



PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.*

Avoiding Plaintiffs' Lottery Tickets

Dealing with Economic Experts, Blackboard Damages & Denney

Presented by
Justin J. Hakala ■ Eric T. Ramar ■ Robert G. Kamenec

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Today's Presenters

		
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Cracking the Calculus

Understanding the Math & Other Preliminary Considerations

Presented by
Justin Hakala

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Age	Year	Lost Wage	Discount	Present Value
53	2019	\$3,089.98	1.00	\$3,089.98
54	2020	\$88,400.00	1.00	\$88,400.00
55	2021	\$91,936.00	1.00	\$91,936.00
56	2022	\$95,613.44	1.05	\$91,060.42
57	2023	\$99,437.98	1.10	\$86,700.54
58	2024	\$103,415.50	1.16	\$82,324.18
59	2025	\$107,552.12	1.22	\$78,000.00
60	2026	\$111,854.20	1.28	\$73,680.00

Lost Earnings Capacity

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Age	Year	Example Hrs/Day	Household Services	Discount	Present Value
53	2019	1	\$630.00	1.00	\$630.00
54	2020	1	\$7,592.00	1.00	\$7,592.00
55	2021	1	\$7,895.68	1.00	\$7,895.68
56	2022	1	\$8,211.51	1.05	\$7,820.48
57	2023	1	\$8,539.97	1.10	\$7,746.00
58	2024	1	\$8,881.57	1.16	\$7,672.23
59	2025	1	\$9,236.83	1.22	\$7,599.16

Household Services

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Age	Year	One Time Costs	Recurring Costs	Discount	Present Value
53	2019	\$300,000.00	\$300,000.00	1.00	\$300,000.00
54	2020	\$300,000.00	\$300,000.00	1.00	\$300,000.00
55	2021	\$300,000.00	\$300,000.00	1.00	\$300,000.00
56	2022	\$300,000.00	\$300,000.00	1.05	\$285,714.29
57	2023	\$300,000.00	\$300,000.00	1.10	\$284,353.74
58	2024	\$300,000.00	\$300,000.00	1.16	\$282,999.68
59	2025	\$300,000.00	\$300,000.00	1.22	\$281,652.06

Future Medical Costs

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Blackboard Damages:

- Lost Earnings Capacity: \$1.8MM
- Future Medical Costs: \$8.6MM
- Household Services: \$627,357
- Fringe Benefits: \$338,946
- **Total: \$11.5MM**

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Earnings Capacity: End Date

Working to 75 years old?!

73	2039	\$186,245.47	2.41	\$77,388.84
74	2040	\$193,695.29	2.53	\$76,051.80
75	2041	\$201,443.10	2.65	\$75,921.78
Past:		\$183,425.98		\$183,425.98
Future:		\$2,847,184.53		\$1,374,417.97
Totals:		\$3,030,610.51		\$1,848,904.36

Footnotes:

1. Calculations begin: 12/1/2019
2. Calculations end: 12/31/2041
3. Date of Birth: 5/6/1966
4. Figures based on earnings capacity of \$85,000/year
5. Adjustment for earnings growth/inflation: 4% per year
6. Future amounts are reduced to present value, via: MCL 600.6303(2)

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- Q. Social security retirement age is about 67 and 2/3; were you planning on working until about then and retiring?
- A. Yes. The sooner I could retire, the better.

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Blackboard Damages:

- Lost Earnings Capacity: ~~\$1.8MM~~ \$1.3MM
- Future Medical Costs: \$8.9MM
- Household Services: \$627,357
- Fringe Benefits: \$338,946
- Total: ~~\$11.5MM~~ \$11.0MM

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Reduction to Present Value

- Birth trauma case involving management of a twin gestation pregnancy

TOTAL NET PRESENT VALUE OF FUTURE LOSSES			
Twin A		<i>Option I</i>	\$14,396,000
		<i>Option II</i>	\$16,065,700
TOTAL NET PRESENT VALUE OF FUTURE LOSSES			
Twin B		<i>Option I</i>	\$25,921,300
		<i>Option II</i>	\$26,076,700

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Reduction to Present Value

- Loss amounts identified in this section are set forth in today's dollars, but the stream of future loss amounts is discounted to reflect the probable net level of interest earnings relative to inflation/price increases or wage growth

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Reduction to Present Value: Statute

MCL 600.6306:

- The court must reduce a verdict to a judgment, including:
 - All future medical and other health care costs and future economic damages, “reduced to present value at **a rate of 5% per year, compounded annually**, for each year in which those damages will accrue, as found by the trier of fact under section 6305(1)(b).”

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Reduction to Present Value—Revised Report

The purpose of this Addendum is to update the future earnings and medical/life care expenses to incorporate a five percent (5.0%) discount rate per the Michigan statute. This

Twin A	LOSSES			FUTURE LOSSES	
	Option I	\$14,712,000		Option I	\$10,471,200
	Option II	\$16,900,000		Option II	\$11,763,600
Twin B	LOSSES			RE LOSSES	
	Option I	\$25,900,000		Option I	\$19,121,900
	Option II	\$26,900,000		Option II	\$19,247,200

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Reduction to Present Value

- Twin A: ~~\$16.1MM~~ \$11.8MM
- Twin B: ~~\$26.1MM~~ \$19.2MM
- Total: ~~\$42.1MM~~ \$31.0MM

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Liens-Case Study: Anoxic Brain Injury

- 29-year-old woman suffers cardiac arrest d/t post-partum cardiomyopathy about one week after an ED presentation for dyspnea, chest pain, and headache.
- \$19MM of \$25MM life care plan is for "Supported Life Care," (attendant care)

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Liens: Attendant Care

OPTION I: Supported Adult Life Care in the Family Home*

CNA/HHA (12 Hours/Day)	29	53	301	\$270.00	\$81,270.00
Skilled Nurse (12 Hours/Day)	29	53	301	\$660.00	\$198,660.00
Skilled Nurse (Respite 24 Hours/Day)	29	53	64	\$1,320.00	\$84,480.00

- Attendant care: \$364,410 per year

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Case Study: Medicaid Lien

06/01/2017	= 7,500.00	= 8,765.30	07/13/201	162944221	MEDLODGE OF FARMINGTON
07/01/2017	= 7,750.00	= 8,990.81	08/17/201	162944221	MEDLODGE OF FARMINGTON
08/01/2017	= 7,500.00	= 8,765.30	09/14/201	162944221	MEDLODGE OF FARMINGTON
09/06/2017	= 6,250.00	= 5,854.50	11/01/201	162944221	MEDLODGE OF FARMINGTON
08/07/2017	= 52.32	= 52.32	11/01/201	162944221	MEDLODGE OF FARMINGTON
01/01/2017	= 7,750.00	= 8,990.81	05/11/201	162944221	MEDLODGE OF FARMINGTON
02/01/2017	= 7,000.00	= 8,314.28	05/11/201	162944221	MEDLODGE OF FARMINGTON
12/19/2016	= 2,860.00	= 2,860.00	06/22/201	162944221	MEDLODGE OF FARMINGTON

- Medicaid covers attendant care
- \$7,500/month, or \$90,000/year

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LCP vs. Medicaid Payments

Michigan MSA	Michigan MSA	➔	\$4.8MM
Michigan Medicaid Payments	Michigan Medicaid Payments		
Michigan Medicaid Payments	Michigan Medicaid Payments		\$10.0MM
Michigan Medicaid Payments	Michigan Medicaid Payments		

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Collateral Sources & MSAs

- Michigan vs. Common Law Collateral Source Rule
 - Michigan provides for setoff
 - Liens are not setoff, but are paid back at negotiated rate
- National Trend:
 - Seeking setoff for future payments, Medicare set-asides, Special Needs Trusts
 - Trying to tell the jury that plaintiff will not be responsible for future medical costs

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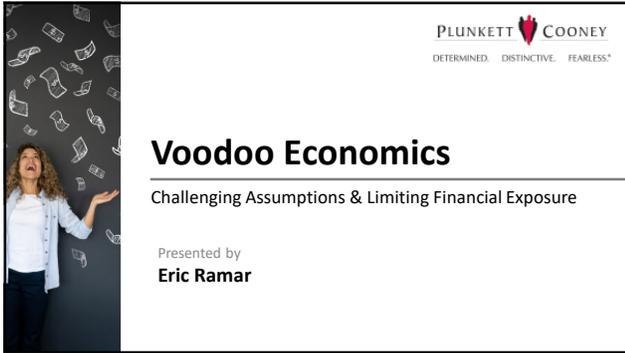
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Collateral Sources & MSAs

- What can you tell the jury?
 - Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, if controverted, or bias or prejudice of a witness.
 - MRE 411 (Liability Insurance)

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Voodoo Economics

Challenging Assumptions & Limiting Financial Exposure

Presented by
Eric Ramar

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Earnings Capacity: Starting Salary

- Is starting salary calculated properly using past W2s?
- Plaintiff's economist experts oftentimes will take great latitude in calculating reasonable starting salary.

Age	Year	Lost Wage	Discount Factor	Present Value
53	2019	\$3,089.98	1.00	\$3,089.98
54	2020	\$88,400.00	1.00	\$88,400.00
55	2021	\$91,936.00	1.00	\$91,936.00
56	2022	\$95,613.44	1.05	\$91,060.42
57	2023	\$99,437.98	1.10	\$90,193.18
58	2024	\$103,415.50	1.16	\$89,334.19
59	2025	\$107,552.12	1.22	\$88,483.39
60	2026	\$111,854.20	1.28	\$87,640.69

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Earnings Capacity: Starting Salary

Age	Year	Lost Wage	Discount Factor	Present Value
53	2019	\$3,089.98	1.00	\$3,089.98
54	2020	\$88,400.00	1.00	\$88,400.00
55	2021	\$91,936.00	1.00	\$91,936.00
56	2022	\$95,613.44	1.05	\$91,060.42
57	2023	\$99,437.98	1.10	\$90,193.18
58	2024	\$103,415.50	1.16	\$89,334.19
59	2025	\$107,552.12	1.22	\$88,483.39
60	2026	\$111,854.20	1.28	\$87,640.69

- Plaintiffs with inconsistent income are particularly important. Is it better to look at past 1-2 years of income or past 10 years when determining an average salary for plaintiff?

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Earnings Capacity: Starting Salary – Using the Proper Occupation

- Vocational Rehab experts are an often-overlooked piece of the damages puzzle.
- Plaintiff will utilize a vocational rehab expert to testify regarding what profession the plaintiff would have been able to perform but-for the negligence/injury at-issue and will provide information related to average hourly/annual salary for that profession.

Continued

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Earnings Capacity: Starting Salary – Using the Proper Occupation

- Economist will use the Vocational Rehab expert's data to project future wage loss.
- Effective cross-examination of the vocational rehab expert can damage the reliability of the entire economist report.

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Example of Attack on Vocational Rehab Expert Opinion

- Plaintiff spent portion of her pre-injury time as a makeup artist at a salon. Plaintiff's vocational rehab expert provided testimony on the hourly wages based upon BLS data for makeup artist.

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Example of Attack on Vocational Rehab Expert Opinion

- The Problem:
 - The Expert used the wage estimates for a makeup artist in the performance/theater setting (BLS Occupation #39-5091).
 - The more accurate job category should have been under Cosmetologists (BLS Occupation #39-5012) which has the description of “Provide beauty services including...apply makeup.”

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Example of Attack on Vocational Rehab Expert Opinion

- The difference:
 - Makeup Artist-Performance/Theater (BLS Occupation #39-5091).

Percentile	10%	25%	50% (Median)	75%	90%
Hourly Wage	\$11.50	\$18.39	\$36.41	\$57.00	\$69.92
Annual Wage (2)	\$23,920	\$38,250	\$75,730	\$118,560	\$145,420

- Cosmetologist (BLS Occupation #39-5012).

Percentile	10%	25%	50% (Median)	75%	90%
Hourly Wage	\$ 9.06	\$ 10.34	\$ 13.16	\$ 18.25	\$ 25.68
Annual Wage (2)	\$ 18,840	\$ 21,520	\$ 27,380	\$ 37,970	\$ 53,410

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Projection Used by Economist With Vocational Rehab's Input

Year	Age	Projected	Actual	Loss	MCL	Present Value
		Compensation	Compensation	Compensation	Factor	Loss Compensation
2018	29.3	\$37,333	\$7,707	\$29,627	1.000	\$29,627
2019	30.3	75,733	5,676	70,057	1.000	70,057
2020	31.3	95,733	6,514	69,219	1.000	69,219
2021	32.3	78,762	7,707	71,056	1.000	71,056

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Earnings Capacity: Future Growth

- How does expert determine wage growth from year to year?
- Plaintiff's experts typically use a flat rate (4%) to determine wage growth into the future.

Age	Year	Lost Wage	Discount Factor	Present Value
53	2019	\$3,089.98	1.00	\$3,089.98
54	2020	\$89,400.00	1.00	\$89,400.00
55	2021	\$91,936.00	1.00	\$91,936.00
56	2022	\$95,613.44	1.05	\$91,060.42
57	2023	\$99,437.98	1.10	\$90,193.18
58	2024	\$103,415.50	1.16	\$89,334.19
59	2025	\$107,552.12	1.22	\$88,483.39
60	2026	\$111,854.20	1.28	\$87,640.69

Continued

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Earnings Capacity: Future Growth

- More reliable determination of wage growth is looking to past 5-10 years of income of plaintiff and determining growth over that time.

Age	Year	Lost Wage	Discount Factor	Present Value
53	2019	\$3,089.98	1.00	\$3,089.98
54	2020	\$89,400.00	1.00	\$89,400.00
55	2021	\$91,936.00	1.00	\$91,936.00
56	2022	\$95,613.44	1.05	\$91,060.42
57	2023	\$99,437.98	1.10	\$90,193.18
58	2024	\$103,415.50	1.16	\$89,334.19
59	2025	\$107,552.12	1.22	\$88,483.39
60	2026	\$111,854.20	1.28	\$87,640.69

- More often, growth of plaintiff's salary in the past 5-10 years is less than the 4% provided by the expert.

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Earnings Capacity: Personal Consumption

- Does the expert subtract from his projections the amount plaintiff would have spent on personal consumption?
- Plaintiff's experts almost always neglect to subtract dollar amounts a person would have spent on themselves over their lifetime.

Continued

Age	Year	Lost Wage	Discount Factor	Present Value
53	2019	\$3,089.98	1.00	\$3,089.98
54	2020	\$89,400.00	1.00	\$89,400.00
55	2021	\$91,936.00	1.00	\$91,936.00
56	2022	\$95,613.44	1.05	\$91,060.42
57	2023	\$99,437.98	1.10	\$90,193.18
58	2024	\$103,415.50	1.16	\$89,334.19
59	2025	\$107,552.12	1.22	\$88,483.39
60	2026	\$111,854.20	1.28	\$87,640.69
61	2027	\$116,320.00	1.35	\$86,800.00
62	2028	\$120,960.00	1.41	\$85,970.00
63	2029	\$125,760.00	1.48	\$85,150.00
64	2030	\$130,720.00	1.55	\$84,340.00
65	2031	\$135,840.00	1.62	\$83,540.00
66	2032	\$141,120.00	1.71	\$82,750.00
67	2033	\$146,560.00	1.80	\$81,970.00
68	2034	\$152,160.00	1.89	\$81,200.00
69	2035	\$157,920.00	1.99	\$80,440.00
70	2036	\$163,840.00	2.09	\$79,690.00
71	2037	\$169,920.00	2.20	\$78,950.00
72	2038	\$176,160.00	2.31	\$78,220.00
73	2039	\$182,560.00	2.43	\$77,500.00
74	2040	\$189,120.00	2.55	\$76,790.00
75	2041	\$195,840.00	2.68	\$76,090.00
Grand Total:				
Wage		\$1,418,415.00		\$1,418,415.00
Personal Consumption		\$1,647,184.00		\$1,647,184.00
Total:		\$2,065,599.00		\$2,065,599.00

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Earnings Capacity: Personal Consumption

- Bureau of Labor Statistics (BLS) releases consumer expenditure data that helps quantify percentage of income spent by individuals in a household based upon income levels.
- Examples include car, food and vices—smoking, alcohol, entertainment, healthcare, clothing, vacations.

(I)	(II)	(III)	(IV)	(V)
Age	Year	Local Wage	Discount Factor	Present Value
30	2010	\$1,000.00	0.90	\$900.00
30	2011	\$1,050.00	0.81	\$850.50
30	2012	\$1,100.00	0.73	\$803.00
30	2013	\$1,150.00	0.65	\$757.50
30	2014	\$1,200.00	0.58	\$714.00
30	2015	\$1,250.00	0.51	\$671.25
30	2016	\$1,300.00	0.44	\$630.00
30	2017	\$1,350.00	0.38	\$590.25
30	2018	\$1,400.00	0.32	\$552.00
30	2019	\$1,450.00	0.27	\$515.25
30	2020	\$1,500.00	0.22	\$480.00
30	2021	\$1,550.00	0.18	\$445.50
30	2022	\$1,600.00	0.14	\$412.00
30	2023	\$1,650.00	0.11	\$379.50
30	2024	\$1,700.00	0.08	\$348.00
30	2025	\$1,750.00	0.06	\$317.50
30	2026	\$1,800.00	0.04	\$288.00
30	2027	\$1,850.00	0.03	\$259.50
30	2028	\$1,900.00	0.02	\$232.00
30	2029	\$1,950.00	0.01	\$205.50
30	2030	\$2,000.00	0.01	\$180.00
30	2031	\$2,050.00	0.00	\$155.50
30	2032	\$2,100.00	0.00	\$132.00
30	2033	\$2,150.00	0.00	\$109.50
30	2034	\$2,200.00	0.00	\$88.00
30	2035	\$2,250.00	0.00	\$67.50
30	2036	\$2,300.00	0.00	\$48.00
30	2037	\$2,350.00	0.00	\$29.50
30	2038	\$2,400.00	0.00	\$12.00
30	2039	\$2,450.00	0.00	\$-4.50
30	2040	\$2,500.00	0.00	\$-120.00
30	2041	\$2,550.00	0.00	\$-240.00
30	2042	\$2,600.00	0.00	\$-360.00
30	2043	\$2,650.00	0.00	\$-480.00
30	2044	\$2,700.00	0.00	\$-600.00
30	2045	\$2,750.00	0.00	\$-720.00
30	2046	\$2,800.00	0.00	\$-840.00
30	2047	\$2,850.00	0.00	\$-960.00
30	2048	\$2,900.00	0.00	\$-1,080.00
30	2049	\$2,950.00	0.00	\$-1,200.00
30	2050	\$3,000.00	0.00	\$-1,320.00
30	2051	\$3,050.00	0.00	\$-1,440.00
30	2052	\$3,100.00	0.00	\$-1,560.00
30	2053	\$3,150.00	0.00	\$-1,680.00
30	2054	\$3,200.00	0.00	\$-1,800.00
30	2055	\$3,250.00	0.00	\$-1,920.00
30	2056	\$3,300.00	0.00	\$-2,040.00
30	2057	\$3,350.00	0.00	\$-2,160.00
30	2058	\$3,400.00	0.00	\$-2,280.00
30	2059	\$3,450.00	0.00	\$-2,400.00
30	2060	\$3,500.00	0.00	\$-2,520.00
30	2061	\$3,550.00	0.00	\$-2,640.00
30	2062	\$3,600.00	0.00	\$-2,760.00
30	2063	\$3,650.00	0.00	\$-2,880.00
30	2064	\$3,700.00	0.00	\$-3,000.00
30	2065	\$3,750.00	0.00	\$-3,120.00
30	2066	\$3,800.00	0.00	\$-3,240.00
30	2067	\$3,850.00	0.00	\$-3,360.00
30	2068	\$3,900.00	0.00	\$-3,480.00
30	2069	\$3,950.00	0.00	\$-3,600.00
30	2070	\$4,000.00	0.00	\$-3,720.00
30	2071	\$4,050.00	0.00	\$-3,840.00
30	2072	\$4,100.00	0.00	\$-3,960.00
30	2073	\$4,150.00	0.00	\$-4,080.00
30	2074	\$4,200.00	0.00	\$-4,200.00
30	2075	\$4,250.00	0.00	\$-4,320.00
30	2076	\$4,300.00	0.00	\$-4,440.00
30	2077	\$4,350.00	0.00	\$-4,560.00
30	2078	\$4,400.00	0.00	\$-4,680.00
30	2079	\$4,450.00	0.00	\$-4,800.00
30	2080	\$4,500.00	0.00	\$-4,920.00
30	2081	\$4,550.00	0.00	\$-5,040.00
30	2082	\$4,600.00	0.00	\$-5,160.00
30	2083	\$4,650.00	0.00	\$-5,280.00
30	2084	\$4,700.00	0.00	\$-5,400.00
30	2085	\$4,750.00	0.00	\$-5,520.00
30	2086	\$4,800.00	0.00	\$-5,640.00
30	2087	\$4,850.00	0.00	\$-5,760.00
30	2088	\$4,900.00	0.00	\$-5,880.00
30	2089	\$4,950.00	0.00	\$-6,000.00
30	2090	\$5,000.00	0.00	\$-6,120.00
30	2091	\$5,050.00	0.00	\$-6,240.00
30	2092	\$5,100.00	0.00	\$-6,360.00
30	2093	\$5,150.00	0.00	\$-6,480.00
30	2094	\$5,200.00	0.00	\$-6,600.00
30	2095	\$5,250.00	0.00	\$-6,720.00
30	2096	\$5,300.00	0.00	\$-6,840.00
30	2097	\$5,350.00	0.00	\$-6,960.00
30	2098	\$5,400.00	0.00	\$-7,080.00
30	2099	\$5,450.00	0.00	\$-7,200.00
30	2100	\$5,500.00	0.00	\$-7,320.00
30	2101	\$5,550.00	0.00	\$-7,440.00
30	2102	\$5,600.00	0.00	\$-7,560.00
30	2103	\$5,650.00	0.00	\$-7,680.00
30	2104	\$5,700.00	0.00	\$-7,800.00
30	2105	\$5,750.00	0.00	\$-7,920.00
30	2106	\$5,800.00	0.00	\$-8,040.00
30	2107	\$5,850.00	0.00	\$-8,160.00
30	2108	\$5,900.00	0.00	\$-8,280.00
30	2109	\$5,950.00	0.00	\$-8,400.00
30	2110	\$6,000.00	0.00	\$-8,520.00
30	2111	\$6,050.00	0.00	\$-8,640.00
30	2112	\$6,100.00	0.00	\$-8,760.00
30	2113	\$6,150.00	0.00	\$-8,880.00
30	2114	\$6,200.00	0.00	\$-9,000.00
30	2115	\$6,250.00	0.00	\$-9,120.00
30	2116	\$6,300.00	0.00	\$-9,240.00
30	2117	\$6,350.00	0.00	\$-9,360.00
30	2118	\$6,400.00	0.00	\$-9,480.00
30	2119	\$6,450.00	0.00	\$-9,600.00
30	2120	\$6,500.00	0.00	\$-9,720.00
30	2121	\$6,550.00	0.00	\$-9,840.00
30	2122	\$6,600.00	0.00	\$-9,960.00
30	2123	\$6,650.00	0.00	\$-10,080.00
30	2124	\$6,700.00	0.00	\$-10,200.00
30	2125	\$6,750.00	0.00	\$-10,320.00
30	2126	\$6,800.00	0.00	\$-10,440.00
30	2127	\$6,850.00	0.00	\$-10,560.00
30	2128	\$6,900.00	0.00	\$-10,680.00
30	2129	\$6,950.00	0.00	\$-10,800.00
30	2130	\$7,000.00	0.00	\$-10,920.00
30	2131	\$7,050.00	0.00	\$-11,040.00
30	2132	\$7,100.00	0.00	\$-11,160.00
30	2133	\$7,150.00	0.00	\$-11,280.00
30	2134	\$7,200.00	0.00	\$-11,400.00
30	2135	\$7,250.00	0.00	\$-11,520.00
30	2136	\$7,300.00	0.00	\$-11,640.00
30	2137	\$7,350.00	0.00	\$-11,760.00
30	2138	\$7,400.00	0.00	\$-11,880.00
30	2139	\$7,450.00	0.00	\$-12,000.00
30	2140	\$7,500.00	0.00	\$-12,120.00
30	2141	\$7,550.00	0.00	\$-12,240.00
30	2142	\$7,600.00	0.00	\$-12,360.00
30	2143	\$7,650.00	0.00	\$-12,480.00
30	2144	\$7,700.00	0.00	\$-12,600.00
30	2145	\$7,750.00	0.00	\$-12,720.00
30	2146	\$7,800.00	0.00	\$-12,840.00
30	2147	\$7,850.00	0.00	\$-12,960.00
30	2148	\$7,900.00	0.00	\$-13,080.00
30	2149	\$7,950.00	0.00	\$-13,200.00
30	2150	\$8,000.00	0.00	\$-13,320.00
30	2151	\$8,050.00	0.00	\$-13,440.00
30	2152	\$8,100.00	0.00	\$-13,560.00
30	2153	\$8,150.00	0.00	\$-13,680.00
30	2154	\$8,200.00	0.00	\$-13,800.00
30	2155	\$8,250.00	0.00	\$-13,920.00
30	2156	\$8,300.00	0.00	\$-14,040.00
30	2157	\$8,350.00	0.00	\$-14,160.00
30	2158	\$8,400.00	0.00	\$-14,280.00
30	2159	\$8,450.00	0.00	\$-14,400.00
30	2160	\$8,500.00	0.00	\$-14,520.00
30	2161	\$8,550.00	0.00	\$-14,640.00
30	2162	\$8,600.00	0.00	\$-14,760.00
30	2163	\$8,650.00	0.00	\$-14,880.00
30	2164	\$8,700.00	0.00	\$-15,000.00
30	2165	\$8,750.00	0.00	\$-15,120.00
30	2166	\$8,800.00	0.00	\$-15,240.00
30	2167	\$8,850.00	0.00	\$-15,360.00
30	2168	\$8,900.00	0.00	\$-15,480.00
30	2169	\$8,950.00	0.00	\$-15,600.00
30	2170	\$9,000.00	0.00	\$-15,720.00
30	2171	\$9,050.00	0.00	\$-15,840.00
30	2172	\$9,100.00	0.00	\$-15,960.00
30	2173	\$9,150.00	0.00	\$-16,080.00
30	2174	\$9,200.00	0.00	\$-16,200.00
30	2175	\$9,250.00	0.00	\$-16,320.00
30	2176	\$9,300.00	0.00	\$-16,440.00
30	2177	\$9,350.00	0.00	\$-16,560.00
30	2178	\$9,400.00	0.00	\$-16,680.00
30	2179	\$9,450.00	0.00	\$-16,800.00
30	2180	\$9,500.00	0.00	\$-16,920.00
30	2181	\$9,550.00	0.00	\$-17,040.00
30	2182	\$9,600.00	0.00	\$-17,160.00
30	2183	\$9,650.00	0.00	\$-17,280.00
30	2184	\$9,700.00	0.00	\$-17,400.00
30	2185	\$9,750.00	0.00	\$-17,520.00
30	2186	\$9,800.00	0.00	\$-17,640.00
30	2187	\$9,850.00	0.00	\$-17,760.00
30	2188	\$9,900.00	0.00	\$-17,880.00
30	2189	\$9,950.00	0.00	\$-18,000.00
30	2190	\$10,000.00	0.00	\$-18,120.00
30	2191	\$10,050.00	0.00	\$-18,240.00
30	2192	\$10,100.00	0.00	\$-18,360.00
30	2193	\$10,150.00	0.00	\$-18,480.00
30	2194	\$10,200.00	0.00	\$-18,600.00
30	2195	\$10,250.00	0.00	\$-18,720.00
30	2196	\$10,300.00	0.00	\$-18,840.00
30	2197	\$10,350.00	0.00	\$-18,960.00
30	2198	\$10,400.00	0.00	\$-19,

Household Services

- In *Thorn v Mercy Mem’l Hosp Corp*, 281 Mich App 644, 661, 761 NW2d 414 (2008), the court of appeals ruled that the category of damages known as “loss of household services” is available as an element of damages in a wrongful-death case.
- Such damages do not fall under the “umbrella of loss of society and companionship” but are a distinct element of damages that can be awarded by the jury on a proper showing. *Id.* at 662.

Continued

Avoiding Plaintiffs’ Lottery Tickets

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Household Services

- The court also held that in a wrongful-death case based on medical malpractice, such damages are economic rather than noneconomic and therefore are not subject to reduction pursuant to the medical malpractice damages cap, MCL 600.1483. *Id.* at 666–667.

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Household Services

- A party asserting a claim has the burden of proving damages with reasonable certainty. *Hoffman v Auto Club Ins Ass’n*, 211 Mich App 55 (1995).
- Uncertainty as to the amount of damages does not preclude an award, but uncertainty as to the **existence** of damages does. *Bruno v Detroit Institute of Technology*, 51 Mich App 593 (1974).
- Remote, contingent, or speculative damages may not be recovered. *Sutter v Biggs*, 377 Mich 80 (1966); *Hoffman*.

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Household Services: Basis for Projections

- Is there any evidence in the case to support notion that plaintiff performed any of these household services prior to the injury at-issue?

Age	Year	Example Hrs/Day	Household Services	Discount Factor	Present Value
53	2019	1	\$620.00	1.00	\$620.00
54	2020	1	\$7,592.00	1.00	\$7,592.00
55	2021	1	\$7,895.68	1.00	\$7,895.68
56	2022	1	\$8,211.51	1.05	\$7,820.46
57	2023	1	\$8,539.97	1.10	\$7,746.00
58	2024	1	\$8,881.57	1.15	\$7,672.25
59	2025	1	\$9,236.83	1.22	\$7,599.16

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Household Services: Basis for Projections

- Testimony obtained through family members will be first indication of whether plaintiff even performed any household services.
- Plaintiff's expert will decline to comment on the number of hours of household services plaintiff provided.

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Household Services: Duration of Projections

- Is there any evidence in case to support notion that plaintiff would have been able to perform these household services up to age 83?

77	2043	1	\$18,712.12	2.93	\$6,366.74
78	2044	1	\$19,480.61	3.07	\$6,335.61
79	2045	1	\$20,238.63	3.23	\$6,275.47
80	2046	1	\$21,048.69	3.39	\$6,215.71
81	2047	1	\$21,890.63	3.56	\$6,156.61
82	2048	1	\$22,766.18	3.73	\$6,097.68
83	2049	1	\$23,676.80	3.92	\$6,039.80
Present			\$50,977.36		\$46,945.66
Future			\$375,439.30		\$162,173.49
Totals:			\$426,416.66		\$209,119.04

Continued

Avoiding Plaintiffs' Lottery Tickets

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Household Services: Duration of Projections

- Expert will agree that he/she is not a physician.
- Expert will typically agree that they have not reviewed many of plaintiff's medical records (typically he/she will have reviewed zero).
- Goes back to basis for life expectancy opinion.

Avoiding Plaintiffs' Lottery Tickets

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Future Medical Costs: Medical Necessity

- Is there any evidence in case from physician attesting that services projected are medically necessary?

Age	Year	One Time Costs	Recurring Costs	Discount Factor	Present Value
53	2019	\$200,000	\$300,000.00	1.00	\$300,000.00
54	2020		\$300,000.00	1.00	\$300,000.00
55	2021		\$300,000.00	1.00	\$300,000.00
56	2022		\$300,000.00	1.00	\$300,000.00
57	2023		\$313,500.00	1.05	\$298,571.43
58	2024		\$327,607.50	1.10	\$287,149.66
59	2025		\$342,349.84	1.16	\$295,734.66

Continued

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Future Medical Costs: Medical Necessity

- Expert lacks foundation to say what medical care plaintiff will need in future.
- Without testimony from healthcare provider attesting that certain medical care is needed to a reasonably degree of certainty, expert cannot include same in his/her projections.

Age	Year	One Time Costs	Recurring Costs	Discount Factor	Present Value
53	2019	\$200,000	\$300,000.00	1.00	\$300,000.00
54	2020		\$300,000.00	1.00	\$300,000.00
55	2021		\$300,000.00	1.00	\$300,000.00
56	2022		\$300,000.00	1.00	\$300,000.00
57	2023		\$313,500.00	1.05	\$298,571.43
58	2024		\$327,607.50	1.10	\$287,149.66
59	2025		\$342,349.84	1.16	\$295,734.66

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How...do we Combat a Life Care Plan?

- Letter from a treating physician that the Life Care Planner relied upon when justifying recommendations in her report.

The last sentence of the first paragraph of his cover letter discusses that they have incorporated my recommendations into their report. The report is quite lengthy, approximately 46 pages. I thought that I was only commenting upon those pages which pertained to my specialty, and I made notes on those pages, specifically, pages 9, 12, and 14, which relate to evaluations by a pediatric physiatrist, such as myself, to Botox injections, and to PT, OT, Speech Therapy, and Music Therapy, etc. I did not understand myself to be commenting upon the other sections of that report that do not pertain directly to my specialty.

Avoiding Plaintiffs' Lottery Tickets

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Life Expectancy: Using Plaintiff's Own Expert's Testimony

- What evidence from this case do you have to support notion that plaintiff would have lived to age 83?

77	2043	1	\$18,712.12	2.93	\$6,396.74
78	2044	1	\$19,480.81	3.07	\$6,335.81
79	2045	1	\$20,298.00	3.23	\$6,274.45
80	2046	1	\$21,048.59	3.39	\$6,215.71
81	2047	1	\$21,860.55	3.56	\$6,158.65
82	2048	1	\$22,766.16	3.73	\$6,097.68
83	2049	1	\$23,676.80	3.92	\$6,039.80
	Present		\$50,977.56		\$48,945.58
	Future		\$379,439.30		\$182,773.69
	Totals:		\$428,416.85		\$231,719.24

- Expert typically will have not reviewed any of plaintiff's medical records, and, thus, will not be knowledgeable of plaintiff's comorbidities.

Continued

Avoiding Plaintiffs' Lottery Tickets

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Life Expectancy: Using Plaintiff's Own Expert's Testimony

- Opinions from other experts in the case regarding life expectancy act to eliminate portions of the expert's projections.

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Question to Plaintiff's Medical Expert(s)

- Q. What is your opinion as to the life expectancy of the plaintiff but-for the alleged negligence in this case?
- A. My opinion is that he would have lived for an additional 15-20 years.

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Life Expectancy: Using Plaintiff's Own Expert's Testimony

70	2036	\$555,583.48	1.96	\$280,607.41
71	2037	\$590,584.73	2.05	\$279,271.18
72	2038	\$626,711.05	2.18	\$277,941.32
73	2039	\$664,013.04	2.29	\$276,617.79
74	2040	\$692,543.63	2.41	\$275,300.56
75	2041	\$692,368.09	2.53	\$273,989.61
76	2042	\$723,514.21	2.65	\$272,684.90
77	2043	\$756,072.55	2.79	\$271,388.40
78	2044	\$790,058.60	2.93	\$270,104.08
79	2045	\$826,549.90	3.07	\$268,827.92
80	2046	\$862,804.15	3.23	\$267,527.88
81	2047	\$901,630.34	3.39	\$266,253.94
82	2048	\$942,203.70	3.56	\$264,986.08
83	2049	\$984,602.87	3.73	\$263,724.22

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Dealing With Denney...

and Daubert to Limit Economic Damages

Presented by
Rob Kamenec

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DETERMINED. DISTINCTIVE. FEARLESS.

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MCL 600.2922

Michigan's Wrong Death Act

(6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances **including** reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

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MCL 600.2922(6)

The word "**including**" in MCL 600.2922(6) "indicates an intent by the Legislature to permit the award of any type of damages, economic and noneconomic, deemed justified by the facts of the particular case."

Denney v Kent Co Rd Com'n, 317 Mich App 727, 731; 896 NW2d 808, 812 (2016)

- Economic damages include "**damages incurred due to the loss of the ability to work and earn money...**"
- Because an underlying claim 'survives by law' and must be prosecuted under the wrongful-death act, ... any statutory or common-law limitations on the underlying claim apply to a wrongful-death action." Survival damages thus allowed

Continued

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Denney v Kent Co Rd Comm

Subsequent cases adopting *Denney* rule:

- *White v FCA US, LLC*, 350 F Supp 3d 640 (ED Mich, November 19, 2018)(applying Michigan law)
- *Estate of Langell by Touma v McLaren Port Huron*, 2020 WL 4382791(Mich App, July, 30, 2020) (unpublished)

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Avoiding Plaintiffs' Lottery Tickets

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Denney v Kent Co Rd Comm

The issue and the solution:

- Survivors would not have benefitted from the decedent’s lost wages during his/her lifetime. Thus, award of such damages is a windfall
 - Distinguish from loss of the decedent’s financial support of the survivors while alive.

Continued



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Denney v Kent Co Rd Comm

- Michigan Supreme Court - not persuaded that the question presented should be reviewed. 500 Mich 997; 894 NW2d 608 (2017)
- Solution: amend the WDA
 - Efforts under way.



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Daubert/Reliability Statute

In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact.

In making that determination, the court *shall* examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and *shall* consider all of the following factors:

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Daubert/Reliability Statute

- (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
- (b) Whether the opinion and its basis have been subjected to peer review publication.
- (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

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Daubert/Reliability Statute

- (d) The known or potential error rate of the opinion and its basis.
- (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

Continued

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Daubert/Reliability Statute

- (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
- (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

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Daubert/Reliability Statute

(2) A novel methodology or form of scientific evidence may be admitted into evidence **only** if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

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Daubert/Reliability Statute

(3) In an action alleging medical malpractice, the provisions of this section are **in addition to**, and do not otherwise affect, the criteria for expert testimony provided in section 2169.

- Court **shall** apply Daubert factors, unless court first finds that expert opinions are unreliable under Michigan Rule of Evidence 702.
- Not all courts allow reliability challenge at trial; most disallow if not earlier raised.

Continued

Avoiding Plaintiffs' Lottery Tickets

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Daubert/Reliability Statute

- Most courts will hold an evidentiary hearing upon request of one of the parties.
- Proponent of expert opinion carries the burden of proof/persuasion unreliability
- Financial expert opinions are subject to reliability analysis.

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Five questions to ask:

Reliability & Your Damages Expert

- 1. Can your financial expert explained complex financial analyses in terms that the jury can understand?
 - *The most qualified expert can lose the jury with spreadsheets, discount rates, financial projections, and basically pure eco-talk*
- 2. Is your expert hypothesizing excessively or instead tying the expert opinion to a discernible methodology?
 - *The more the opinion is based on the relevant facts, the more reliable and convincing the opinion.*

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Five questions to ask:

Reliability & Your Damages Expert

- 3. Is your expert relying on his/her own facts and data, the or those supplied by counsel?
 - *Be assured this question will be asked during cross-examination.*
- 4. Will your expert survive a reliability contest?
 - *The most convincing expert is no expert at all if the opinions are stricken as unreliable.*

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Five questions to ask:

Reliability & Your Damages Expert

- 5. Is your expert willing and able to assist in opposing the *Daubert* motion brought against your expert and preparing the *Daubert* motion brought against the opposing expert?
 - *Budgetary concerns are important, including the unnecessary use of multiple expert witnesses.*

Avoiding Plaintiffs' Lottery Tickets

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The Appellate Perspective

Be aggressive with financial damage claims.

- Absent effective cross-examination, little chance of overturning or reducing a "lottery ticket" type verdict.
- Absent calling your own financial expert/economist, little chance of remittitur.
- Lack of a *Daubert* challenge likely waives any reliability issue on appeal.

Continued

Avoiding Plaintiffs' Lottery Tickets

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The Appellate Perspective

- Submission of your own financial analyses gives the appellate court an alternative to the inflated verdict.
- Challenge verdict forms that are not supported by the expert testimony, and those portions of the form that are unrealistic (life expectancy, work expectancy, lack of reduction of present value, discount rates too low and inflation rates too high).

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Conclusion

- Be on guard for opinions about losses that exceed the boundaries of reason.
- Lost profit damages are not equivalent to "**the purchase of a winning lottery ticket**" and are limited to the actual damages sustained.
- *Sostchin v Doll Enterprises, Inc*, 847 So 2d 1123, 1129 (Fla App, 2003)

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Questions & Answers



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We Want to Hear From You!



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Today's Presentation



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Thank You!



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