CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Licudine v Cedars-Sinai Medical Center 9/29/16

Future Economic Loss; Earning Capacity Claim; Reasonable Probability Standard

In January 2012, plaintiff was a senior at the University of Southern California (USC) with a double major in political science and international relations. She was also the coxswain and captain of USC's women's rowing team, and stood a legitimate chance of being named to the national rowing team. She was planning to apply to law school to fulfill her "passion" to be a human rights lawyer.

On February 6, 2012, plaintiff underwent surgery at defendant Cedars-Sinai Medical Center (Cedars). She had been experiencing sharp abdominal pains over the prior few years, and the doctors at Cedars recommended the removal of her gallbladder. The surgery was supposed to be minimally invasive: The surgeons were to make a small incision in her abdomen, place a hollow tube into the incision, introduce a small camera and the necessary surgical instruments into her abdomen through the tube, and then conduct the surgery.

When inserting the tube, however, defendant Ankur Gupta (Dr. Gupta) nicked a vein and caused substantial internal bleeding. This necessitated a change in plans. In order to repair the vein, extract the blood, and remove plaintiff's gallbladder, the attending physicians cut a six-inch opening in her abdomen. Although her gallbladder was successfully removed, the more invasive surgery necessitated an additional four weeks in the hospital, including

a week in the intensive care unit. What is more, the saturation of plaintiff's digestive organs in her blood caused fibrous tissue called adhesions to form on and around those organs, which has resulted in pain, bloating and dysfunction in her digestive tract.

The matter proceeded to trial in May 2015. At trial, plaintiff testified that she was able to return to school and graduate from USC in the spring of 2012, albeit with help from her mother, dispensation from her teachers, and use of an electronic wheelchair. Plaintiff also applied to, and was accepted by, four law schools to start in the fall of 2013. Two of the law schools—Suffolk Law School and New England School of Law—were in Boston, which plaintiff preferred so she could participate in the Boston rowing community. She explained that she did not apply to Harvard Law School because she did not have "straight A's." Plaintiff also applied to, and was accepted into, the Masters of Public Administration program at Pennsylvania State University. Plaintiff accepted the offers from Suffolk Law School and Penn State, and thereafter requested and was granted medical deferments of her start date. In the meantime, plaintiff worked for two years as an assistant rowing coach, earning $1200 a month.

Plaintiff's former rowing coach testified that more than half of the women who have served as coxswains have gone on to graduate school. Plaintiff also called an expert witness in internal medicine. The expert opined that plaintiff's ongoing gastrointestinal problems would likely be with her for the rest of her life and that she will "continue to suffer pain, require medical evaluations, require medication, and may at some point require an emergent surgical operation for an acute abdominal event." The expert further opined that these consequences "would certainly impact her lifestyle decisions, including career choice and education."

The jury returned a special verdict form finding Cedars and Dr. Gupta negligent, and awarded plaintiff a total of $1,045,000 in damages. More

specifically, the jury awarded plaintiff $285,000 in past economic loss, **$730,000 in future economic loss**, $15,000 for past non-economic loss, and $15,000 for future non-economic loss.

Cedars and Dr. Gupta (collectively, defendants) moved for a new trial and for judgment notwithstanding the verdict on several grounds, including the insufficiency of the evidence to support the jury's award of economic damages. Plaintiff moved for a new trial due to the inadequacy of the jury's award of non-economic damages.

The trial court granted both motions for a new trial on damages and denied defendants' motion for judgment notwithstanding the verdict. With respect to the jury's award of economic damages, the court stated that "there was virtually no evidence" to support the jury's $285,000 award of lost earnings "prior to verdict" and that the jury's award of $730,000 for plaintiff's loss of earning capacity was "speculative and excessive" because "there was no evidence whatsoever of the compensation earned by graduates of any law school, much less the law school plaintiff chose to attend, or compensation of any attorneys, no matter how experienced." With respect to the jury's award of non-economic damages, the court concluded that the jury's meager award of $30,000 *total* for past and future pain and suffering was "grossly inadequate" in light of evidence of the "excruciating pain" she would have to endure "on a daily basis for the rest of her life."

Defendants filed a timely notice of appeal. The Second District Court of Appeal began its work on the appeal by moving to assess whether the jury's award of damages for loss of earning capacity was supported by substantial evidence. The Justices noted the reviewing court must (1) know what standard the jury must apply in awarding such damages, and (2) evaluate whether the evidence meets that standard.

A person who "suffers" a "loss or harm" to her person or property due to another's "unlawful act or omission" may sue for "damages" that "compensate" for all of the loss or harm proximately caused by that act or omission. (Civ. Code, §§ 3281-3283 & 3333; accord, *Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 396) **Damages encompass losses or harms that occurred prior to trial as well as losses or harms "certain to result in the future."** (Civ. Code, § 3283.) **Once a jury determines that an injured party is entitled to damages, the "focus of an award of damages turns to the quantification of detriment suffered by a party."** (*Meister*, at p. 396.) **"Damages must, in all cases, be reasonable."** (Civ. Code, § 3359)

Compensable damages are categorized as either "general" or "special." General damages are those damages that "necessarily result from the act complained of." (*Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1599.) Put differently, general damages "flow from the injuries received." (*Treadwell v. Whittier* (1889) 80 Cal. 574, 581.) Consequently, general damages are "implied by law" (*Beeman*, at p. 1599), and may be "inferred from the nature of the injury" itself (*Connolly v. Pre-Mixed Concrete Co.* (1957) 49 Cal.2d 483, 489; *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 412). General damages include damages for "'pain and suffering, emotional distress, and other forms of detriment that are sometimes characterized as subjective or not directly quantifiable.'" (*Beeman*, at p. 1599; *Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141, 156.) By contrast, **special damages do not necessarily arise from the typical infliction of the injury and are instead the "out-of-pocket losses" "'peculiar to the infliction of each respective injury.'" Special damages include medical and related expenses as well as lost income.**

When a plaintiff's injury interferes with her professional earnings, she can potentially recover general damages, special damages, or both. Retrospectively, she can seek the "loss of wages between the occurrence of the injury and the trial"; these are special damages. (*Swanson v. Bogatin* (1957) 149 Cal.App.2d 755,

758.) **Prospectively, she can seek to recover for her loss of earning capacity; these are general damages.** (*Connolly*, at p. 489; *Zibbell v. Southern Pacific Co.* (1911) 160 Cal. 237, 251-252)

A jury tasked with evaluating a plaintiff's prayer for prospective loss of earning capacity must answer two questions: (1) Did the plaintiff suffer a loss in her earning capacity as a result of her injury; and if so, (2) How is that loss to be valued?

The first question assesses whether the plaintiff's earning capacity was, in fact, damaged at all. It is a threshold question of entitlement. Consistent with the statutory requirement that a plaintiff is eligible only to recover damages for losses "certain to result in the future" (Civ. Code, § 3283**), a jury may award damages for a plaintiff's loss of earning capacity only if the plaintiff is "reasonably certain to suffer a loss of future earnings."** (*Robison v. Atchison, T. & S. F. R. Co.* (1962) 211 Cal.App.2d 280; *Khan v. Southern Pacific Co.* (1955) 132 Cal.App.2d 410, 417-418) Consistent with the classification of loss of earning capacity as general damages**, the jury may infer the reasonable certainty of such a loss from the nature of the injury**. (*Lindemann v. San Joaquin Cotton Oil Co.* (1936) 5 Cal.2d 480, 494) But a jury is not required to draw this inference, and damages for the loss of earning capacity may not be awarded where the evidence demonstrates there was no such loss.

The second question is a question of valuation. As its name suggests, **a loss of earning capacity is the difference between what the plaintiff's earning capacity was *before* her injury and what it is *after* the injury.** (Rest.2d Torts, § 924, com. d, p. 525; *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, at p. 153) **Because these damages turn on the plaintiff's earning *capacity*, the focus is "not on what the plaintiff *would* have earned in the future, but on what she *could* have earned."** (*Hilliard*, at p. 412; *Gargir v. B'Nei Akiva* (1998) 66 Cal.App.4th 1269, 1281; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87

Cal.App.3d 626, 656) **Consequently, proof of the plaintiff's prior earnings, while relevant to demonstrate earning capacity, is not a prerequisite to the award of these damages** (e.g., *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 462; *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 348; *Paxton v. County of Alameda* (1953) 119 Cal.App.2d 393, 414-415). Indeed, **proof that the plaintiff had *any* prior earnings is not required because the "vicissitudes of life might call upon the plaintiff to make avail of her capacity to work," even if she had not done so previously. Thus, damages for loss of earning capacity may be awarded to persons who, at the time of the injury, were homemakers, as well as persons who were retired or otherwise not working.**

A plaintiff's earning capacity without her injury is a function of two variables—the career(s) the plaintiff could have pursued and the salaries attendant to such career(s).

How is the jury to assess what career(s) are available to the plaintiff? Is the sky the limit? In other words, can a plaintiff urge the jury to peg her earning capacity to the salary of a world-class athlete, neuroscientist, or best-selling author just by testifying that is what she wanted to do? Or must the jury instead determine a plaintiff's earning capacity by reference to the career choices the plaintiff stood a realistic chance of accomplishing? The Appellate Court concludes some modicum of scrutiny by the trier of fact is warranted, and holds that **the jury must look to the earning capacity of the career choices that the plaintiff had a reasonable probability of achieving.**

The DCA selects this **standard** for five reasons. **First** and foremost, the reasonable probability standard effectuates the standard our Supreme Court has long articulated. In *Zibbell*, the Court held that **a plaintiff's pre-injury earning capacity was properly pegged to the "business, vocation, trade or profession" for which the "plaintiff had shown himself fitted and qualified" to undertake based on "the nature of his skill and experience."** (*Zibbell*, at pp. 248-249;

accord, *Neumann*, at p. 462) More generally, the Court in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 774-775, held that "the law requires . . . that some reasonable basis of computation of damages be used." Where a plaintiff is not already "fitted and qualified" for the career she seeks to use to define her earning capacity, ***Zibbell* and *Sargon* implicitly suggest that the plaintiff must demonstrate a reasonable probability that she would have become fit and qualified for that career. If she does, the jury will have a "reasonable basis of computing" what the plaintiff could have earned by looking to what persons in that career can earn.**

Second, looking to the careers a plaintiff has a reasonable probability of achieving is **consistent with the standard used to assess a business's prospective lost profits, which also looks to what profits are "reasonably probable."** (*Nelson v. Reisner* (1958) 51 Cal.2d 161, 171-172) Although lost profits are awarded for breach of a contract while loss of earning capacity damages are awarded for a tort, both types of damages require the trier of fact to estimate the future earning capacity of a person or business; both exercises in estimation should turn on the same degree of certainty.

Third, using the reasonable certainty standard for assessing a plaintiff's *entitlement* to loss of earning capacity damages while using the less onerous reasonable probability standard for assessing the *extent* of those damages dovetails neatly with the venerable principle that "'where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty.'" (*Sargon*, at pp. 774-775)

Fourth, requiring the plaintiff to prove that it is reasonably probable that she could have earned the salary she now claims is foreclosed by virtue of her injury ensures that the jury's fixing of damages is not wholly, and thus impermissibly, speculative. (*Ferguson v. Lieff, Cabraser, Hiemann & Bernstein* (2003) 30 Cal.4th 1037) Use of this standard also ensures that the jurors, faced

with a vacuum of evidence, do not commit misconduct by impermissibly resorting to their own extra-record knowledge in attempting to agree upon the likelihood that the plaintiff would become fit and qualified for a particular career.

Lastly, the reasonable probability standard harmonizes nearly all of the patchwork of cases that specify which careers a jury may look to in assessing a plaintiff's earning capacity. In cases where the plaintiff is already part of the work force, courts have looked to the plaintiff's earning capacity in his or her chosen career. (*Hicks v. Ocean Shore Railroad, Inc.* (1941) 18 Cal.2d 773, 784-785; *Bonneau v. North S. R. Co.* (1907) 152 Cal. 406, 413-414) In such instances, the fact that the plaintiff *was* fit and qualified for that career more than sufficed to show a reasonable probability that he could have been fit for that very same career in the future.

Of course, the task of determining a plaintiff's available career options is more difficult when the plaintiff is not yet in the work force. **Where a very young plaintiff's catastrophic injury precludes any work, courts have fixed the lost earning capacity as the average salary of all workers in the workforce**. (*Niles v. City of San Rafael* (1974) 42 Cal.App.3d 230, 241-242.) In that instance, it was reasonably probable that the plaintiff was fit and qualified to do *something* in the workforce, so the average salary of any and all workers was a reasonable measure. However**, where a young plaintiff's injury prevents him or her from pursuing a specific career, courts have generally required some proof that the plaintiff is far along in his or her training or experience.** Where she adduces such proof, courts have looked to that career's earnings to fix lost earning capacity. **Where the plaintiff has not established her likely fitness for a particular career, courts have refused to look to that career in fixing earning capacity**. (E.g., *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 419)

To be sure, a handful of cases suggest that a plaintiff's earning capacity is within a jury's common knowledge and thus may be left to the jury's judgment without the requirement of any evidence as to plaintiff's fitness for a particular career. (*Girard v. Irvine* (1929) 97 Cal.App. 377, 386; *Evarts v. Santa Barbara C. R. Co.* (1906) 3 Cal.App. 712, 715.) *Gargir* also seems to suggest that enrollment in college with a special education major with the intention to attend graduate school is enough by itself to establish an earning capacity based upon a career in special education. (*Gargir*, at pp. 1280-1282.) Because *Girard*, *Evarts*, and *Gargir* are inconsistent with the weight of later Supreme Court precedent on this point and with the standard we derive from that precedent, we respectfully disagree with those decisions.

Once the jury has determined which career options are reasonably probable for the plaintiff to achieve, **how is the jury to value the earning capacity of those careers?** Precedent suggests **three methods**: (1) by the testimony of an **expert witness** (e.g., *Markley v. Beagle* (1967) 66 Cal.2d 951, 956; *Neumann*, at p. 461); (2) by the testimony of **lay witnesses**, including the plaintiff (e.g., *Storrs*, at pp. 94-95); or (3) by proof of the **plaintiff's prior earnings in that same career** (e.g., *Perry v. McLaughlin* (1931) 212 Cal. 1, 12; *Bonneau*, *supra*, 152 Cal. at pp. 413-414). As these options suggest, expert testimony is not always required. (Evid. Code, § 801, subd. (a)) If an expert does testify, however, his or her testimony about the plaintiff's earning capacity must still be grounded in reasonable assumptions. (*Rodriguez*, at p. 659.) Some older Supreme Court decisions seem to suggest that the earning capacity of certain careers is within the jury's common knowledge without the need for further proof. In light of the vast array of diverse and disparate careers available today as well as the extensive case law setting forth the multiplicity of ways in which plaintiffs can and should prove the earnings associated with certain careers, the Justices question whether these older cases are still viable. There is no occasion to reach this question because, as discussed below, plaintiff did not prove she was likely to become fit and qualified to be a lawyer.

Here, the Plaintiff offers various arguments in support of her position that the evidence she produced at trial—namely, her interest in a legal career and her letters of acceptance to law school—supported the jury's $730,000 award for lost earning capacity and that no greater showing is required.

First, she contends that a loss of earning capacity may be inferred from the nature of the injury. As explained above, a jury may infer the *fact* of a loss of earning capacity. But the **jury may not infer the *amount* or *extent* of that loss from the injury alone.**

Second, plaintiff asserts that once she shows the fact of a loss of earning capacity, the burden shifts to the defendant to set an upper limit on her earning capacity and that the upper limit is not confined to the career plaintiff has chosen to pursue. As noted above, courts have drawn a distinction between the fact of an injury to a plaintiff's earning capacity on the one hand, and the extent of that injury on the other. (E.g., *Sargon*, at pp. 774-775.) That distinction lessens a plaintiff's burden to show the extent of damages once the fact of injury has been established, but it does not shift the burden to the defendant. Further, whether the inquiry into a plaintiff's earning capacity encompasses all careers for which a plaintiff shows her fitness to be reasonably probable or is instead limited to the subset of those careers that plaintiff desires to pursue is a difficult question. It is also one we need not resolve today in light of plaintiff's failure, discussed below, to adduce evidence on her fitness for *any* career.

The trial court did not err in concluding that substantial evidence did not support the jury's award of $285,000 in past lost earnings and $730,000 in loss of earning capacity.

With respect to the loss of earnings prior to trial, the evidence indicated that, absent her injury, plaintiff would have started law school in the fall of 2013

and would still have been a law student by the time of trial in May 2015. Thus, there was no evidence of lost earnings prior to trial.

With respect to the prospective loss of earning capacity, plaintiff presented sufficient evidence that she was "reasonably certain" to suffer some loss of earning capacity due to the perpetual pain, bloating and dysfunction of her digestive tract caused by the negligently performed surgery. However, **she did not introduce evidence establishing a reasonable probability that she could have become qualified and fitted to earn a lawyer's salary**. Absent from the record is any evidence of her likelihood of graduating from Suffolk Law School, her likelihood of passing the Bar, or her likelihood of obtaining a job as a lawyer. Plaintiff also adduced no evidence as to what lawyers earn.

The Justices went on to discuss the rationale for granting the new trial motion, a discussion which is omitted here. (See attached PDF)

The Second DCA holds that the jury must fix a plaintiff's future earning capacity based on what it is "reasonably probable" she could have earned. Because the plaintiff in this case did not adduce any evidence to establish that it was "reasonably probable" she could have obtained employment as an attorney or any evidence on the earnings of lawyers, the trial court did not abuse its discretion in determining that the jury's $730,000 award for lost earning capacity was not supported by substantial evidence. What is more, given the unusual facts of this case, the court acted within its discretion in granting a new trial on damages rather than entering a judgment notwithstanding the verdict for the defendants. The Justices affirm the judgment granting a new trial on damages. Each party is to bear its own costs.

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