

April 27, 2020

RE: The 2-Factor Issues of Personal Injury Damages

We hope that you, and your colleagues and families, are healthy and safe in this difficult time. Let us return in this newsletter to the fundamentals of personal injury damages, where lost earning capacity is the present value difference between an estimate of expected pre-injury earning capacity less expected post-injury earning capacity. While as many as eight factors may separate pre versus post scenarios, Mike identified in his original 1987 book *Economic Damages* the two, primary factors which still dominate research and courtroom testimony: a difference in expected earnings levels and, secondly, a difference in the (worklife) probabilities of achieving these earnings levels. This second factor is the joint probability, by age, gender, and education level, of being alive (L) at the age, of actually participating (P) in the labor force at that age, and of being successfully employed (E) when participating -- the joint LPE probability.

Illustration A			
	1	2	3
Pre-Injury	\$20.00	0.90	\$18.00
Less Post-Injury	\$15.00	0.50	\$9.50
Loss	\$5.00	--	\$8.50

Illustration A provides a simple example using hourly wages. Assume the plaintiff, before injury, had established a wage earning capacity of \$20/hour and shows a “normal” worklife expectancy in terms of labor force participation and employment. A vocational rehabilitation expert gives a factor #1 opinion that wage earning capacity has fallen to \$15/hour, so that the simplistic loss conclusion by a forensic economist is \$5/hour. Expected earning capacity is the hourly wage in pre and post times the joint LPE probability of actually being employed and earning the wage rate. If the vocational expert believes this LPE probability (factor #2) has fallen from 90 percent to 50 percent, as in this example, the estimated loss rises from \$5.00/hour to \$8.50, a 70 percent increase.

The methods and issues behind factor #1 and factor #2 debates in U.S. courtrooms have been the leading research focus that we have pursued in our combined 67 years of forensic practice. The worklife reduction issue, in particular, has been a contentious issue throughout these years.

Two pieces of research have shaped these debates in the past few years. The first, by Brookshire and Forlines (2014-2015), has shown that statistical PE declines for self-described disabled persons are 70-80 percent a decline in their P rates of actual trying to become employed and stay employed. The E rate of successful employment for those who participate is only 20-30 percent

of the worklife decline. This is important because the U.S. government data sources typically used are not relevant if the vocational expert is only discussing an injury-induced decline in employment rates, with no mention of “try rate” declines.

Then, published research by Drs. Krueger and Skoog (2015) showed--using these same U.S. government sources--that of those defining themselves in various categories of disability, a large percentage cease this self-definition of disability after a year or so. The data speak to temporary disabilities, not permanent disability. However, the effects of injury may still result in considerable reduction in the duration of post-injury employment.

Recently published in the *Journal of Forensic Economics*, Skoog et al. (2019) find considerable differences in the remaining worklife expectancies for individuals who are “active” in the labor force versus those who are “inactive.” Claimants seeking damages for lost earnings are typically participating (active) at the time of their injury. Such individuals may find themselves out of the labor force (inactive) as they recover from their injuries between this time and the date of evaluation/adjudication. It is well established by studies in labor economics that individuals active in the labor force have a greater propensity for worklife than those who are out of the labor force at the time of evaluation. This recently published article demonstrates practical examples of these tendencies which are summarized below in Illustration B. Here, it is assumed that two years have elapsed between the date of injury and the date of vocational evaluation for males across all levels of educational attainment.

Illustration B				
	Pre-Injury Years Remaining (Active)	Post-Injury Years Remaining (Inactive)	Loss (Years)	Loss (Percentage)
Individual A: Age 30 at Date of Injury	30.66	26.44	4.22	13.8%
Individual B: Age 55 at Date of Injury	10.53	5.43	5.10	48.4%
Individual C: Age 60 at Date of Injury	7.36	2.99	4.37	59.4%
Individual D: Age 65 at Date of Injury	5.17	1.67	3.50	67.7%

These data suggest that the distinction tends to be more significant for older workers as a greater proportion of the remaining work-life expectancy is eroded as the age of the given plaintiff increases.

The academic and courtroom debates continue as the nature and sophistication of these issues develop. Therefore, U.S. government data which are relevant must be carefully used. Also, of course, the vocational and economic expert must adequately explain calculations or criticisms to a jury.

As always, we are happy to discuss these issues and others as they may relate to the facts of a particular case. Have a safe and healthy remainder of 2020!