



Implementing Best Practices & Educating Lawyers: Teaching Skills and Professionalism Across the Curriculum

Workshop
3D

Festival of Damages Arguments:
An Exercise for a First Year Torts Class

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Workshop on “Festival of Damages Arguments”

The Festival is a day when first year Torts students serve as advocates, judges and reporters to discuss and argue specific damages issues. The problem involves two cases, four issues, argued by eight advocates before four panels of three judges. Each student belongs to either an advocate team or a judicial panel.

Why a Festival?

Recent law school graduates who are otherwise well versed in tort law generally do not appreciate the quantitative nature of tort damages. (I base this on my twenty-five years supervising young attorneys on tort cases at the Department of Justice.) A quantitative approach to analyzing damages is not readily taught to 1Ls by the Socratic method, by straight lecture, or by assigning cases. The hope is that a problem solving session in a Festival / Party / Out-of-the-Ordinary Class would help students: Learn rudimentary tools for assessing Tort Damages; See first hand how small differences in assumptions can result in significant differences in damages; Engage in collaborative thinking and writing; and Begin to develop advocacy skills.

Preparation & Procedures

The Festival is announced two weeks before the event and team/panel assignments are made at that time. I assign reading in the Damages chapter of the casebook. I then spend most of two classes lecturing about damages and quickly going through the cases in the reading. I give them copies of the Future Damage Calculator and demonstrate how it works to calculate Life Expectancy and Work-Life Expectancy (both Years of Remaining Labor Force Participation and Years Remaining until Final Retirement). I also give them a Present Value Table and explain how it helps calculate the present value of annual payments for a fixed number of years, assuming a particular interest rate.¹

Each litigation team prepares a two-page brief in which it may cite one case in addition to specific cases in the casebook. Each team chooses one person to argue. Two days before the event the briefs are distributed to all class members, each of whom is responsible for reading and preparing a two-minute summary of the issues in each argument.

Several days prior to the arguments, I meet with the judicial panels to organize the arguments. This provides an opportunity to set forth the ground rules and to insure that the judges understand the issues and cases well enough to ask incisive questions. In addition to the normal rules about time and decorum, the judges are instructed that each of them may ask no more than three questions of any advocate. This serves to reduce the potential for one judge to tie up an entire argument. This is a secret instruction, not shared with non-judges until after the arguments.

¹ Photocopies of Future Damages Calculator results for ages 16 and 42 are attached at page 7. The Present Value Table for 19 years is on page 8.

Before each argument a student is chosen at random to briefly explain the issues that are about to be presented. This requirement insures that the students will read all the briefs. It also serves to call the class to order. As a practical matter, it may be wise to choose students who are not serving as advocates or judges.

Arguments are five minutes per side, with no rebuttal. The plaintiffs go first in each argument. At the conclusion of all the arguments there is a fifteen-minute break during which the judicial panels retire and deliberate. The judicial panels then return and announce their conclusions.

Handout

Here is the handout announcing the exercise.

The Festival of Damages Arguments

You will each be involved in a classroom argument on damages. The Supreme Court of Grossmanohoma has remanded two cases involving four issues. Each issue will be argued before a separate three judge appellate panel.

Each of you will be on either a litigation team or a judicial panel. Each litigation team must meet as a group at least twice before the argument and prepare a two page brief in which it may cite one case in addition to the authority provided to it. The team will select one person to argue. The briefs will be distributed to all class members.

All judicial panel members will meet as a group with me. Each judicial panel will then meet once by itself on the day before the arguments.

Because an attorney or judge should never miss an opportunity to educate the public (or, if need be, appear on television), each of you should be prepared to give a two minute summary of the issues prior to the beginning of each argument. Before each argument one of you will be called upon to provide that introduction to the class and any visiting dignitaries. So, you should read and absorb all eight briefs.

Arguments will be five minutes per side, with no rebuttal. The plaintiffs will go first in each argument. At the conclusion of all the arguments there will be a fifteen-minute break during which the judicial panels will reach their conclusions. The judicial panels will then announce their conclusions.

Meeting of all Judicial Panel Members: _____

Briefs due: _____

Day of Argument: _____

Holiday v. Costner. This is a wrongful death action in which a 42-year old, white male dentist was killed in a tragic escalator accident on 6/6/06. His reported income was \$144,000 for 2003, \$146,500 for 2004, and \$148,500 for 2005. Liability has been resolved in favor of plaintiff.

Issue 1. What is the value of Dr. Holiday's lost future income without regard to inflation?

The answer will be a single dollar amount. The judicial panel will show how it reached that number.

Issue 2. How should the courts of Grossmanohoma account for inflation in assessing damages?

The three possible answers are: the "inflation-discount method," the "real interest method" or the "total offset method."

Sydney v. Harris.

This is a wrongful death case in which a 16-year old, white female high school sophomore was killed in a traffic auto accident on 1/23/06 in which she was run over by a drunken young man on his way home from a high school basketball game. She suffered severe brain injuries and was conscious for only ten days prior to her death on 2/13/06.

Ms. Sydney was an average student in an average high school. Half of her classmates will graduate from college; 10% of those will receive post-graduate degrees. She planned to become a dentist. The average dentist in Grossmanohoma earns \$140,000 per year; the average college graduate, \$100,000; and the average high school graduate, \$50,000. Liability has been resolved in favor of plaintiff.

Issue 3. What is the value of Ms. Sydney's lost future income without regard to inflation?

The answer will be a single dollar amount. The judicial panel will show how it reached that number.

Issue 4. What is the value of Ms. Sydney's pain and suffering and loss of enjoyment of life?

The answer will be a single dollar amount. The judicial panel will show how it reached that number.

Analyzing the Issues

Issue 1. What is the value of Dr. Holiday's lost future income without regard to inflation?

This is a fairly straightforward problem. Dr. Holiday's lost future income is the sum of what he would have earned in each of the years he would have worked. This involves two subsidiary questions:

- A. How many years would he have worked?
- B. What would he have earned each year he worked?

Resolution of the first question requires use of Life Expectancy Tables. *See* Appendix at 10. The Tables show that a white² male, age 42, has a Life Expectancy of 35.1 more years. His Work-Life Expectancy is that he will actively participate in the workforce for another 19.1 years and will finally retire from the workforce in 19.1 years. So, Dr. Holiday had an expectation of working 19.1 more years and finally retiring at age 61.1.

Resolution of the second question begins from the data available. Dr. Holiday's reported income was: \$144,000 for 2003, \$146,500 for 2004, and \$148,500 for 2005. Students can argue whether the income is increasing geometrically, arithmetically, or in some other fashion?

Dr. Holiday's lost future income equals what he would have earned in each year between 2006 and his expected retirement in 2025.1.

2006 income
2007 income

+ 2025 income
Lost Future Income

The key debate will be about how Dr. Holiday's income will change from year to year. The argument will likely involve speculation and calculations by both sides.

Issue 2. How should the courts of Grossmanohoma account for inflation in assessing damages?

The three possible answers are: the "inflation-discount method," the "real interest method;" the "total offset method."

This is a Question of Law to be argued from case law, logic and policy. Plaintiffs will likely push for the "total offset method" since it will maximize the recovery. Defendants may argue for either the "real interest method" because of the current low interest rates, or the "inflation-discount method." Both methods would require some discounting to present value. The absence of any expert testimony in the problem would make the "inflation-discount method" difficult for the judges to apply.

The consequences of the decision are substantial. Assuming Dr. Holiday would have earned \$150,000 annually for 19.1 years, under the "total offset method" the award for lost future income would be \$2,865,000 (\$150,000/year x 19.1 years = \$2,865,000). Under the "real

² In analyzing work-life expectancy the tables differentiate by sex and race. Judge Weinstein recently rejected race-based life expectancy statistics. *McMillan v. City of New York*, 253 F.R.D. 247 (E.D.N.Y. 2008) ("Reliance on 'race'-based statistics in estimating life expectancy for purposes of calculating damages in this case is rejected in computing life expectancy and damages.").

interest method,” and assuming a difference of 2% between the rate of inflation and a fair rate of interest, the award for lost future income would be \$2,246,835 ($\$150,000 \times 15.6785^3 = \$2,246,835$). The difference is \$618,165 or 21½%. The size of an award under the “inflation-discount method” would depend on the testimony about future inflation and future interest.

Issue 3. What is the value of Ms. Sydney’s lost future income without regard to inflation?

This is a simply stated but complex problem. It involves the same two subsidiary questions:

- A. How many years would she have worked?
- B. What would she have earned in each year until final retirement?

Calculating Ms. Sydney’s Work-Life Expectancy is straightforward. The Tables show that a white female, age 16, has a Life Expectancy of 64.5 more years. Her Work-Life Expectancy is that she will actively participate in the workforce for another 30.3 years and will finally retire from the workforce in 44.5 years. So, Ms. Sydney had an expectation of working for 30.3 years before finally retiring at age 60.4.

Calculating Ms. Sydney’s annual earnings is a complex and complicated problem. There is no certainty about whether she would become a dentist or even a college graduate, so we don’t know the level of her peak earnings. Nor do we know how many years of labor force participation she would have at her highest earning level (dentist or college graduate), as opposed to labor force participation at lower-paying positions during her education (waitress or teaching assistant). Her earning potential will change if she graduates from college or Dental School, as will her stream of income if she works while going to school.

2008 income (as high school graduate)
2012 income (increases if college graduate)
2015 income (increases if Dental School graduate)

2049 income
+ 2050 income
Lost Future Income

As a general matter, her lost future income equals what she would have earned in each year she worked between when she began employment and her expected retirement in 2050.4. If we knew her education level, damages could be calculated in simplest terms as:

- If a dentist, 30.3 years at \$140,000/year = \$4,242,000
- If a college graduate 30.3 years at \$100,000/year = \$3,030,000
- If a high school graduate, 30.3 years at \$50,000/year = \$1,515,000

³ From the Present Value Table for 19 years and 2%. The Table is on page 8.

Plaintiff's counsel will argue that Ms. Sydney should be treated as though she would become a dentist and should be compensated at a high level. They will likely argue that she would have earned \$140,000 per year for 30.3 years. They may argue for some calculation that takes into account the uncertainty of dental school graduation, but skews the analysis towards a higher award than simply averaging the probabilities and expected earnings.

Defense counsel will likely argue that she probably would not have graduated from dental school and her earnings would be between those of a high school and a college graduate. Additional possible defense arguments include: (1) any award should take into account the likelihood that she would not have graduated from college or dental school; (2) assuming she did graduate from college or dental school, she would have worked during her education and, therefore, would not have spent 30.3 years working in her final position; (3) the value of lost future income is the income itself minus the cost of education, so the cost of her education should be subtracted from her gross earnings.

Issue 4. What is the value of Ms. Sydney's pain and suffering and loss of enjoyment of life?

This is a fact intensive question subject to widely varying legal standards. Arguments on what compensates for ten days of pain in a hospital setting for a fatal head injury, and the loss of a lifetime of enjoyment will be guided by non-binding case authority and appeals to experience, logic, and policy. The students will try to analogize to the cases in the casebook. Because they may cite one additional case, they will try to find one that closely matches the facts and gives either a very high or very low award.

What the Students should Learn

The students should learn the types of arguments available to both sides on all four issues. They will learn that everyone has a Life Expectancy and a Work-Life Expectancy and, in doing so, how to use a Life Expectancy Table. They will have a general understanding about Present Value Tables, the effects of interest, inflation, and future discounting on damage awards, and how the courts may resolve those complications. They will also develop a better conception of arguments that may increase or reduce awards for non-economic damages.

By working through the four problems together they may also perceive how some damages problems are relatively simple, and others extremely complex. The debate over the lost future income of Dr. Holiday is confined to finding different ways of calculating the year-to-year changes in his income. Ms. Sydney's lost future income is, by comparison, incredibly complex. Should the court credit her plan to become a dentist, even though only one in twenty of her classmates will earn a post-graduate degree? Should the defendant benefit from the fifty-fifty likelihood that she wouldn't go beyond high school, even though his drunkenness ended her life? The intellectually challenging problem of accounting for interest and inflation can have a significant effect on the damages awarded. By comparison, arguments and awards for pain and suffering and loss of enjoyment of life are much more freewheeling and unrestricted.

61.8
 60.8
 59.8
 %

38.1
 37.4
 36.6
 %

FUTURE DAMAGE CALCULATOR

Use This Side for Determining Life and Work Expectancy
 Use Other Side to Determine Present Value of Payments

		LIFE EXPECTANCY				WORK LIFE EXPECTANCY			
AGE	42	MALE FEMALE		MALE FEMALE		AVERAGE NUMBER OF REMAINING YEARS OF LABOR FORCE PARTICIPATION			
		34.1 39.1		MALE FEMALE		MALE FEMALE		MALE FEMALE	
		WHITE		28.7 35.1		19.1 14.3		16.0 13.9	
		BLACK		MALE FEMALE		MALE FEMALE		MALE FEMALE	
				30.6 36.4		19.1 18.3		17.1 18.9	
				ALL OTHERS		WHITE		ALL OTHERS	
						AVERAGE NUMBER OF YEARS REMAINING UNTIL FINAL RETIREMENT FROM THE LABOR FORCE			

LIFE EXPECTANCY

The data for this section is extracted from the National Center for Health Statistics: **Vital Statistics of the United States, 1993, Life Tables, Volume II, Section 6.** DHHS Publication No. (PHS) 96-1104, Public Health Service, Washington. U.S. Government Printing Office, 1996.

WORK LIFE EXPECTANCY

The average number of remaining years of labor force participation show the remaining number of years an individual is expected to be in the labor force. It should be used to provide a measure of the number of years the individual would have actually worked prior to final retirement.

The average number of years until retirement from the labor force includes the number of years an individual is expected to be in the labor force plus periods of inactivity during the working years prior to final retirement. It should be used to provide a measure of a worker's earning capacity-that is potential earnings if he or she were to have been employed on an ongoing basis until final retirement.

Worklife duration figures were obtained from the U.S. Dept. of Labor, Bureau of Labor Statistics, compiled as of September, 1985; and material reprinted from "Revised Worklife Tables Reflect 1979-80 Experience", **Monthly Labor Review, U.S. Department of Labor, August, 1985**, author Shirley J. Smith, Demographic Statistician in the Bureau of Labor Statistics. Data on average number of years until final retirement from the labor force has been reprinted from "The Use of Worklife Tables in Estimates of Lost Earning Capacity", **Monthly Labor Review, U.S. Dept. of Labor, April, 1983**, author David M. Nelson, Associate Professor of Economics, Western Washington University, Bellingham, WA 98225. The data was extracted from U.S. Department of Labor, Bureau of Labor Statistics, as of February, 1985.

After finding the applicable "Expectancy" you can determine the present value of future payments over that number of years by using the other side of this calculator (Present Value Tables).

Future Damages Calculator set for age 16

		LIFE EXPECTANCY				WORK LIFE EXPECTANCY			
AGE	16	MALE FEMALE		MALE FEMALE		AVERAGE NUMBER OF REMAINING YEARS OF LABOR FORCE PARTICIPATION			
		58.0 64.2		MALE FEMALE		MALE FEMALE		MALE FEMALE	
		WHITE		50.3 59.2		40.6 30.3		34.3 28.6	
		BLACK		MALE FEMALE		MALE FEMALE		MALE FEMALE	
				52.8 60.8		45.2 44.4		43.8 44.6	
				ALL OTHERS		WHITE		ALL OTHERS	
						AVERAGE NUMBER OF YEARS REMAINING UNTIL FINAL RETIREMENT FROM THE LABOR FORCE			

Future Damages Calculator from Lawyers & Judges Publishing Co., Tucson, Az.

2015-2016 Fall

PRESENT VALUE TABLES

YEARS	1%	1 1/2%	2%	2 1/2%	3%	4%	5%	6%	8%	10%	12%	14%
19	17.2269	16.4262	15.6785	14.9789	14.3238	13.7139	13.0953	12.5181	9.6508	8.3649	7.3658	6.5504

PRESENT VALUE OF ANNUAL FUTURE
 PAYMENTS FOR EACH \$1 PAYABLE
 EACH FUTURE YEAR

— INSTRUCTIONS —

To compute the total present value of future lost earnings (or any other anticipated annual future damages, e.g. hospital, medical care, drugs, etc.) —

1. Set the calculator for the number of years of future earnings, or any other anticipated annual future damages;
2. Choose a fair rate of interest on reasonable safe investments;
3. Read the Present Value for each \$ payable in each future year under the fair rate of interest you have chosen;
4. Multiply the total earnings (or other item of damage) in **each** future year times the number you have read on the calculator.

— EXAMPLE —

Assuming a \$45,000 income each year for the next 28 years and 4% as a fair interest rate — Set the calculator at 28 years and read the present value for \$1 under 4% (16.6631). Multiply that amount by \$45,000. The total present value of those earnings is \$749,839.50.

Based on formula: $A \sqrt[n]{i} = \frac{1 - (1 + i)^{-n}}{i} (P/n)$

- A = present value of the annuity.
- n = number of years over which the annuity is to be paid.
- i = interest rate assumed.
- p = total principle sum over the entire period of the annuity.

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