

# Economic Damages Under House Bill 393

**This paper focuses on parts of House Bill 393 that are likely to change the manner in which economists calculate damages or which will have other impacts on their relationships with the court and with attorneys. In some instances the bill is unclear about how damages should be calculated, and the authors review the possible alternative interpretations.**

## INTRODUCTION

The 2005 Missouri General Assembly adopted House Bill 393 (H.B. 393), which was signed into law by the governor of Missouri and took effect on August 28, 2005. This bill modified 19 sections of the Revised Statutes of Missouri (RSMo) relating to tort damages in Missouri, and instituted four new sections, with its greatest impact in the area of medical malpractice tort actions. Many of the changes had little or no effect on the manner in which economists will be called upon to calculate damages, even if the issues themselves fall into the areas of finance or economics. Changes such as how pre- and post-judgment interest should be calculated, for example, probably do not affect the calculation of damages by economists, nor will they involve economists materially in any related discussions. New restrictions on how joint liability provisions will be applied are another example of a change that will not affect the estimation of economic damages.

The purpose of this paper is to identify the specific ways in which economists will be affected by H.B. 393, either in estimating the value of economic damages, in adding to the discussion of the circumstances and facts related to that estimation, or in their relationships with the court and with attorneys. Additionally, Section VII of the paper discusses several consequences of the limitation H.B. 393 places on the court's previous discretion in establishing a payment schedule for future damages. Accordingly, even though



Thomas R. Ireland<sup>1</sup>



David G. Tucek<sup>1</sup>

the changes in § 508.010 related to venue will affect the geographical distribution

of demand for economists' services, this effect is not discussed. Similarly, the change in the temporal distribution of demand that resulted from the rush to file cases before H.B. 393's effective date is not addressed.

The changes considered in this paper are the following:

(1) H.B. 393 sets out a specific manner in which the value of the services of a caregiver in a wrongful death action may be calculated. (Section 537.090)

(2) H.B. 393 appears to modify how damages should be calculated in cases involving the wrongful death of a minor. (Section 537.090)

(3) H.B. 393 designates the calculations related to the value of care and the death of a minor as "rebuttable presumptions," and may consequently present an ethical conundrum for economic witnesses. (Section 537.090)

(4) H.B. 393 sets new limits for non-economic damages and establishes specific limits for the amounts of punitive damages that may be awarded. (Sections 510.265 and 538.210)

(5) H.B. 393 modifies the manner in which periodic payments will be handled in medical malpractice circumstances. (Section 538.220).

(6) H.B. 393 restricts the court's discretion in fashioning relief in the best interests of the parties and, in doing so, may have consequences that bias awards upwards and affect the behavior of plaintiffs' attorneys, economists and the court itself. (Section 538.220)

<sup>1</sup>Dr. Ireland is emeritus professor of economics at the University of Missouri at St. Louis, and has testified and published extensively in the field of forensic economics. He may be contacted at [Ireland@umsl.edu](mailto:Ireland@umsl.edu). Mr. Tucek provides economic consulting services in personal injury and wrongful death cases and is the general partner of Value Economics, LLC. Mr. Tucek may be contacted at [David.Tucek@valueeconomics.com](mailto:David.Tucek@valueeconomics.com).

## II. SECTION 537.090: VALUING THE SERVICES OF THE DEATH OF A CAREGIVER

H.B. 393 specifies, as a rebuttable presumption, the value of the care given by a deceased person to one or more minors, disabled persons or persons over 65 years of age. The scheduled damages<sup>2</sup> are set equal to 110% of the state average weekly wage as computed under § 287.250, RSMo Supp. 2005, and the value of the care is not dependent on the number of persons cared for. For these scheduled damages to apply, the deceased must not have been employed full time and must have been responsible for at least 50% of the care for one such person listed in the statute.

This new provision of § 537.090 will involve economists, either directly or indirectly, in answering the following questions:

- (1) Was the decedent fully employed at the time of his or her death?
- (2) Over what time period can the decedent's services be deemed to have been lost?
- (3) Was the 50% threshold for care provided met by the decedent?

Because H.B. 393 does not define what is meant by full employment or what constitutes "care," in many cases these questions will raise issues that will not be easy to resolve.

Consider first the question of whether or not the decedent was employed on a full-time basis. Clearly, someone employed 40 or more hours per week would be considered to be employed full time, while someone who worked only 16 hours per week would not. In situations in which the deceased caregiver was employed for, say, 32 hours per week, the number of hours deemed to equal full employment will be of central interest. Since the level of employment considered to be full-time is not specified by H.B. 393, economists will have to look elsewhere for guidance on this issue. One such place is § 287.250.3, RSMo Supp.

2005, which has this to say about full-time employment:

If an employee is hired by the employer for less than the number of hours per week needed to be classified as a full-time or regular employee, benefits computed for purposes of this chapter for permanent partial disability, permanent total disability and death benefits shall be based upon the average weekly wage of a full-time or regular employee engaged by the employer to perform work of the same or similar nature and at the number of hours per week required by the employer to classify the employee as a full-time or regular employee, but such computation shall not be based on less than thirty hours per week.

This provision of § 287.250.3 suggests that the definition of "full-time employment" is determined by the practices of the employer, with the constraint that 30 hours per week is the minimum number of hours that can be considered full-time. Another benchmark for the number of hours constituting full-time employment comes from the U.S. Department of Labor's definition of full-time employment as being equivalent to 35 hours per week, from all jobs combined.<sup>3</sup> Thus, employment of 35 hours or more per week *may* be accepted by the courts as being full-time, while decisions dealing with the range from 30 to 35 hours per week may depend on the practices of the employer.

Of course, the grey area between 30 and 40 (or 35) hours worked per week is not the only factor that complicates the question of whether the decedent was employed full-time or not. Consider, for example, the situation in which a decedent was unemployed at the time of death, but intended to return to full-time employment.<sup>4</sup> Assuming that the 50% threshold for the provision of care was being met, the fact that the decedent

intended to return to work raises, at a minimum, the issue of how long the decedent's caregiving services are to be considered to have been lost. While one answer to this question might be based on the average duration of unemployment experienced by unemployed members of the labor force, in some situations it might be argued that determining the period of loss should consider the decedent's age, education, training and past work experience, as well as local labor market conditions. Similar questions would arise in situations in which the decedent was on reduced hours or on medical leave from a job that would otherwise be considered full-time.

Determining the period of loss is also complicated by H.B. 393's failure to define what constitutes "care." The question of "How long?" arises even in the most clear-cut case, in which the recipient of the care is an infant wholly dependent on the decedent for every aspect of what could constitute care. At some point in time, a minor self-administers care associated with getting dressed, personal hygiene, feeding, etc. Even if "care" is extended to include services such as guidance and counseling that ordinarily cannot be self-administered, it may be that these services are also provided by others (e.g., friends, teachers, or clergy) outside of the home. Thus, as the minor matures, the percentage of care that would have been provided by the decedent would arguably have declined due to the minor assuming responsibility for his or her own care, and due to the provision of care by persons other than the decedent. One way for the economist to resolve this issue in the case of a minor is to present the value of care provided to a minor at each age up to 18 and leave the question of "How long?" to be determined by the trier of fact.

With respect to a care recipient who is a disabled person or over the age of 65, the question of "How long?" can be answered by relying on the probability that the recipient survives to a given age. However,

<sup>2</sup> We have adopted the nomenclature of Drs. Krueger and Ward as designating the amounts calculated under § 537.090 as "scheduled damages." Kurt V. Krueger & John O. Ward, 2005. "Evaluating Damages Under H.B. 393," page 2, available at <http://johnwardeconomics.com>.

<sup>3</sup> BLS HANDBOOK OF METHODS, BUREAU OF LABOR STATISTICS, updated periodically, available at [http://www.bls.gov/opub/hom/homch1\\_c.htm](http://www.bls.gov/opub/hom/homch1_c.htm), Chapter 1, page 1.

<sup>4</sup> This intention might, for example, be inferred from the decedent's collection of unemployment benefits, or by documented efforts to obtain new employment.

a different question may arise when the care recipient is a non-disabled person over age 65. Consider the situation of an adult parent residing in the home of the decedent. At the time of the decedent's death, the parent may have been self-sustaining in terms of personal maintenance and may, for example, receive assistance in administering their financial and legal affairs from others, or not require any such assistance. The question then becomes not "How long?" but "When?" Again, one solution is for the economist to value the services starting with the time of the decedent's death, letting the trier of fact resolve the question of when the 50% threshold would have been met.

### **III. SECTION 537.090: VALUING THE DAMAGES RESULTING FROM THE DEATH OF A MINOR**

H.B. 393 also addresses the pecuniary damages resulting from the death of a minor. Specifically, § 537.090, RSMo Supp. 2005, now states:

If the deceased is under the age of eighteen, there shall be a rebuttable presumption that the annual pecuniary losses suffered by reason of the death shall be calculated based on the annual income of the deceased's parents, provided that if the deceased has only one parent earning income, then the calculation shall be based on such income, but if the deceased had two parents earning income, then the calculation shall be based on the average of the two incomes.

As with the death of caregiver, this provision will involve economists, either directly or indirectly, in answering several questions, the three most important of which are:

(1) Are the statute's scheduled damages the amount of the loss, are they an estimate of what the minor might have earned, or are they (an unspecified) something else?

(2) When does the loss period start and for how long will the loss be sustained?

(3) How much of the statute's scheduled damages represents a loss to the plaintiffs? Again, answering these questions will often not be straightforward and will likely give rise to other questions, some of which already arise in cases involving the death of a minor.

With respect to (1), it is difficult to defend the position that the statute's scheduled damages equal the annual amount of the loss to the plaintiffs. Consider two minors who happen to live next door to each other and are killed in the same auto accident. If the mother of the first minor earned \$100,000 per year and the father was not employed, the scheduled damages specified by the statute would be \$100,000. If both of the parents of the second minor worked and each earned \$50,000 per year, the scheduled damages would be \$50,000. Thus, the position that the statute's scheduled damages equal the annual amount of the loss leads to different loss amounts even when the combined earned income of the parents is the same. There is no reason why the loss incurred by two working parents (the presumed plaintiffs) would be expected to be less than the loss of two other parents, only one of whom was employed, unless the loss were based on the expected earnings of the deceased child. In the absence of an unspecified "something else" alternative, we conclude that the statute's scheduled damages are an estimate of what the deceased child might have earned.<sup>5</sup>

This conclusion helps set the framework for the questions of when the loss period starts and how long it lasts, as well as the

question of how much of the statute's scheduled damages are to be considered a loss. While these questions may not be easy to resolve, they are not new to the estimation of economic damages resulting from the death of a minor. Consequently, other than prescribing a presumed estimate of what the child would earn, H.B. 393's new provision brings little to such cases that is new.<sup>6</sup>

### **IV. SECTION 537.090: THE "REBUTTABLE PRESUMPTION" ETHICAL CONUNDRUM**

H.B. 393's scheduled damages for the death of a caregiver and the death of a minor are designated as rebuttable presumptions by the statute. This means that parties can choose to rely on the calculation results as facts, or offer evidence to the contrary. Economists already have developed methodologies to estimate each of the presumed values, and these estimates will likely differ from the values produced by the methodology contained in the statute. The right to offer evidence rebutting the presumed scheduled damages, coupled with the strong likelihood that the presumed values will differ in many cases from what economists would otherwise calculate, presents economists with a potential ethical dilemma.

Depending on the sign, the difference between the scheduled damages and what would otherwise be calculated will be to the plaintiff's advantage and to the disadvantage of the defendant, or vice versa. The potential ethical dilemma comes into play when the presumed value favors the economist's client in one case, but works to a different client's disadvantage in another. If the clients' interests are to hold sway, and if the economist wants the business, he will be tempted to pick and choose among the

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<sup>5</sup> Additionally, it could well be argued that if the intent was to establish the statute's scheduled damages as the annual amount of the loss, the statute would not contain the language "shall be calculated based on" since the phrase "is equal to" is used in connection with the death of a caregiver immediately before the provision concerning the death of minor. Section 537.090, RSMo Supp. 2005.

<sup>6</sup> The statute states that the pecuniary loss resulting from the death shall be calculated based on the statute's scheduled damages. This language forestalls arguments that the statute's scheduled damages represent the non-pecuniary losses (related, for example, to mental anguish or loss of consortium) sustained by reason of the minor's death since the loss is clearly stated as being pecuniary, which in Missouri means economic damages. (See § 538.205, RSMo.) Moreover, arguments based on the claim that the scheduled damages represents the value the parents expected in return for investing money, time and other resources in raising a child, are frustrated by this language since some, if not the bulk, of such value is non-pecuniary in nature.

statute's values and the values he would otherwise develop on a case-by-case basis. This temptation will arise even if the economist always testifies for the plaintiff or always testifies for the defense, because the question of which side is favored depends on the particulars of the case, and not on whether the client is the plaintiff or the defendant.

The conundrum extends not only to the issue of which value to adopt, but also to the question of how to interpret the statute. For example, in one case an economist may argue that, because a deceased caregiver met the 50% care threshold for an infant, the loss period extends until the infant is expected to turn 18, with no consideration that the percentage of care might have declined below the 50% threshold as the infant matured. This position would seem to preclude the argument that the 50% care threshold would be met at some time in the future in the case of a decedent caring for a parent in the early stages of a debilitating disease, even though such an argument might be persuasive and in the interests of the plaintiff.

#### **V. SECTIONS 510.265 AND 538.210: INCREASED SCRUTINY FOR ECONOMISTS**

Section 510.265.1, RSMo Supp. 2005, is a new section that limits an award of punitive damages to the greater of \$500,000 or "[f]ive times the net amount of the judgment awarded to the plaintiff against the defendant."<sup>7</sup> Presumably, the "net amount of the judgment" is the award net of punitive damages and includes both economic and non-economic damages as defined in § 538.205, RSMo.

H.B. 394 modifies § 538.210.1 to limit non-economic damages to \$350,000 in actions against a health care provider in personal injury or death cases,

"irrespective of the number of defendants." The stated dollar amount of the limitation has not changed, but the effective cap is changed by the phrase "irrespective of the number of defendants," which is new language.

The combined effect of these two provisions of H.B. 393 is to increase the importance of the estimate of economic damages in determining the total amount (the sum of economic, non-economic and punitive damages) of the award. Because non-economic damages are capped at \$350,000, the ceiling on punitive damages becomes \$1,750,000 (five times \$350,000) plus five times the amount of economic damages awarded. Thus, the calculation of economic damages will come under more scrutiny and economists will likely face increased pressure to argue for or against high estimates of economic damages by plaintiff and defense attorneys, respectively.

#### **VI. SECTION 538.220: SPECIFICATION OF A PERIODIC MEDICAL/LIFE CARE PAYMENT SCHEDULE**

H.B. 393 modifies § 538.220.2 by specifying the manner in which a future medical/life care payment schedule is to be determined: "[t]he duration of the . . . schedule shall be [the] period of time equal to the (remaining) life expectancy of the person to whom the services are rendered," with the life expectancy to be "determined by the court, based solely on the evidence of such life expectancy presented by the plaintiff. . . . The amount of each . . . payment[] shall be determined by dividing the total amount of future medical damages by the number of future medical periodic payments."<sup>9</sup> Interest is to apply "on such future periodic payments at a per annum interest rate no greater than the coupon issue yield equivalent, as

determined by the Federal Reserve Board, of the average accepted auction price for the last auction of fifty-two-week United States Treasury bills settled immediately prior to the date of the judgment."<sup>10</sup> If the parties agree to settle and resolve the claim for future damages, the periodic payment schedule does not apply.

Drs. Krueger and Ward have identified several problems stemming from the statute's prescribed method of calculating the schedule of future payments. In particular, they discuss the inequities that may result when the required payments are front- or back-loaded, and when the statute's prescribed interest rate and payment period differs markedly from the discount rate and time period (explicitly or implicitly) underlying the awarded damages.<sup>11</sup> In this section of our paper, we focus on three aspects of H.B. 393's modifications to § 538.220: (1) the issue of whether simple or compound interest is required by § 538.220; (2) the potential conflict between the retained language in § 538.220.2 stating "that future damages shall be paid in whole or in part" with the new language stating "the future medical periodic payments shall be determined by dividing the total amount of future medical damages by the number of future medical periodic payments"; and (3) the role the economist might take in informing the court of the consequences of various payment schedules.

The motivation for discussing the first of these issues is Drs. Krueger and Ward's conclusion that the application of the specified interest rate shall assume simple interest. Based on private communication with one of the authors, it seems this view is based on the belief that use of the term "per annum" in the new language quoted above requires that simple interest be assumed. However, this belief seems to be contrary to the ruling of the Supreme

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<sup>7</sup> The limitations set forth in this new section do not apply if the state of Missouri is the plaintiff requesting the punitive damages, if the defendant pleads guilty or is convicted of a felony arising out of the acts or omissions pled by the plaintiff, or to civil actions brought under § 213.111.1, alleging discrimination in the sale, rental or the provision of housing or of real estate loans "because of race, color, religion, national origin, ancestry, sex, disability, or familial status." Section 213.040.1(1), RSMo Supp. 2005.

<sup>8</sup> Section 510.265.1, RSMo Supp. 2005.

<sup>9</sup> Section 538.220.2, RSMo Supp. 2006.

<sup>10</sup> *Id.*

<sup>11</sup> *Krueger* at pp 11-15.

Court of Missouri in *First Nat'l Bank of Stronghurst, Ill. v. Kirby*, which found:

We see from the above that the law of Illinois is the same in that respect as the law of Missouri. The words "per annum" are used exclusively to designate rate of interest, while the word "annually," in that connection, is an appropriate word to indicate the time of payment.<sup>12</sup>

Our interpretation of this ruling is that "per annum" does not mean simple interest, it only means "per year." There is case law in Missouri stating that interest on a promissory note (or other contractual obligation) may not be compounded in the absence of an agreement that [it should be] computed in that manner.<sup>13</sup> However, the payment schedule contemplated in § 538.220 is not an obligation of any sort until it is established by the court, so it seems permissible that the court could apply compound interest in determining the scheduled payments.

Additionally, justification for the court's use of compound interest may be found in *Lammers v. Lammers*, where the appellate court stated that "trial courts, sitting as courts of equity, may assess compound interest when justice requires it to serve the cause of equity."<sup>14</sup> Given that § 538.215 requires juries to express awards of future medical damages at present value, the application of interest required by H.B. 393's modification of § 538.220 can arguably be viewed as a reversal of the discounting process used to arrive at the present value. Because of differences between the discount rate and the time period underlying the calculation of the present value, and the corresponding values prescribed by H.B. 393, the statute's payment schedule will likely advantage one party at the expense of the other, as Drs. Krueger and Ward have noted. Thus,

it would seem that the court could apply either compound or simple interest in order to mitigate the inequity suffered by the disadvantaged party.

As noted above, there seems to be a conflict between § 538.220.2's retained and new language dealing with the medical payments schedule:

At the request of any party to such action made prior to the entry of judgment, the court shall include in the judgment a requirement that future damages be paid in whole or in part in periodic or installment payments if the total award of damages in the action exceeds one hundred thousand dollars. Any judgment ordering such periodic or installment payments shall specify *a future medical periodic payment schedule, which shall include* the recipient, the amount of each payment, the interval between payments, and the number of payments. *The duration of the future medical payment schedule shall be for a period of time equal to the life expectancy of the person to whom such services were rendered, as determined by the court, based solely on the evidence of such life expectancy presented by the plaintiff at trial. The amount of each of the future medical periodic payments shall be determined by dividing the total amount of future medical damages by the number of future medical periodic payments. The court shall apply interest on such future periodic payments at a per annum interest rate no greater than the coupon issue yield equivalent, as determined by the Federal Reserve Board, of the average accepted auction price for the last auction of*

*fifty-two-week United States Treasury bills settled immediately prior to the date of the judgment. The judgment shall state the applicable interest rate.* (Italics used to highlight new language.)

The judicial question that arises is whether the added language preempts the latitude for the court to include in the judgment a requirement that future damages be paid in whole or in part according to a series of periodic installment payments. Depending on the amount of medical and life care damages relative to the total size of the award, this language has the potential to restrict the court's ability to fashion an equitable payments schedule. Consider the case in which the award consists entirely of damages that are designed to pay for needed surgery in the first five years of an infant's life. If the new language is deemed to restrict the "in whole or in part" latitude previously enjoyed by the court, the result would be a payment schedule that would provide for insufficient funds at the time the surgery is needed. This issue, of course, cannot be resolved in this paper or by economists at all – it is a question for the courts or the legislature to address.<sup>15</sup> But it does have a bearing on the role the economist can take in informing the court of the consequences of various payment schedules.

As noted by Drs. Krueger and Ward,<sup>13</sup> prior to H.B. 393's passage economists often worked with "the plaintiff, [the] defendant, the court and at times a structured settlement company" in a post-trial evidentiary hearing "to work out a payment schedule" equivalent to "the present value of the damage[s] award[ed] by the jury."<sup>16</sup> "H.B. 393 preserves the post-trial evidentiary hearing" and it is conceivable that this could continue to be a forum through which the economist informs the court on the relative merits of

<sup>12</sup> *First Nat'l Bank of Stronghurst, Ill. v. Kirby*, 175 S.W. 926, 929 (Mo. 1915).

<sup>13</sup> See, for example, *Sloan v. Paris*, 541 S.W.2d 316, 321 (Mo. App. W.D. 1976).

<sup>14</sup> *Lammers v. Lammers*, 884 S.W.2d 389, 393 (Mo. App. W.D. 1994).

<sup>15</sup> A finding that the "in whole or in part" provision that preceded H.B. 393's passage into law applies now only to the non-medical portion of the judgment would necessarily rely on a distinction between the medical and non-medical portions of the judgment. It seems, then, that the newly specified interest rate would be found to only apply to the medical payment schedule, allowing the court to fashion the payment schedule for the non-medical portion of the judgment according to the circumstances specific to each case.

<sup>16</sup> *Krueger* at pp 11-12.

alternative payment schedules.<sup>17</sup> And, even if H.B. 393's new language restricts the court's latitude in fashioning a medical payments schedule, the economist can help the court maximize use of the latitude that remains in choosing between simple and compound interest and in setting the payment schedule, including the rate of interest, for the non-medical portion of the judgment.

## VII. SECTION 538.220: LIMITING THE DISCRETION OF THE COURT

Prior to the changes in H.B. 393, there was little instruction available to trial court judges for interpreting the periodic payment provisions in § 538.220. Only eight reported legal decisions had interpreted the previous version of this section, which had been originally adopted in 1986. Ireland discussed the uncertainty surrounding how this section should be interpreted in 2001 and concluded that little direction was available to trial court judges in the five previous opinions that had interpreted § 538.220.<sup>18</sup> (Ireland also made several suggestions about the roles that an economist might play with respect to §538.220, which have now been rendered moot by H.B. 393.)

Subsequent to Ireland's paper, three additional reported decisions have been reached. *Long v. Missouri Delta Med. Ctr.*<sup>19</sup> involved a situation in which the plaintiff child died before the appeal was even heard after medical expenses were awarded for a 15-year period. While the case was remanded to the trial court for further determinations, it is likely that the attorney fee awarded and upheld in the decision was significantly greater than the amount of the award paid for medical expenses of the child or to the child's parents. The decision did not result in clarification of the approach that might be taken for structuring periodic payments over the jury's apparent determination

that the child had a 15-year life expectancy. This decision was effectively consistent with the provisions in H.B. 393 in that the jury accepted the plaintiff's determination of life expectancy, since it ignored the defendant's projection of a shorter life expectancy for the injured child.

*Davolt v. Highland* (2003) made the determination that the \$100,000 figure mentioned in § 538.220 was a threshold figure for periodic payments and not an amount that must be paid as a lump sum with only the excess above \$100,000 scheduled as periodic payments. However, the *Davolt* court did not reverse the trial court decision on this basis, holding:

The circuit court is . . . entitled to fashion relief in the best interests of the parties, subject to review only on the basis of its arbitrariness. The statute does not require but authorizes an evidentiary hearing at the request of either party or sua sponte and does not give any guidance on how such future payments are to be structured.<sup>20</sup>

Thus, this decision emphasizes the fact that the previous version of § 538.220 gave a wide range of discretion to trial court judges.

In *Redel v. Capital Region Med. Ctr.*,<sup>21</sup> the appellate court was faced with a trial court decision in which the trial court had decided not to structure periodic payments even though requested to do so by the defendant hospital. The *Redel* court affirmed all other aspects of the trial court decision, but held that the trial court did not have the discretion not to award periodic payments, remanding the case to the trial court for determination of appropriate amounts of periodic payments.

H.B. 393's modifications to § 538.220 further limit the discretion described in the *Davolt* decision by specifying precise rules for how periodic payments should be calculated. As discussed earlier, the

statute now requires that the total amount awarded for future life care costs should be divided by the number of scheduled periodic payments. In H.B. 393, the period of time over which periodic payments should be made is defined as "equal to the life expectancy of the person to whom such services (are to be) rendered, as determined by the court, based solely on the evidence of such life expectancy presented by the plaintiff at trial."<sup>22</sup>

This is a double-edged sword for plaintiff attorneys in that a longer life expectancy implies a larger total amount of damages if accepted by the jury. However, the same evidence that would produce a longer life expectancy would then serve the function of lengthening the period over which periodic payments would be made, reducing the amount paid per time period and the present value of the award. One intended consequence of these conflicting outcomes might have been to reduce the life expectancy proffered by plaintiff attorneys. Because the attorneys' fees may be unaffected by the structure of the payment schedule, it remains to be seen if this result is realized. Another possible outcome is that plaintiff attorneys will introduce, through a medical witness, testimony on a range of life expectancies and instruct the economist to base the damage estimates on the upper end of this range. This would allow them to argue that the payment schedule be based on a shorter life expectancy than the plaintiff's economist used, by inferring that the jury assumed a shorter period based on their verdict.<sup>23</sup>

H.B. 393 also specifies how the interest rate should be determined for purposes of increasing the amount of future periodic payments. The combination of these provisions significantly restricts the way in which trial court judges can award periodic payments under § 538.220. This can result in problems of either front

<sup>17</sup> *Id.* at 12.

<sup>18</sup> Ireland, Thomas R., "Structured Judgments and Periodic Payments in Missouri: Uncertainty on the Meaning of Tort Reform," 57 J. Mo. BAR 172, 178.

<sup>19</sup> *Long v. Delta Med. Ctr.*, 33 S.W.3d 629 (Mo. App. S.D. 2000).

<sup>20</sup> *Davolt v. Highland*, 119 S.W.3d 118, 138 (Mo. App. W.D. 2003).

<sup>21</sup> *Redel v. Capital Region Med. Ctr.*, 165 S.W.3d 168, 179 (Mo. App. E.D. 2005).

<sup>22</sup> Section 538.220, RSMo Supp. 2005.

<sup>23</sup> This possibility was recently suggested to us by Dr. Kurt Krueger.

loading or back loading, as discussed by Drs. Krueger and Ward, but with elaboration here.<sup>24</sup> Suppose for simplicity that an award for life care is made on the basis of \$100,000 per year, increasing annually at 6 percent for a five-year period, based on evidence presented by the plaintiff at trial for the life expectancy of the injured person. The economist for the plaintiff will have projected damages as follows (figures in the H.B. 393 column will be explained below):

<u>Year</u>	<u>Projected</u>	<u>H.B. 393</u>
Year 1	\$100,000	\$112,742
Year 2	\$106,000	\$117,252
Year 3	\$112,360	\$121,942
Year 4	\$119,102	\$126,819
Year 5	\$126,248	\$131,892

Total projected life care costs over the five-year period are \$563,710. Based on the formula in H.B. 393, the \$563,170 is divided by 5, producing \$112,742 as the initial payment.<sup>25</sup> Assume further that the coupon yield equivalent for the last auction of 52-week Treasury Bills is 4.0 percent. If the payments were awarded in single year annual amounts, the H.B. 393 formula will produce actual payments in excess of the amounts projected by the plaintiff's economist in each of the five years and thus increase damages awarded to an amount in excess of the amount testified to by the plaintiff's economist. This upward bias depends on the fact that annual costs are projected to increase each year, as would normally be the case. If costs were projected to decline each year, this result could be reversed, depending on the rate of decline and on the interest rate applied to each year's payment.

This exaggeration of damages is related to the timing of actual expenses. As we suggested in Section VI, if an injured person's early projected costs were higher than late projected costs, the H.B. 393 formula might result in inadequate funds

being available when needed in early years. If such problems were anticipated, a trial court judge could have taken them into account under the prior version of § 538.220 by structuring scheduled payments to take higher early year expenses into account. Under § 538.220, the trial court judge's hands are now tied unless there are additional, non-medical damages, or unless the parties can reach agreement about the schedule of payments. Preventing such flexibility in structuring payments on the part of trial court judges may favor defendants, but there is a price to pay in that the scheduled payments may be higher under H.B. 393 than they would have been under the previous version of § 538.220.

Finally, it is possible that the court may seek to interpret the new provisions in § 538.220 literally, in order to mitigate the disconnection between the statute's prescribed interest rate and payment period and the discount rate and time period (explicitly or implicitly) underlying the awarded damages. Specifically, it is possible that the court will interpret the directive to divide "the total amount of future medical damages by the number of future medical periodic payments" as requiring the future life care costs to be denominated in nominal dollars.<sup>26</sup> Besides making the bias noted above more explicit, such an interpretation would require juries to make a finding as to the total of the future life care costs, and economists to project those costs in nominal dollars. Additionally, the application of the prescribed interest rate would not be interpreted as a reversal of the discounting process used to arrive at the present value, since that present value would not enter into the calculations. Rather, it would only represent the interest for the period between the jury's verdict and the time of the first scheduled payment.

## VIII. CONCLUSIONS

In this paper we have reached six major conclusions concerning the effect of H.B. 393 on the practice of forensic economics in the state of Missouri. First, the new provisions concerning the death of a caregiver are likely to engage economists in numerous discussions involving the employment status of the decedent, the start and duration of the loss period, and the extent of the care provided relative to the statute's threshold of 50%. There seem to be no clear-cut answers to the questions raised by these issues, and the answers that are reached will likely depend heavily on the circumstances surrounding each individual case.

Second, the scheduled damages relating to the death of a minor can only be viewed as an estimate of what the minor would have earned upon entering the labor force. As such, questions concerning the start and duration of the loss period, the remaining net income against which the plaintiffs may lay a claim, and the fraction of that net income that they can legitimately claim as a pecuniary loss are well-traveled ground. Consequently, unlike the scheduled damages for the death of a caregiver, H.B. 393's provisions concerning the death of a minor bring few issues that are new to economists.

Third, economists may be presented with an ethical dilemma by the "rebuttable presumption" provisions of the statute.<sup>27</sup> The scheduled damages will nearly always differ from the amount the economist would otherwise calculate, and their adoption will consequently benefit the plaintiff and disadvantage the defense, or vice versa, on an individual case basis. Ethical consistency requires that the testifying economist not estimate both values and then decide which to include in his or her report.

Fourth, H.B. 393's changes to the caps on both non-economic and punitive damages increases the interest of all parties

<sup>24</sup> *Krueger* at 13.

<sup>25</sup> This example ignores the likelihood that the plaintiff economist's damage estimates may be expressed on a present value basis, and that the jury's award would reflect not only this present value but also the possibly lower damages estimates presented by the defendant. While the bias discussed here would be masked by both of these events, it nevertheless exists and is inherent in H.B. 393's prescribed calculations.

<sup>26</sup> Section 538.220, RSMo Supp. 2005.

<sup>27</sup> Section 537.090, RSMo Supp. 2005.

in the amount of economic damages estimated by economists. Consequently, their reports will likely be under more scrutiny and they will come under more pressure to produce high estimates by plaintiff attorneys and low estimates by defense attorneys.

Fifth, H.B. 393's provisions for establishing a medical payments schedule may create inequitable results when medical costs are front- or back-loaded, or when the discount rate underlying the judgment differs markedly from the statute's prescribed rate to be used in specifying the medical payments schedule. Moreover, it may be that the new law restricts the court's latitude in fashioning an overall payment schedule that meets the demands of equity in a specific case. The economist can aid the court in this task by informing it of the relative merits of alternative payment schedules.

Sixth, H.B. 393's § 538.220 provisions

have restricted the court's discretion in fashioning relief in the best interests of the parties and have created a double-edged sword for plaintiff attorneys with respect to presenting testimony about the life expectancy of a plaintiff following a serious injury. Additionally, the bill's prescribed medical payments schedule has an upward bias when each year's damages are expected to increase as time passes. If the court interprets H.B. 393 as requiring future life care costs to be denominated in nominal dollars, this bias will be made more explicit and will also require juries and economists to make a finding or projection of the total nominal dollar amount of such costs.

Finally, the authors recognize that their opinions on the meaning and consequences of H.B. 393 are likely to be swept aside by yet-to-be-made rulings of the courts and the appeal process, or by further legislative action.

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