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Damages—Loss of Earnings—Measure of Recovery and Admissibility of Evidence of Prior Earnings and Employment

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Damages—Loss of Earnings—Measure of Recovery and Admissibility of Evidence of Prior Earnings and Employment

Plantiff worked continuously as a welder from 1925 through 1950 when he quit welding and went into a business from which he was never able to realize a substantial income. In 1953, plaintiff, age 49 and in good health, was permanently and totally disabled in an auto accident. In his action for damages, evidence was admitted to show the prevailing wages paid to welders in plaintiff's community as well as plaintiff's own earnings as a welder prior to 1951. A substantial part of these earnings was derived from employment outside of the community. On appeal, *Held*: admissibility of such evidence is in the sound discretion of the trial court and no abuse of discretion was shown. The precise basis upon which the court deemed this evidence to be relevant, however, is unclear. The opinion can be read as sanctioning its use by the jury for the purpose of making either one of two quite different determinations, viz., (1) in fixing the level of plaintiff's "*future earnings . . .* but for the injury;" *or* (2) in computing the amount recoverable for "permanent impairment or loss of *earning capacity.*" At no point does the opinion recognize any distinction between the two determinations.[1]

I. MEASURE OF RECOVERY

While it is usual to state that an injured plaintiff is entitled to be placed in the same position he would have occupied but for defendant's wrong,[2] judicial and other authoritative discussion is divided and obscure with regard to the application of this general principle in measuring damages for plaintiff's impaired ability to work. Several theories have been employed for this purpose, chief among them the "loss of earnings" theory which grants recovery for the actual reduction of plaintiff's probable earnings due to the injury.[3] A second theory, "impairment of earning capa-

[1] Jacobsen v. Poland, 163 Neb. 590, 80 N.W.2d 891 (1957).

[2] Navigazione Libera T.S.A. v. Newton Creek Towing Co., 98 F.2d 694 (2d Cir. 1938).

[3] Clawson v. Walgreen Drug Co., 108 Utah 577, 162 P.2d 759 (1945). Imputed earnings, the non-compensable toil of the plaintiff for himself or his family to which is attributed a pecuniary value, has always been considered a separate element of damages, though logically it falls into the same category as loss of earnings for the impaired ability to work. On imputed earnings, see Marshall v. Smith, 131 Cal. App. 258, 21 P.2d 117 (1933); Kline v. Santa Barbara Consol. Ry., 150 Cal. 741, 90 Pac. 125 (1907).

city," on the other hand, allows recovery for the impairment of plaintiff's abstract capacity to earn,[4] while still a third, less frequently applied, assesses damages for plaintiff's "loss of time."[5] Aside from this and adding to the overall confusion are the cases allowing recovery for inability to pursue one's chosen vocation, even where no actual or potential impairment of earning capacity or loss of earnings is involved.[6]

Due to the varying scope of the above theories as tested in their application, to their use interchangeably and to the misleading inplications of their terms, no settled rule for assessing damages for plaintiff's impaired ability to work has been established. Indeed, some courts expressly refuse to recognize any distinction between the various theories.[7] More frequently, however, the question is simply ignored and the theories are employed interchangeably, as in the instant case.[8] Further difficulties arise from the distinction sometimes taken between the applicable measure of recovery for plaintiff's loss before and after the trial. The *Restatement,* for example, asserts that impairment of earning capacity is the measure of recovery for plaintiff's loss prior to trial whereas damages arising subsequent to the trial are to be figured according to plaintiff's actual loss of earnings.[9] McCormick, in his famous treatise on damages, likewise draws a pre- vs. post-trial distinction, though the result thereof is the converse of the one arrived at by the *Restatement,* viz., that the pre-trial measure is actual loss of earnings while post-trial damages are assessed on an impairment of earning capacity basis.[10] The inconsistency

[4] Clawson v. Walgreen Drug, 108 Utah 577, 162 P.2d 759 (1945).

[5] Muskogee Electric Traction Co. v. Reed, 35 Okla. 334, 130 Pac. 157 (1913). Loss of time will not be considered further as a distinct theory in that, as applied, it parallels loss of earnings as a measure.

[6] Mullery v. Great Northern Ry., 50 Mont. 408, 148 Pac. 323 (1915).

[7] "'Juries are not particularly concerned over or greatly influenced by abstract statements.' It is not at all probable, in fact most unlikely, that the jury would draw a distinction as fine spun as the distinction sought [between earning capacity and loss of earnings]." Fredhom v. Smith, 193 Minn. 569, 574, 259 N.W. 80, 82 (1935).

[8] Such seems to be the case generally in Nebraska. See Jensen v. Omaha & C.B. St. Ry., 127 Neb. 599, 256 N.W. 65 (1934) (loss of earnings); Yost v. Nelson, 124 Neb. 33, 245 N.W. 9 (1932) (earning capacity); Malko v. Chicago, R. I. & P. Ry., 99 Neb. 158, 155 N.W. 876 (1915) (earning capacity).

[9] Restatement, Torts §§ 906, 924 (1939). See also Dyer v. Keith, 136 Kan. 216, 14 P.2d 644 (1932); Iseman v. Hayes, 242 Ky. 302, 46 S.W.2d 110, 85 A.L.R. 996 (1932); Houston City St. Ry. v. Richart, 87 Tex. 539, 29 S.W. 1040 (1895).

[10] McCormick, Damages §§ 86, 87 (1935).

in the result obtained by the *Restatement* and McCormick discloses the fallacy of the distinction. The fact is that it has no sound basis.

The assumption underlying the foregoing discussion, of course, is that the courts' choice of one measure of recovery over the other will often have important practical effects. This is so first of all because of the varying implications of the terms used in the different measures. If, for example, plaintiff is unemployed at the time of the accident, an impairment of earning capacity standard would seem to afford recovery whereas a loss of earnings theory would not. Also, if plaintiff is earning wages in excess of the reasonable market value of his services when injured, most juries would probably be more willing to grant recovery for the excess over market under a loss of earnings as distinguished from an impairment of earning capacity standard. Again, the effect of choosing one theory over the other may have significance in determining the admissibility of evidence bearing upon the amount of the loss. Evidence of plaintiff's earnings in vocations other than the one in which he was engaged at the time of the accident, for example, has much greater apparent relevance under impairment of earning capacity than under loss of earnings.

It may be helpful at this point briefly to examine the application of the two basic damage measures to representative fact situations in order to illustrate more concretely the practical differences between them:

A. Plaintiff who earns more at his employment than the reasonable market value of his services, e.g., nepotism.[11]

> Recovery for loss of earnings will provide recovery for these added wages, qualified by the probabilities of the length of time plaintiff would retain such a position. Recovery for impairment of earning capacity, on the other hand, will provide only an amount equalling the market value of plaintiff's services, an amount falling short of his actual loss, unless, of course, the concept of earning capacity is defined as that sum which plaintiff in fact receives from his employment.

B. Plaintiff who, because of ignorance or lack of industry or for personal reasons, makes less at his employment than he could earn elsewhere, e.g., a professional woman who abandons her career in order to spend more time with her husband and children.[12]

[11] McKenna v. Citizens' Natural Gas Co., 201 Pa. 146, 50 Atl. 922 (1902).

[12] The issue of damages accruing from a housewife's impaired ability to work is especially confused due to her varying rights, e.g. her standing to sue, her non-pecuniary work in the home, and her chances of resuming a career. Recovery under loss of earnings should be based on the probabilities of her resuming outside work. See Rodgers v. Boynton, 315 Mass. 279, 52 N.E.2d 576 (1943); Lippman, The Breakdown of Consortium, 30 Col. L. Rev. 651 (1930).

Loss of earnings as a measure naturally implies consideration of such factors in estimating what plaintiff would probably have earned but for the injury. In contrast, impairment of earning capacity will provide the same amount only if it is pointed out to the jury that lack of industry, desire, opportunity, etc., are factors which lessen the capacity to earn. The impairment of earning capacity terminology, it will be noted, is extremely misleading in this situation.

C. Plaintiff who earns the fair market value of his services at the time of the accident but whose chances of an early retirement are enhanced due to the nature of his employment, other sources of income, etc., e.g., a ball player or a doctor with a large income from capital investments, as in a famous English case.[13]

Loss of earnings impliedly asserts the necessity of determining the period during which plaintiff would probably have continued his employment and factors pointing to an early retirement would reduce the amount of damages awarded. Recovery for impairment of earning capacity, on the other hand, is misleading as to the importance of these factors, especially as the terminology of the measure implies an immediate and complete loss rather than one extending into the future.

D. Plaintiff who is unemployed at the time of the injury, either voluntarily and as a usual course, as in the case of a retired worker, or involuntarily, because of scarcity of available employment.[14]

While loss of earnings as a measure by definition gives plaintiff no more than his actual loss, earning capacity as a measure will sometimes lead the jury to compensate him for services he never intended to perform or which he was or would be unable to perform.

E. Plaintiff who is on vacation, either paid or unpaid, at the time of the injury.[15]

Viewing a paid vacation as a continuance of the job (in that plaintiff's wages while working are less by the amount of his vacation pay), plaintiff would be entitled to his full wages. Both impairment of earning capacity and loss of earnings would clearly permit such recovery. If, however, the vacation was unpaid, use of earning capacity as a measure would at times result in over-compensation, just as in the case of the voluntarily unemployed.

Assuming that our object is to put plaintiff in the position he would have occupied but for defendant's wrong, it should be apparent from the above analysis that loss of earnings as a measure is far preferable to impairment of earning capacity, unless the latter measure is so broadly interpreted as to convert it into a loss of earnings measure, though still there remains the mis-

[13] Phillips v. The London & S.W. Ry. Co., 5 Q. B. D. 78 (1879).

[14] Cincinnati, N.O. & T.P. Ry. v. Perkins, 205 Ky. 798, 266 S.W. 652 (1924).

[15] See Restatement, Torts § 906, Comment b (1939).

leading terminology. Except in the instance where plaintiff has been over-paid for his services, earning capacity as a measure erroneously tends to over-compensate the plaintiff for his loss. This does not mean that there should be no compensation in cases where no actual loss of outside earnings can be shown, or for the losses other than wages arising from the impaired ability to work. Such losses should be considered separate elements by themselves or falling under separate categories, e.g., mental suffering. For example, in the case where plaintiff is on an unpaid vacation at the time of the injury, he should be entitled to some compensation for interference with his unpaid vacation, but it makes no sense to compensate him for the market value of services he never intended to perform. The sum awarded for the lost vacation should depend solely on the degree to which plaintiff suffered by reason of such loss.[16]

Reference is sometimes made to the jurys' possible failure to apply the courts' instructions as given, but this is no excuse for not making these instructions as rational and intelligible as possible. Clarification of the measure of recovery for the impaired ability to work would be a step in correcting a situation not atypical in the law of damages.[17]

II. ADMISSIBILITY OF EVIDENCE OF PRIOR EARNINGS AND EMPLOYMENT

As we have seen, the court did not make it clear whether the admissibility of plaintiff's prior earnings as a welder depended in any manner upon a choice between impairment of earnings capacity and loss of earnings. Regardless of the inter-dependence of these two issues, however, the court's ruling that the admission

[16] "In personal injury actions unless there is shown to be a diminished earning capacity *measured in terms of dollars and cents* flowing from such injuries there can be no recovery based upon this particular element of damages." Phoenix v. Mubarek Ali Khan, 72 Ariz. 1, 229 P.2d 949, 953 (1951). (Emphasis added.) In this case plaintiff had held important positions on a charitable basis, e.g., President of the Indian Welfare League, personal representative of Mahatma Gandhi, lobbyist for repeal of the Indian Exclusion Act, but was not permitted any recovery for impairment of earning capacity.

[17] ". . . [T]he crucial controversy in personal injury torts today is not in the area of liability but of damages. . . . Questions of damages—and particularly their magnitude—do not lend themselves so easily to discourse. . . . Judges consign them uneasily to juries with a minimum of guidance, occasionally observing loosely that there are no rules for assessing damages in personal injury cases." Jaffe, Damages for Personal Injury: The Impact of Insurance, 18 Law & Contemp. Prob. 219, 221 (1953).

of such evidence was not an abuse of discretion deserves independent consideration.

Recognizing that dollars-and-cents precision in assessing personal injury damages is impossible, the courts have not, once the fact of some damage has been established, normally required any greater certainty as to the amount than the nature of the problem of proof admits.[18] All facts and circumstances tending to show the probable amount are proper and there is no fixed rule as to subject-matter in such inquiries.[19] In determining loss of earnings, the nature of plaintiff's prior employment and his earnings therefrom have often been considered,[20] together, of course, with such factors as plaintiff's age, health, character and training.[21] So far as plaintiff's prior employment and earnings are concerned, there is virtual uniformity that such evidence is admissible provided only that it refers to a time period reasonably related to the time of injury and is not rendered inadmissible due to some independent factor.[22]

However, the courts have differed in determining the length of the "reasonable" and permissible time gap.[23] Of course, as previously mentioned, admissibility of prior earnings and employment will sometimes depend on factors independent of remoteness of time, such as apparent abandonment of a prior occupation,[24] a

[18] Alabama Great Southern R.R. v. McWhorter, 156 Ala. 269, 47 So. 84 (1908); Yost v. Nelson, 124 Neb. 33, 245 N.W. 9 (1932); Franklin Motor Car Co. v. Dyer, 29 Ohio App. 241, 163 N.E. 568 (1928).

[19] Wells Fargo & Co. v. Benjamin, 165 S.W. 120 (Tex. Civ. App. 1914).

[20] Abraham v. Gendlin, 172 F.2d 881 (D.C. Cir. 1949); Pawlicki v. Detroit United Ry., 191 Mich. 536, 158 N.W. 162 (1916); Yost v. Nelson, 124 Neb. 33, 245 N.W. 9 (1932); Galveston, H. & S.A. Ry. v. Harling, 260 S.W. 1016 (Tex. 1924); Annot., 130 A.L.R. 164 (1941); McCormick, Damages § 86 n.3 (1935); Sutherland, Damages §§ 1246, 1248 (4th ed. 1916).

[21] Oakes v. Maine C. R.R., 95 Me. 103, 49 Atl. 418 (1901).

[22] See note 20 supra.

[23] *Admissible,* Pawlicki v. Detroit United Ry., 191 Mich. 536, 158 N.W. 162 (1916) (6 mos.); Galveston, H. & S.A. R.R. v. Harling, 260 S.W. 1016 (Tex. 1924) (2 yrs.); Franklin Motor Car Co. v. Dyer, 29 Ohio App. 241, 163 N.E. 568 (1928) (5 yrs.); Oakes v. Maine C. R.R., 95 Me. 103, 49 Atl. 418 (1901) (11 yrs.); Wells Fargo & Co. v. Benjamin, 165 S.W. 120 (Tex. Civ. App. 1914) (20 yrs. in same employ). *Inadmissible,* Hamman v. Central Coal & Coke Co., 156 Mo. 232, 56 S.W. 1091 (1900) (1 yr.); Rooney v. Maczko, 315 Pa. 113, 172 Atl. 151 (1934) (4 yrs.); Fox v. Asheville Army Store, Inc., 216 N.C. 468, 5 S.E.2d 436 (1939) (6 yrs.); Wiley v. Moyer, 339 Pa. 405, 15 A.2d 145 (1940) (9 yrs.).

[24] Houston & T.C. R.R. v. Gee, 27 Tex. Civ. App. 414, 66 S.W. 78 (1901).

previous job for some special and limited occasion,[25] and the probabilities of securing such previous employment in the future if resumption is desired.[26] Nevertheless, time is almost always the most important single factor in the balance and on many occasions has of itself been decisive.

Nebraska seems to have adopted the better and more liberal interpretation of reasonable time in the instant case by admitting evidence of prior employment and earnings, even though the facts tended to show a possible abandonment of plaintiff's trade three years prior to the injury. The liberality of the court's ruling is further highlighted by the fact that a portion of plaintiff's prior earnings was derived from employment outside of the community, overruling a prior Nebraska case,[27] as well as by the court's favorable references to cases outside of Nebraska which sanction a broad field of admissibility.

The court's position seems well-founded. A broad area of admissibility of earnings from previous employment seems almost a necessary concomitant to the intelligent determination of the amount plaintiff would have earned but for the injury. Prediction necessitates an inquiry into the past. Indeed, plaintiff's earnings prior to the injury are almost always a proper consideration in fixing the amount of the loss. Remoteness of time does not imply remoteness to the problem. Prior earnings and employment are highly relevant subjects of inquiry. The *extent* to which these earnings will afford a basis for predicting plaintiff's future loss is one of proof, or weight of the material.[28] This is a question for the jury, except, of course, where the evidence has only an insignificant probative value in relation to the time required to present it, or the possible prejudicial effect on the jury outweighs its relevance.

In summary, and subject to the foregoing qualifications, all evidence of prior employment and earnings should be admitted for consideration by the jury. Such evidence will often provide a definite wage-earning pattern which may then be projected into the future and will at the least furnish a broader basis for the decision of an inherently difficult jury problem.

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[25] Carlile v. Bentley, 81 Neb. 715, 116 N.W. 772 (1908).

[26] Frysinger v. Philadelphia Rapid Transit Co., 249 Pa. 555, 95 Atl. 257 (1915).

[27] Hershiser v. Chicago, B. & Q. R.R., 102 Neb. 820, 170 N.W. 177 (1918).

[28] Germ v. San Francisco, 99 Cal. App.2d 404, 222 P.2d 122 (1950). See Wigmore, Evidence § 29 (3d ed. 1940).