

# What's It Worth? Best Practices in Defending Economic Damages in the Catastrophic Accident

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The Smith family — Roger Smith, his wife, Beth Smith, their son Ryan and their housekeeper Jennifer Cruz — are traveling from their home in suburban Maryland to their beach house when their Honda Odyssey collides with a tractor-trailer. Roger dies instantly. Ryan suffers a spinal-cord injury, rendering him permanently disabled. Beth is mildly injured. Jennifer suffers a fractured skull.

What are the elements of damages for each injured party? What are the best practices in responding to plaintiffs' claims for damages and how should the defense litigation team respond?

The claims professional and the attorney can efficiently and effectively plan the response to a damages claim if they have a good understanding of the elements of economic damages, common issues in claims for economic damages, and what is needed from discovery in order to make a credible damages argument.

Here is a snapshot of the Smith family's situation at the time of the accident:

Roger Smith, age 39, is a partner in an accounting firm.

Beth Smith, age 37, is a homemaker.

Ryan Smith, age 14, is an eighth-grade student. He was a straight A student at the time of the accident. His IQ is 138.

Jennifer Cruz, age 22, is employed by the Smiths as a housekeeper. Jennifer is not a U.S. citizen. Her visa status is questionable and she may be working in the United States illegally.

## ELEMENTS OF DAMAGES

The basic elements of damages in injury and death matters are:

- lost earnings
- lost fringe benefits
- medical costs and
- value of lost household services

What claims under each category apply to the Smith family members, and how can actual damages best be determined for each claim?

## EARNINGS LOSS

**Roger Smith.** Key issues include how much he was making and what he could have expected to earn over the course of his lifetime absent the accident. Specific discovery is needed to show the likely amount of earnings.

Areas to conduct discovery include: Would Roger's compensation likely have risen, declined or stayed the same over the course of his worklife? What was his work history? What was his opportunity for promotion (i.e., equity partner, managing partner)? Did Roger have any health issues that might have affected his future earning capacity? What was the likelihood that Roger's firm would have continued to be successful? How long would Roger have worked? Was he likely to have retired at age 60, or is it more likely that he would have worked until age 65? Did his firm have a mandatory retirement age?

Sources for evidence in addition to tax returns and family financial records would include: data related to Roger's firms performance, employment termination issues (non-compete clauses for example), buyouts, return of shares, formulas for determining values of shares and depositions of Roger's partners. Testimony from an expert economist as to the value of the firm might also be helpful in determining loss to the family members under the wrongful-death claim. Note, however, that damages to a business are separate and distinct from earning-capacity loss to its owner. Relevant damages in a wrongful-death claim are the actual losses suffered by the family members arising from Roger's death.

**Beth Smith.** Beth was not employed at the time of the accident. However, if it can be shown that she had planned on working at some point, it may be reasonable to assume she suffered some loss of earning capacity. Testimony by a vocational specialist may help establish the extent of this loss, if any. Additional discovery would include deposition testimony of Beth regarding her plans to return to the labor market including any specific steps taken prior to the accident to re-enter the labor force.

**Ryan Smith.** When a child with no record of employment or earnings is injured, indications of probable future earnings include the parents' educational level, occupations and the child's school performance. Here, Ryan is demonstrably intelligent, indicated by his straight As and above average IQ. He is also clearly limited in employment opportunities by virtue of his permanent disability stemming from his spinal-cord injury. How much has Ryan lost in future earnings? Evidence from a vocational expert might show that, despite Ryan's disability, his residual earning capacity might be fairly high given his intelligence and future potential. Even though Ryan is still young, discovery should be conducted regarding Ryan's career aspirations.

**Jennifer Cruz.** How long would Jennifer have remained employed in the United States absent the accident? This issue has a direct bearing on Jennifer's lost earning capacity. Factors affecting an undocumented worker's tenure in the U.S. include the worker's probability of deportation, ties to the community, English-language skills, family situation (location of spouse/children), the nature of the worker's U.S. employment and injured parties assimilation into the community (i.e., bank accounts, formal lease agreements, friends/family in the community). Several research papers show employment data of undocumented workers in the U.S. Many undocumented workers maintain strong ties with their countries of origin and are working in the U.S. only until they can earn enough money to return to their native country and start businesses or buy homes. In addition to statistical data, deposition testimony from Jennifer and Beth might reveal how long Jennifer had planned to stay in the U.S.

## LOST BENEFITS

**Roger Smith.** Roger might have enjoyed economic benefits from his employment above and beyond his paycheck and partnership interest in his accountancy firm. These benefits could include health and pension benefits, disability insurance and a company car. Benefits details can be found in partnership and firm documents. However, some items considered to be benefits should not be included as damages in a survival or wrongful-death claim. Disability insurance, for example, is intended to support an injured worker — this does not count as an economic benefit unless it is used, and so should not be included since a continuous stream of lost earnings are otherwise being valued. Fringe-benefit items that generally count toward damages include company-paid health insurance, company-paid life insurance (cost of premium), and pension benefits, since these are benefits the plaintiff has actually lost.

Areas for discovery include: What was Roger's annual contribution to his health care? What is the family's cost of health insurance now? Did Roger have to contribute to his retirement benefits, if so, what percent of his earnings? Discovery should also include requesting documents relating to Roger's pension plan and health care plan to verify benefits and respective employer/employee contributions.

## MEDICAL COSTS

Future medical expenses are calculated by medical-cost specialists who produce life-care plans showing what the plaintiff will need for medical care. This element of damages is strongly affected by life expectancy in instances where the injury is permanent. Examples of future medical

costs include: therapies, medical supplies, special housing and transportation needs, and special education needs.

**Ryan Smith.** In Ryan's case, life expectancy is a key factor in determining the extent of his damages — if it is close to the average life expectancy for 14-year-old males, chances are his future medical costs will be significant. In fact, most very large injury verdicts in personal injury matters involve significant future medical costs.

**Beth Smith.** Beth Smith's medical costs would likely be limited to past medical bills related to the accident, plus whatever medical care that might be needed in the future. Sources for this element of loss would be testimony by a medical expert. Although her injuries were mild, discovery should be conducted to ensure no lingering effect or permanency, which could create an ongoing economic loss.

## HOUSEHOLD SERVICES

Household services are the value of services provided by plaintiff or decedent for the benefit of other family members. Household-services damages should be limited in duration by joint life expectancy and healthy-life expectancy. Services cease on death, and many services cease when one spouse is unable to perform services due to poor health. Actuarial tables exist showing the likelihood of these events.

In this case, Beth and Ryan have lost the benefit of Roger's services. He might have performed such tasks as landscaping or certain types of home repair. If so, the loss is compensable and can be valued by determining the replacement cost of such services.

The type and amount of household services provided by Roger would also be a key area to explore in discovery. How many hours a week did he work around the house? This area should be queried during Beth and Ryan's depositions. Economists also frequently consult various surveys that track the average amount of time married males spend on household tasks. Discovery should also be conducted regarding any bills the family has incurred since Roger's death for the replacement of his household services.

#### **PERSONAL EXPENSES OF THE DECEDENT**

The decedents' probable personal living expenses represent part of the decedent's future income that would not have been available to the surviving family members had the accident not occurred. Any recovery by the surviving family members must take this into account. Therefore, the likely living expenses of the decedent are a key issue in determining damages to the surviving family members.

Sources for personal-maintenance values include: depositions of family members on the decedent's expenditures, checking account records, credit card statements and tax records. Absent sufficient specific information regarding the decedent's spending patterns, Census data and other statistical data maybe used.

When defending a damages claim it is essential that both the claims professional and the attorney understand the elements of economic damages as well as the necessary discovery to conduct when responding to a damages claim. A poorly prepared damages argument can affect credibility on other issues involved in the litigation, while insufficient discovery could lead to significant under or over-valuation of the claims.

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