

**Special Topics in Forensic Economics VII:  
Roundtable on Bias in Forensic Economics**

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**Brief Description:** Damage computation rules, experts, economic appraisal reports, testimony, estimates of particular damage components (e.g., earnings, household services, fringe benefits, personal consumption in wrongful death cases) and values of particular parameters used in appraisals (e.g., the period of time before earnings return to their pre-termination level in wrongful termination cases; the appropriate discount rate in any case where present values must be computed) are sometimes characterized as being “biased toward the plaintiff” or “biased toward the defense.” Panelists will explore the meaning of the term “bias” in these various contexts, giving examples of bias, or of what might be wrongly interpreted as bias, from their own forensic economic practices and experience. How easy is bias to identify? Is it like pornography, difficult to define but “you know it when you see it”? Is there a “litmus test” for bias in an expert, a report, a parameter value?

Some dictionary definitions of “bias” most closely fitting the meaning of the term as used in this session are as follows: “...bent or tendency, an inclination of temperament or outlook, especially a personal and sometimes unreasoned judgment; prejudice; systematic error introduced into sampling or testing by selecting or encouraging one outcome or answer over others.” (*Merriam Webster’s Collegiate Dictionary*, 10<sup>th</sup> Edition)

From another dictionary comes these definitions: “A mental leaning or inclination; predisposition toward (or away from) an object or result; a state of NOT being indifferent (or objective).”

**Topics:**

**1. Bias in Case-Law or Legislated Rules for Computing Damages:** State law and/or court decisions may mandate use of rules and procedures for computing damages that favor the plaintiff or the defendant. As an example, prior to the 1980 decision of the Pennsylvania Supreme Court (*Kaczowski vs. Bolubasz*, Pa. Supreme, 421 A.2d 1027), present values had to be computed using 6% simple interest and future earnings could not be projected to increase beyond the level existing at the date of death or injury. The 1980 decision eliminated discounting to present worth (i.e., it mandated a discount rate of zero)

and permitted, upon laying a proper foundation, wages to grow as a result of increases in productivity. Holding constant all other rules regarding damage calculation, before 1980, the discounting rule was biased in favor of the defense, whereas after 1980, the discounting rule is arguably biased in favor of the plaintiff. When considering other types of bias below, it will be understood that allowance has to be made for the rules of the jurisdiction within which an expert works or in which a particular report is prepared. For example, any expert report prepared for use in Pennsylvania cases is required as a matter of law to use a zero discount rate.

**2. Bias in a Particular Expert's Overall Practice:** If an expert always worked for only plaintiffs or only defendants, this would certainly be a warning sign to check for plaintiff or defense bias, respectively. Why wouldn't an expert who prepares fair and objective appraisals have some business from both sides? While someone new to the consulting business may have only had cases for one side, someone with, say, 10 or more years of experience would have presumably had ample opportunities to work for both sides, assuming the expert operates from a position of neutrality in calculations and analysis (the "neutrality" tenet of ethical behavior in NAFE's "Statement of Ethical Principles"). Where there is some work for both sides (even with as many as 95% plaintiff engagements and as few as 5% defense engagements, or vice versa), it is arguably too simplistic to infer bias merely from the case load proportion. Rather, it would seem necessary to examine particular reports from a random sample of cases before any conclusion could be made about the expert's overall bias. Key questions: Are there systematic differences in assumptions, methods and parameter values in reports prepared for one side compared to the other side? Or is there a high degree of consistency? Does the expert choose a methodology to achieve a particular result, such as using opportunity cost analysis to value household services losses in a particular instance because determined losses will be higher, while using a replacement cost methodology in contexts where a lower estimate is wanted? Are data sets shopped to find one that can be used to achieve a desired result? Does the expert allow the not-so-subtle differences in expectation and process between working for the plaintiff and working for the defense to influence the evaluation process? Does the expert maintain a well known position on important elements of methodology and practice, even after being "counseled" by well meaning others that "know better"?

**3. Bias in a Particular Economic Appraisal Report:** A report is biased if the overall dollar value, or range of values, for the set of damage components included in the report is too high or too low by an amount that exceeds some allowance (10%? 20%? 30%) for the inherent uncertainty in almost any appraisal. Bias may arise because all of the assumptions made in the report are in the client's favor. None of the individual assumptions may be egregiously biased, but the combination of all assumptions used together produces a seriously biased overall dollar value. The expert in some cases may characterize the assumptions made as "mainstream" or "typically made by experts in the field" when that is not the case. Another situation of bias arises in the inscrutable report

where it is impossible to determine how the overall dollar value was obtained even though the dollar value clearly appears to favor the side for which the expert works. Does the report contain the appearance of tailoring methodology or assumptions to "claim" conservativeness or liberalness?

An appraisal's "bottom line" damage estimate may be unbiased to any significant degree even if the choices of parameters and assumptions made in the various parts of the appraisal are very poor. In the typical wrongful death appraisal, for example, there are usually a host of decisions (choice of discount rate, choice of personal consumption deduction percentage, choice of length of working life via a statistical worklife expectancy, LPE method, median years to final separation, or some other method, choice of the appropriate earnings base, valuation of fringe benefits, the value of household services, etc.). Some of these choices may have a larger quantitative impact than others. Some might in isolation be characterized as "plaintiff oriented" (e.g., use of a very low discount rate), whereas others might in isolation be defense oriented (e.g. use of the LPE approach with female participation probabilities to estimate length of working life for a female in a court where the requirement is to estimate earning capacity). If someone was plaintiff-oriented (defense-oriented) in all the major choices, then, as noted above, the appraisal would be biased toward the plaintiff (defendant). However, an appraisal can have egregious offsetting errors that lead to an overall damage figure which is unbiased (or that yields a number in the plaintiff's expert report that is below what the other side's defense expert would compute). As an example, a projection of lifetime earnings for a teenager that relies on earnings of persons 18-24 years old is very conservative because it does not take the age-earnings cycle into account. On the other hand, if that appraisal uses a 0% discount rate (by choice rather than due to a legal requirement) to compute the present value of the teenager's earnings, that choice in and of itself would make the appraisal too large. The two "mistakes" together, however, may produce an appraisal that is close to the dollar value that would be obtained by taking the age-earnings profile into account and, at the same time, using a more reasonable discount rate.

Among the ways that working for the defense is often different from working for the plaintiff, a defense expert may not be asked to produce a report appraising the economic losses. For defense work, it may therefore be impossible to check an economic appraisal for bias in a given case because such an appraisal does not exist. In addition, even the reports that are produced may be restricted to a subset of the damage calculations carried out by the plaintiff's expert, or to totally different kinds of calculations. (As an example, Rodgers was asked by a defense firm in a death case involving two minor children to provide a report confined to estimating (a) the cost of rearing the children from the age at death to until they would have completed their educations, (b) the probability of attending college, given the socioeconomic characteristics of the parents, and (c) the cost of attending four years of college.) There are likely to be differences between plaintiff and defense work that should not necessarily be construed as showing bias. A defense expert

may not be asked for such a report but rather is asked to examine the plaintiff's expert report to determine if it is a reasonable estimate of economic damages and if it has any specific flaws. Furthermore, a defense expert may not have the degree or ease of access to the information about the plaintiff as is available to the plaintiff's expert, and the defense expert may be brought into the case at a later point than the plaintiff's expert. Does the report of the expert show signs of not having all the information that is really needed, or of having misleading information, or of not fully integrating the information that was available, possibly due to lack of time?

#### **4. Bias in Estimating Particular Damage Components and in the Choice of**

**Particular Parameter Values:** One of the more prolific sets of postings to the NAFE-L has concerned the choice of discount rate and reasonable values for this rate. The surveys of NAFE members have provided averages and ranges for particular parameter values and frequency of use of particular methodologies and techniques. Some NAFE continuing education sessions have often been devoted to preparation of a sample case by five or six panelists, to assess differences in assumptions, methodology and conclusions about damage components and overall damages. The results of the continuing education panels suggest a considerable range of variation for parameters, individual damage components and total dollar values for a given case, even among very experienced forensic economists. The book, *Determining Economic Damages*, by Gerald Martin attempts to provide considerable guidance in some areas (e.g., hours of household services and personal consumption deduction percentages) of damage calculation by averaging together the results of a large number of studies, or by showing average rates of inflation, wage and productivity growth and interest rates on Treasury bills and bonds over various historical time periods. Perhaps it is time for a paper to be written that describes a set of reasonable parameter values or ranges and reasonable assumptions about all the major damage elements typically included in a personal injury or death case, assuming the economist is free to choose the values, methodologies and approaches he or she thinks are best. Even though "every case is different," this might be a very useful exercise, even if only to show the specific ways and areas in which useful things can and cannot be said.

**5. Miscellaneous Other Issues:** (1) Is there a useful distinction to be drawn between an even-handed critique of another expert's report and a biased critique? (2) Is bias inevitable as long as experts are hired by plaintiffs and defendants rather than by the court? (3) Is "reverse bias" (plaintiff's economic expert being intentionally conservative or defense economic expert being intentionally liberal) prevalent? ethical? (4) Is it being biased or unethical for a defense expert to omit computing an element of damage if this element is omitted from the plaintiff's expert report? (5) Any other issues?