

# National Litigation Consultants' Review

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## The Use of Statistics in Expert Reports – Go Figure

By James A. Stavros, CPA, CFF

**R**esearch shows that the use of statistics by experts has surged in recent years and the reasons vary. One reason was the Supreme Court's 1993 decision in *Daubert v. Merrell Dow*, which clarified the standard for admissibility of scientific evidence. *Daubert* left no doubt that statistics are generally admissible. Other reasons include the publication of many "how to" books for lawyers, experts and judges on calculating damages, where the use of statistics are discussed in specific cases. The use of statistics in expert reports is here to stay.

However, when to use statistics and the selection of the right statistic is a matter of judgment and subjectivity. The role of a damages expert is to be objective in expressing an opinion on damages; the use of a certain statistics can be very subjective, and therein lies the danger. Many experts are using statistics that simply are not objective based on the facts of the case and use of them or sometimes the non-use of them is incorrect. Triers of fact and the public are weary of the sometimes dubious use of statistics.

Mark Twain once said, "There are three types of lies: lies, damn lies, and statistics." I'm sure you may have seen this quote in the past, but its timelessness is striking; we are still skeptical of using statistics today.

The use of what passes as a statistic to be used in a case is always an issue. For example, can you rely on a survey of 100 people taken in New Mexico as opposed to a U.S. Department of Labor study survey of 100,000 people across the country? The quality of data or statistic can always be debated. As a result, statistics can become highly manipulated by choosing the one that gives you the lowest or highest number, and ultimately undermine objectivity.

The decision to use a statistic in lieu of actual data is an issue I want to discuss. I have seen too many times where an expert uses statistics instead of actual data in a loss model.

Objectivity is key. Experts have many decisions to make in preparing an economic loss model. "Do I use the actual data of the claimant to determine a future earnings loss or earnings statistics for their statistical cohort?" I see this choice all the time in calculating damages in personal injury/ wrongful death cases. A 20 or more year earning history of an individual will be ignored by some experts, only to use an average earnings statistic to predict the future. Many economists take this approach and they explain

it as the concept of "earning capacity" or "earning potential" as being the measure of damages, whereas it is the theoretical capacity that is lost. True, but it is left to the expert to determine how the claimant's earning capacity is best predicted: using actual earnings history of the claimant, which establishes specific patterns or general statistics.

Now in child death cases the use of statistics to determine lost earnings, fringe benefits, personal maintenance, wage growth, etc. is a given, there is no actual history. But the overuse of statistics, especially when there is a long history of actual data, is not being objective. How about when a claimant has only a few years of earnings history, do you use statistics or actual data to determine the future? This question can be answered with a combination of loss scenarios using both actual results and perhaps general earnings statistics, as the facts dictate. It also takes judgment; the expert must ask the questions of what method should be used to most accurately and reliably predict the future?

I have seen too many times, overestimating the damages, the over-use of statistics to determine a loss when actual data and information of the claimant are available. The use of statistics in expert reports is here to stay and have been around for some time. Interestingly, jurors since Twain's time remain skeptical about their reliability and overuse. Nothing could be truer. The expert's use of statistics to determine damages is just one tool they have in determining damages. While the decision to use a statistic, the right statistic, is subjective, it must be done with the overriding goal of objectivity in calculating damages.

I will leave you with one thought, based on a quote from former United States Supreme Court Justice, Louis Brandeis, "I abhor averages. I like the individual case. A man may have six meals one day and none the next, making an average of three meals per day, but that is not a good way to live." 

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