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# Legal Decisions Regarding Reduced Post-Injury Work-Life in a Personal Injury Analysis: An Initial Reaction

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This invited reaction paper is in response to the article by Thomas Ireland and Frank L. Slesnick included in this issue. Both individuals are well known economic experts. Each participates in forensic economic services with extensive trial experience. Dr. Ireland is likely one of the most well-known economists nationally, with a long history of providing comprehensive legal research on litigated cases in multiple venues and states. He has spoken at IARP and other related professional associations to offer insights on economics, calculation methodology, and what actually results from the delivery of vocational and economic opinions after trial. Dr. Slesnick, along with Stephen Horner, is a co-author of the most respected paper in the field of forensic economics and has also participated in programs for vocational professionals.

The paper discusses the roles of vocational experts and economic experts' use of two worklife expectancy models. One is the Markov process and second, LPE by Gamboa and Gibson often called the "Gamboa Methodology." The articles are an analysis of sixteen legal decisions speaking to *worklife expectancy* and how the courts have accepted or rejected arguments on use of either method. When preparing a case, legal decisions are extremely important to having persuasive evidence worklife projections that are reasonable, as worklife as a single factor, can be one, if not the most important variable, of claimed damages.

Seven cases were related to the Markov methodology, nine related to the Gamboa/LPE method. This reader does not know why a different number of cases were used on the analysis as opposed to equal number of cases. It is well known that Dr. Ireland has strong opinions about the validity and reliability of Gamboa's methodology. He has written articles with strong criticism of the process with actual cases in which he has been engaged (See Thomas R. Ireland, Markov Process Work-life Expectancy Tables, *The Rehabilitation Professional, 17*(3), 111–126).

Only by using the Markov method, can one find arguments that the plaintiff would have worked longer than the statistically published years and months. The application of extended use is always augmented by additional facts, evidence, or testimony. By contrast, the Gamboa-Gibson version of the LPE method assumes a reduction of worklife expectancy in all cases that have at least "mild impairment" as defined by the *American Time Use Survey* (ATUS). Dr. Ireland reports that, in a 2102 survey of *National Association of Forensic Economists* (NAFFE), 76.76% state that the tables by Gamboa are not reliable, 23.24% considered them reliable. Dr. Gamboa initially developed this methodology process in 1987 and updated his data seven times through 2015.

In the Ireland & Slesnick paper, each case with legal description, name, title, and year, is abbreviated to quickly see the venue, nature of legal arguments, and outcome. The types of cases are well represented including FELA, Jones Act, Longshore, Medical Malpractice, and Wrongful Death. A sample size limited to 16 cases is a problem if generalizing from these cases. However, sufficient detail and case studies assist the reader for extrapolation purposes and planning in case assignments to avoid obvious pitfalls.

The article is a valuable, condensed study, and provides heuristic value for vocational and economic experts and used sample cases mostly from 2008-2018.

A common theme reported in case findings related to worklife expectancy include statements such as, *absent evidence, computations should be based on the statistical average.* Ireland and Slesnick state

that the courts seem to have a "null hypothesis" for reliance on statistical worklife tables. Other plausible evidence was needed to convince most decisions to allow years of probable work past the average worklife. The evidence that did persuade judges to accept longer than average work-life expectancies included consideration of the plaintiff's general health, pre-existing conditions, type of exertion required for working, safety of occupation(s), physician statements, and sometimes plaintiff's or spouses' statements claiming a specific retirement plan.

The Gamboa-Gibson method addresses "post-injury" work-life expectancy for persons with disabilities whereas Markov tables are measures of pre-injury work-life expectancy based upon the overall population. An expert using Markov method is presented with the potential argument of reduced worklife due to injuries. This leads to specific impact of an injury relying on medical evidence, stating objective medical reasons for shortening working years (future surgeries, treatments, exams, conditions with known worsening over time, etc.) and or clinical judgement of the assigned expert. Another complaint found about the Gamboa-Gibson method was that the American Consumer Survey (ACS) was not intended for litigation and the sample was finite, a one-year data collection as opposed to longitudinal studies. Several court cases cited in the paper, used data from the work of Shirley Smith, BLS in 1982 *Tables of Working Life – Increment-Decrement Model Bulletin 2135* and later 1986 *Worklife Estimates: Effects of Race and Education, Bulletin 2254*, US BLS. This old BLS table is a precursor to the later development of Markov method by Skoog, Ciecka, and Krueger (2011), *Journal of Forensic Economics, 19*(3), 261–296.

Deviation from one's field of practice and skill set is cited several times in the decisions presented by Ireland and Slesnick, both for economic and vocational experts. Ireland and Slesnick state that this one reason both experts may need to be retained, but in some cases one expert is sufficient. Methodology itself most frequently found criticism of experts using the Gamboa-Gibson method, as it is based on heterogeneity in disability categories, making assumptions of work-life expectancy loss overgeneralized.

Lack of peer acceptance and or lack of general acceptance were mentioned on several cases. It is noted that in some cases the expert's qualifications were strong, and they were more important than the methodology. Any shortcomings of methodology could then be subject to questions by direct and cross examination at trial. Ireland and Slesnick had concerns that given *Daubert,* and related standards, admission of testimony could be a problem and fall into the repeated category of being "speculative", not more probable than not.

One decision regarding criticism of the Gamboa method was in *Dorman v. Anne Arundel Medical Center* (2018). The courts stated, *because disabilities come in all types, this broad comparison of "healthy" to "moderately disabled" is unreliable and speculative.*

Other cases cited weakness of the Gamboa method are in *Kempf Contracting and Design, Inc. v. Holland Tucker* (2008) and *Phillips v. Industrial Machine* (1999). Phillips is the single oldest decision in the paper but determined not reliable by the court. However, wide variation exits in legal decisions. In *Figurski v. Trinity Health-Michigan* (2015) the judge had a clear understanding of Mr. Gamboa's credentials and allowed his testimony as a qualified vocational expert. Another more recent case of interest is *Noel v. Inland Dredging Company LLC* (2018). The judge stated, "the plaintiff fails to show that these tables can reliably predict the future worklife expectancy of a specific person" Also, see *Lackey v. Robert Bosch Tool Corp.* (2017) where the vocational expert opinions were "unreliable" and not admissible. *Toor v. Homegoods, Inc.* (2018) was reported in the article with exact details on how Judge Anne E. Thompson of New Jersey considered her analysis of his opinions, not allowing Dr. Gamboa to testify. Some cases were simply viewed by "weight of evidence," as Dr. Gamboa was found to be qualified by education, experience, or credentials in any of these decisions.

After reading the Ireland-Slesnick paper, I have noticed significant ignorance of how judges define worklife expectancy. No decision stated that the Gamboa-Gibson version of LPE is geared for plaintiff and no defense would ever use this methodology. Also, given two extremes for worklife or wage loss, they often simply split the number in half or at the mid-point. Sometimes, testimony, tables, charts, and studies are ignored and independently decided by judge or jury. None of the cases have Jury In-

structions, so it is not known why the court limited or defined factors for the ultimate decisions. Experts need to define terms used and not assume judge or jury understands at all.

On page 77, Ireland and Slesnick state that, *"there is no field of 'vocational economics'."* They do not see the use of that occupational title as acceptable. The *Kempf Contracting and Design* (2008) case accepted this title or designation, though Ireland and Slesnick dispute its existence. They define the unique contributions of the two separate fields of economic expertise and vocational expertise.

This article is a good read and should be examined in detail for all of the practicing vocational or economic experts. Reading it may assist in avoidance of making critical errors in your evaluation or court testimony. Worklife expectancy is generalized to the working population and no tables exist specific to a single occupation.

One important topic not discussed in the article was how experts use the Markov tables to project remaining years of worklife. The use of "average" worklife expectancy is common in legal decisions. However, one can use current Markov tables to determine "median" worklife, or 25th, 75th or 90th percentiles of probable worklife. The range is often plus or minus several years, which could overstate or under represent loss calculations, based on what percentile is relied on and justified in report details. A survey of what vocational experts, similar to the NAFE surveys, should be considered to compare what vocational experts use, and what is and is not perceived as generally accepted to meet part of an FRE 702 foundation. We are certain to hear more about this important topic, worklife expectancy, from Dr. Ireland, Dr. Slesnick, Dr. Gamboa, or others in the near future.

## Author Notes

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