Focus PERSONAL INJURY

Adding up the ultimate cost of death

The 'dependency assumption' is a crucial and contentious calculation used in determining loss

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Lawyers experienced in fatal accident litigation know that the approach to pecuniary damages in such cases is fundamentally different from personal injury matters, and usually more complex. The key difference is that in fatal accidents, the injured party is deceased and is obviously in no position to make a personal claim for damages.

Pecuniary damage claims in fatalities are normally made on behalf of the dependents of the deceased — usually the spouse and children, but occasionally others such as dependent parents, siblings, a former spouse, etc. The claim is made for the lost support (financial and other) which the deceased would have provided to the dependents if not for the untimely death.

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In personal injury matters, determining the quantum of pecuniary damages is often fairly straightforward, requiring that the gross lost earnings, fringe benefits, lost valuable services and future care needs be established and then evaluated over the lifetime or working lifetime of the injured party. Fatality damages, on the other hand, involve a number of additional complicating factors which normally do not arise in personal injury claims, such as:

■ The loss is based on the portion of the deceased's gross earnings which would have been devoted to the dependents if not for the fatality. Commonly called the "dependency assumption," this is a crucial factor which is often a source of debate in litigation.

■ In contrast to personal injury claims, it is well settled that a claim for pecuniary damages in fatality litigation must be made based on lost net income, after taxes and other statutory deductions. For this reason, with fatalities it is usually appropriate to seek an income tax gross-up on all lost dependency amounts.

■ Instead of the future lifetime or working lifetime of the injured party alone, a fatality claim must take into account the expected future joint survival of the deceased and the dependents, as well as the possibility that the deceased might have died anyway between the dates of the actual death and the trial date, if not for the accident. These are complicated calculations. In our experience, they are often incorrectly handled by valuators who are not professionally trained in evaluating life contingencies.

■ In fatality matters, it may be appropriate to allow for the possibilities of divorce and remarriage. Might the deceased's dependent spouse remarry in the future? Might the deceased and the dependent spouse have separated if the fatality had not occurred? Note that separation, divorce and remarriage do not necessarily mean an end to financial dependency. Note also that general remarriage/divorce statistics may be a poor measure of the likelihoods of these events based on the characteristics of the parties in a specific file.

■ A claim for lost valuable services should be based on the services which the deceased would have performed for the dependents, rather than the services which will be required by the claimants.

As mentioned above, the assumption which the valuator uses for the dependency calculation is important and often controversial. If a household has maintained detailed records of pre-fatality spending, then an expert can accurately determine the annual amounts spent personally by the deceased, the amount spent on the dependents, and the amount spent on fixed household costs. From this data, the annual dependency loss can be calculated. But who keeps such records?

More commonly, a dependency assumption is selected based on population studies, taking into account the long and varied history of legal decisions on this point. Three general approaches are in common use:

1. Sole Dependency: The dependent spouse's loss is determined as a specified percentage (often 70 per cent) of the lost net income of the deceased, plus a percentage (often four per cent) for each of the dependent children. This approach can be considered useful where the spouse is expected to have only minimal employment income in the future.

2. Cross Dependency: This approach is often used where both the deceased and the spouse would be expected to have significant earnings. The loss is determined as a specified percentage (often 70 per cent) for the spouse, plus a percentage (often four per cent) for each child, of the expected combined net earnings of both parties if not for the death, less the full amount of the expected post-accident future net earnings of the dependent spouse.

3. Modified Sole Dependency: This is a variation of the sole dependency approach but applied to a two-income family situation. The spouse's dependency is reduced, usually from 70 per cent to 60 per cent, in recognition of the expectation that the spouse will have personal income. However, the spouse's expected future earnings are not directly used in the calculation.

In view of the many complicating factors and assumptions which must be taken into account, lawyers encountering fatal accident litigation will want to ensure that their economic loss expert is comfortable with all of the nuances.

Jay Jeffery has been an actuary since 1973 and Kelley McKeating became an actuary in 1995. Dilkes, Jeffery & Associates (www.dilkesjeffery.com) is a consulting firm that specializes in providing actuarial expert evidence services in personal injury, fatality, wrongful dismissal and other civil litigation matters.

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