

**Date of Injury or Date of Trial:
A Comment on Work Life Expectancy Calculations**

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A hypothetical situation that illustrates a problem recently posed by a forensic economist may be stated as follows: If the plaintiff, an otherwise healthy white male, is injured catastrophically on his thirtieth birthday, and discovery problems and a crowded trial calendar prevent his case from being tried until his thirty-fifth birthday, may the consulting economist calculate the work life expectancy of the plaintiff using his age at trial? The alternative date for the calculation of the work life expectancy of the plaintiff is the date of injury. Simply stated, does the economist have the choice to use either date for the loss calculation? For the purpose of this hypothetical, the work life expectancy of a 30 year old white male is estimated to be 29.3 years, while that of a 35 year old white male is estimated to be 24.9 years.¹

The answer to this question lies not within the field of economics, but rather, within the field of law. It is unlikely, however, that there is any "black letter law" that holds that work life expectancy is to be calculated at a particular time; therefore, it will be necessary to apply legal reasoning to the question.

Prior to discussing the question, it should be noted that the manner of reasoning used in answering questions in economics is different than that used in law. The science of economics can be likened to the art of painting: as the economist uses inductive reasoning to generate hypotheses and then tests those hypotheses to arrive at a result, so the artist starts with a blank canvas, and with the judicious application of color finally obtains a finished product. Legal reasoning is more akin to the art of sculpture: excess material is removed from the stone until the work is finished. Thus, in the absence of "black letter law", it may be necessary to "carve away" at the question using case law until an answer is found. That answer may not quiet the controversy, but will provide the testifying economist with a tenable legal basis for his or her use of one date over the other.

A general principle of the law of damages states that "it is the function of an award of damages to place the injured party in an actual, as distinguished from a theoretical position, financially equal to that which he would have occupied had his injuries not occurred."² The plaintiff/victim cannot be made more than whole, make a profit, or receive more than one recovery for the same harm. That is, the "plaintiff will only be entitled to be made whole and cannot obtain more than single damages...."³

The conclusion that can be drawn from these statements of the legal principle is that the injured party is not entitled to be placed either in a better or worse economic position than he or she would have held had the injuries not occurred. There should be no

¹ Ciecka, James, Thomas Donley and Jerry Goldman, "A Markov Process Model of Work-Life Expectancies Based on Labor Market Activity in 1992-93," *Journal of Legal Economics*, Winter 1995 5(1), 17-42.

² *Hanna v. Martin*, 49 So. 2d 585, 585 (Fla. 1950)

³ *Dundee Cement Co. V. Howard Pipe & Concrete Productions, Inc.*, 722 F2d 1319, 1324 (7th Cir. 1983).

difference between the amount of damages awarded at trial and that necessary to return the plaintiff to the economic position occupied immediately prior to the injury. The tortfeasor is obligated only to the extent of the injuries caused, neither more nor less. Any work life expectancy calculation that gives results that put the plaintiff in a better or worse economic position than originally occupied, or causes the amount of the defendant's obligation to differ from the economic position occupied by the plaintiff immediately prior to the injury, will penalize either the defendant or the plaintiff and violate the general principle of law noted above.

Many cases hint that the time of injury is the proper time upon which to calculate losses. One court said that "the calculation of damages suffered. . . by a person whose personal injuries will result in extended future disability. . . involves. . . estimating the loss of work life resulting from the injury. . . Calculation of the lost income stream begins with the gross earnings of the injured party at the time of injury."⁴ Another reference to the time of injury was made by the court in a loss of future earnings case. The court provided guidance for the method by which a loss of future earnings should be calculated. The court made the assumption that the plaintiff earned \$10,000 per year, had ten years of worklife remaining, and that neither growth of earnings nor inflation would be considered. It was concluded that the defendant would owe the plaintiff \$100,000 for the loss of earnings. The court then introduced the concept of discounting and noted, in dicta, that were the discounted damages to be "disbursed at the precise moment of injury,. . . this calculation would represent a fair award of damages."⁵

Both Culver and McCran use the date of injury as the starting date for the calculation of damages; however, McCran, unlike Slater Boat Co., is specific in suggesting the amount of future damages is correct when calculated from the time of injury. Neither case is dispositive of the question, however, because the statements were made in dicta, not as holdings.

A more recent decision makes clear the preference of the law for using the date of injury upon which to base work life expectancy calculations.⁶ The decision involved a five year old plaintiff suffering from HIV, caused by the introduction of tainted blood during a surgical procedure. The federal court was unable to use the law of the state in which the tort occurred because the precise question had yet to be addressed by the courts of that state, but considered the issue of such importance that it opined as follows:

The first question is whether the applicable work life expectancy is that of someone in the plaintiff's present condition or that of a healthy person of the same age. . . . Using a postinjury [sic] rather than a preinjury [sic] work life expectancy to calculate lost earning capacity would violate fundamental principles of the law governing damages and would produce an absurd and unjust result. . . . Depriving a plaintiff of the right to recover for that portion of his loss attributable to a shortened work life expectancy would frustrate the objective of making the plaintiff whole. Moreover, it would permit the tortfeasor to benefit

⁴ Culver v. Slate Boat Co., 722 F.2d 114, 117 (5th Cir. 1983).

⁵ McCran v. U.S. Lines, Inc., 803 F.2d 771, 773 (2d Cir. 1986).

⁶ Doe v. U.S., 737 F.Supp 155 (D.R.I. 1990)

from the consequences of his own wrongful act at the expense of the innocent victim. Such a result would be inconsistent with both law and logic. Indeed, the weight of authority is that loss of earning capacity should be measured over the course of the work life expectancy the plaintiff would have had if no injury had been sustained.⁷

While the first sentence of the cite appears in conflict with the succeeding sentences, it is clear that the court refused to accept the argument that the benefit of the reduced work life expectancy caused by the negligence of the defendant should inure to the defendant. Thus, the court required the use of the pre-injury work life expectancy for the purpose of calculating future earnings losses. The use of the date of injury as the correct point at which to calculate work life expectancy avoids an "absurd result." Were the date of trial to have been used for the calculation, the plaintiff arguably would have received no future earnings losses as he was not expected to survive to adulthood. The opinion is important, too, because it makes analogous the use of work life expectancy based on the moment immediately prior to the injury and the use of preinjury life expectancy for the purpose of calculating future losses. The court tied those expectancies together for the purpose of calculating damages.

There is an old statement that bad facts make bad law. Given the tender years of the plaintiff in this case, it is possible that the court was attempting to stretch the law to cover the problem; however, nothing in the opinion violates the general legal principle noted earlier.

Although the cited section of the case involves the attempt to use the shortened work life expectancy of the plaintiff for the benefit of the defendant, the logic of the court's position works in the opposite situation. Should the plaintiff maintain that he or she is entitled to an increased work life expectancy because he or she survived to the trial date, the defendant may legitimately argue that such losses provide a windfall to the plaintiff, where the windfall would be "inconsistent with both law and logic."

The plaintiff in our hypothetical provides an example of such a situation. If the work life expectancy is calculated from the date of injury, plaintiff's earnings would cease at age 59.3. If work life expectancy is calculated from the date of trial, however, plaintiff's earnings would not cease until age 59.9. The additional 0.6 of a year's earnings, even when discounted, provides a windfall to the plaintiff to which he is not entitled.

It may be true that the use of the date of injury rather than the date of trial for work life expectancy calculations will require the economist to discard information that affects the life earnings and work life expectancy of the plaintiff. Indeed, the notion that the economist should avoid using information that leads to a more accurate estimate of the plaintiff's losses is bothersome. It does appear, however, that the law requires the calculation of work life expectancy to be made from the date of injury. It is not immutable that this law should control, for as long as the attorney representing the injured party is informed of which date the calculations were based, and there is good reason to do so, it is ethical for him or her to argue for a change in the law. As the law presently stands, however, the answer must be that the calculations are based on the work life expectancy of the injured party at the moment immediately before the injury.

⁷ Doe @ 163.

Reference

Ciecka, James, Thomas Donley, and Jerry Goldman, "A Markov Process Model of Work-Life Expectancies Based on Labor Market Activity in 1992-93," *Journal of Legal Economics*, Winter 1995 5(1), 17-42.

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