


USING ECONOMICS TO WIN JURY TRIALS

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LITIGATION MANAGEMENT

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“A Study of Choices”
Cross-examination of the Plaintiff's Economist

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“Paw Paw’s Lesson”



Economics is the study of choices

- Economics is the study of how members of society choose to use scarce resources in order to maximize economic welfare.”

– *Introduction to Economics (2d ed)*
 Sievert & Dodge

“A study of choices”

- What does “a study of choices” have to do with the typical courtroom calculation of future economic loss?
- What can “a study of choices” show about a plaintiff’s rational decisions as to returning to work versus recovering a lifetime of lost wages in a lawsuit?

Cross Examination of the Plaintiff’s Economist

- Understand Perception of Real World Economists
- Define and Control The Courtroom Economist
- Reveal Counsel’s Fingerprints & Economist’s Bias
- “Play With the Calculator”
- Emphasize Plaintiff’s Economic Choice

Real World Economists

- Adam Smith (1723-1790):
 - *An Inquiry Into the Nature and Causes of The Wealth of Nations*
 - First presentation of a comprehensive and systematic theory of economics.
 - Division of labor and “the invisible hand” of the free market.



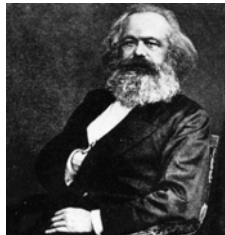
Real World Economists

- Thomas Malthus (1766-1834)
 - *An Essay on the Principle of Population as it Affects the Future Improvement of Society.*
 - Predicted population growth would outstrip food production.
- David Ricardo (1772 – 1823)
 - “Iron Law of Wages”
 - Natural price of labor kept low by population growth.



Real World Economists

- Karl Marx (1818-1883)
 - *Communist Manifesto*
 - *Das Kapital*
 - Rebuke of free market
 - Foundation of communist thought.



Real World Economists

- John Maynard Keynes (1883-1946)
 - *The General Theory of Employment, Interest and Money*
 - Governmental intervention (stimulation of demand) to prevent recession, depression & boom.
- Milton Friedman (1912-2006)
 - *Capitalism and Freedom*
 - Minimizing government intervention in free markets creates political freedom.
 - *A Monetary History of the United States*
 - Regulation of the money supply to control inflation.
 - John Bates Clark Medal (1951)
 - Nobel Prize (1976)



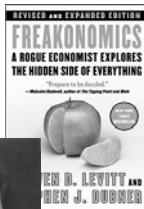
Real World Economists



- Judge Richard Posner
 - Judge, Seventh Circuit Court of Appeals
 - Chicago School- Law and Economics
- Gary Becker
 - Nobel Prize in Economics (1992)
 - John Bates Clark Medal (1967)
 - Chicago School - Law and Economics
 - Economics of rational decisions in life (crime, discrimination, addiction, etc.)

Rock Star Economists

- Steven Levitt
 - *Freakonomics*
 - John Bates Clark Medal (2003)
 - Use of econometric tools and mountains of data to test sociologic hypotheses and enrage the following subgroups:
 - Realtors
 - Sumo wrestlers
 - Drug gangs
 - Teachers
 - Bookies



Levitt: “Home-Dog Theory”

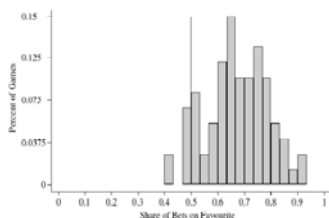


Fig. 3. Share of Bets on the Favorite when the Visiting Team is the Favorite

- Bookmakers use superior knowledge of better biases against “home dog” to manipulate point spread and maximize profit in NFL Games.
- “Why Are Gambling Markets Organised So Differently from Financial Markets?” *Economic Journal* 2004, 114(495), pp. 223-46.

Cross Examination of the Plaintiff's Economist

- Understand Perception of Real World Economists
- Define and Control The Courtroom Economist
- Reveal Counsel's Fingerprints & Economist's Bias
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- Emphasize Plaintiff's Economic Choice

Courtroom Economists

- *Expert Economist*
 - “Economic Loss Report of Mr. Plaintiff”
 - Boilerplate. Very little earnings data - often supplied by plaintiff counsel.
 - Worklife coefficient supplied by Department of Labor tables.
 - “I have no opinion as to whether Mrs. Plaintiff can return to employment.”

[illegible]

Methodology

- Generally accepted “model” for future wage loss.

$$\bullet \text{ PV} = y_0 \sum_{t=1}^N [(1+g)/(1+r)]^t$$

$$PV = y_0 \sum_{t=1}^N [(1+g)/(1+r)]^t$$

- Methodology
 - y_0 (Obtain wage data for year)
 - N (Look up worklife)
 - g (Grow wages at rate g)
 - r (Provide for return at rate r)
 - PV (Discount to present value)

Other than the plaintiff's wages, the three remaining coefficients are supplied by tables or are the economist's "pat answer" forecasts for wage growth and real rate of return.



“The Opinion”

ANNUAL PRETAX INCOME BASE		
\$29,640.00		
PRETAX INCOME AND REGULAR WORKLIFE RESULTS		
PAST LOSS		
(Assumes that Mr. Sanchez earned \$21,869.00 in 2004 and \$7,833.20 in 2005.)		
\$54,405.47		
FUTURE LOSS		
Lower Limit of Reasonable Range	Real Annual Increase Rates	Upper Limit of Reasonable Range
-1.00%	Real Discount Rates	1.00%
2.36% To 3.16%		2.36% To 3.16%
Total and Permanent Disability		
Midpoint		
\$274,015.64	\$288,736.24	\$303,456.84
Net of Minimum Wage		
Midpoint		
\$174,985.43	\$184,385.95	\$193,786.48

“I’m just a calculator”

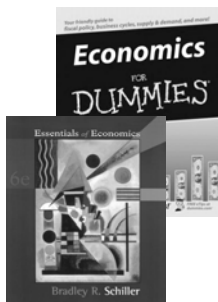


Daubert and Economists

- Very difficult despite lack of reliability factors – even after Kumho.
- It is customary for economists to present loss analysis. See e.g. *Garcia v. Columbia Medical Center*, 996 F.Supp. 617 (E.D. Tex. 1998).
- Court needs *someone* to assist the jury in discounting future loss to present value
- “Mr. Ryan, I see what you’re getting at, but Dr. Marx has testified before this court dozens of times. . . .”

Preparing to cross the economist

- ☐ Get old depos & reports. Find out how the economist reacts under pressure and how well he defends his assumptions about worklife, inflation, wage growth, discount rates.
- ☐ Check report for errors, bad assumptions, aggressive estimates of inflation and wage growth, and overly conservative discount rates.
- ☐ Send a letter request for calculations made with alternative assumptions.
- ☐ Research CV & prior testimony.
- ☐ Get a copy of the textbook used in teaching intro course at his university.



Cross Examination of the Plaintiff's Economist

- Understand Perception of Real World Economists
- Define and Control The Courtroom Economist
- **Reveal Counsel's Fingerprints & Economist's Bias**
- “Play With the Calculator”
- Emphasize Plaintiff's Economic Choice

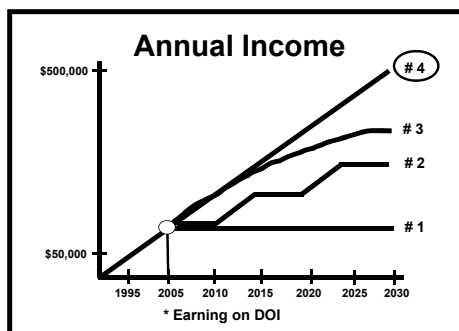
Reveal Counsel's Fingerprints! (Who plugged in the data?)

- Challenge reliability of data provided by plaintiff and counsel regarding earnings & worklife.
 - What records document pre-injury wage? Tax returns? W-2's?
 - Did the economist just take plaintiff's word for it? They often do!
 - Is there bias in the selection of the relevant period to determine past wages earned? Did the plaintiff only provide a year or two of data?
 - Why pick the single highest earnings point as the basis for their forecast? What's scientific about that!
 - Has plaintiff failed to reveal significant periods where plaintiff removed himself from the workforce voluntarily or because of prior injury.
 - Has the plaintiff failed to produce documents the economist requested?

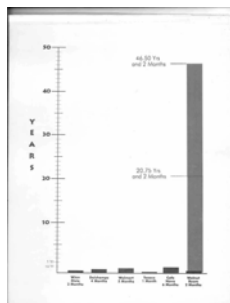
Reveal Economic Bias (Who plugged in the assumptions?)

- Establish assumption made
- Identify alternative assumptions
 - Prior cases or depositions are revealing.
 - Does he change forecast to suit client?
 - Is assumption a bad "fit" for real world data.
- Present Evidence
 - Contradicting assumption
 - Supporting alternative assumption
 - Effect of alternative assumption

Wage Growth Bias



Biased Worklife Assumptions



Cross Examination of the Plaintiff's Economist

- Understand Perception of Real World Economists
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- "Play With the Calculator"
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Ask Him to Calculate for You

- Confirm economist has no opinion as to whether plaintiff is able to return to pre-accident wage.
- Ask economist to assume hypothetically plaintiff is able to earn pre-injury wage
- Ask plaintiff's economist to perform alternate calculations using more reasonable wage and worklife assumptions.
- Most courts require advance notice – send a letter before trial.



Cross Examination of the Plaintiff's Economist

- Understand Real World Economists
- Define and Control The Courtroom Economist
- Reveal Counsel's Fingerprints & Economist's Bias
- "Play With the Calculator"
- Emphasize Plaintiff's Economic Choice

Voir dire: laying the groundwork

Q: "Dr. Marx, can you tell the court the definition of the study of economics?"

A: "Economics is the study of how members of society choose to use scarce resources in order to maximize economic welfare."

Voir dire: laying the groundwork

Q: "Dr. Marx, can you tell the court what an opportunity cost is?"

A: "Opportunity cost is the value of the next best alternative thing you could have done. It measures what you gave up in order to do the best thing."

Plaintiff's direct

- Usually a smooth "pitch and catch" ending in the "blackboarding" of the future loss conclusions.

Past Lost Wages	\$32,652
Future lost Wages	\$405,210
Fringe Benefits	\$50,874
TOTAL	\$488,736

Cross examination

- Have economist "blackboard" an alternate calculation based upon assumption that plaintiff is able to return to pre-accident wage.
- Get economist to confirm the defendant's calculations are as accurate, given the assumptions.
- Most effective if written alongside plaintiff's calculations.
- "Dr. Marx, is it fair to say that the economic value of plaintiff's claim increases by \$456,084 if the jury believes she cannot return to work?"

	Plaintiff	Defendant
Past Lost Wages	\$32,652	\$32,652
Future Lost Wages	\$405,210	\$0
Fringe Benefits	\$50,874	\$0
Total	\$488,736	\$32,652
Difference if return to work		\$456,084

Cross examination: Exposing bias in plaintiffs choices

- After blackboarding your numbers, present the two scenarios to the jury in terms of "opportunity cost."

Q: "Dr. Marx, is it fair to say that if Mrs. Plaintiff had returned to work today, she would have to give up her chance to recover 450,000 dollars in damages this lawsuit? (circle plaintiff's bottom line on blackboard).

A: "Mr. Ryan, it's not fair of me to opine whether someone is telling the truth, and I already said that I have no opinion as to whether she can return to work."

Q: "Dr. Marx, I'm not asking you whether anyone is telling the truth. I'm asking you whether, economically speaking, the opportunity cost of her returning to work, as of today, is 450,000 dollars?"

A: "From a purely economic standpoint, it is an opportunity cost."

Return to premise

- Q: "Dr. Marx, do you recall the definition of economics we discussed earlier today?"
- A: "Yes. Economics is the study of how members of society choose to use scarce resources in order to maximize economic welfare."
- Q: "Is it fair to say that from an economic standpoint, that Mrs. Plaintiff can be expected to allocate her resources in a rational manner to maximize her economic welfare?"
- A: "Yes."
- Q: "Is her claim for damages an economic resource available to her today?"
- A: "Yes"
- Q: "From a purely economic standpoint, and without any opinion as to whether Mrs. Plaintiff is telling the truth, what economic decision would a rational person make regarding a return to work, considering the opportunity cost of 450,000 dollars?"

Be prepared to improvise!

- Q: "Dr. Marx, can you tell the court the definition of the study of economics?"
- A: "No."
- Q: "No further questions. Judge, I object to Dr. Marx' tender as an expert in economics."

The greatest fool

- "Examinations are formidable even to the best prepared, for the greatest fool may ask more than the wisest man can answer."

– Charles Caleb Colton.



Keep it Simple, Fool!

- Its hard to win a battle on the economist's regularly defended turf: his inflation, wage growth, and discount rate forecasts.
- But the fundamental principles of economics can be used in innovative ways to prove plaintiff bias.
- The general public is unaware that economics has as much to do with decisions & resource allocation as it does with math & quantification.

Design cross examinations you can win, in terms the jury can understand and relate to.



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Location

New Orleans, LA

Practice Areas

- Appellate
- Civil Litigation
- Commercial Litigation
- Construction
- Transportation

Isaac H. Ryan is a partner with Deutsch, Kerrigan & Stiles, L.L.P. in New Orleans, Louisiana. He is currently engaged in complex litigation practice covering products liability, medical malpractice, mass tort, transportation, and commercial litigation. Many of Mr. Ryan's cases involve serious injuries and death.

Before joining the firm, Mr. Ryan served as law clerk for Justice Jeannette Theriot Knoll for three years on both the Third Circuit Court of Appeal and the Louisiana Supreme Court. Drawing upon these experiences, Mr. Ryan has authored several articles in the *Louisiana Bar Journal* on the subject of appellate procedure and written advocacy, and he often is invited to lecture members of the bar and the judiciary on the subject of appellate advocacy. Incorporating his appellate experiences into his practice, Mr. Ryan frequently handles referrals of select appellate cases, and he is frequently called upon to consult with outside counsel in tailoring writ applications for submission to the Louisiana Supreme Court.

Mr. Ryan was recently a member of a team of attorneys defending Glock, Inc. and other firearms manufacturers in a noteworthy and unique litigation brought by the Mayor of New Orleans against the entire firearms industry. The lawsuit brought by Mayor Marc Morial in 1998 (*Morial v. Smith and Wesson*, 785 So.2d 1 (La. 4/3/01)) was the first such suit of its kind, and caused dozens of similar lawsuits to be brought by other cities and state governments. Though defendants were initially unsuccessful in their attempts to have the case dismissed before the Civil District Court for the Parish of Orleans, Mr. Ryan was responsible for drafting a successful appeal to the Louisiana Supreme Court which overturned the district judge and dismissed the Mayor's cause of action. When the United States Supreme Court declined to hear the Mayor Morial's application for a writ of certiorari in October 2001, the New Orleans firearms litigation had become the first of its kind to be completely and fully dismissed.

Mr. Ryan is a member of the bar of every court in the State of Louisiana. Mr. Ryan is admitted to practice before the United States Supreme Court and The United States Courts of Appeals for the Fifth and Federal Circuits. In addition, Mr. Ryan is admitted to practice before the Tribal Courts of the Coushatta Tribe of Louisiana and the Chitimacha Tribe of Louisiana. His practice is divided evenly between federal and state court.

Mr. Ryan is a lifelong citizen of New Orleans. He attended Jesuit High School before obtaining a degree in Business Administration and finance from the University of Southern California. He returned to Louisiana State University for Law School, where he honed his skills in writing and research on the Louisiana Law Review. Mr. Ryan is a 2000 graduate of the International Association of Defense Counsel Trial Academy, a ten-day intensive course of trial advocacy held annually in Boulder, Colorado.

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