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Worklife Expectancy and Disability in the Forensic Arena: A Response to Chapter 20 "Worklife Expectancy Models and Concepts" in Rick Robinson's *Foundations of Forensic Vocational Rehabilitation*

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> Here is a middle-aged woman, very overweight, badly scarred on one arm and one leg, unsteady on her feet, in constant and serious pain from the accident, with no education beyond high school and no work skills other than cooking, a job that happens to require standing for long periods which she is incapable of doing. It seems unlikely that someone in this condition could find gainful work at the minimum wage. True, the probability is not zero; and a better procedure, therefore, might have been to subtract from Mrs. O'Shea's lost future wages as a boat's cook the wages in some other job, discounted (i.e., multiplied) by the probability-very low-that she would in fact be able to get another job.[1]

Judge Richard Posner, a prolific writer with a libertarian streak, wrote this opinion some 35 years ago and ushered an unprecedented era of data driven, probabilistic decision making in cases of expected loss of earning capacity. Forensic economists and rehabilitation consultants have since considered, not only an individual's adjusted ability to work post injury (i.e., different or diminished occupational choices), but also, the probabilities of employment, or the "how long" portion of the loss. "A better procedure" indeed was born, with this jurist's astute insight as to the plaintiff's low probability of employment in the post-injury period.

In a forensic setting, damages are not calculated unless damages are sought. The model used in assessing loss of lifetime earnings due to injury is very basic. The model was not created by the authors, but is simply widely used in assessments of future earning capacity loss in order to fulfill the needs of the Court. Key elements used by all experts are as follows:

1. Lifetime earnings absent injury – this includes both how much the Plaintiff could have earned and how long the Plaintiff could have worked (worklife expectancy);
2. Lifetime earnings with injury – this includes both how much the Plaintiff can earn and how long the Plaintiff can be expected to work with the injury (worklife expectancy);
3. Present value assessment – this includes the determination of appropriate compensation growth and discount factors (performed by the forensic economist).

Worklife expectancy is the "how long" part of the estimation of lifetime earnings loss. Currently there are a variety of Worklife Expectancy tables in wide use in forensic and non-forensic arenas. These tables are used to obtain an estimate of the number of working years a person is expected to have before exiting the labor market. There are several variables that need to be taken into consideration when obtaining worklife expectancy values for a particular individual. The main variables are typically age, gender, level of education, and disability status. There may be other factors, but in general, the more variables that are added, the lower the inference power of the tables due to the erosion of sample size.

Over the years, a number of consultants have objected to the use of worklife expectancy tables. It is argued

that the values produced cannot be relied upon because they are simply flawed science.

Rick Robinson's textbook *Foundations of Forensic Vocational Rehabilitation* provides a summary of these criticisms in Chapter 20 titled, "Worklife Expectancy Models and Concepts", authored by George Barrett, Kent A. Jayne, and Rick Robinson (hereafter referred to as BJR). BJR open the chapter stating,

> *When evaluating losses related to a reduction in a worker's prospective vocational capacity, it is necessary to estimate the number of years over which the loss is likely to take place. This estimate is referred to as a worker's worklife expectancy.*[2]

This perfectly sensible statement is then followed by an ominous warning, two sentences later, which sets the tone of the chapter:

> *On the surface, this estimate may seem to be a straight forward process that is easily calculated. In reality, estimating a person's work behavior is not so clear and may change over time.*[3]

The authors go to great lengths to find technical problems with estimates of worklife expectancy, in essence, because there are too many moving parts—too many variables to account for in a model. BJR further declare that estimating worklife expectancy for persons with disabilities is even less straightforward, because, they admit, disability interacts ("interferes") with an individual's participation in the labor market, "causing periods or interruption or inactivity".[4] BJR did not conceive the notion that disability may also terminate worklife altogether, or shorten it as the aging process unfolds. However, the authors agree that disability reduces labor force participation in employment:

> *A 2010 Bureau of Labor Statistics (BLS) report clearly shows a strong relationship between disability and discontinuous or decreased participation in the labor force (U.S. Department of Labor, 2010). Highlights from this report indicates that for all ages, the employment-population ratio was much lower for persons with disability than for those with no disability; the unemployment rate of persons with disability was well above for those with no disability...nearly one third of workers with a disability were employed part-time, compared with about one fifth of those with no disability.*[5]

A quick look at the front webpage for the U.S. Department of Labor, Office of Disability and Employment Policy will confirm that persons with disabilities have twice the unemployment rate than those without disabilities and have three times lower labor force participation.[6]

The fact is that the presence of disability is widely known to have an adverse effect on an individual's ability to work, all other things remaining equal (*ceteris paribus*). This is widely known in vocational rehabilitation circles, and there are very few rehabilitation professionals who will disagree with that assessment. Disability, by its very definition, is a reduction of ability or lack thereof. As Gamboa et al. (2009) state:

The presence of a permanent, partial disability is widely known to affect both earnings and worklife expectancy. This finding is documented in results from various surveys, including the Decennial Census, Current Population Survey (CPS), American Community Survey (ACS), and Survey of Income and Program Participation (SIPP) from the Census Bureau;[7] the National Health Interview Survey (NHIS) from the National Center for Health Statistics;[8] and the *N.O.D./Harris Survey of Americans With Disabilities*.[9] The disability effect is the cause of such events as the passage of the well-known Americans with Disabilities Act (ADA),[10] the existence of the Department of Labor's Office of Disability Employment Policy (referenced above), and the practice of rehabilitation counseling[11].

BJR write that the LPE method (consisting of the joint probabilities of life, participation, and employment) of measuring worklife expectancy has been "effectively criticized" and cite a number of papers by economists and others who have been critical of its use; similarly, they are critical of the use of transitional probabilities (in the Markov case), because there is "a plethora of exogenous and endogenous independent variables which may dramatically influence the labor force decisions of individuals, now and in the future." Such variables include business cycles, recessions, mortgage rates, fiscal policy, the individual's health, family size and consumption, education needs, marital status, changing skill sets, beliefs, and hopes for the future[12]. Indeed, the reader of the BJR chapter should be scared to ever consider any worklife expectancy tables at all, as the authors write, "it should be obvious, given that one year of past performance is not a reliable predictor of future results, that worklife expectancy estimation is at best a flawed science."[13]

This "flawed science" theme is at the heart of the BJR chapter. It is meant to discourage, rather than enlighten, the reader of the book. The fact is that worklife expectancy tables are routinely used in thousands of cases every year, and they represent a true aid to the Trier of Fact in determining how to award economic damages. Without worklife expectancy tables, such computations would be reduced to a guess, or as performed a few decades ago, assuming a straight number of years to age of retirement (typically 65, increasingly now to 66 or 67, depending on date of birth).

For example, assuming that a 25-year-old male with a high school education has 40 years of worklife (to age 65) grossly overstates his actual participation in the labor force. The more proximate value is 30 to 32 years, depending on which worklife table is used. This

is the case because men with high school education spend significant portions of time in and out of employment. To simply assume that such a person would work without experiencing any periods of unemployment is wrong. Employability and employment rates, are sensitive to levels of education. To illustrate, a 25-year-old man with a master's degree will have an estimated 36 to 37 years of worklife, again, depending on which tables are used. The point is that this better-educated young man will still have a lower worklife than 40 straight years, again due to the high likelihood that this person will experience some unemployment. Using empirical data as presented in worklife expectancy tables is far more preferable to assuming 40 years of worklife for a 25-year-old. Exact forecasts are impossible because, for any particular individual, no one can predict the future.

It is precisely for this reason that forecasting a plaintiff's future earnings stream is not an exact science: no one can predict the future with absolute certainty. But, through the use of statistics and the application of professional judgment, experts can predict the future with reasonable scientific certainty. Furthermore, all data has limitations. Yet, very good estimates can be obtained from empirical sources of data. Any individual assessment will require that the forensic practitioner choose several sources of data and the manner in which he or she applies the data to the individual, which may generate a difference of opinion.

In this regard, "general acceptance" does not require universal or majority usage in the relevant community. Peer-reviewed journals frequently publish articles espousing opposing viewpoints, providing an outlet for professional discussion; they are not necessarily the universally accepted ideas or methods in the field. There is no single step in the loss computation process that enjoys universal acceptance in the vocational and economic communities. As such, it is predictable that experts may disagree on the method for computing lost earnings. This is true of defining expected earnings, computing worklife expectancy, projecting earnings growth, and determining discount rates. However, the underlying data and computational methodology that is used in all worklife expectancy tables have substantial (general) acceptance throughout the vocational, economic, and disability research communities, as well as in federal and state courts.

Utterly lacking in the discussion of worklife expectancy in BJR's chapter is any discussion as to what the courts have said in regards to worklife expectancy tables. While critics of worklife expectancy tables have been given a bullhorn, their supporters have been reduced to a couple of observations. BJR fail to mention articles favorable to worklife expectancy and government data supported by other peer-reviewed articles of a forensic or non-forensic nature.

For example, John Johnson wrote an article entitled "Assessing Risk in Enhanced Earnings Valuations." In this article he discusses the value of the Gamboa Gibson worklife expectancy statistics and of the Life, Participation, Employment method of calculating worklife expectancy for the calculation of earnings in matrimonial litigation. Misra, Bua-lam, and Majumder wrote an article discussing the value of the worklife statistics when performing cost-benefit analyses of rehabilitation programs.

Forensic vocational consultants and economists use worklife expectancy tables because they know that a 25-year-old does not have 40 years of worklife remaining. It is less, and in some instances, considerably less.

Gamboa Gibson Worklife Expectancy Tables

A discussion of the Gamboa Gibson Worklife Expectancy Tables (GGWT) appears on pages 415-416 of BJR's chapter. The GGWT tables are the only tables in the United States that address worklife expectancy with and without disabilities and which are most suitable to use in cases of permanent partial disability. BJR acknowledge that GGWT's intent is to "draw distinctions" between labor force participation and employment rates of individuals with and without disabilities, and that "such application would ideally be quite beneficial in the projection earnings of individuals involved in personal injury litigation." [14] As a matter of fact, it is: a forensic consultant would consult the tables to obtain estimates of employment and labor force participation rates for an individual before and after injury (*ceteris paribus*).

BJR, however, proceed to warn that "significant deficiencies" in the methodology exist, "as identified within the forensic economic literature."[15] First, we note that forensic economic literature cited in the chapter does not include articles in favor of using the tables. Of critical importance is the lack of reference to the disability research community at large who routinely use the CPS and the ACS data to research disability issues and to make policy recommendations. The disability research community is in fact the peer community in which data from the CPS and ACS is broadly accepted as measuring the impact of disability on earnings and employment.

BJR make several inaccurate statements in the discussion of the government data utilized in the GGWT. They write, "it is generally concluded that the broad survey data available is limited in its usefulness to describe the work experience of individuals with specific work disabilities."[16] A qualification of who "generally" arrives at such conclusion is in order: the handful of GGWT critics. The issue of specific work disability versus the broader work disability is brought up in countless arguments about the inappropriateness of

using the data (as in this instance case). This is untrue since the functional limitations, rather than the specific disabilities, are at the heart of applying the GGWT. For example, a foot amputation, a lower back fusion, a hip replacement, or a serious knee injury may all create ambulatory disability (as it would a work disability). Using ACS data for ambulatory disability is highly appropriate for those cases, and the courts have agreed.

In 2005, the RAND corporation looked at the issue of diminished future earning capacity of injured workers taking into consideration specific injuries, or in their language, "body parts."[17] Armed with over 300,000 cases, the empirical evidence showed that when workers returned to work, they had lower earnings than a cohort of nondisabled counter parts, consistent with the findings of the major census bureau surveys. While the RAND study did not delve into issues of worklife expectancy, it showed that regardless of the "body part" workers experienced a reduction of earnings when compared to their non-disabled counter parts *ceteris paribus*. RAND went through great lengths in identifying appropriate control groups (workers of the same age, tenure, often within the same employers) to whom they would compare earnings. The heterogeneity of the impairment type goes through the funnel of functional limitations: does the person have problems walking, carrying, or lifting? When the answer is in the affirmative, depending on the type of occupation, they will experience various levels of earnings losses as RAND and every Census Bureau survey addressing disability shows this reality.

Moreover, as a provider of job placement services for persons with disabilities for over 25 years, one of the authors (Vega) would suggest that the opposite is true: the data matches the clinical experience like a hand fits a glove, which brings us to the criticism that the GGWT ignore "the positive effects of vocational rehabilitation in identifying and implementing the interventions likely to improve the labor market experience of those with acquired work disabilities."[18]

Using GGWT tables does not deny the efficacy of physical, vocational or occupational therapy as the authors of this chapter suggest. Occupational, vocational and other ancillary services are routinely recommended for individuals with acquired disabilities as a way of removing barriers to employment; advocacy in their efforts to return to work is the basic philosophy of the rehabilitation counseling profession. Technology, laws, return to work programs, etc., have marginal positive effects on an individual with an acquired disability. Yet, it does not erase the impairment or the impact that the impairment has on that individual's productivity. Impairments result in a diminution of ability (whether physical, mental, sensory, etc.) and this diminution will reduce the individual's human capital since one or both of the precursors to human capital—intelligence and physical ability—are reduced. Importantly, it must be remembered that a disability does not enhance one's pre-injury ability due simply to occupational therapy, rehabilitation counseling, or physical therapy. Disability is, by definition, a reduction in ability. Observing the participation and employment rates of those who report an occupational disability with those who do not report such (*ceteris paribus*) indeed shows significant differences as a function of disability status.

The statement that "these data ignore the positive effects of vocational rehabilitation" cannot possibly be true since some individuals responding to the ACS and/or CPS have likely engaged in vocational rehabilitation programs. Vocational rehabilitation has been around for 100 years. These surveys do not exclude individuals who have participated in vocational rehabilitation and experienced positive effects, but rather include a wide range of individuals with a variety of experiences in order to capture the average impact of a particular functional limitation on an individual's ability to work and earn money.

Appellate Decisions

This section responds to the assertion that worklife expectancy tables are "flawed science" by reviewing appellate level court decisions centered around the thorough scrutiny that the issue of worklife expectancy tables, and specifically, disability worklife expectancy tables, have received. A listing of appellate court decisions favorable to the use of disability worklife expectancy is included in Appendix A of this paper:

An appellate court decision in New Jersey upheld that the expert's opinion was properly admitted and based on reliable methodology. In *Knitowski v. Gundy* (A-5945-09T1), the court held:

> *Here, the expert testimony from Dr. Gamboa was supported by facts and data concerning individuals of an educational background similar to plaintiff who had sustained a cognitive injury. The tables on which Dr. Gamboa relied are well accepted, broadly-based census data that correlate the worklife expectancy of two similarly-situated groups of wage earners matching plaintiff's age, gender and level of education attained, the only distinction between the two groups being the absence or presence of a non-severe head injury. While it is true that some people within the ACS data may have sustained injuries greater than the injuries that plaintiff sustained, the ACS data also includes individuals who suffered a lesser injury.*

The court opinion, as if anticipating the criticisms in BJR's chapter, addresses the fact that the data has limitations, but it is still applicable and useful for the Trier of Fact:

> *. . . We reject defendants' contention that Dr. Gamboa's testimony was rendered inadmissible simply because the ACS data upon which Dr. Gamboa relied was not based on data that was identical to plaintiff's occupation and injury.*

This brief, but brutally effective comment on the heterogeneity/homogeneity criticism is devastating for the main claim in BJR's chapter: that a myriad of factors makes it impossible to rely on the disability worklife tables. BJR engage in the proverbial *throwing out the baby with the bathwater*, because, by detracting from the validity of worklife expectancy tables, the forensic consultant is left with no data upon which to draw an estimate of future losses of earning capacity. No data exists that will be identical to the plaintiff in question. The logic of such argument requires that the same individual exist in the data millions of times. In this instance, good data is enough; perfect data is the enemy of good data.

An appellate court decision in Michigan held that the expert was qualified to provide testimony and the methodology utilized was "sufficiently reliable to satisfy MRE 702 and MCL 600.2955(1). In *Figurski v Trinity Health*, (11-26468-NH) the court stated the following:

> *The Court agrees with Gamboa that forecasting future earnings is not an exact science. Furthermore, "general acceptance" does not require that 100% of the community accept his methodology. Or, that he have a degree in economics.*
>
> *This Court is convinced that Gamboa's methodology is sufficiently reliable to satisfy MRE 702 and MCL 600.2955(1). While Defendants assert evidence as to why an individual should apply the methodologies of labor economics instead of vocational economics, it is not the Court's province to decide which is preferable. That is for the jury to decide. Instead, the Court must limit its review to its gatekeeping obligations and ensure that the testimony that will be introduced to the jury will assist it in understanding the evidence or determining a fact in issue.*

The assertion that disability worklife expectancy tables are "flawed science" is rebutted by the fact that U.S. government survey data through various worklife expectancy tables have been used successfully in thousands of disability cases over the past thirty-five plus years. A review of the literature reveals that census data are widely used by prominent disability researchers to measure the employment impact of disability. The data serve as an excellent aid to the Trier of Fact in assessing economic losses.

Summary & Conclusions

BJR, in their chapter entitled "Worklife Expectancy Models and Concepts", provide an abbreviated academic critique of the use of worklife expectancy tables, but their presentation is barren of any literature that is supportive of the use of worklife expectancy tables. Moreover, their lack of judicial notice is troubling, since assessment of loss of earning capacity that includes consideration of worklife expectancy is crucial to a proper assessment of loss of earning capacity for a person who has lost ability to compete and work in the labor market.

We worry that the reader of the chapter in this book would be intimidated and will believe that worklife expectancy tables are not to be relied upon in a forensic setting. In fact, by calling worklife expectancy tables "flawed science at best," this appears to be their intended purpose. Chapter 20 closes with a confusing statement noting that,

> *Consideration of qualitative factors (vocational clinical interview), couple with quantitative data (worklife expectancy tables) will serve to "fill the holes" and offer the trier of fact a "range of reality" versus relaying exclusively upon a homogeneous set of data to derive estimates worklife expectancy.*

It is unclear what the authors intended to be the difference between customary worklife expectancy tables and worklife expectancy tables with "qualitative factors". However, we agree that because worklife expectancy is a statistical average, exercising professional judgment is essential when defining probable worklife expectancy in years.

Worklife expectancy is specific to gender, education, age, and disability. When assessing worklife expectancy, it is important to consider these factors as they pertain specifically to the individual being assessed. For example, although males have worklife expectancies that are greater than females, a specific female may demonstrate a work pattern that is more like that of an average male of the same age and level of education than that of a female. Similarly, some males may exhibit a pattern of work that is unlike that of an average male with a similar age, education level, and disability status. The specifics of each individual must be considered when assigning worklife expectancy.

The authors of this paper know of no appellate court decision deriding the use of worklife expectancy tables in general or disability worklife tables in particular. On the other hand, a handful of appellate court decisions exist across several jurisdictions upholding the use of such tables. The study and use of worklife expectancy tables should be encouraged, not otherwise; this is all the more critical for a textbook titled *Foundations of Forensic Vocational Rehabilitation*. The alternative is to use no data when estimating an indi-

vidual's future labor force participation, and that would be speculative at best. The authors suggest that future editions of this textbook be revised to include the body of judicial decisions that have weighed on the use of worklife expectancy tables, or at the very least, to give a space to the authors who can explain the benefit of using such tables.

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Shaheen v. Advantage Moving and Storage, 369 Ill. App. 3d 534 (Ill. App. 2006).

U.S. Department of Labor, Office of Disability and Employment Policy (ODEP). (2017). Retrieved from https://www.dol.gov/odep/

Endnotes

[1] O'Shea v. Riverway Towing Company, 677 F. 2d 1194 (1982).

[2] Barrett, G., Jayne K. A., & Robinson, R. H. (2015). Worklife expectancy models and concepts. In R. Robinson (Ed.), *Foundations of Forensic Vocational Rehabilitation* (p. 401). New York, NY: Springer.

[3] Ibid.

[4] Ibid.

[5] Ibid.

[6] www.dol.gov/odep/ As of Dec 2016, the Labor Force Participation for people with disabilities was 20.1% and those without disabilities, 68.1%. The Unemployment Rate for people with disabilities was 9.0% and for those without disabilities, 4.3%

[7] Data from the decennial Census, CPS, ACS, and SIPP can be found on the Census Bureau website at http://www.census.gov/hhes/www/disability.html

[8] One example is a study by Stapleton et al. (1997) that accesses data from the NHIS at http://aspe.hhs.gov/daltcp/reports/eshcclit.htm

[9] http://www.nod.org

[10] http://www.usdoj.gov/crt/ada/adahom1.htm

[11] Gamboa, A. M., Jr., Tierney, J. P., Gibson, D. S., Clauretie, T. M., Missun, R. E., Berla, E. P., . . . Newton, J. (2009). A vocational economic rationale. *Estimating Earning Capacity: A Journal of Debate and Discussion, 2*(2), 97–123.

[12] Ibid, p. 243

[13] Ibid

[14] Ibid, pp 415-416

[15] Ibid, p. 416

[16] Ibid.

[17] Reville, R. T., Seabury, S., & Neuhauser, F., Burton, J.F., & Greenberg, M. D. (2005). An evaluation of California's permanent disability rating schedule. Santa Monica, CA: RAND Corporation.

[18] Ibid.

Appendix A: Appellate Court Decisions Regarding use of GGWT & ACS Worklife Data

Case (Year)	Court	Summary
Nilavar v. Osborn, 137 Ohio App. 3d 469 (Ohio App. 2000)	Court of Appeals of Ohio	Rendered an opinion allowing the use of worklife expectancy tables (GGWT). The Court of Appeals accepted the decision of the trial court regarding the expert's qualifications and the accuracy of his use of the tables to determine the amount of earnings lost by the plaintiff.
Johnson v. CSX, 2008 Ill. App. LEXIS 1354 (Ill. App. 2008).	Appellate Court of Illinois	Affirmed an award to the plaintiff in the case and reaffirmed the appropriate use of ACS data in determining the amount of future earnings lost by the plaintiff.
Shafer & Freeman Lakes Environmental Conservation Corporation v. Stichnoth, 2007 Ind. App. LEXIS 2680 (Ind. App. 2007).	Court of Appeals of Indiana	Declined to overrule the trial judge, who had deemed the expert's use of the tables appropriate in formulating an opinion about the plaintiff's impaired future earning capacity.
Shaheen v. Advantage Moving and Storage, 369 Ill. App. 3d 534 (Ill. App. 2006).	Appellate Court of Illinois	Denied the defense motion and allowed the use of the tables (GGWT). The defense did not object to the vocational expert's use of the tables or methodology, but rather to the fact that the expert did not give weight to the fact that the plaintiff earned more the year after the accident than the year before the accident. The appellate court indicated that they could not conclude that the trial court abused its discretion in this case.
Cox and Tube City LLC v. Matthews, 901 N.E.2d 14 (Ind. App. 2009).	Court of Appeals of Indiana	Defendants argued that the vocational expert's testimony regarding the plaintiff's decreased worklife did not relate to the specific case and lacked a foundation because a doctor did not testify that the plaintiff had a reduction in worklife. The trial court did not agree, and the Court of Appeals of Indiana affirmed the trial court decision.
Knitowski v. Gundy, 2011 N. J. Super. Unpub. LEXIS 2797 (N.J. Super. 2011).	Superior Court of New Jersey, Appellate Division	Affirmed the trial court's decision allowing the expert's testimony based on worklife expectancy tables for disabled individuals. The judge concluded that the plaintiff's reduced worklife expectancy was based upon an accepted methodology and reliable data. It is interesting to note that in this case, the plaintiff earned more postinjury than he did preinjury.
Figurski v. Trinity Health-Michigan, 2015 Mich. App. LEXIS 42 (MI 2015).	Michigan Court of Appeals	Agreed with the trial court's decision allowing the expert's testimony regarding future wage loss under the five step methodology of defining: preinjury annual earning capacity, preinjury worklife expectancy, postinjury annual earning capacity, postinjury worklife expectancy, and a present value calculation of the loss.