



Wage war

Identifying and proving wage loss without a W-2



Cooper

BY MILES B. COOPER

The lawyer listened to the client as the client explained the client's earnings history. "Since the incident, I don't have the strength to do big procedures. I have to turn those down." The client was a surgeon. The lawyer looked at the profit and loss statements, which showed almost identical income in the year

after the incident.

"Explain the consistent earnings then," said the lawyer. The client explained that the client now did more simple procedures. But each simple procedure required the same prep time as a big procedure, and with many more procedures, the surgeon was working many more hours. "The mortgage hasn't changed," said the surgeon, "So I found a way to pay it. I work 30 percent more, and if I was able to do the big procedures my income would be up 30 percent instead of staying the same."

Economic losses drive case value

We as plaintiffs' lawyers recognize pain's value. But adjusters and some jurors tend to belittle it. They grasp simple economic losses but are super stingy on non-economics. Our story above is a good example. A painful life without easily demonstrable wage loss. It has value. But to get full value, one needs demonstrable wage loss.

The economic losses have additional benefits. Under Proposition 51's joint and several liability, 100 percent of economic losses can be assessed against a defendant who is only found to be one percent liable. This presumes the other 99 percent liability is against an insolvent defendant or empty chair defendant. The phantom vehicle defense, for example. So, be creative. Particularly where students, gig economy workers, entrepreneurs, the unemployed, and the self-employed are concerned.

Capacity

The best tool available has long existed but is often overlooked. CACI 3903D, the loss of earning capacity jury instruction, states, "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 plaintiff. It is not necessary that plaintiff have a work history." Consider this a laugh test. Is it reasonable to argue that an individual with no earnings history would have earned \$150,000 a year but for the incident? Laughable if that person has no formal education, no wage history, and no prospects. But if the individual was two weeks shy of receiving an Ivy League MBA and suffered a head injury, the laughter stops.

Experts and data

So, does one stand up in front of a jury and simply argue that someone just shy of an MBA would earn \$150,000 a year? No.

We need data, and we typically need an expert to testify about that data. The usual expert: vocational rehabilitation. Voc rehab experts can review the client's education, experience, and limitations. The voc rehab can then do labor market surveys and obtain wage data. The labor market survey helps demonstrate demand for an occupation. The wage data provides average earnings. The expert can opine about whether a client might be expected to be at the high, middle, or low end based on the client's history.

Sometimes that data comes from the client. Self-employed clients are a unique challenge. They tend to find ways to make up for losses following an incident, like our surgeon. But if they are working 30 percent more, they are entitled to that time's value. Demonstrating the additional effort is the trick. This frequently involves drilling down into the client's books, calendars, and scheduling software. Say the surgeon had 300 hours of operating room time in the year pre-incident but now has 500 hours post-incident. Add to this that there were 20 total knee replacements and 100 arthroscopic knee procedures before but zero total knees and 300 arthroscopies after, with the same income. That's a loss of earning capacity. All it needs is an economist to crunch the numbers.

The data or expertise is sometimes more nuanced. The tech entrepreneur whose start-up was valued at \$10 million but lost the ability to get the next round of funding due to an incident will need a sector expert to explain valuation and funding. That explanation will also need to cover how losing the funding took the company's value from \$10 million down to something less.

Shortened work life expectancy

As one makes sure nothing is overlooked, don't forget shortened work life. The sprinkler fitter with a bad knee may be able to gut it out for another 10 years but won't make it to 65. An orthopedic surgeon can give a "more likely true than not" opinion about how many years early that sprinkler fitter may need to stop.

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Back to our surgeon. After the procedure count, operating room schedule, and earnings were digested by the economist, a coherent loss of earning capacity emerged. It passed the laugh test, and the jury verdict reflected the significant losses suffered by the doctor.

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