The Mythical Defense of Speculative Damages

By Howard A. Kapp

A common defense in personal injury litigation is that the plaintiff's damages were "speculative"; indeed, the term is frequently used as a discussion-ending slogan which the defense expects the judge and the jury to accept as undeniable gospel. Sadly, even some plaintiff's attorneys accept it too, apparently because it sounds so logical. This "no speculative damages" defense is used for all sorts of damages – including, for example, probable future surgeries, pain or treatments – but is most commonly seen in the context of a wage loss, or loss of profits, claim.

The defense, in many cases, is wrong: the defense doesn't automatically win just by screaming "Speculation!" However inconvenient it might be to the defense, the law is to the contrary, and emphatically so.

A prototypical situation is where the plaintiff is seeking damages for a new or improved career path, although the legal principles are the same. This covers a large range of possibilities. Consider some possible wage loss potential claimants and a few of the types of questions that could always be raised:

1. A college student claims to have lost the ability to pursue a lucrative medical career. Is it speculative? How was the student doing? Was plaintiff taking the right classes? What year was the plaintiff in college? How competitive was the college? Did plaintiff take the MCATs? If so, what score did plaintiff get? Did plaintiff have the right subjective background for admission to medical school? How would plaintiff have done in medical school? Would plaintiff have been accepted to, and completed, the anticipated medical residency and specialty?
2. A young child is severely damaged and disabled for life. Since we may know little or nothing (e.g., as in the case of a birth injury) of the child's potential to be a famous brain surgeon, the next Bill Gates or, perhaps, a Charles Manson, do we award nothing? Do we award some economic "average" pulled out of some governmental statistics? Do we give this child more, or less, because of the parents' educational or social background, or successes or failures?
3. A young person had plans (or were they merely aspirations?) to open a new business. Was this a new type of business or an established on-going franchise? Did the plaintiff have the ability to run this business? Was this a risky venture?
4. A still-too-young athlete reasonably aspired to great things as a professional but had not yet achieved professional status and therefore had no earnings at all.[1]

Indeed, from afar, many people – particularly children – seem so similar in potential since they are in that long stage of building the foundation for their lives. Does that fourth grader's obsession with Harry Potter predict further economic success? Does that 12-year-old boy's deep commitment to his future hall of fame baseball career predict his future? Is that first year law student going to be a future trial lawyer of the year or a frequent contributor to the monthly bar disciplinary reports between his frequent visits to the drug rehab facility? Who could have predicted that Madonna would be a star for decades or that Britney Spears would (apparently) be washed up by the age of 25? In that sense, it's all speculative; in that sense, every damages case involves some degree of speculation.

The defense can, in each case, thus present their case as an endless series of "if's," each one, allegedly, piling on level after level of speculation that the claimed loss is real. While this may hurt to hear, it may be *literally* true. But legally it is not dispositive and may not be all that important. For example, while there may be a lot of built-in "if's," the evidence may show that this plaintiff, due to the plaintiff's own characteristics, was likely to overcome all of these conditions.[2] Furthermore, the misuse of "if's" can be frequently overcome by *reductio ad absurdum*, that is, cross-examine the defense expert to show that everybody's life and future is governed by an infinity of "if's," thus exposing this argument as nothing more than one-size-fits-all boilerplate. Again, predicting the future always involves some degree of speculation. Remember, a trial is not about the other guy getting no points at all, it is a tennis match where you get to hit the ball too.

Moreover, it is also the reality that, in many fields of endeavor, there are wide varieties of outcomes from seemingly similar people: just consider the wide range of incomes of plaintiff's lawyers, for example, even though their education may be roughly the same, or appear similar "on paper." In some fields, there are some spectacular winners and a lot of losers;[3] still, people aspire to such fields.

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The Clash of "Legal Values," Resolved

The defense can undoubtedly cite innumerable primary legal sources decrying the non-collectibility of "speculative damages"; these are platitudes and, usually, the extent of the legal analysis the defense is willing, or able, to make. At first blush – which unfortunately some of us accept as the end of the story – this makes perfect sense: clearly, no rational system of law would allow juries, or judges, to impose damages on a tortfeasor on whim, speculation, surmise or guesswork.

CACI 3903D[4] allows the plaintiff to recover "the amount of money [he/she] would have been reasonably certain to earn if the injury had not occurred. It is not necessary that [he/she] have a work history."

There are two major issues within the language of CACI 3903D. First, on the good side, the jury is explicitly told that "work history" is not an element of these types of damages (see *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 348 (footnote 6), 100 Cal.Rptr.2d 854); this leaves open a lot of possibilities. Secondly, the new CACIs, which were to be in "plain English" instead of the hodgepodge created by decades of repeated appellate tweaking of the BAJIs, continue the use of bizarre, and undefined, legal misnomer "reasonably certain"; the term has no specific legal meaning, although there is, to my knowledge, no case law that defines a higher than preponderance level of proof for damages or damages that the defense claims are speculative. The term really means "more likely than not," but the courts, and now the Judicial Council (the developer of the CACIs), have allowed this misnomer to be continued. All plaintiff's attorneys should be on the alert for such bar-raising misnomers and to offer corrected alternatives[5] and be prepared to challenge them directly in a well-positioned appeal.

The law recognizes that – particularly (but not necessarily) if the defendant's culpable conduct caused the uncertainty in, or difficulty of, plaintiff's proof – that it is better to make the plaintiff whole than to reward the defendant with the fruits of its own negligence. As held by the Supreme Court in 1985, "the wrongdoer cannot complain if his own condition creates a situation in which the court must estimate rather than compute. [Citations.]" (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907, 215 Cal.Rptr. 679.)

In *Donahue v. United Artists* (1969) 2 Cal.App.3d 794, 804, 83 Cal.Rptr. 131, it was held that "the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.... 'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights. [Citation.]'"

And, in *Greenfield v. Insurance, Inc.* (1971) 19 Cal.App.3d 803, 97 Cal.Rptr. 164 [citations omitted], the court noted that "[i]n answer to appellant's contention that the damages are uncertain and not capable of calculation, we cite the rule that the wrongdoer must bear the risk of uncertainty which his wrong has created. Once certainty as to the fact of damage is established, less certainty is required as to the amount of damage."

Similarly, as stated in *Duarte v. Zacharian* (1994) 22 Cal.App.4th 1652, 28 Cal.Rptr.2d 88, "[t]he fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable."

And as held in *Guntent v. City of Stockton* (1976) 55 Cal.App.3d 131, 143, 126 Cal.Rptr. 690 [citations omitted]:

> In reviewing a damage award of lost business profits, the appellate court must couple the substantial evidence concept with recognition that evidentiary imponderables are unavoidable. A tenant may recover anticipated profits lost as the natural and direct consequence of the lessor's breach; they need not be established with certainty; it is enough to show as a reasonable probability that the profit would have been earned except for the breach. Once the fact of damages is established, the difficulty of ascertainment will not prevent recovery. The law will allow reasonably calculated damages even if the result is only an approximation; the wrongdoer cannot complain if his own condition creates a situation in which the court must estimate rather than compute.

> These general parameters avoid harsh and overly technical demands for certainty of proof; yet must be applied cautiously and with an eye to variations in the kind of loss. The breach, hence the loss of profit, may be limited to a single order for merchandise or service, having little impact on the plaintiff's remaining business.

Need I say more?

Trying "Speculative Damages" Cases

The trial lawyer's duty is, of course, to present the best case available. In this context, the attorney must garner, and then present, all of the available data to show that the plaintiff's claimed damages were not mere pipedreams, but that the plaintiff had the ability to achieve the goals. Give the jury something to chew on, the more concrete and individualized the better.

Except in the most unusual setting, expect your opponents to rely upon "Speculation!" as their damages theme/slogan; the more evidence, inferential or otherwise, that you can provide, the more that this is exposed as a hollow, empty, and unfair slogan.

Let the defense designate their experts – as if you have any choice – and, hopefully, they will go with the usual all-purpose experts and just try to pick at the plaintiff's case. If so, they will look like the shills that they are; indeed, if you plan your cross-examination carefully, you may get the defense experts to admit the obvious fact that increased difficulty of proving the plaintiff's losses is related to the fact that the plaintiff was injured and/or that the future of every potential plaintiff (and that means all of us) is inherently, at best an imperfect prediction. Since the jury presumably, will have found the defendant liable for that injury, the defense expert cannot help but admit that the employer, the defendant, is, at least, partly responsible for the very speculation at issue and, of course, that the real problem is that every plaintiff is a human being whose future is known, perhaps, only to a higher authority.

Pick better experts, especially those who have specific knowledge of the plaintiff and/or the relevant industry or other relevant communities. Your client, a

someone who had some interest in the field, may be a source for industry-specific groups or experts.

The manner of proof is potentially as wide and creative as the claim itself. Invariably, you must show something about the plaintiff – school grades, extracurricular activities, willingness to work hard, the necessary spark of creativity, ability to get along with others, spiritually, financially or mentally supportive family and friends. Perhaps you need to show that the plaintiff was thrifty, or had otherwise accumulated (or was accumulating), the liquid cash capital necessary for the new business. Friends, teachers, colleagues and even the plaintiff's college professors can frequently provide insight and solid testimony. Keep your arguments within the available evidence of demonstrated interest and avoid arguing from your client's objectively-unrealistic dreams. I would love to play second base for the Dodgers, but after 28 years in legal practice, I doubt that a jury would accept that as a realistic possibility.

Frequently, market conditions are highly relevant. Is the area saturated with competitors? Did your client, a would-be actor, have an agent, attend the cattle calls, have objective signs of a future bright acting career, or did the plaintiff spend days waiting tables, hoping like Lana Turner, to be discovered by happenstance? Was there a real market for plaintiff's widget? This may require seeking out knowledgeable potential witnesses, such as competitors, or even the plaintiff's boss, to offer percipient and/or expert testimony. Be creative and adopt your presentation to the plaintiff's claim, not some preexisting norm of merely hiring the all-purpose hired gun experts.

Consider, for example, the ancient case of *Connolly v. Pre-Mixed Concrete* (1957) 49 Cal.2d 483, 319 P.2d 343 (which is still cited as a source for both CACI 3903D and the corresponding BAJI 14.12), where the plaintiff, a world class amateur tennis star, suffered a career-ending injury in an unrelated equestrian accident. In this case, tried long before the modern expert-dependant era, the plaintiff provided detailed information as to her spectacular amateur career (all dutifully set forth by the Supreme Court), listing her series of major victories. The Supreme Court affirmed the then-amazing damages award of $95,000. At 489, the Supreme Court tells us who her experts were – in the 1950s, no less! – as follows:

> The witnesses who testified as to plaintiff's earning capacity had extensive knowledge of professional tennis, and their opinions were based on their experience and information concerning the amounts earned by other tennis players. One of the witnesses had been a professional champion for six years and had conducted two professional tours. Another witness, who had been connected with tennis for 36 years, had been on the Australian Davis Cup team for a number of years and was a writer on tennis for a newspaper. A third witness, the sports director for a broadcasting system, had been a professional athlete and was familiar with the earning capacity of champion tennis players.

If Ms. Connolly's lawyer – Melvin Belli – could be that creative and provide that much detail more than 50 years ago, can we do any less? ■

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[1] See *Connolly v. Pre-Mixed Concrete* (1957) 49 Cal.2d 483, 319 P.2d 343, the Supreme Court upheld a then-incredibly large verdict of $95,000 and is instructional on the kind of showing that can be made.

The case is also intrinsically interesting as it involved a celebrated tennis player, Maureen "Little Mo" Connolly, whose injury was front page news at the time. Her tragic story has been the subject of at least one motion picture and numerous books. The Supreme Court discussed the nature of the plaintiff's evidence on this point, which is found sufficient even though the plaintiff was an amateur, *albeit* an elite athlete, at the time and thus had no earnings history at all.

[2] For example, in the case of aspiring medical doctor, a sophomore who has already taken and done well on the necessary science courses is likely to do well on the MCATs and get accepted to medical school. Of course, that same student may be hit by a bus on the way to the MCATs or develop cancer or a $1000 per day drug addiction, but that, especially when combined with other evidence of the plaintiff's personal pre-injury standing and abilities, is not likely.

[3] For example, this attorney is handling, at present, a personal injury case of a professional boxer who, at the time of his career-ending injury, had a record of 19-1 and was in training for a major championship fight that, if he had won, would probably have led to a world championship opportunity. Yet, virtually all boxers at or below this level make poverty level incomes; at the very next level, with the availability of pay-for-view and increased interest, the fighters can sometimes negotiate seven-figure purses for each fight. As one expert testified, "there is no middle class in boxing." Oscar De La Hoya – who lost – was paid $52,000,000 for one recent fight.

The same is true in many other contexts as well, from new restaurants (which are notoriously speculative), to actors, to musicians, to software design companies, to major league baseball players (a .300 hitter may make ten times as much as his teammate who only hits .260). Even within those that make a living to predict success – from team managers to professional scouts – it may be impossible to predict which will be which. These uncertainties, however, do not mean that the plaintiff should be denied *anything* or the best available approximation.

[4] As is always true of cases governed by the standard jury instructions, you must carefully review and absorb the "Directions for Use" and "Sources and Authority" since these are of the highest authority, and finger-tip availability at trial.

[5] In this case, the instruction should read "the [best available approximation of the] amount of money [he/she] would have [probably/most likely] earned if the injury had not occurred. It is not necessary that [he/she] have a work history."