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By Geoffrey S. Wells

Using vocational rehab experts and life-care planners to prove general damages

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The use of a vocational rehabilitation expert and a life-care planning expert is even more important today than it has been in the past. This is due in part to the jury's overall skepticism on general damage awards. It is not uncommon today to hear a juror during jury selection say something to the effect that "I have no problem awarding damages that are actually provable, such as lost wages or medical costs in the past and the future, but I have a real problem with pain and suffering damages." The plaintiff lawyer's ability therefore to provide actual economic numbers for the jurors is more important today than it has ever been in the past.

Vocational rehabilitation

The use of a vocational rehabilitation expert should be implemented anytime your clients have permanent injuries that either impair their ability to do their old jobs or impair their ability to do any job. One of the most important aspects of a good vocational rehabilitation plan is assessing the loss of earning capacity. The loss of earning capacity is not just the loss of a particular job, but it is the inability to be able to earn what a person would have been capable of earning had he or she never been hurt. Many defense lawyers gloss over the lost earning capacity component of the vocational rehabilitation plan. I think it is very important that the jury understands through the testimony of your expert the whole issue of lost earning capacity.

Assessing lost earnings where a person can no longer work is easy, and I am not going to discuss it in this article. The difficult part of assessing lost earnings comes into play when your client can do some things, but not other things. Additionally, the real issue comes into play when the defense argues, through their defense vocational rehabilitation expert, that your client actually can earn more money post-accident than they would have earned if the accident had not happened at all. Once you get past the emotional frustration of having to address this argument, you need to have a game plan on how to attack it.

I am going to use a specific case example where you have a client who has average to above-average intelligence and who has been working in some type of physical job such as construction his or her whole life. Post-accident, the client can no longer do physical work. The defense vocational rehabilitation expert does testing. The results of that testing show that the individual can now work as a computer programmer and is going to be the next Bill Gates, earning two or three times as much as he or she did doing construction. How do you handle this argument? The answer – it depends on the client.

I represented a cement finisher who worked in the construction industry doing everything from parking lots to the Staples Center. He suffered a bad fall and received debilitating injuries to both of his ankles and legs in the fall. The defense vocational rehabilitation expert had him becoming a computer programmer in an office, earning two times as much money as he ever did as a cement finisher. The problem with the defense assessment is that no one ever asked the client how he felt about working in an office behind a desk all day. I asked him, and he told me he would rather jump off a bridge than be locked up in a building all day. He told me that he had been in construction his whole life and that he loved being a cement finisher. He considered himself an artist and showed me pictures of all the different structures around Los Angeles that he had worked on. These included the Staples Center, among others. He told me he would never last in an office behind a desk.

In response to this defense assessment, I had my vocational rehabilitation expert assess the psychological component of the job market placement options for my client. My expert agreed that there was no way my client would ever be an office guy, and he explained this in his report. Many jurors who work with their hands outdoors completely understand the whole psychological component of the job market placement.

When discussing damages for lost earning capacity, I think it is important to make the case that your client is not just some statistic, but that he or she is unique and that any assessment must take into consideration the individual's life and life experiences. In the case of the cement finisher, my vocational rehabilitation expert assessed him as someone who had the ability to be a foreman. The problem was that whenever there is a job being poured and something goes wrong, the foreman must have the experience and ability to get into the cement and help out. Since he was unable to do this, it was obvious that he would be unable to ever work in that area again. This substantially increased his lost earnings and lost earning capacity numbers in the case.

Many variations of the above-depicted scenario can be used in your cases. One of the important components to consider is that before your client is examined and tested by your own vocational rehabilitation expert, that you meet with the client and get a feel for him or her and the person's life experience so that you understand those components before he or she is tested. Then, share your thoughts with your vocational rehabilitation expert.

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Life-care planning

Another area of economic damages is the area of the cost for future medical care or what is known as life-care planning. In order to provide an assessment for life-care planning, you need to hire a life-care planner. The life-care planner helps determine the lifetime needs and costs of care for the chronically or catastrophically injured person. The life-care plan incorporates a complete approach to depicting the client's medical, psychiatric, psychological, behavioral, educational, vocational and social needs. The life-care plan also incorporates the individual's recovery process as well as his or her current problems, and future problems that may be inherent with a particular disability. The life-care plan serves as a guide for the client's treating physicians and family members who will be involved with the client's care for the rest of his or her life.

One of the key components of any life-care plan is that it is geared towards preventative medicine that will help minimize any deterioration of the client's individual condition. A well thought-out life-care plan provides scientific and credible evidence to depict future medical needs of the client in the given case.

The key basis for any life-care plan is that your life-care planning expert be provided with all of your client's medical records, reports, tests etc. Additionally, I think it is even more important now that your life-care planner also have the opportunity to review all the treating doctor depositions, as well as your client's deposition. Additionally, where possible, you should make arrangements for your life-care planning expert to have discussions with and get approval from your client's treating doctors as to the proposed life-care plan. The areas of cross-examination by the defense on any life-care plan focus in on the fact that the life-care planner did not discuss any of the proposed plan items with any of the plaintiff's treating doctors. You should take this away from the defense by setting up or requesting that your life-care planner discuss the plan with the treating doctors. It is important to get the treating doctors' blessings to any of the life-care plan areas that pertain to the specific speciality of the treating doctors. Additionally, if you list your treating doctors as non-retained experts in your expert designation, you can call them at trial and have them confirm the need for portions of the life-care plan.

Another area for cross-examination by the defense is always the area that is the biggest ticket item, which is the attendant or level of nursing care required by your client. I think it is very important to get the treating physicians on board early with your life-care planner as to the necessity of the attendant care and the type of care that is required. There is at least one defense expert out there in the market now who claims under oath that the level of care does not matter with respect to life expectancy from a statistical standpoint. If you have a severely or catastrophically injured client, one of the areas the defense will attempt to attack is the life expectancy of your client. This is particularly true where you have a client who has either a gastrointestinal tube and/or tracheotomy requirement. In order to try to rebut the shortened life expectancy with the presence of these items, I think it is a good idea to get the treating doctors on board as to their opinions regarding life expectancy with good care. You want to make your client more than just some statistic – you want to show that your client with good care can live a long time, thereby necessitating long-term, good care.

After the life-care planner prepares a detailed matrix of all the various items required, you want to be sure that both the life-care planner and any treating doctors agree that the likelihood that your client will need these items is at least 51 percent probability; i.e., the same as "reasonably medically probable." Many times the defense will get an unsuspecting treating doctor to say that certain items on your life-care plan are only possible, as opposed to reasonably medically probable. I would suggest that you want to avert this trap laid by the defense by meeting with the doctors ahead of time and explaining to them the difference legally between something that is possible and something that is medically probable. These opinions can make the difference between getting a poor recovery and a great recovery for your client.

Geoffrey S. Wells is a partner at Greene, Broillet & Wheeler in Santa Monica. He has succeeded in obtaining maximum recovery for his clients, resulting in more than 20 multi-million-dollar verdicts and settlements in complex legal actions. Wells is an elected member of the American Board of Trial Advocates. He also is a member of AAJ, CAOC and CAALA. Since 1995, he has served as an arbitrator for the Superior Court for the County of Los Angeles. He is a graduate of the University of Washington, (B.A., 1981) and received his law degree from Pepperdine University School of Law (1985).