Reprinted with permission

The Plaintiff and Defense Attorney's Guide to Understanding Economic Damages

Michael L. Brookshire
Frank Slesnick
John O. Ward

Contributors

George A. Barrett
Elizabeth A.W. Gunderson
John D. Hancock
R. Edison Hill
Kurt V. Krueger
Gerald Martin
Ann T. Neulicht
Jeffrey B. Opp
William A. Posey
James D. Rodgers
E. Wayne Taff
Robert H. Taylor
Robert J. Thornton
Howard H. Vogel

Lawyers & Judges Publishing Company, Inc.

Damages experts must maintain an independence of opinion from the interests of the attorney retaining them. Good damages experts should be as willing to tell the retaining attorney the deficiencies of the case as well as the strengths. Good attorneys should know the limitations of expert testimony and what makes a good damages expert. In the chapters that follow, nationally recognized attorneys and damages experts will present their perspectives on these issues. In addition, each chapter will be supplemented with an accompanying CD section containing some or all of the following components:

- links to internet sources of information to supplement chapters;
- definitions of technical terminology used in chapters;
- sample direct and cross-examination questions and strategies;
- case studies and sample reports supporting subjects covered in chapters; and
- references for each chapter and recommended readings in the field.

he CD will contain links that, when selected, will take the reader to the internet te containing the material emphasized. The CD will also link to internet damages lculators that will allow readers to calculate simple lost earnings and services in eir own cases based on a variety of characteristics of the plaintiff.

By necessity, there are topics that cannot be examined in an introductory xt and the CD will contain an index to such subjects and direct internet links to low the reader to download relevant articles and cases of interest.

Finally, the views expressed by each contributing author are not necessar- shared by other contributing authors or the editors. Our goal in writing this ok was to bring together experts and attorneys with extensive professional and dership experience in their fields and a review of biographical statements at end of the book attests to the achievement of that goal. Our second goal was provide a balanced treatment of topics, both from the perspectives of plaintiffs d defendants, and we believe that goal has been achieved. Finally, our goal s to produce a highly readable and practical text on using damages experts in gation, and judgment of that achievement rests with the readers.

Michael Brookshire, Dr. Frank Slesnick, and Dr. John Ward, co-editors

Chapter 1

Understanding Experts on Damage Valuation

John O. Ward, Ph.D.

Synopsis

1.1 It Ends With Dollars
1.2 Facts and Assumptions
1.3 Elements of Damages Considered
1.4 Sources of Foundation
1.5 Methodology Used
1.6 Damages Presentation
1.7 Credentials of Damages Experts
1.8 Where Do You Find Quality Experts?
1.9 The *Daubert* Age
1.10 Is Economic Testimony Scientific?
1.11 Conclusions

In personal injury and death litigation, attorneys for the plaintiff and defendant will at some point have to decide whether their case will require the use of damages experts based upon the likely outcome of retaining such experts. Appealing directly to the jury for economic damages without the use of experts is certainly warranted in cases where likely economic damages and/or limits of coverage are small and liability is in serious doubt. Such cases are still probably a majority of personal injury and death cases filed with the courts. However, when damages are multifaceted and large, and coverage is substantial, the use of damages experts becomes critical to the attorney's case strategy. It is easy just to say that you will know when you need damages experts when the occasion arises. But most attorneys are not conversant in the language of damages experts and most attorneys really don't understand the process of building a damages case using such experts. They don't know how to select quality damages experts or to judge the quality, strengths, and weaknesses of a damages analysis. Your damages experts will not only provide a theory of damages, they will also assist in the litigation process by lending their names and credibility in settlement discussions. In addition, they can be valuable resources in reviewing an opposition expert's report, developing lines of questions for depositions and trial, participating in the design of settlement offers, and preparing trial exhibits.

The objectives of this book are to provide attorneys with some basic tools for:

1. understanding the damages experts' perspectives of their role in calculating damages;
2. understanding the basic terminology used by damages experts;
3. understanding the difference between a quality damages case and an inadequate case; and
4. understanding how to select damages experts and communicate with the experts.

The authors of the chapters in this book represent highly experienced damages experts from the fields of economics, vocational rehabilitation, and life care planning and highly successful attorneys who represent plaintiffs and defendants in personal injury and death litigation. While the attorneys are expected to be advocates for their clients and partial to their claims, the damages expert is expected to be objective and impartial. Good damages experts make that clear to the attorneys retaining them and good attorneys recognize the importance of maintaining the independence of their experts' opinions.

1 It Ends With Dollars

The damages case rests on establishing the dollar value to be placed on: (1) economic damages representing the harm to the plaintiff in the forms of replacing losses of earnings and fringe benefits, ability to perform services, past and future medical costs in an injury case and support to survivors or an estate in death cases; (2) non-economic damages such as pain and suffering and/or mental anguish; and (3) punitive damages if allowed.

Damages experts can be categorized as (a) those who assist in establishing the facts of damages, such as physicians and psychologists; (b) those who specify the parameters of damages, such as vocational evaluators and life care planners, and (c) economists who mathematically compute lifetime dollar amounts of economic loss. Here we are focused on those who place values on damages. You can think of the damages valuation process as a pyramid of foundation with the calculations of the economic expert on the values of damages at the apex of the pyramid. The ultimate values of damages can be no more reasonable than the foundation supporting those damages. This concept does not elevate the role of the economist or diminish the roles of other damages experts; it simply puts those roles in perspective. To best understand the damages valuation process it is easiest to start at the apex—the damages report and/or testimony of the economic expert. The damages report of the economic expert has the following structure.

1. Economic Expert Report/Testimony
2. Facts and Assumptions
3. Elements of Damages Considered
4. Sources of Foundation
5. Methodology Used
6. Damages Presentation

In fact, the damages put forward by the economist are only as valid as the analysis of damages put forward as foundation by the life care planner or the vocational expert. The garbage in, garbage out defense to an expert economist's testimony rests on this premise.

1.2 Facts and Assumptions

The report/testimony of the economic expert will necessarily rest on facts and assumptions about the plaintiff provided by others. The facts and assumptions provided to the economic expert should be clearly identified in the expert's report and/or testimony as part of the disclosure process. Material facts, such as the plaintiff's birth date, date of alleged injury, marital status, education, and employment history, can be objectively verified as to accuracy. Assumptions such as the cause of the injury or death, the impact of the injury on employability and the probable worklife expectancy of the plaintiff are subjective and may reasonably differ among economic experts. Such assumptions, when provided by a vocational expert or life care planner, are only as valid as the accuracy, diligence, and expertise of the expert providing the opinion. It is important for the attorney employing the expert to remember that each damages expert has a unique role in establishing foundation for the ultimate damages numbers and that those roles are vertically integrated like links in a chain. Economists should generally not try to offer expert opinions on vocational or life care matters, and vocational experts or life care planners similarly should generally not attempt to express economic opinions. There are some exceptions to these rules. Some experts, by training, can function in multiple roles as vocational, economic, or life care planning experts. Such people are very few in number. Some "damages experts" advertise their abilities to provide vocational, life care and economic testimony with few credentials in any of these fields. The roles of damages experts for the defense where plaintiffs have hired such suspect experts should be to attack the expertise of such experts as well as the assumptions and analysis of their work.

1.3 Elements of Damages Considered

The elements of damages considered by the economic expert may include some or all of the following items:

- loss or impairment of future earnings capacity or earnings;
- loss or reduction of past and/or future fringe benefits;
- loss or impairment of ability to perform household services in the past or future;
- past medical costs related to the alleged injury;
- future medical costs and life care needs resulting from the alleged harm;
- lost value of care, advice, and counsel provided to survivors;
- lost enjoyment of life of person harmed to self or survivors; and
- losses of active income from business or investment activities unique to the person harmed.

The above damages categories represent common economic damages in most state and federal courts, although the loss of enjoyment of life and the lost values of care, advice, and counsel are considered in some jurisdictions. The selection of categories of damages to measure is determined by the facts and assumptions of the case and the legal definition of economic damages in the jurisdiction. A strategy of the retaining attorney is to select damages categories to be measured and presented by experts. For example, even if lost household services are allowed as economic damages in the jurisdiction and the expert is capable and willing to measure such damages, a decision by the retaining attorney that such a presentation would compromise his case might dictate their exclusion. For each damages area selected for expert testimony, the attorney must make sure that his economic expert expresses an independent opinion on damages resting within the constraints of the law and the facts of the case.

1.4 Sources of Foundation

The economic expert, as previously stated, is at the apex of the damages triangle and is usually the final voice for the plaintiff or defendant on damages. Whether the jury agrees with that voice, or is even allowed to hear that voice, is a function of the existence of a foundation for the expert's opinion. The foundation for a damages calculation may come from:

1. direct interview(s) by the expert with the injured person, survivors of a deceased plaintiff, employers (pre- and post-injury) or other "fact" witnesses;

2. responses to questionnaires or interrogatories submitted by the expert, plaintiff or defendant;
3. depositions of fact witnesses and case pleadings;
4. tax returns, W-2s, fringe benefit statements, pay-stubs, employment records and Social Security records on earnings;
5. union seniority lists, employment contracts, and pay schedules;
6. reports by CPAs or tax preparers on business income and expenses;
7. medical treatment documents detailing the nature of the injury;
8. past medical payments records;
9. in injury cases, any records of disability insurance appraisal (Employer or Social Security);
10. specific records of job search and results and statements by physicians on employment disability;
11. in injury cases, evaluations, reports, and depositions by vocational/rehabilitation experts;
12. in injury cases, life care plans by life care planners;
13. in injury cases, evaluations, reports, and depositions by psychological experts on loss of enjoyment of life;
14. statistical sources of information on life expectancies, probabilities of labor force participation, unemployment probabilities, wage trends, hours worked trends, household services performed, time-use data on care, advice, and counsel, fringe benefit rates by industry, interest rates, inflation rates and other socio-economic factors; and
15. statements by retaining attorneys of specific "hypotheticals" to be incorporated in the report of elements of damages to be included.

It is incumbent on the economic expert to do "due diligence" in gathering such information, requesting such information and disclosing such information in reports and testimony. The same is true of the vocational expert and the life care planner in their analysis. However, it is not the responsibility of the economic expert to gather "all" of the foundation listed above. The economic expert should gather "enough" foundation to support conclusions with reasonable probability. Information from different sources can be, and often is, redundant. W-2s alone can provide a reasonable basis for projecting future earnings in a specific case and a questionnaire alone can provide a reasonable basis for projecting lost household services in specific cases. In a world of unlimited budgets and time for gathering foundation, an expert might gather all of the foundation elements listed above. In a world of limited budgets and time, the economic expert should gather

as much foundation as "necessary" to support her conclusions on damages. There are no bright lines on where that sufficiency exists.

Items 1 through 10 are of varying importance in establishing foundation. It is not necessary to conduct personal interviews with fact witnesses, and most economic experts do not conduct such interviews. Rather, they rely on written response to questionnaires, depositions, and tax documents in outlining the facts of a case. However, an interview often can enhance the foundation considered, and will enhance the image of "due diligence" of the expert. At trial, under cross-examination, a question that "you never even took the time to talk to the plaintiff" may just be posturing, but it can be effective posturing.

Items 11 through 13 apply to personal injury cases where an earnings record is lacking, mitigation of earnings loss is an issue, future medical care is needed or a claim is made for loss of enjoyment of life. Relatively few economists deal with loss of enjoyment of life because of legal restraints, perceived methodological deficiencies in measuring such damages or beliefs that they are non-economic damages. The economic expert is not a vocational specialist (in most cases) and is not a life care planner (in most cases). Those economists who have such talents are rare. Economists should not be asked to, nor attempt to, translate medical records into occupational disabilities. In most cases, where the injured person has residual earnings capacity or that issue is in doubt, the attorney should retain a vocational expert who can test the plaintiff, review employment and medical records, and offer opinion on pre-injury earnings capacity and post-injury earnings capacity. Similarly, if future medical costs and care are an issue, a life care planner should be retained to establish future medical needs, costs and duration for the economic expert. The economist can then reduce that plan to present value for the jury. The economist can project limited future medical costs based on hypotheticals provided by the attorney, but such projections should generally be avoided absent support from a medical expert.

Item 14 is fundamental to all economic projections and is an area that will be challenged by opposing economic experts. While Bureau of Labor Statistics (BLS) data, Census data, and U.S. Public Health data are relied upon as authoritative by economists, the use of that data is subject to manipulation by choice and use. Some economic experts use minimal statistical data and conclusions to support their positions, and their analysis, as such, is subject to challenge through lack of reasonable probability standards and *Daubert* challenges. Again, there are no bright lines on the use of statistical data in making projections. The expert has to anticipate challenges, be comfortable with the standard of reasonable probability and be able to explain why the data she selected was consistent with that standard.

Item 15 is troublesome for economic experts when, for example, the hypothetical is not supportable within the facts of the case or subject to reasonable

probability of occurrence. Nevertheless, it is appropriate for a retaining attorney to ask the expert to make a specific calculation and for the expert to make such a calculation as long as that attorney-supplied assumption or hypothetical fact is disclosed in the expert's report and testimony. Even though the particular economic expert uses Social Security retirement age in projecting lost earnings, the attorney can request a projection to age seventy, for example, based on the intent of his client. The economist might make two projections, one to Social Security retirement age and the second to age seventy. The second projection should be identified as a hypothetical requested by the attorney. The opposing attorney is always free to request any other age of retirement calculation, through her own expert or through cross-examination at trial.

1.5 Methodology Used

The story goes that if you locked five economists in a room and asked them to come to a conclusion on a topic, you would wind up with five separate conclusions. You could substitute vocational or life care experts for economists in the story. There are a number of variables that go into projecting any of the elements of economic loss discussed above, and a number of ways of incorporating such variables in a loss calculation. As an example, a projection of lost earnings in an injury case involves the selection of an earnings base from which to begin; the selection of which fringe benefits, if any, to add to loss; the length of time to project loss; adjustments to loss for voluntary and involuntary risks of labor force participation and employment; changes in earnings likely to occur because of wage growth due to advancement, productivity increases and demand shifts for labor and inflation; adjustments, if any, to be made for collateral sources of income or taxes; and the discounting of loss for interest that could be earned on the investment of an award over the period of loss. The treatment of each of these steps in the calculation could vary based on whether earnings capacity or probable earnings were the standards of loss, whether real or nominal growth and discounting were utilized, whether age earnings cycle trends are considered, whether projections are based on historical trends or current economic conditions, and the legal rules for the treatment of damages in the specific jurisdiction. So, it is not surprising that two economists would have different conclusions on economic damages in a specific case. Nevertheless, it is not unusual for projections in a specific case by two competent economists with the same base assumptions to fall within a fairly narrow range. This is true because the past twenty years has seen substantial research into the forensic economic methodology, the publication of substantial literature on such methodologies in the *Journal of Forensic Economics, the Journal of Legal Economics,* and other journals, and the publication of a number of books in the field. Each year, up to eight regional,

national, and international conferences of forensic economists are held, with numerous presentations on issues of methodology. There is an emerging and evolving consensus on the components of a valid earnings loss forecast, subject to the law in a specific jurisdiction and the facts of a case. A uniformity of methodology is neither possible nor desirable. Economists will continue to disagree on choices of worklife, earnings growth rates, discount rates, and other methodological components. However, the ranges of methodological choices are well known and increasingly predictable.

The Statement of Ethical Principles and Principles of Professional Practice of the National Association of Forensic Economics (NAFE) contains four standards relative to methodologies used in damages calculations that are:

1. Diligence
Practitioners of forensic economics should employ generally accepted and/or theoretically sound economic methodologies based on reliable economic data. Practitioners of forensic economics should attempt to provide accurate, fair, and reasonable expert opinions, recognizing that it is not the responsibility of the practitioner to verify the accuracy or completeness of the case-specific information that has been provided.

2. Disclosure
Practitioners of forensic economics should stand ready to provide sufficient detail to allow replication of all numerical calculations, with reasonable effort, by other competent forensic economics experts, and be prepared to provide sufficient disclosure of sources of information and assumptions underpinning their opinions to make them understandable to others.

3. Consistency
While it is recognized that practitioners of forensic economics may be given a different assignment when engaged on behalf of the plaintiff than when engaged on behalf of the defense, for any given assignment the basic assumptions, sources, and methods should not change, regardless of the party who engages the expert to perform the assignment. There should be no change in methodology for purposes of favoring any party's claim. This requirement of consistency is not meant to preclude methodological changes as new knowledge evolves, nor is it meant to preclude performing requested calculations based upon a hypothetical—as long as its hypothetical nature is clearly disclosed in the expert's report and testimony.

4. Knowledge
Practitioners of forensic economics should strive to maintain a current knowledge base of their discipline.

In joining NAFE, a forensic economist must accept the above ethical standards. In reality, that does not mean that all NAFE members meet the standards of ethical practice because their work is not screened by NAFE for conformance to published ethical standards. Moreover, a significant number of practicing forensic economists are not members of NAFE. There are forensic economists who act as advocates rather than experts in their practices, who knowingly alter their methodologies to fit the needs of their clients, who rely upon dubious statistical bases, and who represent themselves as damages "illustrators." The same can be said for vocational and life care experts. In the age of *Daubert* it is wise to avoid retaining such experts.

1.6 Damages Presentation

The objective of the forensic economist is to evaluate damages suffered by a plaintiff, either for the attorney representing the plaintiff or the attorney representing the defendant. Typically, the economic expert for the plaintiff will prepare a report detailing those projections. The report should provide sufficient detail to allow a replication of the calculations by another economist. It should disclose all facts and assumptions considered, hypotheticals provided, and sources of information utilized in making the calculations. Such disclosures are necessary under the Federal Rules of Evidence and are increasingly being required in state courts. An economic expert retained by the attorney for the defendant will often be asked to offer only a critical appraisal of the methodology and values of damages offered by the economic expert for the plaintiff. The primary roles of the economist for the defendant are to provide the defense attorney with areas of attack on the validity of the expert's analysis, to write discovery and cross-examination questions, and, increasingly, to assist in preparing motions in limine to bar all or part of the other expert's testimony or to assist in preparing for a *Daubert* hearing to strike the expert's testimony altogether. To provide actual damages values for the defendant could be viewed as an endorsement of liability and a bottom line for a damages award. Where liability is probable, the economic expert for the defense is more likely to be asked to provide such damages calculations.

The same roles exist for vocational or life care experts for the plaintiff or defendant. The detail of those roles is provided in Chapters 6 and 7.

1.7 Credentials of Damages Experts

Selecting a damages expert can be a daunting process. Economic experts may not really be economists. Certified Public Accountants, business finance experts, and some vocational evaluators also offer their services as experts in the valuation of damages in personal injury and death litigation. While most economic experts have Ph.D.s in economics, many have Ph.D.s in other disciplines such as finance, or other degrees such as M.B.A.s or licenses such as CPAs. There is no certification process for economic experts, although CPAs have a certification process and the finance area is littered with certifications. Some economic experts have such dubious certifications as a "Chartered Vocational Economist."

Vocational evaluation experts have an equally confusing credentialing system. Most vocational evaluation experts come from vocation/rehabilitation backgrounds. Most vocational evaluation experts have a master's degree in counseling from schools of education and gain their experience from worker's compensation and Social Security disability compensation work. Some vocational experts have Ph.D.s in Vocational Rehabilitation and Counseling. Vocational evaluators do have a number of certification processes offered by several professional associations. One can be a Certified Vocational Evaluator (CVA), a Certified Rehabilitation Counselor (CRC), or a Certified Vocational Expert (CVE) through such organizations as the American Board of Vocational Experts, the International Association of Rehabilitation Professionals, or the Association of Vocational and Rehabilitation Counselors. What the economic expert needs from the vocational evaluator is (a) a clear statement of the plaintiff's earnings potential but for the alleged injury in cases where the individual has not yet established an earnings history and (b) a clear statement of the plaintiff's earnings potential post-injury. The report of the vocational evaluator usually will contain an employment history, medical history, and family history of the appraised, along with the results of vocational and intelligence testing and conclusions about post-injury earnings potential. Some vocational evaluators might then go on to project the lost earnings capacity of the plaintiff, although this is rare. Few vocational evaluators have the training or credentials to make such a calculation.

Life care planners provide the foundation for a calculation of funds needed to care for the injured plaintiff and to restore the plaintiff to as great a degree of independence as reasonably possible. Life care planners either come from medical backgrounds or vocational backgrounds. Registered nurses enter into the field of life care planning from their experience in nursing and specialized training in life care planning. Colleges offer certificates and graduate degrees in the field of life care planning for both registered nurses and vocational/rehabilitation professionals. Such certificates include the Certified Nurse Life Care Planner (CNLCP) and the Certified Life Care Planner (CLCP). The life care plan should include only those care items made necessary by the alleged injuries sustained by the plaintiff, and should not include other care items due to other medical conditions. It is the responsibility of the life care planner to review all medical records of the plaintiff, typically to interview the plaintiff, and to obtain the approval of treating and retained medical experts for items contained in the life care plan. The life care plan should include the items needed, the length of time needed, the frequency of use, and base cost of the item. The economic expert will project the present value of the costs of such items to a statistical life expectancy or a life expectancy specific to the plaintiff, as provided by medical testimony.

1.8 Where Do You Find Quality Experts?

First, consider what you mean by a quality expert. There are highly successful and well-known economic, vocational, and life care experts who promise to provide the results desired by their hiring attorney—avoid them. Such experts are also well known to qualified experts in their fields; they may have track records of ethics violation complaints; they usually have past testimony barred by a judge; and they are walking targets for *Daubert* hearings. Some experts advertise their services in ATLA or various bar associations' publications. Some experts list their services as sub-contractors through services such as TASA. While such experts may be qualified, it is generally better to select an expert based on recommendations of other attorneys. You find excellent experts by asking excellent attorneys who they use and why they use them. Frequently, experts make presentations to bar association and law school CLE programs. Quality damages experts are good teachers. They have strong professional credentials with records of publication in their fields of expertise. They are consistent in their work as experts—they work for both plaintiffs and defendants and they are strong advocates for their analysis, not the positions of the attorneys who retain them. They ask a lot of questions and they want sufficient foundation for their opinions. They respectfully consider your views on damages and they will incorporate hypotheticals you provide in their analysis if requested. But, your hypotheticals will be identified as such and their analysis will fully be their work. Their conclusions will be replicable by other experts and it will disclose all facts considered, assumptions used, and methodologies employed. Your goal is to have an expert whose opinions are *Daubert*-proof.

Economic experts usually start as university faculty who develop an interest in forensic economics and serve as experts in a limited number of cases. Some of these small practices become large practices with the passage of time. Some economic experts start as economic experts, working for large consulting or accounting firms. Most economic experts have a Ph.D. in economics or finance. Some only have an M.A. or M.B.A. degree, but have substantial experi-

ence in the field. A number of economic experts are not economists at all—they are CPAs. While CPAs traditionally have focused on commercial litigation, a number have established strong credentials as experts in personal injury or death litigation. As stated earlier, there is no credentialing process for economic experts, unlike vocational and life care experts. In following chapters, prominent trial attorneys will discuss their criteria for finding excellent damages experts. It can be a minefield.

1.9 The *Daubert* Age

Just like the economic expert, the opinions of vocational evaluators and life care planners rest on foundations of fact, opinion, statistics, assumptions, and hypotheticals. Each of these experts will use a methodology to arrive at her conclusions. All sources of information considered should be disclosed in her reports and testimony and methodologies used will be judged by the standards of the profession and the consistency of the individual expert in using that methodology.

The final calculation of economic damages in a case rests on the foundation considered by the economic expert and the methodology utilized by the expert. The courts are becoming more demanding of the quality of that foundation and the scientific basis for the methodology used. In federal courts, questions asked about the statistical reliability of estimates and margins of error are increasingly common. To meet these challenges, it is incumbent on the attorney to understand the concepts of "reasonable probability" and known margins of error—especially if confronted by a *Daubert* hearing to bar your expert's testimony.

Rule 702 of the Federal Rules of Evidence states that "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."

For many years, the admissibility of expert scientific evidence was governed by the *Frye* test, a common law rule of thumb named after a 1923 decision by the District of Columbia Court of Appeals (*Frye v. United States* 54 App D.C. 46, 293 F1013 (1923)). Under the *Frye* test, expert scientific evidence was admissible only if the principles on which it was based had gained "general acceptance" in the scientific community. The *Frye* test still remains in most state courts, but it has been replaced in Federal court and a growing number of state courts.

In 1992 in *Daubert* (*Daubert v. Merrill Dow Pharmaceuticals* (92-102) 509 U.S. 579 (1993)), the Supreme Court was asked to decide whether the *Frye* test had been replaced by the adoption, in 1973, of the *Federal Rules of Evidence,* particularly Rule 702. This did not even mention "general acceptance," but simply provided "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."

The majority opinion in *Daubert* held that Rule 702 did indeed supplant *Frye.* This did not mean, however, that all expert testimony purporting to be scientific was now to be admissible. Rule 702 did require that the testimony actually be founded on "scientific knowledge." This implied that the testimony must be grounded in the *methods and procedures* of science—"the scientific method." Evidence thus grounded, said the Court, would possess the requisite *scientific* validity to establish an acceptable level of reliability. An excellent discussion of the movement from *Frye* to *Daubert*, a full statement of the *Daubert* decision and the application of *Daubert* to expert testimony is contained in the web page of the Legal Information Institute http://www.daubertontheweb.com/frye_opinion.htm of The Cornell Law School. In *Daubert*, the Court explicitly refused to adopt any "definitive checklist or test" for determining the reliability of expert scientific testimony, and emphasized the need for flexibility. The Court did list several factors the courts might consider in judging the admissibility of expert testimony. Those factors include:

- whether the theories and techniques employed by the scientific expert have been tested;
- whether the expert's theories and techniques have been peer reviewed or published;
- whether such theories and techniques have a known rate of error;
- whether there are standards governing the application of such techniques; and
- whether the expert's theories and techniques have widespread acceptance among peers.

The absence of one of the above factors is not sufficient to bar the testimony of an expert and the court emphasized that the admissibility inquiry should focus on the expert's "principles and methodology," and "not on the conclusions that they generate." Even with the admissibility of such testimony the traditional tools of cross-examination and rules of evidence could be used to challenge the expert's opinions, but the new rules would allow new and novel theories to be placed before juries without the *Frye* standard of "common acceptance." In *Daubert*, the courts became the gatekeepers to the admissibility of expert scientific testimony by establishing requirements for the reliability of such testimony.

1.10 Is Economic Testimony Scientific?

Expert economic testimony on damages, like vocational or life care testimony, is technical and specialized, but not scientific in the way that much medical and engineering testimony is scientific. Known rates of error are not available for earnings loss projections or valuation of life care plans. However, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court extended the "gatekeeping" role of the courts outlined in *Daubert* to all expert testimony.

So, at least in federal courts and some state courts, the "*Daubert*" hearing has become a common tool to challenge the reliability of opinions of damages experts. It is very important that both the retaining attorney and the damages experts retained be aware of the *Daubert* criteria for admissibility of expert testimony and be prepared to produce an analysis that meets those criteria.

1.11 Conclusions

A quick review of the web pages of the National Association of Forensic Economics (NAFE), the International Association of Rehabilitation Professionals (IARP), and the various certifying bodies for life care planners and vocational experts would reveal that damages experts are very much aware of the issues that *Daubert* and tort reform present to the effective use of damages experts in the courts. Both NAFE and the IARP have embarked on efforts to clearly define the ethical and professional practice standards of their fields of study. The proliferation of "damages experts" over the past two decades, the promotion of dubious damages models by some, the growing need for demonstration of foundation for expert testimony, and the pure costs of hiring such experts has created a "minefield" for plaintiff and defense attorneys in need of such experts. The discussion above has centered on the expert's view of selecting and using damages experts, primarily economists. In the chapters that follow, these and other issues will be examined by both plaintiff and defense attorneys and other damages experts with the goals of providing the reader with an understanding of how to effectively navigate the use of damages experts in personal injury/death litigation.

Chapter 2

The Trial Attorney's View on Choosing and Using Economists and Related Experts on Damages

William A. Posey, Esq.

Synopsis

2.1 Why Retain an Economist?
- A. Plaintiff's considerations
- B. Defense considerations

2.2 Choosing Your Expert on Damages
- A. *Daubert* considerations

2.3 The Use of a Forensic Economist in Litigation
- A. When to hire the economist
- B. Discovery
- C. Trial considerations for plaintiffs
- D. Trial considerations for defendants
- E. Economist and related damage experts

2.1 Why Retain an Economist?

A. Plaintiff's considerations

Attorneys representing injured parties must seek to maximize the recovery for their clients, while at the same time being cognizant of the costs required to establish and explain their damages. One of the early considerations for plaintiff's counsel is whether the case requires an economist for the appropriate presentation of the damages, and whether such an expense is justified, given the nature and extent of the potential damages. There are no golden rules on this issue. However, it is clear that when the injured party has suffered losses or damages that will continue into the future, such as lost wages, the limitation on the ability to earn income, and necessary future medical care, rehabilitation, or assistance, plaintiff's counsel must be prepared to explain how the cost or value of those losses increase in the future due to inflation, and also to reduce those calculations of future damages to their present value at the time of trial. Generally speaking, in all cases other than those in which future damages will be incurred for losses