

# **Assessing Economic Damages in Personal Injury and Wrongful Death Litigation: The State of Oregon \***

Robert A. Male, Ph.D.

## I. Introduction

The practice of forensic economics in each state is structured by the applicable rules of the courts and court system, statutes, case law, and the sometimes implicit but generally followed policies and procedures of the venue. The purpose of this paper is to describe the nature and practice of forensic economics in the state of Oregon, as related to generic personal injury (PI) and wrongful death (WD) casework.

This goal will be accomplished by presenting information extracted from the Oregon Revised Statutes (ORS), Oregon Rules of Civil Procedure (ORCP), Oregon Evidence Code (OEC), Uniform Civil Jury Instructions (UCJI), governing case law, and from the author's experience in determining economic damages for PI and WD litigation in Oregon.

The paper is organized into seven sections, two appendixes, and references. The sections are titled: I. Introduction, II. The Oregon Court System, III. Economic Damages, IV. Discovery, V. Jury Instructions, VI. Forensic Economics in Oregon, and VII. Summary. Each section is intended to convey important information related to the practice of forensic economics in Oregon and empower the reader with useful understanding. Both appendixes, A and B, contain documents related to many of the sections. Appendix A contains selected

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\* Male, R. "Assessing Economic Damages in Personal Injury and Wrongful Death Litigation: The State of Oregon." *Journal of Forensic Economics*, 15(3), pp. 319-334, Published Feb. 2004.

pertinent written jury instructions from an actual Oregon trial. Appendix B contains an example “trial exhibit” report for a PI case. Since the goal of this paper is to acquaint forensic economists with how economic damages evaluations are prepared for Oregon State Courts, elements of standard methodology (i.e. net discount rates, worklife expectancy, personal consumption, etc.) are only discussed if there is some specific connection or mandate related to the Oregon litigation system.

## II. Oregon Court System

Oregon has state trial courts (Circuit Courts), and appellate courts (Court of Appeals and Supreme Court). The unified system of state trial and appellate courts is called the Oregon Judicial Department. As in other states, Oregon Courts follow traditional “common law” and the state constitution and statutes that supersede the common law. Oregon civil law (as differentiated from criminal law) and more specifically the determination of economic damages in civil tort actions is the stated focus of this paper. Oregon’s circuit courts are general jurisdiction courts located in each of Oregon’s 36 counties. The judges for the circuit courts are elected into one of 27 judicial districts, each of which is comprised of one or more counties.

The Court of Appeals was created in 1969 and is the first level of appeal following a trial. The state legislature and governor modify or change the common law by creating or changing a statute. When the appellate court interprets a statutory or common law to decide a case, the decision becomes a precedent for deciding future similar cases or issues. A precedent based on the interpretation of a statute makes the interpretation part of the statute. A precedent that applies common law to a new issue becomes part of the common law.

The highest court in Oregon is the Supreme Court. The only court that may reverse or modify a decision of the Oregon Supreme Court is the United States Supreme Court.

### III. Economic Damages

Economic and noneconomic damages are defined in Oregon Revised Statutes (ORS) – Chapter 18. The wording of this statute is quite clear regarding its application to determining economic damages and is therefore quoted completely:

**18.560 Noneconomic damages: award: limit: “economic damages” and “noneconomic damages” defined.** (1) Except for claims subject to ORS 30.260 and ORS chapter 656, in any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death or property damage of any one person including claims for loss of care, comfort, companionship and society and loss of consortium, the amount awarded for noneconomic damages shall not exceed \$500,000.

(2) As used in this section:

(a) “Economic damages” means objectively verifiable monetary losses including but not limited to reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services, burial and memorial expenses, loss of income and past and future impairment of earning capacity, reasonable and necessary expenses incurred for substitute domestic services, recurring loss to an estate, damage to reputation that is economically verifiable, reasonable and necessarily incurred costs due to loss of use of property and reasonable costs incurred for repair or for replacement of damaged property, whichever is less.

(b) “Noneconomic damages” means subjective, nonmonetary losses, including but not limited to pain, mental suffering, emotional distress, humiliation, injury to reputation, loss of care, comfort, companionship and society, loss of consortium, inconvenience and interference with normal and usual activities apart from gainful employment.

(3) This section does not apply to punitive damages.

(4) The jury shall not be advised of the limitation set forth in this section. [1987 c.774 s.6]

**18.570 Economic and noneconomic damages separately set forth in verdict.** A verdict shall set forth separately economic damages and noneconomic damages, if any, as defined in ORS 18.560. [1987 c.774 s.7a; 1995 c.696 s.6]

Focusing on economic damages and those most often found in PI and WD cases, the key phrases are: “objectively verifiable monetary losses ... loss of income and past and future impairment of earning capacity, and reasonable and necessary expenses incurred for substitute domestic services, ... damage to reputation that is economically verifiable ....”

While seemingly clearly stated in the statute, precedent case law has reinforced important elements of this statute. The Appeals Court Decision *Richmond v. Zimbrick Logging, Inc.* (1993) elaborates on the importance of earning capacity as the primary determinant of economic losses related to work and earnings. This decision is cited as a comment under Oregon’s Uniform Civil Jury Instruction (UCJI) No. 70.18:

**UCJI No. 70.18 Impairment of earning capacity.** You must decide whether the plaintiff has suffered damages due to impairment of (his/her) earning capacity. Impairment of earning capacity is the extent to which the plaintiff’s capacity to earn has been reduced due to the injury. The plaintiff is entitled to compensation for lost capacity to earn, if any, whether the plaintiff would have chosen to exercise it or not, even if the plaintiff never worked to that capacity in the past.

Another recent Appeals Court decision, *Kahn and State of Oregon v. Pony Express Courier Corp.* (2001) explicitly classifies lost “domestic services” as a form of “monetary loss” that is an objectively verifiable monetary loss, and should be included in economic damages. This very important decision also clarified reasonable probability or certainty as the kind of proof necessary to establish economic damages. Elements of another Oregon statute were addressed in this decision as well. In the “Actions for Injury and Death” section of the Oregon Revised Statutes we find 30.010 and 30.020. Once again the wording of these

statutes clearly presents the issues pertinent to determining economic damages related to injury or death.

**30.010 Who may maintain action for injury or death of child.**

(1) A parent having custody of his or her child may maintain an action for the injury of the child.

(2) A parent may recover damages for the death of his or her child only under ORS 30.020. [Amended by 1961 c.344 s.102; 1973 c.718 s.1]

**30.020 Action for wrongful death; when commenced; damages.**

(1) When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent, for the benefit of the decedent's surviving spouse, surviving children, surviving parents and other individuals, if any, who under the law of intestate succession of the state of the decedent's domicile would be entitled to inherit the personal property of the decedent or not, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had the decedent lived, against the wrongdoer for an injury done by the same act or omission. The action shall be commenced within three years after the injury causing the death of the decedent is discovered or reasonably should have been discovered by the decedent, by the personal representative or by a person for whose benefit the action may be brought under this section if that person is not the wrongdoer. In no case may an action be commenced later than the earliest of:

- (a) Three years after the death of the decedent; or
- (b) The longest of any other period for commencing an action under a statute of ultimate repose that applies to the act or omission causing the injury, including but not limited to the statutes of ultimate repose provided for in ORS 12.110 (4), 12.115, 12.135, 12.137 and 30.905.

(2) In an action under this section damages may be awarded in an amount which:

- (a) Includes reasonable charges necessarily incurred for doctors' services, hospital services, nursing services, other medical services, burial services and memorial services rendered for the decedent;
- (b) Would justly, fairly and reasonably have compensated the decedent for disability, pain, suffering and loss of income during the period between injury to the decedent and the decedent's death;
- (c) Justly, fairly and reasonably compensates for pecuniary loss to the decedent's estate;

(d) Justly, fairly and reasonably compensates the decedent's spouse, children, stepchildren, stepparents and parents for pecuniary loss and for loss of the society, companionship and services of the decedent; and

(e) Separately stated in finding or verdict, the punitive damages, if any, which the decedent would have been entitled to recover from the wrongdoer if the decedent had lived.

#### IV. Discovery

With the statutory and case law foundation for determining economic damages in PI and WD cases in Oregon established, we can move on to elements of the Oregon legal system that have a unique effect on the forensic economist and the practice of forensic economics. The most interesting and unique aspect of the overall Oregon litigation system for forensic economists is that experts and their work are not statutorily or procedurally discoverable in Oregon state courts prior to trial testimony. In the Oregon system experts are considered consultants of the retaining attorney and as such are considered "work product" and covered by attorney privilege until they are presented to offer testimony at trial. Procedurally this nondisclosure is well ensconced in the Oregon litigation process, while not easily extracted from the rules. Rule 36 General Provisions Governing Discovery of the Oregon Rules of Civil Procedure (ORCP) states in B (1), "*In General*. For all forms of discovery, parties may inquire regarding any matter, not privileged, which is relevant to the claim ....". B(3) of Rule 36 *Trial Preparation Materials*, states in part "a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B(1) of this rule .... In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

Oregon Evidence Code (OEC), Article V, Privileges, Rule 503 contains the following:

**Rule 503. Lawyer-Client Privilege (ORS 40.225)**

(1) **Definitions.** As used in this section, unless the context requires otherwise:

(e) “Representatives of the lawyer” means one employed to assist the lawyer in the rendition of professional legal services, but does not include a physician making a physical or mental examination under ORCP 44.

(2) **General Rule of Privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.

(a) Between the client or the client’s representative and the client’s lawyer or a representative of the lawyer;

(b) Between the client’s lawyer and the lawyer’s representative;

(c) By the client or the client’s lawyer to a lawyer representing another in a matter of common interest;

(d) Between representatives of the client or between the client and a representative of the client; or

(e) Between lawyers representing the client.

(3) **Who May Claim the Privilege.** The privilege created by this section may be claimed by the client, a guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer’s representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

Rules 104, 702, 703, 704 and 705 of the Oregon Evidence Code are all consistent with, or identical to, the corresponding rules in the Federal Rules of Evidence. So, once presented to the court as an expert witness the forensic economist has the same qualification hurdles to get over as elsewhere. However, when a forensic economist testifies in an Oregon Circuit Court, the opposition attorney has most likely: only been told the amount of damages to be testified to; has not seen a report (at least not a detailed one that also identifies the expert); has not deposed the expert; and probably does not know for certain the identity of the expert that will testify until he or she appears.

In addition, as a standard procedure many Oregon courts exclude witnesses from the courtroom prior to their testifying. At the start of trial, attorneys may request that the witness exclusion rule be waived for expert witnesses so that they may be present to hear an opposing expert's testimony. If this request is made, the defense attorney usually initiates it so that a possible rebuttal expert may be able to possibly help with cross-examination and also to better prepare rebuttal testimony. In Oregon, the non-disclosure rules and process is referred to somewhat fondly as "trial by ambush". This process has a number of interesting effects on the practice of a forensic economist that will be discussed in the following sections of this paper.

## V. Jury Instructions

Pertinent portions of a set of written Jury Instructions from an actual Circuit Court case can be reviewed in Appendix A. The Jury Instructions demonstrate the culminating effect of all the laws, rules and procedures on the case being litigated. In this manner the Jury Instructions can be very illuminating with regard to the work of the forensic economist. The selected instructions found in Appendix A are reprinted as written, with the corresponding Uniform Civil Jury Instruction number provided. It would be useful for the reader to review Appendix A before continuing on to the next section.

## VI. Forensic Economics in Oregon

This section is organized into sub-categories to hopefully facilitate an understanding of how the Oregon litigation system affects the "usual" work of the forensic economist when determining damages in PI and WD cases.



## Earning Capacity

Earning capacity is the pertinent measure of economic loss, both in PI and WD cases. This is well established in the statute, case law and jury instructions. Earnings history and work history play the usual role in the determination – but earning capacity is the measure that forensic economists should use when determining past and future economic losses. One phrase in ORS 18.560 reads: “loss of income and past and future impairment of earning capacity”. While probably obvious to the reader, in most cases it would be an error for the forensic economist to find past losses (pre-trial) for both loss of income and impaired earning capacity. The absence of discovery prior to trial sometimes promotes the use of hypotheticals during direct and cross-examination. Hypotheticals should be responded to in as direct a manner as possible (see Appendix A, UCJI No. 10.07).

## Burden of Proof

The burden of proof regarding compensatory damages rests with the plaintiff and must be established to reasonable probability or reasonable certainty. In *Kahn* (2001) the Appeals Court concluded that “objectively verifiable monetary losses” means only that the damages claimed are “capable of confirmation by reference to empirical facts” (emphasis added by court). Additional decisions supporting this standard are: *Wilson v. B.F. Goodrich* (1982) and *Sutherlin School District #130 v. Herrera* (1993). A related issue is the verdict must not exceed the amount of monetary damages alleged in the pleadings (see: *Lovejoy Specialty Hospital v. Advocates for Life*, 1993 and Appendix A, UCJI No. 70.02, 70.04 and 70.06).

## Present Value

In Oregon (as elsewhere) an award of future damages should be reduced to present value (*Osborne v. Bessonette/Medford Mtrs.* (1973) and *Plourd v. Southern Pacific Transp. Co.* (1973)). However, it is the responsibility of the trier of fact to determine the rate of interest and the present value of the award. Neither the plaintiff nor the defendant is required to introduce this evidence – but they are allowed to do so.

In *Meier v. Bray* (1970) the court stated, “The most satisfactory method to determine the rate of interest to be used is to allow the trier of fact to make a finding of a reasonable rate on the basis of evidence introduced or from evidence which can be judicially noticed or from both.” (Also note in Appendix A: “UCJI No. 70.70, DAMAGES – PRESENT VALUE”).

When testifying in court, it is helpful for the forensic economist to present the economic damages in present value and to also be “instructive” about the nature and components of the calculation to assist the jury with their deliberations. Whether or not to have an expert testify about present value is considered a “tactical” question by some plaintiff and defense attorneys.

## Prejudgment Interest

Prejudgment interest can be pled as a separate item or it can be included as an element of damages. If specifically pled, it must appear in the complaint with specified items, facts and money due with relevant dates. The statutory rate of interest is 9% per annum – simple interest (ORS 82.010). The statutory rate is the “default rate”, but it is also variable at the court’s discretion when presented with persuasive evidence that a more appropriate rate applies. Prejudgment interest is only rarely requested in PI and WD cases where the present value

analysis (as of date of trial) can be used to integrate past losses (at present value) into the overall damages claimed.

### Household Services

As noted previously, household services losses are treated as an economic loss and subject to the same burden of proof as other economic damages. This type of economic loss is treated similarly in PI and WD cases.

ORS 30.020(2)(d) (see previous) includes the loss of “services” along with pecuniary loss. However, when a WD action is brought by the parents of a deceased child as representatives of the “decedents estate” (ORS 30.020(2)(c)), this should not be included as an element of economic damages unless it can be shown with “reasonable certainty” that the child would have provided services to the parents.

### Nondisclosure of Experts

As previously described, experts and their opinions are not automatically discoverable as part of the Oregon litigative process. This has a number of implications for the practicing forensic economist. A non-exhaustive listing of the effects of this system on the work of the forensic economist includes (in no particular order and no matter if retained by plaintiff or defense attorney):

- 1) Virtually no depositions are held of forensic economists;
- 2) Often a written report is not requested or desired;
- 3) In many respects the forensic economist fulfills the role of consultant to the retaining attorney right up to the point of providing testimony at trial; and
- 4) Trial testimony has qualification standards similar to many other states.

Effect 1) is somewhat self-explanatory. Since neither attorney knows the identity of nondisclosed experts on the other side, or for that matter whether experts

have been retained – depositions are a mute issue. Even when an attorney for a case that is going to mediation requests a report, the report is often provided only to the mediator and the opposition is not informed of the expert's identity (if disclosed to the mediator). Arbitrations where testimony is provided are treated the same as a trial, with the expert most often being disclosed just before the appearance.

Effect 2) is interesting for a couple of reasons. Occasionally a plaintiff attorney requests a complete written report for the purpose of trying to resolve the case through settlement. This is almost always related to a motor vehicle accident where the plaintiff attorney is attempting to demonstrate to the insurance adjuster that the damages are in excess of the policy limits or prior settlement offer.

While the attorney has the option to disclose an expert and the expert's opinion, more often the opinion alone is presented in an effort to influence the opposition. For a number of years the author has prepared two related, but different forms of reports. One is the usual full narrative report with complete disclosure and documentation. The other is a one-page document in the form of a "trial exhibit" containing only the information necessary to convey the determined economic damages and serve as a guide for direct testimony.

A complete narrative report may not be written for cases destined for Oregon State Court. Whether retained by plaintiff or defense, the attorney often does not want a full narrative report – nor does either want to pay for the time investment necessary to develop such a report. If the case does go to trial and the expert testifies – the testimony becomes the court record and, when offered, a narrative report usually does not get admitted as an exhibit, while the one-page document has been admitted as an exhibit. An example of such a one-page "report or trial exhibit" can be found in Appendix B.

This form of “report” has been used by retaining attorneys in numerous ways. One rather unique context for the exhibit is that it is consistent with the expert’s nondisclosed role of consultant to the attorney while providing the attorney the information needed to understand the issues and elements of the damages evaluation and to prepare a complaint or demand letter, or to provide to a mediator or use in court as an exhibit.

Effect 3) has been addressed somewhat above, but may still benefit from elaboration. One expert’s perception of an effect of Oregon’s nondisclosure rule is that it tends to minimize some of the differences that usually exist between working with the plaintiff vs. working with the defense. Under “normal” disclosure rules, the expert retained by the defense very often works only as a consultant that critiques the opposition expert’s work and helps the defense attorney to prepare rebuttal strategies. In the “normal” course of events, the defense expert many times does not develop a complete damages analysis or testify. For Oregon Circuit Court cases, the first and foremost need of both the plaintiff and defense attorneys is an accurate valuation of damages, and this is what they usually ask of their experts. In this way the experts on both sides are, at least initially, primarily involved in the same type of “evaluation activities”.

Effect 4) relates to appearance at trial with no prior knowledge or voir dire. Oregon continues to recognize *Frye* (*Frye v. United states*, 1923) as the primary test for the acceptance of expert testimony. However, as noted previously, the Oregon Evidence Code (OEC) Rules 104, 702, 703, 704 and 705 closely track or are identical to the corresponding Federal Rules of Evidence. The appearance of an expert with little to no prior notice means that pre-trial motions-in-limine are very rare and the opposing attorney must deal with the expert solely during the trial. A recent Oregon Supreme Court decision clearly describes the test for the admissibility of expert testimony. In *Jennings v. Baxter Healthcare Corporation* (2000) the Supreme Court listed seven elements for admissibility:

- 1) The technique’s general acceptance in the field;

- 2) The expert's qualifications and stature;
- 3) The use which has been made of the technique;
- 4) The potential rate of error;
- 5) The existence of specialized literature;
- 6) The novelty of the invention; and
- 7) The extent to which the technique relies on the subjective interpretation of the expert.

The court also noted that the above list is not exhaustive and relied heavily on other prior cases in reaching its conclusions, in particular, *State v. O'Key* (1995) and *State v. Brown* (1984). In a footnote, the Court also reiterated a footnote from *Brown* (1984) listing eleven additional factors that the court may consider:

- 1) The potential rate of error in using the technique;
- 2) The existence and maintenance of standards governing its use;
- 3) Presence of safeguards in the characteristics of the technique;
- 4) Analogy to other scientific techniques whose results are admissible;
- 5) The extent to which the technique has been accepted by scientists in the field involved;
- 6) The nature and breadth of the inference adduced;
- 7) The clarity and simplicity with which the technique can be described and the results explained;
- 8) The extent to which the basic data are verifiable by the court and jury;
- 9) The availability of other experts to test and evaluate the technique;
- 10) The probative significance of the evidence in the circumstances of the case; and
- 11) The care with which the technique was employed in the case.

## VII. Summary

The following is a cursory listing of what experts should be familiar with when preparing an economic damages analysis venued in Oregon Circuit Court:

- Experts and their work are considered the “work product” of the retaining attorney, and as such do not have to be disclosed until their appearance for testimony.
- In many Oregon courts the usual practice is to exclude witnesses from the courtroom until they testify.
- The standards for expert testimony admissibility are grounded in *Frye*, the Federal Rules of Evidence and Oregon Case Law as described above.

- Complete narrative expert reports are often not requested or desired by either plaintiff or defense.
- Depositions are rare to non-existent.
- Economic damages are to be based upon earning capacity.
- The standard of proof for economic damages is that they be objectively or economically verifiable to a reasonable probability or reasonable certainty.
- Lost household services are an economic (monetary) loss.
- Economic damages in a death case with dependents (spouse, children, etc.) include loss of earning capacity and household services as reduced for appropriate personal consumption and present value.
- Economic damages in a case where no direct dependents exist, such as the death of a child, are confined to “pecuniary loss to the decendant’s estate.” A claim for loss of “services” as an economic loss must be based upon reasonable certainty that the services would have been provided.
- Awards may not exceed pleadings.
- Jurors are not told of the cap on non-economic damages awards (see ORS 18.560, (4)). While this may have implications for the nature of both economic and non-economic awards that are made, these are not speculated upon here.
- Damages may be presented in present value. The determination of present value is the responsibility of the trier of fact.

**APPENDIX A**

**IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH**

DENNIS P. EMRICK, )  
Plaintiff, ) Case number 0002-02019  
v. )

ACandS, INC., ASTEN GROUP, ) **JURY INSTRUCTIONS**  
INC., QUIMBY WELDING SUPPLIES,) )  
INC., SCAPA DRYER FABRICS,) INC., )  
and UNITED STATES MINERAL ) )  
PRODUCTS CO., ) )  
Defendants. ) )

The Court submits these written instructions to the Jury.  
Dated this 20<sup>th</sup> day of November, 2000.

John A. Wittmayer  
Circuit Judge

Jury Instructions

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**UCJI No. 10.06**

**EXPERT WITNESS**

An expert witness may give an opinion on any matter in which that witness has special knowledge, skill, experience, training, or education.

You should consider the qualifications and credibility of the expert witness and the reasons given for the opinion. You are not bound by the opinion. Give it the weight, if any, to which you consider it is entitled.

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**UCJI No. 10.07**

**HYPOTHETICAL QUESTIONS**

Hypothetical questions have been asked. A hypothetical question asks a witness to assume that certain facts are true, and then to give an opinion based on those assumed facts.



If you find that any of the facts assumed and relied on by the witness when forming an opinion were not established by the evidence or were untrue, you must disregard that opinion.

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**UCJI No. 14.01**

**BURDEN OF PROOF**

The plaintiff has the burden of proving by a preponderance of the evidence any claim made in the plaintiff's negligence and products liability claims. The plaintiff has the burden of proving by clear and convincing evidence the elements of fraud made in plaintiff's fraudulent misrepresentation claim. In the absence of such proof, the plaintiff cannot prevail as to those claims.

At this point there are no claims remaining in this case on which the defendants bear the burden of proof.

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**UCJI No. 14.02**

**PREPONDERANCE OF THE EVIDENCE**

The term preponderance of the evidence means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, on any question in the case, the evidence appears to be equally balanced, or if you cannot say on which side it weighs heavier, you must resolve that question against the party on whom the burden of proof rests.

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**UCJI No. 70.02**

**DAMAGES - PRELIMINARY INSTRUCTION**

If you find from the evidence and the instructions that the plaintiff is entitled to prevail, then it becomes your duty to

decide whether the plaintiff has been damaged and, if so, the amount of his damages.

In deciding the amount of any such damages, you must determine each of the items of the plaintiff's damages that I am now about to mention, provided you find the damages to have been sustained by him as a result of the defendant's fault or negligence, or as a result of defendant's defective product. The plaintiff must prove each item of damage by a preponderance of the evidence.

The amount claimed for damages by the plaintiff is not to be considered by you in arriving at your verdict except in one respect: That is, the amount claimed for damages does fix a maximum limit, and you are not permitted to award the plaintiff more than that amount.

The mere fact that I am instructing you with regard to the measure of damages is not to be considered by you as an attempt by the court to suggest or indicate that you should or should not award damages.

There are two types of damages that you are to consider in this case, economic, and noneconomic damages, which I will now explain to you.

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#### **UCJI No. 70.04**

#### **DAMAGES - NONECONOMIC**

Noneconomic damages are the subjective, nonmonetary losses incurred by the plaintiff.

The law does not furnish you with any fixed standard by which to measure the exact amount of noneconomic damages. The law does require that all compensation allowed be reasonable. You must apply your own considered judgment, therefore, to determine the amount of noneconomic damages.

In determining the amount of noneconomic damages, if any, consider each of the following:

First, consider the pain, mental suffering, emotional distress or humiliation that the plaintiff has sustained from the time he was injured until the present and that it is reasonably probable the plaintiff will sustain in the future as the result of his injuries.

Second, consider any inconvenience and interference with the plaintiff's normal and usual activities apart from activities in a gainful occupation that you find have been sustained from the time he was injured until the present and that it is reasonably probable the plaintiff will sustain in the future as the result of his injuries.

Third, consider any other subjective, nonmonetary losses.

The amount of noneconomic damages may not exceed the sum of twenty million dollars (\$20,000,000).

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#### **UCJI No. 70.06**

#### **DAMAGES -- ECONOMIC**

Economic damages are objectively verifiable monetary losses incurred by the plaintiff. In determining the amount of economic damages, if any, consider:

1. The reasonable value of necessary medical, hospital, nursing and rehabilitative care and services and other health care services furnished in the treatment of the plaintiff sustained by the plaintiff in the past. This amount may not exceed the sum of \$147,248.

2. The reasonable value of necessary medical, hospital, nursing and rehabilitative care and services and other health care services that it is reasonably probable will be sustained by the plaintiff in the future. This amount may not exceed the sum of \$250,000.

3. The amount of loss of income sustained by the plaintiff from the injury through August 7, 2000. This amount may not exceed the sum of \$23,506.

4. The amount of impairment of earning capacity that it is reasonably probable the plaintiff will sustain in the future. The amount of impairment of earning capacity may not exceed the sum of \$441,906.

5. The reasonable value of substitute household services that the plaintiff has incurred in the past, and that it is reasonably probable the plaintiff will incur in the future. This amount may not exceed the sum of \$178,573.

6. The amount of loss of Social Security benefits that it is reasonably probable the plaintiff will incur in the future. This amount may not exceed the sum of \$122,656.

7. The amount of loss of pension benefits that it is reasonably probable the plaintiff will incur in the future. This amount may not exceed the sum of \$386,644.

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#### **UCJI No. 70.07**

##### **DAMAGES - PRESENT VALUE**

If you decide that the plaintiff is entitled to prevail and find that the plaintiff will have a future loss of earnings because of his injury, then it becomes your duty to reduce that future loss to its present value. This is necessary because the plaintiff will be compensated now for future losses.

To find present value you must decide the amount of money which, if invested today at a reasonable rate of interest, will return to the plaintiff over the period of his future loss the same amount the plaintiff would have earned had the plaintiff not been injured.

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#### **UCJI No. 74.01**

##### **DAMAGES - LIFE EXPECTANCY - MORTALITY TABLES**

According to standard mortality tables the life expectancy of a person aged 54 years is an additional 24 years.

This fact may be considered by you in arriving at the amount of damages if you find that the plaintiff is entitled to a verdict or recovery for permanent injury.

Life expectancy shown by the mortality tables is an estimate of the probable average remaining length of life of all persons in our country of a given age and it is for you to determine the probable life expectancy of plaintiff from the evidence in this case, taking into consideration all other evidence bearing on the same issue such as that pertaining to his occupation, sex, health, habits, and activities.

**POST-VERDICT ADJUSTMENTS BY THE COURT**

If you find that plaintiff is entitled to recover on more than one claim, he will not receive damages more than once although you are asked to complete three verdict forms.

Do not be concerned that you need to reduce plaintiff's total damages in order to provide whole damages. Damages entries on the verdict forms relate to total money damages. Adjustments according to law may be made by the court after your verdict. Plaintiff will only get a single judgment at the end of the case, even though there are three separate verdict forms, and you may make separate assessments of damages. Do not concern yourself with calculations to be performed later by the court.

## APPENDIX B

### **UNION WORKER ECONOMIC LOSSES**

DOB: 9/2/48; DOI: 4/15/02; Age: 53.6; Normal Retirement Age: 66; Life Expectancy (LE): 24.9 yrs.; Healthy Life Expectancy (HLE): 18.3 yrs.; Active Worklife Expectancy (AWE) DOI: 9.61 yrs.; Inactive Worklife Expectancy (IWE) DOI: 5.22 yrs.

Note: Worklife Expectancy is the statistically average number of full years that a person is most likely to work over the remaining life expectancy. As integrated into the analysis it includes consideration of age, gender, education, the probability of life, the probability of participation in work related activities, and a projected retirement age. It is used to incorporate appropriate risk and uncertainty into future earnings projections.

**Pre-incident Earning Capacity (EC) 2003 PV = \$50,674 wages & FB = 40%**

Note: Considers historical earnings and average wages of a Union Boilermaker in Oregon.

**Post-incident EC - - A = \$0 wages & FB**

Note: Mr. Worker has not worked for some time and is still very incapacitated after two spinal surgeries. The possibility that he may recover sufficiently to return to regular work in the future seems minimal at this point.

**Post-incident EC - - B = \$24,977 wages & FB = 20%**

Note: Average earnings for a Machine Operator, Guard, and Cashier in Oregon. This assumes that Mr. Worker will at some future date be capable of returning to regular full time employment. At present, and for the near future, Mr. Worker is not employable.

**Past EC Losses (DOI to 7/1/03) = \$51,865 PV**

Note: Adjusted for AWE & actual earnings subtracted.

**Pre-incident Lifetime Future EC (7/01/03 to retirement age) = \$410,006 PV**

Note: AWE was used along with a real annual wage growth rate of 0%. The expected annual inflation rate = 2.5%.

**Post-incident Lifetime Future EC - - A (7/01/03 to retirement age) = \$0 PV**

Note: This assumes Mr. Worker will never be able to return to any form of regular employment.

**Post-incident Lifetime Future EC - - B (7/01/03 to retirement age) = \$ 110,889 PV**

Note: IWE was used as Mr. Worker has been inactive since shortly after the DOI, and to include consideration of the effects of occupational disability on worklife expectancy and the increased uncertainty associated with the post-incident earning stream. A real annual wage growth rate of .2% was used.

**Lost Earning Capacity (DOI to 7/01/03) = \$51,865 PV**

**Lost Future Earning Capacity - - A (7/01/03 to retirement age) = \$410,006 PV**

**Lost Future Earning Capacity - - B (7/01/03 to retirement age) = \$299,117 PV**

**Household Work Losses (DOI to LE) = \$59,407 PV**

Note: This projection is based on the age-weighted average for males, adjusted for HLE, and assumes a higher post-incident productivity has been achieved.

**TOTAL POST-INCIDENT LOSSES  
\$410,389 to \$521,278 PV**

## References

*Damages, Volumes I and II.* 1998-2002, Oregon State Bar.  
*Jury Instructions, Emrick v. Acands, Inc.* 2000, The Circuit Court of the State of Oregon,  
for the County of Multnomah.  
*Oregon Evidence Code.* 2001, Oregon State Legislature.  
*Oregon Revised Statues.* 2001, Oregon State Legislature.  
*Oregon Rules of Civil Procedure.* 2001, Oregon State Legislature.  
*Oregon Rules of Court.* 1999, West Group.  
*Uniform Civil Jury Instructions.* 1999, Oregon State Bar.

## Case Law

*Frye v. United States*, 293 F.1013 (D.C. Cir. 1923).  
*Jennings v. Baxter Healthcare Corp.*, 331 Or 285, 14 P3d 596 (2000).  
*Kahn v. Pony Express Courier Corp.*, 173 Or App 127, 20 P3d 837 (2001).  
*Lovejoy Speciality Hospital v. Advocates for Life*, 121 Or App 160, 855 P2d 159 (1993).  
*Meier v. bray*, 256 Or 613, 620, 475 P2d 587 (1970).  
*Osborne v. Bessonette/Medford Mtrs.*, 265 Or 224, 229, 508 P2d 185 (1973).  
*Plourd v. Southern Pacific Transp. Co.*, 266 Or 666, 676, 513 P2d 1140 (1973).  
*Richmond v. Zimbrick Logging, Inc.*, 124 Or App 631, 863 P2d 520 (1993).  
*State v. Brown*, 297 Or 404, 687 P2d 751 (1984).  
*State v. O'Key*, 321 Or 285, 899 P2d 663 (1995).  
*Sutherlin School District #130 v. Herrera*, 120 Or App 86, 851 P2d 1171 (1993).  
*Wilson v. B.F. Goodrich*, 292 Or 626, 642, P2d 644 (1982).