

Understanding The Law Of Damages

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PLAINTIFF'S PERSONAL INJURY FROM START TO FINISH

NBI SEMINAR

II. UNDERSTANDING THE LAW OF DAMAGES

The *Mississippi Law of Torts* provides that the “usual elements of damage for personal injury include past and future medical expenses, past and future loss of income, past and future physical and mental pain and suffering, disfigurement, and disability.”¹ This is a basic principle of tort law; yet, many of us struggle with the appropriate way of explaining personal injury damages in jury instructions. Set forth below is an adopted form of four separate jury instructions² submitted by United States District Judge Glen Davidson in a personal injury action I recently tried in the Northern District of Mississippi:

Damages Instruction No. 1

You are instructed that damages is the word which expresses in dollars and cents the injuries sustained by the plaintiff. In order to recover damages, the plaintiff must illustrate with a preponderance of the evidence that nature and cause of his damages. A plaintiff does not lose his right to recover damages because he is unable to prove with absolute certainty the mathematical value of his injury. If the cause of the injury has been illustrated with a preponderance of the evidence, you may reasonably estimate the damages, and the assessment thereof is within your discretion.³

Damages Instruction No. 2

If you determine that the defendant breached his duty of reasonable care on _____, 2010 and that said breach caused the plaintiff's injuries, then you may determine that the plaintiff is entitled to recover compensatory damages.

Compensatory damages consist of two types: Economic Damages and Non-Economic Damages.

Economic Damages are objectively verifiable monetary amounts which arise from such things as medical expenses and medical care, rehabilitation services, custodial care, disabilities, loss of earnings and earning capacity, loss of income, loss of the

¹ Weems & Weems, *Miss. Law of Torts*, §18-2 (2002) (citing, *Woods v. Nichols*, 416 So.2d 659, 671 (Miss. 1982); *Kinnard v. Martin*, 223 So.2d 300 (Miss. 1969); Miss. Model Jury Inst. 20.14 (1977)).

² These form instructions use the generic party descriptions of “plaintiff” and “defendant”. In practice, I suggest that you substitute these generic terms with actual party names.

³ *Mississippi Model Jury Instructions*, § 11:1 (citing, *Amiker v. Brakefield*, 473 So.2d 939 (Miss. 1985); *Washburn v. Pearson*, 226 So.2d 758 (Miss. 1969)).

fringe benefits of employment, costs of obtaining substitute domestic services, loss of employment and other objectively verifiable monetary losses.

Non-Economic Damages are subjectively determined monetary amounts arising from pain, suffering, inconvenience, mental anguish, worry, emotional distress, loss of society and companionship, humiliation, embarrassment, lost enjoyment of life and other similarly subjective losses.⁴

Damages Instruction No. 3

It is your decision to determine just and fair compensation for the plaintiff. Your discretion as to the measure of compensatory damages is wide, but not unlimited, and you may not act arbitrarily. Exercise your discretion as to the amounts of compensatory damages reasonably, intelligently and in harmony with the evidence in the case and the Court's instructions. The compensatory damages for personal injury cannot be assessed by any fixed rule, and you are the sole judge as to the measure of compensatory damages in this case.

Should your verdict be for the plaintiff in this case, you may consider the following factors to determine the amount of compensatory damages to award as may be shown by a preponderance of the evidence:

- 1) The type of injuries suffered by the plaintiff and their duration;
- 2) the past, present and future physical pain and suffering of the plaintiff and its duration;
- 3) the past, present and future mental distress of the plaintiff and its duration;
- 4) all medical expenses already incurred by the plaintiff and those medical expenses which are reasonably probable to be incurred in the future, including rehabilitation services and other similar amounts which are medical in nature and consistent with the evidence;
- 5) all costs of custodial care and support services which are reasonably probable to be incurred in the future;
- 6) any future mental or physical disability or impairment that is reasonably probable to occur and/or has occurred, its duration and its effect on the plaintiff's future earnings or earning capacity. In arriving at your award for loss of future earnings or earning capacity, you should consider the plaintiff's health, physical ability, mental ability, age and earning power before his injuries and the effect of the plaintiff's injuries upon them;
- 7) past lost wages;
- 8) the past and future losses of social security matching benefits and other similar losses of the plaintiff;
- 9) the past and future losses of the fringe benefits of employment of the plaintiff; and,
- 10) any past and future losses of household domestic services.⁵

⁴ *Mississippi Model Jury Instructions*, §§ 11:2 and 11:3.

⁵ *Mississippi Model Jury Instructions*, § 11-5 (citing *Alpha Gulf Coast, Inc. v. Jackson*, 801 So.2d 709 (Miss. 2001); *Downtown Grill, Inc. v. Connell*, 721 So.2d 1113, 1123 (Miss. 1998); Miss. Code Ann. § 11-1-69.

Damages Instruction No. 4

When reaching your determination of the amount of compensatory damages to award the plaintiff, you are instructed to presume that any medical, hospital or doctors' bills which have been incurred or paid in the treatment of the plaintiff's injuries were necessary and reasonable.⁶

A. ECONOMIC DAMAGES

Mississippi courts do not have a history of imposing specific requirements on the calculation of damages. The general principal is that only certain elements of damages are available but the methodology used to calculate these damages is left to the jury. These elements of damage, and certain related matters, are briefly addressed below:

1. Earning Capacity

Mississippi law provides that lost earnings should be based upon earning capacity rather than actual earnings. Additionally, the Supreme Court has held that loss of earning capacity does not have to be total to remain a recoverable element. In *Walters v. Gilbert*,⁷ the Court ruled that:

loss of earning capacity can be partial and temporary, or partial and permanent, or total and temporary, or total and permanent. It depends upon the nature and extent of the physical impairment as is well recognized in all compensation acts.

There are numerous Mississippi cases in which damages were derived from an earning capacity figure that clearly exceeded the plaintiff's earnings at the time of injury or death. For instance, in *Classic Coach, Inc. v. Johnson*,⁸ the Mississippi Supreme Court allowed the average salary of a college graduate to be used as base earning capacity even though the decedents had not yet graduated from college. In fact, only one of the decedents was enrolled at the time of the accident and the other had temporarily left the university to earn money to finance his education. *Choctaw*

⁶ Miss. Code Ann. § 41-9-119; *Hubbard v. Canterbury*, 805 So.2d 545 (Miss. Ct. App. 2000).

⁷ 158 So.2d 43 (Miss. 1963).

⁸ 823 So.2d 517 (Miss. 2002).

*Maid Farms, Inc. v. Hailey*⁹ and *Woods v. Nichols*¹⁰ provide other examples of lost earnings that are based upon earning capacity figures which total higher than the plaintiff's actual earnings.

Not only has the Court allowed recovery of earning capacity figures which exceeded actual earnings, the Court has even allowed recovery of earning capacity figures when the plaintiff's post-injury earnings were higher than his pre-injury earnings. In *Jesco v. Shannon*,¹¹ a foreman injured in a factory explosion returned to work as a janitor with earnings higher than his pre-injury earnings. The Mississippi Supreme Court found that "the fact that the employer had been generous to date of trial does not negate [sic] impairment in earning capacity."

The Mississippi Supreme Court has also allowed unemployed individuals or individuals who were not part of the labor force to recover damages based on earning capacity. In *Miss. Cent. R. Co. v. Smith*,¹² a former nurse who had been out of the workforce for several years was awarded damages based upon her earning capacity. Similarly, an elderly unemployed man was declared to have some earning capacity in *Walters v. Gilbert*,¹³ and the Court declared as follows concerning the level of proof necessary to establish earning capacity:

Appellant seems to confuse earning capacity with actual monetary benefits earned. It is not essential that wages, income tax returns, or deposit slips be shown to establish earning capacity, though such evidence would be strong and conclusive of the actual earning capacity. But any person who is not a hopeless cripple or permanently helpless has some earning capacity. He could be a night watchman, parking lot attendant, baby sitter, or hold some similar job.... In the case at bar, though appellee's earning capacity was insufficient to require the filing of an income tax return and though he failed to prove any payment of wages paid to him, this does not preclude the jury from determining what, if any, his earning capacity, little as it may be, was.

A final issue associated with earning capacity is the use of age-earnings profiles. Some economists use age-earnings profiles based on Current Population Survey data; whereas,

⁹ 822 So.2d 911 (Miss. 2002).

¹⁰ 416 So.2d 659 (Miss. 1982).

¹¹ 451 So.2d 694 (Miss. 1984).

¹² 168 So. 604 (Miss. 1936).

¹³ 158 So.2d 43 (Miss. 1963).

others simply use the average of annual lifetime earnings for all future work years. This latter approach essentially overstates earning capacity in the early years and understates it in later years.

2. Worklife Expectancy

Once the earning capacity of the plaintiff has been determined, it is the job of the plaintiff's expert economist to determine the worklife expectancy of the plaintiff. Many experts utilize Bulletin 2254¹⁴ to calculate worklife, while others use Skoog and Ciecka.¹⁵

3. Taxes

In *Smith v. Industrial Contractors*,¹⁶ the Fifth Circuit, considering a case under Mississippi law, upheld the lower court's decision to allow lost future earnings to be reduced by income taxes. This decision was based upon

the Mississippi goal of awarding the beneficiaries the amount, but only the amount, that the decedent reasonably would have and could have contributed to the them.

Most economists routinely make a deduction from projected earnings to account for state and federal income taxes. Some also adjust the discount rate to account for income taxes on the interest to be earned or use a discount rate based on tax exempt bonds.

4. Fringe Benefits

Fringe benefits are a recoverable element of economic loss in a personal injury action. In *Flight Line, Inc. v. Tanksley*,¹⁷ the Supreme Court ruled that expert testimony placing fringe benefits at 31.7% of earnings was admissible. This percentage figure was based on data from the *United States Statistical Abstract* and supported by a telephone conversation with the plaintiff's employer who stated that benefits were about 30%. In a previous trial in this same case, the same economist had valued fringe benefits at 11% of earnings, referencing only "legally required" benefits. The court

¹⁴ *Worklife Estimates: Effects of Race and Education*, Bureau of Labor Statistics, Bulletin 2254 (February 1986).

¹⁵ Skoog, Gary R. and James E. Ciecka, *The Markov (Increment-Decrement) Model of Labor Force Activity*, Journal of Legal Economics, 2001, 11(1).

¹⁶ 783 F.3d 1249 (5th Cir. 1986).

¹⁷ 608 So.2d 1149 (Miss. 1992).

ruled that controversy over benefits and the appropriate percentage was “fine fodder for cross-examination” but held that the testimony was admissible.

Experts in Mississippi regularly utilize a percentage for fringe benefit earnings based on Bureau of Labor Statistics or Chamber of Commerce data. Courts have expressed no preference for one source or another.

5. Household Services

In *Gulf Transport Co. v. Allen*,¹⁸ the Mississippi Supreme Court ruled that the value of lost household services is an appropriate element of economic damage. Economists regularly rely on Bryant, Zick and Kim¹⁹ or the works cited in Douglass, Kenny and Miller²⁰ to determine average hours devoted to household services; however, a party is allowed to present evidence to support or attack the use of this average wage. These services are normally valued at a minimum wage rate.

6. Present Value

The Supreme Court clearly requires that future earnings be reduced to their present value, and that a jury instruction to that effect be granted if requested by the defendant.²¹ The discount rate most commonly utilized by economists is based on the rate for United States Treasuries.

7. Inflation

The Mississippi Supreme Court has long recognized the impact that inflationary conditions have on the purchasing power of money, and consequently allows jurors to hear evidence of this impact. In *Flight Line, Inc. v. Tanksley*,²² the Court allowed an economist to project a 6.7% rate of inflation for future earnings based on the average for the previous 15 years.

¹⁸ 46 So.2d 436 (Miss. 1950).

¹⁹ Bryant, W. Keith, Cathleen D. Zick, Hyoshin Kim, *Household Work: What's it Worth and Why?*, 1992, Information Bulletin 322 IB228, Cornell University.

²⁰ Douglass, John B., Genevieve M. Kenney and Ted R. Miller, *Which Estimates of Household Production are Best?*, Journal of Forensic Economics, Winter 1990, 25-45.

²¹ See, *Young v. Robinson*, 538 So.2d 781 (Miss. 1989).

²² 608 So.2d 1149 (Miss. 1992).

8. Medical Expenses

Mississippi law allows for the recovery of past and future medical expenses, so long as the future medical expenses are established “in terms of reasonable probability in accordance with the jury instructions.”²³

B. NON-ECONOMIC DAMAGES

Pain and suffering may be recovered as an ordinary element of damages in a personal injury action, and the jury has broad discretion in determining the amount of the award for such damages. The only standard of damages for pain and suffering is what the jurors as reasonable persons would consider just.²⁴

Emotional distress damages are recoverable under two standards: First, emotional distress damages are recoverable where the defendant’s conduct is malicious, intentional, willful, wanton, grossly negligent, indifferent or reckless.²⁵ Under this intentional infliction of emotional distress standard, no injury is required to recover for the mental anguish experienced by the plaintiff.²⁶

The second standard for recovery applies for negligently inflicted emotional distress. Under this scenario, the plaintiff must prove some demonstrable harm which was reasonably foreseeable by the defendant.²⁷

1. Non-Economic Damages Cap: Medical Malpractice

In 2002, the legislature enacted a \$500,000.00 cap on non-economic damages in medical malpractice cases. As defined in the statute:

“Noneconomic damages” means subjective, nonpecuniary damages arising from death, pain, suffering, inconvenience, mental anguish, worry, emotional distress, loss of society and companionship, loss of consortium, bystander injury, physical impairment, disfigurement, injury to reputation, humiliation, embarrassment, loss of

²³ *Eiland v. Westinghouse*, 58 F.3d 176 (5th Cir. 1995).

²⁴ *Mississippi Law of Damages 3d*, §35:3 (2003) (citing, *Biedenbarn Candy Co. v. Moore*, 184 Miss. 721, 186 So. 628 (1939); *Kinnard v. Martin*, 223 So.2d 300 (Miss. 1969); *First Nat. Bank v. Langley*, 314 So.2d 324, 77 A.L.R.3d 570 (Miss. 1975).

²⁵ *Leaf River Forest Products, Inc. v. Ferguson*, 662 So.2d 648 (Miss. 1995).

²⁶ *Id.*

²⁷ *Morrison v. Means*, 680 So.2d 803 (Miss. 1996), clarified and modified, 744 So.2d 736 (Miss. 1999).

the enjoyment of life, hedonic damages, other nonpecuniary damages, and any other theory of damages such as fear of loss, illness or injury. The term “noneconomic damages” shall not include punitive or exemplary damages.²⁸

2. Non-Economic Damages Cap: General Liability

The legislature has also enacted acted a \$1,000,000.00 cap on non-economic damages in all other personal injury actions.²⁹ These non-economic damage caps have proven to be a significant limitation upon recovery in those cases involving catastrophic injury.³⁰

If any of you have a case in which there is a significant chance of obtaining a non-economic award which will exceed the cap, I encourage you to notify the Mississippi Association of Justice (“MAJ”). The MAJ, in conjunction with other entities, will assist you with friend of the court briefing, as well as your own, in preparing constitutional attacks of these grossly unfair and arbitrary limitations of a plaintiff’s rights to obtain full redress.

C. WRONGFUL DEATH and SURVIVAL CLAIMS

The wrongful death statute simply provides that a wrongful death beneficiary is entitled to recover “such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit.”³¹ Given the vagueness and breadth of this language, the Mississippi Supreme Court has taken it upon itself to specify that the following wrongful death damages are available: 1) the present net cash value of the life expectancy of the deceased, 2) the loss of the companionship and society of the decedent, 3) the pain and suffering of the decedent between the

²⁸ Miss. Code Ann. § 11-1-60. In 2004, the Legislature included “disfigurement” within the definition of non-economic damages. Accordingly, plaintiffs can no longer obtain separate compensation outside the cap for disfigurement from injuries such as burns.

²⁹ Miss. Code Ann. § 11-1-60.

³⁰ Judge Tom Lee expressed frustration in a recent medical malpractice case at his inability to award more than the \$500,000 non-economic cap. *West v. USA*, 2009 LEXIS 61592, *23 fn. 5 (S.D.MS. July 20, 2009)(“In fact, but for the statutory cap, the court, taking into account future noneconomic damages, would have been inclined to award more than \$500,000.”)

³¹ Miss. Code Ann. § 11-7-13.

time of injury and death, 4) funeral and burial expenses, and 5) expenses of the decedent's last illness.³² We will briefly address a couple of these elements of wrongful death damages:

1. Present Net Cash Value of the Life Expectancy of the Deceased

The present net cash value of the decedent's life is determined by multiplying the projected annual future income of the deceased by his work life expectancy, discounting it to present cash value, and deducting a percentage for the deceased's personal living expenses.³³ Since the Supreme Court declared the necessity of a personal consumption factor, experts have debated the expenses to include and percentages to employ. For example, one expert has argued that personal consumption should only include basic living expenses of the decedent,³⁴ whereas other experts have employed personal consumption factors for three and four person households when the decedent is single.³⁵ The courts have allowed the parties to argue the merits of each approach and have left the determination within the province of the finder of fact.

An extremely important matter of which Mississippi practitioners should be mindful is that our courts is a "loss to estate" jurisdiction. Most jurisdictions utilize a "loss to dependents" measure of damages, which awards damages to dependents to replace the financial benefits they would have obtained from the decedent.³⁶ Mississippi courts, however, do not require a wrongful death beneficiary to establish that he was receiving, or was likely to receive, financial support from the deceased to recover the net cash value of the decedent's life.³⁷

³² See, eg., *Jones v. Shaffer*, 573 So.2d 740, 743 (Miss. 1990); *McGowan v. Estate of Wright*, 524 So.2d 308 (Miss. 1988)(citing several cases).

³³ *Sheffield v. Sheffield*, 405 So.2d 1314, 1318 (Miss. 1981); see also, *Jones v. Shaffer*, 573 So.2d 740, 742 (Miss. 1990)("In computing a person's lost net cash value, a personal consumption factor must be taken into account.").

³⁴ *Classic Coach, Inc. v. Johnson*, 823 So.2d 517 (Miss. 2002).

³⁵ *Greyhound Lines v. Sutton*, 765 So.2d 1269 (Miss. 2000); *Classic Coach, Inc. v. Johnson*, 823 So.2d 517 (Miss. 2002); *Jones v. Shaffer*, 573 So.2d 740, 743 (Miss. 1990).

³⁶ Weems & Weems, *Miss. Law of Torts*, § 14-4(a) (citing, Dobbs, *The Law of Torts*, § 296 (2000); *Freeman v. Davidson*, 768 P.2d 885 (Nev. 1989)).

³⁷ *Jones v. Shaffer*, 573 So.2d 740, 744 (Miss. 1990); *Sheffield v. Sheffield*, 405 So.2d 1314 (Miss. 1981).

2. Loss of Companionship and Society of the Decedent

It is important to recall who may recovery wrongful death benefits. If the decedent has a surviving spouse, that spouse is entitled to recover loss of society, companionship and services. If a decedent has children, they are entitled to recover for loss of training and guidance until the age of majority. The children are also entitled to loss of society and companionship from the date of the death of the parent for the balance of the child's life. As under intestate distribution, the children and surviving spouse share damages equally and to the exclusion of other relatives.³⁸ In the event that the decedent leaves no surviving spouse or children, the wrongful death statute allows those occupying the next most preferred class under intestate distribution to recover their losses of society, companionship and services and to the exclusion of those relatives in the less preferred classes.

³⁸ Miss. Code Ann. § 11-7-13; *Partyka v. Yazoo Development Corp.*, 376 So.2d 646, 648 (Miss. 1979).

