

Future economic damages

Russell G. Thornton, JD

While the 2003 tort reform legislation capped non-economic damages that may be recovered in a health care liability claim, this cap does not apply to economic damages, such as future loss of earning capacity and future medical expenses (1). Given that expert testimony based on reasonable medical probability is needed to establish liability (a breach of the applicable standard of care) (2) and causation (that the breach of the standard of care caused injury to the patient) (3), many assume that future economic damages must also be established based on reasonable medical probability through expert testimony. That is not true. In fact, the relative ease with which future economic damages can be established may be surprising, especially in light of the high threshold required to establish the other elements of a health care liability claim.

Future medical expenses are reasonable and necessary health care expenses required for the treatment of injuries sustained as a result of the negligent care at issue (4). To recover future medical expenses, the plaintiff must show a “reasonable probability” his injuries will require him to incur medical expenses in the future (5). The plaintiff may recover future medical expenses if he shows the existence of an injury, that medical care was rendered for the treatment of that injury prior to the time of trial, the cost of that past medical care, and that he is still injured to some degree at the time of trial (5, 6). At a bare minimum, the plaintiff must show the reasonable value of his past medical treatment and the probable necessity of future medical treatment (6). While it is “preferred” that the plaintiff establish future medical expenses through expert testimony, expert testimony is not required (6). The necessary evidence can come from the plaintiff himself (7).

Courts rarely disturb an award of future medical expenses on appeal (5). This reluctance is based on the realities associated with the assessment of future damages, primarily based on the fact that the very nature of this and other future damages is uncertain (5).

Future loss of earning capacity is “the diminished capacity to earn a living after the trial” of the case (8). For the same reason that applies to future medical awards, the jury is allowed “considerable discretion” in determining the amount awarded for loss of earning capacity (8, 9). In fact, the jury is given this wide latitude on all future damage awards.

Recovery of future loss of earning capacity requires a claimant to present sufficient evidence to allow a jury to reasonably measure this loss in monetary terms (8, 9). This evidence can include “evidence of past earnings; the plaintiff’s stamina, efficiency, and ability to work in light of the injury; the weaknesses and changes that will naturally result from the plaintiff’s injury; and the plaintiff’s work-life expectancy” (10). While the plaintiff is not required to show actual earnings, life expectancy, and prior employment, he must show that before the injury he had the capacity to work and that this capacity was impaired by the injury (8, 9). The fact that the plaintiff is unemployed does not prevent recovery if there is evidence the plaintiff’s ability to earn a living was decreased by his injury (9). Expert testimony is not needed to establish loss of earning capacity (11).

“Loss of inheritance” is loss of the value of “the assets that the deceased, in reasonable probability, would have added to the estate and left at natural death” to the claimant (12). Recovery for loss of inheritance requires the plaintiff to prove that “the decedent’s [future] earnings less his expenditures would have left an estate for his beneficiaries to inherit and that the beneficiaries would have outlived the decedent” (13). Loss of inheritance cannot be recovered “if the decedent would have earned no more than he and his family would have used for support” (14). To establish that the decedent would have left an estate for his beneficiaries (i.e., he would have earned more than what would have been used for support), the plaintiff must conduct this analysis using data specific to the decedent (15). Other data, such as data based on an “average person” the decedent’s age at the time of death, is inadequate (16). For example, this analysis must take into account specifics such as the decedent’s specific medical condition at the time of his death, his future employment, his life expectancy, and his future expenses such as medical expenses (16). Similarly, specific data and information on any beneficiaries’ health and medical condition must be presented to establish that the beneficiaries would have outlived the decedent (17).

From Stinnett Thiebaud & Remington LLP, Dallas, Texas.

Corresponding author: Russell G. Thornton, JD, Stinnett Thiebaud & Remington LLP, 4800 Fountain Place, 1445 Ross Avenue, Dallas, Texas 75202 (e-mail: rthornton@strlaw.net).

“Pecuniary loss” is defined as “the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value” that the decedent would have provided to the claimant had he lived (12). While one might intuitively question why pecuniary loss damages would not be subject to the noneconomic damages cap, given this element appears to include noneconomic damages, review of the applicable statutory provisions makes clear that this element of damages is not subject to the cap (18).

No precise legal measure of pecuniary loss exists (19). Entitlement to this element of damages is not limited to or dependent on evidence of past financial contributions or an expectation of future financial contributions (20). Evidence that the decedent was relied on for advice that affected family and work and could be counted on for counseling or a loan in a financial pinch is sufficient (20). Expert testimony is not needed to establish this element of damages (21).

This quick analysis and evaluation of the legal framework that surrounds future economic damages shows that the parameters are not very strict. The court and jury are not limited or constrained by expert testimony. In fact, the jury is given very wide latitude in determining the proper amount to award for these elements of damages. Thus, the appellate process cannot be expected or relied on to correct unreasonable awards. Defense counsel, carriers, and health care providers must recognize these damages as a potentially fertile area where astute counsel may work to increase the value of a case.

1. Tex Civ Prac & Rem Code, §74.301.
 2. See *Battaglia v Alexander*, 177 SW3d 893, 899 (Tex 2005).

3. See *Shelton v Sargent*, 144 SW3d 113, 120 (Tex App—Fort Worth 2004, pet denied).
 4. See *P.J.C.—Malpractice, Premises & Products*, §82.3 (2008).
 5. *Conditt v Morato*, 2007 Tex App LEXIS 7432 * 16–17 (Fort Worth) (Sep 13, 2007) (citing *Antonov v Walters*, 168 SW3d 901, 908 (Tex App—Fort Worth 2005, pet denied)).
 6. *Columbia Med Ctr of Las Colinas v Bush*, 122 SW3d 835, 863 (Tex App—Fort Worth 2003, pet denied).
 7. See *Conditt*, 2007 Tex App LEXIS 7432 at *18–19.
 8. *Tagle v Galvan*, 155 SW3d 510, 519 (Tex App—San Antonio 2004, no pet); *McIver v Gloria*, 169 SW2d 710, 712 (Tex 1943).
 9. *Plainview Motels, Inc v Reynolds*, 127 SW3d 21, 35 (Tex App—Tyler 2003, pet denied).
 10. *Moyer v Moyer*, 2005 Tex App LEXIS 6966 *48 (Tex App—Austin) (Aug 26, 2005).
 11. See *Sosa v City of Balch Springs*, 772 SW2d 71, 72 (Tex 1989); *McIver*, 169 SW2d at 712–713.
 12. *P.J.C.—Malpractice, Premises & Products*, §81.3 (2008).
 13. *Columbia Med Ctr of Las Colinas v Hogue*, 271 SW3d 238, 254 (Tex 2008) (citing *C&H Nationwide Inc v Thompson*, 903 SW2d 315, 322–324 (Tex 1994); *Yowell v Piper Aircraft Corp*, 703 SW2d 630, 633 (Tex 1986)).
 14. *Sanchez v MICA Corp*, 107 SW3d 13, 20 (Tex App—San Antonio 2002, pet granted, jdmt vacated w/o ref to merits, in part, remanded in part) (quoting *Yowell*, 703 SW2d at 633).
 15. *C&H Nationwide, Inc*, 903 SW2d at 323; *Yowell*, 703 SW2d at 634.
 16. *Hogue*, 271 SW3d at 255.
 17. *Id* at 254–255.
 18. See Tex Civ Prac & Rem Code, §§41.001(12), 74.001(a)(20) and 74.301.
 19. *Malone & Hyde, Inc v Hobrecht*, 685 SW2d 739, 746 (Tex App—San Antonio 1985, judgment set aside).
 20. *Id* at 747–749. See also *Atchison, Topeka & Santa Fe Railway Co v Cruz*, 9 SW3d 173, 180–181 (Tex App—El Paso 1999, pet granted, jdmt vacated w/o ref to merits).
 21. See *Cruz*, 9 SW3d at 180–181; *Mercy Hospital of Laredo*, 776 SW2d 626, 633–634 (Tex App—San Antonio 1989, writ denied).