

From the Witness Stand

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Personal Injury and Economic Loss

Elements of Economic Loss

As with any damages matter, the three main issues to be proven in an economic impairment complaint are the defendant's liability, causation, and economic loss (damages). Generally, the plaintiff needs to establish liability on the part of the defendant. Experts engaged to testify as to causation (that the incident was the direct or proximate cause of the plaintiff's injury) generally include one or more physicians.

Physicians or other healthcare providers will generally provide a *life care plan* for the expected current costs of future medical care and medical commodity needs. In many cases, the life care plan is the largest component of the economic loss sustained by the plaintiff.

When the injury does not require significant future medical services or commodities, past and future lost earnings will typically constitute the largest element of the economic loss calculation. The calculation is essentially defined as the difference between the earnings plaintiff would have earned "but for" his/her injury and the earnings that can now be reasonably expected in light of the injury. In most cases, the testimony and report of a vocational and/or economic expert will be required.

Loss of personal services may also be an element in an economic loss analysis. This calculation estimates the value of the personal services rendered by the injured individual to his/her family. Typically, these include such tasks as lawn care, household cleaning, child-care, job training (to earn replacement income), rehabilitation, home remodeling, transportation needs, and other related items.

Life Care Plans

The economic loss expert needs to study the medical services and medical commodities life care plan, develop a methodology to estimate future costs, and bring those costs to a present value. The Bureau of Labor Statistics (BLS) provides historical monthly medical cost increases or decreases at <http://data.bls.gov>. The BLS data is available over many time periods. If an economic loss expert decides to use the data as a foundation for future medical cost growth, the rationale for the time period used will need to be disclosed and defended in the expert's report.

The composition of the data provided by the BLS is shown below:

Medical care commodities

Prescription drugs and medical supplies
Nonprescription drugs and medical supplies
Internal and respiratory over-the-counter drugs
Nonprescription medical equipment and supplies

Medical care services

Professional services
Physicians' services
Dental services
Eyeglasses and eye care
Services by other medical professionals
Hospital and related services
Hospital services
Inpatient hospital services
Outpatient hospital services
Nursing home and adult day care services
Health Insurance¹

Generally, the life care plan will include options of "Home Care" or "Facility Care" as the plaintiff ages. Alternative life care plan future costs will be required for costs including Home Care and Facility Care alternatives.

Past and Future Lost Earnings

Past and future lost earnings calculations



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and methods are probably the subject of more jurisdictional differences than any other element of an economic loss analysis. The actual calculation is the present value of the projected “but for” earnings less the projected actual earnings. For these purposes “earnings” includes not only compensation but also the employer paid portion of the employee’s benefits.

The critical dates in the past and future lost earnings calculation are:

- Date of Injury (DOI)
- Date of Birth (DOB)
- Date to begin discounting (usually trial date or other date determined by counsel)
- Date of estimated retirement
- Estimated Date of death (DOD)

To “grow” the “but for” earnings, the economic loss expert must determine the composition of future raises. There are generally two components in a raise: Cost of Living (COLA) and Productivity (Merit). Future earnings capacity must be considered. For example, if a new doctor is employed as a medical intern and gets injured, his future earnings capacity would not be reflected in his or her prior compensation experience.

The areas of jurisdictional difference involve the growth rate and discount rate. Some jurisdictions apply an offset method. One method allows the earnings to be grown at the productivity rate with the COLA adjustment and discount rate assumed to offset each other. Some methods assume a total offset of the growth rate and the discount rate. Other jurisdictions allow the growth rate to be based on productivity and the COLA rate reduces the selected discount rate.

The Federal government provides many publications to assist in the determination of “but for” earnings: BLS Annual Demographic Survey, BLS Occupational Handbook, and Economic Report to the President. Some state workforce agencies also have income and economic data within their jurisdictions. Sources of benefits information include the National Compensation Survey from the BLS, the employee handbook (i.e., provided by the employer to the employee), and benefits statements from the employer or union. Care must be employed in using some source material. For example, do not prepare a separate “lost retirement benefits” schedule if those benefits are already included in the source material above.

A plaintiff’s work life expectancy is the expected number of years of work remaining but for the injury, and includes expected periods of inactivity. The retirement date (Separation from Service) is the number of years remaining from the age at injury until the expected retirement of the injured party from their primary job. Various publications have produced studies discussing these time periods.

Lost personal services of the injured party may be estimated

from the “Dollar Value of a Day Table” published in 2004 by Expectancy Data, Shawnee Mission, KS. The economic loss expert needs to consider inflation in developing a loss analysis beyond the 2004 data. If the injured party has provided sufficient detail on their personal services activity, it may be possible to estimate the cost of lost services by calculating the replacement cost of those services, e.g. if the injured party cut the grass, how much would it cost to have a lawn care service cut the grass?

Mitigating Income

Mitigating income is income earned from alternative employment that the plaintiff has the capacity to perform based on their circumstances following the injury. The economic loss expert will generally rely on the report of the occupational or vocational expert as the foundation for these calculations.

Consider the following example: a warehouseman sustained a serious back injury in an automobile accident (not work related). He, as Plaintiff, asserted that he had looked for alternative employment, but had been unsuccessful. Defendant’s vocational expert reported that seated jobs such as a cashier at a movie theater or car wash would be appropriate, but determined the reason the Plaintiff was not hired was for lack of language skills that were not caused by his back injury. Plaintiff’s lost future earnings claim was for approximately \$1 million. Considering the mitigating income from earnings as a cashier, Defendant’s expert’s lost future earnings calculation yielded \$250,000. The case settled prior to trial for \$265,000.

Collateral Source Income

Collateral source income is income received by the injured party as a consequence of his/her injury. Most commonly, these payments are in the nature of health or disability payments. As articulated by the Illinois Supreme Court, “a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor.” *quoting, Restatement (Second) of Torts sect. 920A, Comment b, at 514 (1979).*² Collateral income does not reduce plaintiff’s economic losses of the plaintiff in the expert’s report. However, a collateral income calculation may be requested as a supplement to the economic loss calculations by counsel. This is usually done only as a settlement tactic.

Summary

Personal injury litigation is best pursued as a team effort. In calculating the economic losses sustained by the Plaintiff, the economic loss expert needs to understand the reports of other experts, develop a credible methodology, and consider the requirements of the local jurisdiction.

¹ The weights in the CPI do not include employer-paid health insurance premiums or tax-funded health care such as Medicare Part A and Medicaid.

² Arthur v. Catour, 345 Ill.App.3d 804, 808, 803 N.E.2d 647 (3d Dist.2004).

Testifying Financial Experts – Experts with Language, Too

The life of the testifying expert, especially that part of the life spent in the deponent’s seat or in the witness chair, is fast paced, challenging, terrifying, exhilarating, rewarding, and many more things that keep the testifying expert on his or her toes. The profession is not, however, dull, boring, mundane, humdrum, dreary, or monotonous.

Adjectives

The preceding paragraph is full of adjectives – words that,

according to Encarta, “qualify or describe a noun or pronoun.” Some adjectives are informative, but imprecise, as in the statement “slightly west of north.” In this phrase, the adjective “slightly” indicates that we might want to steer 350 degrees, but it also might lead us to steer 345 or 355 degrees – it is not a term of precision. Experienced experts do not say, or write, “about two dozen” if they mean twenty-three. They do not say “approximately one million dollars,” without including a footnote indicating the actual, calculated value.

The expert's job is to be neutral and unbiased. As a general rule, adjectives have little place in expert testimony or reports. A skilled attorney will quickly neutralize the adjective-loving expert by pointing out their imprecision, e.g., "Well, Mr. Witness, tell me exactly how small "slightly" is. You're actually guessing as to the size of (the noun or pronoun that is "slightly" different than in its unmodified state), aren't you? In fact, you do not know the exact (value, size, quantity, etc.), do you?"

In other instances, adjectives can be superfluous, as in the statement "the dress was very black." Black is an absolute, by definition it is not a color, but rather the absence of all light. Something cannot be any blacker than black, and the word "very" lends nothing to the statement.

By their nature, in their attempt to "qualify or describe," adjectives shade the meaning of the noun or pronoun they are chosen to modify. The user, speaker or writer, is often subconsciously, or consciously, trying to influence the opinion of the listener or reader by the chosen adjective.

Attempting to "shade the facts" (the noun or pronoun is, or should be, factual), could be construed as bias in favor of one side or the other (depending on which type of adjective was used), and it is conceivable that such modification could be characterized as advocacy, a kiss of death for the expert. Again, a skilled attorney will have a field day with the witness for whom the basic facts are, in and of themselves, not enough.

Adjectives are not the testifying expert's friend.

Accounting Terms

Many financial or economic experts are also accountants – and not just any accountants, but certified public accountants. With that appellation comes a body of professional knowledge, professional standards, a code of ethics, and terms of art that bear certain meaning.

SSARS (Statements on Standards for Accounting and Reviews Services) and SASs (Statements on Auditing Standards) guide CPAs in the performance of financial statement-related engagements. Those engagements, whether they be compilations, reviews, or audits, convey a certain level of performance, the application of certain procedures (or not), and a degree of reliability with respect to the results of those efforts

(i.e., the level of assurance offered by the accountant with respect to the financial statements examined).

Unfortunately, the lay public does not understand those distinctions and generally perceives accountants as doing only one, or both, of two things – "auditing" which in their minds certainly includes the identification of all embezzlement and employee theft, and the results of which "guarantee" that the financial statements are as unassailable as the Ten Commandments; and/or the preparation of tax returns. However, the financial statement standards do not generally apply to litigation engagements, business valuations, and/or damages calculations.

Consider the following statement excerpted from an actual expert's report in a lost profits dispute. The expert did the standard things one would do in determining lost revenue and the avoided costs associated with that revenue in arriving at his opinion of lost profits, but this is what he said in his expert report, "We *reviewed* [emphasis added] the Plaintiff's ... financial statements...."

This expert most likely will spend a long time in front of the jury explaining why he did not prepare all of the typical schedules nor apply all of the standard procedures associated with a review of a financial statements engagement. When the attorney is done with this witness, the jury is most likely to remember only all of the things he did not do – not his opinion of damages with respect to the allegations.

Do not expect your expert to use the words "compile," "compilation," "review," or "audit" in his or her testimony and/or expert report. Challenge them if they do, and be certain they have chosen their words with precision.

Conclusion

The responsibility of the trier of fact is to reach a decision on liability for, and then the magnitude of, damages. The job of the expert is to help them understand the complex issues involved in the damages component, or valuation issue, of the case; and to provide facts, information, illustrations, and examples that will educate them and assist them in their decision-making. The job is not to make that decision more difficult for them through the injudicious use of techno-speak, terms of art, or inappropriately chosen adjectives.

Help! I've Fallen and I Can't Get Up!

Papadopoulos vs. Fred Meyer Stores, C04-0102RSL, United States District Court for the Western District of Washington

In this 2006 "slip and fall" case, some interesting history of Plaintiff motivated Defendant to enter a motion in limine seeking to strike the testimony of Plaintiff's vocational rehabilitation expert and Plaintiff's damages expert. At the heart of the motion was that the expert's opinions were "...based on assumptions that are patently unreasonable and inconsistent with reality..." and should therefore be excluded as being "...pure speculation and conjecture..."

Plaintiff was a restaurateur, and primarily a cook by vocation. From 1990 through 1999, Plaintiff reported average earnings from self-employment of \$21,700; and wages of \$18,500 in 2000 as a restaurant cook. In 2000, Plaintiff filed bankruptcy, and reported no earnings at all between the date of the filing and the date of the accident (June 2003). However, eight months prior to the accident, Plaintiff was

found by the Washington State Department of Social and Health Services (DSHS) to be permanently disabled and his ability to work as a cook "severely limited." An Administrative Law Judge found that Plaintiff's "...combination of coronary artery disease and atherosclerotic heart disease fit the disability definition. His coronary diseases prevent him from doing any gainful activity, even the less stressful, mildest sort of employment."

Plaintiff's vocational rehabilitation expert opined that Plaintiff "...is totally and completely disabled from any and all employment, be it full or part-time, in any exertional level of employment..." Defendant's counsel noted that this description of Plaintiff's condition was very nearly identical to the finding of the DSHS eight months *prior* to the accident. The expert further opined that Plaintiff's

“...occupational and lifestyle functioning changed dramatically after the onset of the complications to his medical condition occasioned by the fall at Fred Meyer [Defendant].”

Plaintiff's counsel proposed the following hypothetical to this expert: “Assuming that Mr. Papadopoulos' pain and depression were under control (and he was otherwise medically released to return to work by his physicians), what position or positions could he undertake, what training would be required, and [what] wages would [it] be reasonable to assume he could earn?”

The expert concluded that Plaintiff could, hypothetically, return to work as a chef. Further, the expert opined that Plaintiff would “...gradually return to work over a 6 to 9 month basis...,” and during that time earn a salary of \$3,418.50 per month which was the mean of what “half of all chefs and head cooks earn” according to the *Washington Occupational Information System Occupational Summary*, would remain at that rate until “1 year,” and then advance to \$4,215 per month (the upper boundary of what half of all chefs and head cooks earned).

Plaintiff's damages expert, building on the rehabilitation expert's response to the hypothetical, opined that the present value of Plaintiff's lost earnings from the date of the injury to the date of his opinion (April 2006) were \$111,644; and that future lost earnings, i.e., through Plaintiff's remaining work life expectancy, were \$632,250.

Defendant's counsel's definition of “patently unreasonable and inconsistent with reality” was premised on a “... basic assumption of an annual salary more than twice his prior earnings is simply unreasonable on its face, particularly in light of the fact plaintiff had not worked at all for the two and a half years immediately prior to the accident.” Defendant moved to disallow the testimony of the experts.

The Court disagreed. In denying Defendant's motion regarding the testimony of the experts, it noted that “... A salary of just over 1 1/2 times the amount of Plaintiff's 1994 annual salary, however, does not rise to the level of ‘rampant speculation’, “ and “... that [the experts] have used reliable principles and methods to arrive at their calculations and have applied these principles and methods reliably to the facts of the case.”

On a second motion, the Court granted in part, and denied in part. Specifically, information about Plaintiff's preexisting medical condition was allowed. However, in a strict following of the *collateral source rule*, information about Plaintiff's disability payments was denied.

This case is a prime example of a well-executed team effort. Both experts stayed in the mainstream, utilized generally accepted treatises and procedures in arriving at their opinions, and the economist particularly correctly ignored collateral source income as mitigating earnings.

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