

The Role of Voluntary Labor Force Absences in the Determination of Earnings Capacity

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The Plan

- (1) What is This Presentation About?**
- (2) A Thought Experiment**
- (3) What Role is Played by Voluntary Absences?**
- (4) Can the Law Trump Logic?**
- (5) Measuring WLE by Including Periods of Involuntary Absences**
- (6) Overall Conclusions**

From Horner/Slesnick (1999)

“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.” (H/S, p. 15)

“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.” (H/S, p. 29, fn 24)

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These statements imply that voluntary absences from the labor force should be included in WLE when measuring earnings capacity – I disagree.

Something We Can All Agree On

- **Compensatory damages are awarded to make an injured party whole.**
“[I]t is a rational, and a legal principle, that the compensation should be equivalent to the injury. ” *Bussy v. Donaldson*, 4 U.S. (4 Dall.) 206, 207 (1800)
- **No one knows what future earnings of injured plaintiff would be but for his injury.**
- **It is almost guaranteed that *ex post*, the plaintiff will be over- or under-compensated.**
- **Our estimation methodology should not have an *ex ante* expectation of over- or under-compensation.**

A Thought Experiment

- **Imagine we knew exactly what would have happened had the plaintiff not been injured. We could determine a damages award that neither over- or under-compensated the plaintiff.**
- **Alternatively, imagine we knew exactly what would have happened had the plaintiff not been injured, given the plaintiff is alive. We could assume normal mortality risk and determine a damages award that neither over- or under-compensated the plaintiff on an *ex ante* basis.**
- **Having done so in either situation, if we go back and increase the loss estimate for income that would be earned but for voluntary absences from the labor force, we will have over-compensated the plaintiff, either in fact or on an *ex ante* basis. (Same as if in the second alternative we had ignored the mortality risk.)**
- **Ignoring actual or expected voluntary absences from the labor force can only serve to over-compensate the plaintiff. It is the same as compensating the plaintiff for the time he is expected to sick, injured or deceased by ignoring the probability these events might occur.**

What Role is Played by Voluntary Absences?

- **Short answer: They should be ignored except when establishing the existence or level of an earnings capacity that differs from current actual earnings.**
- **Consider two examples**
 - **The attorney who stays home with pre-school children**
 - **Initially inactive WLE as of date of injury**
 - **Initially active WLE as of date youngest child enters school**
 - **A dentist who voluntarily works for a salary at a clinic, rather than owning a practice.**
 - **At issue is the question of whether he will continue to voluntarily remain at the clinic – there are no tables or data that shed light on this question.**
 - **Provide estimates based on leaving the clinic and on opening a practice at various points in the future. Still use WLE to measure the loss – the voluntary decision to underutilize his earnings capacity suggests the existence of an earnings capacity that is greater than current earnings, it doesn't make it certain with respect to level or timing.**

What Role is Played by Voluntary Absences?

- **Qualification to Example 1: The attorney's skills or credentials may have diminished during the voluntary absence from the labor force.**
- **Qualification to Example 2: The plaintiff might have very good dental skills but be unable to successfully run a practice.**
- **Regardless, the attorney's decision to stay at home or the dentist's decision to work at the clinic doesn't mean they should be compensated for periods when they would voluntarily be out of the labor force.**

What Role is Played by Voluntary Absences?

- **3rd example: A school teacher wins the lottery, quits his job and moves to Florida. He is injured in an automobile accident and can no longer speak. Three possible positions on measuring earnings loss:**
 - It equals zero, because he never intended to teach again.
 - Initially inactive WLE starting on the day of the accident.
 - Assume he would have resumed teaching as of the date of his injury.
- **Comments**
 - First option is an extreme view since his intentions may not be realized if he blows his winnings and has to return to work, or if he just gets bored.
 - Third option is also extreme – it cannot realistically be assumed that he would return to work with certainty on any day.
 - Still, initially inactive WLE probably overstates his loss: the role of economic necessity in transitioning to the active state is diminished by the lottery winnings..

Conclusions Thus Far

- **Periods of voluntary absences from the labor force should be excluded in the measurement of WLE and the future loss.**
- **Zero earnings when injured during a voluntary absence do not mean a loss of zero.**
- **Voluntary decisions to accept employment at a rate of pay seemingly lower than an alternative do not mean that the capacity to earn more didn't exist, but are more difficult to handle.**
- **Regardless, voluntary decisions to stay out of the labor force or take a lower paying job only establish the potential existence of earnings capacity that differs from current actual earnings.**

Can the Law Trump Logic?

- ***Wolfe v Kansas City*, Supreme Court of Missouri 334 Mo. 796; 68 S.W.2d 821; 1934 Mo. LEXIS 495**
 - “However, the loss of the power to earn money or, earning capacity, has another meaning and that is the present power or ability to earn a living or earn money, which is inherent in every individual, although that power has never been exercised and there is no present intention to exercise it, because [it is] not necessary.”
 - **Points to the existence of earnings capacity even when there is no record of earnings, but is silent on its measurement.**

Can the Law Trump Logic?

- *Florida Greyhound Lines, Inc. v. Jones*, 60 So. 2d 396 (Fla. 1952)
 - “This thought leads to the conclusion that the capability of a housewife that has been destroyed or impaired by the negligent act of another may not be ignored in assaying the damage, simply because she had not gathered money in some other activity. The measuring of the loss cannot be put off until another day. If she has been incapacitated, the time would never come for her to demonstrate what she could earn; and after all, there is but one trial — and that is now. We are convinced that the matter should be submitted to the jury as a phase of the damage, as difficult of appraisal as it may be.”
 - **Like *Wolfe*, points to the existence of earnings capacity even when there is no record of earnings, but is silent on its measurement.**

Can the Law Trump Logic?

- *Anderson v. Litzenberg* 115 Md App 549, 694 A.2d 656 (1993)
 - “One component of pecuniary loss recoverable by an injured person amounts to any loss, impairment, or diminution of his earning capacity in consequence of his injury.... Impairment of earning capacity is measured by the ‘lost capacity to earn, rather than what a plaintiff would have earned.’... The prevailing proper measure of lost earning capacity is the difference between the amount that the plaintiff was capable of earning before his injury and that which he is capable of earning thereafter.”
 - **“Capable” certainly suggests one should still account for the risk of death, sickness, or injury that would have prevented the plaintiff or the decedent from being an active labor force participant, since the plaintiff is not exempt from these risks. It also seems to suggest that voluntary absences from the labor force should be ignored.**

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 - But, what does “capable” really mean? In the case of our dentist, it certainly means the ability to run a practice, but does it necessarily mean that the decision not to do so should be ignored? In the case of our stay-at-home attorney, “capable” is constrained by parental obligations – can these be ignored in measuring the loss?

You can't win the lottery without buying a ticket – have you really experienced a loss if you voluntarily decide not to exercise your earnings capacity?

Can the Law Trump Logic?

- *Moyer v. Merrick*, 155 Col. 73, 392 P.2d 653 (1964)
 - “[testimony about plaintiff’s intentions to restrict earnings to preserve Social Security benefits] . . . had no bearing on the issues of the case, and tended to destroy plaintiff Moyer's rights to be compensated for the impairment of his physical capacity and impairment of his ability to earn, regardless of whether he intended to work or not. What one's earning capacity would be if not interfered with because of the injury caused by defendant is the true test.”
 - **This language supports including periods of voluntary absences from the labor force in measuring the loss and may be a clear case of the law trumping logic.**
 - **But, “whether he intended to work” is not the same as “whether he would work”. Decision could just be saying that the possibility of returning to work in spite of stated preferences should not be ignored.**

Can the Law Trump Logic?

- *Lorenz v. Sowle*, 360 Mich. 550, 104 N.W.2d 347 (1960).
 - “When plaintiff has been deprived by injury of a wage-earning ability in certain employment, evidence that he formerly had and, but for the injury, again could have engaged in that employment is pertinent and admissible as to the value of that which defendant has caused him to lose. . . . Once again the test employed was not what he would have but what he could have done, but for the injury, as he had done in the past.”
 - **The issue in this case was the likelihood of returning to a specific type of employment, not of returning to the labor force. But the logic could be used to support including periods of voluntary absences from the labor force in measuring the loss.**

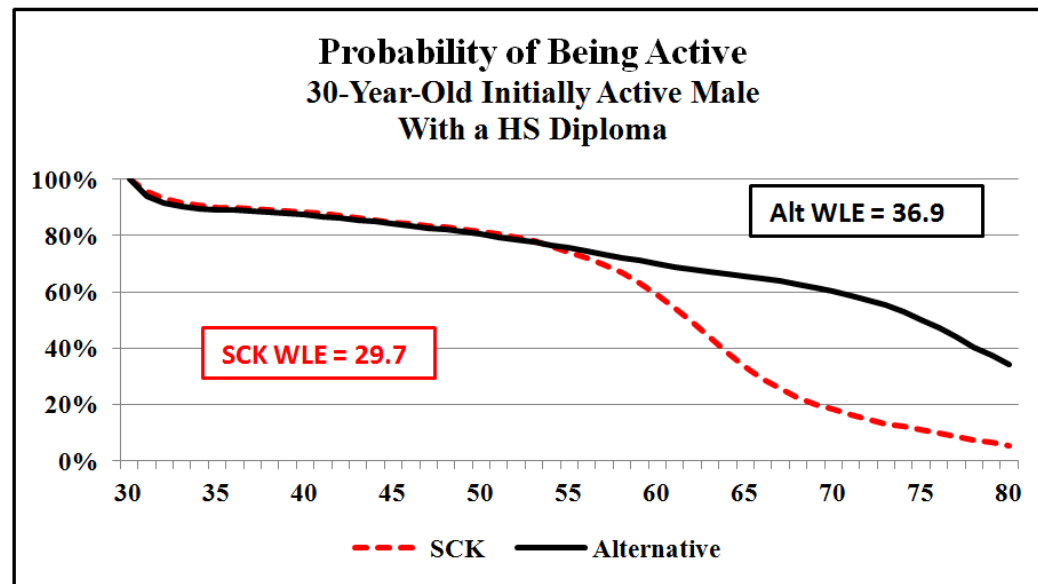
Can the Law Trump Logic?

- **It depends on your state, and on the interpretation of the case law, so your mileage may vary.**
- **Avoid assuming use of the term “earnings capacity” equates to the H/S definition, particularly if the case predates the article by more than 60 years.**
- **Also, consider that the case law may just be rejecting the argument that tomorrow’s earnings equals today’s, or that zero earnings when injured equals zero loss.**
 - **See Peck, Cornelius J., and William S. Hopkins. "Economics and Impaired Earning Capacity in Personal Injury Cases." Wash. L. Rev. 44 (1968): 351.**

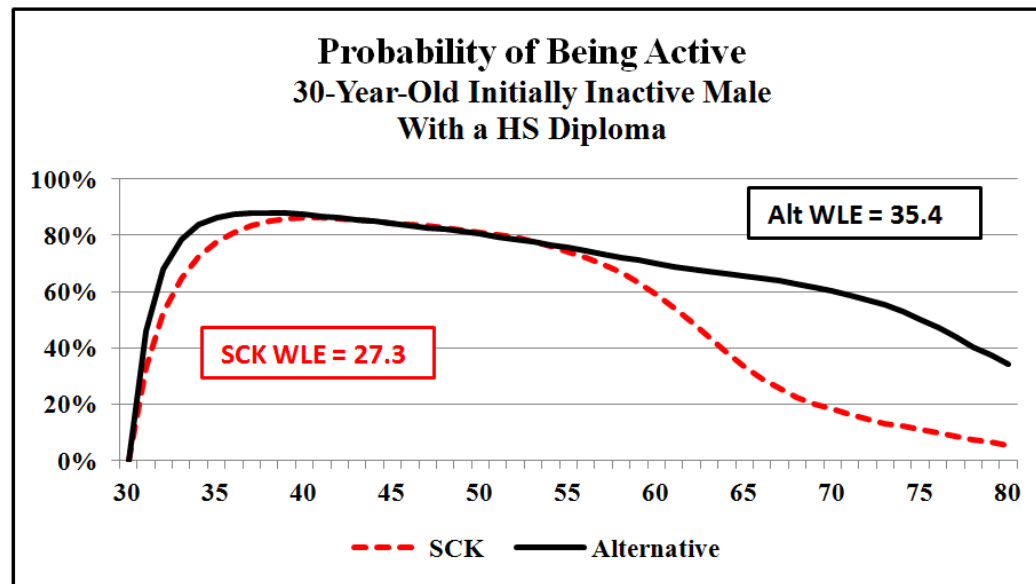
Measuring WLE by Including Periods of Involuntary Absences

- **Redefine active as those persons who are employed, or who do not self-identify as disabled and are not seeking employment.**
- **Redefine inactive as those persons who are officially unemployed, who self-identify as disabled and do not have a job, or who want to work but are discouraged from seeking employment.**
- **This definition of active/inactive treats those who are voluntarily out of the labor force (e.g., full-time students, homemakers and retired persons) as active.**

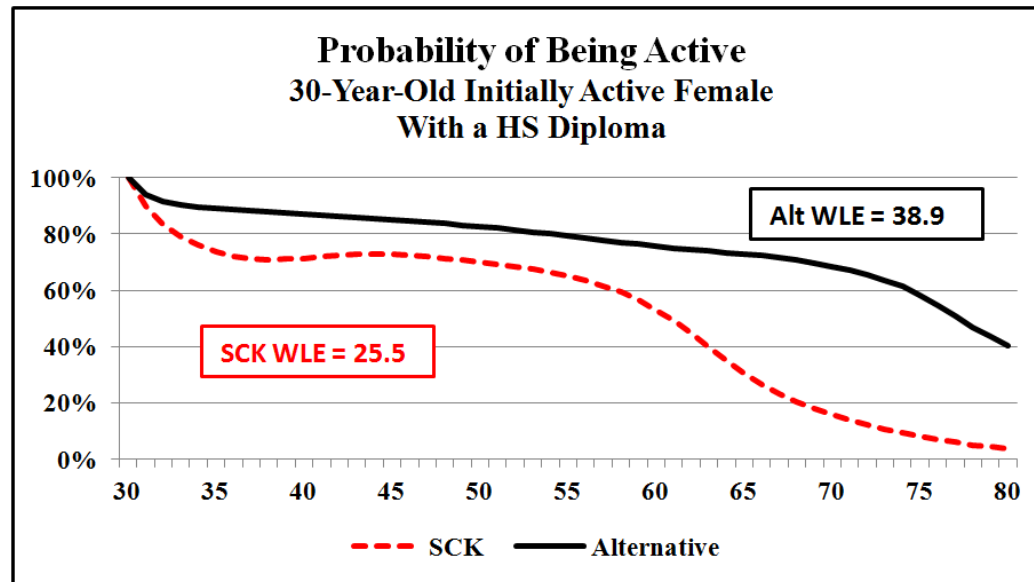
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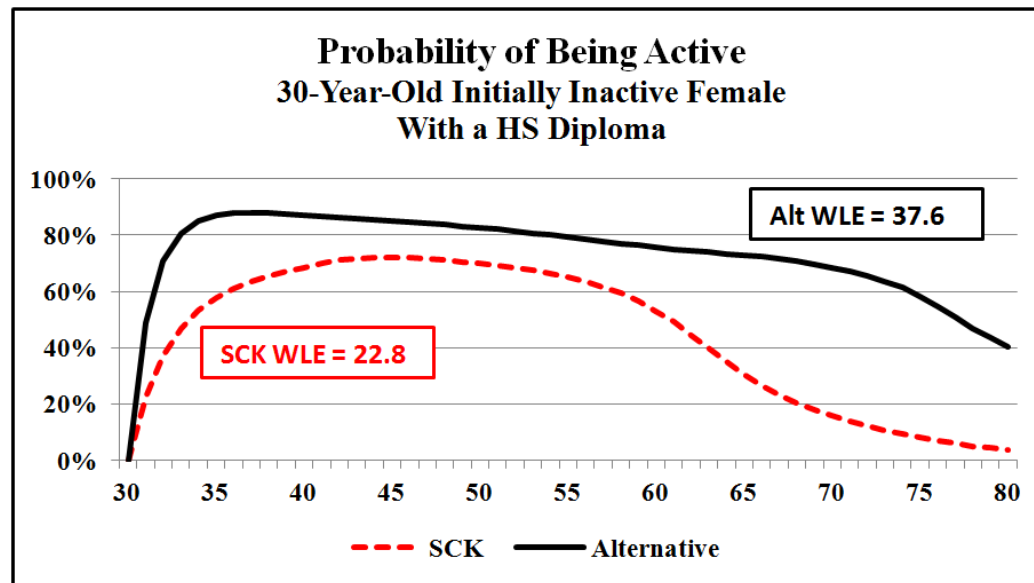
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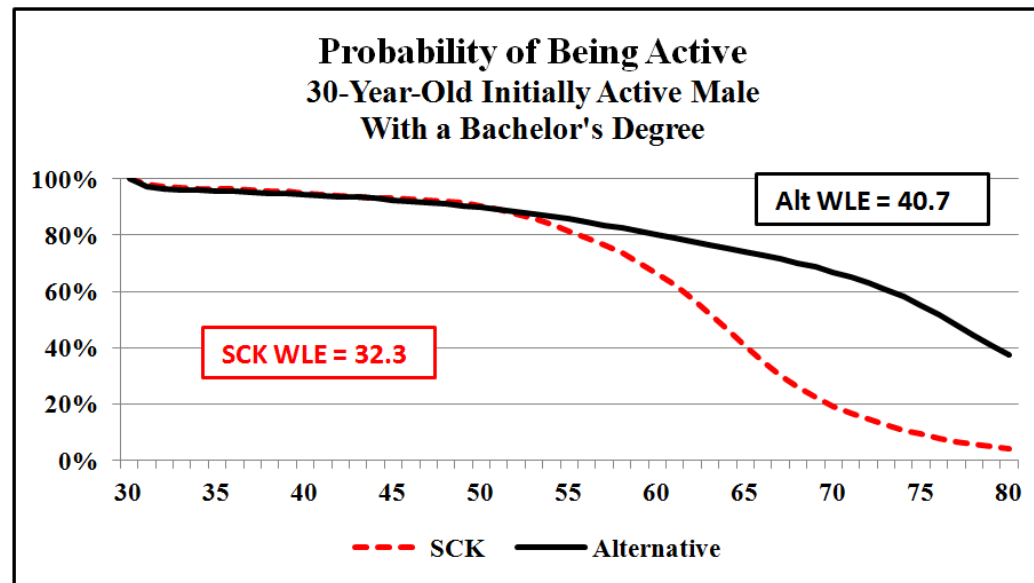
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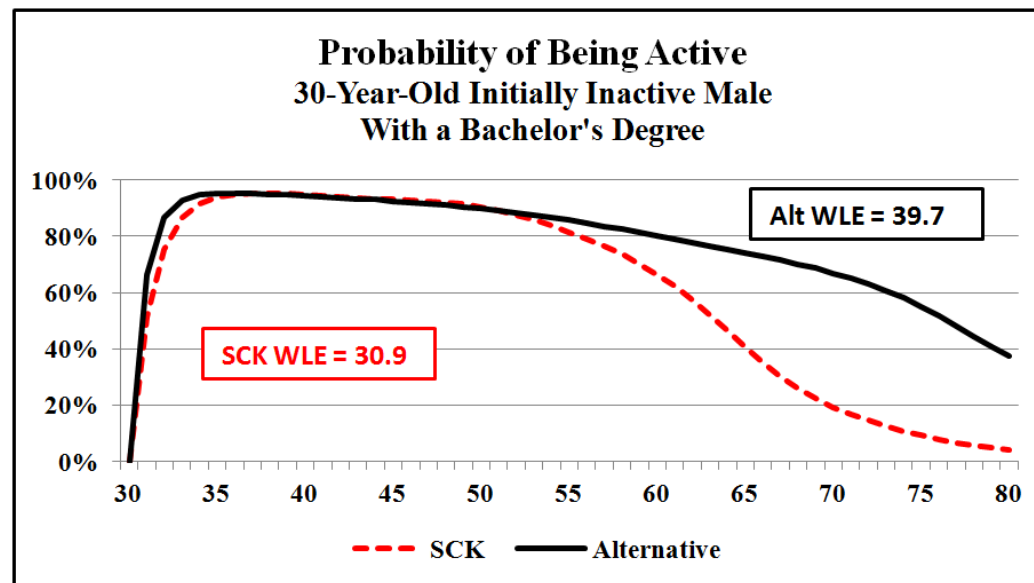
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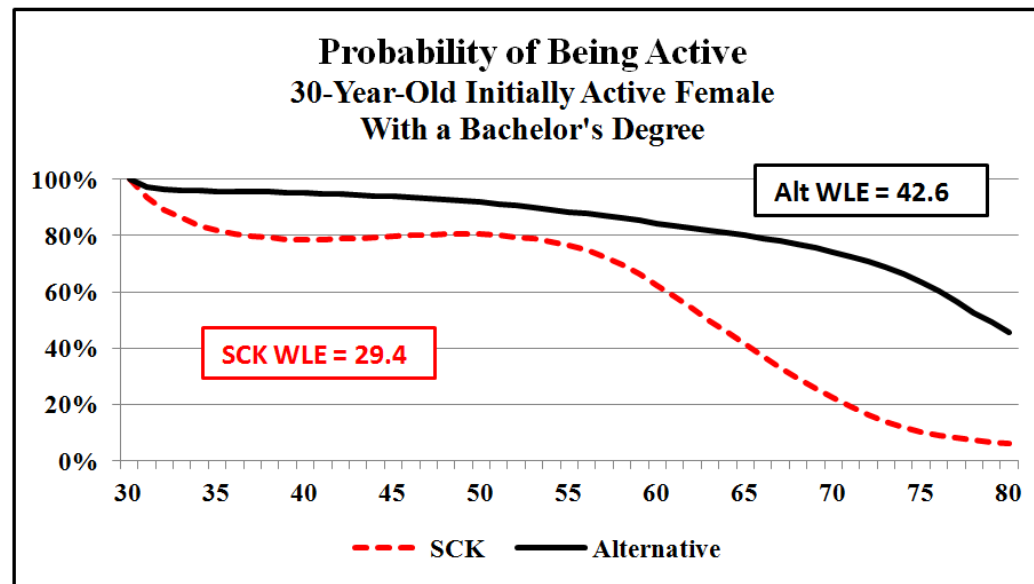
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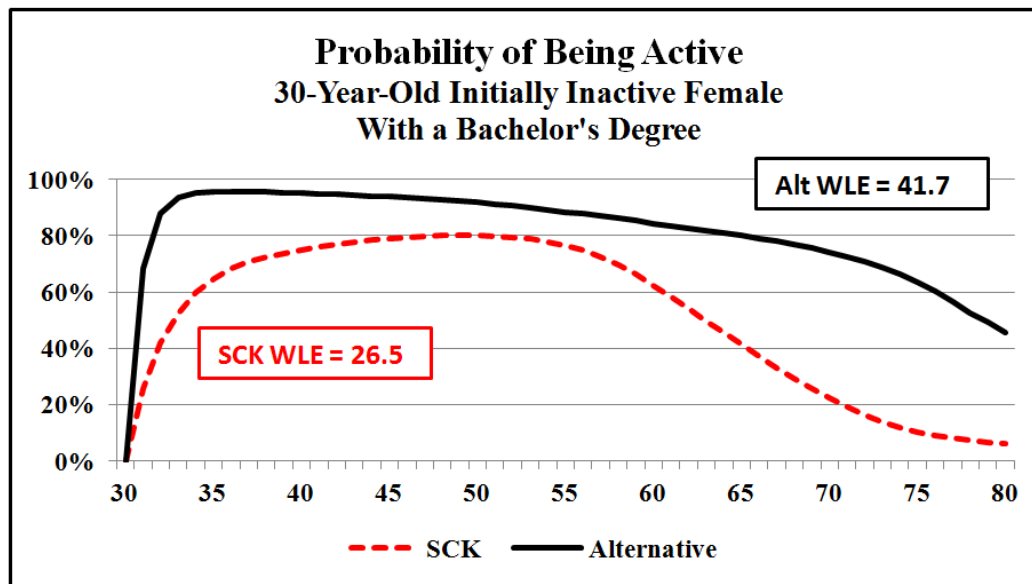
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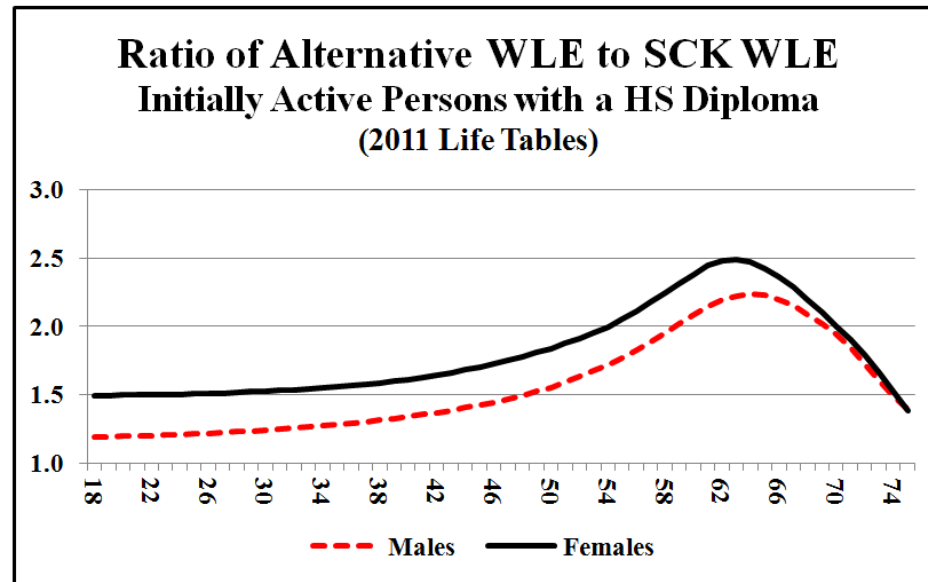


Think About the Ratio of the Alternative WLE to the SCK WLE.

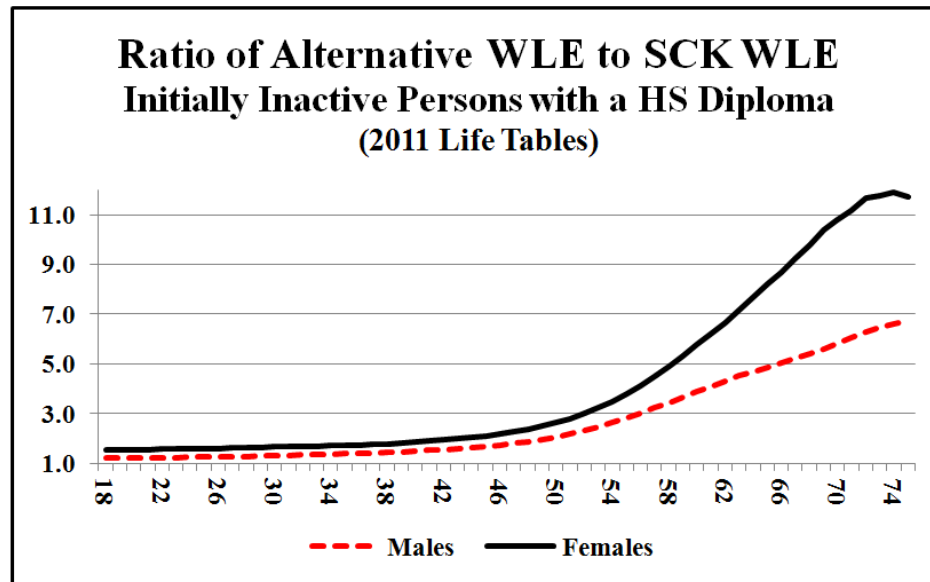
- **Biased downward because**
 - **SCK includes periods of official unemployment. Using CBO's 5.00% estimate of the full-employment level of unemployment, the ratio should be at least 5.26% higher.**
 - **Someone who is on disability and self-identifies as disabled, may in fact be able to find and keep a job.**
- **Biased upwards because**
 - **Someone who is voluntarily out of the labor force won't know if they would be unemployed unless they seek employment.**
 - **Tendency for some disabled individuals to consider themselves as retired.**

Degree of offset is unknown. Still useful to look at the ratio.

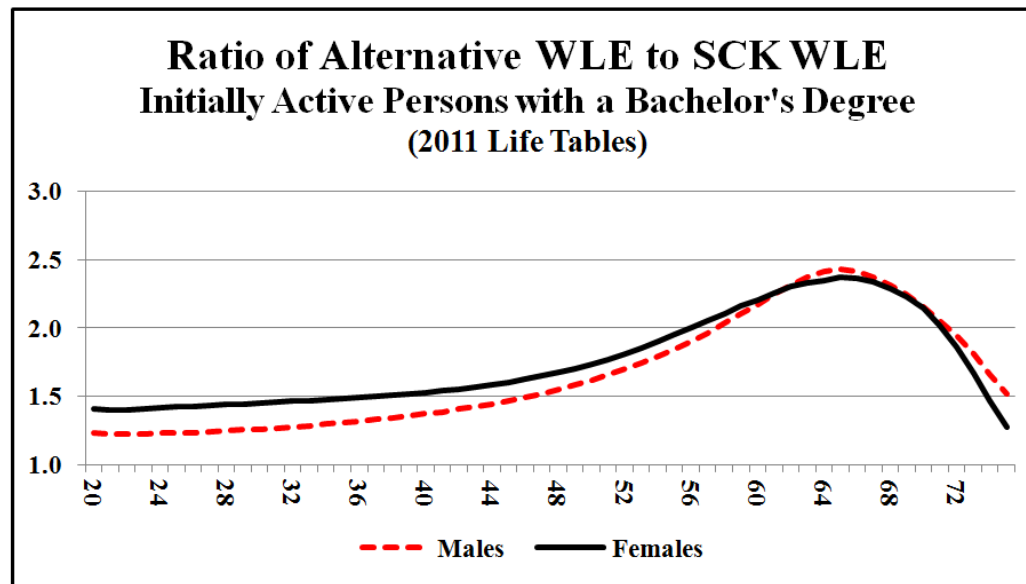
Ratio of Alternative to SCK



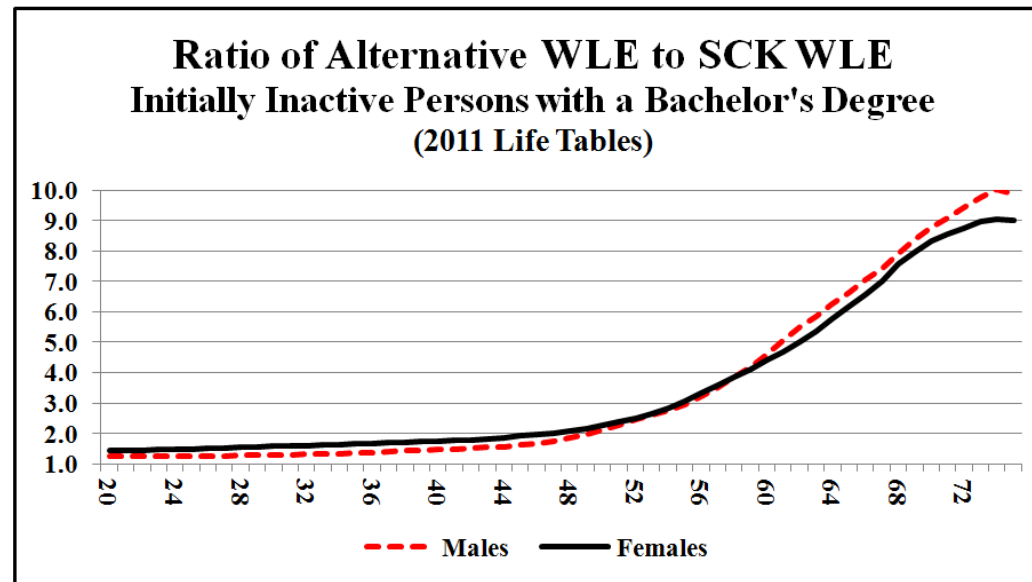
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Ratio of Alternative to SCK



Ratio of Alternative to SCK



Ratio of Alternative to SCK

Ratio of Alternative WLE to SCK WLE
(2011 Life Tables)

Age	HS Diploma				Bachelor's Degree			
	Males		Females		Males		Females	
	Active	Inactive	Active	Inactive	Active	Inactive	Active	Inactive
25	1.21	1.24	1.50	1.59	1.23	1.25	1.42	1.48
30	1.24	1.30	1.53	1.65	1.26	1.29	1.45	1.57
35	1.28	1.38	1.56	1.72	1.31	1.36	1.48	1.65
40	1.34	1.49	1.61	1.84	1.37	1.47	1.53	1.74
45	1.42	1.67	1.70	2.11	1.47	1.61	1.60	1.91
50	1.55	2.05	1.84	2.64	1.62	2.10	1.74	2.25
55	1.77	2.81	2.05	3.78	1.84	2.96	1.95	3.05
60	2.08	3.87	2.38	5.76	2.17	4.60	2.21	4.41
65	2.22	4.85	2.42	8.21	2.43	6.62	2.37	6.19
70	1.94	5.82	2.00	10.81	2.15	8.79	2.15	8.32
75	1.39	6.73	1.39	11.72	1.51	9.88	1.27	9.03

Ratio of Alternative to SCK

- **Alternative overestimates WLE (and over compensates for earnings loss) by 10 percent or more for males and by 30 percent or more for females.**

OR

- **Treating periods of voluntary absences as active is not operationally possible.**

Overall Conclusions

- **If loss estimates include income that would be earned but for voluntary absences from the labor force, we will have over-compensated the plaintiff on an *ex ante* basis.**
- **Zero earnings when injured during a voluntary absence do not mean a loss of zero.**
- **Voluntary decisions to accept employment at a rate of pay seemingly lower than an alternative do not mean that the capacity to earn more didn't exist, but are more difficult to handle.**

Overall Conclusions

- **The law can trump logic, but don't assume that just because a court case uses the term "earnings capacity" that the court is adopting the Horner/Slesnick definition in its entirety, particularly if the case predates the paper by decades.**
- **Trying to implement a definition of "active" that includes periods of voluntary absences of the labor force may not be possible and will likely over compensate the plaintiff by a significant amount, on an *ex ante* basis.**