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Outside Counsel

News Loss of Earnings- Problem Clients, Undocumented Aliens

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Personal injury cases frequently involve claims of-loss-of earnings. The questions then arise, under what circumstances are these losses compensable, and what is the quantum of proof.

An individual who is injured, either temporarily or permanently, as a result of the negligence of another may recover damages for loss of earnings where the injury prevents him or her from performing the work or services in which he or she was engaged at the time of injury.[1] This includes future loss of earnings.[2] Recovery for lost earning capacity is not limited to a plaintiff's actual earnings before the accident, however, and the assessment of damages may instead be based upon future probabilities.[3] Thus, it is not necessary for an injured person to show his or her actual earnings preceding the injury in order to recover for deprivation of future earnings capacity.[4] Only "some evidence" showing the difference between what a plaintiff is now able to earn and what he could have earned is required.[5]

The jury has a right to consider prospects of advancement, and the probability of attaining a higher position and earning a greater salary.[6] The refusal to give any consideration and fail to make any award for the plaintiff's prospective loss of earnings may be improper and require the court to grant a motion for additur.[7]

That the plaintiff earned more money after the subject accident than before does not mean that there was no compensable loss of earnings. " *The proper test is not whether plaintiff's salary was reduced for these years, but whether her earnings were reduced because of her injury.* The...[defendant] ignores the possibility that *but for the injury, plaintiff's earnings...likely would have been far greater.*"[8]

Problem Clients

It is well-established that an infant may recover for future loss of earnings.[9] A plaintiff that was involved in a post-accident injury, which completely disabled him, may be permitted to recover for loss of earnings.[10] While "past and projected future earnings may be material issues to be considered by the trier of fact in evaluating an injury to a plaintiff's earning capacity, they are not, in and of themselves, determinative of that capacity."[11] Indeed, loss of earnings may be obtained by an unemployed person.[12]

Undocumented Aliens

In *Balbuena v. IDR Realty*, the Court of Appeals made clear that an illegal/undocumentedalien working off the books can recover for their loss of earnings.[13] The Court noted that a "jury's analysis of a future wage claim proffered by an undocumentedalien is similar to a claim asserted by any other injured person in that the determination must be based on all of the relevant facts and circumstances presented in the case."[14] It is clear that the failure of the trial court to allow the plaintiff to recover for past and future lost earnings for an undocumentedalien worker constitutes reversible error.[15] If, however, the plaintiff obtained employment by submitting false documentation to the employer, the undocumented employee may be precluded from recovering for lost wages.[16]

Proof

Because of the inherent difficulty in establishing the proof of earnings in such a case, courts may allow greater flexibility and latitude in review of permissible proof.

We agree that the plaintiff administrator should be permitted to offer evidence of any wages that his decedent, an alien working in the United States on an apparently illegal basis, might have earned. *Any pertinent evidence is competent unless prohibited by statute* (citation omitted). It is for the jury to weigh defense proof that decedent would have earned those wages, if at all, by illegal activity (citation omitted).[17]

An award for loss of earnings may be based solely on the plaintiffs testimony and without any corroborating documents.[18] This is particularly the case when then defendant expressly declines to challenge said unsupported testimony by the use of the W-2 forms in its possession.[19] Proof of damages may be based solely on oral testimony as long as the witness has knowledge of the actual costs.[20] An award for past and future loss of earnings is appropriately documented through pay stubs showing hourly and overtime wages and union records.[21]

Experts

While expert testimony may not be required to prove economic losses,[22] in order to recover the full value of the economic loss sustained, an economist may be helpful and is permitted.[23] An economist may give expert testimony as to the economic value of-loss-of earnings and benefits.[24] An economist may properly testify based on assumed facts which are fairly inferable from the evidence, such as evidence of the plaintiff's age, employment skills and physical limitations, and may project plaintiff's future lost earnings based on the assumption that the plaintiff will not be employed in the future.[25] An economist may be properly used to prove loss of earnings for an undocumentedalien.[26]

A vocational economic analyst may also testify as an expert witness to establish the future loss of earnings for the plaintiff.[27] However, while a vocational rehabilitation expert is qualified to assess plaintiff's vocational abilities, without proper foundation, the witness is not qualified to express an opinion on past and future loss of earnings, past and future loss of household services, and future medical expenses; that is normally the subject of an economist.[28]

Recovery is not limited to actual earnings before the accident and a plaintiff may introduce expert testimony assessing damages based upon future probabilities. An expert may rely on out-of-court material if it is of a kind accepted in the profession as reliable in forming a professional opinion. This may include a letter from plaintiff's employer describing plaintiff's potential for advancement.[29] An economist may base his/her opinion on contracts, union/municipal/prevailing wages, governmental or economic studies and surveys.

Expert economic testimony has been permitted to establish the pecuniary value of the loss of services of a plaintiff, such as in a wrongful death action.[30] While expert testimony is permissible to prove the value of a plaintiff's claims for loss of household services, it is not a prerequisite to establishing their value.[31]

A fact witness, such as a union member that gives testimony as to the terms of the plaintiff's pension plan, is a fact witness and not an expert witness, and no expert disclosure is necessary.[32]

Creative Law, Discovery Use

The Fair Labor Standards Act (FLSA) requires

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payment of a minimum wage in the private and public sector.[33] The court can take judicial notice of what the payscale of the minimum wage is.[34] In *Pineda v. KEL-Tech Construction, Inc.*, the court held that:

"Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following [minimum wage] rates...." (Citation omitted). The FLSA defines employee as "any individual employed by an employer." (Citation omitted). As the NLRA does, the FLSA covers undocumented aliens because courts interpret the FLSA's protection broadly. (Citations omitted).

By assuring fair treatment of illegal workers and payment of at least a minimum wage to all workers, the NLRA and the FLSA resemble the guarantee of a "prevailing wage" that New York Labor Law Article 8 provides. (See Labor Law §220[3]). For example, similar to the protection of workers against unfair pay in Article 8, "[t] he prime purpose of the [FLSA] was to aid the unprotected, unorganized and lowest paid of the nation's working population...." (citation omitted). The FLSA merely mandates that, as a matter of federal law, employers must pay a minimum wage and "[n]othing in FLSA suggests that undocumented aliens cannot recover unpaid minimum wages and overtime...." (citation omitted). As discussed in the next section, New York Labor Law applies to undocumented workers as well....[35]

In public work contracts, Article 8 of the New York Labor Law requires the payment of prevailing wage and supplemental benefits to all workers. New York Labor Law §220 states: " *The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages* as hereinafter defined."[36] Article 8 also provides that " *supplements, as hereinafter defined, to be provided to laborers, workmen or mechanics upon such public works, shall be in accordance with the prevailing practices in the locality,* as hereinafter defined." (Id.) (emphasis added). Finally, "[a] ny person or corporation that willfully pays or provides after entering into such contract or a subcontract to perform on any portion of such contract, less than such stipulated wage scale or supplements as established by the fiscal officer shall be guilty of a misdemeanor...." (Id.).

In a case involving a claim for lost earnings for an undocumentedalien where the plaintiff's employer is a party to the litigation, plaintiff's counsel should question the employer about the contracts entered into, the prevailing wages paid. Moreover, questions should be asked about the employer complied with the law and paid the plaintiff the prevailing wages, and what, if any, documents they required the plaintiff to furnish, and compel production of documents that the defendants signed with respect to verification of the plaintiff's status. Although the Immigration Reform Control Act (IRCA) does not penalize the workers for gaining employment without proper work authorization, it does place limits on their hiring. First, "[i]n general, it is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing that the alien is an unauthorized alien...."[37] To this end, "[t]he person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien...."[38] The employer complies with the requirement by "examination of a document if the document reasonably appears on its face to be genuine."[39] Specifically, an employer must examine a "Social Security account number card" or "other documentation evidencing authorization of employment in the United States."[40]

A defendant may face criminal sanctions for knowingly allowing an undocumentedalien to work for them, and may decide discretion is the better of valor with respect to these claims. If the defendant does not make an issue of the plaintiff's immigration status (and if the defendant subjects himself/herself to criminal penalties for doing so, they may chose to forgo doing so), the judge and jury may not have to review these issues.

Discovery Issues

In *Ochs v. Trust*,[41] the trial court granted plaintiff's motion for a protective order and vacated the defendant's notice to admit claiming that plaintiff was currently a nondocumented alien, and denied the defendant's cross-motion to: preclude the plaintiff from testifying about his lost earnings, compel the plaintiff to appear for a further deposition as to his immigration status, and to produce citizenship documentation, and was affirmed by the Appellate Division. In *Pineda v. KEL-Tech Construction, Inc.*, the court denied discovery of immigration status records in unpaid wages cases because such discovery poses a serious risk of injury to the plaintiffs.[42] In *Gomez v. F&T Int'l*, the court denied the defendant discovery of the plaintiff's immigration status.[43] The court noted that there was no indication that the plaintiff used false documents to obtain employment; their testimony showed that their former employer did not require any documentation. Plaintiff may therefore properly assert his claim for lost earnings, and furthermore, since his injuries prevented him from working in the future, there was no need to establish that he obtained or was in the process of obtaining work authorization. The court noted that what was really happening was that "under the guise of litigating lost wages is that undocumented workers are being intimidated with the prospect of being deported and having their families torn apart after providing services for dangerous work." The court stated that it would "not condone this behavior whether intimidation is the intended result or simply an unfortunate by product of litigating a legitimate concern," and would not allow these claims to be turned into deportation threats.

Conclusion

Loss of earnings, where applicable, is an area that deserves attention in order for the injured plaintiff to be fully compensated for their damages, regardless of their socio-economic and immigration status. As the Appellate Division noted in *Majlinger*, citing other courts, "[E]ven an unlicensed dog is not an outlaw and is entitled to some rights."[44]

1. *Ehrgott v. New York*, 96 N.Y. 264 (1884).
2. *Weir v. Union Ry*, 188 N.Y. 416 (1907).
3. *Kirschhoffer v. Van Dyke*, 173 A.D.2d 7, 10 (3rd Dept. on transfer from 2nd Dept. 1991); *Grayson v. Irvmar Realty Corp.*, 7 A.D.2d 436, 439 (1st Dept. 1959).
4. *Faulk v. Aware, Inc.*, 35 Misc. 2d 302, 306 (Sup. NY 1962).
5. *Kavor v. Amerada Hess Corp.*, 141 A.D.2d 331, 332 (1st Dept. 1988).
6. *Geary v. Metropolitan Street Railway Co.*, 731 App. Div. 441.
7. *Metz v. Great Atlantic & Pacific Tea Co.*, 30 Misc. 2d 258, 164 (Sup. Kings 1961).
8. *Behrens v. Metropolitan Opera Assoc.*, 18 A.D.3d 47, 794 N.Y.S.2d 301 (1st Dept. 2005) (emphasis added).
9. *Campolo v. City of Yonkers*, 137 A.D.2d 480 (2nd Dept. 1988); *Ledogar v. Giordano*, 122 A.D.2d 834 (2nd Dept. 1986), app. discontinued and withdrawn, 68 N.Y.2d 911 (1986).
10. *Spose v. Ragu Foods, Inc.*, 142 Misc. 2d 366 (Sup. Monroe 1989).
11. Id., 142 Misc. 2d at 369.
12. *Spence v. State of New York*, 6 Misc. 2d 1029, mod, 6 A.D.2d 1024 (4th Dept. 1958); *Reichman v. Brooklyn Truck Renting Co.*, 263 App. Div. 1014 (2nd Dept. 1942).
13. 6 N.Y.3d 338, 812 N.Y.S.2d 416 (2006).
14. Id.
15. *Piedrahita v. RGF Development Corp.*, 38 A.D.3d 741 (2nd Dept. 2007); *Shi Pei Fang v. Heng Sang Realty Corp.*, 38 A.D.3d 520 (2nd Dept. 2007).
16. *Coque v. Wildflower Estates Developers, Inc.*, 31 A.D.3d 484 (2nd Dept. 2006).
17. *Public Administrator of Bronx County v. Equitable Life Assurance Society of the United States*, 192 A.D.2d 325 (1st Dept. 1993) (emphasis added).
18. *Balmaceda v. Perez*, 182 A.D.2d 983, 983-984 (3rd Dept. 1992); *Butts v. Braun*, 204 A.D.2d 1069 (4th Dept. on transfer from 2nd Dept. 1994).
19. *Grinnell v. City of New York*, 244 A.D.2d 171 (1st Dept. 1997).
20. *Electronic Services International, Inc. v. Silvers*, 284 A.D.2d 367, 368 (2nd Dept. 2001).
21. *Angamarca v. Silverstein Properties, Inc.*, 16 A.D.3d 242 (1st Dept. 2005).
22. *Meagher v. International Ry. Co.*, 271 App. Div. 945 (4th Dept. 1947); *Lamot v. Gondek*, 163 A.D.2d 678 (3rd Dept. on transfer from 2nd Dept. 1990).
23. *DeLong v. County of Erie*, 60 N.Y.2d 296 (1983).
24. See, *Dennis v. Dachs*, 85 A.D.2d 223, resettled, 88 A.D.2d 511 (1st Dept. 1982), lv. gtd, 88 A.D.2d 795, app. wdrn., 58 N.Y.2d 972 (1983).
25. *Czerniejewski v. Stewart-Glapat Corp.*, 269 A.D.2d 772 (4th Dept. 2000).
26. *Olszewski v. Park Terrace Gardens, Inc.*, 14 Misc. 3d 1223A, 836 N.Y.S.2d 487 (Sup. NY 2006).
27. *LaFountaine v. Franzese*, 282 A.D.2d 935, 940-941 (3rd Dept. 2001).
28. *Smith v. M.V. Woods Construction Co., Inc.*, 309 A.D.2d 1155 (4th Dept. 2003).
29. *Tassone v. Mid-Valley Oil Co., Inc.*, 5 A.D.3d 931, 773 N.Y.S.2d 744 (3rd Dept. 2004).
30. *DeLong v. County of Erie*, 60 N.Y.2d 296, 307-308 (1983) (value of housewife-mother).
31. *Kastick v. U-Haul Co. of Western Michigan*, 259 A.D.2d 970 (4th Dept. 1999).
32. *Sheppard v. Blitman/Atlas Building Corp.*, 288 A.D.2d 33, 35 (1st Dept. 2001).
33. 29 U.S.C. §206.
34. See, *Garcia v. Freeland Realty, Inc.*, 63 Misc. 2d 937, 943.
35. 15 Misc. 3d 176, 184-185. See also, *Jara v. Strong Steel Doors, Inc.*, 16 Misc. 3d 1139A, 2007 NY Slip Op. 51755U, 2007 N.Y. Misc. LEXIS 6355 (Sup. Kings 2007).
36. Labor Law §220[3].
37. 8 USC §1324a[a][1][A].
38. Id.
39. Id. at §1324a[b][1][A][ii].
40. Id. at §1324a[b][1][C].
41. 12 Misc. 3d 1157(A), 2006 N.Y. Slip Op. 50938 (U), 2006 WL 1372948, aff'd, 39 A.D.3d 514, 2007 N.Y. Slip Op. 02913, 2007 WL 1017345 (2nd Dept. 2007),
42. 15 Misc. 3d 176, 190 (Sup. NY 2007). See also, *Gomez v. LIRR*, 201 A.D.2d 455 (2nd Dept. 1994) (notice to admit re: immigration status vacated).
43. 16 Misc. 3d 867 (Sup. NY 2007),
44. *Majlinger v. Cassino Contracting Corp.*, 25 A.D.3d 14, 25 (2nd Dept. 2005), aff'd sub nom., *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338 (2006).