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Expert Economists Can Help Prove Loss of Earnings for Infant Plaintiffs With Brain Injury

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The use of an expert economist to prove a brain-damaged child's future loss of earnings should be a vital part of the plaintiff's direct case. Expert economic testimony allows the injured party to put before the jury a specific damage amount, even though specific monetary suggestions to the jury are generally prohibited in personal injury cases in New Jersey. Attorneys representing injured infants should take this opportunity to guide the jury on the value and severity of the injuries and case being presented.

The Supreme Court of New Jersey in *Lesniak v. County of Bergen*, 117 N.J. 12 (1989), established the right to present evidence of a child's future loss of earning capacity. However, the Court in *Lesniak* held that expert economist testimony is not *required* to prove future loss of earnings damages. Notwithstanding this relaxed standard, the opportunity to educate the jury on future earnings values, and present firm damages numbers to a jury that will not hear any other sug-

gestion of a number to quantify plaintiff's damages, should not be passed up.

Economic concepts are often foreign to jurors who are charged with the duty and the struggle to fairly and reasonably compensate the infant plaintiff before them. The Court will provide little guidance other than that it is entirely up to them to fairly and reasonably compensate the plaintiff. The trial court will instruct the jury that they are the determiners of the facts and the amount of damages is their sole province; not the judge and not the attorneys. We would be kidding ourselves to believe that this is an easy task without trepidation for many jurors. To provide the jury with guidance can only assist them in their process and determinations.

The *Lesniak* decision laid out the road map of what evidence is required to have a jury consider the future loss of earnings damages of an infant plaintiff without quantification from an expert economist: 1) a permanent injury; 2) which has a reasonable probability of impairing the plaintiff's future earning capacity.

[I]f the evidence is such that a jury could conclude that an infant plaintiff has suffered a severe injury with lasting or permanent effects and the injury

will within a reasonable probability impair the child's ability to earn, specific proof tending to quantify the lost future earning capacity is not a prerequisite to recovery for that element of damage.

Since *Lesniak* does not require expert quantification proof, what are the risks and benefits of presenting such testimony?

Model Civil Jury Charge 8.11(c) (2)(b) provides the jury with some guidance on work life expectancies, future loss of earnings and statistical averages. However, this brief instruction is not an adequate substitute for a professional economist's explanation of the relevant statistics and principles.

As we know from the Supreme Court's holding in *Botta v. Brunner*, 26 N.J. 92 (1958), evaluating and assessing pain-and-suffering damages are for the jury alone, as it is improper for plaintiff's counsel to argue to a jury that they should use a "per diem formula for the calculation of pain and suffering."

Botta v. Brunner also specifically prohibits plaintiff's counsel from suggesting an amount of damages for a plaintiff's past and future pain and suffering, or from suggesting that the jury award what they would want had they

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sustained the injury alleged, that is, invoking the "Golden Rule": do unto others as you would have them do to you.

Since the attorney for the plaintiff is prohibited from suggesting a specific amount of money for pain-and-suffering damages, the use of expert economic testimony gives counsel the ability to put a specific monetary amount before the jury for their consideration. This provides the jury with a guide on complicated economic issues because an infant is usually without an advanced educational or earnings history, as well as clearly conveying to the jury that this particular case is of substantial value.

The expert economic testimony provides the jury with guidance on how prospective educational attainment translates into dollar amounts, how income taxes and fringe benefits fit into the loss-of-earnings damages equation and how discount and growth rates work. The testimony also provides the jury with vital and necessary background and an understanding of historical earnings values.

The complexity of a toxic exposure, birth defect, product liability or medical malpractice case often makes the jury's job even more difficult. To be able to potentially solidify one element of damages and provide the jury with cold, hard numbers, which they can accept or reject in whole or in part, can only benefit the injured party and ease the burden placed on the jury to make these very difficult and often very technical and scientific determinations.

Recently, we encountered a motion by a defendant to preclude our expert economist in an infant lead-poisoning case on the basis that placing a seven-

figure number for an infant's future loss of earnings before a jury was inherently prejudicial to the defendants. The defendants also contended that our expert economic opinion was speculative and a net opinion and therefore should be precluded.

In denying the defendants' motion, the trial court relied on *Lesniak* and held that the plaintiff was permitted, but not required, to proffer economic expert testimony on future loss of earnings and therefore it was not prejudicial or speculative. The trial court also held that it was entirely proper for the expert economist to rely upon the expert medical and psychological opinions establishing permanency of injury and a loss or impairment of that child's ability to earn in calculating the infant's future loss of earnings.

In our practice, the expert economist provides the jury with the numbers and explains each element of the future economic loss in simple, easily understandable terms. Under the guiding principle that, generally speaking, the further a person advances academically the more money that person will earn over his lifetime, our expert economist provides an opinion on the value of various levels of educational attainment.

In our toxic tort, infant lead-poisoning cases, an expert psychologist opines, through the administration of various standardized and clinically accepted psychometric tests, that the infant plaintiff has certain learning disabilities, cognitive deficits and attentional problems. Based on the data provided through the administration of these tests, the expert formulates an "educational prognosis," or what can be expected of this child in

terms of academic achievement in his damaged state versus how far the child would have gone in school in his undamaged state, i.e., without learning disabilities and cognitive deficits. This can be easily translated into a dollars-and-cents loss by an economist.

The risk of presenting this evidence depends on how it is presented. Recently, in *Risko v. Thompson Muller Automotive Group*, 206 N.J. 506 (2011), the Supreme Court reversed a seven-figure verdict in favor of the plaintiff because the plaintiff's attorney strongly suggested to the jury during summations that they "would be violating the law" and would "be reported to the judge if they reject the notion that plaintiff's case could be worth more than \$1,000,000." Plaintiff's counsel also made reference to the suffering endured by the plaintiff from her serious injuries as violating the Eighth Amendment's prohibition of torture.

Thus, the risk of presenting future loss of earning damages is that if the attorney is too zealous in his arguments, he could be stepping over the boundaries enunciated in *Botta v. Brunner*. However, as the opinion in *Risko* showed, it was not so much the suggestion of the damages floor as it was plaintiff's counsel's suggestion that the individual jurors who disagreed with that floor should be brought before the court for violating the law, which was the proverbial straw that broke the camel's back leading to the new trial on damages.

Based on *Risko*, the risk of proffering the expert economic opinion can be measured, weighed and eliminated, leaving only the benefits of a greater chance of full compensation for your infant client. ■