The Basics of Proving Economic Loss
How to use damage experts

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In cases involving clients with catastrophic injuries, it is essential to develop and prove their claims for medical expenses, future medical expenses, lost wages, future lost wages and/or impairment to earning capacity. These damages can amount to millions of dollars and are a critical part of the case.

UCJI 70.03, relating to economic damages, provides:

> Economic damages are the objectively verifiable monetary losses that the plaintiff has incurred or will probably incur. In determining the amount of economic damages, if any, consider:
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> (1) The reasonable value of necessary medical/hospital/nursing/rehabilitative and other health care and services for treatment of the plaintiff.
>
> (2) The amount of lost income incurred by the plaintiff since the injury to date.
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> (3)(a) The amount for past impairment of earning capacity.
>
> (3)(b) The amount for probable future impairment of earning capacity.
>
> (4) The reasonable value of substitute domestic services that the plaintiff has incurred and probably will incur.

The question for newer practitioners can be, how do you prove those losses? That is where life care planners, vocational rehabilitation specialists and economists come into play. Using these primary experts is a starting point in the process of proving economic damages.

Proving past medical expenses

That said, past medical expenses are generally easy to prove and do not require the use of these experts. To prove past medical expenses it is important to obtain each and every medical bill from every medical provider that provided treatment to your client for his or her injuries. These include hospital bills, ambulance bills, prescription records, ER physician bills, radiology bills and everything else involving treatment. Once you have all the medical bills, you should prepare one of your medical experts to testify that the services represented by the medical bills were necessary to treat the injuries your client suffered as a result of the defendant's negligence. This medical expert will also have to be prepared to testify that the amount of the bills was reasonable for the medical services provided. To prove the reasonableness of the medical bills you may have to use several witnesses who have familiarity with the services provided and what is the reasonable price for those services in the community. For instance, at OHSU a surgeon typically can testify to the necessity of the medical services provided but usually cannot testify to the reasonableness of the charges. With OHSU, you need to make arrangements with the accounting department to have a person familiar with the amounts charged and what is reasonable in the community for those services to testify to the reasonableness of the bills. To avoid this process, I send a request for admission to the defendants asking them to admit the necessity of the medical services and the reasonableness of the medical bills to date. More often than not, the defendants will make this admission. Oregon law is now settled that a plaintiff is entitled to recover all necessary and reasonable medical expenses billed to the plaintiff that was caused by the defendant's negligence. *White v. Jubitz,* 347 Or 212, 219 P3d 566 (2009). Evidence of what was actually paid and any write-offs on those bills by Medicare, Medicaid or private health

insurers is not admissible. *Id.* Nor is the fact that the plaintiff even has Medicare, Medicaid or private health insurance. *Id.*

I recently had a case involving a negligently performed hernia repair surgery that resulted in my client developing multiple abdominal fistulas. To repair the fistulas, she had to undergo a total of 7 surgeries over a year-and-half and was left with a permanent ileostomy. The medical expenses billed to her totaled over $1,500,000 even though Medicare paid only a portion of that amount. The defendants' counsel admitted the necessity and reasonableness of those medical expenses, alleviating my need to prove those damages.

Proving future medical expenses

The more difficult damage to prove is the amount of future medical expenses your client will incur over the remainder of his or her life. In proving these damages, it is important to first determine how long your client is going to live. There are many occasions when a plaintiff won't live a normal life expectancy. For instance, in birth injury cases involving cerebral palsy, the effected child may not live a normal life expectancy depending on the extent of his or her injuries. The same issue arises in quadriplegic cases. The best evidence for proving your client's life expectancy is his or her treating physician. Life expectancy can also be proved through your own retained medical experts who have examined your client. The next step is to retain a life care planner to create a life care plan.

According to the International Academy of Life Care Planners, a "life care plan is a dynamic document based upon public standards of practice, comprehensive assessment, data analyst, and research, which provides an organized, concise plan for current and future needs with associated costs for individuals who have experienced catastrophic injury or have chronic health care needs." Life care planners are usually educated and trained in various rehabilitation fields such as rehabilitation counseling or vocational rehabilitation, and have an added certification in life care planning. Their job is to determine what medical services and supplies your client will need the remainder of his or her life, together with what equipment and home modifications will be needed to accommodate the person's injury.

After obtaining a life care planner, you should meet the person in your office, tell him or her what the case is about and ask what is needed from you. Sending a letter to the life care planner explaining your client's case and injuries in detail is not the best approach. If you do, remember that if the case goes to trial the defense attorney will see that letter and attempt to use it against you if you have explained anything different from what you are presenting at trial.

The life care planner will need to review all of your client's medical records. He or she will then want to interview your client, talk to your client's treating doctors and talk to any experts you have retained who have examined your client.

Depending on the type of injury your client has, it can be very helpful to have him or her undergo a physical capacity test as well. I have used a physical capacity examiner from Washington state to perform these tests. I like him because he has a PhD in biomechanics and testifies well. A physical capacity test involves a series of physical tests that usually take about a day to complete and measure in detail your client's physical deficits from the injury. This information helps the life care planner determine what modifications will be needed to the client's home and to the client's car, if he or she drives, what domestic help the client will need at home, and what other medical services will be needed in the future. The physical capacity test is also important to the vocational rehabilitation specialist in determining what types of jobs, if any, the client can perform in the future.

After the life care planner has reviewed the medical records, interviewed your client, and met with your client's treating doctors and retained experts, he or she will create a draft life care plan. It is critically important that each item listed on the life care plan be supported by a recommendation of either a treating doctor or one of your retained experts. Otherwise, you will not be able to prove the medial necessity of the item at trial and jurors may think you are unprepared or overreaching. To ensure each item on the life care plan is supported by an appropriate medical expert recommendation, I arrange a personal meeting with each treating doctor and expert involved. At these meetings, I get the doctor or expert to commit to testifying that he or she recommends each item in the life care plan that is associated with his or her recommendation. I also make sure the doctor or expert will not disagree with any item in the life care plan recommended by another treating doctor or expert.

After this process is completed, it is important to look over each item in the life care plan and be comfortable yourself with presenting each item to the jury. For instance, I had a case involving a woman who suffered a severe injury to her left L5 nerve root during an L5/S1 discectomy surgery. The life care planner included certain modifications to the client's home that were recommended by her doctors. The life care planner then wanted to testify based on statistics that my client would move at least one more time in her life and therefore would need the home modifications twice. I knew, however, that my client had lived in the same house for over 20 years and had no intention of moving. I did not want the jury thinking I was overreaching. As a result, I told the life care planner to take out one of the home modifications.

At this point, the life care plan can be finalized. You now have proof of all future medical care your client will need and the costs associated with that care.

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However, you're not done.

Economists

Oregon law requires the jury to determine the present value of the plaintiff's future medical expenses. *Denton v. EBI Companies*, 67 Or App 339, 343-44, 679 P2d 301 (1984). UCJI 70.05 provides:

> If you decide that the plaintiff is entitled to prevail and find that the plaintiff will have a future economic loss because of the plaintiff's injury, then it becomes your duty to reduce that future economic loss to its present value. This is necessary because the plaintiff will be compensated now for future losses.
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> The present value of future economic loss is the amount of money that, if invested today at a reasonable rate of interest and over the period of the plaintiff's loss, will equal the future economic loss.

A plaintiff is technically not required to present evidence of the present value of future losses. *See Miller v. Pacific Trawlers*, 204 Or App 585, 601, 131 P3d 821 (2006); and, *Brokenshire v. Rivas and Rivas, Ltd.*, 142 Or App 555, 563-64, 922 P2d 696 (1996), rev. dismissed, 327 Or 119, 957 P2d 157 (1998). As a practical matter though, you need to present it because the defense will. In order to prove the present value of your client's future medical expenses, you will need to consult with an economist. In my experience, the best economists are university economic professors. They have excellent credentials and are good at explaining things to juries. Provide the economist with the life care plan and he or she will make the calculation.

Typically, the economist will review the life care plan and first determine the rates of inflation for each item mentioned. Medical expenses historically inflate at a higher rate than the general rate of inflation and the economist should have statistical studies of the rate of inflation for particular medical services. If the economist applies an across the board inflation rate for all medical services, which defense economists typically do, it is wrong and can be proven so through statistical studies on inflation rates of medical services, which you should be able to get from your economist. It is important to have the economist and the life care planner talk to each other about the particular items in the life care plan to make sure the economist is applying the correct inflation rate for each item.

Once the inflation rate calculation is made, the economist will apply a discount rate to reduce the medical expenses to present value. The discount rate is used by the economist to determine the present amount of money it will take, if invested today in a conservative investment over the period of the client's loss that will equal the amount of the future loss. After this calculation is made, you will now have proof of the present value of the life care plan and thus the present value of your client's future medical costs.

The fight you will face at trial between your economist and the defense economist will be over the inflation rates and the discount rates used. Make sure to understand what inflation rates your economist is using and why and what discount rate and why. Also, the defense economist may attempt to present evidence of the present cost of an annuity to cover your client's future medical expenses although that's less likely in the present economy.

In any event, be prepared to fight this by seeking its exclusion and also having your economist testify as to why an annuity is not appropriate.

Proving past lost income

Proving past lost income may or may not require the use of a vocational rehabilitation expert depending upon the nature of your client's work. A vocational rehabilitation expert is a person educated, trained and certified as a vocational rehabilitation counselor and qualified to determine the loss of a client's past and future earning capacity and/or loss of income. If your client is an hourly wage earner, for example, you are not going to need a vocational rehab expert to prove his or her past lost wages. Keep in mind though that "wage loss includes all lost benefits [including] vacation, sick leave or other leave used while the plaintiff was unable to work." UCJI 70.20. You can usually prove this loss through your client, his or her employment records and a witness from the employer.

If your client has a job with fluctuating income, such as a real estate agent, a vocational rehabilitation specialist is helpful in proving this damage. For example, one of my clients was a real estate agent in Coos Bay, who suffered a severed ureter during a hysterectomy surgery and was completely off work for six months in 2007. Her income had fluctuated significantly from 2005 through 2007 making it difficult to determine her lost income for the six months in 2007. I had a vocational rehabilitation expert determine my client's loss of income in 2007 along with her loss of future earning capacity.

Loss of future earning capacity

In addition to past lost income, a catastrophically injured client who has past lost income will undoubtedly have future loss of earnings or loss of earning capacity.[1]

The best way to prove these damages is through a vocational rehabilitation expert. This expert will need to review your client's medical records, educational records, employment records and tax returns. In addition, he or she will interview your client and perform a number of vocational aptitude tests that determine your client's abilities in a wide range of topics including mathematics, verbal and abstract reasoning and mechanical reasoning. The vocational rehabilitation expert will then create a report.

Depending upon the circumstances of your client's injuries and work history, the report will include your client's projected remaining work years, projected life time earnings (had the client not been injured) and projected earnings your client will likely earn, if any, with the injury. Alternatively, if your client is still employable but unable to do the job he or she was doing before the injury, the report may include the costs associated with retraining the person to do an alternative job that he or she can do. It is important to talk to the vocational rehabilitation expert before the report is created to understand and discuss what recommendations will be suggested for your client.

Once your client's total lost earnings or lost earning capacity is determined, you will once again need to work with the economist to reduce that number to present value.

Conclusion

Working with life care planners, vocational rehabilitation experts and economists is a labor intensive and time consuming process. If you have a good case, start early building your damages. It's well worth it. We know that most cases settle, but this evidence is a must for that to ever happen.

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[1] Oregon law on lost earning capacity and what is needed to prove it can become quite complex depending on the circumstances of the case. For example, a plaintiff has a claim for loss of earning capacity even if he or she was unemployed at the time of the injury and has no intention of getting a job. *Richmond v. Zimbrick Logging Inc.*, 124 Or App 631, 863 P2d (1993), rev. den. 318 Or 459, 871 P2d 123 (1994). Also, a plaintiff has such a claim even if he or she makes more money at a new job after the injury if the person cannot do the job he or she did before the injury. *Henderson v. Hercules, Inc.*, 57 Or App 791, 646 P2d 658 (1982). A claim for loss of earning capacity in these circumstances is very difficult to quantify with any actual dollar figure and you may or may not want to use a vocational expert depending on the extent of the client's injury. For an excellent discussion of Oregon law on loss of earnings and earning capacity see, OSB Damages CLE Chapter 6.