

Risk-Adjusted Employer-Paid Benefits in Wrongful Death Cases

William Jennings and Penelope Mercurio*

In calculating damages for wrongful death, consideration should be given to the loss to the survivors or loss to the estate of the deceased because of lost future income. Based on the legal principle of restoring damaged parties to the position they would have had if not for the wrongful death, calculations of damages should also include compensation for related employment benefits. The relevant measure of damages should be based on the economic value of fringe benefits which otherwise would have accrued to the survivors or the estate of the deceased. As such, three issues are raised: (1) which future fringe benefits, if any, should be included? (2) should the damages for future fringe benefits be reduced to present value? (3) and, if so, at what discount rate?

Not all employer-paid fringe benefits of the deceased may be used in the calculations of damages. For example, in states where recovery is limited to the damages suffered by the spouse or children of the deceased, calculations of damages should not include all the fringe benefits but rather only those fringe benefits which would have benefitted the deceased's spouse or children. Thus, recovery for medical insurance coverage paid for by the deceased's employer would be limited to that portion of the medical insurance cost paid by the employer and for the benefit of the deceased's spouse or children. Care should also be taken to avoid counting both lost future income and the lost fringe benefit of paid vacation or counting both lost future income and fringe benefits paid by the worker—these double counting errors overstate the loss and may lead to overcompensation of the injured plaintiff.

Once careful analysis of the basis of recovery and the future economic cost of includable fringe benefits is made, future damages are generally reduced to present value through selection and application of an appropriate discount rate.¹ In reducing future income the future fringe benefits to present value, economic experts and courts have generally used discount rates based on "safe" low-risk investments. However, notwithstanding the courts' desire to avoid placing investment risk on the injured party, calculations of damages for lost fringe benefits should also include consideration of the risk associated with future receipt of the fringe benefit. As we have argued elsewhere,² to the extent the deceased's future is uncertain and his or her ability to earn future pay and future fringe

* William Jennings is Chair, Department of Finance, Real Estate and Insurance and Penelope Mercurio is Professor of Business Law, California State University, Northridge.

¹ D. Dobbs, *Handbook on the Law of Remedies*, Section 8.5 (1973).

² See, W. Jennings and P. Mercurio, "Selection of an Appropriate Discount Rate in Wrongful Death and Injury Cases," *Journal of Contemporary Law*, Vol. 14, No. 2, 1988, where we argue that risk associated with future labor earnings could be considered in present value calculations of lost future earnings and earnings capacity.

benefits is not risk-free, the appropriate calculation of damages must be also be based on non-risk-free discount rates.

Failure to recognize the potential variation in future fringe benefits by selecting risk-free discount rates would lead to calculations of damages unadjusted for risk and, in many cases, over-compensation for the injured plaintiff.