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Future economic damages – When do you need an expert?

Take the time to integrate evidence of the client's injuries with the testimony of your experts

We think nothing of lining up the usual suspects to establish our client's injuries and the appropriate standard of care. However, given the number of published and unpublished cases on appeal in the past year involving admissibility and necessity of an expert opinion for future economic damages, it is worth taking a little extra time to creatively integrate evidence of our client's injuries with our expert's opinions. A pocket brief ready to file and serve at trial with legal authority for your presentation of damages can only help establish your case, educate the jurist and if necessary, provide a clear record for appeal.

When do you need expert testimony?

If the nature of the plaintiff's injury is within the common knowledge and experience of the average juror, there is no need for expert testimony, regardless of whether the injury is objective or subjective. (*Bauman v. San Francisco* (1940) 42 Cal.App.2d 144, 165 [108 P.2d 989].) For many years, California courts have allowed a plaintiff to testify as to the value of personal property (*Holmes v. Southern Cal. Edison Co.* (1947) 78 Cal.App.2d 43 [177 P.2d 32]) as well as the value of his or her own personal services (*Donahue v. Ziv Television Programs, Inc.* (1966) 245 Cal.App.2d 593, 609 [54 Cal.Rptr. 130].) Expert testimony is limited to a subject sufficiently beyond common experience that would help a layperson's understanding. (Evid. Code, § 801(a).) As discussed below, a plaintiff alone may provide sufficient evidence to establish future economic damages in certain cases, without the necessity of expert testimony.

Sufficiency of the evidence – Do you have enough with your expert opinion?

The amount of damages is a question of fact for the jury. (*Miller v. San Diego Gas & Elec. Co.* (1963) 212 Cal.App.2d 555, 558-559 [26 Cal.Rptr. 126].) But the amount must be supported by "substantial evidence" for the purpose of review. (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 271 [32 Cal.Rptr.2d 807].) We typically think that often involves the use of expert opinion. However, just because you have an expert's opinion does not mean that this opinion always constitutes substantial evidence. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1110 [63 P.3d 913] [an expert's opinion which rests upon guess, surmise or conjecture, rather than relevant, probative facts, cannot constitute substantial evidence].) This is why it is crucial to know what a particular area of the law requires in terms of proving future economic damages.

Civil Code section 3283 states in part that "[d]amages may be awarded ... for detriment ... certain to result in the future." But "substantial evidence" does not mean absolute certainty. There is no requirement that a plaintiff prove with certainty the extent of the harm she has suffered as a result of the defendant's conduct. (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219 [219 Cal.Rptr. 445].) Although "[i]t is desirable ... that there be definiteness of proof of the amount of damage as far as is reasonably possible [,] [i]t is even more desirable ... that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered." (*Ibid.*, citing Rest.2d Torts, § 912, com. a, at p. 479.) Courts have interpreted this to mean a plaintiff may recover if the detriment is "reasonably certain" to occur. (*Garcia v. Duro Dyne Corp.* (2007) 156 Cal.App.4th 92, 97-98 [67 Cal.Rptr.3d 100], citing *Ostertag v. Bethlehem Shipbuilding Corp.* (1944) 65 Cal.App.2d 795, 805-806, 807 [151 P.2d 647].) It is for the jury to determine the probabilities as to whether future detriment is reasonably certain to occur in any particular case. (*Ibid.*)

See Stevens, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
July 2011 Issue

Personal-injury claim

Damages may be awarded for injuries likely to occur in the future. (Civ. Code, § 3283.) The foundational case for measuring future damages in a personal injury case is *Ostertag, supra*, in which the expert testified: "I cannot say positively what this boy's future is, but ... I think it is reasonable to assume he is going to have trouble" 'with his condition." (*Id.*, at pp. 805-806, 807.) It is "not required" for a doctor to "testify that he [is] reasonably certain that the plaintiff would be disabled in the future. All that is required to establish future disability is that from all the evidence, including the expert testimony, if there be any, it satisfactorily appears that such disability will occur with reasonable certainty." (*Mendoza v. Rudolf* (1956) 140 Cal.App.2d 633, 637 [295 P.2d 445].) The fact that the amount of future damages may be difficult to measure or subject to various possible contingencies does not bar recovery. [Citation.]" (*Garcia v. Duro Dyne Corp.*, *supra*, 156 Cal.App.4th at 97-98 [evidence that worker's mesothelioma was reasonably certain to recur supported verdict awarding future economic damages in products liability action involving asbestos to which worker was exposed, despite fact that worker was in remission at time of trial; although no expert could state precise future date of recurrence or precise amount of future damages, evidence was sufficient for approximation of future recurrence and future expenses].) "There may be disputed facts regarding the amount of medical expenses or lost wages, or disputed inferences about the probable course of events such as the length of incapacitation or whether a continuing disability will worsen, plateau, or improve." (*Abbott v. Taz Express* (1998) 67 Cal.App.4th 853, 856 [79 Cal.Rptr.2d 360].)

"While there is no clearly established definition of 'reasonable certainty,' evidence of future detriment has been held sufficient based on expert medical opinion which considered the plaintiff's particular circumstances and the expert's experience with similar cases." (*Bihun v. AT & T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [863 P.2d 179].) A verdict will be upheld if it is within the range of possibilities supported by any of the testimony. (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 532, [81 Cal.Rptr.3d 387].)

An expert need only render an opinion that based on professional experience and observations in treating cases where like injuries have occurred, and as a result of that experience, we might or might not expect like results to follow in this case. (*Cordiner v. Los Angeles Traction Co.* (1907) 5 Cal.App. 400, 404 [91 P.436].) And the expert's opinion can be inconsistent and still admissible: "The fact that inconsistencies may occur in the testimony of a given witness does not require that such testimony be disregarded ... nor does it mean that such testimony is necessarily insufficient to support the verdict. It is for the trier of fact to consider internal inconsistencies in testimony, to resolve them if this is possible, and to determine what weight should be given to such testimony." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 878 [151 Cal.Rptr 285].)

"[A] reasonably approximate estimation is deemed to be sufficient, and the existence of a satisfactory method of achieving this estimation will preclude the defendant, whose wrongful act gave rise to the plaintiff's injury, from complaining that the amount of future damages cannot be determined with mathematical precision." (*Southern California Disinfecting Co. v. Lomkin* (1960) 183 Cal.App.2d 431, 450 [7 Cal.Rptr 43].) Similarly, the plaintiff's expert in *Guerra v. Balestrieri* (1954) 127 Cal.App.2d 511 [274 P.2d 443] based his opinion on future damages on the fact plaintiff was still experiencing pain two years after the accident and his experience that "[f]requently in this type of neck injury a patient will continue to have symptoms indefinitely" and "[i]t may last forever; ... it may get worse; he may improve somewhat." (*Id.* at pp. 518-519.) The court held, "From such testimony the jury could reasonably conclude that plaintiff was reasonably certain to experience some pain and disability for the rest of his life." (*Id.* at p. 519.)

Emotional distress

To recover for future emotional distress, a plaintiff must prove that his or her mental suffering is reasonably certain to occur in the future. (Civ.Code, § 3283; *Bihun v. AT & T Information Systems, Inc.*, *supra*, 13 Cal.App.4th at 995.) Expert testimony is unnecessary if the injury is such that the jury could conclude, based on all the evidence and relying upon its own experiences and common knowledge, that future emotional distress is reasonably certain to occur. (*Mendoza v. Rudolf, supra*, 140 Cal.App.2d at 636.) Any evidence reasonably tending in an appreciable degree to prove the fact of future detriment is admissible; its sufficiency is for the jury to decide. (*Bauman v. San Francisco* (1940) 42 Cal.App.2d 144, 163, superseded by statute on another ground as stated in *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 150 [132 Cal.Rptr.2d 341].) For example, a plaintiff's testimony that at the time of trial she was still suffering from headaches, nervousness and pain was evidence tending to prove future damages. (*Loper v. Morrison* (1944) 23 Cal.2d 600, 611 [145 P.2d 1].)

It is important that your client be ready to articulate his or her emotions, discomforts, and fears as well as any developed behavior in avoidance related to the accident. Spend some additional time on drawing these areas out with your client. Adequately preparing your client to testify regarding his or her emotional distress will not only establish a stronger claim for future damages but will likely enhance the entire case.

Future earnings

There is no requirement that expert testimony about future earning capacity be presented before the jury is entitled to determine compensation for loss of future earnings. Evidence as to the nature and extent of injuries is sufficient to enable the jury to determine the extent to which the plaintiff's earning power has been impaired. (*Gargir v. Akiva* (1998) 66 Cal.App.4th 1269, 1280-1281 [78 Cal.Rptr.2d 557].) "One's earning capacity is not a matter of actual earnings . . .

See Stevens, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
July 2011 Issue

In short, the test is not what the plaintiff would have earned, but what [s]he could have earned." (Stein, Damages and Recovery-Personal Injury and Death Actions (1972) § 58, p. 94; *accord*, *Connolly v. Pre-Mixed Concrete Co.* (1957) 49 Cal.2d 483, 489 [319 P.2d 343] ["Loss of earning power is an element of general damages which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury, and damages in this respect are awarded for the loss of ability thereafter to earn money"].)

Support for a broad approach to future earnings was recently confirmed in *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298 [120 Cal.Rptr.3d 605]. In *Pannu*, Justice Perluss noted the relevant evidence that supported the future earnings portion of a $21.6 million award: "ample evidence of Pannu's entrepreneurial skills, his work ethic and his consistent success in growing his businesses." (*Id.*, at p. 1322) The opinion went into factual details of the plaintiff's business success as well as his business acumen, noting that he had "the experience and motivation to assess employee performance, to prevent malfeasance and to maximize growth. His injuries deprived him of far more than his ability to earn a manager's salary. . . ." (*Id.*, at pp. 1322-1323.) Taking the time to discuss all aspects of your client's future earnings, rather than just looking at paycheck stubs or tax returns, will help you develop a broad theory of future earnings.

Breach of contract

Damages flowing from a breach of contract are typically established by both your client who establishes the breach and an expert who renders an opinion on the value of the goods or services lost. In the law of contracts, the theory is that the party injured by a breach should receive as nearly as possible the equivalent of the benefits of performance. (Civ.Code, § 3300.) "The aim is to put the injured party in as good a position as he or she would have been had performance been rendered as promised [Citation.]" (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 848 [67 Cal.Rptr.3d 635].)

Traditionally, damages for breach of contract include those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time, but not consequential damages. (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550 [87 Cal.Rptr.2d 886] [holding that damages for emotional distress based on contractual breach are unavailable].) However, there is authority to support an argument that consequential (special) damages may be appropriate pursuant to Civil Code section 3283.

For example, Williston, *the* authority on contracts, states: "Indeed, in a resale situation, the buyer has been permitted to claim as consequential damages from the seller the amount of the buyer's potential liability to its customer; if the buyer establishes the probability that it will be sued by the customer, it is immaterial that the buyer has not yet been sued and made to bear the loss, and recovery is measured by the probable liability of the buyer to the customer." (24 Williston on Contracts (4th ed.2002) § 66:68, pp. 737-738, fns. omitted.) Other authorities note that a plaintiff may recover for future losses if there is an appropriate showing that those losses "will in fact be incurred in the future." (2 Dobbs, The Law of Torts (2001) § 380, p. 1056; see 1 Dobbs, Law of Remedies (2d ed.1993) § 8.5; Rest.2d Torts, § 910.)

The question of special damages turns on notice and/or knowledge, i.e. if the circumstances were known or should have been known to the breaching party at the time he entered into the contract. (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442 [227 Cal.Rptr. 40]; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 815, p. 733.) Evidence of the parties' expectations, performance as well as their respective knowledge can open the door to special damages for a breach of contract claim, allowing your expert to expand the damages opinion for the value of the contract, its significance to your client, the measure of loss the breach caused your client coupled with the breaching party's knowledge of that potential loss.

Lost profits

Lost profits are a category of special damages, similar to contractual damages. In a business tort case, a plaintiff may recover consequential damages such as lost profits under Civil Code section 3343 even where no out-of-pocket loss is established. (*Stout v. Turney* (1978) 22 Cal.3d 718, 729-730 [150 Cal.Rptr. 637].) The lost profits must be reasonably anticipated. (*Hartman v. Shell Oil Co.* (1977) 68 Cal.App.3d 240, 247 [137 Cal.Rptr. 244].) Even if an expert renders an opinion on the amount of lost profits based on past experience, if the future endeavor, business plan, or project is too uncertain or speculative, expert opinion may not be enough. (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 977 [22 Cal.Rptr.3d 340].) This typically arises when a plaintiff's company is relatively new.

For example, in *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870 [116 Cal.Rptr.2d 158], profits allegedly lost as result of defendant's negligence in preventing plaintiffs from opening an Internet-based toy business were not recoverable because plaintiffs failed to raise factual question whether business would have realized net profits. (*Id.*, at p. 882.) But the California Supreme Court has recently granted review on this issue in *Sargon Enterprises, Inc. v. University of Southern California* (2011) 2011 WL 437295. In *Sargon*, the appellate court reversed for a new trial on lost profits. Key to the decision was the conflict between traditional measurements of lost profits for an established company and the expert's use of "economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." (*Ibid.*) "The trial court's ruling is tantamount to a flat prohibition on lost profits in any case involving a revolutionary breakthrough in an industry." (*Ibid.*)

Recent publicity regarding Stanford professor B.J. Fogg's class on creating Facebook applications is on point: his

See Stevens, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
July 2011 Issue

class of 75 students created 31 applications that were used by 16 million people – all in one semester. Be prepared to note the distinction of traditional methods of measuring lost profits and why such methods may be inaccurate to measure your client's lost profits in order to justify your expert's approach to lost profits.

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