony. Kansas has consistently followed the *Frye* test for the admissibility of expert testimony (*Kuhn v. Sandoz Pharmaceuticals Corporation*, 2000). In *Kuhn*, the court emphasized that the *Frye* test does not apply to "pure opinion" expert testimony, hence generally acceptance and reliability are key evaluators of the admissibility of any expert testimony in Kansas. As such, when evaluating any of the compensable economic loss items within the State of Kansas presented in this article, the forensic economist must be ready to demonstrate the methods used to compute PI and WD damages are contained within the economic literature and are reliable measures of Kansas economic loss items.

List of Cases

Atchison, T. & S. F. R. Co. v. Fajardo, 74 Kan. 314 (Kan., 1906)
Bartlett v. Heersche, 204 Kan. 392 (Kan., 1969)
Bridges v. Bentley, 244 Kan. 434 (Kan., 1989)
Cerretti v. Flint Hills Rural Electric Co-op Ass'n, 251 Kan. 347 (Kan., 1992)
Chicago, R. I. & P. R. Co. v. Posten, 59 Kan. 449 (Kan., 1898)
Clark v. Southwestern Greyhound Lines, 144 Kan. 344 (Kan., 1936)
Cleveland v. Wong, 237 Kan. 410 (Kan., 1985)
Cornejo v. Probst, 6 Kan. App. 2d 529 (Kan. App., 1981)
Cott v. Peppermint Twist Management Co., 253 Kan. 452 (Kan., 1993)
Gannaway v. Missouri-Kansas-Texas R.R. Co., 2 Kan. App. 2d 81 (Kan. App., 1978)
Gregory v. Carey, 246 Kan. 504 (Kan., 1990)
Hamilton v. Netherton (194 Kan. 683 (Kan., 1965)
Howell v. Calvert, 268 Kan. 698 (Kan., 2000)
Kansas Malpractice Victims Coalition v. Bell, 243 K. 333 (Kan., 1988)
Koser v. Atchison, Topeka & Santa Fe Ry. Co., 261 Kan. 46 (Kan., 1996))
Kuhn v. Sandoz Pharmaceuticals Corporation, 270 Kan. 443 (Kan., 2000)
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Laterra v. Treaster, 17 Kan. App. 2d 714, (Kan. App., 1992)
Leiker v. Gafford, 245 Kan. 325 (Kan., 1989)
Lewark v. Parkinson, 73 Kan. 553 (Kan., 1906)
Merrick v. Missouri-Kansas-Texas R.R. Co., 141 Kan. 591 (Kan., 1935)
Missouri, K. & T. R. Co. v. McLaughlin, 73 Kan. 248 (Kan., 1906)
Morris v. Francisco, 238 Kan. 71 (Kan., 1985)
Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490 (U.S.,1990)
Pape v. Kansas Power & Light Co., 231 Kan. 441 (Kan., 1982)
Railway Co. v. Fajardo, 74 Kan. 314 (Kan., 1906)
Rockey v. Bacon, 205 Kan. 578 (Kan., 1970)
Ryder v. Black & Veatch Consulting Engineers, 791 P.2d 753 (Kan. App., 1990)
Shattuck v. Pickwick Stages Corp., 135 Kan. 602 (Kan., 1932)
Shirley v. Smith, 261 Kan. 685 (Kan., 1997)
Short v. Wise, 239 Kan. 171, (Kan., 1986)
Slocum v. Kansas Power & Light Co., 190 Kan. 747 (Kan., 1963)
Spencer v. Eby Construction, 186 Kan. 345 (Kan., 1960)
Tank v. Chronister, 160 F.3d 597 (U.S. App. 10, 1998)
Thompson v. KFB Ins. Co., 252 Kan. 1010 (Kan., 1993)
Wentling v. Medical Anesthesia Services, P.A., 237 Kan. 503 (Kan., 1985)
Wilson v. Williams, 261 Kan. 703 (Kan., 1997)