

Estimating Damages in Personal Injury Cases

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Presented by
Robert W. McLeod, Ph.D., CFA, CFP, CLU, CVA
Financial Economics Consulting Group, Inc.

Admissibility of Expert Testimony

- Daubert v. Merrill Dow Pharmaceuticals, Inc.
- Kumo Tire Company v. Carmichael

Daubert

- In Daubert, seven members of the Court agreed on the following guidelines for admitting scientific expert testimony:
 - **Judge is gatekeeper.**
 - **Relevance and reliability.**
 - **Scientific knowledge = scientific method/methodology:** A conclusion will qualify as *scientific knowledge* if the proponent can demonstrate that it is the product of sound "scientific methodology"/derived from the **scientific method**.
 - **Factors relevant:** The Court defined "scientific methodology" as the process of formulating hypotheses and then conducting experiments to prove or falsify the hypothesis, and provided a nondispositive, nonexclusive, "flexible" test for establishing its "validity":
 - Empirical testing: the theory or technique must be falsifiable, refutable, and testable.
 - Subjected to peer review and publication.
 - Known or potential error rate and the existence
 - The existence and maintenance of standards and controls concerning its operation.
 - Degree to which the theory and technique is generally accepted by a relevant scientific community.
- In 2000, Rule 702 was amended in an attempt to codify and structure the "*Daubert* trilogy." Rule 702 now includes the additional provisions which state that a witness may only testify if
 - 1) the testimony is based upon sufficient facts or data
 - 2) the testimony is the product of reliable principles and methods, and
 - 3) the witness has applied the principles and methods reliably to the facts of the case.

Kumo Tire

- Extension of Daubert to non-scientific testimony

Sources of Damages in Personal Injury Cases

- Loss of Earnings
- Loss of Fringe Benefits
- Medical Expenses/Life Care Plans
- Hedonic Damages
- Loss of Consortium

Assumptions for Loss of Earnings

- Base Earnings
- Growth Rate in Earnings
- Discount Rate
- Worklife Expectancy
- Taxes

Base Earnings

- Actual Earnings at Time of Injury
 - Problem for those currently unemployed or underemployed
 - Problem for children and students
- Earnings Capacity
- Earnings Impairment
 - Vocational/Rehabilitation Experts

Growth Rate in Earnings

- General Approaches
 - Plaintiff's actual rate of increase
 - Bureau of Labor Statistics Data
 - Inflation Rate
- Should the growth rate be based on national, regional or local data?
- Specific Factors
 - Promotions Expected
- Real vs. Nominal Growth Rates

Discount Rate

- Normally use U.S. Treasury Securities
- Question of which maturities
 - Short-term Treasuries
 - Blended Rate
- Real vs. Nominal Discount Rates

Worklife Expectancy

- Numerous Studies
 - Worklife
 - Average age at retirement
- Breakdown based on
 - Race
 - Sex
 - Education

Taxes

- Damages for lost earnings are normally tax free (punitive damages are normally taxable except for punitive damages paid in civil wrongful death actions when applicable state law, in effect on September 13, 1995, only allows punitive damages in such cases. (Internal Revenue Code Section 104(c)))
- Need to adjust income for taxes
- If income is after tax, then you need to adjust the discount rate for taxes



Loss of Fringe Benefits

- Fringe Benefits
 - Health Care
 - Retirement
 - Life Insurance

Medical Costs/Life Care Plans

- Medical costs attributed to the accident/injury are recoverable.
- Issue of subrogation
- Reliance upon other experts:
 - Physicians
 - Life Care Planners
- Growth Rates
- Discount Rates

Hedonic Damages

- Loss of the enjoyment of life
- Willingness to Pay Model
 - Based on measuring what people pay for safety that results in small reductions in their risk of death.
 - For example, if average people are willing to pay \$25 for a carbon monoxide detector that stands a one in two hundred thousand chance of saving their life, the WTP model would imply that such purchasers value their life at \$5 million (\$25 times 200,000).

Loss of Consortium

- Normally refers to the claims of physically uninjured spouses in personal injury cases brought by their physically injured mates.
- Factors to consider in determining damages
 - disposition and temperament
 - social life
 - services rendered in supervising the household
 - acts of affection, love and sexual intercourse

Questions?

