TRIAL TRANSCRIPT OF DEBRA SABATINI DWYER, M.S., Ph.D.; 2014 Trial Trans. LEXIS 768

Supreme Court of New York, Special Term, Suffolk County

INDEX NO. 16850-09

October 27, 2014

Reporter
2014 Trial Trans. LEXIS 768 *

CHARLES DONALDSON, Plaintiff, - against - ARMAND E. ABULENCIA, M.D., ISLAND ORTHOPAEDICS & SPORTS MEDICINE, P.C., Defendants.

Expert Name: Debra Sabatini Dwyer, Ph.D., M.S.

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Judges

BEFORE HON. JERRY GARGUILO, Supreme Court Justice

Proceedings

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[11]October 27, 2014
Riverhead, New York

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REPORTED BY: Linda Dutra

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[2] **[*2]** THE COURT: Over here. Sure.

[3](Whereupon an off-the-record

[4]discussion was held between the

[5]attorneys and the Court at this time).

[6]THE COURT: Mr. Bithorn, your

[7]next witness?

[8]MR. BITHORN: Yes.

[9]May I step outside?

[10]THE COURT: Yes, please.

[11]MR. BITHORN: Your Honor the

[12]Plaintiff calls Dr. Debra Dwyer.

[13](Witness called, and sworn).

[14]THE CLERK: State your name for

[15]the record.

[16]THE WITNESS: Sure.

[17]Debra. Dwyer. D- E- B-

[18]R-A. D-W-Y-E-R.

[19]THE CLERK: Please be seated.

[20]Thank you.

[21]Please give the Court your

[22]business address.

[23]THE WITNESS: It's seventeen

[24]springbrier lane. That is

[25]S-P-R-I-N-G-B-R-I-E-R. Centereach.

[14]

[1]

[2]C-E-N-T-E-R-E-A-C-H. New York. One

[3]one seven two oh.

[4]THE COURT: Good morning doctor.

[5]THE WITNESS: Good morning.

[6]THE COURT: Doctor all

[7]witnesses are given three suggestions

[8]by me.

[9]You know you are going to be

[10]asked questions today. Of course pay

[11]careful attention to the question

[12]that's put to you. And answer as best

[13]as you can. Limit your answer to **[*3]** the

[14]information sought by the question.

[15]Example if I were in that chair

[16]and the lawyer asked me on what street

[17]I live I'd simply give the name of the

[18]street. I wouldn't volunteer the town

[19]the state the zip code because the

[20]information sought is simply the

[21]identity of the street.

[22]Got that?

[23]THE WITNESS: Okay.

[24]THE COURT: And even though you

[25]may be certain where a question is

[15]

[1]

[2]going, wait for the question to be

[3]complete before you commence your

[4]answer so this way we could have a

[5]complete record; okay?

[6]THE WITNESS: Sure.

[7]THE COURT: Number three, if you

[8]hear somebody say objection stop until

[9]I give you direction.

[10]You may proceed.

[11]MR. BITHORN: Thank you, your

[12]Honor.

[13]DIRECT EXAMINATION BY MR. BITHORN:

[14]Q Good morning, doctor Dwyer.

[15]A Good morning, Mr. Bithorn.

[16]Q Doctor Dwyer, I am going to ask you

[17]questions.

[18]And first, let me start off, can you

[19]tell the jury a bit about your educational

[20]background and training?

[21]Well first of all what is that you do

[22]generally?

[23]What is your **[*4]** title today?

[24]A I'm an associate professor of

[25]economics at Stony Brook University.

[16]

[1]

[2]Q Okay.

[3]Please tell the jury about your

[4]educational background and training and

[5]experience.

[6]A Sure.

[7]So I received my Bachelor's from

[8]Queens college in flushing New York in economic

[9]and English literature.

[10]I went on to get my Master's and my

[11]PHD from Cornell university in labor and health

[12]economics. From there I went to Syracuse

[13]university where I did a post doctoral

[14]fellowship at the center for policy research.

[15]I was recruited to the social

[16]security administration for a couple of years

[17]where I worked in Washington D.C.. as an

[18]economist in the division of economic research.

[19]And then I came back to Stonybrook

[20]where I've been for the past fifteen years as a

[21]professor in the economics department in

[22]medicine and in technology society.

[23]Q Has any part of your vocational

[24]training --education and the vocational training

[25]involve or include issues of healthcare, health

[17]

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[2]--public policies in that regard, as well?

[3]A Sure.

[4] **[*5]** I've --my entire career has been at

[5]the intersection of the health market and the

[6]labor market, so it has to do with work and

[7]health.

[8]I was a chairperson of a Master's

[9]program in healthcare policy and management. I

[10]currently teach the PHD program economics and

[11]public policy.

[12]Most of my applications are --either

[13]have to do with work or with disability and

[14]health.

[15]Q Okay.

[16]And that's right over here at Stony

[17]brook; you said?

[18]A Yes.

[19]Q As part of your professional

[20]background and experience have you done loss

[21]analysis for claims by people who've been

[22]injured in lawsuits?

[23]A Yes, I have.

[24]Q Economics. Just as a field, what is

[25]economics, and how does it interplay with the

[18]

[1]

[2]issues involving a lawsuit?

[3]A Sure.

[4]So economics broadly defined, is

[5]about how societies allocate resources when

[6]there's scarcity.

[7]So, when --in other words it's

[8]optimal decision making when decisions are

[9]tough.

[10]And in order to do that, we need to

[11]be able to value things like inputs and outputs.

[12]And so my training **[*6]** specifically in

[13]labor and health economics is about assessing

[14]damage and the values of loss. That's what

[15]we're qualified to do.

[16]Q When you are assessing such things in

[17]doing a loss analysis, I mean how do you broadly

[18]go about doing such things when it's involving

[19]for instance claims by an individual who's been

[20]injured in a lawsuit?

[21]A So, I'm going to interpret that

[22]question as you're asking me how do I go about

[23]valuing the person who experiences a loss.

[24]Q What type of information do you look

[25]to utilize for purposes of doing such an

[19]

[1]

[2]analysis?

[3]A I see.

[4]So, as a labor economist, what we do

[5]is we look at the value of their productivity.

[6]I --what that means, is what they're

[7]capable of earning in a labor market.

[8]Because we assess the value of a

[9]human life; the damages, particularly associated

[10]with the loss of the ability to work through the

[11]wage rate. We believe the wage rate represents

[12]their value of their productivity.

[13]So what I looked at is their most

[14]recent earning capacity. I am trying to get a

[15]sense of what their potential **[*7]** earnings would be

[16]over the remainder of their life.

[17]In order to calculate the total loss,

[18]I need to grow those earnings based on average

[19]trends.

[20]So I'm using federal statistics to

[21]get a sense of how fast wages have grown

[22]historically to be able to project them into the

[23]future based on individual information I get

[24]from tax returns or from employment information

[25]about the individual.

[20]

[1]

[2]Q At my request did you do such an

[3]economic loss analysis for Charlie Donaldson?

[4]A Yes, I did.

[5]Q And were you provided with certain

[6]information to assist you in calculating the

[7]analysis?

[8]A Yes, I was.

[9]Q What were you provided with for

[10]information?

[11]A I was provided a two thousand and

[12]seven W-2 and tax statement. I was provided

[13]with various documents from Winter Brothers,

[14]which was his last employer prior to the injury.

[15]Let make sure --and the transcript. I was

[16]provided with the transcripts his testimony.

[17]Q Okay.

[18]Mr. Donaldson's testimony in this

[19]case?

[20]A Yes.

[21]Q The background --what's your

[22]understanding of the **[*8]** background facts and

[23]assumptions from which you derived your

[24]calculations of loss?

[25]A So I was provided with the date of

[21]

[1]

[2]his accident. Which was January 26, 2007. I

[3]was also provided with a --the last date of

[4]work. Which was just --that was his last day of

[5]work.

[6]I was provided with the date of

[7]medical issue, may 31, 2007. I was provided

[8]with his date of birth.

[9]So these are the pieces of

[10]information that I need to be able to project

[11]into the future what the future loss would be.

[12]Q Okay.

[13]In doing your analysis of the

[14]economic damages and losses in this case, how do

[15]you calculate the length of time that might by

[16]be associated with losses that go into the

[17]future?

[18]A So, there are two key dates that I'm

[19]looking for. One is the date that he would

[20]retire. And completely stop working. And the

[21]other is the date that he's expected do die.

[22]And so, we get those values from

[23]federal statistics.

[24]So typically what we use for the work

[25]date --the day that he would stop working

[22]

[1]

[2]--would be the age that he would collect full

[3] **[*9]** benefits from social security under social

[4]security legislation. For Mr. Donaldson that

[5]would be age sixty seven.

[6]In this case I used age sixty five

[7]based on his self report of retiring at age

[8]sixty five.

[9]For life expectancy the national

[10]center for health statistics provides annually

[11]data about life expectancies for males and

[12]females in the general population.

[13]So I took the national center for

[14]health statistics data to predict that he would

[15]live until the age of seventy six point one.

[16]Q Okay.

[17]I want you to assume --for purposes

[18]of this question, I'm going to ask you to assume

[19]several things. And then at the end I'm going

[20]to ask you some question based upon the

[21]information --the assumptions that are being

[22]made in the question.

[23]I want you to assume for purposes of

[24]this question that Charlie Donaldson is a high

[25]school graduate with no college nor vocational

[23]

[1]

[2]training. He was injured while work for Winter

[3]Brothers as a driver on January twenty six, 2007

[4]when he fell and he was hurt.

[5]I want you to further assume he

[6]underwent surgery **[*10]** by doctor Abulencia the

[7]following day January 27, 2007.

[8]Further assume that following his

[9]surgery by doctor Abulencia, Charlie had to

[10]undergo corrective surgery. And he had to

[11]undergo extensive medical treatment thereafter.

[12]I want you to assume that there's

[13]been testimony that the Defendant in this case

[14]was negligent. In other words, deviated from

[15]accepted practice. In that --and that

[16]substantially contributed in causing him

[17]injuries. Including something known as reflex

[18]sympathetic dystrophy. Pain. Additional

[19]surgeries. And treatments.

[20]Further assume that Mr. Donaldson had

[21]suffered injury and damages. And has not

[22]returned to his prior employment, nor to any

[23]similar employment.

[24]Assume further, that there's been

[25]testimony that the negligence by the Defendant

[24]

[1]

[2]deviated from accepted practice, substantially

[3]caused Charlie Donaldson to not be employable in

[4]his prior occupation as a truck driver, nor in

[5]any labor intensive similar job.

[6]I want you to assume that at the time

[7]of his injury, he was earning --he had been

[8]employed by Winter Brothers **[*11]** as a driver hauling

[9]dumpsters, earning six hundred fifty six dollars

[10]per week.

[11]And I want you to assume that there

[12]will be testimony by Mr. Donaldson this

[13]afternoon.

[14]MR. BITHORN: So this is subject

[15]to connection, your Honor.

[16]Q That he planned to continue working

[17]to age sixty five.

[18]With those assumptions in mind, could

[19]you tell us how you calculated the economic

[20]damages that were suffered here, and the losses

[21]that were suffered here as a result of his

[22]condition?

[23]And tell us what factors you take

[24]into consideration in calculating that.

[25]A Yes.

[25]

[1]

[2]Q Thank you.

[3]A So, the income loss --we will start

[4]with that. That would be the earnings that he

[5]would have earned had he not been injured, until

[6]the age of six five.

[7]If you take the rate of six hundred

[8]fifty six dollars per week that he was earning

[9]--and that was documented by Winter Brothers --

[10]it comes out to thirty four thousand one hundred

[11]twelve dollars a year.

[12]We began the past loss. So the past

[13]loss will be defined as the year 2008. Which is

[14]the first full **[*12]** year of non work.

[15]So, he stopped working in Jan 2007.

[16]We began the damages in 2008 at thirty four

[17]thousand one hundred twelve dollars. And we

[18]consider it past losses up until the current

[19]time of 2014.

[20]So, I mentioned earlier that we have

[21]to project it into the future. And as you know,

[22]wages rise over time, just like prices rise over

[23]time.

[24]So wages raise--rise on average over

[25]the last twenty years at a rate of three percent

[26]

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[2]per year.

[3]So, we take that three percent per

[4]year average wage growth, and apply it to the

[5]thirty four thousand one hundred twelve dollars.

[6]So that in 2009 his purchasing power would go up

[7]by that three percent. So that it would be

[8]thirty five thousand one hundred thirty six

[9]dollars.

[10]We do that three percent per year up

[11]until 2014. So that his earnings this year

[12]would have been thirty four thousand six hundred

[13]twenty two dollars if it were increased at three

[14]percent per year. For a total past loss in

[15]earnings of two hundred fifty five thousand two

[16]hundred seventy two dollars.

[17]Q In calculating the losses in the **[*13]** past

[18]and using that three percent increment to

[19]increase the amounts, is that a fair methodology

[20]that's used by economists in evaluating these

[21]types of cases and claims?

[22]A It's standard. So, it's what we use

[23]in our research as well when we're --we have to

[24]project earnings for people.

[25]Q In terms of calculating losses, you

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[1]

[2]just spoke in terms of losses of earnings in the

[3]past. Have you also done calculations of losses

[4]of earnings as it goes forward into the future?

[5]A Yes.

[6]Q Could you explain to the jury your

[7]analysis in that regard?

[8]A Yes.

[9]So, I talked about the past. What we

[10]would have to do, is now project into the future

[11]what his losses would be.

[12]His income loss would be over twenty

[13]three years into the future, until he reaches

[14]the age of sixty five.

[15]And again, we would grow it at a rate

[16]of three percent per year. And we would use

[17]what his current income loss would be of forty

[18]thousand seven hundred thirty two dollars per

[19]year.

[20]So, you could calculate that up until

[21]the age of sixty five, growing it at three

[22] **[*14]** percent per year.

[23]Q Just --that forty thousand number

[24]would be a number that if he's --that his

[25]earnings would have risen to from 2007 through

28

[1]

[2]present date, 2014, at this time?

[3]A Correct.

[4]Q Okay.

[5]In going forward and doing the

[6]calculations, until Mr. Donaldson was at age

[7]sixty five, where does that take us?

[8]A So, at age sixty five, then, he would

[9]live to the age of seventy six point one. If he

[10]had worked that entire period, he would be

[11]entitled to social security earnings.

[12]And so, we calculated the value of

[13]the social security benefits that he would have

[14]received if he had he continued to work. And

[15]that amounts to five thousand nine hundred

[16]eighty three dollars per year. That's what he

[17]would have gotten from social security.

[18]That we would grow for the eleven

[19]years between sixty five and his death. And at

[20]a rate of two point five percent --which is

[21]slightly lower than the wage growth --that's the

[22]rate that social security indexes to.

[23]Q Now, in terms of the losses, doctor,

[24]have you prepared a chart that demonstrates

[25]losses **[*15]** that were calculated for Mr. Donaldson?

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[2]And would be helpful if that was

[3]shown to the jury?

[4]A I believe it would be a nice summary

[5]for the jury.

[6]Q Okay. Very good.

[7]A Should I step down?

[8]Q Yes, doctor.

[9]Thank you.

[10](Whereupon the witness

[11]stepped down from the witness stand

[12]and approached the exhibit at this

[13]time.)

[14]A Should I just explain?

[15]Q Yes.

[16]Thank you.

[17]A Okay.

[18]So this really is just a summary of

[19]what I just said. It's probably useful for you

[20]to actually see the numbers.

[21]So as you could see, in 2008 the

[22]income loss is the six hundred fifty six dollars

[23]times fifty two. Which is the thirty four

[24]thousand one hundred twelve dollars.

[25]Growing it at the rate of three
30

[1]

[2]percent per year you could see it grows from

[3]thirty to thirty five, thirty six.

[4]And so in 2014, that thirty four

[5]thousand six hundred twenty two dollars is

[6]slightly lower because it's only up until

[7]September. And then we take the remainder of

[8]the year for 2014, and that would be part of the

[9]future **[*16]** income loss.

[10]So the value in 2014 of his full

[11]earnings would have been forty thousand seven

[12]hundred thirty two dollars if he had continued

[13]working since 2007. For a total income loss to

[14]be calculated over twenty three point fifteen

[15]years 'til he turns age sixty two.

[16]So if you want to go forward to the

[17]social security?

[18]Q Yes.

[19]Just give me one second.

[20]A Okay.

[21]So this is just a summary of what I

[22]had said about logs in social security income.

[23]So if you go to the social security

[24]website, they have a defined benefit plan where

[25]you could enter in the values of what he would

[31]

[1]

[2]have earned, and what his benefits would have

[3]been.

[4]So, his benefits would have been five

[5]thousand nine hundred eighty three dollars per

[6]year. He would get that for eleven years, until

[7]he turns the age of seventy six point one.

[8]And again the rate that the social

[9]security administration grows these pensions is

[10]two point five percent per year.

[11]Q Now doctor I know you touched on it a

[12]bit earlier with the three percent increase.

[13]But the concept of **[*17]** inflation, why and how is

[14]concept of inflation intertwined with the

[15]projection and analysis that you do here?

[16]A So, I had mentioned the words

[17]purchasing power before. Because prices rise

[18]regularly over time. That's what the inflation

[19]rate measures. Is you take a bundle of goods,

[20]and you put the price level in 1984. And you

[21]see how much the --that bundle of goods would

[22]cost today.

[23]And on average that has been going up

[24]about three percent per year as well.

[25]Wages --in order to be competitive

[32]

[1]

[2]for good workers, wages grow, as well.

[3]Employers want to be able to attract good

[4]workers. So, they--the wage rate goes up.

[5]It doesn't mean that people are

[6]better off. It means that they able to absorb

[7]to price increases.

[8]So, a slice of pizza back when I was

[9]a teenager was about fifty cents a slice. It's

[10]about two dollars a slice now.

[11]That's an example of how if you're

[12]spending money on pizza you're purchasing power

[13]has declined. As so your wages go up to reflect

[14]that.

[15]Q As part of the analysis that you do,

[16]you told us you were looking at Mr. **[*18]** Donaldson's

[17]earnings from winter brothers at that time. I

[18]want you assume for purposes of this question,

[19]that Mr. Donaldson's employment history prior to

[20]that time, was a bit erratic -- to use that

[21]term -- until he found himself over at Winters

[22]Brothers.

[23]Just based upon what --what --where

[24]he was at Winter Brothers, the earnings that he

[25]was receiving at that time -- in other words,

33

[1]

[2]how if at all does that information merge into

[3]your analysis that he would be earning six

[4]hundred fifty six dollars, and the assumptions

[5]that he would continue to work in that capacity?

[6]A So, I do like to look at --what we

[7]typically use is the last earnings. And again,

[8]what I had said earlier, is what we want is an

[9]estimate of his potential earnings.

[10]And so, the fact he landed a job at

[11]this rate suggests that that's what he is

[12]capable of earning on the labor market. But

[13]because I didn't have a lot of history from Mr.

[14]Donaldson I did also compare what he would have

[15]gotten compared to the averages, and the general

[16]population.

[17]So I took a couple of others average

[18]income **[*19]** values to see if this was within a

[19]reasonable degree of economic certainty. And

[20]what I used, was on one end the minimum wage.

[21]And on the other end, average of what full-time

[22]workers earn with a high school diploma. Males

[23]with a high school diploma.

[24]If you use the minimum wage, it's

[25]about seventeen thousand per year. Which is

[34]

[1]

[2]about half of what we're using.

[3]If you use the average earnings for

[4]all male workers with only high school

[5]graduates, they earn about forty three thousand

[6]a year on average. And that includes part-time.

[7]If you look at only full-time it goes up to

[8]about forty seven thousand dollars per year.

[9]So, the thirty four thousand that we

[10]began with, is within a reasonable degree of

[11]economic certainty.

[12]Q Okay. Thank you, doctor.

[13]If you could return to the stand?

[14]A Sure.

[15](Whereupon the witness THE

[16]resumed the witness stand at this

[17]time.)

[18]THE COURT: As soon as Rob gets

[19]back we will turn the lights back on.

[20]THE COURT OFFICER: I'll get

[21]them.

[22]MR. Bithorn: Thank you.

[23]Q Doctor, just -- at this point **[*20]** would

[24]you be kind enough to summarize the final

[25]amounts that were reflected for the losses of

35

[1]

[2]each of the categories that were calculated?

[3]That being the past losses with

[4]regard to earnings. Future losses concerning

[5]earnings. And then the social security amounts

[6]that you had calculated the losses with social

[7]security retirement income?

[8]A Sure.

[9]So the past earnings that we know

[10]definitively if we use the starting rate of

[11]thirty four thousand one hundred twelve dollars,

[12]is two hundred fifty five thousand two hundred

[13]seventy two dollars in past income loss.

[14]The future income loss then would

[15]commence with forty thousand seven hundred

[16]thirty two dollars this year, and continue until

[17]age sixty five growing at a rate of three

[18]percent per year.

[19]For the loss in social security

[20]retirement income, based on the social security

[21]administration numbers, we would use five

[22]thousand nine hundred eighty three dollars per

[23]year beginning at the age sixty five. And would

[24]grow until he turns seventy six point one at a

[25]rate of two point five percent per year.

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[1]

[2] **[*21]** Q Okay.

[3]The second amount; the future income

[4]loss that you had indicated, you said starts at

[5]about forty thousand, and it goes forward for

[6]how many years?

[7]A Twenty three point one five.

[8]Q And if Mr. Donaldson had worked less

[9]years that would be a calculation that the jury

[10]could make on their own --in their own

[11]determinations?

[12]And if he worked more years, that's a

[13]calculation that they could make on their own

[14]determination?

[15]A That's correct.

[16]Q Okay.

[17]You are working off of testimony and

[18]the estimates that you have?

[19]A For age sixty five.

[20]Yes.

[21]Q Yes.

[22]Okay. Doctor, is your testimony

[23]regarding the losses that you've indicated here,

[24]is it based upon a reasonable degree of economic

[25]certainty; the calculations amounts and analysis
37

[1]

[2]that you provided here?

[3]A Yes.

[4]Q Are you being compensated for your

[5]time that you spent in analyzing this data, as

[6]well as for your time spent in court here this

[7]morning?

[8]A Yes.

[9]Q And by the way, doctor, after you

[10]leave here -- court this morning, **[*22]** where are you

[11]headed?

[12]A To be in a classroom at 12:00 at

[13]Stony Brook.

[14]Q Okay.

[15]Teaching?

[16]A Yes.

[17]Q What is your rate compensation

[18]doctor?

[19]A Four thousand dollars.

[20]Q Okay.

[21]And have you provided economic

[22]calculations to juries in other cases where

[23]individuals have been injured, where my firm

[24]Duffy and Duffy represented the injured party?

[25]A Yes.

38

[1]

[2]Q Okay.

[3]Thank you, doctor?

[4]A Thank you.

[5]THE COURT: Mr. Rainis?

[6]MR. RAINIS: Thank you.

[7]CROSS-EXAMINATION BY MR. RAINIS:

[8]Q Good morning, doctor.

[9]A Good morning.

[10]Q Doctor, how many times have testified

[11]in court providing estimates of economic loss

[12]like you're doing today?

[13]A A couple of dozen.

[14]Q So is that about twenty five times --

[15]A Yes.

[16]Q --approximately?

[17]And how many times in 2014?

[18]A Probably about eight.

[19]Q When was the last time that you

[20]testified in court?

[21]A I believe it was August.

[22]Q When is the next time you're

[23]scheduled to testify?

[24]A I don't **[*23]** have one scheduled.

[25]Q Okay.

39

[1]

[2]And you gave your estimates in Court

[3]today based on economic certainty; correct?

[4]A Yes.

[5]Within a reasonable degree.

[6]Q Okay.

[7]And you've conceded in Court before

[8]that economic certainty is different from actual

[9]certainty; correct?

[10]A Yes.

[11]Q Okay.

[12]And your economic analysis assumes

[13]that Mr. Donaldson is totally disabled from any

[14]employment; correct?

[15]A Correct.

[16]Q And that he can't perform any other

[17]kind of work at the present time; true?

[18]A I'm not an expert to be able to

[19]assess that. I'm just giving the value of

[20]damages if he's found not able to work.

[21]Q Okay.

[22]So if he's able to work in some

[23]capacity, the damages would be different --less

[24]than what you've told us about this morning;

[25]correct?

40

[1]

[2]A Correct.

[3]Q For example, if he could get another

[4]job making roughly--essentially the same salary

[5]he had been making when he was hurt, the damages

[6]would be zero; correct?

[7]A Correct.

[8]Q Now, economists don't know what's

[9]going **[*24]** to happen in the future; do they?

[10]A Not with certainty.

[11]Q Okay.

[12]And for economists, the only way they

[13]could predict the future with reasonable

[14]economic certainty, is to look at the past;

[15]correct?

[16]A Yes. Correct.

[17]And current conditions.

[18]Q Right. The past.

[19]And that's what you did here in

[20]selecting a growth rate; correct?

[21]A Correct.

[22]Q And so, what you did, was you looked

[23]back twenty years. And the growth rate --and

[24]I'm making this up because I don't know --but it

[25]was four percent this year, and it was five

[41]

[1]

[2]percent this year, and it was one and a half

[3]percent this year, and it was--whatever it went.

[4]And you're saying that it averaged over the past

[5]twenty years about three percent; correct?

[6]A Correct.

[7]Q And that's because looking at the

[8]past in economics is the best way to predict

[9]what's going to happen in the future; correct?

[10]A Correct.

[11]Q Now, in looking at Mr. Donaldson's

[12]work history, you only --instead of looking

[13]twenty years back to predict the future, you

[14]looked at the last nine days of **[*25]** that twenty

[15]years; correct?

[16]A Correct.

[17]Q Okay.

[18]And by looking at only that last nine

[19]days you're able to with reasonable economic

[20]certainty predict what he would have earned over

[21]the remainder of his life; is that what you're

[22]telling us?

[23]A What I did, was I took what his

[24]earnings capacity was, and projected that

[25]forward understanding that that was what he

[42]

[1]

[2]earned at the time of the injury. Which means

[3]that's what he's capable of earning.

[4]But that's why I also looked at what

[5]the averages were for someone with a high school

[6]graduate --a male high school graduate.

[7]Q But in terms of making --you talked

[8]about people who --I'll withdraw the question.

[9]Part of what economists do --you

[10]explained-- was determine how people make

[11]decisions; correct?

[12]A Correct.

[13]Q So, some people might decide to work

[14]to their economic capacity all the time;

[15]correct?

[16]A Correct.

[17]Q Other people might decide for

[18]whatever reason, not to work to their economic

[19]capacity; correct?

[20]A Correct.

[21]Q And if you looked at Mr. **[*26]** Donaldson's

[22]work history, did you make any determination as

[23]to whether he is the type of person who works to

[24]his economic capacity, or does not do that?

[25]MR. BITHORN: Objection.
43

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[2]THE COURT: Overruled.

[3]THE WITNESS: What does that

[4]mean?

[5]THE COURT: You could answer.

[6]Q Did you make that determination?

[7]A I'm sorry. I forgot the question.

[8]Q Sure. I'll rephrase it, or

[9]something.

[10]THE COURT: You want it back?

[11]MR. BITHORN: Yes.

[12]If you would?

[13]Thank you.

[14]THE COURT: Linda?

[15]Thank you.

[16]THE COURT REPORTER: Sure.

[17](Whereupon the Court

[18]reporter read back the last question

[19]at this time.)

[20]A So, I did look at his --

[21]Q That's a yes or no question.

[22]You either made that evaluation, or

[23]you did not.

[24]A It's not a yes or no to me. So, I

[25]will say yes.

44

[1]

[2]Q So, based upon his work history, in

[3]your estimation was he someone who worked to his

[4]economic capacity?

[5]A I don't observe it.

[6]What I assert from looking at his

[7]transcript, and what I've been **[*27]** told, is he was

[8]trying to start his own business. So, I don't

[9]observe the effort that went into that.

[10]What I do --we go historically when I

[11]look at the economy as a whole -- because that's

[12]a very good indication of a business cycle, and

[13]what will happen in the future. When you're

[14]looking at a --the value of a person's work,

[15]what you're trying to get at, is the value of

[16]his work over his lifetime, and what he's

[17]capable of. And so it is pretty standard to use

[18]the last earnings.

[19]But this case was unusual, because

[20]there were only ten days of his employment on

[21]that job. Which is what I was trying to get at

[22]within a reasonable degree of economic

[23]certainty, and went to the averages. The

[24]national statistics.

[25]Q Understood.

[45]

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[2]So -- so you can't say with a

[3]reasonable economic certainty that he would have

[4]stayed at Winter Brothers job he had only had

[5]for nine days; correct?

[6]A Correct.

[7]MR. BITHORN: Objection.

[8]THE COURT: Wait. There's an

[9]objection.

[10]MR. BITHORN: That's part of the

[11]economic analysis.

[12]I have an objection.

[13] **[*28]** THE COURT: Could I have the

[14]questions read back?

[15]THE COURT REPORTER: Sure.

[16](Whereupon the Court

[17]Reporter read tack the last question

[18]at this time.)

[19]THE COURT: Overruled. The

[20]answer stands.

[21]You answered that question

[22]already.

[23]MR. RAINIS: Yes. She did.

[24]Q Now -- and the only earnings document

[25]you looked at, was his W-2 form for the nine
46

[1]

[2]days he worked; correct?

[3]A Correct.

[4]Q And there are things that are

[5]available to you, that would show you the --his

[6]earnings over his employment lifetime, up until

[7]the day of his accident; correct?

[8]A Correct.

[9]Q And did you review any of those

[10]documents?

[11]A I didn't review the actual tax

[12]statements. But I did request the information

[13]from the law firm.

[14]And I did get that.

[15]Q You got that information?

[16]A Yes.

[17]Q But you didn't look at it?

[18]A I did look at it.

[19]Q So, you're aware of his earnings for

[20]the twenty years preceding his accident?

[21]A That's correct.

[22]Q But you didn't take that into account

[23]in predicting the lost **[*29]** earnings into the future;

[24]correct?

[25]A I did.

47

[1]

[2]It's not correct.

[3]Q The nine days that Mr. Donaldson

[4]worked for Winter Brothers, were the nine --were

[5]the nine days that he made the most money in his

[6]life; correct?

[7]A Correct.

[8]Q And you --having looked at his

[9]employment history, you're aware that there were

[10]many years where he didn't work at all; correct?

[11]A There was always some earnings, I

[12]thought.

[13]Q Well, let's say --there were years

[14]where he made less than five hundred dollars a

[15]year.

[16]A Correct.

[17]Q And there were multiples of those;

[18]correct?

[19]A Correct.

[20]Q And over the twenty years, there were

[21]thirty eight different employers he had;

[22]correct?

[23]A I didn't count them.

[24]Q Do you dispute that?

[25]A No.

48

[1]

[2]Q Okay.

[3]And did you factor in the man --I'll

[4]withdraw the question.

[5]Now, you chose a retirement age of

[6]sixty five you told us; correct?

[7]A Correct.

[8]Q And you chose that, you said based

[9]upon eligibility for social security and what

[10]Mr. **[*30]** Donaldson said?

[11]A Mainly what Mr. Donaldson said.

[12]Q Where did he say that?

[13]A It was in the transcript.

[14]Q So, sometimes --and you have no way

[15]of knowing whether that's an accurate date that

[16]he would continue to work to, or it would be

[17]inaccurate; correct?

[18]A That's correct.

[19]Q And as an economist, you use life

[20]expectancy statistics to determine Mr.

[21]Donaldson's life expectancy; correct?

[22]A Yes.

[23]Q And you used consumer price index

[24]statistics to determine the inflation rate;

[25]correct?
49

[1]

[2]A Correct.

[3]Q And --but you didn't use statistics

[4]that are available and published to determine

[5]his work life expectancy; did you?

[6]A There is --

[7]Q Did you use those statistics?

[8]A There are none as far as I know.

[9]Q There are no work life expectancy

[10]statistics, or tables?

[11]A There are.

[12]Excuse me.

[13]Q Did you use those?

[14]A No.

[15]Q Now -- and in fact, the bureau of

[16]labor statistics life expectancy tables for

[17]male--males who are currently forty one year old

[18]high school graduates, is for **[*31]** another twenty

[19]years or until age sixty one not until age sixty

[20]five; correct?

[21]A Correct.

[22]But it's growing.

[23]Q So, statistically Mr. Donaldson would

[24]only work to age sixty one; correct?

[25]A No.
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[1]

[2]So statistically --the numbers that I

[3]have looked at recently, are more like sixty two

[4]to sixty four. But, off the top of my head

[5]whether that varies for someone of his birth

[6]cohort and gender, I'm not sure.

[7]What I do know as an expert in this

[8]area, because I do research in this area, is

[9]that the expected retirement age is growing.

[10]So that people who are forty today--I

[11]mean people who are retiring today, are not

[12]behaving exactly the same way as someone who's

[13]retiring into the future.

[14]What we tend to use, are the standard

[15]normal ages of retirement under the social

[16]security system. Which would be sixty seven for

[17]Mr. Donaldson.

[18]Q Now, you talked about a loss in

[19]social security retirement benefit. You came up

[20]with a number of five thousand.

[21]I wrote it down somewhere.

[22]THE COURT: Nine eighty three.

[23]Q Five thousand **[*32]** nine hundred eighty

[24]three dollars.

[25]A Yes.

[51]

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[2]Q Explain to the jury how you

[3]calculated that number.

[4]A So, the social security

[5]administration is pretty rich in its resources

[6]to be able to go and enter --there's a formula.

[7]So, I know --

[8]Q What is that formula?

[9]That's what I want to know.

[10]A So, it's the --based on the --you

[11]take the last ten years of your highest

[12]earnings. So what we would do, is take the last

[13]ten years prior to sixty five.

[14]So age fifty five to sixty five; take

[15]the average of those earnings, and enter into a

[16]formula that the social security administration

[17]provides. And it gives you what your monthly

[18]benefit would be.

[19]Q What was the amount you entered into

[20]that formula?

[21]A So, it would be up in the upper forty

[22]thousand rage, annually.

[23]So, that's based on --if you project

[24]--which my understanding is we don't reveal

[25]those numbers here-- so if you project the forty

[52]

[1]

[2]thousand seven hundred thirty two dollars that

[3]he would currently be earning now, to when he

[4]turns age fifty five, and **[*33]** then average that ten

[5]yearss, that's what you would use as your

[6]primary income amount for the formula.

[7]Q And then what is the formula that

[8]that number is used --so, how do you get from

[9]that number to the fifty nine hundred eighty

[10]three dollars?

[11]A It's a fairly complex calculation.

[12]So I --off the top of my head I wouldn't do it.

[13]But-- I couldn't do it.

[14]But, I could --

[15]Q Do you know what it is; how you make

[16]that calculation?

[17]A I do.

[18]Q What is it?

[19]A It's a percentage. So you take that

[20]average.

[21]I actually don't recall off the top

[22]of my head. I'm not actually that good with

[23]remembering formulas. I have to go back to my

[24]computer and calculate it.

[25]Q You knew you were coming into the
53

[1]

[2]Court today to testify about lost social

[3]security, or claims of lost social security

[4]earnings; correct?

[5]You knew that?

[6]A Yes.

[7]Q But you didn't refamiliarize yourself

[8]with the formula of how you calculated that

[9]number?

[10]A So, it is a defined benefits plan.

[11]So you take something like forty five thousand

[12] **[*34]** dollars, which is what he would have been

[13]earning. And there is a percent of that that

[14]would be used to calculate. And I don't

[15]remember the percent of that. But it must be

[16]somewhere along ten percent.

[17]Q That's because roughly ten percent of

[18]forty five is five thousand nine hundred?

[19]Actually, a little more than that?

[20]A Right.

[21]Q That's --but you don't know for sure

[22]how you got those number?

[23]A I'm confident the number is correct.

[24]I couldn't reproduce it for you right

[25]now.

54

[1]

[2]Q Thank you?

[3]MR. RAINIS: That's all I have.

[4]THE COURT: Mr. McNamee?

[5]MR. MCNAMEE: No questions, your

[6]Honor.

[7]THE COURT: Redirect.

[8]MR. BITHORN: Thank you, your

[9]Honor.

[10]REDIRECT EXAMINATION BY MR. BITHORN:

[11]Q Doctor, just a couple of items.

[12]The determination that you were

[13]making regarding Mr. Donaldson's ability to go

[14]back and work nowadays, Mr. Rainis had asked you

[15]some questions on that subject.

[16]You're not a physician; am I correct?

[17]A Correct.

[18]Q Are you relying upon information

[19]concerning his level **[*35]** of injury based upon what's

[20]been provided in this Court by a board certified

[21]orthopaedic physician?

[22]A Correct.

[23]Q And if there are records in this case

[24]that this jury will have available to them, and

[25]presented to them that talk about the level of
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[2]injury for Mr. Donaldson indicating the severity

[3]of it is making him unable to continue to work,

[4]that would be something that would be supportive

[5]of your position also that he can't work going

[6]forward; correct?

[7]A Correct.

[8]Q You also were asked some questions

[9]about work history. And you were asked about

[10]the fact that --the length of time Mr. Donaldson

[11]was with Winter Brothers.

[12]Counsel asked you that --you can't

[13]say whether he would have stayed at winter

[14]brothers; correct?

[15]A Correct.

[16]Q In fact you can't say whether he

[17]would have left winter brothers, and went on to

[18]find a job that would have been paying him even

[19]more money than Winter Brothers; isn't that

[20]true?

[21]A That's true.

[22]Q And he -- counsel had asked you

[23]whether or not the job that he had at Winter

[24]Brothers was the **[*36]** most he earned in his lifetime

[25]in terms of a well paying job for him in that

[56]

[1]

[2]regard.

[3]Remember he asked you that question?

[4]A Yes.

[5]Q To the extent that this was a --the

[6]most pay that Mr. Donaldson was seeing in terms

[7]of his work history, is it fair to infer that

[8]for Mr. Donaldson, this was a job that he would

[9]have continued, given the fact that he was

[10]making more money than he ever made in his

[11]lifetime?

[12]A It's likely.

[13]I mean, it just seemed like that made

[14]sense to me. That he was trying things. And

[15]then found a job that looked more secure.

[16]Can I say with certainty whether he

[17]would have stayed there? No.

[18]But what I do know, and what

[19]economists do, is this is the kind of job that

[20]he was capable of getting. And the averages

[21]support that. That for someone with his skill,

[22]the averages are in the mid forties.

[23]So we gave him mid thirties.

[24]Q Okay.

[25]You actually went, and you made it a
57

[1]

[2]a lesser number --withdrawn.

[3]You were asked some questions about

[4]using work life statistics. Mr. Rainis asked

[5]you. **[*37]** And you had talked about what you used to

[6]calculate the projection of future loss in

[7]earnings.

[8]Mr. Rainis asked you about retirement

[9]ages of age sixty one.

[10]Do you recall that?

[11]A Yes.

[12]Q You didn't use sixty one in your

[13]analysis here; is that correct?

[14]A That's correct.

[15]Q By the way, with regard to trends

[16]concerning someone's need to work in the future,

[17]given the state of the economy how it's been

[18]over the past ten plus years, has there been a

[19]trend where people have been working to more

[20]advanced ages?

[21]MR. RAINIS: Objection.

[22]THE COURT: Give me --

[23]MR. RAINIS: I could just ask the

[24]tail of it.

[25]THE COURT: Give me grounds.
58

[1]

[2]So, the question is withdrawn?

[3]MR. BITHORN: Yes.

[4]THE COURT: Give me the tail.

[5]MR. BITHORN: Sure.

[6]Q What has the trend been with respect

[7]to individuals-- the need for individuals of

[8]more advanced years to continue working into the

[9]future?

[10]A So, the trend has been, people may

[11]report they wanted to retire earlier. They

[12]retire later than they were planning. **[*38]**

[13]Sixty one is prior to the earliest

[14]age of collecting social security benefits.

[15]So if your primary pension is coming

[16]from the government, it's not likely that you

[17]would retire before the age of sixty two. That

[18]is the earliest age you could take up benefits.

[19]Q Okay.

[20]Thank you, doctor.

[21]MR. BITHORN: No further

[22]questions.

[23]THE COURT: Mr. Rainis?

[24]MR. RAINIS: Yes.

[25]Sorry. Just a couple.

59

[1]

[2]Q You said that your projections about

[3]lost income in the future were based upon the

[4]testimony of a physician in this courtroom.

[5]I want you to assume that that

[6]physician said that Mr. Donaldson can work in

[7]more sedentary work. Not truck driving.

[8]You didn't factor that into your

[9]calculations; correct?

[10]A Correct.

[11]Q And --

[12]MR. BITHORN: That's all I have.

[13]Thank you.

[14]THE COURT: Mr. McNamee first.

[15]MR. MCNAMEE: No questions, your

[16]Honor.

[17]MR. BITHORN: Just one.

[18]Q Doctor, I want you to assume that the

[19]transcript of the testimony of the physician who

[20]testified on Friday in this case, **[*39]** doctor

[21]Hermele, has no question whatsoever that used

[22]the word sedentary in it as counsel had just

[23]asked you a question asking you about doctor

[24]Hermele and sedentary. And I want you to assume

[25]for purposes of this question, that doctor
60

[1]

[2]Hermele in fact was asked the following question

[3]and gave the following answer at page forty

[4]four.

[5]"When you look at the injuries that

[6]Mr. Donaldson has suffered with, do you have an

[7]opinion as to whether those injuries negatively

[8]impact upon his ability to be gainfully

[9]employed?" Answer, "yes." Question, "And does

[10]it?" Answer, "I have not examined the patient.

[11]But from his records that I looked at, I don't

[12]see how he could physically return to the prior

[13]occupation as a truck driver, or any labor

[14]intensive similar job."

[15]Did you --in calculating, or in

[16]making the assumptions that you made in this

[17]case, did you take that into consideration that

[18]this gentleman; a high school graduate, no

[19]further training beyond that, with this injury,

[20]would be incapable of pursuing further

[21]employment in a similar capacity as was

[22]testified to? **[*40]**

[23]A Honestly, when I calculate these

[24]damages -- because I'm not a vocational expert

[25]or a physician -- I don't consider what type of

[61]

[1]

[2]employment he's capable of. I'm not aware of

[3]that, given my expertise.

[4]So, I calculate --all of my numbers

[5]hinge on this is what the damages would be if he

[6]could no longer work.

[7]Q That item would be a consideration

[8]for the jury to make in this case, as far as

[9]--well, withdrawn.

[10]Thank you, doctor.

[11]MR. RAINIS: No questions.

[12]MR. MCNAMEE: No questions.

[13]THE COURT: Doctor, you're

[14]excused.

[15]Thank you for coming in.

[16]THE WITNESS: Thank you.

[17](Witness excused)

[18]THE COURT: Mr. Bithorn?

[19]MR. BITHORN: Could we have a

[20]short recess?

[21]THE COURT: Let's take ten.

[22]Everybody could stretch. Don't

[23]discuss the case.

[24]We'll get in here as quickly as

[25]possible.

End of Document