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HEADLINE: **Trial Advocacy, Economic Testimony: From Lay Witness to Economist**

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BODY:

Calling an economist to testify should serve as the foundation and support needed to justify a jury's award for pecuniary loss. The direct of the economist takes seed not with the preparation of this witness, but with the critical medical and lay testimony that goes before.

Prior to calling the economist, you must first lay the foundation for his testimony. Know your goals. Are you projecting lost earnings or merely a diminution of future earning capacity? Are you projecting just medical costs or rehabilitation costs, psychological counseling costs and future medical consultations as well? Do you represent the estate of a parent leaving small children behind, where you are asking the economist to quantify the value of parental services? Do you represent the estate of a housewife, where you are asking the economist to quantify a wife's value in terms of household services? Prior to your economist's testimony, you must have the evidentiary background that lays the groundwork for your expert's opinion.

Diminution in Earning Capacity

Obviously, you can not have your economist testify as to the value of future loss of earnings if you have not shown that your client is permanently disabled from employment. No economist can give an opinion that your client is disabled. The best person to do that is your treating physician. To make that point with the plaintiff's doctor, establish the doctor's expertise and training in determining work disabilities. Establish that the physician on a daily basis has to determine whether patients are physically able to return to work. Show that the doctor recommends when and if his patients can return to full-time employment. Demonstrate that he has done this for patients, employers or disability carriers in the past, and that it is part of his expertise. Of course, you must show that he is familiar with the type of employment responsibilities and physical requirements of the occupations that the defense will say your client can perform. Then ask your doctor the following:

Q. Do you have an opinion, to a reasonable degree of medical certainty, as to whether my client will be able to return to work at his current job?

Q. What is the basis for your opinion?

Q. Do you have an opinion as to whether he can return to work in any capacity?

Q. Why do you say that?

There may be situations in which you would lose credibility by offering proof of a total disability. Then, you may need to show that your client will be able to work in the future, but will earn less money based upon the need to reduce the workload to a part-time basis or employment that pays less money. A medical doctor will probably not be the right witness. To prove this aspect of your case, you will likely need a vocational expert who specializes in finding alternative employment for injured workers. With the vocational expert, after eliciting the appropriate qualifications for his ability to comment on future employability, ask the following questions:

Q. Do you have an opinion, to a reasonable degree of vocational certainty, as to whether my client will be able to return to full-time employment?

A. Yes. My opinion is he will only be able to return to part-time, minimum-wage employment.

Q. What is the basis for that opinion?

A. He will not be able to make the daily commute, concentrate for more than short periods of time, and will be on pain medications that affect his thought processes. Therefore, at best, he will only be able to return to work for 20 hours a week at minimum wage.

To further enhance your loss-of-earnings proof, you should consider bringing in a former employer or supervisor to tell the jury what a strong and efficient worker your client was, as well as the physical requirements for the job. The stronger the preceding evidence, the more credible your economist's projections will be.

Future Medical Costs

The same type of thinking should lead to believable projections for future medical and rehabilitative costs. The economist's projections are only as good as the medical foundation for them. When questioning your client's doctors on the seriousness and permanency of her injuries, do not forget to get opinions on her future medical needs:

Q. Doctor, do you have an opinion, to a reasonable degree of medical probability, as to what, if any, future medical treatment my client, your patient, will need?

A. She will need arthroscopic surgery to clean out the knee joint immediately and a total knee replacement in about five years, when she is 50 years old.

Q. Will she need any other treatment or surgery?

A. Yes. She will need additional total knee replacements every 10 to 15 years for the rest of her life, since that is the average life span for each prosthesis.

Q. Will she need anything else?

A. Yes. She will need rehabilitation, including ultrasound, heat packs and massage for her lower back injury for the next 20 years.

Q. Doctor, do you have an opinion, to a reasonable degree of medical probability, of course, as to the reasonable costs of these procedures in today's dollars, including the total knee replacements, ultrasound, heat packs and massage?

A. The total knee replacement would cost \$50,000 in today's dollars, and the therapy costs would be \$100 per session two times per week.

The Direct of the Economist

Now you have laid the appropriate foundation for your economist to testify as to lost earnings and future medical costs, by setting out the present costs associated with your client's future needs. It is for the economist to project those actual costs into the future. First, however, you must show the court that your economist is qualified to give the projections:

Q. Dr. Smith, what is an economist?

Q. What does an economist do?

Q. Tell us your educational background starting with your undergraduate degree.

Q. Where did you get your doctorate in economics?

Q. Describe your work history within economics.

Q. What, if any, publications have you written with respect to economics?

Q. Do you hold any teaching positions?

Q. Prior to today, have you been qualified as an expert in the field of economics in the courts of the state of New York?

Q. Have you testified in any other states?

After qualifying the witness, have him explain relevant terms such as inflation, growth rates, fringe benefits and all operative economic terms. Have him demonstrate why it would be inappropriate and unjust simply to do straight projections of future loss of earnings without including a growth rate or the value of fringe benefits to the worker. Have him explain why the medical growth rate is higher than a general growth rate that is applied to earnings. Then launch into hypothetical questions incorporating all of the relevant prior testimony on which he will need to base his opinions.

Q. Professor Smith, I want you to assume that the following is true: I want you to assume that Patty Plaintiff has been treated by a board-certified orthopedic surgeon since the day of her accident. I want you to further assume that her orthopedic surgeon, Dr. Schwartz, testified under oath that she has a badly damaged knee that will require first, arthroscopic surgery immediately at the cost of \$10,000, and then, a total knee replacement in five years costing \$50,000 in today's dollars, followed by revisions of that total knee replacement every 10 to 15 years for the rest of her life. Do you have an opinion, to a reasonable degree of economic certainty, as to what the future cost of those surgical procedures will be over the course of Patty's lifetime?

Q. Could you be kind enough to step down into the well, with the permission of the Court, and write that on the blackboard?

Q. Could you please explain how you came to that opinion?

Q. What growth rate did you use? Why? Is that to a reasonable degree of economic certainty?

After completing this aspect of the direct, then move to the future rehabilitative costs. Go through another mini-hypothetical question, rather than doing one long one. This will make the direct simpler for you and easier for the jury to follow:

Q. Professor, I also want you to assume that Patty's treating physician says she will need rehabilitative therapy that will include hot packs, ultrasound and massage. Her doctor further testified that those costs amount to \$100 per session in today's dollars, and that she will need that treatment two times per week for the next 20 years. Do you have an opinion, professor, to a reasonable degree of economic probability, as to what the future costs of that treatment will be for Patty Plaintiff?

Q. Would you kindly memorialize that by putting those numbers on the board with the permission of the Court?

Q. What growth rate did you use for the rehabilitative costs? Why? Is that the proper growth rate to a reasonable degree of economic probability?

The same type of short hypothetical questions should be used for your lost earnings claim. Just make sure you do not go outside the evidence in constructing your hypothetical:

Q. Professor, I also want you to assume that her physician has testified that Patty is totally disabled from her prior employment, or any employment for that matter. I would like you to further assume that her former employer testified that she no longer can complete the requirements of her position, and that, as her tax returns bare out, she was earning \$60,000 per year as a secretary and that she had full fringe benefits including a paid four-week

vacation, full health insurance benefits for her family, full dental benefits and a pension. Do you have an opinion, to a reasonable degree of economic certainty, as to what her loss of earnings has been from the date of the accident to the present time? Could you please put that on the board? Do you have an opinion to a reasonable degree of economic certainty as to what her future loss of earnings will be for the remainder of her work-life expectancy? Could you please write that on the board?

Q. What growth rate did you use to make these projections? Why? Is that the appropriate growth rate to a reasonable degree of economic certainty?

Q. Did you incorporate into that projection the value of fringe benefits?

Q. What is the actual value of fringe benefits, and why is it important to include it in loss of income projections?

It is important to have your economist include the value of fringe benefits in the lost earnings equation, because you can add approximately 29 percent to the annual lost income per year. Compounded annually by your economist, that can add substantial sums that your client would be entitled to receive in the jury's award.

Reduction to Present Value

Since the advent of Articles 50-A (which is being repealed and reworked) and 50-B, jurors and, therefore, economists no longer reduce the projections to present value: that is, a number today that could be appropriately invested with the prevailing interest rates to provide the plaintiff with an amount that would compensate her over her work-life or life expectancy. As a result, the numbers projected by the economist can appear astronomical. Although the court must charge the jury that it should not reduce the award to present value, that instruction sometimes can get lost in the totality of the charge. Therefore, it is best to have the economist explain to the jury that he is not reducing the numbers to present value and that they are future-value numbers. At that time it is appropriate to ask the court for an instruction, that neither the economist nor the jury should make such a reduction and that the court will be involved in post-verdict calculations to take care of that issue. It is a good idea to remind the jury of that notion in summation.

Household Services

The appellate courts have put their imprimatur on the economist's ability to quantify the replacement costs of household services and parental guidance in death cases. In addition, they have sustained substantial awards for each category. As a result, you don't have to leave it solely up to the jury to decide the value of these awards. Your economist can testify as to the manner in which economists typically evaluate these replacement costs and place a dollar value on them, which can be projected into the future. It is always important, however, to supply the economist with the foundational testimony for his opinion. This could include the amount and type of work the housewife did prior to her death or the things she did for her child before her death. Be aware, however, that jurors sometimes may place a higher value on these services than the raw economic data supports.

Conclusion

Credible economic testimony is critical to procure and sustain a large special damage award. The effort, however, does not begin and end with the economist. Appropriate lay testimony, medical testimony and vocational testimony is important in order to lay the groundwork for the ultimate economic opinions. Once the economist takes the stand, appropriate background questions to show the witness' qualifications and detailed factual hypothetical questions can lead to substantial awards based upon a reasonable degree of economic certainty.