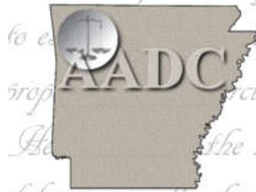


Arkansas Association of Defense Counsel

September 25, 2017

Evidence of Damages from the Defense Perspective

By Russell Atchley and Maggie Benson

- **Aggravation to pre-existing**

That a plaintiff's injuries are the result of a preexisting condition is of little value to the defense perspective with respect to the measure of damages. Under the model jury instructions, the jury is permitted to consider "the full extent of injury sustained" even if the degree of injury is found to have proximately resulted from the aggravation of a preexisting condition that predisposed the plaintiff to injury to a greater extent to than another person. AMI 2203; *see also Clawson v. Rye*, 281 Ark. 8, 661 S.W.2d 354 (Ark. 1983). Accordingly, in *Clawson*, a doctor's assignment of a percentage figure to a disability suffered by a plaintiff was a relevant fact for the jury to consider when determining damages suffered. *Id.* Where jury had testimony regarding the injured plaintiff's condition pre-injury, her condition following a first accident, and her condition following the second accident which was the subject of the litigation, the fact she suffered a total of 15% disability overall was a relevant fact the jury needed to find her injury from the second (aggravating) incident. Admission or rejection of such evidence is discretionary.

- **Delineating loss of earnings and loss of earning capacity with respect to proof**

"Loss of future earnings and loss of earning capacity are separate elements of damages." *See* AMI 2206 comment (citing *Cates v. Brown*, 278 Ark. 242, 245, 645 S.W.2d 658, 660 (1983)).

Loss of future earnings	Loss of future earning capacity
- requires proof, with reasonable certainty, of (1) the amount of wages lost for some determinable period and (2) the future period over which wages will be lost. AMI 2206 (collecting cases). -Where there is proof that the plaintiff, at the time of the trial, is still unable to earn as much as he did before he was injured, an instruction on the loss of future earnings is proper. *Check v. Meredith*, 243 Ark. 498, 500, 420 S.W.2d 866, 867 (1967). - Testimony by the plaintiff, his wife, and his employer regarding plaintiff's earnings, unsupported by documentary proof of earnings, was held to be sufficient to support the trial court's giving of this instruction in *Davis v. Davis*, 313 Ark. 549, 554–55, 856	- The gravamen of loss of future earning capacity is the loss of the ability to earn in the future resulting from a permanent injury, proof of which loss does not require the same specificity or detail as does proof of loss of future wages, nor does it require proof of specific pecuniary loss. *Cates,* 278 Ark. at 245, 645 S.W.2d at 660 (*citing* Henry Woods, *Earnings Capacity as Elements of Damage in Personal Injury Litigation*, 18 Ark. L. Rev. 304 (1965) and AMI 2207). - The evidence in a particular case might support an award for either element; but, because of the danger of double recovery, it is error to disregard the Note on Use and give the lost future earnings portion of this instruction along with AMI 2207. *Coleman v. Cathey*, 263 Ark. 450, 454, 565 S.W.2d 426, 429 (1978).

S.W.2d 284, 286–87 (1993) (noting that the test is "reasonable certainty," not "exactness," and distinguishing *Swenson v. Hampton*, 244 Ark. 104, 424 S.W.2d 165 (1968)).	

- **Discrediting expert testimony on loss of earning capacity**

- Argue opinions on lost earning capacity do not satisfy the admissibility requirements of Rule 702 and *Daubert*

- Where plaintiffs are young, it can be argued that expert's conclusions on lost earning capacity are based on assumptions regarding career paths

- If applicable, argue that assumptions not based on opinions of vocational rehabilitation expert or others qualified to pine on whether plaintiff can pursue certain career paths, but based on self-reported limitations which are unsupported by proof, and thus, the opinions are speculative, not based on sufficient facts, and should be excluded

- "Under *Foote* and *Daubert*, the trial court must make a preliminary assessment of whether the reasoning or methodology underlying expert testimony is valid and whether the reasoning and methodology used by the expert has been properly applied **to the <u>facts</u> of the case**." *Green v. Alpharma, Inc.*, 373 Ark. 378, 399, 284 S.W.3d 29, 45 (2008).

- Expert testimony is inadmissible if it is speculative. *E-Ton Dynamics Indus. Corp. v. Hall*, 83 Ark. App. 35, 39, 115 S.W.3d 816, 819 (2003); *Jacuzzi Bros. v. Todd*, 316 Ark. 785, 875 S.W.2d 67 (1994).

- Expert testimony is also inadmissible if it is "unsupported by sufficient facts, or contrary to the facts of the case." *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 757 (8th Cir. 2006) (citing *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056–57 (8th Cir. 2000)).

- "[E]xperts may not offer opinions that range too far outside their area of expertise." *Arrow Int'l, Inc. v. Sparks*, 81 Ark. App. 42, 49, 98 S.W.3d 48, 53 (2003) (citing *Brunson v. State*, 349 Ark. 300, 310, 79 S.W.3d 304, 310 (2002)).

- Per Eastern District of Missouri:

> "Departures from actual pre-injury earnings must be justified and cannot be unduly speculative. Like all expert testimony, an expert witness's calculations of future earning capacity are inadmissible under Federal Rule of Evidence 702 if based on 'unsupported speculation.' " *Andler v. Clear Channel Broad., Inc.,* 670 F.3d 717, 727 (6th Cir.2012) (citing *Daubert,* 509 U.S. at 589–90). Further, "[s]uch testimony should be excluded if it is based on 'unrealistic assumptions regarding the plaintiff's future employment prospects,' *Boucher v. U.S. Suzuki Motor Corp.,* 73 F.3d 18, 21 (2d Cir.1996), or 'facts that [a]re clearly contradicted by the evidence,' *Boyar v. Korean Air Lines Co.,* 954 F.Supp. 4, 8–9 (D.D.C.1996)." *Id.* Additionally, the expert testimony regarding future earnings "should take into account factors such as the plaintiff's age, employment record, training, education, ability to work, and opportunities for advancement." *Id.*

Mallicoat v. Archer-Daniels-Midland Co., No. 4:11CV1218 TIA, 2013 WL 6000097, at *3 (E.D. Mo. Nov. 12, 2013).

- **Discrediting life care planner testimony**

- Argue for exclusion based on failures to meet requirements of Rule 702 and *Daubert*

- Testimony must be reliable and relevant

- "[T]he cases are legion that assert that expert testimony is inadmissible when it is based on speculative assumptions." *Group Health Plan, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 753, 760 (8th Cir. 2003).

- A life care planner is not a physician, and thus, to the extent the life care plan includes medical opinions, a life care planner exceeds scope of education and experience

  - Experts may not testify outside their area of expertise. *See, e.g.*, *Barrett v. Rhodia, Inc.*, 606 F.3d 975 (8th Cir. 2010) (holding that an expert specializing in neurology was not qualified to opine about the relation of plaintiff's dementia and exposure to toxic gases). *See also Goodwin v. MTD Prods., Inc.*, 232 F.3d 600, 609 (7th Cir. 2000) (finding that an expert with neither a medical degree nor medical training "is not qualified to give expert testimony on medical questions").

- Argue failure to prove how a life care planner is qualified to give expert testimony about a person's past, present, and future medical condition. Though a life care planner may offer expert testimony about the *costs* associated with medical treatment, a life care planner is not qualified to give expert testimony about the medical treatment itself.

- *See Norwest Bak v. Kmart Corp.*, 1997 WL 33479072 at *1 (N.D. Ind. 1997) (while life care planner was an "expert" within field of life care planning, he lacked education, training, and experience to predict future medical needs. Though his "extensive experience in the treatment of neurologically impaired patients qualifie[d] him to state opinions of the *costs* of treatment *if the need for treatment [was] established by medical evidence*," he was *not* "qualified to *provide the medical evidence*.")

- **Damages under the Wrongful Death & Survival Statutes**

(the following researched based largely on former Chief Justice Brill's Law on Damages)

Wrongful death damages and damages sought under the survival statute are distinct. Brill §34:2. Under the Arkansas survival statute, the tort claims that would have been asserted by the decedent survive, and may be asserted by the personal representative on behalf of the estate. Ark. Code Ann. § 16-62-101. Arkansas's wrongful death statute permits statutory beneficiaries to recover for the personal losses they suffer by virtue of the decedent's death. Ark. Code Ann. § 16-62-102. The survival and wrongful death claims are typically brought in a single action. Arkansas's law of comparative fault is applicable to survival and wrongful death actions. The "wrongful death statute is designed to give compensation to statutory beneficiaries; nothing in the statute authorizes punitive damages."

Wrongful Death	Survival
- **Mental Anguish**: "grief normally associated with the loss of a loved one." Ark. Code Ann. § 16-62-102(f)(2). - Factors that the jury may consider in evaluating mental anguish awards: (1) The duration and intimacy of the relationship and the ties of affection between decedent and survivor; (2) Frequency of association and communication	1) loss of life damages** 2) medical expenses attributable to the fatal injury; 3) the value of lost earnings prior to death; 4) conscious pain and suffering prior to death;

between an adult decedent and an adult survivor; (3) The attitude of the decedent toward the survivor, and of the survivor toward the decedent; (4) The duration and intensity of the sorrow and grief; (5) Maturity or immaturity of the survivor; (6) The violence and suddenness of the death; (7) Sleeplessness or troubled sleep over an extended period; (8) Obvious extreme or unusual nervous reaction to the death; (9) Crying spells over an extended period of time; (10) Adverse effect on survivor's work or school; (11) Change of personality of the survivor; (12) Loss of weight by survivor and other physical symptoms; and (13) Age and life expectancy of the decedent. - **Pecuniary Injuries**, including a spouse's loss of services and companionship of a deceased spouse - Pecuniary injuries are defined as the present value of the benefits, including money, goods, and services, that the decedent would have contributed to the statutory beneficiaries if he had lived. The jury may consider such factors as (1) the past contributions of the decedent and the reasonably expected contributions he would have made; (2) the length of the future contributions to the beneficiary; (3) past and future earnings; and (4) life expectancy of the decedent and the beneficiaries. - An award to a beneficiary may, if appropriate, reflect both pecuniary losses and mental anguish; likewise, an award to a surviving spouse may also include loss of consortium. - The award for each beneficiary for mental anguish is determined on an individual basis. - Beneficiaries in the statutory class do not automatically recover for mental anguish; the claim for each must be pleaded and proven. Generally, mental anguish damages can only be awarded to a beneficiary who testifies as to his own suffering, but some authority permits	5) recovery for compensation for scars, disfigurement, and visible results of the injury; 6) the reasonable value of funeral expenses; 7) the reasonable expenses of any necessary help in the home that was required as a result of the injuries; and 8) property damage.

testimony from another source to support an award. - Statutory beneficiaries include: the surviving spouse, children, parents, and siblings of the deceased person, as well as persons standing in loco parentis to the deceased and persons to whom the deceased stood in loco parentis at any time during the life of the deceased	

****Loss of Life Damages under the Survival Statute:**

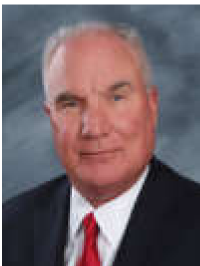
Loss of life damages were added to Arkansas's survival statute in 2001. The Arkansas Supreme Court has addressed the amendment only twice since that time, in *Durham v. Marberry*, 356 Ark. 481, 156 S.W.3d 242 (2004), and in *One National Bank v. Pope*, 372 Ark. 208, 272 S.W.3d 98 (2008). A few federal decisions in Arkansas have considered loss of life damages. Whether expert testimony is appropriate evidence for loss of life damages has not been taken up by the state's appellate courts.

In a recent circuit court case in Washington County, the Court excluded Dr. Ralph Scott from testifying on loss of life damages. There, defendants relied heavily on the Supreme Court's holding in *Marberry* that "[l]oss of life damages seek to compensate a decedent for the loss of the value that the decedent would have placed on his or her own life." 356 Ark. 481, 293, 156 S.W.3d 242, 248. Defendants argued Dr. Scott's opinion on the "statistical value of life" of an average person was not relevant to loss of life damages and would not aid the jury in valuing the decedent's life, would be confusing and misleading to the jury, and would be unfairly prejudicial to the defendants. Defendants further argued Dr. Scott's opinion on the "statistical value of life" of an average person was founded on untestable methodology and erroneous assumptions, and thus, the opinion was not reliable.

In a recent federal case, Judge Miller excluded Dr. Scott's expert testimony on loss of life damages holding that the testimony was unreliable and thus inadmissible. *Smith v. Trans-Carriers, Inc.*, 4:15-cv-00253-BSM (E.D. Ark May 17, 2016). Judge Miller cited *McMullin v. United States* in stating the court "has explained that an expert opinion similar to the one being proffered by Scott cannot be tested because the value a decedent would have placed on his own life cannot truly be determined." *Id.* (citing *McMullin v. United States*, 515 F. Supp. 2d 914, 924 (E.D. Ark. 2007)).

In sum, while Arkansas allows for loss of life damages, it is unclear what type of evidence ought to be considered in evaluating those damages. It is clear that an estate seeking loss of life damages "must present *some* evidence that the decedent valued his or her life, from which a jury could infer and derive that value and on which it could base an award of damages." *One National Bank v. Pope*, 372 Ark. at 214, 272 S.W.3d at 102.

The AADC thanks Russell Atchley and Maggie Benson of Kutak Rock, LLP for writing this article.



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