

# New York Law Journal

## The Direct Examination of the Economist

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By Ben Rubinowitz and Evan Torgan

While an award of damages for pain and suffering is often subject to the whims of jurors and strict oversight by courts, an award for economic damages can be just as substantial if supported by comprehensive testimony from a qualified economist. Conducting an effective direct examination of an economist presents several challenges, such as maintaining the jury's attention through the presentation of relatively dry subject matter, and conveying the complicated financial terms and calculations to lay jurors in a language that they can understand. With thorough preparation, an effective trial attorney can overcome these challenges and obtain a substantial verdict for his or her client.

### Laying the Proper Foundation for the Economist's Testimony

Prior to calling the economist, it is important to have a strong factual foundation for his or her testimony. For example, if the trial attorney is projecting loss of earnings based upon a total disability, medical testimony should be presented first in order to back up that position. While most doctors are qualified to determine whether their patient is disabled, the trial attorney may, in certain circumstances, need a vocational expert to make that determination. Although some economists possess the requisite training as vocational counselors, they are not generally qualified to opine as to whether the plaintiff is disabled from employment, or whether he or she could find other less strenuous employment. Additionally, an economist is often not qualified to testify about a plaintiff's future medical needs. Thus, before calling the economist to the witness stand, the trial attorney should ensure that the plaintiff has already testified to his injuries, that a qualified medical expert has already testified as to the plaintiff's

disability, as well as to future medical and therapeutic needs, and that a vocational expert has already ruled out other sources of employment or reduced earning capacity.

### Preparing the Economist to Testify

As with any expert witness, it is critical that the attorney have the witness behave as humbly as possible in order to enamor him or her to the jury. Begin by laying out the economist's credentials in an unassuming, yet impressive, manner. Since most forensic economists spend a lot of time testifying in court and preparing reports for lawyers, trial counsel should use that experience to his or her benefit, rather than permitting the witness to be portrayed as a hired mouthpiece for the attorney. Toward that end, the fact that the economist makes a living testifying for lawyers should be brought out in a positive light on direct examination, rather than letting the defense skewer him or her on cross.

- Q: Professor Argent, prior to today have you been qualified as an expert in economics in the courts of the State of New York?
- Q: Approximately how many times have you been so qualified?
- Q: Aside from your testifying as an expert in New York courts, in what other state courts have you been so qualified?
- Q: How many times?
- Q: Aside from those state courts, have you been qualified as an expert in United States Federal Courts?
- Q: In which districts?
- Q: Please explain to the jury how you are being compensated for your time?

By highlighting that the economist has been deemed an expert numerous times, by many different courts, the trial attorney can set the tone regarding his or her expertise and head off any suggestion that the witness is simply a puppet for the plaintiff and his or her attorney.

### Explaining the Concepts of Growth and Inflation

Once getting through credentials and expertise, a critical concept to convey is that of inflation and growth. It is very important that the trial lawyer communicate that concept to the jury so they

understand how costs will increase over the plaintiff's life expectancy, and why the numbers for future economic damages will be so high. The best way to convey growth is to have the economist explain how prices and salaries have risen since the past, and demonstrate how that same type of growth will occur in the future. Furthermore, it is important to communicate to the jurors that economists base their opinions on the same reliable statistics used by the United States government. This should lend immediate credence to many of the figures that the economist uses in his or her calculations. For instance, all forensic economists – whether defense or plaintiff oriented – must utilize the Consumer Price Index (the CPI) as the basis for their projections. Therefore, it is important that the trial lawyer embrace this figure as his or her own. The attorney should have the economist explain how the CPI is compiled, its significance to federal economic policy, and its applicability to the case. An effective way of introducing and explaining the CPI is as follows:

Q: Is there something that economists generally recognize and utilize in the field of economics known as the CPI or the Consumer Price Index?

Q: Tell us what the Consumer Price Index is?

A: Well, the CPI is the average price of goods, of commodities that are purchased by a typical urban consumer in the United States.

Q: Is the CPI something that is kept and published by the federal government?

A: Yes, the Bureau of Labor Statistics at the Department of Labor is the entity that actually collects all of the data. They go out and survey various stores for example, and find out how much an apple costs this year, and the following year, and they do this for all different commodities.

Q: In determining various inflationary trends and growth rates, did you rely on the Consumer Price Index published by the United States government?

Q: What I would like to do now is go into the area of Lost Earnings. Did I ask you to project the plaintiff's loss of income to a reasonable degree of economic certainty?

Q: Before we get into the specific projections, how were you able to determine a specific growth rate for the plaintiff's future lost earnings or future earning capacity?

A: Well, I first looked at the data of what a veterinarian was making in the New York Metropolitan area over time, and then I went back as far as the data was

available for the category called Veterinarians, and looked at what they were earning back as far as 1999, and then I looked at what they were making in the last available year, which is 2013.

Q: Is this based upon published data by the Bureau of Labor Statistics?

Q: Is that data that is available to not just economists but to the public at large?

In order to help the jury conceptualize how the CPI affects earnings and purchasing power, the trial attorney should enlarge all of the relevant charts from each portion of the CPI upon which the witness will be basing his or her opinion, having the court take judicial notice of enlarged charts.<sup>i</sup> In this way, the jury will see the data upon which the economist is making his or her projections, and comprehend the growth rates the trial lawyer is utilizing for future damages.

#### Presenting Evidence on Lost Earnings

After educating the jury on the notion of growth rates and compounding, it is important to discuss the actual facts of the case. Although economists primarily rely on the Consumer Price Index and general theories of economics, the true basis for their testimony should be facts that are already in evidence, such as employment records, tax returns and the testimony of employers or co-workers and other experts. The liberal use of short, to the point, hypothetical questions will truly be the real basis for the attorney's questioning.

Q: Professor Argent, I would like you to assume the following as true. I want you to assume that the plaintiff was crossing the street with the light in her favor when she was struck in the head by a left turning vehicle. That her treating neurosurgeon testified under oath that she ended up with a severe brain injury which included damage to the optic nerves that rendered her blind, and a diffuse axonal injury that have left her unable to speak coherently or take care of her basic needs. I want you to further assume that her neurosurgeon, Dr. Mathis, testified that she is not only disabled from being a veterinarian, but that she is totally disabled from any gainful employment at all. I want you to further assume that the Executive Director of the Animal Center testified that not only was the plaintiff an excellent veterinarian, but that she actively recruited her, and that her starting salary was \$100,000.00 per year. Moreover, Executive Directors testified that in addition to her salary, the plaintiff was given full fringe benefits that included a medical plan, a dental plan, vacation time, sick days and

a pension. She further testified that had the plaintiff been working there today, her salary would have risen to \$150,000 per year plus fringes. I want you to further assume that the Executive Director of the Animal Center further testified that the plaintiff was one of the best veterinarians he ever had and that she would have had a job there for as long as she wanted to stay, and that she could have had her choice of jobs anywhere. Do you have an opinion, to a reasonable degree of economic certainty, as to what the plaintiff's loss of earnings amount to?

Q: What is your opinion?

Q: What is the basis of your opinion?

The effective trial lawyer should lead the jury through the economist's calculations step by step, utilizing the CPI and other government statistics.

Q: I want you to assume that the plaintiff worked as a veterinarian for three months prior to her injury.

Q: Can you show us the mean wage for veterinarians in the metropolitan area in 1999?

A: \$64,260 per year in 1999

Q: And what was a veterinarian's average annual salary in the following year, 2000?

A: In 2000, they earned \$76,170 per year.

Q: And dropping down in the chart to the year 2006, by way of example, what was the average salary for veterinarian's in the metropolitan area?

A: \$110,150.

Q: If we were to go to the final year of data kept by the federal government for vets in the metropolitan area, what was the average annual salary?

A: \$131,750.

Q: So Dr. Argent, what was the average growth rate for veterinarian salaries in the New York – New Jersey metropolitan area between 1999 and 2013?

A: 5.68%

Q: How does that growth rate apply to the plaintiff's case and her earnings?

A: Well we would add 5.68% each year to her salary along with what we call compounding?

Q: How would that work?

A: Well, by way of example, let's round it down to 5%. If someone were earning \$100,000 per year, the next year they would be earning \$105,000. The

following year, they would be earning not \$105,000, but \$105,000 plus \$5,250 or \$110,250 per year. So your earnings keep going up over time because of the growth rate compounded over time.

When establishing a plaintiff's expected future compensation, the attorney must not forget to include the value of fringe benefits, as they can significantly increase the actual amount of an individual's compensation. For instance, in a table entitled, "Employer Costs for Employee Compensation", fringe benefits are shown to be between 29.6% and 31.1% for the years 2004 through 2013. Thus, for a worker earning approximately \$100,000 per year, the economist could demonstrate that the worker's actual compensation was approximately \$130,000, with the additional \$30,000 representing the value of the fringe benefits. It is sometimes a good idea to do two sets of projections: one with the value of fringe benefits, and one without. Of course, calculating the future lost earnings without fringe benefits is unjust in its insufficiency and that should be pointed out to the jury.

Another important concept in economic projections is discounting to present value. In most jurisdictions, the verdict amounts have to be reduced by the jury to present value, meaning an amount of money that if invested at the prevailing interest rates will yield the amount of money the plaintiff will need for the amount of years that the verdict is intended to cover. In those states, and in federal court, the economist will reduce the numbers to present value. In New York State courts, the jury is not permitted to do that. Therefore, even though the jury will be instructed by the court not to reduce their awards to present value, it is a good idea to have the economist testify to what the reduction is and give an example of how low the projections will be once they are so reduced. It is critical to let the jury know that the projections are inflated because they are not reduced, and that the reductions will be done by the court post-trial. Toward that end, ask the court to instruct the jury that it will later be reducing the award to present value, and that it cannot make such a reduction.

#### Presenting Evidence on Medical Expenses

Many economists will project all future related medical costs with one growth rate – the growth rate for medical services. However, the more conservative approach is to actually break down the specific medical item to a specific category in the CPI within medical services. The relevant categories of the database can be viewed on the Bureau of Labor Statistics website and printed out and enlarged for the jury. The large category of Medical Care is broken up into two smaller categories: Medical Care Commodities and Medical Care Services. Some economists will make the gross projections from the broad area of medical care, and others from one of the two categories. The more precise way to make medical cost projections is by going into more specific sub-categories. By choosing a specific sub-category as opposed to a broader category, the numbers may be either substantially higher or substantially lower. For example, in looking at the need for future physical therapy for a client, the category the economist uses will increase or decrease the ultimate projections. If the physical therapy is in a private office, it will be a substantially smaller growth rate and a substantially smaller yield than if it is hospital-based physical therapy. If the physical therapy is in a private office, it would be projected under the category of “Services by Other Medical Professionals.”

Q: Professor Argent, I want you to assume that the plaintiff’s physician testified she will need physical therapy 1-2 times per week for the rest of her life. Furthermore he testified that for now, it would be appropriate to be followed by a physical therapist in a private office, where the typical charges are \$150-\$250 per session. How would you go about determining a growth rate for that treatment?

A: Well, I went to the Consumer Price Index, found on the website of the Bureau of Labor Statistics. I looked for the component called Medical Care, which is broken down to medical care services, which is further broken down to a category called services by other medical professionals. That component only goes back to 1986. It includes services performed by other professionals such as psychologists, chiropractors, physical therapists, podiatrists, social workers and nurse practitioners.

Q: Did you come to an opinion, to a reasonable degree of economic certainty as to what the appropriate growth rate would be for that type of counseling?

A: Yes. The growth rate would be 3.05%.

Q: Do you have an opinion, to a reasonable degree of economic certainty as to what the lifetime cost of physical therapy would be for the plaintiff?

A: For physical therapy alone in an office setting it would be \$1,466,782.

To demonstrate how the specific subcategory by an economist could dramatically change the projections, let's assume that the physical therapy would be so sophisticated that it would have to be done in a hospital setting. Thus, the growth rate would not be based on the subcategory of "Services by other Medical Professionals", but rather on "Outpatient Hospital Services", which are much higher.

Q: I would like you to assume Dr. Argent, that the plaintiff's physiatrist at Rusk Institute testified that she will need very sophisticated physical therapy at a hospital institution like Rusk. And that is because she has such a great constellation of medical, neurological and physical problems. I would also ask you to assume that the cost at Rusk is \$1300 per session. What growth rate would you use to do those types of projections with?

A: 6.94%.

Q: What is the basis for your using that growth rate?

A: Well, because the treatment would be at Rusk or a hospital like Rusk, I would have to go to a different category of Medical Services. This would be an outpatient medical service. Those are services provided to patients classified as outpatients in hospitals, which would include the therapies at Rusk and other similar institutions.

Q: Do you have an opinion, to a reasonable degree of economic certainty as to what the cost of physical therapy over the course of her lifetime would be at Rusk Institute or a similar institution?

Q: What is the basis for your opinion?

### Conclusion

Although the direct testimony of an economist can be dry and purely numerical, it is a critical part of proving substantial damages to a jury. Before calling the economic expert, the trial attorney must prove a strong foundation of disability, earnings and medical needs. Then, through the economist, he or she must explain the concept of growth and inflation, utilizing the Consumer Price Index from the Federal Bureau of Labor Statistics. Both compounding the interest and the addition of fringe benefits



must be explained and utilized. Showing the jury the actual charts from the Bureau will both enhance the credibility of the testimony and aid the jury in understanding the methodology. Clear, precise and decisive economic testimony can ensure that your client gets a fair and just award.

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<sup>1</sup> Sommer v. Sommers, 203 A.D.2d 975 (4<sup>th</sup> Dep't 1994), citing Fisch, New York Evidence Sec. 1051, [2d ed.]; McCormick on Evidence sec. 330 [Cleary 2d ed].

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