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"Lost Years" as a Wrongful Death Claim

By Geoffrey Young[1]

In a recent article in this journal[2] Messrs. Branch and Price point out that a "lost years" claim may duplicate the loss to a family from a wrongful death. Those dealing with plaintiffs with shortened life expectancies may be interested in an economist's view of the relationship between the two types of claim.

As an example, consider the claim of a married man who as a result of an accident suffers a reduction in his earning power. It is known that one year after the trial, also as a result of the accident, he will undergo an operation which will either leave him with a normal life expectancy, but a continuing earnings loss, or will kill him outright. To determine his probable loss, an economist would estimate his loss for the first year in the ordinary way. From the date of his possible death in one year, however, there are two possible claims, each with a chance of occurring; (1) he will survive and enjoy normal life expectancy, and his earning loss claim will continue, defined in the usual way as the total of every future year's

(EARNINGS ABSENT THE ACCIDENT **-** EARNINGS WITH ACCIDENT) **X** PROBABILITY OF SURVIVAL

or (2) he will die, and the loss to his spouse will be the same as in the case of a wrongful death, which is to say, the total of every future year's

EARNINGS ABSENT THE ACCIDENT **X** PROBABILITY OF SURVIVAL ABSENT THE ACCIDENT **X** SPOUSE'S "SHARE" OF EARNINGS **X** PROBABILITY OF SPOUSE'S SURVIVAL

where the spouse's "share" represents what she needs to maintain herself as before the death of her husband, and where her "survival" means survival as a wife, subject to the vagaries of divorce as well as mortality. For dependent children, the loss is similar, but ceases at adulthood.[3]

The court, knowing the loss under each of the two possible outcomes of the operation, should make an award that represents the value of each claim multiplied by the probability of its occurrence. Given information about the effect of the accident on the plaintiff's probability of survival, an economist or actuary can calculate the claim as the sum of the total for every future year of

(EARNINGS ABSENT THE ACCIDENT - EARNINGS WITH ACCIDENT) X PROBABILITY OF SURVIVAL GIVEN THE ACCIDENT

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EARNINGS ABSENT THE ACCIDENT X (PROBABILITY OF NORMAL SURVIVAL ABSENT THE ACCIDENT - PROBABILITY OF SURVIVAL GIVEN THE ACCIDENT) X SPOUSE'S "SHARE" OF EARNINGS X PROBABILITY OF SPOUSE'S SURVIVAL

The second part of the claim is the wrongful death component: it is exactly the claim that would be made by spouse, had the "probability of survival given the accident" been nil, that is, had the victim died in the accident. Because the victim is alive at the trial date, however, the person actually suffering the loss (the spouse) has no standing as a plaintiff, and the claim must be presented by the victim as a "lost years" claim.

This reasoning is not reflected in current decisions. The court has established in - several cases[4] that a lost years claim represents the sum for future years of

(EARNINGS ABSENT THE ACCIDENT - "LIVING EXPENSES") X (PROBABILITY OF NORMAL SURVIVAL ABSENT THE ACCIDENT - PROBABILITY OF SURVIVAL GIVEN THE ACCIDENT)

As Branch and Price point out, the Court has accepted "living expenses" of 33 and of 50 percent of total income in different cases. Our economic research has led us to conclude that a surviving spouse needs almost two-thirds as much income as a couple at the same living standard, and where there are children, perhaps three quarters: that is, an appropriate deduction from income might be in the range of one quarter or one third. Thus a standard claim for "lost years" may understate the family's loss in the years soon after the trial.

Now suppose that instead of being married the victim in our example is merely engaged to be married. Had he been killed outright there would normally be no wrongful death claim. In this case, though, he is likely to acquire a wife, and possibly children, in the year before his live-or-die operation is scheduled. Even had our plaintiff not yet settled on a prospective spouse, Statistics Canada can tell us the average probability that a man of his age will acquire dependants in the following year.

If a spouse not yet widowed or a child not yet orphaned has no current right in law right to make a claim, then even more remote is the possibility that a future widow not yet wooed or a prospective orphan not yet born can make a claim for a future wrongful death. Again the accident victim must make the claim in the form of a "lost years" claim. He may indeed dissipate the award prior to his death, but there seems no practical alternative. Perhaps the award can be viewed as restoring his attractiveness as a marriage partner to that of a man of normal life expectancy, able to make provision for the support of his spouse and children with reasonable certainty.[5]

The Residual Lost Years Claim

As we have seen, the Court has gone well beyond the "wrongful death" justification of "lost years" damages. As Branch and Price point out, the basis the Court has established for "lost years" appears to be inconsistent with the traditional "functional approach" to damages.[6]

The Court may be following along the lines expressed by Lord Wilburforce in Pickett[7], who writes of the plaintiff, "He may not have dependants, but he may have others, or causes, whom he would wish to benefit, for whom he might even regard himself as working." This set of "dependants" is seen as having a claim on the lost earnings of the plaintiff, a claim that is added to the plaintiff's claim and for which he is the informal trustee. However, rather than asking for expert evidence on the amounts that the plaintiff might be expected to give to charities, or to leave as an inheritance, the Court has accepted the notion that the award should represent the entire amount of the individual's future lost years' income, reduced by an amount for "the maintenance of life ...[or]...expenditure for personal living expenses..." [Semenoff v. Kokan (1991), 84 D.L.R. (4th) 76 (B.C.C.A.)]. This claim is far in excess of a typical amount of donations to charity or of the value of lost inheritance.[8]

It would appear that the Court, aware that the wrongful death component of the loss suffered by a plaintiff with dependants who suffers a shortened life expectancy may represent up to three quarters of his "lost years" income (at least for a few years) is concerned about undercompensating such plaintiffs. By treating all "lost years" claims the same, however, the Court has achieved this by greatly overcompensating (by the standard of the traditional approach) those with no dependants and few prospects of acquiring them.

"Living Expenses"

Branch and Price suggest that economists will argue over the amount of "living expenses". Certainly economists can provide statistical information on the approximate amount that an individual is likely to spend on food, clothing and shelter (or any other head of expenditure defined by the Court), based on age, income levels and family status. What we cannot do, however, is to answer the underlying question of what proportion of income represents "living expenses" as opposed to income[9] "at (the plaintiff's) disposal" [as Lord Wilburforce describes it in Pickett]. To an economist the distinction between necessities and discretionary spending, that is, between "needs" and "wants", is meaningless in theory and impossible to determine by experiment.

Economists expounding this point to first year students use the experience of wartime prison camps, where people were willing to trade calories biologically necessary for their health for cigarettes, a "luxury" in common parlance. Indeed, there is a contradiction implicit in the very notion of defining a *percentage* of income as "living expenses". If the Courts really were interested in knowing what a plaintiff needed to live, and asked biologists to testify to the minimum physical requirements for survival in Canada (information with no relationship to what people actually spend on food, clothing and shelter, of course), the answer might vary with body weight and climate, but not with the size of the plaintiff's lost income. One must suspect that this method has been rejected because of the apparent inequity of its consequence, which would be that plaintiffs with very low lost incomes would be left (after subtracting "biological" living expenses) with very small or zero claims, while those with very high lost incomes would have claims close to the total amount of their lost incomes.

Summary

To an economist, the Court's present treatment of lost years claims seems a lumping together of several fundamentally different underlying types of claim. Economists can give useful information about the probable "lost years" impact on family members, on prospective family members, and on third party charities or heirs, but we cannot provide firm underpinnings for a theory that appears to be patched together to provide a justification for awards that courts may simply feel intuitively to be reasonable.

As an economist I would understand, and be able to provide some help in valuing, a loss of future earnings claim for a person with a shortened life expectancy consisting of

1. A claim for loss of earnings (and cost of care, if applicable), based on actual post-accident life expectancy.
2. Where the plaintiff has existing dependants, a claim for the substance of a wrongful death loss, based on the loss of income the dependants would suffer during the "lost years". This claim might represent over half of the lost years' income. As Branch and Price suggest, some safeguards to prevent dissipation of this part of the award by the plaintiff may be needed.
3. A similar claim for wrongful death, based on the needs of potential future dependants during the "lost years", would be made where there is some possibility of the victim acquiring such dependants before his death. The plaintiff will necessarily have to act as the "trustee" of this part of the award.
4. A residual claim for a part of "lost years" income, on behalf of Lord Wilburforce's "others, or causes, whom he would wish to benefit, for whom he might even regard himself as working". The circumstances of the individual would be consulted here, but the amount of the claim would in most cases be only a small percentage of lost income[10].
5. No award for lost earnings can compensate for the mental suffering accompanying a sentence of premature death. A perceived inadequacy of the present awards for non-pecuniary damages may underlie the willingness of the Court to grant "lost years" awards that exceed what an economist would see as the financial impact of such a tragedy. Perhaps the courts should be empowered to make a separate award under this head of non-pecuniary damages.

A claim along these lines does not conform to existing decisions, which lump claims 2, 3 and 4 into a single category and omit claim 5. Those with most incentive to work for some refinement of the Court's current "broad-brush" approach are those representing plaintiffs with existing dependants, inasmuch as the current arbitrary level of 50 percent of earnings may undercompensate for their losses. Where the plaintiff has no dependants and little likelihood of acquiring them, and where post-accident life expectancy is much reduced, those defending a lost years claim may find it worthwhile to persuade the Court to refine its present approach and distinguish between plaintiffs in different situations.

[1] This paper benefited from discussions with Mark Hughes, a young professional economist, and Robert Wickson, my partner at Discovery Economic Consulting.

[2] Ward K. Branch and Kevin I. Price, "Case Comment - Lost Years: The Compensation for Dying Young" *The Advocate,* Vol. 52 Part 5, September 1994. For a textbook discussion of lost years, see Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada,* Carswell Student Edition, 1981, pp. 237-244.

[3] Other adjustments to the claim may be made, such as a deduction for the cessation of dependence resulting from remarriage, and/or an allowance for the disappearance of the victim's offsetting claim on the surviving spouse's income.

[4] *Semenoff v. Kokan* (1991), 84 D.L.R. (4th) 76 (B.C.C.A.).

Bastian v. Mori (unreported), June 8, 1990, Vancouver Registry No. C876136, (1990) B.C.J. No. 1324 (S.C.).

Duncan v. Kemp (unreported), May 1, 1991, Vancouver Registry No. C866158, (1991) B.C.J. No. 1001 (S.C.).

Toneguzzo-Norvell v. Burnaby Hospital (unreported), January 27, 1994, (1994) S.C.J. No. 4.

[5] Normally, of course, the existence of dependants is known at the date of a wrongful-death accident. The probability of dependants' survival as dependants declines after the accident at a rate that depends on the expected mortality (or attainment of adulthood and consequent non-dependence) of other family members and on the probability of divorce, absent the accident. Thus while in a normal wrongful death claim the probability of having a family is known at the time of the accident, statistics and judgement are still required to allow for the probability of the dependent family existing at every point in the future, absent the accident. Thus the judgement that is required in the case of a plaintiff who survives the accident, has a diminished life expectancy, and may form family ties in the future is not different in kind from what is already required of the court. Statistics are available, and the court can of course substitute its own values based on its evaluation of the individual's prospects.

[6] Branch and Price suggest that the Court have accepted that the claim by an individual with a shortened life span should be based on full lifetime income because he has lost a "capital asset". This distinction is not clear to an economist. The value of an asset is equal to the discounted sum of the net stream of earnings it produces, and an asset with a limited life has a value that is correspondingly reduced.

The Court itself indicates that "it is established that a deduction for personal living expenses must be made from the award for lost earning capacity of the years she will actually live. This is necessary to avoid duplication with the award for cost of future care." (Source: *Toneguzzo-Norvell v. Burnaby Hospital* (unreported), January 27, 1994, (1994) S.C.J. No. 4.) The Court argues that "the same reasoning applies to both [the lived years and the lost years]" (Toneguzzo-Norvell v. Burnaby Hospital). This only confuses the issue. It indeed is clear that the cost of care award should not duplicate the loss of earnings award (that is, if an award is made for special shoes, it is reasonable to deduct from the loss of earnings award the amounts that would otherwise be spent on ordinary shoes). This overlap represents a very specific and fairly easily measurable amount, bearing no necessary relationship to "living expenses".

[7] *Pickett v. British Rail Engineering Ltd.,* (1980) A.C 136, (1979) 1 All E.R. 774.

[8] See, for example, Cooper-Stephenson and Saunders, p. 244. The level of claim proposed by the Court is such a high proportion of projected earnings that a plaintiff with some residual

earning capacity and modest care costs may find it in his interest to bring forth any evidence that the accident will shorten his life. While his claim for "lost years" earnings will be reduced by "living expenses", this reduction may be less than the reduction to his normal claim for loss of earnings because of his residual earning capacity.

[9] A distinction must be made between "living expense" in this sense and the definition sometimes used in wrongful death claims, where the individual's "living expenses" sometimes refers to the amount that is subtracted from total income to leave what is usually referred to as the spouse's "share" of pre-accident income. More precisely, the spouse's share is a measure of the amount of income that will leave the spouse (or other dependent) in the same financial position as absent the accident. This is a concept that economists can define and make an attempt to estimate, based on data on the amounts families spend on various items, expert judgement about the relative needs of men, women, boys and girls for food, clothing, etc., common sense judgement about relative needs for living space, and so forth.

[10] This excludes governments, in many cases the biggest third party losers in their role as partners (wanted or not) in all our financial endeavours. The loss to society of an expensively-educated young person at the beginning of his or her earning years can be enormous, and the failure of our courts and governments to recognize this in awards (and hence insurance premiums) represents an underpricing of automobile use.