

2001 USARCS CLAIMS TRAINING COURSE
Tort Claims Seminar Workshop
Damages

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I. INTRODUCTION.

II. REFERENCES.

- A. Army Regulation (AR) 27-20, Claims.
- B. Department of the Army Pamphlet (DA Pam) 27-162, Claims.
- C. Federal Tort Claim Handbook

III. MEASURE OF DAMAGES.

A. Federal Tort Claims Act. 28 U.S.C. §§ 1346, 2401, 2412, 2671-2680, Reference B, Figures 4-1 thru 4-3.

1. By its terms, the FTCA preempts all other statutory tort remedies based on negligence within the United States, its commonwealths, territories, and possessions.

2. Basic statutory predicate for liability:

The United States shall be liable... in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. 28 U.S.C. § 2674.

3. The FTCA prescribes that the laws of the place in which the act or omission occurred giving rise to the suit shall apply. 28 U.S.C. 1346(b); Richards v. United States, 369 U.S. 1 (1962). The whole law is to be applied, including choice of law rules. Richards, supra. Reference C, para. IIC.1.

- States have adopted different approaches to choice of law determinations.

- (a) Lex loci delicti or "site of the injury" rule.
- (b) Governmental interest

(c) Most significant contacts.

4. Federal not state law applies to a determination of who is a U.S. employee and when the statute of limitations excludes a claim. Reference B, Chapter 2, para. 2-67.

5. The Army's guidance on the FTCA is contained in Chapter 4, AR 27-20.

B. Military Claims Act. 10 U.S.C. § 2733.

1. Measure of damages is governed by the terms set forth in Chapter 3, AR 27-20.

2. The type and amount of damages are limited to those set forth in Reference A, para. 3-5. The principles set forth therein are derived from maritime law with notable exceptions.

3. Of particular note are the following:

(a) Payments from a collateral source will be deducted from any award. For cases defining a collateral source, see Reference C, para. IIC.10.

(b) Joint and several liability is replaced by proportionate liability which limits awards to the Army's fair share.

(c) Claims for emotional distress are entertained only to immediate family members in the zone of danger who exhibit physical manifestations of distress.

(d) Awards for non-economic damages are limited to \$500,000 per injured party, including derivative claims.

(e) Subrogated claims are not payable.

(1) Claims by insurers of soldiers whose vehicles are damaged in a collision with a GOV while the soldier is engaged in an activity that is incident to service as defined under the incident to service doctrine fall under this category. Only the deductible can be paid.

(2) However, the entire amount can be paid directly to the soldier if there has been no recovery from the insurer.

(3) Procedures should be instituted to pay soldiers directly and expeditiously so that the soldier does not have to utilize liability coverage.

(f) Only one claim may be presented for wrongful death. Parties in interest are estates, surviving spouse, children, and dependent parents to the exclusion of all others.

(g) In the United States, the MCA is preempted by the FTCA.

(h) In the United States, the MCA applies to claims for personal injuries, death, or property loss due to noncombat activities not arising incident to service. It also applies to incident to service barred property claims by soldiers (not payable under Chapter 11).

IV. DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH CASES.

A. Basic Concepts.

1. Noneconomic or General Damages. Those losses which naturally or necessarily result from the tortious conduct in personal injury cases. General damages may include pain and suffering, loss of enjoyment of life, inability to engage in usual activities, emotional distress, disfigurement, and mental anguish of survivors or disruption of family community in wrongful death cases. Certain states have imposed a cap on these damages. Reference C, para. IIC.1.

2. Economic or Special Damages. Those losses that are particular to the specific claimant and injury as a result of the tortious conduct. They may include lost wages and services, cost of medical care, and disability.

3. Past Damages. Those economic and noneconomic damages that occurred prior to the settlement.

4. Future Damages. Those economic and noneconomic damages that are reasonably certain to flow from the injury after claim is settled. In many jurisdictions, certain elements of future damages, e.g., lost earnings and lost services are subject to reduction to present value.

5. Consequential Damages. Not payable under the FTCA or MCA. Such damage, loss or injury that does not flow directly and immediately from the tortious conduct, but only from some of the consequences or results of the tortious conduct. Property damage claims are payable only for damage to tangible property. Reference C, para. IIC.26, Reference B, para. 2-77.

6. Punitive or Exemplary Damages. Damages other than compensatory damages which may be awarded against a tortfeasor as punishment for willful, wanton, malicious, or fraudulent conduct. Punitive damages are not permitted under the FTCA or MCA. Reference C, para. IIC.3.; Molzof v. United States, 901 U.S. 301 (1992).

B. Source of Law Controlling Damages.

1. Permissible elements of damages vary from state to state.

2. One must research elements of damages under applicable state common and statutory law.

(a) Wrongful death statutes

- (b) Survival statutes
- (c) Common law
- (d) Tort reform statutes
- (e) No-fault statutes

C. Elements of Damages in Personal Injury Cases. Various elements of damages listed below may not be recognized in some jurisdictions as separately compensable elements, e.g., pain and suffering may include loss of enjoyment of life, disfigurement and mental anguish.

1. Loss of Income, including fringe benefits and leave. Reference C, para. IIC.10 and 14.

(a) Elements of past, special damages. May include loss of profit from a business, as opposed to loss of wages from an employer.

(b) Proof of loss established through employment records and tax returns.

2. Loss or impairment of earning capacity.

(a) Compensation for future loss of income.

(b) Must establish that loss is reasonably certain. Show impairment to earn at pre-injury rate and what probable earnings would have been absent injury.

(c) Investigation must determine claimant's earning/work history and potential through employment records, tax returns, school records, and interviews, and claimant's worklife expectancy through reference to Department of Labor statistics and medical reviews. Should obtain employment/ earning history, (federal income tax returns or Form W-2s) for the 5 years preceding the injury and use the information as a basis for estimating future earning capacity. Reference B, Figure 2-42.

3. Permanent disability or injury.

(a) Definition. An injury that can reasonably be expected to last for the duration of the person's life.

(b) Scope and nature of disability can be determined through an independent medical evaluation (IME), which is authorized by 28 CFR 14.4(b)(1) (Reference B, Figure 4-2) and AR 27-20, para. 2-36; medical record review; statements from treating health care providers; and through reference to the American Medical Association Guides to the Evaluation of Permanent Impairment. Reference B, Tables 2-7A-C.

4. Loss of services, guidance, care, protection.

(a) This element of damages includes performing household chores and maintenance and providing advice, care and security for family members. It generally relates to the family's physical needs as opposed to emotional needs.

(b) Bryant et al., Household Work, What's It Worth and Why? ("The Cornell Study") is a good reference to determine the number of hours devoted to or the value of household work. Reference B, Tables 2-8A-C.

(c) The unique circumstances of the claimant's family must be determined.

5. Medical Expenses, Past and Future. Reference B, Table 2-9, Reference C, para. IIC.24

(a) General test of whether a medical expense is compensable is whether it was reasonable and necessary.

(b) In considering future medical expenses, the majority of states require that there be a reasonable probability that the future medical expense will be incurred; a minority of states apply a more stringent requirement of reasonable certainty.

(c) Must determine causal relationship between tort and medical expense. Treatment related to preexisting condition or post-injury injury that has no connection to the underlying tort is not compensable. Treatment related to the aggravation of a preexisting injury is compensable.

(d) Independent medical examinations (IMEs), review of medical records and bills, obtaining statements from or interviews of treating physicians, development of a life care plans, and claimant interviews are important means to determine past and future medical expenses. An IME is usually requested in conjunction your AAO. Reference B, Figure 2-39.

6. Loss of Consortium.

(a) Definition. Conjugal fellowship between husband and wife, including company, society, cooperation, affection, and aid. Some states permit a child's loss of consortium due to an injured parent. Reference C, para. IIC.25.

(b) Loss of consortium is generally different from loss of solatium, which relates to factors such as loss of society, companionship and affection for children or other family members. Solatium is discussed in Reference B, paras. 10-10 and 13-13.

7. Loss of Enjoyment of Life (Hedonic Damages).

(a) Depending upon state laws, may be permissible under the FTCA whether or not the victim is conscious. See Molzof v. United States, 501 U.S. 301 (1992). May be a separate element or part of pain and suffering depending on state law. Reference B, Figure 2-40.

(b) Loss of enjoyment of life may include impairment of mental health, disfigurement, loss or impairment of senses, inability to participate in daily, family or recreational activities, interference with childbearing, interference with sexual relations, and shortening of life expectancy.

(c) May be duplicative of other elements of damages and therefore need to be wary of claims for hedonic damages.

8. Pain and Suffering.

- Some states may require that the victim be conscious.
- Difficult element to quantify due to its subjective nature. Nonetheless, can gain some insight into the claimant's assertion of pain and suffering through review of medical records and interviews of claimant, witness, friends and health care providers. Ascertain type, dosage, and frequency of pain medication; frequency of other treatments.

9. Emotional Distress or Anguish.

- Generally relates to mental suffering resulting from such emotions as grief, anxiety, fright and despair.

10. Emotional Distress of Witness in Absence of Physical Impact.

- For recovery it is generally required that the claimant was (1) proximate to the accident or incident, (2) the emotional distress occurred from sensory and contemporaneous observance of the accident, and (3) the claimant was closely related to the accident victim. Most states require that the tortfeasor's conduct be willful, wanton or grossly negligent. Some states permit this tort based on simple negligence. Reference C, para. IIB.1.c.4.

11. Disfigurement.

(a) Some states do not permit disfigurement as a separate element of damages. e.g., Kentucky.

(b) Medical record review, IME, interview of treating health care providers, and interview of claimant may be necessary to determine the nature, scope, permanency and impact of the disfigurement. Obtain before and after photographs. Where indicated, have a plastic surgeon examine the victim or review the photographs with a view to improvement.

D. Elements of Damages in Wrongful Death Cases.

1. At common law there was no right of recovery for wrongful death, nor did a tort claim survive the death of the injured party. Consequently, recovery for wrongful death became a creature of state statutes. The breadth of damages permissible under state wrongful death and survival statutes can vary widely.

2. Where state wrongful death statute is punitive in nature, liability is limited to actual or compensatory damages measured by pecuniary injuries. 28 U.S.C. § 2674.

3. One of two approaches to damages has been adopted by states.

(a) Loss to beneficiaries. Focus is upon compensating the decedent's beneficiaries for the loss of economic benefit they reasonably could have expected to receive from the decedent had he not been killed. This represents a pure wrongful death cause of action. Elements of damages under this approach generally consist of the following:

- (1) Loss of financial contributions and support.
- (2) Loss of services.
- (3) Loss of nurture, guidance, care, and training by child.
- (4) Loss of society, comfort, love and affection.
- (5) Loss of inheritance or net accumulation.

(b) Loss to the decedent's estate. Wrongful death damages calculated with reference to the decedent's earnings represent a "hybrid" statute combining basic wrongful death and survival statutes. States that have adopted this approach to damages have arrived at different formulas to quantify the loss.

(1) Net earnings of decedent. Generally calculated by taking the decedent's gross earnings and deducting out personal living expenses. The resultant figure is then multiplied by the decedent's worklife expectancy.

(2) Gross earnings. No deductions are made for consumption. Georgia has adopted this approach in calculating the value of the decedent's life.

(3) Future accumulations. The estate that would have been remaining if decedent had lived to theoretical life expectancy. This approach is used in Iowa.

(4) Regardless of which approach is prescribed, recovery may also be permitted for such things as medical expenses, pain and suffering, funeral expenses, and mental anguish of the survivors.

(5) Be aware of the interplay between a state's survival statute and its wrongful death statute.

(6) The bottom line to approaching damages for wrongful death is to learn the dynamics of decedent's family and to put the decedent's family members in the same position they would have been in had the decedent lived. For sample interview questions, see reference B, Figure 2-23.

E. Practice Points.

1. Develop an office desk book of permissible elements of damages and authorities of the states in your jurisdiction.

2. Begin thinking about and investigating damages upon receipt of the claim in cases where liability is a real possibility.

3. A thorough investigation is imperative if you expect to discover fraudulent or exaggerated damages.

4. Determine from your United States Attorney's Office what their history has been in settling FTCA suits. Are they aggressive in winning good settlements for the United States or do they tend to be generous?

V. PROPERTY DAMAGES. Reference B, para. 2-77.

A. General Concepts.

1. Property Damage. Reduction or total destruction of property involved.

2. Date of Loss (DOL). When accident or loss occurred.

3. Condition Before Loss. Condition of property immediately before loss occurred.

4. Depreciation. The value of the property at the time of loss vis-a-vis its value if new. The Joint Military/Industry Depreciation Guide is a valuable reference to determine the depreciation of various types of personal property.

5. Salvage. The residual value of the property after the accident.

6. Betterment. The increase in property value after repair, rehabilitation, or replacement as compared to condition at time of DOL. Betterment is an offset to damage.

7. Total Loss. Occurs when repair cost exceeds value of property on DOL.

8. Constructive Total Loss. The value of the damaged property marginally exceeds the repair cost; however, the other costs associated with repair, e.g., renting a replacement, effectively renders the property a total loss.

9. Fair Market Value. Price property will bring from hypothetical sale on open market.

10. Loss of Use. This element of damage depends on state law. Normally, it is limited to economically repairable property for the period of time required to repair the property. One's lack of funds to repair does not extend the period of loss. However, loss of use may be allowed even though there is a total loss for the period of time needed to obtain a replacement.

11. Loss of business or profits. Limited to direct interference by physical damage to a commercial enterprise, such as a retail outlet or commercial vehicle. It must be evidenced by an unavoidable interruption, such as time to repair a building or vehicle. Direct proof that there was an actual loss is required. Damages for loss of opportunity are speculative and not allowable.

12. Overhead. The cost, not of filing a claim, but of administering actual repairs, such as those made by a public utility.

B. Measure of Damages.

1. Diminution in value. Fair market value of property immediately before loss minus residual value. Used in total or constructive total loss situations and in cases where property is not totally destroyed.

2. Cost of Repair. Cost necessary to restore property to its pre-loss condition.

3. Actual or Intrinsic value. Used in cases where there is no fair market value for property involved. May be determined by deducting depreciation from the original cost of the property or deducting depreciation from the replacement cost.

C. Cause of Damage - Recurring Issues.

1. Aircraft.

- The MCA may apply where no negligence has been established and the "non-combat activities" clause applies.

2. Fire.

(a) The MCA may apply where no negligence has been established and the "non-combat activities" clause applies.

(b) Public fire fighting costs are not payable; however, they may be payable as an unauthorized procurement when requested. Reference B, para. 2-32g(3).

(c) Letting fire burn vs. mitigation of damages

3. Damage to crops.

(a) Determine acreage, yield and market value. County extension agents, U.S. Department of Agriculture, and commodity brokers and exchanges may provide useful information in quantifying damage.

(b) Be sure to offset market price for crop by saved harvesting costs and costs associated with bringing crop to market.

(c) Also consider mitigation of damages by planting a second crop.

4. Timber.

(a) Determine type of trees, maturity, yield and market value. In addition to sources of information listed in paragraph 3 above, the U.S. and state forestry services and local nurseries and landscapers may be useful resources of information.

(b) Actual damages are often difficult to assess immediately after damage because the forest usually repairs itself.

5. Explosions (Blast damage).

(a) Generally cognizable under MCA.

(b) Forward to USARCS for technical review of claim by independent contractor. Reference B, para. 2-26.

6. Shade Trees. Trees which shade a dwelling. Evaluation chart is found in reference B, Figure 2-43.

VI. LIMITATIONS ON DAMAGES.

A. Limitations under the FTCA.

1. Punitive Damages. Reference C, para. IIC3.

(a) Punitive damages prohibited by FTCA. 28 U.S.C. § 2674.

(b) The term "punitive damages" is not defined in the FTCA.

(c) The U.S. had some success in arguing that damages that were not strictly compensatory were necessarily punitive. See Flannery v. United States, 718 F.2d 108 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984).

The FTCA's proscription on awards of punitive damages authorizes only those awards that compensate or reimburse, or provide recompense or redress for injuries suffered by the claimant. To the extent that an award gives more than the actual loss suffered by the claimant, it is "Punitive" whether or not it carries with it the deterrent and punishing attributes typically associated with the word "punitive."

Id. at 111.

(d) The U.S. Supreme Court in Molzof v. United States, 502 U.S. 301, (1992), rejected the Government's definition of punitive damages and abrogated the Flannery precedent, ruling that " 2674 bars the recovery only of what are legally considered *punitive damages* under traditional common law principles." Molzof, supra, 502 U.S. at 312. The court concluded that the damages sought by the plaintiffs are not punitive because their "recoverability does not depend upon any proof that the defendant has engaged in intentional or egregious misconduct and their purpose is not to punish." Id.

(e) The Court's decision in Molzof, however, has left unaffected the meaning and effect of the second clause of § 2674, which only permits actual or compensatory damages for wrongful death actions brought pursuant to statutes that provide, or have been construed to provide, for damages only punitive in nature. See D'Ambra v. United States, 481 F.2d 14 (1st Cir. 1973), cert. denied, 414 U.S. 1075 (1973)

2. Interest. Prejudgement or presettlement interest not permitted. 28 U.S.C. § 2674; Reference C, Para. IIC5.

3. Attorney fees. Attorney fees are not permitted as a separate claim. No attorney shall charge more than 25 percent of a judgment awarded by a court or compromise settlement after suit is filed. Attorney fees may not be in excess of 20 percent of any compromise settlement of an administrative claim. 28 U.S.C. § 2678. AR 27-20, para. 2-41f.

B. State Law Limitations.

1. Collateral Source Rule. Reference C, para IIC10.

(a) General rule. If an injured person receives compensation for his injuries from a source wholly independent of the tortfeasor, the payment should not be deducted from the damages that he would otherwise collect from the tortfeasor.

(b) Examples of Non-Collateral Source Compensation.

(1) CHAMPUS Benefits. Considered non-collateral and therefore deductible from any judgement against the United States. Dempsey v. United States, 32 F.3d 1490 (11th Cir. 1994). Does the same rationale apply to TRICARE in view of required payments by patient?

(2) Past Medical Care Furnished at Government Facilities.

(3) Certain Veterans Benefits - including Dependency and Indemnity Compensation (DIC), 38 U.S.C. § 1310 et seq. and Benefits for Survivors of Certain Veterans Rated Totally Disabled at Time of Death, 38 U.S.C. § 1318. The claimant's VA records should be obtained and your local VA General Counsel's Office should be consulted concerning the effect a contemplated settlement may have on benefits the claimant is receiving.

(c) Examples of Collateral Source Compensation.

(1) Private health insurance payments.

(2) Workers, compensation benefits.

(3) Social Security Payments. Most cases hold that these payments are a collateral source and not deductible unless state collateral source law permits. Hassan v. U.S. Postal Service, 842 F.2d 260, 262 (11th Cir 1988).

(4) Medicare Payments. Although Medicare benefits are considered a collateral source, we do not compensate claimants for payments made on their behalf under Medicare. The Health Care Financing Administration, U.S. Department of Health and Human Services, considers a lien to exist on the amount of Medicare benefits expended as a consequence of the Army's tortious conduct. Coordination should be made with the USARCS action officer before any claim is settled involving Medicare benefits.

(5) Survivor Benefit Plan.

(d) Several states have passed legislation modifying the common law rule.

- Examples. Florida, Fla. Stat. Ann. §768.76 (reduction is made for all payments by a collateral source for which there is no right of subrogation); Georgia, Ga. Code Ann. §51-12-1(b) (trier of fact may consider insurance payments and collateral benefits in determining damages to be awarded).

2. Tort Reform Legislation - Cap on Damages. Reference C, para. IIC1.

(a) Several states have imposed monetary caps on damage awards in tort cases. These caps are applicable to the United States and should be asserted when applicable.

(b) Examples.

(1) Virginia law imposes an overall \$1,600,000 damage cap in medical malpractice cases.

(2) Kansas law imposes a \$250,000 cap on wrongful death nonpecuniary damages.

3. Mitigation of Damages. Reference C, para. IIC.11,12, and 18.

(a) General rule. Injured person has a positive duty to minimize his or her damages through the use of reasonable diligence.

(b) State seat belt law. Many states permit evidence that the injured party was not wearing his or her seat belt when considering the injuries sustained. Represents a unique form of mitigation since it addresses pre-tort conduct.

(c) Duty to participate in or undergo treatment. The general rule is that an injured party has the duty to submit to medical treatment, including surgery, when a reasonable person would have done so under the same or similar circumstances. Factors considered in the reasonableness of the claimant's conduct are the risks involved, probability of success, and the pain and suffering or cost and effort involved in the treatment.

4. Joint Tortfeasors. Reference C, Section II D.

(a) At common law no right of contribution among joint tortfeasors.

(b) Joint and Several Liability. One tortfeasor may be held responsible for all of the damages sustained by the claimant.

(c) Must determine whether state law permits contribution among joint tortfeasors. If it is permitted, find out how it is apportioned. Many states have adopted the Uniform Contribution Among Tortfeasors Act, which mandates an equitable approach to apportioning damages.

(d) Some states adhere to the doctrine of proportional fault, while others permit non-settling defendants to take a credit for amounts paid by settling or adjudged defendants.

5. Comparative vs. Contributory Negligence.

(a) At common law, contributory negligence on the part of the claimant bars recovery. Most states have abandoned such a harsh rule in favor of some form of comparative negligence.

(b) Comparative negligence. The general rule is the claimant's damages are reduced by his percentage of fault. Two forms of comparative negligence have been applied.

(1) Pure comparative. Applies general rule without regard to whether claimant's percentage of fault exceeds the defendant's.

(2) Modified or partial comparative. Two forms under this approach: (a) fault of claimant is not as great as defendant's -- Kansas and Minnesota are two states employing this approach -- and (b) fault of claimant is not greater than defendant's -- Massachusetts and Ohio employ this approach.

6. No-fault insurance and Personal Injury Protection (PIP).

(a) Provides recovery or certain quantum of damages without resort to litigation.

(b) Need to determine state law and its impact on recovery. Some states do not permit subrogation for benefits paid under their PIP laws.

(c) May bar recovery in absence of serious injury -- New York, Pennsylvania.

7. Subrogation and Assignments. Reference A, para. 2-10.

(a) Definition. The substitution of one person in the place of another with regard to a claim, demand or right. Insurance companies generally have a right of subrogation for the benefits they have paid to their insured.

(b) State law defines the distinction between a subrogee and a lienholder. The latter cannot file a claim but must claim through the insured. Some states require a lienholder's consent in order to settle.

(c) If a right of subrogation exists in favor of an insurance company, we should seek a claim directly from it. In the absence of a right to subrogation, the claimant is entitled to the amount of loss paid by a third party, subject to the collateral source rule.

(d) A volunteer is neither a subrogee nor a lienholder but an assignee. Such a claim is barred by the Antiassignment Act. 31 U.S.C. § 727.

(e) Subrogation claims are excluded under Chapter 3 claims.

VII. Special Considerations.

A. A property claim and personal injury claim by the same claimant, arising from the same incident may be paid separately. The purpose is to avoid costs generated by delay. e.g. loss of use. Reference B, para. 2-90.

B. Check subrogation rights under applicable state law.

C. Reported and unreported analogous cases may provide guide to what your case may be worth. Also, check with local United States Attorney's office concerning what a particular case may be worth.

D. Economic Reports. They are being used with increasing frequency by claimants to establish quantum of damages. Can be attacked by scrutinizing the assumptions and data on which the economist's conclusions are based.

E. Reduction of Certain Elements of Damages to Present Value.

1. Damages subject to reduction.

- (a) Loss or impairment of earning capacity (loss of future earnings).
- (b) Future medical expenses.
- (c) Loss of household services.
- (d) In some states, noneconomic damages.

2. Methods of reductions. An excellent discussion of this topic can be found in Jones & Loughlin Steel Corp. V. Pfeifer, 462 U.S. 523(1983) and Culver v. Slater Boat Co., 722 F.2d 114 (5th Cir. 1983). Reference C, para. IIC.15.

(a) Net (below market) discount method. Estimated market discount rate, adjusted for the effect of any income taxes, offset by the estimated rate of general future price inflation, represents the net discount rate. Claimant's total future income, including estimated productivity increases and merit increases, is reduced by the net discount rate. This approach was adopted by the 5th Circuit in Culver, supra.

(b) After-tax market interest rate method. The 5th Circuit in Culver, supra, refers to this as the case-by-case method. Requires estimate of the claimant's total wages over his worklife expectancy, including wage increases for inflation, reduced by the after-tax market interest rate.

(c) Statutorily set discount rate. Example: Georgia has adopted a 5 % discount rate. Georgia Code § 51-12-13. Claimant's total estimated future income is to be reduced to present value at a rate of 5%.

(d) Lawyers and Judges Publishing Co. publishes a present value calculator. (It is on the reverse side of the life expectancy and worklife expectancy calculator)

F. Reduction for Taxes. A reduction of future lost income for income taxes that would be owed is not permitted by many states in personal injury cases. However, in most states that calculate damages in wrongful death cases based on some reference to lost wages, a reduction for taxes is permitted.

G. Calculation of Life Expectancy. Some states (e.g., North Carolina) have codified life expectancy tables. Other methods of calculating life expectancy is through reference to Department of Health and Human Services mortality tables, insurance company mortality tables, and, in some jurisdictions, annuitist or actuary testimony. Lawyers and Judges Publishing Co. publishes a useful calculator for determining life expectancy and worklife expectancy.

H. Rated Age. In a personal injury case, particularly a catastrophic injury case where a life care plan or extensive or lifelong medical/attendant care is anticipated, a rated age of the injured party is needed. These can be obtained through a broker who will send pertinent medical records to insurance companies for review. Cost of a lifetime annuity will vary with the companies' assessment of rated age. Higher rated age means shorter life expectancy.

I. Calculation of Worklife Expectancy. Department of Labor statistics on worklife duration is a useful reference. Also, interview of the claimant, family members, employers, and fellow employees may provide information on how much longer the claimant would have continued working.

J. Personal Consumption. Typically varies with size of family, income and individuals lifestyle. Financial records, tax returns, witness interviews will provide some evidence of personal consumption on an individual case basis, whereas reference to Department of Labor statistics or scholarly articles (e.g., Patton and Nelson, "Estimating Personal Consumption in Wrongful Death Cases," Journal of Forensic Economics, Vol. 4, No. 2, Spring/Summer 1991.) will provide statistical levels of consumption (Lawyers and Judges Publishing Co. publishes a useful "Consumption Cost Calculator").