ABSTRACT:
Each State creates its own set of responses to an array of common problems in calculating a “make whole” remedy. For example, are income taxes to be explicitly recognized or to be excluded as too speculative? Some variables might be specified by statute or by court decision. For example, the expert in forensic economics might be compelled to use of a specific life expectancy table or interest rate regardless of the expert’s professional opinion. This paper examines the Nebraska method of assessing these economic damages.

Make Whole
fictional transaction mimicking market

FAIR MARKET VALUE
is what a willing buyer would pay a willing seller when no compulsion binding either party, and with both having full knowledge of all relevant facts and material information (i.e., knowing and voluntary) in an arms’ length transaction with equity to both.

Pecuniary
The law’s prime remedy is price (i.e., cash); but, expansive definition of MONETARY VALUE.

Economic Damages (use experts)
earnings
lost profits (less favored than earnings)
domestic services
medical expenses (especially future)
lost time
lost opportunity

Noneconomic Damages (no experts)
pain and suffering
inconvenience
society, companionship, consortium reputation (???)
humiliation

The plaintiff bears the burden of proof (i.e., both production and persuasion) on the measure of damages. However, the burden is greater for the fact of damages than the burden is for the magnitude of damages.

Earnings: Actual
e.g., income tax records

Earning Capacity
range of jobs one can perform
forensic team
medical
vocational
economic

Earnings: Expected
Earning Capacity modified by Actual Earnings

Mitigation
(a.k.a. Doctrine of Avoidable Consequences)
existence of duty is a question of law
judge is only expert on law
application of duty is a question of fact

Collateral Source
avoid rewarding the defendant
encourage precaution by the plaintiff
subrogation reduces risk of double recovery
Present Cash Value
Einstein and the Rule of 72
real discount rate and forecasting inflation
other growth rates and total offset
Economic damages
must be reduced to present cash value;
but,
noneconomic damages
need not be reduced to present value.
However,
noneconomic damages often capped.

Expert (i.e., opinion) Testimony
assist the trier of fact
Frye
general acceptance
rejected polygraph in 1923
Daubert trilogy
gatekeeper
four foundation questions:
qualified expert
relevant
assist the trier of fact
not excluded per Rule 403
Although relevant, evidence may be excluded if its probative value is
substantially outweighed by the danger of unfair prejudice, confusion of
the issues, or misleading the jury, or by considerations of undue delay, waste of
time, or needless presentation of cumulative evidence.

Speculation
Nebraska follows majority rule:
income taxes are speculative.

Conjecture
Evidence must be the basis for the verdict:
but,
need not be the basis for an expert’s opinion.

Passion
Punishment is the province of the Legislature.

Hedonic Damages
a.k.a., value of life, itself
a.k.a., VSL: Value of a Statistical Life
Nebraska follows the majority rule:
[1] as a matter of law,
no expert has the ability
to assist a trier of fact on this question of fact;
and
[2] this value is embedded
in other noneconomic damages.

Punitive Damages
Contrary to popular reporting,
Nebraska does allow for defendant liability for punitive damages.
However,
the plaintiff does NOT get the money.
The money goes to the Permanent School Fund
(i.e., K12 endowment).

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