

Anthony Gamboa's Criticism of Thomas R. Ireland's Criticism of the Lack of Merit of Gamboa-Gibson Disability Worklife Expectancy Tables

Thomas R. Ireland

Introduction

Anthony M. Gamboa submitted his critique of my paper on "Why the Gamboa-Gibson Disability Work-Life Expectancy Tables Are Without Merit" to *The Rehabilitation Professional*, not the *Journal of Legal Economics* (JLE), where my paper was published in the May 2009 issue (Ireland 2009b). I assume that Gamboa submitted his paper to *The Rehabilitation Professional* because he did not think there was a significant chance that his paper would have been accepted by the *Journal of Legal Economics*. However, I also assume that his intent was to make it appear that there is an intellectual debate about the underlying issues and wanted to have a publication he could point to that could be used to reduce the impact of my earlier paper in cases where my earlier paper is introduced into litigation. His two primary criticisms, as stated in the first paragraph of his paper (p. 127) are that my opinion:

mistates the significance of reduced employment levels for persons with a disability and ignores the numerous court decisions upholding the use of the use of the Gamboa-Gibson tables (The Tables), the government data, and the methodology employed in assessing earning capacity loss for persons with a disability.

In this note, I address problems with those criticisms and other statements made in his paper.

Did Ireland Misrepresent the Significance of Disability in Assessing Lost Earnings?

My JLE 2009 paper does not discuss the general significance of disability in assessing the lost earnings of disabled persons who retain residual earning capacity. Therefore, it is simple and obvious to point out that I did not "misrepresent the significance of reduced employment levels for persons with a disability (sic)." Since there was no discussion of the significance of reduced employment levels for persons with disabili-

ties in my JLE 2009 paper, there cannot have been any misrepresentation. My paper was devoted exclusively to what was wrong with the Gamboa-Gibson disability worklife expectancy tables that made use of those tables inappropriate. There is also no discussion of the significance of reduced employment levels for persons with disabilities in *The New Worklife Expectancy Tables* (2006 or any of the earlier versions of the tables). The issue I discussed in JLE 2009 is whether any of the tables contained in *The New Worklife*

Expectancy Tables should be used to evaluate earnings losses of a specific plaintiff who has been injured and may have reduced worklife in residual employment after his or her injury. While my JLE 09 paper said nothing about this issue, my opinion about the likelihood of damages is not different from other economists. There may well be losses in both earnings and in post-injury worklife as the result of a permanent injury, but the Gamboa-Gibson disability worklife expectancy tables have no merit as a way to make that evaluation.

So Gamboa's first major criticism has no merit. It is simply wrong. While not covered in my JLE 2009 paper, it is my opinion that disability can have an enormous impact on whether or not a worker has residual earning capacity, how much income an individual can earn in residual employment and how long an individual might be expected to be able to continue to work in residual employment. In many of the cases I have worked on over the years, individuals have been rendered by injury to be totally disabled from any future labor market employment. It does not get more "significant" than that.

Does Court Acceptance of the Gamboa-Gibson Tables Create Merit?

Gamboa's second major criticism of my JLE 2009 paper is that my paper "ignores the numerous district court and appellate court decisions upholding the use

of the Gamboa-Gibson tables.” Gamboa is technically correct. I did not consider any legal decisions in my JLE 2009 paper. In that sense, I “ignored” them. However, my paper was not intended to address legal decisions nor to make legal arguments. My paper was designed to do exactly what its title suggested it was going to do. Its purpose was to demonstrate why the Gamboa-Gibson disability worklife expectancy tables have no merit. So this Gamboa criticism is also misdirected. Since the paper wasn’t about legal decisions and I did not talk in the paper about legal decisions, it is not much of a criticism to point out that I “ignored” legal decisions. Implicitly, however, this criticism raises the interesting and relevant question: Why, if the Gamboa-Gibson tables are so flawed, have they not been successfully barred in hearings that followed motions in limine to preclude testimony based on those tables? Even though that question was not considered in my JLE 2009 paper and would have been inappropriate in the context of that paper, it is at least a question that is worthy of being addressed.

The Gamboa-Gibson work-life expectancy tables have been challenged in a number of motions in limine. To the best of my knowledge, no challenge that was based strictly on the tables themselves has been successful. While experts who were using the Gamboa-Gibson tables have sometimes been precluded from testifying, flaws in the tables themselves were not the basis for precluding those experts from testifying. It is therefore fair to assume that decisions that have banned testimony because that testimony was based on the Gamboa-Gibson tables do not exist. Many of the challenges and results of the challenges have been posted at the Vocational Economics website. Refusal to bar testimony based on the Gamboa-Gibson tables, however, does not establish the merit of the tables. Use of most worklife expectancy tables have not been challenged in motions in limine. The number of challenges to the Gamboa-Gibson worklife expectancy tables speaks to their lack of credibility, even given that the challenges have not been successful. The only challenges to worklife expectancy tables other than the Gamboa-Gibson tables that I am aware of are challenges to the railroad worklife expectancy tables that Charles Scherfy produced for American Association of Railroads for a number of years and challenges to the Camus study of the worklife expectancy of oilfield workers. The Sherfy tables, which were never published other than through distribution by the defense railroad bar, had special problems that related both to the method used to compile them and unique features such as the lack of consideration of post-railroad employment in other industries by railroad workers and so forth. Work by Skoog and Ciecka (2006) has since replaced the Sherfy tables as tables being used in litigation involving railroad worklife expectancy. However, I am not aware of any reported decisions that

specifically barred testimony based on the Sherfy tables.

The sole instance of testimony based on a specific worklife expectancy table being barred was in the case of *Marcel v. Placid Oil Company* (1994). In that decision, Kenneth Boudreaux, the economic expert for the defense, was not permitted to provide testimony based on a study of worklife expectancies of oil field workers based on what was called “the Camus study,” which had been performed by Richard Camus & Associates. Oilfield workers have very short worklives within that profession, but earn very high incomes because of the dangers involved. In that decision, the 5th Circuit said:

In presenting the testimony of Dr. Boudreaux, Placid did not tender any evidence comparing the worklife in the oilfield with the national average or with the worklife in any other occupation. Without some indication of how oilfield worklife differs from that of other occupations, however, there are several bases upon which the district court could have excluded the evidence, for example a finding that the probative value of the Camus study did not outweigh the prejudice of its admission or that it was not sufficiently reliable in the present context. Upon the record before us, we cannot hold that it was an abuse of discretion to exclude the tendered evidence.

The 5th Circuit also noted in a footnote that “Plaintiffs contend that Placid failed to preserve this issue for appeal because it did not proffer either the Camus study or the testimony of Dr. Boudreaux.” This decision was also cited in *Jack v. Schlumberger Technology Corp.* (2008). In that case, the defense did not oppose the exclusion of testimony based on the Camus study.

When economic testimony has been barred, the reasons have generally been either: (1) that the concept itself is being rejected, such as with hedonic damages testimony about which most judges understand that loss of enjoyment of life cannot be measured by any scientific process; or (2) that the underlying theory of damages is so highly speculative that an economic expert’s report bears little relationship to reality. In *Joy v. Bell Helicopter Textron, Inc.* (1993), Dr. John Glenie had projected four earnings loss scenarios for the decedent, Mr. Joy. Tax returns indicated that prior to his death, Mr. Joy and his wife operated a toy store and had reported \$14,680 on his tax returns, with an equal amount reported by his wife. The lowest of four future earnings rates used for future projections was \$35,907, with values ranging up to \$97,536 based on a consulting career Mr. Joy had mentioned thinking about on one occasion. The court found all of Dr. Glenie’s projections speculative and did not allow him to testify. The Gamboa-Gibson tables are a form of worklife expectancy tables, the majority of which are admissible in courts of law. Further, the argument that an individual’s worklife expectancy may have

been reduced by a permanent injury is an argument that most economic experts would acknowledge. The problem with the Gamboa-Gibson disability worklife expectancy tables is that they are not reliable, not that they represent an unusual concept that defies common sense or that results based on the tables are totally implausible on their surface as in the *Joy* case. As a result, judges have been content to let the issues be fought out during cross examination.

Defending Against Use of the Gamboa Tables

Testimony based on the Gamboa-Gibson tables should be barred because of the lack of scientific merit in the construction of the tables. I am willing to issue affidavits in support of such motions in limine. However, motions in limine are not necessarily the right way to deal with testimony based on the Gamboa-Gibson tables. Since Gamboa and other persons using the Gamboa disability worklife tables are likely to be on the plaintiff side, challenges to such testimony will usually come from the defense side. Using cross examination to deal with a weak economic expert present testimony is often better than barring testimony from that expert. In my JLE 2009 paper, I raised three issues, each of which is powerful enough if presented properly to discredit a plaintiff expert who uses the Gamboa-Gibson disability worklife expectancy tables. However, the first two issues are unnecessary. The data relied upon is not designed to measure disability as it would affect worklife expectancy. The LPE method is not an appropriate method for developing worklife expectancy data even if the underlying survey data was appropriate. However, both of those arguments can be dropped, placing exclusive reliance on the third criticism that even appropriate data combined with an appropriate method would still produce worklife expectancy tables that would have no relevance to the facts of the current case.

Arguing about the specific definition of disability or work disability or which questions on which surveys are most important should not be the focus of defending against use of the Gamboa-Gibson worklife expectancy tables. The focus should be on the specific disabling condition that affects the specific plaintiff in the case. The question is not, as Gamboa argues in his response to my paper (page 133), whether “persons with a disability, on average, regardless of how disability is defined, enjoyed the same levels of employment as persons without a disability.” The relevant questions are whether the specific plaintiff in current case with the specific disability that plaintiff now has as a result of the injury at litigation in the current case will have a reduction in his or her rate of earnings and whether he or she will have a reduction in his or her worklife expectancy. The first of those questions falls within the purview of a legitimate vocational expert who uses the techniques of vocational/rehabilitation

analysis to determine what employments are now available to the plaintiff and what the plaintiff is likely to earn in the future.

The second question about whether the plaintiff will have a reduction in worklife expectancy does not hinge on whether disabled persons, on average, regardless of how one defines disability, will have shortened worklife expectancies. The second question depends on whether this specific plaintiff with this specific disabling condition will have a shorter worklife than if the injury had not occurred. What might be true of the average for the category of persons who meet the disability definition used to define the category does not matter and is irrelevant. The question that matters is about this person with this disabling condition who was in the particular occupation he or she was in before the injury.

Gamboa is correct when he points out in his response to my JLE 2009 paper that such data are nonexistent. Each disability circumstance is unique. Lumping all persons who meet a definition for disability together and observing that reductions in worklife expectancy for the group as a whole serves no useful purpose. Gamboa used one of my favorite examples in his response to my JLE 2009 paper. He pointed out (page 129) that a concert pianist, or court reporter, who loses an index finger would be likely to identify that loss as implying having a work disabling condition, but not an opera singer or rehabilitation counselor. (I would have used a little finger and limited my example to a concert pianist.) It is very likely that loss of any finger would mean the loss of employment as a concert pianist with a top concert orchestra. Probably there would be a corresponding earnings loss between that employment and the injured persons best remaining opportunity for residual employment. However, it would not mean that the concert pianist would have a reduced worklife expectancy in whatever occupation he or she chose to replace being a concert pianist. As a music teacher after his or her injury, there is no reason to think that he or she will not be able to work as many years as before the injury, albeit at lower pay.

Pointing out facts like these is how the lack of merit of the Gamboa-Gibson worklife expectancy tables can best be shown. In some instances, the defense may be happy to allow use of the Gamboa tables because the particular circumstances of the disabled worker suggest that he or she would not work as long as the Gamboa (incorrect) averages would suggest. When the Gamboa tables do not favor the defense, there will be specific facts that show why the disabled person is not likely to have a shortened worklife expectancy in the post injury occupation. In Ireland (2009a), I have discussed how an economic expert can present calculations to a jury that will be helpful when the degree of reduction in worklife expectancy in residual employ-

ment is uncertain. Motions in limine are most useful when jurors may not be able to understand the underlying scientific issues. As my papers have suggested (Ireland 2009a and 2009b), worklife expectancy is not, at its core, a complicated question. Disabling conditions may or may not reduce worklife after an injury. In each case where such a possibility exists, there will be specific facts that can be and should be explored. The fact that the Gamboa-Gibson tables based on self-identified disability definitions do not automatically apply to a given disability circumstance can be demonstrated fairly easily to a jury. A defense attorney who has been well prepared by an economic expert to understand the basic issues should be able to defend against use of the Gamboa-Gibson worklife expectancy tables by pointing out that the tables do not apply to the disabling condition at litigation.

Gamboa's "Epidemiological" Argument

On page 128, Gamboa quotes Marcia Angell (1997) from a book that deals with medical evidence in a breast implant case, as follows:

Courtroom trials are not about populations . . . We have no basis, at least in the current state of knowledge, for making a judgment about a particular woman. We must therefore appeal to epidemiological data—that is, studies of populations.

Epidemiology deals with disease. The point being made by Angell is that if an individual has a particular disease, the future course of that disease cannot be known in the present such that any projection must be based on statistical averages derived from "populations." The question is about which "population" we should use for the statistical averages that are going to be relied upon. The analogy suggested by this quotation is that in studying the impact of a particular disease, one should lump all "non serious" diseases together and determine the impact on lost earnings that would be caused by "non serious" diseases. Likewise, one should lump all serious diseases together and determine the impact on lost earnings of "serious" diseases. If one did so, I would anticipate that "non serious" diseases would have some impact on lost earnings relative to earnings of an otherwise equal population of persons who are "without disease" or simply a population of "all persons" within the same demographic category. The impact would take the form of both lower average earnings for those with "non serious" diseases and somewhat shorter worklives for persons with "non serious" diseases. I would also anticipate that "serious diseases" would have more impact on lost earnings than "non serious" diseases, both in terms of reducing earnings and in terms of shortening worklives.

Would using these data, however, improve the accuracy of projections of lost earnings for a person with moderate psoriasis who is a postal clerk? Psoriasis

would presumably be defined as a "non serious" disease. By analogy, let us use a college professor who has lost a little finger as an analogy for a psoriasis. Do we have any reason to think that psoriasis would reduce the postal clerk's earnings or worklife expectancy or the college professor's earnings or worklife expectancy? Can we not determine by simple common sense that some diseases and some permanent disabling conditions are not likely to reduce worklife expectancy? Are we going to override what we know from common sense by determining that the first individual has a "non serious" disease and the second person has a "not severe" disability and that therefore we should look at data for the entire population of persons with "non serious" diseases in the first instance and the population of persons with "not severe" disabilities in the second instance to project earnings losses that we can tell from common sense are not likely to cause any reduction in worklife expectancy.

It is important to remember that all worklife expectancy figures are based on population averages. We have to ask which population best fits the probable outcome for an individual with the specific condition at hand. The answer of the overwhelming majority of forensic economists, as indicated in the 2009 NAFE Survey, is that we should use the population of all persons in each demographic category and not data based on the alleged populations of "not severely disabled" and "severely disabled" persons. See Brookshire, Luthy, and Slesnick (forthcoming), question #33, showing that 17.6% favor use of the Gamboa-Gibson disability worklife expectancy tables, 61.8% are opposed and 20.6% of survey respondents are not familiar with the tables.

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Legal Case Citations


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Biography


Thomas R. Ireland, Ph.D., is a professor emeritus of economics with the University of Missouri at St. Louis. Dr. Ireland has worked as a consultant for attorneys in the area of forensic economics since 1974 and has a consulting practice that is fairly evenly divided between plaintiff and defense assignments.



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Further Response to Ireland

Probabilistic decision making is widely accepted as appropriate in numerous professions. Whenever a worklife expectancy value is presented in a loss of earning capacity case, the trier of fact considers the probability of future employment for a specific individual. The Gamboa – Gibson Tables serve as an aid to the trier of fact because probabilities specific to physical disability, cognitive disability, and work disabling conditions that are severe or non-severe can be considered.

It is the trier of fact that ultimately decides if a particular individual is likely to be better off or worse off than the statistically average cohort group. Gender, education, age, and disability vs. non-disability status narrow the parameters from which future probabilities of employment are estimated for persons without or with disability.

It is encouraging to note that Ireland now acknowledges that “There may well be losses in both earnings and in post injury worklife as the result of a permanent injury.” Excellent! How does Ireland propose to estimate the post injury worklife as an aid to the trier of fact?

On April 8, 2010, Tom Ireland and I will have the opportunity to debate one another on the topic of “Worklife Expectancy for Persons with a Disability.” The debate will occur at the annual meeting of the American Academy of Economic and Financial Experts, to be held at the Mirage Hotel in Las Vegas, Nevada. I look forward to the debate.

Biography

Anthony M. Gamboa, Jr., Ph.D., MBA, the CEO and a Senior Analyst with Vocational Economics, Inc., based in Miami, FL. Dr. Gamboa was the developer of the VALE System and has considerable experience as a vocational-economic consultant in state and federal courts across the country.