

**“Assessing Economic Damages
in Personal Injury and Wrongful Death Litigation:
The State of Nebraska”**

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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.

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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**.

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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

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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.

Greater Weight of the Evidence

(a.k.a., preponderance of the evidence)

Reasonably Certain

not exact proof
more reasonable than certain

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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

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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

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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.

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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.

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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.

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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.

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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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