

## **Chapter 6**

# *Determining and Proving Economic Damages*

by Julie Schwartz, M.S.

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## §600 *Elements of Economic Damages*

Economic damages are often defined as the loss of income production. However, many other economic components are involved in the sudden onset of a disability. Consider the loss of opportunity for career development and the diminution of savings and retirement or pension funds. The process of restoring vocational capabilities through medical and vocational rehabilitation are also essential ingredients to economic damages. The lost contribution of labor and skills to the family unit represents economic damages. These “homemaker services” apply both to male and female spouses. Damages also arise from loss of relationships between family members due to a disabling condition. Often psychological services and counseling are needed to facilitate the adjustment.

### §601 *Loss of Income Production*

Loss of income production must include analysis of both past and future earnings and potential. Patterns of past employment are not the only premise for calculating past wages. For example, an individual involved in schooling or entry-level employment just before an injury may then lose steps of wage or career advancement during the recovery period.

Some disabling injuries slow or stop the development of a career. For example, an auto tune-up mechanic who sustains a disabling wrist injury may have a reduced level of productivity or be passed over for promotion or training in the more lucrative job of a heavy-line mechanic. This disability is termed a “Secondary Work Limitation.” However, if the worker has an “Occupationally Significant Disability,” he or she is required to change careers or occupations. Within the new work, their additional future losses may be caused by absence from the work force, by slowed pace of advancement, reduced work schedule or reduced productivity while working. A “Severe Disability” may result in total unemployability or inability to work full time or consistently even in part-time work.

The terms utilized in the above paragraph are from a study performed in 1972 by the Social Security Administration. At the time of the study a large percentage of the world population had disabilities. If a disability prevented the individual from working in even a part-time job, the impairment was considered to constitute a “severe disability.” Similarly, permanent impairment that prevented the individual from doing his or her customary work was considered to be an “occupationally significant disability.” The majority of Americans reported having “secondary work limitations,” which allowed them to continue in their customary employment, but with special accommodations to help them perform their jobs.

With the passage of the Americans with Disabilities Act (ADA) on July 26, 1990, the potential for the above-classified individuals to enter and succeed in competitive employment dramatically improved. Since July 1994, it is assumed that employers with 15 or more employees must accommodate employees with secondary work limitations. More complex accommodations may be necessary for persons who have occupationally significant disabilities, to avoid forced career changes.

For example, reasonable accommodations for an individual with a degenerative neuromuscular condition might include the following:

- Shorter workdays
- Partial work out of a home office
- Shared job responsibilities with another part-time employee
- Utilization of equipment to make the work function less strenuous or repetitive

Even individuals with traditionally “severe disabilities” may no longer be totally unemployable, thereby redefining all of the categories presently in use. For example, before implementation of the ADA, an individual with a severe disability may have been unemployable because of a lack of public access transportation. However, under the ADA public transit systems must provide mainstream

access to buses within cities, as well as transit for those who cannot gain access to the main bus lines. Buildings that previously would have been blocked by architectural barriers now provide pneumatic door openers, ramps, sidewalk path markings and audible signals in elevators.

Individuals in each of the above three categories must still face the attitudes of co-workers, supervisors, managers and owners, potentially interfering with the opportunity to produce a reasonable income. Although the ADA mandates that otherwise qualified individuals must have an opportunity for employment, there is no ADA “police force.” Persons with disabilities must be advised of their civil rights.

Many states have also passed comparable laws and created special offices for handling ADA issues. For example, Arizona is the first state in the nation to establish its own “Arizonians with Disabilities” gubernatorial level office. In Arizona, civil rights laws have been rewritten to mirror the intent and language of their federal counterparts on architectural access.

## *§602 Loss of Economic Opportunity*

In defining economic opportunity, there are rules of thumb which indicate that a person ordinarily will earn more as his value to his employer increases. Therefore, we can assume that if a person’s career path is disrupted, economic losses will continue at least into the short-term future. The opportunity for a raise may be withdrawn because of a period of convalescence, or the opportunity for promotion may be set aside until the returned worker has stabilized in his performance.

If the career path is abandoned entirely and a new one begun, significant disruption will usually occur. A plumbing apprentice being forced to enter a service industry occupation will suffer dramatic losses of future economic opportunity. During the apprenticeship phase, scheduled raises occur as a percent of the prevailing journeyman wage. Beyond journeyman status are other promotions to foreman or movement into construction management or into the role of independent contractor.

The preinjury path of career development must be compared to the altered path, which may involve moving into semiskilled labor or a service industry position. Growth rates of base salaries differ by complexity of the job, union status, region of the country, and supply and demand in the local labor market.

### *§602.1 Labor Shortages in the 21st Century*

The demand for skilled and professional labor in our economy is growing dramatically. This trend will continue as we approach the 21st century, and will likely worsen. The timing is right to move individuals who have disabilities into the mainstream of life, providing the economy with essential labor and reducing the amount of federal funding for people with disabilities. Rather than welfare-style compensation, the worker will receive wages and garner the same independence and respect that other members of the U. S. economy enjoy.

The impact of the Americans with Disabilities Act is significant. Forty-three million disabled people, unemployed at the time ADA legislation was drafted, now have opportunities for economic development. The key element is the ADA’s vocational rehabilitation requirements.