

# THE TRANSPORTATION LAWYER

February 2011 • Volume 12, Number 4

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*A Joint Publication of*

TRANSPORTATION  
LAWYERS ASSOCIATION



*and*

CANADIAN  
TRANSPORT LAWYERS' ASSOCIATION



ASSOCIATION CANADIENNE  
DES AVOCATS EN TRANSPORT

*A Comprehensive Journal of Developments in Transportation Law*

# Debunking LOST FUTURE EARNINGS DAMAGES



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A common battle in truck accident litigation is in the area of damages and future economic losses—how much value to place on a plaintiff's lost future earning capacity. Think of the 40-year-old plaintiff who has been unemployed for a couple years, then was injured in a truck wreck, has chronic back pain now and can't get a decent paying job. The plaintiff's expert economist wants to use work life expectancy tables that reduce the probable length of plaintiff's work life because of the accident and the economist then opines on large lost future earnings damages. Fortunately for the defense, strong arguments exist to have such expert opinions excluded at trial as inherently flawed.

The opinion of a plaintiff's expert economist that values a reduction in earning capacity is often based on *The New Worklife Expectancy Tables* (Gamboa tables) published by Vocational Econometrics, Inc. and developed by A. M. Gamboa, Jr. and David S. Gibson. These tables are often employed when the injured plaintiff does not have a sufficiently developed work history. The Gamboa tables purport to establish the probable length of one's work life—the number of years that person will be employed in his or her life—following a disability and an expert then puts value on that reduction in work-life

through probability calculations. However, both academics and courts have dismissed the Gamboa tables as inherently flawed and unreliable as a method to establish the reduction in a plaintiff's work life.

In 2009, Professor Thomas Ireland (Professor of Economics, Department of Economics, University of Missouri, St. Louis) summarized the criticisms as follows:

This is a brief explanation for why the disability work-life expectancy tables produced by Anthony M. Gamboa and David S. Gibson are generally regarded to be without merit in the field of forensic economics. The most recent version of those tables was published by Vocational Econometrics, Inc., in 2006. Previous versions were published in 1987, 1991, 1995, 1998, and 2002. Vocational Econometrics, Inc., is a corporation owned by Anthony M. Gamboa and John Tierney, so publication of these tables is an in-house publication. None of the editions of these tables has been regarded as being reliable sources of information.<sup>1</sup>

Professor Ireland identifies three distinct flaws in the Gamboa tables. First, the Gamboa tables employ unreliable data from the U.S. Census Bureau's Current Population Survey ("CPS") and the American Community Survey ("ACS").<sup>2</sup> Both surveys were not designed to measure work-life expectancy.<sup>3</sup> The previous versions of the tables employed data from the CPS, which the Census

Bureau acknowledges is unreliable for measuring disability.<sup>4</sup> The 2006 current version of the tables employs data from the ACS, but Professor Ireland identifies similar problems in the ACS data.<sup>5</sup> Second, the LPE method (measuring the probability one will work in a given year) employed by the Gamboa tables is a flawed methodology.<sup>6</sup> One major flaw in this methodology is that it considers the designations "severely disabled," "not severely disabled," and "not disabled" to be fixed and does not account for the reality that some individuals transition between the designations throughout their lives—e.g. a non-disabled person in one year could be disabled the next year and a severely disabled person could improve to "not severely" disabled status.<sup>7</sup> The effect of the flaw is the exaggeration of the work-life expectancy of a "not disabled" person because of the assumption that a "not disabled" person will never become disabled and it understates the work-life expectancies of a "severely disabled" person and "not severely disabled" person because it assumes these persons will never recover from their disability.<sup>8</sup> Third, the Gamboa tables do not account for individual circumstances—such as type of disability or the effect that disability has on one's occupation—in estimating work-life expectancy.<sup>9</sup> Professor Ireland states "[k]nowing that a given individual is self-identified as 'not severely disabled' but knowing nothing else about that individual,

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there is no way to know whether or not that individual's unknown disability will or will not have any effect on his or her work-life expectancy."<sup>10</sup>

In *Phillips v. Industrial Machine*, 597 N.W.2d 377, 384 (Neb. 1999), the Supreme Court of Nebraska affirmed a trial court's grant of a motion for a new trial due to the erroneous admission of expert testimony based on the Gamboa tables. In *Phillips*, the plaintiff was injured in an automobile accident involving a car driven by the defendant Industrial Machine's employee.<sup>11</sup> Prior to trial, the defendant stipulated to liability and trial was as to the damages.<sup>12</sup> Plaintiff's treating physician stated that plaintiff had sustained a permanent disability, but did not place her on any work restrictions.<sup>13</sup> Plaintiff's expert, a vocational rehabilitation counselor, testified that plaintiff has a work disability based on the treating physician's statement that the injury was permanent and the expert's own evaluation of the plaintiff's self-reported history.<sup>14</sup> The Supreme Court agreed with the trial court, stating "the fact that a medical condition is permanent does not equate with a medical opinion that a person is disabled."<sup>15</sup> A medical doctor was not offering an opinion that plaintiff was disabled. Therefore, the plaintiff's vocational expert was not qualified to offer his opinion regarding plaintiff's disability.<sup>16</sup>

Furthermore, the Nebraska Supreme Court agreed with the trial court's heavy criticism of the Gamboa worklife tables:

[T]he definition of "disabled" as used in the New Work Life Expectancy Tables made no differentiation between people with minor disabilities and those with serious disabilities or between people with disabilities which affect their work and those with disabilities which have no effect on their work. . . . [U]nder these broad statistics, [the expert] could present virtually the

same opinion testimony he presented in this case in any courtroom, with any injured plaintiff, without modifying the opinion at all.<sup>17</sup>

The Supreme Court held that the expert's opinion lacked probative value, and was properly excludable, because the "New Work Life Expectancy Tables, [] do not discern between minor and serious disabilities or take into consideration whether such disability affects an individual's ability to work."<sup>18</sup>

In his concurrence, Justice Gerrard took issue with the majority's finding regarding the admission of the expert's opinion as to the plaintiff's disability as that term is defined by the vocational rehabilitation field.<sup>19</sup> However, Justice Gerrard joined with the majority in dismissing the reliability of the Gamboa tables, finding the plaintiff's expert's "reliance on this questionable data [to be] the methodological flaw."<sup>20</sup> Justice Gerrard criticized the tables because they

measure and average together the experiences of individuals within a tremendously diverse range of occupations and injuries such that, for statistical purposes, a police officer with a broken arm is equivalent to an attorney who develops a hearing impairment, who is in turn equivalent to a surgeon who becomes paraplegic.

The flaw in this methodology is apparent. The degree of an individual's unique disability obviously has an effect on how long that individual will remain in the work force. The nature of a person's disability, relative to his or her particular occupation, will also have a commensurate effect on that person's employability status and worklife expectancy. A statistical average of such a broad range of disabilities, applied to an equally broad

range of occupations, renders the result almost meaningless when attempting to determine what effect a disability will have on an individual person under particular circumstances. The use of actuarial tables in determining worklife expectancy should be rejected where the tables do not sufficiently relate to the unique circumstances of the person under evaluation.<sup>21</sup>

Accordingly, he joined the majority in finding that "it was [an] error to admit the [expert's] opinion that the [plaintiff's] worklife expectancy had been reduced."<sup>22</sup>

This same argument can be applied in federal court cases. Federal Rule of Evidence 702 states: "(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." The same rule of evidence exists in state court cases as well. See e.g., N.C. Gen. Stat. 8C-1, Rule 702(a).

Bringing it all together, the Gamboa tables cannot function as a reliable predictor of a person's work life following disability because it ignores the individual circumstances of the person—including the level of disability and the impact of the injury on the occupation of the person. Rather, it relies on averages of self-reported data, based on unreliable definitions, which an expert then applies to an individual. It is inherently unreliable, devoid of probative value, and renders an experts' opinion to mere speculation. The probabilities in the tables include persons with a wide variety

of disabilities not necessarily comparable to the plaintiff's condition. Therefore, any opinions offered by a plaintiff's expert economist based on the Gamboa tables should be excluded at trial.

Defense counsel in truck accident litigation should be mindful of these arguments. Invariably the plaintiff wants to rely on the Gamboa tables to increase the future economic damages. Be on the lookout for the

plaintiff's expert economist putting in his expert report that the net loss of earning capacity is based on the probabilities of a reduced work life set forth in the Gamboa tables. The Ireland article and the *Phillips* case have solid arguments to challenge the reliability of the expert's opinion. A motion *in limine* and a motion to exclude the testimony of plaintiff's expert economist on the grounds of unreliability and speculation should be in your hip

pocket for use at trial. Also, during the deposition of plaintiff's expert, your familiarity with the criticisms of the Gamboa tables is critical in order to lock the plaintiff's expert into answers that later undermine their opinion. If the court denies the motions, you still can attack the weight of the expert's opinion and make your arguments to the jury. 

### Endnotes

1. Thomas Ireland: *Why the Gamboa-Gibson Disability Work-Life Expectancy Tables Are Without Merit*, 15 J. LEGAL ECON. 105 (2009).
2. *Id.* at 106.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 108
10. *Id.* (citing James E. Ciecka, et al., *The New Gamboa Tables: A Critique*, 12 J. LEGAL ECON. 61 (2002))
11. *Id.* at 379
12. *Id.*
13. *Id.*
14. *Id.* at 381.
15. *Id.* at 384.
16. *Id.*
17. *Id.* at 382.
18. *Id.* at 382, 384.
19. *Id.* at 392.
20. *Id.*
21. *Id.* at 393.
22. *Id.*