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A Forensic Economic Thought Experiment

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It is rare that a forensic economist can estimate future losses with certainty: even in the case where the future annual loss is known precisely, the duration of the loss likely depends on the continued survival of the plaintiff. However, suppose we knew exactly what an injured plaintiff's future earnings would have been but for the injury. There would consequently be no error in our estimate of the lost earnings, and it would be possible to calculate an award for those lost earnings that neither under- or overcompensates the plaintiff. If we then increased the award to account for the earnings that would have been received had the plaintiff not been voluntarily absent from the labor force, we clearly will have overcompensated the plaintiff.

At first glance, the conclusion reached by this thought experiment seems unremarkable. Clearly, adding any amount to an award that neither under- or overcompensates the plaintiff will result in overcompensation. The conclusion is more significant if we consider two passages from Horner and Slesnick's 1999 paper, "The Valuation of Earning Capacity: Definition, Measurement and Evidence" (*Journal of Forensic Economics*, 12(1), pp. 13-32):

> Thus, to analyze the earning capacity of an attorney who has chosen to stay home with pre-school children rather than enter or remain in the labor market, we need not investigate the process by which such a decision is made, nor attempt to estimate the year-by-year probability of returning to the market. (p. 15)
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> The existing worklife tables, including mean future working years and median years to final separation, are based on labor force participation status. This underlying data does not distinguish between voluntary and involuntary nonparticipation. Thus, these tables are not an ideal instrument for measuring earning capacity. (p. 29, footnote 24)

These passages imply that voluntary absences from the labor force should be included in work life expectancy when measuring earnings capacity – a position that directly conflicts with the conclusion reached in the first paragraph above.

This conflict raises the question of whether the distinction between voluntary and involuntary absences from the labor force is material when considering the loss of earnings capacity. The short answer is "Yes, but not to the extent that the two quoted passages suggest." Clearly, voluntary absences should be ignored when considering the existence of earnings capacity – the classic example of the injured homemaker who left a job in order to raise a family demonstrates this. However, the conclusion reached in the first paragraph just as clearly demonstrates that voluntary absences should not be ignored when measuring earnings capacity or work life expectancy. In the case of our homemaker, the published work life estimates for an initially inactive individual exclude voluntary absences from work life, but account for the likelihood of a return to the labor force. Consequently, use of the initially inactive work life estimates recognizes that no loss occurs during voluntary labor force absences while acknowledging the existence of the capacity to earn but for the injury. Absent specific legal instruction to the contrary, voluntary absences from the labor force should be treated like any other absence when estimating earnings capacity or work life expectancy – else the plaintiff will be overcompensated on an *a priori* or before-the-fact basis. By the same token, voluntary absences play no role in deciding whether a loss of earnings capacity exists and should be ignored in making this determination. •

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