

LITIGATION

Are Future Earnings Claims Economic Mudslinging or Business Reality?

PERSONAL INJURY

BY JIM STAVROS

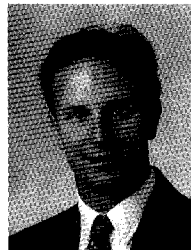
Special to the Legal

A construction worker recently sued for more than a million dollars in lost lifetime earnings due to a personal injury. His claim was based on estimated pre-injury earnings that had been calculated by averaging published full-time yearly salary amounts for several different blue collar professions, ignoring this individual's actual earnings history in only one industry.

On the surface, this methodology and calculation appeared reasonable assuming actual earnings approximated industry averages. But on close examination the claim looked quite the opposite.

The worker had been employed on a very part-time basis in the construction industry earning significantly less than the stated published amounts. More significantly, he acquired a full-time post-injury sedentary position at which he earned far more than if he had worked full-time in his construction job.

Common sense would indicate that the worker had suffered no future economic loss whatsoever, but that didn't stop him from claiming a substantial amount from the defendant.



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Nor has the absence of common sense or business reality stopped many others from launching exaggerated claims.

The past decade has seen a particular rise in personal injury claims. Many are obviously legitimate and founded on reasonable grounds, but many are not. Emboldened by some highly publicized large settlements, some plaintiffs may view a personal injury claim as a potential lottery win.

A substantial component of these large, often multi-million dollar personal injury claims can involve lost earnings or economic damages. Unlike some other aspects of a claim that are difficult to quantify, and therefore more prone to the subjective response of juries—such as pain and suffering, including trauma and emotional stress—the financial component is far more objective.

With the assistance of forensic accountants, economists and vocational

experts, economic losses can be identified and estimated through methods that are verifiable. It should be a straightforward process. Unfortunately, that's not always what happens because for some experts there is the challenge of differentiating between the claimant's actual results and the results a claimant would like to achieve.

ECONOMIC FACTS, NOT FICTION

Financial experts are too often advocational or just plain sloppy when developing economic loss models. This tends to occur because they ignore actual results and choose the facts or statistics that best fit their position without being objective.

As Sherlock Holmes once cautioned, "Insensibly one begins to twist facts to suit theories instead of theories to suit facts." Consequently, their pre- and post-injury earnings estimates—and accordingly, the loss estimate—often lack "business reality" and instead overly rely on statistics or the use of earnings data in a position or industry the claimant never experienced.

To avoid this pitfall, financial experts should use actual financial data such as tax returns and W-2 tax forms, employment files, insurance reports, legal pleadings, deposition testimony, among other documents and information, to determine a pre- and post-injury earnings base.

Important components of a pre-injury earnings base include:

- Consideration of historical gross earnings for a relevant period.
- Length of time at the same position with the same employer and within the same industry.
- Wage or salary growth trends.
- Corporate, industry and economic trends.
- Opportunity for growth within the company.

Experts should also corroborate financial and other data through depositions, interrogatories and insurance forms, a process that can highlight discrepancies or inconsistencies.

The use of statistical information in estimating pre- and post-injury income is used more or less in certain cases and situations. For example, statistics are heavily relied upon in wrongful death cases because actual data may not exist.

A common mistake by a financial expert is to base the claimant's pre-injury earnings on the last (often highest) year of earnings versus an average of several prior years; or to base the pre-injury earnings on "annualized" earnings—earnings through sporadic employment that are estimated over a 12-month period.

This approach may not be necessarily incorrect, however, the reasons should be fully explained in the report.

An economic damage calculation for individuals who are self-employed or are majority shareholders in a business is more complex. The financial diminution of the company, lower profits and personal compensation must be analyzed to determine the reasons for the decline.

An individual may assert the diminution was due to his or her injury but documents may indicate other reasons for the decline, such as:

- Increased competition.
- Poor economic conditions.
- Loss of important suppliers.
- Loss of key sales staff.

● Loss of customers, among many other possible factors.

For example, an injury may be incidental to the economic decline of a company but the individual's compensation (and claim for lost earnings) is tied directly to the performance of the company. Accordingly, a financial investigation should be performed on the company's records to determine the "real" reason for a company's economic decline and whether the individual's injury impacted this decline.

EARNINGS GROWTH

Actual growth in salary should be the foundation for growing earnings. Other factors should be considered, including the economy, the state of the industry, management, new technology, union agreements and company performance.

Experts often rely on general federal government statistics of worker productivity to estimate lost earnings growth. These statistics should be used with caution because they are general and the data may not apply to the claimant or industry in question.

The Pennsylvania *Kaczkowski v. Bolubasz* case sets forth the "offset method" by ignoring inflation for earnings growth and not discounting future earnings to the present value.

The growth of inflation and reduction of earnings through discounting are, in theory, supposed to offset each other. By ignoring inflation and discounting, fewer assumptions about the future are required (rates of inflation, discount rates, investment type and interest rates), at least in Pennsylvania.

This case does not hold true in other

states like New Jersey where inflation and discounting should be considered in a personal injury economic model.

Undoubtedly, the debate about discounting future earnings will be argued state by state.

LIFE, PARTICIPATION AND EMPLOYMENT TABLES

Determining accurate projections for a plaintiff's future employment until retirement, traditionally at age 65, is not without risks. There is the possibility that an individual might become unemployed, disabled, choose to leave the work force for a period of time, or die before retirement.

The U.S. Department of Labor provides life expectancy, labor force participation and employment statistics that change every year, some of which are based on age, sex and race. These statistics are collectively known as the Life, Participation and Employment Tables, or LPE.

Experts should also corroborate financial and other data through depositions, interrogatories and insurance forms, a process that can highlight discrepancies or inconsistencies.

LPE statistics assess the general probability of these risks to an individual (for example, the LPE statistic for a 25-year old white male is .8832; for a 65-year old is .1884).

The annual earnings loss is multiplied by LPE,

which represents the overall probability that this individual will achieve these earnings in a given year, reducing the estimate for future earnings. They are applicable for a claimant whose injury keeps him or her out of work, temporarily or permanently.

Some expert reports use incorrect tables in their economic models or ignore LPE statistics all together, which results in an overstatement of estimated lost earnings. It is common sense that an individual's health, life expectancy and

desire to be in the work force will change over time. In fact, the claimant's condition as being injured and disabled to work is a ratification for the use of LPE statistics.

Although LPE is a general statistic applied to a specific individual, its application is a reality check that makes sense.

POST-INJURY EARNINGS

Post-injury earnings, if not already defined by actual earnings, should be estimated within the guidelines of a medical and vocational evaluation where possible.

A key determination is whether the injury is temporary or permanent and if the impairment is total or partial. In general, the more serious and permanent the injury, the more a financial expert must rely on statistics, industry data, research and the opinions of other experts because "actual earnings" may be absent.

A frequently posed question is, "What is the claimant doing now compared to what can they do to mitigate the loss?"

If a claimant is deemed able to work, perhaps in a sedentary position or reduced capacity, but is not working, the questions change: "Is there a lack of opportunity to get a job? Or a lack of desire?"

Sometimes there is a financial disincentive to work because the receipt

of non-taxable worker's compensation benefits may approximate taxable pre-injury earnings. It may be difficult to move an injured plaintiff off worker's compensation and into another job that typically has earnings less than worker's compensation.

If a claimant has been cleared by a medical/vocational expert to work but continues to collect benefits and chooses not to work, this can create a difficult scenario for projecting an earnings loss. The question arises as to whether there is an actual loss.

In today's current economic climate finding a job may not be overly formidable. Human nature and experience with these situations indicate some claimants will continue to collect insurance benefits for as long as possible before returning—some may have to be forced—to work.

CONCLUSION

An estimate of an earnings loss should be based on the facts and the actual employment history of the plaintiff as much as possible and should acknowledge the inherent risks of "uninterrupted" future earnings (LPE statistics)—that's business reality.

Statistics should be used objectively and sparingly, except in situations—such as a wrongful death claim—where they usually play an extensive role.

Also, statistics should not be used in place of a claimant's actual historical

data unless there is good reason.

Most importantly, experts should not be advocates. Unfortunately, they can be viewed this way if they omit or ignore key documents, information and statistics which should be considered, or choose a position which is economically untenable and lacks business reality.

While lawyers should be advocates for their clients; experts should be independent and objective. Economic mudslinging—the preparation of unreasonable and unrealistic loss earnings projections—can create inflated economic damage award expectations for legitimate claimants.

Claims must be supportable and reasonable. While a claimant will always be optimistic about "what could have been," there must be a basis for these future plans and therefore, for what could have been.

Sir Winston Churchill once said, "I am an optimist. It does not seem to much use to be anything else." But even Churchill would agree that while personal injury claimants could be optimistic about their economic damages, they must also be realistic.

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