Economic Damages in Personal Injury Cases

Attorneys in personal injury cases want to manage the process of calculating damages. The best way to estimate damages is to ask a professional who writes reports and can testify about damages if necessary. Some professionals can provide thumbnail estimates of damage amounts early on, while facts and evidence are being gathered. Still, it's helpful to understand components of the damage calculation, because it's easy to overlook certain types of damages. This article is a quick primer to assist attorneys considering the calculation.

Simply summarized, the typical elements of an economic damages calculation are:

1. Loss of Earnings.
2. Fringe Benefits.
3. Loss of Household Services.
4. Offsetting Amounts.
5. Present Value.

<u>Loss of Earnings</u>: In cases where the injured party has been put out of work, rendered incapable of work, or in instances of wrongful death, Loss of Earnings is a central component of calculated damages. In general, lost earnings are based on annual earnings history before the injury or accident, as evidenced by payroll records or tax returns. Lost earnings are typically divided into Pre-Trial and Post-Trial amounts. Projected earnings growth—i.e., future raises or cost of living adjustments—can be included. The amount of lost earnings is calculated for the remaining Worklife of the subject. Worklife results not just from anticipated retirement or life expectancy, but also from demographic factors. The U.S. government has published data on this question, and economists have done research to estimate the expected Worklife depending on age, sex, work history, and other characteristics. The results of this analysis, known as the Markov Process Model, are published in tables that can be used to estimate the expected Worklife of a particular person.

<u>Fringe Benefits</u>: Loss of fringe benefits should be included in the calculation, as these would otherwise be paid by an employer. These include the standard items of the Employer's Share of Social Security and Medicare (7.65%), Unemployment Insurance (varies by state), and Worker's Compensation Insurance. Short Term and Long Term Disability Insurance are often paid by an employer, and should be included if so. Medical Insurance Premiums, Dental Insurance Premiums, and Prescription Drug Premiums paid by an employer should be included, and call for evidence specific to the employer, since premium amounts vary widely. Many employers routinely offer a Life Insurance or Death Premium, which can be included. Finally, the value of any Retirement Program, such as 401(k), or a defined benefit plan can

be included. Any of these items are easy to overlook, and an attorney can relatively easily review the company website and/or hiring information packet offered by an employer so as not to miss any items that should be included. Sometimes, this information is unavailable for a specific employer, and courts have accepted national averages instead. This information is available from public sources, such as the Bureau of Labor Statistics. There has been some debate about acceptable sources for national averages. When added together, the fringe benefits are typically expressed as a percentage of payroll. If annual earnings of $100,000 are established, and a fringe factor of 22% is appropriate, the annualized earnings amount is simply $122,000.

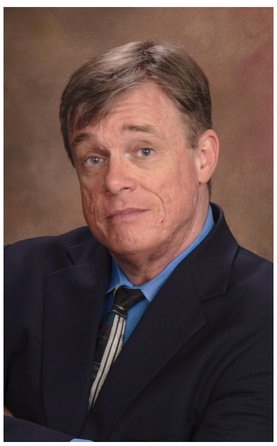
<u>Loss of Household Services</u>: Courts relatively routinely allow the inclusion of costs for household work that would otherwise have been performed by the injured person. These can include housework, cooking and cleaning, home maintenance, shopping, child care and guidance, and others. Some professional studies are available to provide standards for the number of hours, cost or value of the lost ability to perform these household functions. However, this can easily be overlooked even though it is a valid component of economic damages to the insured.

<u>Offsetting Amounts</u>: Where wrongful death has occurred, some allowance needs to be deducted from gross earnings to account for amounts that otherwise would have gone for personal consumption. Where social security or other disability insurance has paid money during a trial period to an injured person to compensate for disability, or will pay such after the trial period, these need to offset the amount calculated for lost earnings.

<u>Present Value</u>: Once each of the elements is summarized into a stream of future annual cash flows, that amount is discounted to its present value. The injured person is entitled to receive lump sum compensation that reimburses for all the lost earnings and expenses they would otherwise have incurred. While the concept is not difficult, the math can be complicated. The discount rate selected is the most important factor. In general, a high discount rate results in a smaller lump sum (and benefits defendants), while a lower discount rate results in a larger lump sum amount (and benefits plaintiffs). Unfortunately, there are competing theories about which discount rate is most appropriate. Some theoreticians argue the discount rate should be identical to the future growth of the injured person’s earnings. This concept has even been enshrined in law in certain states. Perhaps the best prevailing theory is this: if the lump sum is invested at prevailing risk-free rates, it should produce the same cash flow the injured person would otherwise have received. One challenge is that risk free rates in recent years have varied widely from distortions pursuant to the Great Recession of 2008. Some theories argue that the discount rate should match the timeframe of the Worklife expectancy. However, if risk free rates have been at or below 1% since 2008, they were usually 4%-5% or more in the decades preceding. This is an opportunity for disagreement. The National Association of Forensic Economists publishes a survey of opinions by professionals on these questions, which can be used belay the need for evidence on technical questions.

Conclusion: Sometimes, medical costs and other direct expenses can be an element of damages, both as incurred and as projected into the future. However, since situations vary from case to case, these are not covered here.

The typical report runs ten to twenty pages, and includes an appendix with detailed tables showing calculation methods. It also includes text describing the methodology, a bibliography, the engagement letter, the qualifications of the professional submitting the report, and some sensitivity analysis that shows how the result might be changed by a few key alternate assumptions. In the end, however, a single lump sum figure is the key result of any report, and it is the figure to be kept in mind if fault is established.



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