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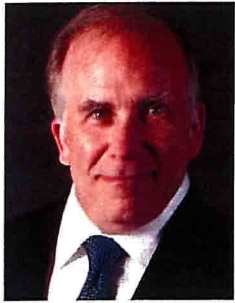


## *Portraits* OF THE *Past*





# TIPS *from the Trenches*



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With this article, we explore applicable law and plaintiff's burden of proof relative to recovery of lost future earnings and lost future earning capacity.

BY GEORGE DENT AND DAVID G. WIRTES, JR.

## LAW

The starting point is Alabama Pattern Jury Instruction – Civil 11.17 (3d ed. [PL] 2015):

(Name of plaintiff) says that (name of defendant)'s conduct caused (him/her) (to lose future earning capacity) (the loss of future earnings).

To decide the amount to compensate (name of plaintiff) for the (loss of future earnings) (loss of future earning capacity) you must first determine the effect, if any, the injury has upon (his/her) (future earnings) (earning capacity). To decide this question, consider the following:

1. (Name of plaintiff)'s health, physical ability, and earning power or capacity before (his/her) injury, pain and suffering, and what they are now;
2. The type and degree of (his/her) injury; and,
3. Whether you are reasonably satisfied the injury is permanent, or if it is not permanent, how long it will last.

If you decide that (name of plaintiff) (will lose future earnings) (has lost future earning capacity), you must then determine the amount (he/she) is reasonably certain to lose and reduce that amount to its present cash value.

## APJI 11.17.

A helpful explanatory resource is

Jenelle Mims Marsh, *Alabama Law of Damages* § 36:4 (6th ed. 2012 & 2016 Supp.).

## Evidentiary Standard: "Some Direct Evidence"

In *Carnival Cruise Lines, Inc. v. Snoddy*, 457 So.2d 379 (Ala. 1984), the Court held that it was error to present expert testimony that the treating physician's impairment rating of 13% to the whole body established the amount by which the plaintiff's future earning capacity was diminished. Id. at 381-83. Carnival Cruise Lines explains the nature of the evidence needed to successfully prove lost future earnings:

- "In a personal injury action, a plaintiff is entitled to recover both the value of the work time lost prior to trial ('lost earnings') and the value of the reduction in his ability to earn a living ('impairment of earning capacity'). Id., 457 So.2d at 381.
- For an award of lost earning capacity, "there must be evidence introduced at trial from which the jury may reasonably draw an inference as to the existence of an impaired capacity to earn, resulting from the injuries complained of." Ibid.
- "[T]here must be evidence from which the factfinder may reasonably translate the evidence of plaintiff's physical



disability into a finding of plaintiff's inability to perform his work in the same manner as before sustaining his injuries." Ibid.

- "In evaluating whether expert evidence is required for submission of the loss-of-earning-capacity issue to the jury, or whether the nature and extent of the injury, when considered along with the totality of the circumstances, furnish a reasonable inference of such a loss, we need to delineate between the two situations conceptually. The loss of a hand may have no effect on the capacity of a theoretical physicist to earn a living, while the same injury may have devastating economic consequences for a neurosurgeon, a concert pianist, or a construction worker. The degree of physical impairment is the same in each case, but the resulting impairment of earning capacity is quite different for each worker." *Id.*, 457 So.2d at 382.
- "[O]ther categories of damages, such as pain and suffering and disfigurement, are compensable even if there is no diminished capacity to earn a living." Ibid.
- "[T]he element of damages known as impairment of earning capacity is conceptually distinct [from pain and suffering or disfigurement] and will vary with the circumstances and with the person." Ibid.
- "It is this element of individual variation that precludes the universal inference of diminished earning capacity merely from evidence of physical disability, and nothing more." Ibid.
- "A jury, left to flounder without some evidence of a causal connection between the physical impairment and the reduced earning capacity,

and without an evidentiary predicate upon which to assess the actual degree of impairment in earning capacity, engages in pure speculation and conjecture." Ibid.

- "Unlike an assessment of damages for pain and suffering or mental anguish, the correlation of physical disability with impaired earning capacity cannot be said, in every case, to fall within the purview of the average person's common understanding and experience. Except in extreme and obvious cases, some direct evidence of the existence and extent of impaired earning capacity is necessary as the foundation upon which the jury may make an informed assessment of damages." *Id.*, 457 So.2d at 382-83 (emphasis added).
- The Court stated that it was applying this general rule of evidence: "Where the fact sought to be proved is fairly and reasonably inferable from competent evidence adduced at trial, and that inference lies within the common knowledge of the factfinder, then that evidence is admissible without the aid of expert testimony." 457 So.2d at 383.
- "A rule that would permit the inference of diminished earning capacity from the fact of permanent injury alone is far too narrow, for surely 'a person may suffer some permanent injury which would not permanently affect his earning capacity.'" *Id.* (citation omitted).

Another case with a good discussion of the evidence needed to prove lost earning capacity is *Southern Ry. Co. v. Stallings*, 268 Ala. 463, 107 So.2d 873 (1958). The Court quoted at length the treating physician's testimony about the nature of the plaintiff's injuries. 107 So.2d at 877-78. After all this quotation,

the Court simply said "There was evidence from which the jury could find that plaintiff was wholly incapacitated from doing his work as a boilermaker." 107 So.2d at 879. After noting that "the evidence is clear that [plaintiff] had a permanent injury to his right wrist incapacitating him from working as a boilermaker, the only kind of employment he had been engaged in for about 37 years," and noting his life expectancy and his work-years expectancy, the Court held that the evidence was sufficient despite the lack of specific evidence of overall incapacity to engage in gainful work:

Although there is no evidence specifically defining the extent of plaintiff's overall incapacity to engage in gainful work, it nevertheless was a question for the jury, in their fair and enlightened discretion, to fix the amount of damages for impairment of earning capacity. 107 So.2d at 879 (emphasis added; citations omitted). Quoting an earlier case, the Court noted again the jury's discretion: "As to impaired earning capacity, like mental and physical pain, mutilation, disfigurement, or loss of an organ, it is shown to be difficult to furnish a standard for measurement, and the amount is to be fixed by the jury in their fair and enlightened discretion." 107 So.2d at 879 (internal punctuation and citations omitted). *Southern Ry. v. Stallings* also helpfully contains a long discussion about the means of proving present value. 107 So.2d at 880-84. Finally, the Court there also noted that evidence of a pension or retirement is not relevant to the jury's calculation of future lost earning capacity. 107 So.2d at 884.

In *Bishop v. Poore*, 475 So.2d 486 (Ala. 1985), the Court upheld an award of lost earning capacity "where plaintiff was not actually working nor receiving wages at the time of the accident." "Plaintiff alleged permanent injury in his complaint, and produced evidence to support such injury. He



also presented specific data detailing his usual past earnings. In light of this evidence, we cannot say that the jury was without guide in awarding damages in this case.” *Id.* at 488.

Several of the reported cases are Federal Employer’s Liability Act (FELA) cases. There could be an argument that the evidentiary standards are slightly different in these federal cases, but the opinions do not tend to make that distinction. For example, in *Illinois Cent. Gulf R. Co. v. Russell*, 551 So.2d 960 (Ala. 1989), the Court cited *Carnival Cruise Lines v. Snoddy* and *Southern Railway v. Stallings* en route to holding “that it was permissible for the jury to determine from the evidence, in its fair and enlightened discretion, Russell’s loss of future earnings, and that it was not error for the trial court to allow Russell’s lawyer to suggest, in his closing arguments, that 12% was a reasonable basis for calculating damages.” *Id.* at 964. Note that this is different from the 13% figure in *Snoddy* because it was merely argued to the jury rather than presented as an expert’s testimony as to the basis for finding future lost income. The following is a good passage to cite for not needing expert testimony:

We find the record to be replete with logical inferences that Russell could well lose future earnings as a result of his back injury. Therefore, we hold that it was not error, in this case, for the trial court to submit the issue of loss of earning capacity to the jury without expert testimony establishing Russell’s loss of earning capacity.  
551 So.2d at 963-64.

**Plaintiff’s Testimony Can Be Enough**

Applying again the standard that the “amount is to be fixed by the jury in their fair and enlightened discretion,” the Court affirmed an award for loss of earning capacity based upon the plaintiff’s own

testimony in *CSX Trnsp., Inc. v. Long*, 703 So.2d 892, 897-98 (Ala. 1996):

The record is replete with evidence that would support logical inferences that Long could well lose future earnings as a result of his hearing loss, and the common knowledge of the jury would allow the jurors to draw those inferences in this case [citing *Illinois Central v. Russell*]. ... Long testified that his job at CSX is under constant review and that “there is no way” he could maintain his salary of \$50,000 per year if he lost his CSX job. His education and prior work experience, coupled with his hearing loss, make him virtually unemployable in the open labor market. The trial court did not err in instructing the jury that it could award Long monetary damages for loss of future earning capacity.  
*Id.* at 898 (citation omitted).

In *Fitzpatrick v. Dean*, 278 Ala. 284, 177 So.2d 909 (1965), the Court held that the plaintiff’s testimony and the documentary evidence of before and after earnings was enough for an award of loss of earning capacity. “[T]he plaintiff in cases of this character – and of course any other competent witness – may testify to earnings by personal effort over a period so reasonably extended as to afford the basis for a just estimate of average earnings.” 177 So.2d at 911 (citation omitted). This case allows an award of loss of profits where the profits would have been earned by the plaintiff’s “personal effort, skill, or ability.” *Id.* (citation omitted).

Pattern Jury Instruction 11.17 cites *Hathcock v. Wood*, 815 So.2d 502 (Ala. 2001), but the treatment of the lost future earnings question is very brief:

Mrs. Wood’s testimony as to the loss of the family business was admissible for purposes of proving the damages claimed, because it supported an inference

that the Woods lost the business because injuries he sustained in the March 19, 1994, accident caused Mr. Wood to be unable to work. Therefore, Mrs. Wood’s comments concerning the Woods’ poverty tended directly to prove Mr. Wood’s diminished earning capacity; thus, they were relevant to a material issue in the case.

815 So.2d at 508 (citing *Carnival Cruise Lines v. Snoddy*).

An unusual case is *Enzor v. Wilson*, by and through Wilson, 519 So.2d 1244 (Ala. 1987), where a birth-injured infant was allowed to recover lost earning capacity. This issue is treated in part IX of the opinion, 519 So.2d at 1269-73. There are long quotations of the questions to and answers from the plaintiff’s special education therapist, Dr. Francine Holland, and an economist, Dave Saurman, Ph.D. *Id.* at 1269-72. The Court also quotes the jury charge and quotes from *Carnival Cruise Lines v. Snoddy*, *id.* at 1272-73, before concluding: “[The evidence] did not leave the jury to ‘flounder’ in a sea of ‘pure speculation and conjecture.’ There was direct evidence of her disabilities and evidence that related those disabilities to her impaired earning capacity. We cannot in this case conclude that the trial court erred in submitting that subject to the jury.” 519 So.2d at 1273.

**These Damages Must Be Pleaded Specifically**

In *Eternal Rest Cemetery Corp. v. Pugh*, 366 So.2d 1113 (Ala. 1979), the Court held that, although lost earning capacity is special damages that needs to be pleaded specifically (see Rule 9(g), Ala.R.Civ.P.), it was sufficient to allege “loss of sleep, loss of weight, loss of physical and nervous distress and great mental anguish,” *id.* at 1115. The Court cited *Birmingham Electric Co. v. Cleveland*, 216 Ala. 455, 113 So. 403 (1927), as holding allegations that the plaintiff were “permanently injured” and ‘nervous system was greatly shocked,’



... sufficient to allow proof of impaired earning capacity.” 366 So.2d at 1113, quoting *Cleveland*. After holding that the complaint was sufficient, the *Eternal Rest* Court then held that the evidence was insufficient: “The long-established principle on proof of lost earnings is that such an allegation must be supported by some specific proof which will allow a reasonably accurate finding.” 366 So.2d at 1116. There was no evidence of either Mrs. Pugh’s “gainful employment or lost earnings” or Mr. Pugh’s earnings from “operating a small garage as an auto mechanic.” *Id.* at 1117.

### **Continuing To Work Does Not Bar An Award for Lost Earning Capacity**

*Mackintosh Co. v. Wells*, 218 Ala. 260, 118 So. 276 (1928) is an early and oft-cited case upholding an award of lost earning capacity even though the plaintiff continued to work.

The physical injuries of plaintiff were grievous and extended to a loss or injury of the several members of his body, specifically described in the complaint, and for which permanent injury damages were claimed. ... The fact that the evidence shows that the plaintiff was, at the time of trial, holding and discharging for the city the same position (at the same salary) as inspector, held by him to the time of his injury, does not make inapplicable the rule announced in [*Birmingham Elec. Co. v. Cleveland*, 216 Ala. 455, 113 So. 403 (1927)]. ...

... And the allowance of damages for permanent decreased earning capacity as the result of such physical dismemberment and injury without specific evidence of loss or decreased income or salary, before or at the time of the trial, is not a mere speculation. 118 So. at 280 (citing *Birmingham Electric v. Cleveland*), *supra*.

In *Louisville & N.R. Co. v. Steel*, 257 Ala. 474, 59 So.2d 664 (1952), the Court held that continuing to work did not bar a recovery for lost earning capacity:

[T]he plaintiff is not precluded from recovery for impairment of his earning power by reason of injury sustained by him because he returned to work ... It is held that wages actually earned by a person and his earning power are not identical. The fact that the plaintiff worked for appellant for several months prior to the trial of the case was merely evidence to be considered by the jury in determining whether or not his earning power had been impaired by the accident.

59 So.2d at 669 (citations omitted). This is an FELA case, but as noted elsewhere, the cases do not clearly draw a distinction.

The same point has been made in a worker’s compensation case. In *Abex Corp. v. Coleman*, 386 So.2d 1160 (Ala. Civ. App. 1980), the Court of Civil Appeals held that even though the plaintiff’s present earnings exceeded his pre-injury earnings, he was properly allowed to recover for lost earning capacity. Citing another worker’s compensation case, the court stated the following tests:

Alabama law recognizes the rule that where post-injury earnings equal or exceed pre-injury earnings, there exists a presumption that the claimant’s earning ability has not been reduced. ... However, this presumption may be rebutted by (1) independent evidence which demonstrates incapacity or (2) evidence which tends to indicate that the post-injury earnings are an unreliable basis for estimating earning capacity. ...

We have held that the factors which indicate the unreliability of post-injury earnings include:

(A)n increase in general

wage levels since the time of the claimant’s accident; claimant’s own general maturity; receipt of additional training by claimant; longer hours worked by claimant after the accident; payment of wages disproportionate to the claimant’s ability to perform work-related tasks because of sympathy for the claimant; and the temporary and unpredictable character of post-injury earnings received by the claimant.

386 So.2d at 1162 (quoting *Florence Enameling Co. v. Jones*, 361 So.2d 564 (Ala. Civ. App. 1978)).

### **Present Value**

The Notes on Use to APJI 11.17 advise that in an action involving federal substantive law, the method of computing present value must be presented to the jury. Not so under Alabama law. In *Mullins v. Summers*, 485 So.2d 1126 (Ala. 1986), the Court held that it was not error to refuse to require expert testimony on the mathematical procedure for reducing loss of future earnings to present value. After reaffirming this holding from *Louisville & N.R. Co. v. Grizzard*, 238 Ala. 49, 189 So. 203 (1939), the Court expressed reservations about this rule. 485 So.2d at 1130. It went so far as to “ask this Court’s Advisory Committee On Civil Rules of Practice and Procedure to study the problem ... and to report to this Court its recommendations for dealing with that problem in future cases.” *Id.* at 1130. Nothing came of this, and *Mullins* is still the law. Nevertheless, to avoid any possible reversal on appeal, testimony can be offered in state court about reduction of lost future earnings to present value. See *Southern Ry. Co. v. Stallings*, 268 Ala. 463, 107 So.2d 873, 880 and 882- 83 (1958) (quoting an actuary’s testimony on how to reduce future lost earnings to present value).