

Evaluating Damages Under HB 393

Kurt V. Krueger and John O. Ward¹

Introduction

The 2005 Missouri Assembly House Bill 393 (HB393), effective August 28, 2005, modifies nineteen statutes relating to tort damages in Missouri. This paper discusses the changes in the statutes under HB393 that are related to the calculation of economic damages for:

- pre- and post-judgment interest (408.040);
- any death of a care-giver (537.090);
- any death of a minor (537.090); and,
- periodic payments of future medical costs (538.220).

Pre and Post Judgment Interest

The 2005 HB393 changes Missouri Statute 408.040 from simple 9% pre- and post-judgment interest rates to variable simple interest rates based on the “intended Federal Funds Rate.” The intended Federal Funds Rate is the interest rate at which depository institutions lend balances at the Federal Reserve to other depository institutions overnight. Beginning August 28, 2005, pre-judgment per annum (or simple) interest is the intended Federal Funds Rate plus five percent; post-judgment per annum interest is the intended Federal Funds Rate plus three percent.

The Federal Reserve Board last changed the intended Federal Funds Rate to 3% on May 3, 2005. Since 1990, the intended Federal Funds Rate has averaged 4.2% while 1-year U.S.

¹ Kurt V. Krueger and John O. Ward are economists employed by John Ward Economics in Prairie Village, Kansas. Dr. Krueger is also Vice President of the National Association of Forensic Economics and an Associate Editor of the *Journal of Forensic Economics*. Dr. Ward is Emeritus Professor of Economics at the University of Missouri-Kansas City and Editor Emeritus of the *Journal of Forensic Economics*.

Evaluating Damages Under HB 393

Treasury Bonds have had average yields of 4.5% since 1990. The current intended Federal Funds Rate is published by the Federal Reserve Board on their Internet site accessible at <http://www.federalreserve.gov/fomc/fundsrate.htm>.

Death of a Care-Giver

HB393 supplements the Missouri's wrongful death statute, 537.090, in order to schedule the pecuniary damages² for the deaths of care-givers and minors. In this section, we address the newly added scheduled damages for the death of a care-giver and in the next section we discuss the scheduled damages for the death of a minor. Missouri Statute 537.090 continues to state that:

In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting such damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss. In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued. The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts, but damages for grief and bereavement by reason of the death shall not be recoverable.

HB393 first adds to 537.090 by stating:

If the deceased was not employed full time and was at least fifty percent responsible for the care of one or more minors or disabled persons, or persons over sixty-five years of age, there shall be a rebuttable presumption that the value of the care provided, regardless of the number of persons cared for, is equal to one hundred and ten percent of the state average weekly wage, as computed under section 287.250, RSMo.

We refer to this addition to 537.090 by HB393 as the scheduled damages for the death of a care-giver.

² Scheduled damages, contrary to caps on damages, tend to act as a floor to damages. Scheduled damages can also lead to differences from expected non-scheduled levels when (a) they do not consider the severity of injury or amount of loss to survivors in the advent of death, or (b) they raise damages within ungenerous jurisdictions or reduce the discount given by juries to disliked plaintiffs (or attorneys).

Evaluating Damages Under HB 393

Before addressing the terms within the scheduled damages of HB393, we discuss the concept of “*the value of care provided*” as a scheduled Missouri wrongful death damage item. The word “care” does not appear in the string of damage word items in the first part of 537.090, i.e. “reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support.” Before HB393, care would be considered an economic loss arising out of lost “services” and “support.” Therefore, “*the value of care provided*” is not a new damage under 537.090, but a damage item that is newly given a statutorily scheduled value germane to survivors who are “*minors or disabled persons, or persons over sixty-five years of age.*” All other survivors proceed with their damage claims under the existing 537.090 items, including the loss of the care provided to them by the decedent. Furthermore, “*minors or disabled persons, or persons over sixty-five years of age*” preserve their damages under 537.090 that are non-duplicative of care.

The addition of “*the value of care provided*” into the list of wrongful death damage items along with its elevation to a scheduled damage item arrives in HB393 without a definition of what constitutes “*care provided.*” While physical care is easily understood as “*care provided,*” care-giving is just one component of the services provided within families and it is required in variable amounts and ways. While all children require physical care services, infants require more than adolescents. An adult child might have custodial care of their aged and/or disabled parent and provide limited physical care of their parent, but he or she is responsible for the provision of the care services received by the parent and the management of the parent’s finances. Therefore, the aged parent’s loss would seemingly fall under the scheduled damages of HB393 with evidence that the aged parent depended on the custodial care provided by his or her child. Through the marital relationship, each spouse is responsible for the care of the other

Evaluating Damages Under HB 393

regardless of age or dependence. While the dependence status of “*minors or disabled persons*” is easily contemplated, dependence on care by “*persons over sixty-five years of age*” is not referenced by HB393, so the implication is that HB393 scheduled damages for care are applicable to all survivors over the age of 65 regardless of health status.

The phraseology of HB393 can be segmented in order to understand how a damage claim would be constructed under its terms. The first phrase of the care-giver scheduled damages is “*If the deceased was not employed full time.*” The U.S. Department of Labor specifies full-time workers as those persons who usually work 35 hours or more (at all jobs combined) per week including those persons temporarily absent from work but who usually work at least 35 hours per week.³ The only Missouri reference to full-time work that we could find is in Missouri’s workers compensation law where it contemplates setting benefits by comparing or surveying wages in full-time jobs that require a minimum of 30 hours per week of work.⁴

The second phrase from the care-giver HB393 addition is “*and was at least fifty percent responsible for the care of one or more minors or disabled persons, or persons over sixty-five years of age.*” Again, HB393 does not distinguish the type of care provided, only the responsibility for the provision of care. It is this lack of specification that leads us to conclude that all survivors over the age of 65 would be covered by the scheduled damages for any amount of care they received from the decedent. Persons under age 18 are considered as minors in Missouri;⁵ and, “disabled persons” are undesignated with regards to their level of the physical or

³ http://www.bls.gov/opub/hom/homch1_c.htm

⁴ Missouri Statute 287.50 includes “If an employee is hired by the employer for less than the number of hours per week needed to be classified as a full-time or regular employee, benefits computed for purposes of this chapter for permanent partial disability, permanent total disability and death benefits shall be based upon the average weekly wage of a full-time or regular employee engaged by the employer to perform work of the same or similar nature and at the number of hours per week required by the employer to classify the employee as a full-time or regular employee, but such computation shall not be based on less than thirty hours per week.”

⁵ See for example Missouri Worker Compensation Statute 287.020.

Evaluating Damages Under HB 393

mental abilities. Disability is a general term that refers to any long- or short-term reduction of a person's activity as a result of an acute or chronic condition⁶ and it does not consider employment as a determining factor.⁷

The fourth and last care-giver phrase of HB393 is “*there shall be a rebuttable presumption that the value of the care provided, regardless of the number of persons cared for is equal to one hundred and ten percent of the state average weekly wage, as computed under section 287.250, RSMo.*” This phrase sets into the Missouri wrongful death law a presumptive element and value of loss for a jury to use when determining total damages to all survivors, i.e. the presumptive element of care damage is just one part of the jury's total damage verdict.⁸ The instruction to juries in Missouri for wrongful death damages are patterned by MAI 5.01:

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff [and decedent] sustained [and plaintiff is reasonably certain to sustain in the future] as a direct result of the fatal injury to (insert name of decedent). You must not consider grief or bereavement suffered by reason of the death.

Although 537.90 provides items defining wrongful death damages, the Missouri Supreme Court's Committee Review of MAI 5.01 last recommended that

The separate elements of damage are properly a matter for argument and are not and should not be listed in this damage instruction. During the instruction conference, the parties and the court should discuss (on the record) just what damages are supported by the evidence and properly can be argued to the jury. In this way, jury arguments can proceed without undue interruptions.⁹

⁶ This is the definition of the National Centers for Health Statistics (<http://www.cdc.gov/nchs/dataawh/nchsdefs/disability.htm>)

⁷ See for example Missouri Statute 208.146 which provides financial assistance to employed disabled persons.

⁸ For example, consider the death of a 35-year-old married homemaker in 2006 with three survivors: a 5-year-old child, a 35-year-old husband with a life expectancy of 40 more years, and a 66-year-old mother who has a life expectancy of 20 more years. From 2006 to 2019, damages include scheduled care-giver damages for the child and mother and other 537.90 existing damages for the child, mother, and husband. From 2020 to 2026, damages include scheduled care-giver damages for the mother and other existing 537.90 damages for the child, mother, and husband. From 2027 to 2036, existing 537.90 damages apply to the child and husband. From 2037 to 2046, damages include scheduled care-giver damages for the husband and other existing 537.90 damages for the child and husband. And lastly, from 2037 to the normal life expectancy of the decedent, existing 537.90 damages apply to the child.

⁹ Supreme Court of Missouri, en banc, in re: Revisions and Additions to MAI-Civil, August 28, 2001.

Evaluating Damages Under HB 393

With the schedule damages of HB393, some change to MAI 5.01 might be necessary in order to contemplate the rebuttable presumption regarding the value of care provided (and the pecuniary losses suffered by reason of the death of a child). Regarding presumptions, the Missouri Supreme Court has quoted that

The court must not state as a presumption of law that which is a matter for the jury's determination, and a requested instruction of that nature is properly refused; and so it must not state the strength of a presumption of fact and the amount of proof necessary to overcome it.¹⁰

The Missouri Supreme Court has also stated that

To say, however, in an instruction to a jury, in the case of a rebuttable presumption, and when evidence has been introduced upon the question, that 'the law presumes' so and so, and that such presumption 'must be overcome' or 'overthrown' by evidence, is sometimes useless, sometimes prejudicial, and always illogical.¹¹

Since the scheduled damages presented by HB393 are presumptions of law, how those rebuttable presumption will be incorporated into MAI, if at all, must be decided before the enactment of HB393 on August 28, 2005. While it might be straightforward to stay with “the separate elements of damage (as being) properly a matter for argument,” the presumption of specific damage amounts by statute complicates that decision.

The “*state average weekly wage, as computed under section 287.250, RSMo.*” is published by the Missouri Department of Labor and Industrial Relations and from July 1, 2004 through June 30, 2005 it is set to \$643.72.¹² One hundred and ten percent of the state average weekly wage is \$708.09; and, multiplying by 52 weeks in a year results in the schedule value of care as \$36,821 annually.

There are several example ways that we can empirically put the scheduled value of care into perspective. The maximum time-amount of care that a decedent could provide would be

¹⁰ *Ross v. Pendergast*, 182 S.W.2d 307 (Mo. 1944).

¹¹ *State ex rel. Detroit Fire & Marine Ins. Co. v. Ellison*, 187 S.W. 23 (Mo. 1916).

¹² http://www.dolir.mo.gov/wc/SAWW_Info.htm

Evaluating Damages Under HB 393

related to each hour they are not asleep or personally caring for themselves. According to average time-use data for persons ages 18 & over in the United States, those weekly sleeping and personal care hours are 65.2 for males and 68.9 for females.¹³ Assuming a maximum of 100 care hours per week and 51 weeks of care per year (one week respite), the hourly scheduled value of care would be \$7.36. In comparison, the median hourly earnings of child care workers in Missouri were \$7.68 in 2003.¹⁴ Regarding married females that are not disabled and not in the labor force that have children under the age of 13 living at home, time diary data reveals 91.6 weekly average hours of time use that could be construed as providing care.¹⁵ At that level of care provided, the hourly schedule damage rate computes to \$7.73 per hour which is proximate to the Missouri median child care worker earnings rate. The scheduled care damages for married females that work part-time would be the same as the scheduled damages for married females that do not work. According to time diary data, those part-time employed married females with children under 13 allocate 73.9 weekly hours of time to activities that could be construed as care-related services in the home and 18 hours weekly hours of work at a job.¹⁶ For those mothers, the average value of scheduled care would be \$9.58 per hour and they also add 18 weekly hours of income to the family which would also be considered an element of wrongful death pecuniary losses to survivors. Lastly, retired females (males) spend a total of 79.4 (71.4) weekly hours of time to activities that could be construed as care-related services (household production, caring

¹³ *The Dollar Value of a Day, 2003 Valuation*, tables 73 and 82. Expectancy Data (2005), <http://ExpectancyData.com>.

¹⁴ http://www.bls.gov/oes/current/oes_mo.htm

¹⁵ Ibid note 12, table 35. These hours associate with household production, caring and helping, and secondary child care during the hours that the mother and children are awake. These categories of time use are illustrative, not definitive, of time-use categories that could be considered as providing care. Those categories of time use also do not prohibit other damages as occurring during those hours. For example, while a mother is watching-over her child at play she could also be performing non-care services for her husband.

¹⁶ Ibid note 12, table 32.

Evaluating Damages Under HB 393

and helping, and other waking hours with family members)¹⁷ computing to an hourly scheduled value of \$8.92 (\$9.92). While the above empirical examples are not precise estimates of the hourly value of scheduled care, they point out that scheduling damages at a fixed amount, regardless of the demographic of the decedent or the amount of care they provided and to whom, will produce different valuations of the care provided by decedents.

In Table 1, we show the present discounted value of \$36,821 in schedule care damages for a variety of future years and net discount rates. A precise calculation of loss would consider the joint probabilities of the survivor and decedent(s) living. The effect of discounting becomes noticeable the longer the number of years of loss. Currently, 10-year interest rates are averaging 4.05% for taxable U.S. Treasuries and 3.77% for non-taxable municipal bonds.¹⁸ The growth in recent wages and salaries has averaged 2.4% for all private industry workers.¹⁹ These current growth and discount rates currently point to a 1.5% net discount rate for wages and salaries.

Table 1. 2004-2005 Value of Scheduled Care (\$36,821 per year) by Future Years and Net Discount Rate

Example Present Values		Net Discount Rate (Interest minus Growth)			
		0.00%	1.0%	2.0%	3.0%
Years of Loss	5	\$184,104	\$178,707	\$173,553	\$168,628
	10	\$368,208	\$348,741	\$330,746	\$314,089
	15	\$552,312	\$510,522	\$473,120	\$439,564
	20	\$736,416	\$664,451	\$602,073	\$547,800
	25	\$920,520	\$810,910	\$718,869	\$641,166
	30	\$1,104,624	\$950,260	\$824,655	\$721,704
	35	\$1,288,727	\$1,082,847	\$920,469	\$791,176
	40	\$1,472,831	\$1,208,999	\$1,007,250	\$851,104
	45	\$1,656,935	\$1,329,028	\$1,085,851	\$902,798
	50	\$1,841,039	\$1,443,232	\$1,157,042	\$947,390
	55	\$2,025,143	\$1,551,893	\$1,221,522	\$985,855
	60	\$2,209,247	\$1,655,280	\$1,279,923	\$1,019,036

¹⁷ Ibid note 12, table 39.

¹⁸ <http://www.bloomberg.com/markets/rates/index.html>

¹⁹ <http://www.bls.gov>

Death of a Minor

HB393 supplements the Missouri's wrongful death statute, 537.090, in order to schedule the annual pecuniary losses for the deaths minors by stating:

If the deceased is under the age of eighteen, there shall be a rebuttable presumption that the annual pecuniary losses suffered by reason of the death shall be calculated based on the annual income of the deceased's parents, provided that if the deceased has only one parent earning income, then the calculation shall be based on such income, but if the deceased had two parents earning income, then the calculation shall be based on the average of the two incomes.

We refer to this addition to 537.090 by HB393 as the scheduled damages for the death of a minor.

Missouri case law interpreting Missouri's wrongful death statute 537.090 provides guidance regarding the death of a child. When parents bring a WD action for their minor child's death and seek pecuniary damages,

The measure of damages and the amount of the verdict in an action for wrongful death of a minor inherently involves some element of speculation and intangibles. An award is not based on direct, positive evidence but upon probabilities which the jury must reasonably find. The jury has an extraordinarily wide discretion in determining the amount of recovery in such wrongful death cases. The probabilities depend upon the child's age, condition, health, mentality, personality and the parent's ages and circumstances. In cases of this kind the award of damages can rest only on considerations of the most general character and much must be left to the common sense of the jury." *Cobb v. State Sec. Ins. Co.*, 576 S.W.2d 726 (Mo. 1979)

"The test of the right of recovery ... is the reasonable probability of pecuniary benefit from the continued life of the deceased (*Weast v. Festus Flying Service, Inc.*, 680 S.W.2d 262 (Mo. App. 1984)). In computing the loss of consortium for the loss of a parent for a child, or the loss of a child for a parent, factors such as the physical, emotional, and psychological relationship between the parent and child must be considered (*Lopez v. Three Rivers Elec. Coop.*, 92 S.W.3d 165 (Mo. App. 2002)).

Unfortunately, the language of HB393 related to the presumed damages involving the death of a child leaves open two or more interpretations that will require deliberation before the

Evaluating Damages Under HB 393

enactment of HB393 on August 28, 2005. On the face value of the language in HB393, annual pecuniary loss to the parents is simply based on their income. If the parents had one income of \$100,000 per year, the annual pecuniary loss due to the death of their minor child is \$100,000, presumably for their parents' remaining life expectancy. Any allowable non-pecuniary losses would be added by the jury to the presumed lifetime amount.

A second interpretation of the language of HB393 could be that the jury, when calculating annual pecuniary loss, should presume that the earnings of the child would equal the earnings of the parent. Therefore, if the parents had one income of \$100,000 per year, the annual pecuniary loss due should be calculated based on the presumption that the child would have earnings of \$100,000 and the jury should determine the probability of pecuniary benefit from the \$100,000 of their child's expected earnings. In this interpretation, all currently considered pecuniary losses under the string of damage items in 537.90 would be preserved along with any allowable non-pecuniary losses. The determination of a child's probable earning capacity is contained in Missouri case law. For example, in *Coffman v. St. Louis-San Francisco Railway Company*, 378 S.W.2d 583 (Mo. 1964), the Missouri Supreme Court gave a thorough account of the determining the reasonable estimate of the lost earning capacity of a minor based upon the "schoolmindedness" of the plaintiff's family, the intentions of the parents to send the plaintiff to college, the educational attainment of siblings and parents, and the average earnings of persons by level of education attained. Because the process of determining the likely earnings of children has been thoroughly reviewed by the Missouri courts, it is unclear why the Missouri legislature choose to defer to the earnings of parents if its intent was to pattern damages under this interpretation of the damages due to the death of a child—which leads us back to the first

Evaluating Damages Under HB 393

offered interpretation that all pecuniary loss is equal to the parents' income for their remainder of their lifetime.

Periodic Payments of Future Medical Costs

HB393 supplements the Missouri's wrongful death statute, 538.220, in order to specify the calculation of a future medical periodic payment schedule in the cases of improper medical care. Untouched by HB393 are sections 1, 3, 4, and 5 of 538.220 and HB393 adds a part 6 to 538.220. The language in parts 2 (additions are italicized) and 6 of 538.220 now are

2. At the request of any party to such action made prior to the entry of judgment, the court shall include in the judgment a requirement that future damages be paid in whole or in part in periodic or installment payments if the total award of damages in the action exceeds one hundred thousand dollars. Any judgment ordering such periodic or installment payments shall specify *a future medical periodic payment schedule, which shall include the recipient, the amount of each payment, the interval between payments, and the number of payments. The duration of the future medical payment schedule shall be for a period of time equal to the life expectancy of the person to whom such services were rendered, as determined by the court, based solely on the evidence of such life expectancy presented by the plaintiff at trial. The amount of each of the future medical periodic payments shall be determined by dividing the total amount of future medical damages by the number of future medical periodic payments. The court shall apply interest on such future periodic payments at a per annum interest rate no greater than the coupon issue yield equivalent, as determined by the Federal Reserve Board, of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The judgment shall state the applicable interest rate.* The parties shall be afforded the opportunity to agree on the manner of payment of future damages, including the rate of interest, if any, to be applied, subject to court approval. However, in the event the parties cannot agree, the unresolved issues shall be submitted to the court for resolution, either with or without a post-trial evidentiary hearing which may be called at the request of any party or the court. If a defendant makes the request for payment pursuant to this section, such request shall be binding only as to such defendant and shall not apply to or bind any other defendant.

6. *Nothing in this section shall prevent the parties from contracting and agreeing to settle and resolve the claim for future damages. If such an agreement is reached by the parties, the future periodic payment schedule shall not apply.*

Before HB393, if the plaintiff and defendant could not agree to the periodic payment schedule for future damages, the unresolved issues were decided in a post-trial evidentiary hearing. At those hearings, the plaintiff, defendant, the court, and sometimes a structured settlement company works with the present value of the damage award given by the jury and

Evaluating Damages Under HB 393

together they try to work out a payment schedule that equals, in present value terms, the present value of the damage award given by the jury as it is required to do under statute 538.215.

Usually, the unresolved issues amount to whether the present value of the structured payments are equal to the present value of the damage award given by the jury, and as economists, we are frequently asked to our opinion regarding the equalization of those two amounts. In our experience when working with reputable structured settlement companies, an equitable representation of periodic payments is usually quickly arrived at.

HB393 preserves the post-trial evidentiary hearing but adds a convoluted procedure of calculating the future medical periodic payment schedule as follows:

- 1) The duration of the schedule is equal to the life expectancy of the plaintiff determined solely on the evidence of life expectancy presented by the plaintiff at trial. This means that for however long the plaintiff argues he or she will likely live, the future medical damages awarded will be divided by that number of years to arrive at the scheduled payment and then those payments are paid over that number of plaintiff argued life expectancy years. The most obvious problem with this new procedure is that the jury in awarding future medical costs likely balanced the plaintiff's and defendant's arguments as to life expectancy in arriving at their award of future medical damages. For example, suppose the plaintiff argued \$3,000,000 of future medical damages for 30 years of life expectancy while the defendant argued \$1,000,000 of future medical damages for 10 years of life expectancy. If the jury split the plaintiff's and defendant's arguments at \$2,000,000 of future life care costs, the annual payment would be $\$2,000,000 \div 30 = \$66,667$ when in fact both sides agreed that life care costs amount to \$100,000 per year!

Evaluating Damages Under HB 393

- 2) A second catastrophic problem with the HB393 schedule calculation method is that it fails to realize that the total awarded future medical damages, per statute 538.215, must be expressed by the trier of fact at present value. It is without economic (or medical) sense to divide a total present value amount of future medical damages by the number of remaining years to live to arrive at the needed periodic amounts to pay for medical expenses as required. The present value of future medical damage does not have a linear relationship to required annual medical expenditures. Life care plans are typically front-heavy or back-heavy in their cost, i.e. the bulk of cost is need upfront or as age progresses the need for medical care progresses creating a back-heavy plan. If the life care plan is front-heavy, the plaintiff will not have enough funds to pay for currently needed medical expenditures. If back-heavy, the plaintiff could be oppositely overcompensated.
- 3) Once the payment schedule is determined, the court is supposed to apply under HB393 simple interest to the future periodic payments using a rate no greater than the last auction of fifty-two week United States Treasury bills. Given that the total future medical damages are expressed in present value, it is without economic sense to apply simple interest to the period payments calculated from medical costs calculated at present value using compound growth and interest rates.

The predicted response to HB393 additions to Missouri statute 538.220 is chaos because HB393 adds undesirable strategic behavior by plaintiffs and defendants to evidence presented pre-and post-trial regarding future medical costs.

Consider the situation where at trial the plaintiff presents the undisputed evidence that the present value of future medical costs is \$300,000 calculated as \$10,000 per year for 30 years and

Evaluating Damages Under HB 393

that medical costs will grow at 5% per year and the appropriate discount rate is 5% per year (i.e. growth in medical costs offset the discount rate). Absent rebuttal from the defendant and the determination of defendant's liability by the jury, the jury awards \$300,000 of present value future medical expenses. Under the province of the deliberations of the jury, the plaintiff will incur a total of \$664,388 of future medical costs (\$10,000 per year with 5% growth). Post-trial, the defendant requests a periodic payment schedule according to the newly added HB393 calculation. The court takes the \$300,000 future medical damage, divides by 30 years to get scheduled payments of \$10,000 per year, and then adds 3% simple interest (the last 1-year Treasury Bill auction rate) to arrive at \$430,500 in total future necessary payments to the plaintiff. The defendant agrees to make those payments using a bonded structured settlement company which will give defendant say 5% return on an annuity to fund those future payments. The defendant pays the structured settlement company \$214,527 to fund the future \$430,500 in payments to plaintiff. Hence, the overall effect of HB393 is that the defendant escapes \$85,473 in current damage payments.

Assuming that the plaintiff anticipates the strategic behavior of the defendant in the above example, at trial the plaintiff shows total future life care costs as \$664,388 (\$10,000 per year with 5% growth) and discounts to present value at 3% simple for a present value figure of \$443,866. The jury awards the \$443,866 in present value. The scheduled value of care is now \$14,796 annually ($\$443,866 \div 30$ years). The court applies the 3% simple interest to the payments to arrive at \$636,947 in total payments to the plaintiff. The defendant obtains a structured settlement to pay those future costs at a cost of 5% interest for a present value cost to the defendant of \$317,404.

Evaluating Damages Under HB 393

The above example points to the fair, neutral present value cost of \$300,000 for future medical damages. Absent HB393, the plaintiff and defendant would enter into a structured settlement with a present value of \$300,000 with any number of future payment amounts and dates. However, with HB393 strategic behavior is introduced based upon the knowledge of the effects of HB393 on damage payments. If the plaintiff is ignorant of the effects, the defendant benefits by escaping \$85,473 in current damage payments which is 28% of the neutral present value amount; if the plaintiff anticipates the defendant demanding a HB393 calculation, he or she anticipates that result at trial and post-trial has a 5.8% gain in damages.