

Legal Decisions Regarding Work-Life Expectancy: A Response

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Ireland and Slesnick consider two categories of cases involving variance in worklife expectancy (WLE) from the norm: Category 1, in which a claim is made for an extended WLE, and Category 2, in which WLE is deemed shortened by disability. Cases in the first category are more heterogeneous than in the second. They involve individual experts offering opinions specific to single cases. In the second category, all of the cases cited and the opinions offered could be boiled down into a single case. They amount to a repeated argument.

Category 1: Extended Worklife Expectancy

In general, these cases involve experts opining that Plaintiff would have worked longer than some average. The Courts accepted some of those opinions, given sufficient expert testimony. They objected to others, viewed as self-serving and lacking foundation.

Take heed. If an argument is going to be made that she would have worked to 72 rather than to the statistical WLE of 68, you must have a firm foundation. There is no black letter rule about what that foundation must be.

An interesting aspect of many of these cases is that comparisons are being made between proposed WLE and some population average. Most of the cases involved railroad or seafaring workers. I suspect that their worklives are not average.

There are few WLE studies specific to particular occupations (e.g., Skoog & Ciecka, 2014). Some occupations are normally shorter than the population average (e.g., police and fire). It is generally recognized that some jobs involve more wear and tear, and are associated with a shorter WLE (Richards & Solie, 2006). This is a point overlooked by most of the cases cited.

Category 2: Worklife Shortened by Disability

These cases focus on the Gamboa-Gibson worklife tables. The arguments would be unchanged in response to claims of shortened WLE due to disability that did not rely on Gamboa-Gibson.

Gamboa-Gibson rely entirely on microdata from the American Community Survey as foundation for their estimates of shortened worklife expectancy. Those vary by the degree of disability, 'moderate' or 'severe'.

These are the American Community Survey 2018 disability questions:

17(a) Is this person deaf or does he/she have serious difficulty hearing?

17(b) Is this person blind or does he/she have serious difficulty seeing even when wearing glasses?

18(a) Because of a physical, mental, or emotional condition, does this person have serious difficulty concentrating, remembering, or making decisions?

18(b) Does this person have serious difficulty walking or climbing stairs?

18(c) Does this person have difficulty dressing or bathing?

19 Because of a physical, mental, or emotional condition, does this person have difficulty doing errands alone such as visiting a doctor's office or shopping?

Source: <https://www2.census.gov/programs-surveys/acs/.../questionnaires/2018/quest18.pdf> (page 9)

These questions define disability for the ACS and, essentially, for all current federal statistics. They define disability in the Gamboa-Gibson tables.

Non-Disabled, Moderately Disabled, Severely Disabled

Note that there is no distinction between severe and non-severe disability in the ACS questions. Yet this is inherent in the typical Gamboa-Gibson analysis. (2) D'Ambrosia: "Mr. Meunier uses work-life expectancy tables for people with severe disabilities, and non-severe disabilities compared to people of the same age and level of education." (4) Dorman: "Dr. Pacey used Census Bureau data (and other sets of similar data) to compare the lifetime income of (1) a healthy, able-bodied male with a college degree with (2) a "moderately disabled" male with a college degree."

The federal government provides no direction there. The vocational expert who testifies about the severity of disability based on ACS is making a subjective judgment.

One Size Fits All

The problem with one-size-fits-all is obvious.

A male high school grad who checks box 17(a) is disabled. He doesn't hear too well. One who checks box 17(b) may be blind. One who lost a foot might (or might not) check box 18(b) because stairs are a hassle. Likewise, for one with an above the knee amputation. All of these people are not in the non-disabled population. They are all, one and all, disabled.

It is not clear whether Gamboa-Gibson distinguish between people who check box 17(a) and box 19. They may be limited to others with similar disabilities (hard of hearing or limited by physical, mental, or emotional conditions) or all grouped together as 'disabled'. In either case, individuals are grouped with others who have checked a box on the ACS survey. There is no difference between one with chronic pain, or a recently diminished intellectual capacity, or a life-long schizophrenic who each checked Yes in Box 18(a). One size fits all.

The impact on their worklife expectancies must be identical, either question by question or as a whole.

What of the high school grad, age 35, employed as a plumber for the past 15 years, who lost his dominant hand? Compare him to the 35 year old high school grad car salesman, who lost his non-dominant hand. Were their worklife expectancies the same before their injury? Are they now? The Gamboa-Gibson tables say they are in both cases. Might one or both of them not checked any disability box in the ACS?

This is objectionable. It is the repeated theme of the second category of the Ireland-Slesnick cases. It is the center of the counter Gamboa-Gibson argument: One size does *not* fit all. (4) Dorman: "Because disabilities come in all types, this broad comparison of "healthy" to "moderately disabled" is unreliable and speculative." (10) Kempf: "The databases Tierney used in reaching his opinion were also not specifically geared to Tucker's specific disability as defined by the ACS." (12) Lackey: "Lynch grouped Lackey with a wide range of "disabled" persons, with little to no regard for the type or permanency of the injury, work history, or the ability and intention to return to work." (13) Noel: "Even assuming that the Gamboa Gibson tables accurately reflect the average work-life expectancy of disabled versus non-disabled populations, plaintiff fails to show that these tables can reliably predict the future work-life expectancy of a specific person." (15) Phillips: "Marchisio 'could present virtually the same opinion testimony he presented in this case in any courtroom, with any injured plaintiff, without modifying the opinion at all'."

We can even expand on the Ireland-Slesnick list of cases to one not involving Gamboa-Gibson. *Williams v. Toyota Motor Manufacturing, Kentucky, Inc.*, No. 00-1089, Supreme Court of the United States, 534 U.S. 184; 122 S. Ct. 681; 151 L. Ed. 2d 615; 2002 U.S. LEXIS 400: "An individualized as-

assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person.”

The fact that the Gamboa-Gibson tables are not specific to Plaintiff, but group her with myriad others each with his or her own level of disability, makes them unacceptable.

Permanency

There may be little need for further argument once one sees that the general Gamboa tables do not apply to a single disabled individual. But, for the sake of completeness, we should consider the permanency of disability.

Those gathering data on individuals with disabilities have been frustrated by inconsistent reporting. (Jones, 2005) People reporting a chronic disability in one survey may report none in a subsequent survey. It may be that someone who lost a limb felt (and reported) being disabled initially, but later adapted to it and no longer reported being disabled. Some disabilities are not chronic. Not all disabilities are permanent.

(12) *Lackey*: “Lynch ended up with a work-life projection that might, by his own concession, have worked equally well for Lackey and someone with a broken arm that will heal.” (16) *Toor*: “Logically, the ACS data cannot predict future work life data, as the ACS does not follow individuals who respond to a given year’s survey across additional years.”

But, in the Gamboa-Gibson tables, once disabled, always disabled. (And, likewise, if initially able bodied, never disabled.) This clearly biases their estimates.

References

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