

Legal Decisions Regarding Reduced Post-Injury Work-Life in a Personal Injury Analysis: A Vocational Perspective

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Professionals with vocational expertise are often called upon to provide expert testimony on the earnings lost following an injury. Though no expert can measure future lost earnings with scientific certainty, vocational experts can offer expertise to the trier of fact by combining statistical data, training, and experience. Government data and independent research show that, when compared to persons without a work disability, persons with a work disability typically experience lower levels of employment, are more likely to become unemployed when working, and are less likely to find employment when unemployed.

The purpose of this paper is not to promote one data source over another. The purpose is to discuss the application of worklife data in cases involving partial disability and to underscore the necessity of relying on the expert's judgment, knowledge, and experience, as well as their understanding of the data sources and utilizing the most appropriate data source in a case. These appear to be the key issues addressed in the court decisions of the sixteen cases identified in the Ireland-Slesnick article.

Use of worklife expectancy statistics requires expertise. The individual's unique characteristics are considered along with statistical data. With such an approach, an appropriate fit between probability data and the individual can be achieved.

In the interest of brevity, this article will not address all of the issues regarding the article *Legal Decisions Regarding Reduced Post-Injury Work-life in a Personal Injury Analysis* by Thomas Ireland and Frank Slesnick. Many of the criticisms proffered by the authors have been addressed in numerous articles, therefore, will not be rehashed here.

Discussion

The main issue is measuring worklife expectancy for individuals with a work disabling condition. The vocational expert, in considering the individual's age, education, previous work experience, exertional and nonexertional limitations, retraining potential, transferable skills, present employment status, and future ability to perform work, defines a probable worklife expectancy for an individual being evaluated.

It is standard that worklife expectancies specific to persons with a work disability be considered when examining the cost effectiveness of vocational rehabilitation programs. Most typically, the statistic is used to define probable future earnings for an individual who has sustained injury and permanent impairment resulting in a work disability. It is used to better define the probable level of expected earnings that are likely for the individual with a work disability, and the statistic serves as an aid to the trier of fact in defining future loss of earnings resulting from the tort.

The presence of a disability is widely known to affect worklife expectancy, regardless of the definition of disability used. Nonforensic researchers have used data from various studies to measure the effect

of disability on employment. Even those studies using definitions that are not specific to work disability have found that disability negatively impacts employment.

The notion of discounting an individual's future earning capacity by the probability of being alive and employed first appeared in an appellate court decision entitled *O'Shea v. Riverway Towing* (1982, 1194) written by Richard A. Posner. The decision covers numerous issues pertinent to assessing an individual's future loss of expected earnings as a result of injury. It recommends a method of estimating pre-injury and post-injury expected earnings that involves probability statistics. What is extraordinary about the decision is that it was written in April of 1982, a time at which few experts in the country were using probability statistics to forecast before-injury expected earnings and fewer still were using such data to forecast probable post-injury expected earnings. The "better procedure" recommended in the decision will be examined in relation to the method employed by the expert employed by the plaintiff's attorney in the case.

In commenting on the plaintiff's before injury expected earnings, he notes:

If the probability of her being employed as a boat's cook full time in 1990 was only 75 percent, for example, then her estimated wages in that year should have been multiplied by .75 to determine the value of the expectation that she lost as a result of the accident; and so with each of the other future years.

In terms of assessing after injury expected earnings, he describes the following:

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. But the district judge cannot be criticized for having failed to use a procedure not suggested by either party. The question put to him was the dichotomous one, would she or would she not get another job if she made reasonable efforts to do so? This required him to decide whether there was a more than 50 percent probability that she would. We cannot say that the negative answer he gave to that question was clearly erroneous.

The opinion reflects a "better procedure" for estimating future expected earnings – that of utilizing probability statistics to better define future expected earnings in assisting the trier of fact. The *O'Shea* case involves a woman with a severe work disability. The probability of employment for a 57-year-old female high school graduate with a severe work or physical disability is .044 or .116, respectively, compared to a probability of employment of .654 or .673 for a female of the same age and education with no disability (Gamboa & Gibson, Rev. 2015).

The issue of decreased worklife life expectancy post-injury is one that is typically addressed by vocational professionals, as they are the ones with expertise and experience in the area of employment and disability. Economists typically do not opine to reduction in worklife expectancy as this is not their area of expertise. As noted in the Ireland-Slesnick article, "the courts insist that an expert must stick to his or her area of expertise".

It is generally accepted that rational decision making requires the use of both probability statistics and professional judgment (Rubin 2003). While the US Census data that emanates from both the CPS and the ACS provide an excellent data source for defining both earnings and employment levels for persons without and with various types of disability, applying the data to a specific individual requires a thorough understanding of the data in combination with an understanding of the unique traits and characteristics of the individual with a disability. Professional judgment by the vocational expert is necessary to determine from which population to draw the statistics to measure the expected earnings and employment rates of a given plaintiff in cases involving partial disability.

There are a number of data sources that measure the impact of disability on employment. While no data set is perfect, the imperfections do not necessarily preclude it from being a viable resource in estimating reduced worklife expectancy. As discussed above the expert must utilize their knowledge and experience in conjunction with the specifics of the individual and the facts of the case.

The Ireland-Slesnick article criticizes the use of the Census Bureau's American Community Survey data for disability worklife expectancy in litigation, yet, approve of the Markov tables which utilize data from the Census Bureau's Current Population Survey, (which the authors have criticized in the use of litigation), but do not consider the presence of disability. To assume there is no reduction in worklife in cases involving partial disability requires a strong foundation, just as a strong foundation is required when applying disability statistics to post-injury worklife expectancy. As noted by virtually every major survey in this field, disability, on average negatively impacts employment. There is a difference between opining worklife is typically reduced due to injury but cannot be accurately measured by the expert for a specific plaintiff and opining there is no reduction in worklife expectancy. Economists typically are not qualified to measure worklife reduction so the argument that it cannot be accurately measured by them is understandable. Many economists and some vocational experts routinely opine in all (or virtually all) cases of permanent partial disability that there is no future reduction in worklife expectancy. While there may be cases where individuals with a disability may not have a reduction in worklife, an expert consistently proffering testimony opining no reduction in worklife flies in the face of academic research done outside the forensic setting.

The decisions cited confirm the methodology utilized has been found reliable by the courts, the issue in the cases has been the qualifications of the experts, their understanding of the data, and the appropriate application of the data, based on the facts of the case.

When discussing the Markov tables, Ireland and Slesnick note that these tables are typically used by Economists. When discussing the Gamboa-Gibson worklife tables, which contain disability data typically used in cases of partial disability, the authors cite results from a survey of Economists. As previously noted in this paper, as well as in the paper prepared by Ireland and Slesnick, and as clarified by the decisions they presented, vocational professionals, not economists, provide opinions regarding residual worklife for individuals with a permanent partial disability.

The authors state that National Association of Forensic Economists (NAFE) conducted a survey in 2012. The survey was emailed to 583 members with 189 of them responding, a return rate of 32.4%.

The question that Dr. Ireland focuses on is Question 33:

Vocational Experts are often asked to estimate the worklife of a plaintiff after an injury occurs. Some will utilize privately published worklife disability tables, which are normally based on U.S. Census data. In your opinion, are such data reliable for the purpose of estimating worklife?

The responses to the NAFE question are as follows:

Respondents were given the option of "Yes," "No," or "I am not familiar with such tables." The only set of such tables that exist are the Gamboa-Gibson tables, so this was effectively a question about the Gamboa-Gibson tables. The results were that 18.4% answered "Yes," 60.8% answered "No," and 20.9% were not familiar with the tables. In other words, 76.76% who were familiar with the tables indicated that they did not consider the tables reliable.

The question in and of itself is ambiguous. The question appears to be one of a vocational nature that is being posed to economists: Are the data reliable for vocational experts? Or, Are they reliable for a forensic economist without the assistance of a vocational expert? The question is unclear. Most forensic economists do not have the vocational experience regarding the effects of disability on worklife expectancy. Unless of course, they are a professional who has obtained both vocational and economic education and training.

This question is the equivalent of asking a vocational expert what appropriate net discount rate economists should use when calculating present value? It is inappropriate and not an accurate measure of the acceptance of the methodology in that field.

Also, it should be noted that of the 189 respondents, 158 of the responses were deemed usable, with 96 members stating they would not consider the tables reliable for estimating worklife expectancy. Additionally, not all forensic economists are members of this organization. The implication that this study is representative of all forensic economists seems misleading.

An article reporting the results published in the *Journal of Forensic Economics* states the following:

During the development of previous surveys, several members of NAFE expressed concern that some forensic experts were improperly using earlier survey results. Because of these discussions, the authors have agreed to the following statement:

This article stems from a survey of the NAFE (National Association of Forensic Economics) membership. The views of the respondents do not necessarily represent the view of the National Association of Forensic Economics, or of its Board of Directors, or of all the members of NAFE. The authors have not attempted to determine what biases, if any, exist in the results due to (a) the general composition of all experts who testify about economic damages, (b) the effect of non-responses, (c) the effects of various State and Federal case and statutory laws, and (d) the accuracy and truthfulness of the responses received. To have determined the actual practice of all forensic economists and correcting for these potential biases was beyond the scope of the research effort.

Again, the purpose of this paper is not to criticize or favor one set of tables over another, but to point out the key considerations when determining what data source to use. In any given case one set of tables may prove to be more appropriate to use than the other. However, when dealing with cases of partial disability, that decision should be left to the individual with the expertise to make that judgment. In most, if not all cases, that would be a vocational professional, not an economist. Each have their role and as the courts have ruled, each need to stick to those specified roles. There are exceptions of course, and those would be professionals with education and training in both the vocational and economic fields.

Conclusions

A review of the sixteen case decisions discussed by Ireland and Slesnick reveals that the methodology utilized, especially in the Gamboa-Gibson tables, as noted by Ireland-Slesnick, has been found reliable by the courts. Typically, the issues are the expert's qualifications and inappropriate application of the data based on the facts of the case and foundation issues, not the data itself. In regard to the use of the Gamboa-Gibson tables, there are approximately 11 appellate court decisions that have upheld the methodology utilized.

Dr. Ireland and Dr. Slesnick point out their criticisms of the Gamboa-Gibson worklife tables. As stated earlier, this paper will not address all of those criticisms as they have been addressed in numerous prior publications. That is not the purpose of this paper. There is no perfect data set. There are criticisms that can be made for all data. However, even with imperfections the data may still be appropriate for use. There are a number of worklife data sources specific to disability. Understanding the data and professional judgment are key in objectively determining which data are appropriate based on the specifics of the case. In accordance, it is imperative that the expert operate within his or her field of expertise as evidenced by many of the court cases cited. As noted in this paper and the one prepared by Dr. Ireland and Dr. Slesnick, when evaluating the residual worklife of an individual with a disability, it is typically the role of the vocational expert to determine the best source to measure the post-injury worklife, given their knowledge, training, and expertise with regard to the world of work and disability. An economist opining there is no reduction in worklife for a person with a permanent partial disability is expressing a vocational opinion. This is as inappropriate as a vocational expert without economic training opining on the proper net discount rate.

References

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