Damages for loss of earning capacity: What could have been

Would *have or* could *have? "Reasonable" loss of ability to earn in the future is a big factor*

"I coulda had class; I coulda been a contender; I coulda been somebody, instead of a bum, which is what I am."

— **Marlon Brando** in "On the Waterfront"

By John P. Blumberg

Loss of earning capacity is like that. It is an item of recoverable damages that focuses not on what *would* have been, but on what *could* have been. Loss of *ability* is considered *general* damages, and not *special* damages. Accordingly, the standard of proof is not what amount of money is the probable or reasonably certain loss but rather, what amount will be reasonable compensation for the loss of the opportunity and ability to work in a chosen field. This is not an inconsequential difference; and the failure to appreciate and apply this element properly can have disastrous consequences for the plaintiff's financial recovery.

Future wage loss vs. lost earning capacity: What's the difference?

Civil Code section 3283 provides: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future." This certainty requirement was imported into CACI 3903C, which instructs the jury that "to recover damages for future lost earnings, the plaintiff must prove the amount of income/earnings/salary/wages, he will be reasonably certain to lose in the future as a result of the injury." *Certainty* can be a difficult burden; therefore, CACI 3903C should be used only if the future loss is definite. For example, if the plaintiff is 63-years-old and was employed at a company with a union contract that would have been in effect for the remainder of plaintiff's reasonable worklife expectancy, the earnings loss is quantifiable. As such, it is in the category of *special* damages. (*Handelman v. Victor Equipment Co.*, (1971) 21 Cal.App.3d 902, 906.)

Earning capacity, however, is categorized as an element of *general* damages "which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury, and damages in this respect are awarded for the loss of ability thereafter to earn money." (*Connelly v. Pre-Mixed Concrete Co.*, (1957) 49 Cal.2d 483, 489.) Hence, CACI 3903D instructs: "To recover damages for the loss of the ability to earn money as a result of the injury, plaintiff must prove the reasonable value of that loss to him/her. It is not necessary that he/she have a work history."

• **Practice Tip:** Always request CACI 3903D.

Why does lost earning capacity constitute general rather than special damages?

Before the phrases "economic damages" and "noneconomic damages" were coined after the passage of Proposition 51, which disallowed joint and several liability for so-called "noneconomic damages," damages were categorized as either *general* or *special*. In 1865, the California Supreme Court explained: "Damages are either general or special. General damages are such as the law implies, or presumes to have accrued from the wrong complained of. Special damages are such as really took place and are not implied by law...." (*Stevenson v. Smith* (1865) 28 Cal. 102, 104.)

The distinction was further defined 125 years later in *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1600, where the Court of Appeal explained that special damages are those actual out-of-pocket losses that have already occurred that can be proved by receipts, bills and other financial records. This includes past earnings loss. But "general damages are those losses which naturally flow from the injury and which are not quantifiable by reference to bills or receipts. Thus, damages for pain, suffering and emotional distress are paradigmatic examples of general damages."

Another way of viewing loss of earning capacity is to compare it to the other losses that are considered to be general damages – the lost ability to walk, run and lift are general damages, *i.e.*, something taken away by the tortfeasor's negligence. Similarly, the lost ability to work is also something that was taken away, and therefore, compensable.

Proving loss of earning capacity

Whether phrased as *loss of earnings* or *loss of earning capacity*, attorneys representing plaintiffs must prove "the reasonable value of that loss." Do not fall victim to the argument that such value must be proven by a probability! A victim who has suffered an amputated limb does not have to prove the value of the loss by a probability because the loss is presumed. One would never hear a legitimate argument regarding the *probable* value of such a loss. The test for such valuation is only what is *reasonable*. Accordingly, the test for valuation

of lost earning capacity is only what is reasonable. "Evidence of actual earnings before or after injury merely assists the jury, as persons of ordinary intelligence and experience, in arriving at the amount of the award which it is in their power to determine from the nature of the injury." (*Ridley v. Grifall Trucking Company* (1955) 136 Cal.App.2d 682, 688.)

Could the amateur have been a professional?

If a professional athlete in his or her prime sustains a career-ending injury, it is a reasonable assumption that earnings would have continued at a professional level. But what about the promising amateur? Statisticians would calculate that the chances that talented amateurs will become professional are much less than 50 percent. However, lost earning capacity differs from medical causation which requires a *greater* than 50 percent likelihood. (See *Dumas v. Cooney* (1991) 235 Cal.App.3d 1593, 1608.) Even though the law does not require proof of probability, plaintiff's attorney must still present a compelling argument, supported by evidence.

In *Connolly v. Pre-Mixed Concrete Co., supra*, the plaintiff had been a champion amateur tennis player who planned to turn professional before being injured. Tennis experts testified about her superior athletic prowess and the income she would have likely received during a professional career. The defendant appealed, claiming excessive damages were awarded by the jury, but the Supreme Court affirmed, finding that, even though she had never earned money as a professional, the evidence supported the jury's determination that the plaintiff lost the ability to do so.

• **Practice Tip:** Just because the odds are that a talented amateur won't be a professional does not mean that it can't be proven. If only statistics are used as a predictor, then Magic Johnson, Brett Favre and Babe Ruth all would have been predicted not to have a professional future! (For an in-depth study of this subject, see: Karcher, *Rethinking Damages for Lost Earning Capacity in a Professional Sports Career: How to Translate Today's Athletic Potential into Tomorrow's Dollars*. Chapman Law Review, Vol. 14, No. 1, 2010.)

A teenager had no earnings history

A high-school teenager has dreams of being a teacher of "special needs" children with physical and mental disabilities. But during summer camp, her knee is so badly injured that she now lacks the physical dexterity and mobility to pursue her desired career. In *Gargir v. B'nei Akiva* (1998) 66 Cal.App.4th 1269, the jury awarded the young woman damages based on lost earning capacity as a special education teacher, and the Court of Appeal affirmed, explaining:

> One's earning capacity is not a matter of actual earnings. The impairment of the power to work is an injury wholly apart from any pecuniary benefit the exercise of such power may bring and if the injury has lessened this power, the plaintiff is entitled to recover.... In short, the test is not what the plaintiff would have earned, but what [s]he could have earned.

(*Id*. at p. 1283.) (See also *Stein, Damages and Recovery – Personal Injury and Death Actions* (1972) § 58, p. 94.)

The important distinction just discussed is particularly applicable when the plaintiff is a student or an apprentice. The jury verdict was affirmed on the basis of the evidence relating to her future aspirations. The Court of Appeal held that expert testimony was not necessary.

• **Practice Tip:** If a student has provable career aspirations that are affected by an injury, show that the "lost" career was financially more promising than the "average" employment now available to plaintiff. And even if it is not financially more remunerative, it is still an item of general damages that is compensable.

What could the earnings have been for the child?

When a child is injured so severely that she will never be employed, there is an unquestionable loss of earning capacity. But how can it be measured? This is where expert testimony is absolutely necessary. Lost earning capacity of an infant or child can be determined from sociological and statistical data. One recognized measure of a child's potential is the educational attainment and occupations of the parents. If the parents are college graduates in white collar or professional occupations, an expert can reasonably opine that it is probable that their child would have a similar capacity. Then, U.S. Government surveys can be cited to demonstrate earning levels and worklife expectancies.

• **Practice Tip:** A vocational expert and an economist can cover all of the elements required to prove the probable economic loss of a child with no future ability to work.

Recovery for "lost years"

As a result of a medical error, a man's life expectancy is shortened. He can recover damages for loss of earning capacity. Although lost earning capacity is most often thought of in relation to the living, a plaintiff can claim economic damages for the "lost years" that his premature death will cause. In *Fein v. Permanente Med. Group* (1985) 38 Cal.3d 137, 153, the California Supreme Court held that such damages were proper. The rule was subsequently applied in *Hurlbut v. Sonora County. Hosp*. (1989) 207 Cal.App.3d 388, 405, and *Overly v. Ingalls Shipbuilding, Inc*. (1999) 74 Cal.App.4th 164, 171. The *Overly* court held that, contrary to the "personal consumption" deduction that is made in wrongful death cases, no deduction is to be made for the injured party's expected living expenses during the lost years. (*Id.* at 174.) In other words, the lost earning capacity calculation is for 100 percent of the earnings that will be lost due to the anticipated premature death.

• **Practice Tip:** Whenever there is a claim that the injury or disease shortened life expectancy, present evidence establishing the shortened work-life. The projected earnings loss is categorized as loss of earning capacity.

Housewife was never employed

It is not uncommon that many women will forsake employment to stay home and raise a family. Nowadays, there are men who also fit this category. Can an injured stay-at-home mom or dad claim damages for loss of earning capacity? Yes. In *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 412-13, after giving birth to her second child, the plaintiff had an IUD called a "Dalcon Shield" implanted in her uterus. It caused disabling injury. At trial, although no evidence of monetary loss was presented, the jury awarded damages therefor. In affirming, the Court of Appeal said:

> Loss of earning power is an element of general damages that may be inferred from the nature of the injury, with or without proof of actual earnings or income either before or after the injury. [citations omitted.] The test is not what the plaintiff would have earned in the future but what she could have earned. This is an element of general compensatory damages. Such damages are awarded for the purpose of compensating the plaintiff for injury suffered, *i.e.*, restoring ... [her] as nearly as possible to ... [her] former position, or giving ... [her] some pecuniary equivalent. [Citations omitted.] Impairment of the capacity or power to work is an injury separate from the actual loss of earnings. [Citation omitted.] *The plaintiff may recover even where she was not working and earned nothing.* [Emph. added.]

• **Practice Tip:** The loss isn't based on what the plaintiff *would* have earned, but what he or she *could* have earned.

75-years-old. Shouldn't someone that age be retired anyway?

The retirement model used to be retirement by age 65. Not anymore. In difficult economic times, or when Social Security doesn't pay the bills, one needs to have the capacity to earn money. This isn't a new idea; it was recognized over 100 years ago in *Storrs v. Los Angeles Traction Co.* (1901) 134 Cal. 91, 93-95. Up until he was injured, the 75-year-old plaintiff had been active, and in good health, engaged in his own business and had held positions of trust in several financial and other corporations. There was no evidence, however, that he held any such positions at the time he was injured or that he was earning any money, or the amount of money that he was capable of earning. Nevertheless, the jury awarded damages and the Court of Appeal affirmed:

> The evidence itself was competent to be considered by the jury in determining the extent of his earning capacity. ... There was also evidence that, as a result of the injury, he had become afflicted with heart disease, by which his capacity for attending to his business was seriously impaired. ... His right to recover does not depend upon the fact that at the time of the injury he was actually employed in the service of another, nor does the amount of his recovery depend upon the amount of wages which he was receiving. The fact that he was not in the receipt of any salary or wages, but was attending to his own business, does not deprive him of right to compensation for the loss of his earning capacity, since it is what he was capable of earning, rather than what he was actually earning, that was to be considered by the jury.

• **Practice tip:** Older plaintiffs have the right to be able to work if the need arises. Most jurors – particularly older ones, will understand the need to supplement income. Remember, the current political debate is to raise the Social Security age.

Back to work with full compensation

The seeming ability of an injured person to return to his or her former employment is not necessarily proof that there is no lost earning capacity. In *Robison v. Atchison Topeka & S.F. Ry. Co.* (1962) 211 Cal.App.2d 280, 286-288, the plaintiff was a 50-year-old locomotive switchman who was injured in a fall. Seventy-five days later, he was back to working full time, but suffering from recurring pain that made it much more difficult for him to perform his duties after his resumption of work than it had been before the accident. He had difficulty sleeping at night. The evidence supported a conclusion that plaintiff's condition was one which was reasonably certain to be permanent in nature. Even though he continued working for the four years preceding the trial, the jury awarded damages for loss of earning capacity. The Court of Appeal affirmed:

> In view of the plaintiff's age and the evidence as to the discomfort involved in the performance of his duties and as to his impaired agility, the trier of fact could properly find that he was reasonably certain to suffer a loss of future earnings because of inability to work for as long a period of time in the future as he could have done had he not sustained the accident.

Although the *Robison* court used the term, "reasonably certain," it was, most likely, a careless confusion between loss of earnings and loss of earning capacity. Other decisions describing the loss as general damages, and CACI 3903D, correctly recognize the difference.

• **Practice Tip:** Government data collected by the U.S. Commerce Department, the Bureau of Labor Statistics and

the U.S. Department of Labor can establish that persons with a disability earn less and work less than their non-disabled counterparts, even those in sedentary jobs. For example, a young attorney who suffers a back injury might still be able to work, but instead of 50-60 hours per week, she is limited to 30-40 hours. This hypothetical attorney will likely receive fewer salary increases and be less likely to achieve the recognition that would lead to advancement. Government statistics show that a person who continues working with a chronic injury will exit the workforce earlier than someone without such a condition. A vocational expert can provide testimony about these statistics and calculate the likely income loss.

Is it economic or noneconomic damage?

Proposition 51 (codified as Civ. Code, § 1431.2) and MICRA (Civ. Code, § 3333.2) impose consequences on damages that are categorized as "noneconomic." If there is comparative negligence, economic damages are joint and several, but noneconomic damages are not. In medical malpractice cases, noneconomic damages are capped at $250,000, but economic damages are not. Although "general damages" include physical and emotional harm, as shown by this article, it can also include loss of earning capacity, which is economic in nature. Accordingly, even though loss of earning capacity is in the category of general damages, it is not noneconomic.

In *Fein v. Permanente Med. Group* (1985) 38 Cal.3d 137, 153, the California Supreme Court validated the "lost years" theory of loss of earning capacity, although they described it as "loss of future earnings." As authority for the proposition, they cited *Robison v. Atchison Topeka & S.F. Ry. Co., supra,* which was a case dealing with loss of earning capacity, not loss of earnings, per se. The Court then observed that such award would be subject to periodic payments under Civil Code section 3333.1, which applies only to certain collateral source payments, which are economic damages. (See *Fein v. Permanente Med. Group* (1985) 38 Cal.3d 137, 157.) Therefore, any claim based on loss of earning capacity is *economic* and not *noneconomic damage*.

Advocacy: It's the reasonable value

CACI 3900 instructs jurors that, in awarding damages, they must not speculate or guess. The defense will likely argue that the projected loss of earning capacity is speculation. Although case law has firmly established that a plaintiff need not introduce evidence that proves a future loss of earning capacity, and even though CACI 3903D instructs that no earnings history is required, the plaintiff's advocate must be prepared to persuade the jury nonetheless. The appropriate response to the "speculation" argument is to remind the jury that the definition of speculation is that which is based on conjecture rather than knowledge and information. Hopefully, there would have been testimony of experts and other witnesses about the potential future that was destroyed by the defendant's negligence.

If future earning loss is presented in conjunction with CACI 3903C, the law requires that it must be reasonably certain. However, CACI 3903D – Loss of Earning Capacity – speaks in terms of the reasonable value of plaintiff's loss. Loss of earning capacity is like loss of a limb. There is a presumption that it harmed the person. The ability to "make due" or "overcome" the loss does not offset the loss. Be prepared to prove what the future could have been, but encourage the jurors to think of it as the loss of hopes, dreams and aspirations. In other words, what might have been.

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