

CHOOSING THE BEST TOOL FOR PROVING ECONOMIC DAMAGES¹

I. PERSONAL INJURY

A. Loss of Earnings

1. Inability to Work

To make a claim for lost wages, plaintiff must first establish that he/she was incapacitated by injury and was unable to work, had to reduce his/her workload, and/or could not perform certain parts of his/her job. Ordinarily this can be shown with medical records such as a release from work slip provided to plaintiff's employer. If representation begins early enough in a case, the attorney should make sure that an employee's absence from work is well documented by medical evidence.

If such documentation was not entered into the medical record before an attorney is retained, and the client indicates that the treating medical provider instructed plaintiff not to work or to restrict activities, the medical provider should be consulted about amending the chart notes to reflect the oral instructions given to plaintiff.

If plaintiff was not instructed to miss or restrict work, but did so because of his/her perceived inability to physically perform, plaintiff's medical provider should be consulted, and a report should be prepared supporting plaintiff's decision (if medically justified). If the decision to miss work or reduce work is outside the expertise of the medical provider, plaintiff should seek the assistance of an occupational therapist/vocational counselor. A physical capacities evaluation is very helpful to determine how the plaintiff's injuries impacted his/her abilities to work.

It is unusual for a medical provider to provide a release from work to a self-employed plaintiff, but the medical records in such a case should document the restrictions placed on plaintiff by his/her provider. In the case of a self-employed plaintiff, it is important for the plaintiff to communicate to his/her provider the full extent and nature of the physical demands of his/her employment. Plaintiff may enhance the

¹ "Economic Damages" are defined for Washington State in RCW 4.56.250(1)(a) as:

objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.

claim with the assistance of an occupational therapist/vocational counselor. The strength of a case will depend on the quality of the experts and credibility of the evidence.

2. Value of Lost Earnings

A. Wage Earner

Good communication with plaintiff's employer is helpful in establishing the value of lost wages. During negotiations, a letter from the personnel department on company letterhead should establish the amount of time that plaintiff lost as a result of his/her injury (divided into regular time and overtime), the loss of benefits (including pension, profit sharing, insurance coverage, vacation, stock options, transportation assistance, etc.) and the rate(s) of pay during the time of loss (including anticipated pay raises and bonuses). Documents such as pay stubs, time cards, tax returns and social security earnings information should be provided to support plaintiff's wage loss. Sick leave and vacation time that are used during an injury are compensable damages.² If the actual amount of time lost is not clear because of varying hours and/or percentage of overtime, it should be established by prior history and testimony of employers.

B. Self-Employed

When plaintiff is self-employed, previous earning history should be shown with tax returns, verified profit and loss statements, and account books. Loss of profit caused by the loss of plaintiff's personal services is a measure of damages. Often plaintiff is forced to hire additional help or incur additional costs in the business because of his/her disability, and, if reasonable and necessary, this can be shown through the same documents, as well as pay stubs. Replacement cost for plaintiff's services often is not the complete measure of damages, because a replacement may lack the plaintiff's motivation to make a business succeed as well as other values that plaintiff brings to the business. If plaintiff was forced to forego a number of jobs that he/she had been engaged for, declarations from the lost source of employment should be obtained, and specificity is essential (i.e. the exact nature of the employment, the terms agreed to, prior history with the plaintiff, etc.). When plaintiff has a start-up business or a business with fluctuating

² Collateral Source Rule, *See Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795 (1998).

earnings, use of an economist may be critical to proving damages. Sometimes the best way to prove damages is to show the reasonable value of the plaintiff's services to the business—what he/she could have earned in wages.³

If tax returns are not consistent with the plaintiff's stated earnings counsel should be wary about making a wage loss claim, and depending on the size of the claim, may even choose to forego it. If defendant can show that plaintiff has cheated on paying taxes, the plaintiff's credibility will be hurt and the plaintiff may lose the jury's esteem in other ways as well.

A lost earnings claim can be made even if the plaintiff was not employed at the time if it can be shown through credible evidence that it is more likely than not that the plaintiff would have earned money but for his/her period of disability. As with loss of employment opportunity for a self-employed plaintiff, declarations from the lost source of employment should be obtained, and specificity is important. In the case of someone who is a student, testimony from a vocational counselor and/or economist should be considered

A claim for lost earnings is not recoverable to the extent plaintiff reasonably failed to mitigate his/her damages by earning whatever he could at another occupation. *Kubista v. Romaine*, 87 Wn.2d 62, 67 (1976). The burden of proof is on the defendant to show plaintiff unreasonably failed to mitigate his damages. *Id.* at n.1. A plaintiff, therefore, need not raise the issue on his own initiative.

B. Impairment of Earning Capacity

1. Inability to Work

A claim for loss of earnings is generally confined to losses sustained prior to trial, whereas a claim for impairment of earning capacity looks to the future. As with a claim for lost earnings this claim must be supported by medical testimony to show that it is more probable than not that based on the permanency of plaintiff's injury resulting from defendant's negligence, his/her future earning capacity has been impaired. *Gilmartin v. Steven's Inv. Co.*, 43 Wn.2d 289, 261 P.2d 73 (1953). Although it may not be necessary

³ See Ruble Analysis of Economic Loss, Attachment A

in all cases, a physical capacities evaluation should be conducted, and then with the help of this evaluation, testimony from a vocational counselor and/or economist should be considered.⁴

2. Value of Diminished Earning Capacity

Of course, the valuation of a plaintiff's diminished earning capacity will be dependent on many factors, and the jury's determination is only governed by what is fair and reasonable. A jury should consider the plaintiff's age, life expectancy, work-life expectancy, probability of unemployment, health, habits, employment, skills, training, etc. Unlike the loss of earnings prior to trial, the issue for future loss is the diminution of earning capacity (potential), not necessarily the loss of future earnings. This value is arrived at by determining what the plaintiff was capable of earning before the injury and subtracting what the plaintiff is capable of earning after the injury. Actual earnings are evidence of earning capacity, but proof of actual earnings previous to injury is certainly not dispositive. *Kirk v. Seattle Elec. Co.*, 58 Wn. 283, 108 P.2d 604 (1910). Future losses should include the loss of overtime, vacations, benefits and raises where these can be shown to be likely through the testimony of employers, co-workers or vocational counselors. The loss of household services is also compensable. The gross earnings potential must then be reduced to present value.

Damages are not limited to the plaintiff's earnings at the time of the injury. *Dowd v. Morris*, 133 Wn. 215, 233 P.2d 320 (1925). I.e., if it can be shown that plaintiff was going to change professions but for the injury, and that profession would be paid at a higher rate, then the plaintiff would be entitled to damages based on the higher rate. Even if plaintiff earns more after an injury than before, if it can be shown that future earnings are likely to be impaired, damages should be awarded for the lost potential. *Bradley v. Maurer*, 17 Wn. App. 24, 31, 560 P.2d 719 (1977).

There is a difference between the nature of the disability and the impairment of earning capacity. For example, the percentage of physical disability cannot just be

⁴ See Attachment B, Reid Case Management Vocational Assessment based on PCE, and Attachment C, Patton & Ruble Analysis of Economic loss

multiplied by the gross earning capacity to determine the impairment of earning capacity. The determination should take more variables into account. For example, evidence that plaintiff had poor work habits, was prone to unemployment and/or misconduct can be used by a defendant to reduce the loss of earnings potential.

Loss of earning capacity for a professional should take into account age, health and physical condition prior to injury, experience, training and skills, size and type of practice, work history, professional standing and honors, and other factors that are relevant to capacity for work and earning potential. Loss of earning capacity for a housewife who is not employed outside the home can take into account the potential employment that would be available outside the home. Moreover, the loss of household services such as meal preparation, housekeeping, house repairs, and childcare can be quantified, and are compensable. The use of a home economist can be useful in such a case.

Loss of earning potential for a business owner should be shown through the testimony of an economist.⁵ Proof of future earning potential for a child or student can depend on the age, health and physical condition of the child or student prior to injury, as well as intelligence, habits, personality, school performance, skills, earnings, occupation and education of parents, educational opportunities, and employment opportunities. Again, proof of these factors would benefit from the use of an economist and/or vocational counselor. As stated by the Washington Supreme Court in *Halverson v. Anderson*, 82 Wn.2d 746; 513 P.2d 827 (1973):

Proof of impairment of earning capacity, particularly where an earning pattern has not been established, is not a simple undertaking. See S. Schreiber, *Damages in Personal Injury and Wrongful Death Cases*, at 28, 35, 319, 437, 447, 452, 474 and 507 (1965); S. Speiser, *Recovery for Wrongful Death*, chs. 3, 4, 8 and 9 (1966); Annot., *Proof of prospective earning capacity of student or trainee, or of its loss, in action for personal injury or death*, 15 A.L.R.2d 418 (1951), also *Later Cas. Serv.* 13-15 A.L.R.2d 395 (1973); P. Eden, *The Use of Economists and Statisticians in Impaired Earning Capacity Cases*, 10 *The Practical Lawyer*, vol. 3, at 23 (1964); H. Woods, *Earnings and Earning Capacity As Elements of Damage In Personal Injury Litigation*, 18 *Ark. L. Rev.* 304 (1964); C. McCormick, *Law of Damages* (Hornbook Series 1935).

⁵ See Attachment D, Expected Earnings Report of Eugene Silberberg.

II. WRONGFUL DEATH

Proof of economic damages in a wrongful death case is similar to proof in a catastrophic injury case, but plaintiff must take into account the deduction from damages that results from the elimination of personal consumption. See Attachment D. It is often best to prepare this figure based on statistics, because plaintiffs are likely to be inaccurate in the personal consumption of the deceased. An economic analysis should be prepared with the help of a questionnaire such as Attachment E.

III. MEDICAL EXPENSES

A. Medical Expenses Incurred

Plaintiff is permitted to recover all reasonable and necessary medical expenses incurred as a proximate result of the defendant's negligence, even if these expenses were palliative rather than curative, as long as they are supported by medical testimony. It should be expected that a defendant would challenge the reasonableness and necessity of medical expenses through the use of an Independent Medical Evaluator pursuant to Rule 35. Medical bills are admissible under ER 904, but should be supported with expert testimony as to their reasonableness and necessity.

B. Future Medical Expenses

Plaintiff is entitled to future medical expenses provided that they are proximately caused by the defendant's negligence, and it is shown through medical testimony that it is reasonably certain these future expenses will be incurred and that they are reasonable and necessary. Of course the stronger the medical testimony, the better.

IV. LIVING EXPENSES

In a catastrophic injury case it is helpful to use a "life plan" expert for coordination of the experts who would be involved in providing for and maintaining a plaintiff's quality of life, such as nurses, vocational counselors and therapists. The lifetime cost of these expenses could be determined by this life-plan expert, and, reduced to present value, should be included in an economist's presentation.