

What a Forensic Economist Needs from a Life Care Planning Expert

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Abstract. *In most legal venues, a life care plan must be converted to present value to become a measure of damages in litigation. This requires that an economic expert fully understand the life care plan presented by a life care planning expert. This paper considers problems that an economist may have in interpreting a life care plan and provides suggestions for how life care planning experts can assist an economist in overcoming those difficulties. The paper also considers difficulties an economist can cause for a life care planning expert and how the chances of those difficulties can be reduced.*

Introduction

When a life care planning expert prepares a life care plan for purposes of a litigation about an injured person, an economic expert will be required to convert the costs indicated in that plan into a damages projection that is, in most states, stated in present value terms. Litigation that involves a life care plan inherently involves a catastrophic injury of some sort. Damages analysis begins with opinions of medical and other qualified experts that necessitate the provisions of goods and services to assist an injured person. A life care planning expert translates these opinions into a specification of the goods and services the injured person will need, sources from which they can be procured, and current costs of procurement. Thus, a life care plan converts expert opinions into a coordinated plan of expenditures over the period of time when such goods and services are expected to be necessary. Ordinarily, the loss period for the life care plan is the “life expectancy” of the injured person, but the loss period could be for shorter specified periods of time, either for a fixed number of years or on a life contingent basis. [The terms “life expectancy,” and “life contingent” are defined in the glossary in Appendix I. Other definitions for terms that might not be familiar to life care planning experts also are provided in the glossary.]

If both the life care planning expert and the economist who is valuing a life care plan have a complete mutual understanding of the tasks and responsibilities confronting each expert, the economist’s role in assessing the present value [see glossary] of the life care plan is straightforward and takes relatively little time for the economist. Unfortunately, mutual understanding between the life care planning expert and the economist is often not that complete and a variety of problems can arise. This paper will address a number of those problems, but is not intended to provide complete coverage for all problems that might arise. Hopefully, a more complete understanding of the problems that will be covered will provide insight into how to

address problems that will not be covered. The problems that will be addressed are:

- (1) Difficulties economists have with the manner in which information is presented in life care plans.
- (2) Difficulties that relate to separating life care costs that would have existed without an injury from those that were caused by an injury at litigation.
- (3) Difficulties that relate to collateral source and collateral benefit issues that affect certain types of litigation, particularly medical malpractice.
- (4) Difficulties in dealing with lost household services.
- (5) Difficulties that arise when economists invade the province of life care planning experts.

Difficulties in Interpreting and Organizing Information in a Life Care Plan

For most economic experts, life care plans occur in only a small minority of the personal injury and wrongful death cases in which they take assignments (In wrongful death cases, life care plans would be for survivors who were left without needed care because of the death of a decedent). Economic experts work in many personal injury cases in which there are no ongoing life care costs, but the injured worker has been forced to switch occupations. They also work in wrongful death cases in which there are no ongoing life care costs and in wrongful termination cases in which there is no physical injury at all. This is in sharp contrast to the experience of life care planning experts who work only in cases with needs for future life care. Further, economic experts have typically not gone through educational programs designed to assist them in understanding life care plans. Thus, a life care planning expert should assume that the economic expert who will be called upon to value the life care plan he or she is preparing has only rudimentary understanding of how life care plans are developed and presented. One of the authors has had life care planning experts insist that they are incapable of arriving at annual totals for the expenses they have recommended in their life care plans. If this is difficult for the author of a plan, it is going to be even more difficult for a person who did not prepare the plan. If a life care plan is going to be properly assessed, the economic expert must be provided with a clear understanding of the dollar amounts being recommended in the plan.

Clarity. It is often very difficult for an economic expert to correctly interpret the tables prepared by a life care planning expert. A common problem, for example, is for a life care plan to specify a particular treatment from age 10 to age 20 and then another treatment from age 20 to age 30. This specification gives two conflicting cost values for age 20. Another problem is that life care planning experts sometimes use shortened forms of expenditure items that would be understood by other life care planning experts, but not economic experts.

Organization. The information in a life care plan often is presented in a way that makes calculations unnecessarily time consuming. Some economic experts make separate projections of present value for each item in a life care plan, others divide life care plan expenditures into expenditure classes such as “medical” versus “non medical” as in Appendix II (or even more specialized components of medical and non medical costs, such as the distinctions found in the Consumer Price Index for Medical Costs, the MCPI). For all economic experts, however, it is helpful for annual totals for all costs to be provided. Even if these totals are not used directly in projecting the costs of a life care plan, they provide a way for an economist to check whether calculations of individual items are consistent with those totals. Appendix II is based on the

way one of the authors likes information to be presented. For many (but not all) life care plans, one of the authors uses different implicit assumptions about annual cost inflation for medical versus non medical costs. It is therefore necessary that he have annual totals for these costs.

Identifying expenditures that are not caused by an injury. It is reasonable for a life care plan to contain all life care costs of an individual even if some of those costs were not caused by the injury in litigation. Even healthy and whole individuals have life care costs, but only those costs that were caused by an injury are relevant to the litigation at hand. When an economist is calculating damages caused by an injury, it is critical that life care costs that would have been necessary even without the injury be separated from costs that are caused by an injury. This can be particularly complex if the individual already had abnormally high life care costs even before an injury, so that the damages at litigation are life care costs in addition to costs that would have been necessary even without the injury. Likewise, it can be particularly complex in the case of a birth injury or infant medical malpractice that occurred with a child already “damaged” from congenital defects. A life care planning expert should realize that the economist who is calculating damages needs a great deal of guidance in this area. If in doubt that another expert will be able to tell which costs are based on an injury and which are not, a letter of instruction to the economist would be appreciated.

Clarifying conditional future expenditures. Many life care plans do not discuss conditional aspects of future medical expenses. It is impossible to specify with certainty how long an injured person will live, but there are medical or other treatments that will become necessary at future ages if, and only if, the individual lives to the ages at which those treatments would be needed. It is very helpful if life care planning experts specify the circumstances under which given treatments might be needed. In many life care plans, uncertain costs are simply listed as costs that might occur at some point in the future. It is very helpful if the degree of uncertainty can be reduced as much as possible.

Separating prescription and non prescription drugs and supplies. It is important for a life care planning expert to identify which drugs and supplies can only be obtained on a prescription basis and which drugs and supplies can be purchased over-the-counter without a prescription. Growth rates for prescription drugs and supplies have historically increased faster than over-the-counter drugs and supplies. Since economic experts are much less familiar with the names and nature of specific drugs and supplies, it may be very helpful to an economic expert if a life care planning expert clearly identifies which items are prescription items and which are not.

Avoidance of overlapping medical care recommendations. Some life care planning experts are not careful to avoid overlapping medical care recommendations, such as what would happen if surgeries occur. Life care planning experts should be as specific as possible about when such medical treatments should occur, how long the expected recoveries should be, and how soon after the surgeries physical or occupational therapies should begin. Merely identifying how much the surgeries will cost can be insufficient if there is also a stream of post operative changes in life care costs that should also be taken into account. The discussion of such changes should include both costs that increase and costs that would decline during the recovery period.

Reductions during special periods such as summer camps. Another common problem with life care plans is that reductions in needed services during summer camps or school are not considered. This is a particular problem with attendant care. In some situations such as summer camp, regular school, or recommended therapy periods, attendant care may not be necessary. On the other hand, the attendant care may be completely appropriate during such

periods. An economist is not in a position to know information of this sort, so it is important for a life care planning expert to think through such periods and clearly identify whether and why attendant care will be needed.

Why totals are best calculated by the life care planning expert. Whether annual totals are prepared by a life care planning expert or an economic expert, the process is one of simple addition. One adds up all of the costs projected in a given year to provide a total. Subtotals by category are calculated in the same fashion. Although adding up the annual costs of 100 items in a life care plan using a calculator or adding machine is a time consuming process, if the information in the plan has not been recorded correctly or clearly in the plan charts, an economist will typically discover that while in the middle of adding up annual totals. That will result in the economist having to stop work until the economist can check with the life care planning expert about the item in question. It is for that reason that a life care planning expert can perform this task more efficiently than an economic expert. If there is ambiguity about how an item should be interpreted, the life care planning expert will know what was intended and not have to stop to ask the economist. The process of adding up annual totals also has the additional advantage of causing the life care planning expert to look at each cost projection which, in turn, may result in detection of mistakes that would have thrown off the economic expert. In tables like the table in Appendix II, calculating both total expenditures and totals in subcategories also provides a cross check of cost figures in the plan. Addition mistakes can be detected if the total of medical category costs and non medical category costs do not add up to total expenditures for each year.

Difficulties in Considering Offsets

As used by forensic economists, “offsets” are reductions that should be made to reduce the amount of projected damages. If, for example, a worker is injured so that she can no longer continue in the same job, but can work in some other job, an offset is made for the earnings in the job or jobs that remain possible for the individual. In the literature of forensic economics, the offset problem relating to life care plans is often discussed in terms of a van that is specially equipped to handle the needs of a person with a disability. The cost of such a van will be included in a life care plan. The question is whether or not an offset should be subtracted for the costs of a passenger automobile since the van can be used to provide transportation in lieu of the passenger automobile. Similar questions relate to housing that must be modified because of a disability. An individual would have had to purchase housing even if not injured. Should the full cost of specialized housing be considered the damage, or only the additional cost made necessary by the injury? A somewhat different offset question involves situations in which a badly injured person has been in an institutional environment in which food is provided by the institution. Should an offset reduction be made for the food the individual would have purchased if not injured and therefore not institutionalized?

The van example. Some will argue that double recovery for transportation costs will occur if offset deductions are not made for the costs of a specialized van needed because of an injury. A life care plan or an economist’s assessment may make reduction to avoid such double recovery. For example, the cost of an average passenger automobile and the costs of maintaining that automobile may be subtracted as an offset to the costs of van in the life care plan. Since the van can be used to provide transportation provided by the passenger automobile before the injury, it is argued that the cost of the automobile should be subtracted (Slesnick, 1990; Tinari, 1995). It has also been argued that there are important differences between transportation pro-

vided by a van and transportation provided by a passenger automobile (Feldman and Egge, 1995), so that an offset assumption may not be warranted. Perhaps the specialized van is only suitable for use by the plaintiff and can only be efficiently used for medical appointments and long drives for the injured plaintiff, but cannot be used for other purposes. "Transportation" is not a homogenous good. If the injured plaintiff was driving an expensive BMW before his accident and the specially equipped van will cost less than the BMW, there has not really been a savings because of the injury. Similar arguments could be made on both sides relating to modified housing.

The food example. Some attorneys for defendants will argue that since food is provided if an individual is placed in an institutional setting, an offset should be made for food the individual will not have to purchase if not in that institutional setting. The extreme form of this argument is that whatever the individual would have spent on food according to the Consumer Expenditure Survey (2004) should be subtracted as an offset to the cost of the institution. There is an enormous difference between food purchased by a healthy person living in his or her own home and the food that is provided in an institutional setting. Carried even further, it could be argued that since televisions in the institution provide entertainment, what the individual should have spent for entertainment should be subtracted. Likewise, if the individual is a single individual, it can be argued that the institutional setting replaces housing, which also should be subtracted.

Recommendation. It is not reasonable to expect that a life care planning expert could divide the annual cost of institutional care into elements for food and for entertainment, so the authors are not recommending that life care planning experts do that. However, the arguments are stronger in the case for vans and housing and it would be helpful for the life care planning expert to identify regular costs that would apply if offsets were considered in those areas. In doing so, the life care planning expert may want to avoid taking a position whether or not such offsets should be subtracted. Since offsets of this sort may be a disputed area between the parties, the best approach may be to identify possible offsets without suggesting that they should be made.

Difficulties in Dealing with Lost Household Services

If an individual is injured, one of the areas of damages that forensic economists often consider is the loss of household services by either the individual or the individual's family. Typically, if an individual is single and would have been living alone, attorneys do not ask economic experts to estimate the value of lost household services as an element of damages separate from lost earning capacity and the costs of a life care plan needed by an individual. Interestingly, however, there is a case on point in New Mexico specifically holding that a single person who has a loss of the capacity to perform household services for herself is entitled to recover for the reasonable value of those services (*McNeely v. Henry*, 1984). If there is a loss of services to other family members, in most other states, the claims of loss by those family members can be considered even if the injured plaintiff has been institutionalized as long as the other family members are named as claimants in the legal action. The *McNeely* decision in New Mexico carries this one step further to argue that the value of lost capacity to produce household services is apparently compensable even if the individual was living alone and is now living in an institution. Such claims, however, are rare.

Of greater interest are situations in which an injured person for whom a life care plan has been prepared continues to live at home, perhaps with other family members. If the injury is

severe, there has probably been a loss in capacity to produce household services. Perhaps the lost services are being provided by other family members, but it is often the case that attendant care is providing some services for the injured party that would ordinarily be thought of as household services. An attendant, for example, may prepare meals or clean up rooms for the benefit of the injured person. If so, the line between household services that have been made necessary to meet the needs of the injured plaintiff and household services that the injured plaintiff might have provided for other family members may be indistinct. However, life care plans sometimes include such services as lawn maintenance. If an injured person is living alone and now needs lawn maintenance in order to be able to live in a given dwelling unit, it may be appropriate to include lawn maintenance in a life care plan. If lawn maintenance of this sort is included as part of a life care plan, a loss of the ability to provide that lawn maintenance should not also be counted as part of lost household services. Making sure that this does not happen is primarily a responsibility of an economist, but a life care planning expert should also be aware of the possible danger of double counting in the area of household services.

It should also be noted that life care planning experts in New York are often called upon in New York to provide foundation for claims of lost household services. Ultimately, household services are a form of life care that is needed by everyone. In New York, household services can only be claimed as an element of damages if the purchase of household services has been made necessary by the injury to the plaintiff (Ireland and Riccardi, 2003). Appropriately therefore, life care planning experts are needed to provide a foundation for projections of the value of lost household services by economists in New York.

Difficulties with Collateral Source Issues

The collateral source rule is a substantive rule of law (Jacobsen, 1991). In its purest form, the collateral source rule holds that the value of benefits received by a plaintiff from a source wholly independent of the tortfeasor (see glossary) should not be deducted from the damages the plaintiff would otherwise collect. However, over the past thirty years tort reform movements have focused on narrowing the scope of the collateral source rule. This has particularly been the case in the area of medical malpractice. One of the leading examples of the types of changes that have been made was changes in California's Medical Injury Compensation Reform Act (MICRA) in 1975. MICRA created provisions in Civil Code section 3333.1 that allowed a jury to consider benefits from a number of collateral sources as offsets to the costs of a life care plan. A jury is not compelled to make reduction for these collateral sources, but may consider funding from "the United States Social Security benefits, any state or federal income disability or worker's compensation act, any health, sickness or income disability insurance, and any contract or agreement of any group, organization, partnership or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental or other health care services. Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid to or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence" (MICRA, 1975).

That language, which is mirrored in changes in medical malpractice tort provisions in a number of other states, means that many costs that a life care planner projects will be offset by benefits received by injured plaintiffs from sources with which a life care planning expert and many economic experts may not be familiar. These issues should not affect whether the goods and services in a life care plan are necessary to meet the reasonable life care requirements of the injured plaintiff. They are, however, relevant to understanding why attorneys may take the

strategies they take in cases involving life care plans.

Difficulties with Collateral Provision

Collateral provision is another aspect of the issues related to collateral sources. The sources indicated in the previous section are sources of funding for a life care plan for which California (and other states) will allow juries to treat as offsets to be considered in determining how much to award to provide a life care plan. Federal and state laws mandate that governments provide a variety of services to minors with a disability, particularly including education and training. This provision must take place whether or not the source of the disability of a given minor was caused by a tort or by a natural occurrence. Thus, some version of many of the services that will be needed by a child with a disability will be available without charge. In general, life care planning experts must make the case that publicly available resources that are available without cost are not sufficient to meet the reasonable needs of an injured child, if that is true. For example, if the child can receive educational services from public schools, how important is it that the child receive special educational services that are only available through private institutions? That is a case that must be made by a life care planning expert because it falls well outside the expertise of an economic expert.

Difficulties with Legal Pricing Requirements

An injured plaintiff in California is not entitled to recover past medical costs at prevailing rates, but only at reasonable rates for comparable services (*Nishihama v. City and County of San Francisco, 2001*; *Hanif v. Housing Authority, 1988*). In *Nishihama*, the appellate court found that the trial court had erred in allowing the jury to award the normal billings of a medical provider for a plaintiff's care when the plaintiff's employer-sponsored health care plan had an agreement to accept reduced rates for charges by that provider. What could be recovered on the basis of what was actually paid was only 21 percent of the charges that were billed. The *Hanif* decision said, "when the evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff can recover for that care despite the fact that it may have been less than the prevailing rate."

Typically, life care planning experts do not calculate past life care damage. However, if there are sources for collateral funding of the kind that occurred in the *Nishihama* case, that funding may continue into the future. If so, a life care planning expert must take into account what the costs will actually be to maintain the services required by an injured plaintiff, and not just the prevailing rate for such costs. This is an area in which life care planning experts are much better equipped to discover the details of any special cost adjustments that need to be made based on differences between prevailing rates and the costs that an injured plaintiff will have to bear to obtain needed services. For this purpose, a life care planning expert should determine, to the best of the life care planning expert's ability:

1. The probability of obtaining future needed medical services from alternative sources.
2. The length of time current insurance coverages will continue.
3. The probability that each item in a life care plan will actually be needed.

Difficulties that Can be Caused by an Economist

The final topic in this article is how an inexperienced economic expert can cause problems for a life care planning expert and how to best guard against such problems. To a certain extent, life care planning experts, vocational experts and economic experts are all vulnerable to being embarrassed or undermined by other damages experts retained by an employing attorney. Any calculations prepared by an economic expert of the present value of the costs of a life care plan can be no more accurate than the life care plan the economic expert is valuing. Likewise, calculations of the present value of lost earnings cannot be more accurate than the determination by a vocational expert of residual earning capacity. By being last in line in damages calculations, an economic expert is the most vulnerable damages expert to mistakes made by other experts retained by an employing attorney. There is, however, a mistake that an inexperienced economic expert can make that can destroy the credibility of the reports of a life care planning expert and the economist at the same time. The economist can decide to substitute his or her own judgment for one or more of the recommendations in a life care plan.

If an economic expert makes changes in any of the recommendations in a life care plan based on the economist's assumption that the life care plan is wrong in one or more of the recommendations, the economist is effectively taking on responsibility for defending the rest of the values in the life care plan. The economist is saying that with respect to the changed items, the economist is more of an expert than the life care planning expert. If this occurs, the economist has undermined the report of the life care planning expert and, at the same time, has opened the door for the opposing attorney to ask the economist detailed questions about other aspects of the life care plan. Since life care planning is not the expertise of an economic expert, it is likely that the attorney will have a field day showing in what ways the economic expert is not an expert in the life care planning area.

The authors have two suggestions to avoid this problem. The first is that a life care planning expert should establish good communication with the economic expert who will value the life care plan. The life care planning expert should try to understand the economist's problems are in developing a report of damages based on the life care plan. The second recommendation is that a life care planning expert should indicate clearly to any retaining attorney that a copy of any report of damages based on the life care plan must be provided to the life care planning expert. If a life care planning expert finds inconsistencies between the economic expert's report and what the life care plan was intended to say, these problems should be worked out before depositions and not after. It has been the experience of the authors that reports valuing life care plans are often not provided to life care planning experts unless asked for by life care planning experts. Reports of cost by an economic expert should be obtained by life care planning experts and read carefully for possible conflicts.

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Recommended Readings

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Stephanie Rizzardi Pearson, MBA, has offered expert economic consulting on an estimated 2,500 cases since 1985, providing court testimony in about 300+ cases throughout California, in both Superior Court and District Court. Ms. Rizzardi Pearson completed her BA in Economics at the University of California, San Diego and her MBA, with a concentration in Finance, at the Claremont Graduate University. She belongs to the American Rehabilitation Economics Association, for which she held the position of Internal Vice President from 1999-2000, the National Association for Forensic Economics and the American Academy of Economic and Financial Experts. Ms. Rizzardi Pearson has participated in various professional conferences and also holds a CEA (Certified Earnings Analyst) certificate from the American Rehabilitation Economics Association. She has spoken before the Nevada Trial Lawyers Association, Fresno County Trial Lawyers Association, MCLE Class for Farmers Insurance Group, and other groups.

Appendix I – Glossary

Life Contingent. A stream of payment is said to be “life contingent” if the responsibility for making payments exists as long as the recipient (one or more than one recipients) remains alive. The responsibility for making this stream of payments ceases when the recipient (or all of the recipients) have died.

Life Expectancy. In a life table, life expectancy is defined as the average number of years a person would be expected to live in the future. This term is frequently misunderstood as the number of years a person will live in the future. A life expectancy is a single estimate that reduces a great deal of information into a single number. Correctly understood, it is a “point estimate” for how long an average person with the same characteristics would be expected to live under specified assumptions. The probability that an individual with a life expectancy of 30.7 years will live exactly 30.7 years and then die is almost vanishingly small. This term means that when thousands of people with the same characteristics are included in a group statistic, approximately half of them will have died in 30.7 years and approximately half of them will live longer than 30.7 years.

Present Value. The present value of a stream of future payments is a sum of money which, if awarded today, would allow the stream of future payments to be replaced if invested at an assumed discount rate. If, for example, the interest rate that is used as a discount rate is 5 percent, and an individual had \$1,000 today, the future value of that \$1,000 after one year is \$1,050. Thus, the present value of \$1,050 one year from now is \$1,000 if the discount rate is 5 percent. This is mechanically calculated by dividing $\$1,050/1.05 = \$1,000$. For two years the figure, \$1,000 invested at 5 percent equals $\$1,050 \times 1.05 = \$1,102.50$. Similarly $\$1,102.50/(1.02)^2 = \$1,000$.

Tortfeasor. The tortfeasor is the person or agency that has caused the harm to the victim, about which litigation has commenced. “Feasor” can be translated as “maker” so that a tortfeasor is the maker of the tort. Since the torts considered in this article are injuries, the tortfeasor is the maker of the injury that caused the construction of the life care plan.

Appendix II – A Sample Table for Reporting for Reporting Life Care Plan Annual totals

Year	Age	Total Expense	Medical Expense	Non Medical Expense	Attendant Care/ Institutional Facility	Transportation
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