



Issues in assessing future lost earning capacity

A look at situations where assessment of lost earning capacity is not straightforward

By JAMES A. MILLS

Oftentimes an economist is able to readily discern the economic damages in a case. If a career plumbing employee has been profoundly injured and can no longer work, the damages calculation will be relatively straightforward. The plaintiff will usually have several years of pre-injury W-2 forms to evidence their earnings. If they were part of a union, documentation can be obtained with which to value their fringe benefits. Since they are profoundly injured it is clear to an average person that there will be no mitigating earnings.

But what about the case where the injury is less severe? How can the damages be ascertained – if there is any loss at all? In cases where the damages are less obvious, the economist or accountant will often need to work in concert with other experts in order to assess the damages.

Before discussing examples of such situations, it is important to define the damages which are being estimated. In this discussion the concept is lost earning capacity. California jury instructions, in CACI 3903D (Judicial Council of California, Civil Jury Instructions, Fall 2015 Edition) state: “The loss of [name of plaintiff]’s ability to earn money.” 3903D further states “To recover damages for the loss of the ability to earn money as a result of the injury, [name of plaintiff] must prove the reasonable value of that loss to [him/her]. It is not necessary that [he/she] have a work history.”

Under Sources and Authority for this instruction, *Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374 instructs “The test [for lost earning capacity] is not

what the plaintiff would have earned in the future but what she could have earned...” (emphasis added). Having defined earning capacity, the examples below illustrate how capacity is estimated in a variety of case settings.

The injured child with no working experience

Consider a child who experienced shoulder dystocia during birth. As a result she had experienced a winging effect with her scapula on one side. She had no brain damage or reduction in mental capacity. Since she was still a minor she had no pre-injury or post-injury earnings that could be used as a guide. In this case a vocational (rehabilitation) expert opined that, at all levels of education, this child would be excluded from certain types of employment due to her shoulder injury. This, in turn, would result in a percentage reduction in her future earning capacity.

There was no question that she would be able to attain any level of education that she would have been able to accomplish but for the injury. In addition, the rehabilitation expert showed that, with higher levels of education, the economic damages would diminish. This was because fewer occupations would involve physical work as the level of education increased. In this case the economist calculated the difference in earnings for each potential level of education (high school graduate, associate degree, etc.). It was then up to the jury to decide what the proper educational attainment level for this child would have been, but for her injuries, in order to choose the proper level of damages.

There are numerous situations wherein a child or young adult is injured

who has yet to establish a career and/or an earnings history. In many of these cases educational attainment data from the U.S. Census Bureau is a helpful guide for earning capacity figures. Here the economist may not need to rely on opinions from another expert. If it is clear that the child will never work, then the calculation is a matter of choosing the pre-injury range of educational attainment. In a case where the young person will still have a residual earning capacity, the economist will need input on what that is in order to complete the analysis. Generally this input will be from the vocational rehabilitation consultant.

Impaired earning capacity for the self-employed

• *The business partner*

If the injured person is a partner in their own business, there are several potential points of view from which to calculate the loss. The first question an economist may ask is who is claiming the loss: the person or the business entity? (Here we will only examine losses to the person.)

Consider first the partner who can no longer do the physical part of their business but can still perform all management functions. An example could be a landscaping company owner. Perhaps, pre-injury, the plaintiff met with clients to bid jobs, did bookkeeping and human resources functions, and performed on-site work. Now injured, a physician has opined that the physical work that the plaintiff used to do is beyond their safe post-injury restrictions. In this case the partner can hire someone to replace that physical labor they can no longer do.



The cost of the replacement labor (wages and benefits) would be a valid method of calculating the economic damages of the plaintiff.

The same could be done for the injured co-owner in a family restaurant. A mild traumatic brain injury has left the plaintiff forgetful, and sometimes unsafe. He gets in the car to run an errand and ends up several towns away without being able to explain why. He can go to the restaurant but simply cannot function in the job. As with the landscaping business, a replacement worker, in this case a restaurant manager, can be hired to replace what the plaintiff can no longer do. Again, the damages would be the wages and fringe benefits of the hired worker. It may be necessary for a vocational expert to opine as to exactly what tasks done by the injured co-owner must be replaced, as well as what the local wages would be for the replacement worker.

• **The sole proprietor**

Another situation for a self-employed person is someone who is no longer able to perform the job functions at all – management functions or physical labor. If records are available that demonstrate their pre-injury earning capacity, those can be relied upon. But those records are not always available. This does not mean that an earning capacity analysis cannot be completed. It may be wise, in a case like this, to hire a vocational rehabilitation expert to lay the foundation for the lost earning capacity damages. The vocational expert can interview the plaintiff to ascertain their pre-injury skills and experience. Then they can opine as to the local wages or earnings of persons with that skill set. From here the economist can perform the present value loss analysis.

Another example in which the impact of the injury is not readily obvious is the case of a cabinet maker who has lost a finger. It could be that the injured person would be able to return to their usual employment and suffer no future reduction in earning capacity. But what if the cabinet maker has an exposed nerve and will

require further surgeries? In this case it is difficult for an economist to estimate damages without additional input from other experts.

Can the plaintiff return to work in his usual occupation? If not now, will he be able to in the future? And if not at all, what can he do in the alternative to mitigate his losses? This is another case in which the input of a vocational rehabilitation expert will be of assistance. That person can work with medical experts to assess the probability of the exposed nerve being resolved, and what period of time that recovery will take. From there the rehabilitation expert can opine as to how long it will take for the plaintiff to return to pre-injury employment, or if he can't, what he can do in the alternative. Of course the rehabilitation expert can also opine on needed schooling or retraining (if it is needed) and the cost and length of time needed for such training. It is after these pieces are in place that the economist can estimate the damages associated with the injuries.

Estimating without a vocational rehab expert

There may be cases wherein an injured plaintiff has suffered a loss of earning capacity and a vocational rehabilitation expert is not deemed necessary by the attorney. If a construction worker is restricted in their movements, what is their loss of earning capacity? Suppose they can no longer lift their hands over their shoulders. If the construction job is analyzed by where the work is done relative to the worker's mobility, a loss of capacity could be estimated.

Assume that one-third of work is "low work," flooring, electrical outlets, etc.; one-third of the work is in front of you, framing wallboard, light switches, etc.; and one-third is "high," ceilings, light fixtures, etc. Under these assumptions one could conclude that if the worker cannot lift his arms above his shoulders, and is precluded from "high" work, they have lost one-third

(33 percent) of their earning capacity. There are some caveats here. What if work is "low," but involves reaching (for example, working under a sink)? Will the injured worker be able to do that work with their injury? Can the person do "high" work if they are on scaffolding or a ladder? Importantly, if the worker can only do two-thirds of the work, what employer is going to hire them? In other words, is a 33 percent post-injury capacity reduction really a 100 percent capacity reduction because the worker won't be able to compete with uninjured workers? An economist can make calculations based on assumptions given by the attorney who hires them, but it is outside of their area of expertise to opine on questions like this.

Was a promotion on the horizon?

Then there is the matter of the injured or deceased person that was on track for a promotion or job change. We have their past earnings history, but that was to have changed shortly after their injury. How can this be measured?

The economist will want to know the probability of the promotion, the timing, and the difference in compensation. Often, this information is available from the employer. The economist can talk to that person or review their deposition transcript. It is important in these cases to get a sense of the probability of the job change. Was it imminent, or perhaps already offered? Are there other examples with the same employer or industry of the timing for this kind of change? Is the employer willing to validate these assumptions?

It may be that the employer can't, or won't, participate in this process. These may be cases in which an executive recruiter (headhunter) with special knowledge of the market is retained. Similar to the role of the vocational expert, the headhunter reviews the injured person's education, experience and job history. They can then opine as to the plaintiff's potential value in the job market. In a



case where the timing is unclear, it may be better to estimate two loss streams, one with and one without the promotion. Then the trier-of-fact can determine, after hearing all witnesses and seeing all evidence, which was the more probable outcome for the injured party.

Losses after a wrongful termination

The question of continuing losses can also be challenging in wrongful termination cases. Consider the case wherein a plaintiff claims they were wrongfully terminated and has since gained employment elsewhere. In cases like this there may be a short period of earnings loss if the plaintiff finds similar employment at the same level of compensation.

Other times, the combination of wages and benefits at the pre-termination job was higher than that of the post-termination job. Assuming no other changes, the damages calculation is relatively straightforward: it is the difference between the total value of compensation (wages and fringe benefits), pre-termination less post-termination. There are, however, those cases wherein the plaintiff is not able to find new employment. After what period of time will it be assumed that the plaintiff will not find similar work again in the future?

Is their age and education level going to work against them in finding future employment? Are they working in a field wherein once terminated they have little hope of finding the same work due to a damaged reputation?

If the plaintiff has sought employment after termination, have they done a thorough job of this – in other words – what constitutes a reasonable and diligent job search? These are questions that are outside of the area of expertise of the economist. An employment expert can be helpful in these cases to lay this foundation. Of particular interest will be that expert's opinions regarding the likelihood of reemployment in the plaintiff's pre-termination field or occupation, and at what level of earnings. The employment or vocational expert can also opine as to the effects of long-term unemployment. Bureau of Labor Statistics data show that after extended periods of unemployment workers exit the labor market – they are unable to find employment. The employment expert can opine as to the likelihood or probability of reemployment, and discuss issues such as how employers view long periods of unemployment in their assessment of job candidates.

Conclusion

The role of the forensic economist can be twofold. First, to estimate the present

value of the future damages claimed. When this includes lost earning capacity, all aspects of pre-injury capacity, as well as post-injury capacity, need to be considered in order to produce as accurate an estimate as possible. The second is to explain to a trier-of-fact what the elements of damages are and how we arrived at the present value for those damages. Oftentimes outside experts such as physicians, life care planners and vocational rehabilitation experts lay the foundations that the economist will use in assessing the economic damages.

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