

Rethinking Damages for Lost Earning Capacity in a Professional Sports Career: How to Translate Today's Athletic Potential into Tomorrow's Dollars

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INTRODUCTION

There are many who “want to be like Mike,” but very few people possess the skills or potential to *actually be* like Mike. So how do we know when somebody actually possesses the extraordinary athletic skill or potential to be able to earn money in a professional sports career? We know that those who are currently earning money possess such skill and—assuming they stay healthy—will probably continue to do so. But how do we know when somebody has the potential to one day become a professional athlete?

Suppose for a moment that the real life Michael Jordan was injured by the tortious conduct of a third party when he was a senior in high school, leaving him unable to play basketball for the rest of his life. While the entire world would have missed the opportunity to witness arguably the best basketball player of all time, Jordan himself would have missed the opportunity to earn millions in employment compensation and endorsement income as a professional athlete.

Now suppose that the injury did not prevent him from playing basketball for the rest of his life, but kept him from playing during his freshman year at the University of North Carolina. Although he may not have lost the chance at a professional career, that chance may have been diminished. The challenge would be to determine how much that chance has been diminished and to quantify that diminished chance in lost future earnings. Having the luxury of hindsight today, it is easy to say that when Jordan was a senior in high school and a freshman in college he had the potential of becoming the best basketball

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player of all time. But having to assess his potential at the time of the injury prospectively would provide much less certainty.

Though claims involving lost earning capacity damages are open to the critique of being based on mere “speculation and conjecture,” there is a level of speculation in any estimate of damages due to the uncertain nature of the future.¹ In lost earning capacity damages, as in awards for pain and suffering, the law provides recovery where damages can be proved with reasonable certainty.² Courts addressing these issues in the context of athlete-plaintiffs, for the most part, have failed to delineate any standards for distinguishing those particular plaintiffs who possess the requisite level of athletic skill and potential to be allowed recovery for lost future earnings in a professional sports career. Implicit in their holdings is what this Article refers to as a “two-step burden of proof.”³ Step one entails proving that the defendant’s conduct did in fact cause the plaintiff’s chance to earn money in the future as an athlete to be lost or diminished (the factual cause link).⁴ Step two entails proving the amount of the lost or diminished chance with reasonable certainty.⁵

This Article provides a theoretical and practical perspective on damages for lost earning capacity in a professional sports career. Part I addresses how an athlete’s earning potential can be assessed and the various factors that go into the assessment. In this context, the Article proposes that earning potential be considered in terms of a range that defines low, middle, and high categories of athletic potential. Part II discusses the athlete’s burden of proof in the form of a two-step process. This part addresses the complexities of the causation analysis and explains how the loss-of-chance doctrine and the traditional but-for test can be applied to establish the factual cause link. This part also explains how evidence and expert witness testimony can be used to meet both burdens of proof and satisfy the admissibility standard under Federal Rule of Evidence 702. Part III discusses the methodology, data compilations, and calculations the author used as an expert witness to estimate Andy Oliver’s future lost earnings in his lawsuit against the NCAA.⁶ This part highlights

¹ See *Gorniak v. Nat’l R.R. Passenger Corp.*, 889 F.2d 481, 484 (3rd Cir. 1989).

² *Id.*

³ See *infra* Part II.

⁴ See *infra* Part II.A.

⁵ See *infra* Part II.B.

⁶ One week before the scheduled trial, Oliver settled the issue of damages for \$750,000. This Article does not address the merits of Oliver’s underlying claims. The judgment granting declaratory and permanent injunctive relief is reported at *Oliver v. Nat’l Collegiate Athletic Ass’n*, 155 Ohio Misc. 2d 17, 2009-Ohio-6587, 920 N.E.2d 203, 206

the complexities involved in proving lost earning capacity damages of top draft prospect amateur athletes, but nevertheless offers a useful roadmap for similar cases.

I. ASSESSING EARNING POTENTIAL

A. What is Lost Earning Capacity?

Victims of tortious conduct are generally entitled to recover damages for past or prospective loss or impairment of earning capacity.⁷ This recovery often arises in connection with personal injury caused by intentional torts, negligence, and strict liability.⁸ However, recovery is not limited to personal injury actions involving physical harm that prevents the plaintiff from working as he or she would like. Recovery may also be had where the defendant's conduct does not result in physical injury, but nevertheless impairs the plaintiff's ability to earn money. This is evident in cases involving defamation, tortious interference with an existing or prospective business or business transaction, employment discrimination, and wrongful termination or discharge from employment.⁹

Lost earning capacity damages compensate the plaintiff for an impairment of the ability to earn money in the future that would not exist but for the defendant's wrongful conduct.¹⁰ The standard measure of damages for lost earning capacity can therefore be stated in general terms as the difference between what the plaintiff was capable of earning before the defendant's conduct and what the plaintiff is capable of earning thereafter.¹¹ It is the impairment or diminution in the ability to earn money in the future that is being measured today, not the difference in actual earnings before and after the impairment causing event.¹²

(2009). Numerous law review articles have been written about the *Oliver* case and its implications. See, e.g., T. Matthew Lockhart, *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism,"* 35 U. DAYTON L. REV. 175 (2010); Brandon D. Morgan, Comment, *Oliver v. NCAA: NCAA's No Agent Rule Called Out, but Remains Safe,* 17 SPORTS LAW. J. 303 (2010); Virginia A. Fitt, Note, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism,* 59 DUKE L.J. 555 (2009); James Halt, Comment, *Andy Oliver Strikes Out the NCAA's "No-Agent" Rule for College Baseball,* 19 J. LEGAL ASPECTS OF SPORT 185 (2009).

⁷ RESTATEMENT (SECOND) OF TORTS § 924(b) (1979).

⁸ JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 6.1 (Gerald W. Boston ed., 3d ed. 1991).

⁹ See, e.g., *Morales v. Cadena*, 825 F.2d 1095, 1100 (7th Cir. 1987) (affirming loss of earning capacity award in employment discrimination case based upon jury's consideration of plaintiff's emotional turmoil, depression, and career disruption).

¹⁰ *Gorniak v. Nat'l R.R. Passenger Corp.*, 889 F.2d 481, 484 (3rd Cir. 1989).

¹¹ JOHN A. TARANTINO & PATRICIA K. ROCHA, ESTIMATING & PROVING PERSONAL INJURY DAMAGES §§ 320-21 (Scott Ward ed., James Publishing, Inc. 1996).

¹² "Evidence of earnings before and after the injury would be relevant" but "[p]re-injury earnings may understate the actual loss. If future wage increases are to be

Therefore, although evidence of actual earnings is relevant and may assist the fact finder in establishing the plaintiff's earning ability, recovery for lost earning capacity damages is not jeopardized if the plaintiff was not gainfully employed at the time, or even if the plaintiff had no prior history of wages earned.¹³ Moreover, lost earning capacity is not necessarily limited in scope to the power to earn money in the particular line of work engaged in by the plaintiff at the time of the impairment-causing event. Indeed, the fact-finder may determine that the plaintiff was capable of earning *more* than she was actually earning at the time of the wrongful conduct and may consider what the plaintiff was capable of earning in *any* particular line of work for which the plaintiff was suited prior to the impairment-causing event.

If the plaintiff has special knowledge, ability, or skill, the impairment in earning power is much greater than that of a person of ordinary knowledge, ability, or skill. In situations in which the plaintiff is engaged in or pursuing a professional career that requires extensive education or training, establishing lost earning capacity damages becomes more problematic in that the value of a person's earnings in professional pursuits varies greatly depending upon the extent of an individual's exertions. This certainly applies in the context of professional athletes. As a result, it is difficult to accurately assess lost earning capacity based entirely upon what members of the plaintiff's profession generally are capable of earning. Relevant and meaningful factors to consider include the quality and level of the plaintiff's performance in the education or training already received and the initiative or motivation displayed by the plaintiff in pursuing the career goal to be realized through the education or training.

Lost earning capacity damages should be viewed as compensating the plaintiff today in an amount that will not be determined with absolute certainty until some point in the future. Without a crystal ball, some level of uncertainty is inherent in *any* determination of lost earning capacity, including

expected, either because of general increase in industrial productivity or because of the plaintiff's reasonably expected advancement, those increases have also been lost and are thus recoverable as damages." DAN B. DOBBS, *THE LAW OF TORTS* 1048 (2001).

¹³ See, e.g., *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194, 1198 (7th Cir. 1982) ("If a man who had never worked in his life graduated from law school, began working at a law firm at an annual salary of \$35,000, and was killed the second day on the job, his lack of a past wage history would be irrelevant to computing his lost future wages."). *But see* VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 209 (4th ed. 2009) ("As a practical matter, an actual work history helps a lot in determining the amount a plaintiff would have been capable of earning but for an injury.").

that of an athlete.¹⁴ In this respect, lost earning capacity damages are no different than compensatory damages for future pain and suffering in personal injury cases. In such cases, the fact finder determines an amount today that attempts to accurately reflect *unknown* future harm (i.e., the level of pain and suffering the plaintiff will incur), but which is based upon facts and circumstances *known* today (i.e., the plaintiff's age, the extent of the injury, the medical treatments incurred, etc.).¹⁵ Uncertainty in and of itself should not be a concern, provided there is a sufficient level of confidence in the precise method being employed to accurately assess the loss.

An accurate assessment of lost earning capacity damages must consider the plaintiff's wage-earning *potential*, which is based upon existing facts and circumstances, and only a part of which is evidence of actual earnings.¹⁶ For example, a high school or college student with no history of wages earned may have significant potential today to earn substantial wages in the future based upon certain accomplishments, level of education, and other factors. Conversely, a middle-aged adult with a well-established wage history may have already reached his or her highest earning potential. Thus, in order to accurately assess the plaintiff's lost earning capacity *today*, the fact finder must determine the plaintiff's wage-earning potential, taking into account wage history and other existing facts and circumstances.

Another layer of complexity is added to the assessment of earning potential where the plaintiff possesses a rare or special native talent, such as an artist, musician, actor, or athlete. While there exists a certain level of uncertainty regarding the earning potential of a person who is engaged in academic study leading to a career in a typical occupation or profession, there is a much greater degree of uncertainty as to the earning potential of one pursuing an artistic or athletic career in which future success depends not only on training but also primarily on native

¹⁴ "The challenge of proving a professional athlete's lost career earnings is not unlike that faced by every plaintiff in every tort suit." Roger I. Abrams, *Calculating the Expected Earnings of a Major League Pitcher*, 8 VA. SPORTS & ENT. L.J. 193, 194 (2009).

¹⁵ "As a broad rule, any competent evidence is admissible which tends to prove the plaintiff's earning capacity, such as evidence of the nature of the injury which has interfered with that earning capacity, the duration of the injury, and the value of the earning capacity before and after the injury." STEIN, *supra* note 8, at § 6:6.

¹⁶ *Id.* ("The admission of evidence to prove the plaintiff's future earning capacity may include evidence that would fairly indicate present earning capacity and the probability of its increase or decrease in the future, including evidence of age, intelligence, habits, health, occupation, life expectancy, ability, probable increase in skill, and rates of wages paid generally to those following the same vocation, particularly where the injured person has fitted himself or herself for, but has not yet entered, the work of his or her choice.").

talent.¹⁷ In recognizing a distinction between persons who largely exploit native talents and those who exploit intensive training, the court in *Grayson v. Irvmar Realty Corp.*¹⁸ reduced a jury award of damages for lost earning capacity to a young woman studying music toward the development of a career as an opera singer:

It is notable that those who exploit rare and special talents may achieve exceedingly high financial rewards, but that the probability of selection for the great rewards is relatively low. On the other hand, those who, provided they have the intelligence and opportunities, train for the more skilled occupations and professions, not so heavily dependent upon unusual native gifts, will more likely achieve their objectives.

The would-be operatic singer, or the would-be violin virtuoso, or the would-be actor, are not assured of achieving their objectives merely because they have some gifts and complete the customary periods of training. Their future is a highly speculative one, namely, whether they will ever receive recognition or the financial perquisites that result from such recognition. Nevertheless, the opportunities exist and those opportunities have an economic value which can be assessed, although, obviously, without any precision. But a jury may not assume that a young student of the opera who has certain gifts will earn the income of an operatic singer, even in the median group.¹⁹

Although the *Grayson* court allowed recovery for lost earning capacity damages, the court significantly reduced the jury's award because "except from her teachers, she had not achieved any spectacular or extraordinary recognition for her talents."²⁰

B. The Athlete's Earning Potential Range (EPR)

Spectacular or extraordinary recognition for talent goes hand-in-hand with earning potential. With regard to athletically talented individuals with professional prospects and aspirations, there exists a wide earning potential range, which this article will refer to as the "EPR." Lowest on the EPR are unknown high school athletes who have never earned any compensation for their athletic ability. Highest on the EPR are well-known, high-profile professional athletes with an established record of employment earnings or endorsement income. Between these

¹⁷ See *Grayson v. Irvmar Realty Corp.*, 184 N.Y.S.2d 33, 35 (N.Y. App. Div. 1959) ("[I]n the case of persons of rare and special talents many are called but few are chosen. For those who are not chosen, the probabilities of exploiting their talents financially are minimal or totally negative. In this class would fall the musical artist, the professional athlete, and the actor.").

¹⁸ *Id.*

¹⁹ *Id.* at 36–37.

²⁰ *Id.* at 37.

opposite ends of the EPR, there are numerous categories of athletes who have achieved varying levels of recognition for their athletic skill and possess varying levels of wage-earning potential.

For example, toward the lower end of the EPR, there are amateur athletes, known as “prospects,” who have the potential to become professional athletes. However, among these prospects, there are high-profile college football and basketball players who have achieved spectacular recognition for their athletic skills at the most competitive collegiate programs. These prospects are likely to reach the professional ranks much sooner than some younger, unknown high-school prospects who may need more time to mature and develop their skills against better competition in college or the minor-league farm system. Moreover, players drafted in early rounds have achieved greater recognition and are generally considered to be better prospects than players drafted in later rounds. Thus, a first-round draft pick typically has greater earning potential—and is therefore higher on the EPR—than a fifth-round draft pick. Likewise, a high school athlete who will become eligible to be drafted at a future date and is currently “projectable” as a first round draft pick is viewed as a better prospect than a college athlete projectable as a fifth round pick, and thus has greater earning potential. The better the prospect, the greater the earning potential, and the higher the athlete is on the EPR.

Toward the higher end of the EPR are the star veteran players at the top of the wage scale in their respective sports, as well as the “journeyman” veteran players making the league minimum salary. Likewise, Olympic athletes such as Michael Phelps and Shaun White, who have achieved celebrity status and have a history of endorsement earnings, would be high on the EPR.²¹ The high end of the EPR also includes young professional players who have performed well early in their careers and who, though currently making the league minimum salary, will likely earn a substantial salary that more accurately reflects their market value in the coming years. Moreover, there are professional baseball players at various levels in the minor-league farm system, with players in the Triple-A leagues generally considered to be closer to advancing to the major league level than players in the Double-A, Single-A and Rookie leagues. However, this does not necessarily mean that all players in

²¹ “[Shaun] White reportedly earns more than \$7.5 million a year in endorsements and prize money.” Tripp Mickle, *Whiteout: Action Sports Star Leaves Longtime Agency IMG and Signs with CAA*, SPORTS BUS. J., May 31–June 6, 2010, at 1, 28.

Triple-A have greater earning potential than those in the leagues beneath them, because there are players in the Rookie and Single-A leagues who are considered to be better prospects than many players at the higher levels, and who therefore have greater earning potential.

In *Nat'l Collegiate Athletic Ass'n v. Yeo*,²² Yeo, an amateur Olympic swimmer, claimed that a university's enforcement of the NCAA's ineligibility ruling constituted an unconstitutional deprivation of protected liberty and property interests. The trial court recognized the plaintiff's earning potential based upon the following uncontradicted evidence produced at trial:

(1) Yeo had already established a world-class reputation and her 'good name, outstanding reputation, high standing in her community, her unblemished integrity and honor are particularly important in the Republic of Singapore and in light of her cultural background'; (2) if NCAA rules did not prohibit athletes from accepting professional compensation while competing in NCAA sanctioned events, Yeo 'would be immediately eligible to capitalize on her public persona by entering into lucrative endorsement and marketing opportunities as well as being eligible for prize winnings due to her performance as a member of Singapore's national team'; and (3) 'UT-Austin represented to [Yeo] at the time she transferred from [Cal-Berkeley] to become a student-athlete at UT-Austin that UT Austin would not jeopardize or compromise [Yeo's] eligibility to compete on behalf of UT-Austin in NCAA athletic competition.' . . . Yeo had competed in two Olympic games before attending college and had been named sportswoman of the year and Olympic flag-bearer for her native country, Singapore. At both the temporary restraining order and permanent injunction hearings, Yeo represented that it was this continuing interest in her athletic and professional reputation that UT-Austin had damaged by its actions.²³

Although the Supreme Court of Texas rejected the lower court's determination that Yeo's claimed interest in future financial opportunities was entitled to due process protection, the trial court's discussion regarding Yeo's earning potential would be relevant to an assessment of lost earning capacity damages of an amateur athlete who successfully establishes a legal claim other than a constitutionally-based claim.²⁴ It appears the trial

²² 171 S.W.3d 863 (Tex. 2005).

²³ *Yeo*, 171 S.W.3d at 868.

²⁴ "Yeo's claimed interest in future financial opportunities is too speculative for due process protection. There must be an actual legal entitlement." *Id.* at 870 (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). *But see* *Hall v. University of Minnesota*, 530 F. Supp. 104 (D.C. Minn. 1982) (holding that a university student and varsity basketball player, whose applications for admission into a degree program had been denied, and whose athletic eligibility had been lost as a result, was entitled to a preliminary injunction because otherwise his overall aspirations regarding a career in

court viewed Yeo fairly high on the EPR even though she was an amateur and had never earned any compensation as a professional swimmer.

A variety of factors come into play in the assessment of extraordinary athletic skill and thereby impact an athlete's future earning potential. On a macro level, an athlete's ability to earn money is based upon his or her value to an employer (i.e., a team or sporting event)²⁵ and value as an endorser of products and services.²⁶ This value is generally based upon the athlete's performance, reputation, and marketability.²⁷ With regard to a professional boxer's earning power, one court essentially found that earnings fall directly on the heels of winning:

As in most money-making callings, a boxer's earning capacity is related to his reputation and his reputation is dependent upon his success. In the sports world the interested public follows the detailed records of individual athletes and teams with avidity. It flocks to watch the athletes with winning records; and the earnings of those athletes are related directly to the number of paying spectators they can attract. Spiritually, a professional boxer may emerge greater in defeat than in victory. Materially, however, his prestige and the purses he can command are lowered. Any action which affects his record so prejudicially of necessity impairs economic rights and interests sufficiently to give the petitioner legal standing to sue.²⁸

An athlete's *potential* to earn money in the future is based upon an assessment of their *future* capability to achieve success as an athlete. This is determined by thoroughly evaluating evidence of past athletic performance, recognition and training already received, and the amount of training and opportunities the athlete is likely to receive and realize in the future.²⁹

professional basketball would be substantially threatened, that harm outweighed any harm that granting the injunction would inflict on other parties, and student demonstrated a substantial probability of success on his due process claim).

²⁵ See Erik Matuszewski, *LeBron James's Departure Would Cut Value of NBA Cavaliers by \$250 Million*, BLOOMBERG (June 29, 2010, 8:23 AM), <http://www.bloomberg.com/news/2010-06-29/lebron-james-s-departure-may-cut-value-of-nba-s-cavaliers-by-250-million.html> (discussing the value of LeBron James to the Cleveland Cavaliers).

²⁶ See generally *Doe v. McFarlane*, 207 S.W.3d 52 (Mo. Ct. App. 2006).

²⁷ *Id.* at 63 (citing, in a right of publicity case, expert witness testimony that "using athletes and entertainers as endorsers or spokespeople can increase brand awareness and thereby provide a company a commercial advantage over its competitors, and that it is 'vitally important' that the celebrities not have any negative connotation associated with them so as not to offend any potential consumer").

²⁸ *Tilelli v. Christenberry*, 120 N.Y.S.2d 697, 699 (N.Y. Sup. Ct. 1953) (holding that evidence was not sufficient to sustain Athletic Commissioners' conclusion that judge had failed to follow standards set forth in boxing rules in a petition to annul action of Commissioners, which action had changed the vote cast by a judge in a boxing match).

²⁹ *Grayson*, 184 N.Y.S.2d at 37 ("In determining, therefore, the amount to be recovered, the jury may consider the gifts attributed to plaintiff; the training she has

Further, an athlete's earning potential must take into account the athlete's present physical attributes and skills, as well as an assessment of what those attributes and skills will look like in the future.

In their assessment of future athletic ability and performance, professional scouts look at an athlete's individualized native talents, referred to as "tangibles," as well as makeup³⁰ and character, referred to as "intangibles."³¹ Tangibles consist of things like an athlete's physical size, strength, power, speed, and athleticism,³² as well as possession of sport-specific skills (or "tools") such as ability to throw, catch, hit, shoot, field, and so on.³³ Intangibles are made up of attitude, personality, leadership skills, motivation and drive, priorities, philosophies, intelligence, temperament, ability to handle pressure situations both on and off the field, performance in important games, prior incidents of team or league discipline for misconduct, criminal records, academic performance, performance on psychological exams, and virtually anything else that may positively or negatively impact an athlete's image.³⁴

received; the training she is likely to receive; the opportunities and the recognition she already has had; the opportunities she is likely to have in the future; the fact that even though the opportunities may be many, that the full realization of those opportunities is limited to the very few; the fact that there are many other risks and contingencies, other than accidents, which may divert a would-be vocal artist from her career; and, finally, that it is assessing directly not so much future earning capacity as the opportunities for a practical chance at such future earning capacity.").

³⁰ One commenter described makeup as

a mix of discipline, attitude, confidence, seriousness and stage presence that allows players under the spotlight in a technically difficult sport like baseball to adjust to tougher and tougher competition. Makeup leads the chosen to the top. Its absence chops down the insanely talented athletes they're up against. Scouts say signing players who have it is a smart way to play the odds.

John W. Miller, *Baryshnikov in Baseball Cleats*, WALL ST. J. (Aug. 19, 2009, 6:14 AM), http://online.wsj.com/article_email/SB10001424052970204683204574356811579058466-1MyQjAxMDA5MDEwODExNDgyWj.html (discussing an \$800,000 signing bonus paid by the Minnesota Twins to a sixteen year-old from Berlin whose parents are former Berlin ballet stars).

³¹ See *infra* note 34 (citing references).

³² See Mike Courter, *NFL Draft-Hot Prospects for 2009*, THE HUDDLE (Apr. 23, 2008), http://www.thehuddle.com/x8/nfl_draft/mc-hot-2009-prospects.php (noting that Demetrius Byrd "will be readily mentioned as a first round projection for the 2009 Draft by combining classic height, weight and speed tangibles . . .").

³³ See Ray Glier, *Scouts Scour for Set of Five Tools in Preparation for Draft*, USA TODAY (June 2, 2010, 4:25 PM), http://www.usatoday.com/sports/baseball/2010-06-02-mlb-draft-five-tool-player_N.htm (noting that a "five-tool player" in baseball means "a hitter for average and power who has a strong arm, is good with the glove and runs to first base in at least 4.3 seconds out of the right-handed batter's box").

³⁴ Greg A. Bedard, *2010 NFL draft: Quarterback prospects at a glance*, MILWAUKEE WIS. J. SENTINEL (Apr. 14, 2010), <http://www.jsonline.com/sports/packers/90746109.html> ("[Tim Tebow] [m]ay have the best intangibles—leadership, charisma, character, intelligence, desire—in the entire draft."); Blake Hofstad, *ESPN Scouts Inc. Intangibles: What?*, COLLEGE FOOTBALL SATURDAY (Apr. 9, 2010),

According to Terry Bradway, the New York Jets' senior personnel director, character is divided into personal character and football character—"Football character is in terms of work ethic and spending time, preparation, study, doing all those extra things that you want to do to become a player Then from the personal standpoint, it's the off-the-field stuff."³⁵ Gary Hughes, special assistant to the general manager of the Chicago Cubs, said:

A player's mental makeup can influence his physical skills. Instincts is a tremendous tool, to say that instincts is not a tool is foolish Makeup is a tool, too, but it is tougher to recognize. You see a guy get upset at a play that goes bad, and you might say, 'I love that. The guy is [a] fiery player.' But the other scout might say, 'He's a hothead.'³⁶

An athlete's tangibles tend to entail more of an objective assessment influenced by performance statistics, radar guns, and stop watches.³⁷ An athlete's intangibles are more subjectively determined, but they certainly have an impact upon professional scouts' evaluations of the athlete, including where the athlete is ultimately selected in the annual amateur draft.³⁸

<http://www.collegefootballsaturday.com/?p=1217> ("Perhaps the most overlooked trait when evaluating NFL Draft prospects are leadership abilities on and off the field. These don't have to do with position, size, speed, or anything else. It's the difference between the good prospects and great ones."). For a discussion of the types of factors that go into a draft prospect's intangibles, see Joe LaPointe, *Where Athletes Run, Jump and Mull Life as a Cat*, N.Y. TIMES, Feb. 23, 2009, at D3, available at http://www.nytimes.com/2009/02/23/sports/football/23combine.html?_r=4&ref=sports ("Along with medical tests and drills to measure physical skills, the N.F.L. scouting combine allows 32 teams to talk to top prospects for 15 minutes each. It is like speed dating for draft choices, and the questions are not always about football."). *ESPN Magazine* addressed the impact of intangibles regarding prospects for the 2010 NFL draft:

[S]couting is often less about projecting and more about digging up dirt. "It's not just an evaluation job," says Falcons GM Thomas Dimitroff. "It's a research job." Every year, there are prospects who'd benefit from a little extra intel. This year, Oklahoma tight end Jermaine Gresham needs GMs to know he's not a loose cannon; USC defensive end Everson Griffen is battling rumors he's inconsistent; and Michigan cornerback Donovan Warren must reverse a rep for blowing assignments.

Each prospect is assigned a magnetic card, which details his height, weight, Wonderlic score, overall grade and position within the team's system. The card also features stickers that designate intangibles, coded differently by each team. The Patriots, for example, use lowercase and capital letters: "C" stands for circumstance—if, say, a receiver's stats are down because he played with a lousy quarterback; "c" represents a character concern.

Seth Wickersham, *You Have Terrible Taste in Prospects*, ESPN MAG., Apr. 19, 2010, at 79, 80, 82, available at <http://sports.espn.go.com/nfl/draft10/news/story?id=5115152>.

³⁵ William Rhoden, *Shifting Standards for Character*, N.Y. TIMES, Apr. 17, 2010, at D2, available at <http://www.nytimes.com/2010/04/17/sports/football/17rhoden.html>.

³⁶ Glier, *supra* note 33.

³⁷ See Courter, *supra* note 32.

³⁸ See, e.g., *NFL Teams Focus on Character as Much as Talent for '10 Draft*, SPORTS BUS. DAILY (Apr. 23, 2010), <http://www.sportsbusinessdaily.com/article/138790>. See also Rhoden, *supra* note 35 ("A player who is perceived as having good character will move up

In summary, lost earning capacity damages in cases involving a plaintiff who possesses extraordinary athletic skill are based upon an assessment of the plaintiff's earning potential as an athlete that exists *today*. The next section will discuss how the athlete-plaintiff can prove (1) a causal connection between the defendant's actions and a lost or reduced chance or opportunity to earn money in the future as an athlete, and (2) the amount of that loss to a reasonable degree of certainty. The EPR can be helpful to plaintiff and defense counsel, as well as their expert witnesses, in addressing both burdens of proof.

II. THE ATHLETE'S TWO-STEP BURDEN OF PROOF

Compensatory damages for harm to earning capacity are not recoverable without proof of pecuniary loss.³⁹ A prerequisite to recovering for lost earnings or loss of earning capacity is that the plaintiff must offer evidence establishing "that a significant amount of earnings has been lost, or that his earning capacity has been significantly harmed."⁴⁰ The plaintiff must establish "by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit."⁴¹ However,

the draft ladder, and a player perceived as a character risk will move down and lose millions of dollars."); Nate Davis, *NFL Draft's Dust Settled, a Look at Some of the Event's Winners and Losers*, USA TODAY (Apr. 25, 2010, 1:46 AM), <http://content.usatoday.com/communities/thehuddle/post/2010/04/nfl-draft-dust-settled-a-look-at-some-of-the-events-winners-and-losers/1> ("[Tim Tebow's] unquestioned intangibles and determination to improve his throwing motion did, in fact, ultimately earn him a first-round contract."); Charles Robinson, *Fortunes of Tebow, Clausen Unlike Projections*, YAHOO! SPORTS (Apr. 24, 2010, 7:49 PM), http://sports.yahoo.com/nfl/news;_ylt=AoRw0pqb.u8oXqJdurBS6Mw5nYcB?slug=cr-draftwinnersandlosers042410 (noting how concerns about Jimmy Clausen's leadership abilities and attitude "left him crashing down draft boards"); Alex Marvez, *Round 1 Shows Character Counts*, FOXSPORTS.COM (Apr. 23, 10:45 AM), <http://msn.foxsports.com/nfl/story/Tim-Tebow-selection-shows-NFL-places-premium-on-character> ("[Dez] Bryant was a top-10 talent who dropped all the way to No. 24 until picked by Dallas Bryant's off-field problems at Oklahoma State overshadowed his ample physical gifts. Bryant was suspended for almost all of his junior season after lying to NCAA investigators. Media reports have painted Bryant as immature and irresponsible even when it came to something as simple as attending college classes on time."); Associated Press, *Cowboys Open Training Camp; Dez Bryant First Player on Field*, USA TODAY (July 24, 2010, 10:02 PM), http://www.usatoday.com/sports/football/nfl/cowboys/2010-07-24-cowboys-training-camp_N.htm?csp=usat.me ("The Cowboys traded up three spots in April to get Bryant 24th overall after the talented receiver slipped in the draft amid questions about his character."); Nicole Auerbach, *DeMarcus Cousins Aims to Boost Draft Stock, Shed Labels*, USA TODAY (June 23, 2010, 10:14 AM), http://www.usatoday.com/sports/basketball/nba/2010-06-22-draft-demarcus-cousins_N.htm (noting that DeMarcus Cousins "has been pegged as uncoachable—an immature troublemaker with a bad attitude" and "selecting him in the draft can seem risky" considering such perceptions).

³⁹ RESTATEMENT (SECOND) OF TORTS § 906 (1979).

⁴⁰ RESTATEMENT (SECOND) OF TORTS § 912 cmt. d (1979).

⁴¹ § 912.

the desirable level of certainty to be reached in determining adequate compensation is one of *reasonable certainty*, not one of complete or definite certainty.⁴² Thus, recovery is permissible even in cases where there is no real equivalence between the harm and compensation in money (i.e., claims involving emotional harm) or where the nature of the harm is extremely difficult to approximate or quantify with a sufficient level of accuracy (i.e., claims involving lost business profits).⁴³

Comment d to section 912 of the Restatement (Second) of Torts describes a situation in which the defendant has tortiously interfered with the plaintiff's entering into or continuing a business enterprise or business transaction, which entails both the likelihood of profit and, conversely, a possibility for loss.⁴⁴ In order for a plaintiff to recover lost profits, she must prove that the enterprise or transaction "was or was likely to be profitable and that the chance of profits has been interfered with."⁴⁵ To illustrate, the Restatement provides an example of a business transaction in a sports context involving tortious interference with a contract to promote a boxing match:

A has a contract with B by the terms of which A is to arrange for a boxing match between B and C. D tortiously causes B to break his contract before A has incurred any expenses with reference to it. A is entitled to compensatory damages from D only if he proves that it is more probable than not that the match would have been made by him and would have been a financial success, and if his proof offers a reasonable basis for estimating the profits.⁴⁶

The above illustration saliently demonstrates the complexity inherent in proving economic damages for lost future earnings or lost earning capacity: First, A must prove that D's wrongful conduct did *in fact* cause A a loss of the chance or opportunity to earn money. Second, A must prove the *amount* of that loss to a reasonable degree of certainty.⁴⁷ There must be a reasonable probability, not just speculation, that the plaintiff suffered damages from the defendant's actions, and there must be

⁴² § 912, cmt. a. *See also* *Felder v. Physiotherapy Assocs.*, 158 P.3d 877, 886 (Ariz. Ct. App. 2007) ("As the comment to the Restatement recognized, however, it is desirable that 'an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.'" (citing RESTATEMENT (SECOND) OF TORTS § 912, cmt. a (1979))).

⁴³ RESTATEMENT (SECOND) OF TORTS § 912 cmt. a (1979).

⁴⁴ § 912 cmt. d.

⁴⁵ § 912 cmt. d.

⁴⁶ § 912 cmt. d, illus. 8.

⁴⁷ § 912 cmt. a ("It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible.").

evidence, not just speculation, that provides a reasonable estimate of the amount of damages.⁴⁸ Depending upon where the plaintiff falls on the EPR, meeting this “two-step burden of proof” can be a daunting, possibly even insurmountable task for plaintiffs seeking lost earning capacity damages.

Any evidence or expert testimony proffered to meet the athlete-plaintiff’s burdens of proof must satisfy the admissibility standard under Rule 702 of the Federal Rules of Evidence:⁴⁹ “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise”⁵⁰ As the Supreme Court articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁵¹ the determination of admissibility requires the judge to make a two-pronged “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”⁵² In order for the proffered testimony to meet the first prong—the “scientific knowledge” prong—the Court in *Daubert* explained that *science* “implies a grounding in the methods and procedures of science” and that *knowledge* means something “more than subjective belief or unsupported speculation” and refers to “any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.”⁵³ “In short, the requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability.”⁵⁴ The second prong of Rule 702, the “helpfulness” requirement, according to the Court, is essentially a standard of relevance and, more specifically, a question of “fit,” because if the proposed scientific evidence does not bear a “valid scientific connection” to the inquiry of the case, it will not be helpful to the jury and therefore is not relevant under Rule 702.⁵⁵

⁴⁸ § 912 cmt. a.

⁴⁹ *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002) (noting “that [t]he burden of laying the proper foundation for the admission of the expert testimony is on the party offering the expert, and the admissibility must be shown by a preponderance of the evidence”) (citing *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999)).

⁵⁰ FED. R. EVID. 702.

⁵¹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

⁵² *Id.* at 592–93.

⁵³ *Id.* at 590.

⁵⁴ *Id.*

⁵⁵ *Id.* at 591–94. The Court emphasized that “scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.” *Id.* at 591.

The “gatekeeping” obligation of trial judges under *Daubert*, however, extends to all expert testimony, not merely testimony that is scientific.⁵⁶ Under *Daubert* and its progeny, “expert testimony is admissible if the expert is qualified to testify on the topic at issue, the testimony will assist the trier of fact, and the expert’s methodology is sufficiently reliable.”⁵⁷ A merger of Rule 702’s two-prong test with the two-step burden of proof means that non-scientific evidence or expert testimony concerning an athlete’s lost earning capacity damages must (a) be sufficiently reliable, and (b) assist the trier of fact in (i) making a determination whether the defendant’s conduct caused a loss or reduction of the athlete’s chance to earn money in a prospective professional career, and if so, (ii) making a determination of the present value of that lost or reduced chance.

A. Step One: Proving that the Defendant’s Conduct in Fact Caused a Lost or Reduced Chance to Earn Money as an Athlete

1. The Loss of Chance/Opportunity Doctrine

Damages for lost earning capacity essentially compensate the plaintiff for a loss of chance or opportunity to earn future profits, and thus lost earning capacity is conceptually analogous to the loss of chance doctrine. The loss of chance doctrine, also known as the lost opportunity doctrine, allows a plaintiff to recover for the impairment (i.e., “loss”) of the plaintiff’s ability (i.e., “chance” or “opportunity”) to achieve a more favorable outcome or result because of the defendant’s actions.⁵⁸ Thus, the plaintiff’s real injury in a lawsuit seeking damages for lost earning capacity consists of the diminished chance of achieving a favorable outcome. The loss of chance doctrine seeks to give the plaintiff a recovery equal to the extent that the defendant’s

The study of the phases of the moon, for example, may provide valid scientific ‘knowledge’ about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.

Id.

⁵⁶ See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (holding that the *Daubert* factors for assessing reliability apply to nonscientific as well as scientific reliability).

⁵⁷ Stewart I. Edelstein, *Daubert and Lost-Profits Testimony*, 41 TRIAL 31, 31 (2005).

⁵⁸ For a discussion of the loss of chance doctrine, see Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981) [hereinafter King, *Causation*]. See also Joseph H. King, Jr., “Reduction of Likelihood” Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine, 28 U. MEM. L. REV. 491 (1998); Darrell L. Keith, *Loss of Chance: A Modern Proportional Approach to Damages in Texas*, 44 BAYLOR L. REV. 759 (1992).

conduct caused a reduction in the *chance* to profit, which makes it distinct from a lost profits claim.

The loss of chance doctrine, which is applied often in personal injury and medical malpractice cases, evolved in response to the perceived unfairness of the “all or nothing” rule of tort recovery.⁵⁹ The all or nothing rule provides that the plaintiff may only recover if she can prove that the defendant’s conduct more likely than not caused the unfavorable outcome—if the plaintiff meets this burden, she recovers one hundred percent of her damages, but if she does not meet this burden, she recovers nothing.⁶⁰ For example, if a patient has a fifty-one percent chance of survival and a doctor’s negligent failure to diagnose or properly treat caused that chance to drop to zero, the estate would be entitled to one hundred percent of the wrongful death damages, but if a patient has a forty-nine percent chance of survival and the negligence caused that chance to drop to zero, the estate receives nothing.⁶¹ A fundamental problem with the all or nothing approach is that it does not accomplish a fair and adequate allocation of costs and risks in proportion to the extent of the harm.⁶² If the plaintiff’s chance of achieving a favorable outcome before the defendant’s wrongful conduct was less than fifty percent, it is logically impossible for the plaintiff to show that the defendant’s conduct was the but for cause of the diminished chance. The loss of chance doctrine attempts to alleviate the flaw that is inherent in the all or nothing rule; the flaw being that it provides a “blanket release from liability” whenever there is less than a fifty percent chance of achieving a favorable outcome, irrespective of the flagrancy of the defendant’s conduct.⁶³ To illustrate the loss of chance doctrine in monetary terms utilizing a proportional damages method, if the favorable outcome is \$100, and the plaintiff’s chance of obtaining it was fifty percent before the defendant’s conduct, and that conduct reduced the plaintiff’s chance to thirty-three percent, then the loss of chance damages would be \$17, which represents the seventeen percent reduction (\$100 multiplied by seventeen percent).⁶⁴

⁵⁹ See King, *Causation*, *supra* note 58, at 1365–66.

⁶⁰ *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 829 (Mass. 2008).

⁶¹ *Id.*

⁶² See King, *Causation*, *supra* note 58, at 1377 (“By placing [loss of chance] losses outside tort law, the all-or-nothing approach distorts the loss-assigning role of that law.”).

⁶³ *Matsuyama*, 890 N.E.2d, at 829–30.

⁶⁴ “[T]he proportional damages method is the most appropriate way to quantify the value of the loss of chance for a more favorable outcome, because it is an easily applied calculation that fairly ensures that a defendant is not assessed damages for harm that he did not cause.” *Id.* at 840. See also *Renzi v. Paredes*, 890 N.E.2d 806, 813 (Mass. 2008). But see David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L.

The landmark British case of *Chaplin v. Hicks*⁶⁵ first recognized loss of chance as an independent recovery of breach of contract damages. In *Chaplin*, a contestant in a beauty contest was awarded damages based on the value of her loss of chance to actually compete in the contest.⁶⁶ The contest involved fifty candidates, from whom twelve would be selected as winners and who would be awarded professional acting contracts—the plaintiff was one of the original fifty contestants.⁶⁷ The defendant, a theatrical manager, breached a contractual obligation to notify the plaintiff that she was required to do a personal interview as a condition to participation in the contest.⁶⁸ Because the plaintiff did not complete the interview, she was denied the right to participate in the contest and thus lost the chance to be selected as one of the twelve winners.⁶⁹ The court found it irrelevant that the plaintiff could not possibly prove that she would have been successful being selected as one of the twelve contest winners, because the plaintiff's damage or injury consisted of the lost *opportunity* to compete in the contest.⁷⁰ The defendant appealed the jury's award, asserting that it was unduly speculative and contingent, but the award was affirmed on appeal.⁷¹ The plaintiff's damages equaled the amount of the value of the acting contract, discounted based on the plaintiff's probability of being selected for a contract; twenty-five percent, in this case, since the average chance of each competitor winning was one in four (twelve winners selected out of fifty candidates).⁷² In essence, *Chaplin* demonstrates a straight application of the proportional damages method illustrated earlier, which works in a case like *Chaplin* where both the value of the favorable

REV. 605, 631–33 (2001) (arguing that the proportional damages method fails to serve the basic aims of deterrence because it routinely over or under compensates plaintiffs). Some courts have rejected the proportional damages method in favor of an approach in which the fact finder makes a subjective determination of the value of the lost chance without going through the illusory exercise of setting a value for a more favorable outcome and then reducing that amount by some percentage. *See, e.g.,* *Smith v. State Dept. of Health & Hosp.*, 676 So.2d 543 (La. 1996).

⁶⁵ *Chaplin v. Hicks*, [1911] 2 KB 786.

⁶⁶ *Id.*

⁶⁷ *Id.* at 787.

⁶⁸ *Id.* at 791.

⁶⁹ *Id.* at 793.

⁷⁰ *See* *Snow v. Villacci*, 754 A.2d 360, 365 (Me. 2000) (“[T]here is no logical or public policy reason to deny recovery to a person who has lost an opportunity due to the negligent acts of another person, as long as the elements necessary for recovery are proven by a preponderance of the evidence. If a plaintiff has in fact lost a unique opportunity to increase her earnings, and that loss was caused by defendant's actions, she should be able to recover those damages just as she would have if the defendant's wrongdoing has caused her to lose wages.”).

⁷¹ [1911] 2 KB at 788.

⁷² *Id.* at 791.

outcome (the acting contract) and the reduced chance (twelve out of fifty) is relatively easy to determine.

To put this in the context of an athlete's recovery of damages for lost earning capacity or lost future earnings in a professional sports career, the athlete's economic harm is the lost or diminished chance to earn an amount of money in the future (the favorable outcome), and the athlete must establish that the defendant's wrongful conduct was the factual cause of the diminished or lost chance.⁷³ For example, in *Hall v. University of Minnesota*,⁷⁴ the district court articulated the economic harm that would be bestowed upon a college basketball star if he was wrongly denied application to a degree program, resulting in a declaration of ineligibility:

According to the evidence, if the plaintiff is accorded the opportunity to represent the University of Minnesota in intercollegiate varsity basketball competition during winter quarter of 1982, his senior year, he will have a significant opportunity to be a second round choice in the National Basketball Association draft this year, thereby acquiring a probable guarantee of his first year's compensation as a player in the National Basketball Association. If the plaintiff is denied the opportunity to participate in intercollegiate basketball competition on behalf of the University of Minnesota during winter quarter 1982, his chances for a professional career in basketball will be impaired; and it will be extremely unlikely that his compensation as a first year player in the National Basketball Association will be guaranteed. The evidence indicates that without an opportunity to play during the winter quarter of 1982, the plaintiff would likely be a sixth round choice in the National Basketball Association draft.⁷⁵

2. The But For Test

Proving the precise reduction in loss of chance in exact percentages, in most cases, is nearly impossible to do. Nevertheless, once breach is established, the plaintiff still must prove the existence of a factual cause link between the defendant's actions and the lost or diminished chance.⁷⁶ In other words, it must be shown that the defendant's conduct is the but for cause of the loss of chance (i.e., but for the defendant's conduct, the likelihood of a favorable outcome would not have been reduced or destroyed).⁷⁷ In lost profits claims, the plaintiff typically must prove that it is more probable than not the

⁷³ See, e.g., *Hall v. Univ. of Minn.*, 530 F. Supp. 104 (D. Minn. 1982).

⁷⁴ *Id.*

⁷⁵ *Id.* at 106.

⁷⁶ See *Matsuyama v. Birnbaum*, 890 N.E.2d 819 (Mass. 2008).

⁷⁷ "The proper test in a loss of chance case concerning the conduct of a single defendant is whether that conduct was the but-for cause of the loss of chance." *Id.* at 842.

plaintiff would have profited.⁷⁸ In loss of chance cases, while some courts have required the plaintiff to prove by a preponderance of the evidence that the defendant's actions caused the diminished chance,⁷⁹ other courts have held the plaintiff to a lower burden of proof than the usual preponderance of evidence standard generally applicable in civil claims.⁸⁰ For example, one court held that the plaintiff need merely show that, but for the defendant's breach, a "real and substantial chance" existed that an opportunity or transaction with a third party would have occurred and led to the plaintiff's profits; a real and substantial chance defined as something more than a purely speculative or fanciful chance.⁸¹

As a threshold matter, the underlying cause or causes of action that establish liability in a particular case may impact the athlete's ability to prove a factual causal link between the defendant's wrongful conduct and the athlete's diminished or lost chance of future earnings. There are two cases decided by the Arizona Court of Appeals that illustrate this point; one case involved a college basketball coach's damages for breach of an employment contract,⁸² and the other case involved a personal injury action brought by a minor league baseball player against a physical rehabilitation company.⁸³

In the first case, *Lindsey v. University of Arizona*,⁸⁴ the plaintiff, who successfully coached men's basketball for several years at Grand Canyon College, applied for and accepted a head coaching position at the University of Arizona.⁸⁵ The plaintiff was terminated by the university after an unsuccessful first season and filed suit, claiming that the university breached an oral promise to hire him for four years, despite language in a letter from the university president that the contract was only for one year.⁸⁶ The Arizona Court of Appeals affirmed a jury's award of \$215,000 for the plaintiff's lost wages, representing deprivation

⁷⁸ See, e.g., RESTATEMENT (SECOND) OF TORTS § 912 cmt. d., illus. 8 ("A is entitled to compensatory damages from D only if he proves that it is more probable than not that the match would have been made by him and would have been a financial success. . . .").

⁷⁹ See *Matsuyama*, 890 N.E.2d at 832 ("In order to prove loss of chance, a plaintiff must prove by a preponderance of the evidence that the physician's negligence caused the plaintiff's likelihood of achieving a more favorable outcome to be diminished. That is, the plaintiff must prove by a preponderance of the evidence that the physician's negligence caused the plaintiff's injury, where the injury consists of the diminished likelihood of achieving a more favorable medical outcome.").

⁸⁰ See, e.g., *Allied Maples v. Simmons & Simmons*, (1995) 1 W.L.R. 1602 (U.K.).

⁸¹ *Id.* at 1611–14.

⁸² *Lindsey v. Univ. of Ariz.*, 754 P.2d 1152 (Ariz. Ct. App. 1987).

⁸³ *Felder v. Physiotherapy Assoc.*, 158 P.3d 877 (Ariz. Ct. App. 2007).

⁸⁴ *Lindsey*, 754 P.2d 1152.

⁸⁵ *Id.* at 1154.

⁸⁶ *Id.* at 1155–56.

of employment for three years because sufficient evidence was presented to sustain a finding of breach of contract.⁸⁷ However, the Court of Appeals overturned the jury's award for loss of future earning capacity in the amount of \$480,000, to which the plaintiff maintained he was entitled because of the difficulty he would have in obtaining future employment as a coach in view of his premature termination as coach at Arizona.⁸⁸ The *Lindsey* court concluded that this was akin to reputation damage, which, according to the court, as a general rule is not recoverable in a breach of contract action because it "cannot reasonably be presumed to be within the contemplation of the parties when they entered into the contract" and the computation of such damages is "too speculative."⁸⁹ In regard to the effect the plaintiff's termination would have on his future earning capacity as a basketball coach, the court found that the jury could "do nothing more than engage in speculation and conjecture" because it would depend upon the success or failure of the Arizona basketball team had the plaintiff continued as head basketball coach for an additional three years.⁹⁰

Twenty years later, the same court decided the case of *Felder v. Physiotherapy Associates*, in which a minor league AAA professional baseball player prevailed at trial on a negligence claim against a physical rehabilitation company relating to a permanent eye injury he sustained while taking batting practice at the company's facility.⁹¹ Regarding the issue of lost earning capacity, which necessarily involved an assessment of the plaintiff's chances of making it to the major leagues, the potential length of his major league career, and the potential range of his compensation, the jury awarded \$7 million and found that the plaintiff was thirty percent at fault, thus reducing the award to \$4.9 million.⁹² On appeal, the defendant claimed that the trial court erred as a matter of law by failing to find that the evidence of lost future earnings was "too speculative" and therefore insufficient to support a claim of lost earning capacity.⁹³ The

⁸⁷ *Id.* at 1157.

⁸⁸ *Id.* at 1158.

⁸⁹ *Id.*

⁹⁰ *Lindsey*, 754 P.2d at 1158 ("Had Lindsey continued in his employment as the University of Arizona head basketball coach for an additional three years and sustained losing seasons similar to the team's 4-24 overall record for the 1982-83 season, his coaching career would most likely have been ended and he would have no future earning capacity as a basketball coach. Had he, on the other hand, coached the team to a national championship, his future earning capacity may have exceeded the \$480,000 award many times over.").

⁹¹ *Felder*, 158 P.3d at 877.

⁹² *Id.* 884.

⁹³ *Id.* at 885.

defendant tried to attack the factual cause link between the defendant's negligence and a major league career, arguing that the "fact of damage" is damage to the plaintiff's major league career, and thus the plaintiff must first prove that he would have been promoted to the major leagues.⁹⁴ But the Court of Appeals viewed the causation issue in a different light, noting that the evidence clearly showed that the plaintiff's professional baseball career ended as a direct result of the eye injury, and thus the *fact* of damage was proven.⁹⁵ The court found that reaching the major league level would be an "advancement" in the plaintiff's professional career and the eye injury "plainly took away his chance to continue and advance as a player," including the chance of a major league career, thus "the amount of the damages for being deprived of that chance was for the jury to decide."⁹⁶

The *Felder* court distinguished *Lindsey* as involving a "bright-line rule" whereby a reduction in future earning power or capacity is not recoverable in an action for breach of an employment contract, and it concluded that the holding in *Lindsey* was not applicable to a personal injury case.⁹⁷ The court further noted that proving lost profits in breach of contract cases is "more complicated" and the line between the fact of damage and the amount of damage becomes more blurred when lost profits are at issue.⁹⁸ According to the *Felder* court, although many of the lost profits cases discuss the evidentiary hurdle in terms of proving the *amount* of lost profits, the courts are actually more heavily scrutinizing whether the plaintiff has presented sufficient proof of the *fact* of lost profits.⁹⁹ However, the *Felder* court did not explain *why* the factual cause link in breach of contract actions involving damages for lost future earnings or profits requires more skepticism and scrutiny than in personal injury cases. Certainly, the answer does not lie in the fact that one is necessarily more "speculative" than the other. Surely it is just as speculative to suggest that a minor league baseball player who never played an inning in the major leagues would have earned substantial compensation in the future at the

⁹⁴ *Id.* at 886.

⁹⁵ *Id.*

⁹⁶ *Id.* at 886–88.

⁹⁷ *Felder*, 158 P.3d at 887 n.6.

⁹⁸ *Id.* at 887.

⁹⁹ *Id.* See, e.g., *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 680 P.2d 1235, 1247 (Ariz. Ct. App. 1984) (affirming the finding that plaintiff, who sought to recover lost profits from a commercial catfish farm, had failed to show that he would have been successful at the business); *Coury Bros. Ranches, Inc. v. Ellsworth*, 446 P.2d 458, 463–64 (Ariz. Ct. App. 1968) (finding evidence failed to show that breach of contract caused losses).

major league level as it is to say that a college basketball coach who was wrongfully terminated would have earned substantial compensation in the future as a winning coach.

The most plausible justification for the “bright-line rule” in *Lindsey* is perhaps the fact that contract remedies seek to accomplish different goals, incentives, and policies. Contract law seeks to award an amount that puts the non-breaching party in the same economic position it would have been had the contract not been breached—also known as general or expectation damages.¹⁰⁰ Under traditional contract law principles, the most that the coach in *Lindsey* could have expected to earn under the terms of his employment contract, absent the university’s breach, was his annual compensation pursuant to the terms of the agreement for as long as the length of the contract term, which is the amount the coach was awarded by the jury. Indeed, recovery for lost future earnings or lost profits in a breach of contract case, known as special or consequential damages, presents a classic *Hadley v. Baxendale*¹⁰¹ scenario that demands special proof and a sufficient level of foreseeability at the time the contract was entered in order to bring such damages within the contemplation of the parties.¹⁰² The requirement of proof of foreseeability is evidence of the courts’ hesitance to allow recovery for special damages when the risk of such losses can sufficiently be allocated between the contracting parties or by procuring insurance before the loss is incurred. Tort law, on the other hand, is aimed at deterrence, compensating the victim and making the injured party whole, and apportioning liability based on fault. Thus, the lost earning capacity factual cause link in a case involving tortious interference with contract does not typically demand the same level of scrutiny as one that involves breach of contract.

The *Lindsey* and *Felder* courts did not discuss the causation issue in terms of the traditional but for analysis applied in loss of

¹⁰⁰ The *Lindsey* court specifically noted that damages for lost earning capacity “cannot reasonably be presumed to be within the contemplation of the parties when they entered into the contract.” *Lindsey v. Univ. of Ariz.*, 754 P.2d 1152, 1158 (Ariz. Ct. App. 1987).

¹⁰¹ *Hadley v. Baxendale*, (1854) 9 L.R.Exch. 341, 355 (holding that damages based on lost profits were not foreseeable to the defendant common carrier which entered into a contract with plaintiff grain miller to deliver a broken crankshaft to another party for repairs by a certain date, and delivery failed to occur on time resulting in lost business for the plaintiff and a resulting breach of contract claim against the carrier seeking recovery of lost profits).

¹⁰² *See, e.g., Susi v. Simonds*, 85 A.2d 178, 179 (Me. 1951) (“[F]or the plaintiff to recover the special damages he claims to have suffered beyond what would naturally flow from the breach claimed of such contract, it must affirmatively appear that the special circumstances under which the contract was actually made which gave rise to such damages were communicated by the plaintiff to the defendant and were thus in the contemplation of both parties at the time of making the contract.”).

chance cases.¹⁰³ However, it seems that the *Felder* court was implicitly suggesting that but for the plaintiff's eye injury (due to the defendant's negligence) the plaintiff would not have lost the *chance* at a major league career, not that the plaintiff would have in fact reached the major leagues.¹⁰⁴ In other words, it is not debatable that a permanent eye injury ending the plaintiff's ability to play professional baseball at the minor league level also ended any chance of eventually playing in the major leagues, which chance existed before the injury, and it was then up to the jury to assess an amount of his damages for being deprived of that chance.¹⁰⁵ If the plaintiff had been precluded from proving lost earning capacity damages, he would have fallen victim to the "all or nothing" rule discussed earlier.¹⁰⁶ The "bright-line rule" for lost earning capacity in breach of contract cases, as in *Lindsey*,¹⁰⁷ could alternatively be viewed as an application of the all or nothing rule with an implicit assumption that the plaintiff should recover nothing because he cannot prove that the defendant's breach more likely than not caused an unfavorable future outcome. Moreover, the inherent unfairness of the all or nothing rule in tort cases is *usually* absent in breach of contract cases essentially for the reasons that justify application of the bright-line rule in most contract cases.¹⁰⁸ However, *Chaplin* highlights the exception to the bright-line rule and demonstrates that there may be contract cases that especially warrant recovery of damages for lost future earnings.¹⁰⁹ The causal link was fairly compelling in *Chaplin* because (1) the loss of a chance to compete in the beauty contest and be one of the twelve finalists who would receive an acting contract was within the "contemplation of the parties at the time the contract was entered,"¹¹⁰ and (2) we can confidently say that, but for the defendant's failure to notify the plaintiff about the condition to participating in the beauty contest, the plaintiff would not have lost the chance (albeit a twenty-five percent chance) to be one of the twelve finalists and receive an acting contract.¹¹¹

Nevertheless, the pertinent question left unanswered in *Felder* was the extent of the plaintiff's chance, before the eye

¹⁰³ *Lindsey v. Univ. of Ariz.*, 754 P.2d 1152 (Ariz. Ct. App. 1987); *Felder v. Physiotherapy Assoc.*, 158 P.3d 877 (Ariz. Ct. App. 2007).

¹⁰⁴ *Felder*, 158 P.3d at 886 ("His injury plainly took away his *chance* to continue and advance as a player.") (emphasis added).

¹⁰⁵ *Id.*

¹⁰⁶ See *supra* notes 59–64 and accompanying text.

¹⁰⁷ 754 P.2d 1152.

¹⁰⁸ See *supra* note 102 and accompanying text.

¹⁰⁹ *Chaplin v. Hicks*, [1911] 2 KB 786.

¹¹⁰ *Id.* at 795.

¹¹¹ *Id.* at 793.

injury was inflicted, of earning future compensation in a major league career—the court determined that the plaintiff lost that chance without addressing what the plaintiff's chance was prior to the eye injury.¹¹² A more precise application of the loss of chance doctrine, then, would be based on the proportional damages method applied in *Chaplin*,¹¹³ which would only give the plaintiff a recovery in an amount that reflected the extent to which the defendant's conduct caused a *reduction* in the chance of a major league career, which would necessarily require an assessment of the plaintiff's chance both before and after the injury (but which may have been nearly impossible to determine in *Felder*). For example, suppose it could be shown that the plaintiff only had a twenty percent chance of making the major leagues before the eye injury and, because the injury ended the plaintiff's professional career, the injury reduced that chance to zero. Presumably, then, the plaintiff would only be entitled to twenty percent of the amount he could expect to have earned in a future major league career absent the injury. But even if it could somehow be shown that he had a twenty percent chance, the amount he could reasonably expect to have earned in a future major league career would also need to be determined, which of course would be more uncertain than the known value of one of the twelve acting contracts to be awarded in the beauty contest.

Determining the reduction in chance is further complicated when the defendant's tortious conduct does not result in a personal injury or death that permanently ends an athlete's career, as in *Felder*, but instead hinders the athlete's ability to reach their full athletic potential or to earn an increased level of compensation as an athlete.¹¹⁴ In these situations, an additional calculation must be made regarding the plaintiff's percentage chance *following* the injury, which would obviously be some percentage greater than zero if the injury does not end the plaintiff's career (and then the difference between the two would equal the lost chance in a percentage amount). The proportional damages method, in which percentages are assigned based on probabilities, may lend itself well in cases where estimates can be made based on data obtained and analyzed scientifically and accepted by the relevant community, such as the use of statistical survival rates in medical malpractice cases to determine the

¹¹² *Felder v. Physiotherapy Assoc.*, 158 P.3d 877 (Ariz. Ct. App. 2007).

¹¹³ See *supra* note 65 and accompanying text.

¹¹⁴ For a case in which the court determined that the injury did not hinder the plaintiff's ability at all, see *Taylor v. Allstate Ins. Co.*, 205 So. 2d 807, 810–11 (La. Ct. App. 1968) (rejecting plaintiff's claims that his performance as an established professional football player was curtailed as a result of injury to plaintiff's back because there was no evidence in the record which indicates that the injury had any such result).

chance that a patient would survive a certain medical condition or treatment.¹¹⁵ However, such percentage determinations are usually not very conducive to assessing an athlete's lost earning capacity in a professional career, which probably explains why the *Felder* court did not venture down that path.¹¹⁶ Courts that impose a lower burden of proof or require less precision for causation purposes can demand a higher level of scrutiny when the plaintiff must prove the damage amount with a reasonable degree of certainty.

The higher the plaintiff is on the EPR, the greater the degree of confidence with which it can be estimated that the plaintiff did *in fact* have a real and substantial chance of future earnings in a professional career.¹¹⁷ *Albrecht v. Industrial Commission*¹¹⁸ presents such a case, in which a former professional football player for the Chicago Bears, whose football career as an offensive lineman ended after five years when he sustained a back injury, appealed the Commission's decision denying him wage-loss differential workers' compensation benefits (the purpose of which is to compensate injured employees for reduced earning capacity).¹¹⁹ Based on evidence that Albrecht was a first-round draft choice and started every game from his first season in 1977 up to the time of his injury in 1982, in addition to evidence that there were offensive linemen in the NFL, and specifically with the Bears, who played longer than the ten-year average career length for an NFL offensive lineman, the court was able to conclude that "but for claimant's injury, he would have been in the full performance of his duties as a Bears offensive lineman after 1983."¹²⁰ The court rejected arguments that Albrecht "cannot prove how long he could have continued

¹¹⁵ See *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 833 (Mass. 2008) ("A statistical survival rate cannot conclusively determine whether a particular patient will survive a medical condition. But survival rates are not random guesses.").

¹¹⁶ See *supra* note 112 and accompanying text.

¹¹⁷ See, e.g., *Nolan v. Jefferson Downs, Inc.*, 592 So.2d 831, 839–40 (La. Ct. App. 1991) (awarding of lost future earning capacity affirmed where jockey won over sixty races in first year of apprenticeship, retained an agent, was breaking and setting records, was in the top ten, was the first successful female jockey at Jefferson Downs, had beaten one of the top jockeys in the country on a fairly regular basis, and was recognized as outstanding female athlete in Louisiana and named to the Sugar Bowl Hall of Fame).

¹¹⁸ *Albrecht v. Indus. Comm'n*, 648 N.E.2d 923 (Ill. App. Ct. 1995).

¹¹⁹ Such an award is based

on the difference between the 'average amount' the employee would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of injury and the 'average amount' he is earning or is able to earn in some suitable employment after his injury.

Albrecht, 648 N.E.2d at 925–26 (quoting *Gen. Elec. Co. v. Indus. Comm'n*, 495 N.E.2d 68, 73 (Ill. App. Ct. 1986)).

¹²⁰ *Albrecht*, 648 N.E.2d at 926.

playing professional football or how much he would have earned without engaging in speculation” and that “the competitive nature and physical demands of the sport dictated that [his] employment as a Bear was of a temporary nature in that it was dependent on [his] ability to excel over other players competing for his job.”¹²¹ It similarly discounted testimony from the general manager for the Bears that Albrecht signed contracts year to year that “were contingent on [his] success in making the football team” and that “not every player is guaranteed to make the team on any given year.”¹²²

3. Personal Injury Cases Involving Amateur Athletes

When the athlete is an amateur, the causal connection does not necessarily become more tenuous, but remains a very fact intensive inquiry as to whether the plaintiff had a chance at a professional sports career that was reduced or lost as a result of the defendant’s actions. Personal injury cases involving athletes in many respects resemble any bodily injury case in that (1) the victim is no longer able to perform the type of work he had performed before the injury, which is typically established through medical testimony, and (2) if severe enough, the injury is usually permanent in nature such that the loss of earning capacity extends for the plaintiff’s entire work life, and the permanence of the injury is also typically established by medical testimony to evidence that the plaintiff has reached maximum recovery.¹²³ Personal injury cases involving athletes also resemble employment discrimination cases that require the plaintiff to demonstrate that they are *qualified* to do the work,¹²⁴ just as an athlete is required to demonstrate that he is qualified to earn future compensation as a professional athlete.¹²⁵ There are a number of personal injury cases in which amateur athletes, for the most part college students or graduates, have sought

¹²¹ *Id.*

¹²² *Id.* (“[W]e may not base our decision solely on the evidence submitted by the Bears organization since that would require impermissible speculation that claimant’s career would not have extended beyond 1983 due to the nature of the sport when evidence in the record indicates otherwise.”).

¹²³ *See, e.g., Nolan v. Jefferson Downs, Inc.*, 592 So.2d 831, 840 (La. Ct. App. 1991) (citing testimony from doctors that jockey could no longer do competitive horse racing because of eye injury; one doctor testifying that a fluorescein angiogram of jockey’s eye indicated “it is more likely than not that over the course of her entire life time that she will have a progressive decrease in her central vision in the right eye” and that it was likely the vision in her eye would ultimately decrease to legal blindness).

¹²⁴ *See, e.g., CAL. GOV’T CODE* § 12940(a)(1) (West 2000) (noting that it does not constitute employment discrimination to refuse to employ a person with a disability where that disability prevents the person from performing the essential job functions with reasonable accommodation).

¹²⁵ *See supra* Part II.A.1.

recovery of damages for loss of earnings or earning capacity for having been deprived of the chance for a professional sports career.

In the cases in which amateur athletes were awarded recovery, the courts tended to generalize the standard for meeting the factual cause link, but the causal connection was nevertheless established in these cases based on a theory that the plaintiff had previously demonstrated considerable promise as an amateur athlete. For example, in *Horton v. McCrary*, the court affirmed an award of \$100,000 to a nineteen-year-old college baseball player who was involved in a car accident and incurred a broken leg requiring surgery.¹²⁶ Damages were awarded for loss of the opportunity for a professional baseball career based on expert testimony from a person who had a degree in physical education with an emphasis on coaching, coached baseball, taught baseball techniques, played semi-professional baseball, and observed the plaintiff play college baseball.¹²⁷ He opined that the plaintiff would have been drafted to play professional baseball, that the plaintiff “had better skills than many of the other college baseball players who became professionals” and that if the plaintiff “had continued on the pace that he was going through his freshman year there was no doubt in . . . [his] mind that Tim would have been picked up by a professional ball club.”¹²⁸ The court approved of the trial judge’s admission into evidence of a scrapbook consisting of newspaper articles, photographs, and awards documenting the plaintiff’s athletic accomplishments during high school and college, all of which tended to show his “desire and fervor for athletics” and helped to quantify the loss he suffered because of his inability to continue participation in athletics at the same level he had prior to the accident.¹²⁹

In *Stafford v. Unsell*, the court affirmed a jury’s award of \$35,000 to the plaintiff, an amateur motorcycle racer, who suffered a broken nose and a broken foot in an auto accident.¹³⁰ At age fifteen, the plaintiff was one of the top ranked amateur motorcycle racers in the country, and he anticipated turning professional at age sixteen and signing a contract with a major

¹²⁶ *Horton v. McCrary*, 620 So.2d 918, 930 (La. Ct. App. 1993), *aff’d in part, rev’d in part on other grounds*, 635 So.2d 199, 204 (La. 1994).

¹²⁷ 620 So.2d at 929.

¹²⁸ *Id.*

¹²⁹ *Id.* at 927–28, 931 (“Despite Tim’s attempts to regain his pre-accident physical condition, the record preponderates that he would not be able to pursue his dream of playing professional baseball. The testimony of the two expert witnesses . . . clearly show that Tim had the desire and the ability before the accident to play professional baseball.”).

¹³⁰ *Stafford v. Unsell*, 492 So.2d 94 (La. Ct. App. 1986).

motorcycle manufacturer/sponsor.¹³¹ A calcium deposit formed on the plaintiff's foot as it was healing, which allegedly caused severe pain when he engaged in strenuous physical activity and kept him from properly training as a racer.¹³² Testimony at trial indicated that racers must be superbly conditioned athletes, which causes many to burn out by the age of twenty-four, and the plaintiff claimed that because the injury prevented him from maintaining a conditioning program, his racing performance had been so poor that he was unable to get a contract.¹³³ In answer to the defendant's appeal, the plaintiff asserted that his loss of future earnings was much higher than the jury awarded—in the neighborhood of \$400,000.¹³⁴ The court disagreed with the plaintiff and, from a causation standpoint, found that even though the plaintiff had a chance at a professional racing career, it was only a slight chance due to facts and circumstances unrelated to the injury from the accident—for example, the fact that the “hazards of racing can end a promising career abruptly” and the fact that the plaintiff had various other physical ailments that the jury could have reasonably believed contributed to or solely caused his loss of racing skills.¹³⁵ In essence, the court's holding suggests that it viewed the \$35,000 award as reasonably proportionate to the extent to which the accident diminished the plaintiff's already slim chance of making money as a professional racer.

In *Washington v. American Community Stores Corp.*,¹³⁶ the court upheld a jury verdict that the plaintiff, who sought to recover for back injuries that were undisputedly permanent, had suffered a permanent impairment of his earning capacity in a career as a professional wrestler or wrestling coach based on evidence which showed that he had received numerous accolades as a wrestler, including college football and wrestling scholarships, compiled a collegiate wrestling record of 103 wins and only four losses, won a national varsity wrestling championship during his sophomore and senior years in college, and intended to compete in the Olympic trials.¹³⁷ There was also

¹³¹ *Id.* at 98.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 98–99 (“The jury also could have reasonably believed that Scooter's pain was not as severe or disabling as claimed and that his performance was not significantly hampered. He only consulted a doctor once over several years in regard to the pain allegedly caused by the calcium deposit.”).

¹³⁶ *Wash. v. Am. Cmty. Stores Corp.*, 244 N.W.2d 286 (Neb. 1976).

¹³⁷ *Id.* at 288–89. The plaintiff had been employed by the state as an adult parole officer since his graduation from college, and there was no evidence that he had received

expert testimony that, before his injury, he was a prime candidate for the U.S. Olympic team and had the qualifications to become a great international wrestler and win an Olympic medal, and that those who compete in the Olympics and win a medal have a much better opportunity to secure employment in the coaching or professional wrestling fields.¹³⁸ In conclusive fashion, the court found “that the evidence strongly supports the inference . . . that the plaintiff, besides his bodily disability, had suffered a permanent impairment of his earning capacity in a professional or coaching career in the wrestling sport.”¹³⁹

In *Clinchfield Rail Road Co. v. Forbes*,¹⁴⁰ the court affirmed a \$75,000 award to a twenty-five year-old football player who suffered permanently disabling injuries and held that the trial judge did not commit error in permitting evidence of a professional football contract the plaintiff had signed with the Cleveland Browns on the issue of lost earning capacity.¹⁴¹ The defendant argued that the contract was not evidence of the plaintiff’s earning ability because it was contingent on his making the team and, since there was no evidence that the plaintiff possessed the necessary skill and ability to play professional football, the contract had no probative value and was speculative at best.¹⁴² However, the court noted that evidence had been presented to show that the plaintiff was an outstanding football player in college, including testimony from one of his coaches and other witnesses familiar with the game of football and the plaintiff’s playing ability that they considered

any actual earnings from wrestling at the time of his injury or at the time of the trial. *Id.* at 287–88.

¹³⁸ *Id.* at 288. The court approved, with some minor reservations, a jury instruction to the effect that

where a competitor in a sporting or athletic event, because of his superior ability in that field, has an opportunity of being awarded, with reasonable certainty or probability, a substantial benefit to him which may be of value to him in the future, and that he is deprived of this opportunity by another, through the other’s negligence, then the person so deprived thereof, may recover such damages which the evidence shows with reasonable certainty that he has suffered therefrom.

Id. at 290.

¹³⁹ *Id.* at 289–90. (“From our quite detailed review of the facts, it is clear that there was ample evidence to sustain the findings of the jury as to the talents, skill, experience, training, and industry in the pursuit of the wrestling sport and preparation for professional occupation and career in this area. The other evidence as to plaintiff’s age, life expectancy, health, and habits sustains the presence of all these elements required as to the proof of loss of earning capacity.”).

¹⁴⁰ *Clinchfield R.R. Co. v. Forbes*, 417 S.W.2d 210 (Tenn. Ct. App. 1966).

¹⁴¹ The court found that “[t]his contract was exhibited to the jury who were made aware of the contingency that Forbes did not receive any compensation until he made the team. It was for the jury to weigh this piece of evidence along with all the other competent evidence.” *Id.* at 215.

¹⁴² *Id.* at 214.

him an outstanding athlete, as well as evidence showing that many professional football teams were interested in his services prior to his signing the contract with the Browns.¹⁴³

Finally, in *Connolly v. Pre-Mixed Concrete Co.*, as a result of an accident in which considerable muscle tissue in the plaintiff's leg was destroyed, the court held that a jury award of \$95,000 for lost earning capacity damages to a twenty year-old woman who was a champion amateur tennis player with aspirations of becoming a professional tennis player was not excessive.¹⁴⁴ The plaintiff had "planned to go on a three-months' professional tennis tour, for which she had been offered a percentage of the receipts, with a guarantee of \$30,000."¹⁴⁵ In addition, there was expert testimony that: (1) the plaintiff had not yet reached her peak, (2) she could have, but for the accident, earned considerably greater amounts as a professional tennis player, (3) she would have received additional sums from endorsements of sporting goods and other articles, (4) her earnings during her first year as a professional alone would have been at least \$75,000, and (5) she could have expected at least seven or eight years of participation as a professional.¹⁴⁶

In the personal injury cases in which recovery of lost earning capacity damages was denied, involving amateur athletes claiming deprivation of a prospective professional sports career, the factual cause link was found wanting. But here, again, the

¹⁴³ *Id.* at 214–15. The court noted the testimony of two doctors who opined that he would suffer a permanent disability the remainder of his life . . . [that] would prevent him from playing football and . . . that if the plaintiff pursued a football coaching career, his permanent disability would affect his bodily movements and he would be unable to do the stooping, bending and other necessary physical movements a coach normally would do in their field.

Id. at 217.

¹⁴⁴ *Connolly v. Pre-Mixed Concrete Co.*, 319 P.2d 343 (Cal. 1957).

¹⁴⁵ *Id.* at 346.

¹⁴⁶ *Id.* The witnesses who testified as to the plaintiff's earning capacity consisted of (1) a six-year professional champion who had conducted two professional tours, (2) somebody who had been connected with tennis for thirty-six years, had been on the Australian Davis Cup team for a number of years and was a writer on tennis for a newspaper, and (3) the sports director for a broadcasting system who had been a professional athlete and was familiar with the earning capacity of champion tennis players. *Id.* According to the court, these witnesses "had extensive knowledge of professional tennis, and their opinions were based on their experience and information concerning the amounts earned by other tennis players." *Id.* See generally *Jones v. Iowa Cent. Cmty. Coll.*, 972 F.2d 354 (8th Cir. 1992) (unpublished opinion) (reversing the district court's determination that evidence was insufficient to support jury's award for loss of future earning capacity on belief that there was no evidence presented that plaintiff would have regained academic eligibility to play college basketball despite testimony from an assistant basketball coach at Syracuse University that if plaintiff had played college basketball for four years (combination of junior and four-year colleges) without getting hurt he could have played professional basketball in Europe earning \$75,000 per year for ten years).

courts did not provide a definitive standard or explanation regarding the factual cause link.

For example, in *Tanuvasa v. City and County of Honolulu*,¹⁴⁷ the court held it was prejudicial error for the trial judge to have given a jury instruction allowing a damages award to a college student for loss of the opportunity to play professional football, where (1) the evidence showed that, although the plaintiff had a brilliant career as a high-school football player, he played football in college largely as a substitute due to a series of problems arising in part from injuries he sustained while playing, (2) expert testimony demonstrated that the plaintiff stood a chance of playing professional football in the bottom twenty-five percent of the National Football League (NFL) or in the World or Canadian Leagues only if he were in shape and motivated, (3) no evidence was presented indicating that any NFL team that might have picked the plaintiff in the NFL draft did not do so because of the injury inflicted by the defendant, and (4) the plaintiff did not testify specifically that he did not attempt to try out as a free agent in any professional football league because of the injuries he incurred in the incident.¹⁴⁸ Although the plaintiff stated he was experiencing frequent headaches, dizziness, and trouble concentrating, the court found there was no evidence that as a direct and proximate result of the occurrence in question he was prevented from pursuing a professional football career.¹⁴⁹ Interestingly, the court flatly rejected a claim that, even if the plaintiff was not actually “prevented” from pursuing such a career, he *lost the chance* to try to pursue it.¹⁵⁰ Although the court acknowledged that “there is some evidence that [plaintiff’s] chances for pursuing a football career were diminished,” the jury instruction, “as worded, is equally susceptible of the construction that what was being claimed was the loss of a career.”¹⁵¹

In *Emoakemeh v. Southern University*, the court held that the trial court did not abuse its discretion in denying an award of

¹⁴⁷ *Tanuvasa v. City and County of Honolulu*, 626 P.2d 1175 (Haw. Ct. App. 1981). The plaintiff claimed to suffer headaches, dizziness and blurry vision on a frequent basis, perhaps every other day, as a result of a beating with a heavy flashlight by a police officer. *Id.* at 1178–79.

¹⁴⁸ *Id.* at 1179. According to the court, the only evidence anywhere to be found establishing a causal connection between the injuries sustained by the plaintiff and his ability to play professional football was in the cross-examination testimony of a medical expert retained by the defendants to examine him, who stated that he found no evidence that the plaintiff had sustained brain damage as a result of the incident and that he had advised the plaintiff that he had been injured so many times playing football that he should not attempt to play it anymore. *Id.* at 1179, 1184.

¹⁴⁹ *Id.* at 1184–85.

¹⁵⁰ *Id.* at 1185.

¹⁵¹ *Id.*

damages for lost earning capacity to a Nigerian national who was on a tennis scholarship and was injured by a gunshot wound to his thigh during an altercation in a dormitory.¹⁵² The plaintiff “sought to prove that he had the potential to play world class tennis that would have garnered him a top-notch teaching job at a prestigious racquet club.”¹⁵³ One witness who testified regarding the plaintiff’s potential to play professional tennis, and who played tennis against the plaintiff once and witnessed the plaintiff play during sporadic trips to Nigeria, admitted that questions regarding the plaintiff’s potential as a future tennis star were very difficult to answer, but that, because of his ability and the fact that he played in previous ATP tennis tournaments, one could “deduct that he has the potential of perhaps furthering his career in the professional field of tennis.”¹⁵⁴ However, nobody who had played tennis with the plaintiff, or had coached him, testified on his behalf regarding his alleged talent in the sport.¹⁵⁵ Further, although the plaintiff had been ranked 826th in the world when he was sixteen years of age, he was subsequently stripped of his ranking because he lost in the qualifying rounds of certain tournaments.¹⁵⁶ Therefore, noting that the plaintiff had the burden of proving loss of future earning capacity with reasonable certainty, the court found no error in the trial court’s conclusion that the totality of the evidence regarding the plaintiff’s tennis abilities was far “too speculative” to support such an award.¹⁵⁷

Lastly, *Clement v. Griffin* was an action brought by members of a college baseball team involved in a collision while riding in the school van.¹⁵⁸ The court found no error in the trial judge’s admission of evidence that one of the plaintiffs had the “dream” of pursuing a professional baseball career with a restriction that such evidence could only be used to establish the psychological impact that the loss of the opportunity to pursue that dream had on the plaintiff, including mental suffering and loss of enjoyment

¹⁵² *Emoakemeh v. S. Univ.*, 654 So.2d 474 (La. Ct. App. 1995).

¹⁵³ *Id.* at 479.

¹⁵⁴ *Id.* at 478. The court noted, however, that “[h]e could not state that the plaintiff had the potential to be a world class tennis player, but only that the potential ‘was there.’” *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 479. See generally *Weddle v. Phelan*, 177 So. 407 (La. Ct. App. 1937) (holding that, although an injured twenty-two year-old semi-professional baseball player was awarded damages for loss of expected future employment as such a player, evidence as to his alleged loss of earnings as a prospective professional baseball player in the major leagues was too speculative to be considered).

¹⁵⁸ *Clement v. Griffin*, 634 So.2d 412 (La. Ct. App. 1994).

of life.¹⁵⁹ Further, the trial judge instructed the jury that no evidence had been presented that the plaintiff would have become a professional baseball player.¹⁶⁰

B. Step Two: Proving the Amount of the Loss to a Reasonable Degree of Certainty

Recall the Restatement's illustration involving D's tortious interference causing B to break his contract with A to promote a boxing match between B and C.¹⁶¹ The pertinent question regarding the amount of A's lost future profits is, what would A have earned from the promotion of the boxing match absent D's tortious interference? It would be impossible to establish with *complete* certainty A's lost profits from a boxing match that A was unable to promote due to D's interference. Indeed, because it involves interference with an intangible right—a business opportunity or transaction—the amount of the lost profits may be difficult to prove with *any* degree of certainty. However, the law only demands that lost profits be proven with *reasonable* certainty, which can be evidenced by books of account, records of previous transactions, tax returns, or profit history of similar businesses.¹⁶² Similar to proving the value of a tangible item, if the market value of the business or enterprise interfered with could be approximated, then the value before and after the loss could be shown. Alternatively, if market value could not be approximated, then the income before and after the loss could be shown. In cases involving a lost business opportunity, a reasonable approximation of the value of the loss will often suffice even if a claim for lost profits would be speculative.¹⁶³

¹⁵⁹ *Id.* at 445–46.

¹⁶⁰ *Id.* at 446. *See also* Harvey v. Ouachita Parish Sch. Bd., 674 So.2d 372, 379 (La. Ct. App. 1996) (affirming trial court's award for loss of the opportunity to fully participate in competitive college football based upon the clear preponderance of the evidence showing that plaintiff was a highly recruited football player in high school, "was almost certainly headed towards a collegiate football program," and trial court's rejection of lost earning capacity in a professional career as "remote" and "insufficiently proved to be more probable than not").

¹⁶¹ *See supra* note 43 and accompanying text.

¹⁶² "Reasonable certainty as to the amount of lost profits can be shown by books of account, records of previous transactions or tax returns, or the profit history from a similar business operated by the plaintiff at a different location." Felder v. Physiotherapy Assoc., 158 P.3d 877, 887 (Ariz. Ct. App. 2007) (internal citation omitted) (quoting Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co., 680 P.2d 1235, 1245 (Ariz. Ct. App. 1984)).

¹⁶³ *See* Air Tech. Corp. v. Gen. Elec. Co., 199 N.E.2d 538, 548 (Mass. 1964) (citing Chaplin v. Hicks, [1911] 2 KB 786, 791–801 and stating that the "problem is to determine the value of the opportunity to which AT was entitled as a contract right, even if AT's lost profits cannot be ascertained. A reasonable approximation will suffice"). *See also* Snow v. Villacci, 754 A.2d 360, 365 (Me. 2000) (acknowledging that recovery of prospective, hypothetical earnings presented special evidentiary challenges, and holding that a

1. The Calculations and Data

The fundamental question in any case in which an athlete is claiming lost earning capacity in a professional sports career is, what would the plaintiff have earned as a professional athlete absent the defendant's conduct? The answer to that question can generally be thought of in terms of three basic calculations:

(1) First, calculate an amount that the plaintiff could reasonably have expected to earn in a prospective professional career *immediately preceding* the defendant's actions, taking into account not only the plaintiff's unique athletic skills and physical and intangible attributes, but also any risks and contingencies that would otherwise exist to impact the plaintiff's ability to earn those dollars in the future.

(2) Then, calculate an amount that the plaintiff can reasonably expect to earn in a professional career *now as a result of* the defendant's actions.

(3) Then, subtract the amount in step 2 from the amount in step 1.

In a case where the diminished chance based on a percentage can be determined with a reasonable degree of confidence, thus making the proportional damages method more palatable, step 2 would entail a calculation of the plaintiff's percentage chance both before and after the breach and in step 3 the difference in percentage would be multiplied by the amount calculated in step 1.

The more established the athlete is as a professional with a history of earnings, i.e., at the higher end of the EPR, the greater the degree of certainty with which the athlete's lost earning capacity can be determined, because a salary record provides a benchmark at which to calculate future earnings with more precision.¹⁶⁴ Such an example can be seen in former Miami Dolphins wide receiver O.J. McDuffie's recent malpractice lawsuit against former team physician John Uribe for the handling of an injury McDuffie incurred to his big toe in the tenth game of the 1999 season, which ultimately led to the end of

plaintiff may recover damages based on lost earning opportunity if supported by an adequate evidentiary foundation).

¹⁶⁴ See Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 *FORDHAM L. REV.* 73, 80 (1994) ("[T]he most common starting point for calculating the lost earning capacity of adults is the plaintiff's established earnings record. Current earnings are then used as the basis for projecting future earnings levels.").

his career.¹⁶⁵ McDuffie was cut before the 2002 off-season with three years left on his contract following a successful career in the NFL.¹⁶⁶ In May of 2010, a jury awarded McDuffie \$10 million in lost earnings.¹⁶⁷

However, salaries of professional athletes are hardly stagnant, and there are extreme variances in compensation among athletes based upon varying levels of individual performance as well as external factors such as league rules that artificially restrict a player's salary for a period of years or allow a player to earn a salary at market value via free agency or salary arbitration. As such, the common methodologies used by forensic economists to determine lost earning capacity in most occupations are not very conducive to determining an expectable future earnings stream for an athlete in a professional sports career.¹⁶⁸ In short, there is no single method, measure or formula that applies uniformly to all cases for calculating lost future earnings in a professional sports career because athletes are unique and fall in different places along the EPR. Further, the extent of the lost opportunity can vary depending upon the flagrancy of the defendant's conduct and the resulting injury or damage, thus making the calculation a very fact-intensive

¹⁶⁵ See David J. Neal, *Former Miami Dolphins' O.J. McDuffie Gets \$11.5 Million*, MIAMI HERALD, May 6, 2010, at 6D, available at <http://www.miamiherald.com/2010/05/06/1615345/former-miami-dolphins-0j-mcduffie.html>. McDuffie alleged that Uribe advised him he could continue to play even though the MRIs showed tendon damage. *Id.*

¹⁶⁶ *Id.* McDuffie was the Dolphins' first-round pick out of Penn State in 1993, led the NFL with ninety receptions for 1,050 yards and seven touchdowns in 1998, and had career totals of 415 receptions for 5,074 yards and twenty-nine touchdowns, but he had only forty-three receptions for 516 yards and two touchdowns in 1999 and fourteen receptions for 143 yards and no touchdowns in 2000. *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Many economists, for example, measure lost future earnings or earning capacity based upon an estimate of three joint probabilities—the probability of life, the probability of labor force participation, and the probability of employment—using published data on participation rates by age, gender, education, and race, which estimates the joint probability that the individual will be alive, in the labor market, and actually employed at any future age. See William Jennings & Penelope Marcurio-Jennings, *A Critique of the Joint Probability of Life, Participation and the Employment Approach*, 8 J. LEGAL ECON. 61, 62 (1998). The joint probability estimate at each future age is then multiplied by the corresponding expected earnings to produce a stream of future expected lost earnings throughout an individual's anticipated work life, typically through at least age seventy-five, is then reduced to present value. *Id.* See also Laura Greenberg, *Compensating the Lead Poisoned Child: Proposals for Mitigating Discriminatory Damage Awards*, 28 B.C. ENVTL. AFF. L. REV. 429, 443–45 (2001) (discussing child-plaintiff cases in which experts rely on objective factors such as “gender, age, and race-based tables to predict the number of years that the plaintiff would have remained in the labor force and to determine his or her expected average wages” as well as subjective data whereby the expert “evaluates the plaintiff on educational capacity through IQ and aptitude tests, examines the socio-economic status of the plaintiff's family, including the education and work history of the plaintiff's parents and siblings, and analyzes the family's economic ability to provide higher education”).

inquiry.¹⁶⁹ The key to any calculation is the reliability of the evidence upon which it is based, and, to satisfy the admissibility standard under Rule 702, the evidence must assist the trier of fact and the expert's methodology must be sufficiently reliable.¹⁷⁰

2. Using Comparable Players: The Appraisal Method

A future earnings assessment of an athlete in a professional career in some respects resembles an appraisal because a professional athlete, although legally characterized as an employee for a professional club, is an asset or an investment that yields a certain return over time.¹⁷¹ An appraisal of an asset or a business seeks to determine the fair market value of the asset or business if it were sold, and there are a variety of methods that may be utilized.¹⁷² Under the sales comparison approach, an estimate of a property's fair market value is based on a comparison of the subject property to similar properties that were recently sold or that are currently pending for sale.¹⁷³ The more accurate the comparables, the more confidence we have that previous sales and pending purchase agreements reflect the appraised asset's fair market value.¹⁷⁴ The sales comparison approach is appealing for its reliance on the market itself, but its reliability is heavily dependent on the reliability of the available information in the marketplace.¹⁷⁵ The cost approach is based upon the cost to develop a property comparable to the subject property as it currently exists, and is premised on the theory that "[a]ll things being equal, no one will pay more for an existing property than it would cost to develop a similar property to one's

¹⁶⁹ "No single model is the best method for determining the present value of lost earnings in all situations." James E. Ciecka, *A Survey of the Structure and Duration of Time Periods for Lost Earnings Calculations*, 4 J. LEGAL ECON. 39, 49 (1994) (discussing eight different techniques commonly used by forensic economists to estimate lost earnings focused entirely on the timing and duration of loss periods and not on other aspects of present value calculations such as discount rates, growth rates for earnings, or age earnings adjustments).

¹⁷⁰ See *supra* note 50 and accompanying text.

¹⁷¹ See Matuszewski, *supra* note 25 (debating the value of the Cleveland Cavaliers with and without LeBron James).

¹⁷² See generally Alex E. Sadler, Note, *The Inherent Ambiguity of Commercial Real Estate Values*, 13 VA. TAX REV. 787 (1994).

¹⁷³ See *id.* at 802. See also Leslie Kent Beckhart, Note, *No Intrinsic Value: The Failure of Traditional Real Estate Appraisal Methods to Value Income-Producing Property*, 66 S. CAL. L. REV. 2251, 2265 (1993) (citing AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, *THE APPRAISAL OF REAL ESTATE* 340 (9th ed. 1987): "The sales comparison approach assumes that the market value of the subject property is related to the prices of comparable properties in the same or a similar marketplace.").

¹⁷⁴ Beckhart, *supra* note 173, at 2265 ("The sales comparison approach is based on the principle of substitution. This principle states that when several similar or commensurate commodities, goods, or services are available, consumers will demand the one with the lowest price and cause it to be distributed most widely.").

¹⁷⁵ See Beckhart, *supra* note 173, at 2268-69.

own specifications.”¹⁷⁶ Just as there is no single method that uniformly applies to the calculation of lost earnings in all cases, there is no single method that applies to the appraisal of assets.¹⁷⁷

Athletes possess unique skills and can be likened to a unique business for appraisal purposes, in which sales of comparable businesses are often used to assess value.¹⁷⁸ For example, in affirming the trial court’s determination of the net asset value of the 1976 New England Patriots for purposes of ascertaining the fair value of its stock in an appraisal proceeding, the Supreme Court of Massachusetts in *Sarrouf v. New England Patriots Football Club, Inc.*¹⁷⁹ highlighted the uniqueness of a professional sports team from other businesses in that it is “not only a business venture, but, as the judge pointed out, a sportsman’s endeavor.”¹⁸⁰ According to the court, an owner of a professional team is a “celebrity” and a “member of an exclusive club” who, through the use of his wealth and capital, becomes an “armchair athlete” in the “public spectacle of professional sports.”¹⁸¹ The business’ uniqueness is further evident in the prices these extremely wealthy individuals are willing to pay to own an NFL team outright, which are largely independent of earning potential.¹⁸² As such, the court held that the trial judge was entitled to use evidence of prices paid for new franchises as a starting point in his valuation of the net assets of the New England Patriots Football Club.¹⁸³ The trial judge also evaluated several factors that made the club even more valuable, including evidence that (1) the club enjoyed a monopoly over the entire New England area, (2) over the previous two years, the club’s operating revenue rose seventeen percent and its operating

¹⁷⁶ Beckhart, *supra* note 173, at 2269.

¹⁷⁷ See ASWATH DAMODARAN, INVESTMENT VALUATION: TOOLS AND TECHNIQUES FOR DETERMINING THE VALUE OF ANY ASSET 1–6 (2d ed. 2002) (noting how different valuation methods require unique information and procedures for various assets).

¹⁷⁸ Doe v. McFarlane, 207 S.W.3d 52, 69–70 (Mo. Ct. App. 2006) (“In fact, the Restatement (Third) of Unfair Competition recognizes that expert testimony concerning the licensing fees paid to similarly-situated persons for comparable uses is relevant to determine the fair market value of a defendant’s unauthorized use of a plaintiff’s name in a right of publicity case.”).

¹⁷⁹ *Sarrouf v. New England Patriots Football Club, Inc.*, 492 N.E.2d 1122 (Mass. 1986).

¹⁸⁰ *Id.* at 1128.

¹⁸¹ *Id.*

¹⁸² *Id.* (“Most teams are owned outright by extremely wealthy individuals. The value they place on ownership of an NFL team is discernable in the prices they are willing to pay, which are largely independent of earning potential.”).

¹⁸³ *Id.* (“In 1974, two new NFL franchises were sold in Tampa, Florida, and Seattle, Washington. The price for the franchises in these new markets was \$16,000,000, though the agreement for payment brought the real cost down to a present value in 1974 of \$12,500,000 for each franchise.”).

income rose twenty-five percent, (3) the stadium lease was a valuable additional asset, and (4) television broadcasts were profitable to networks and it was reasonable to believe that the new television contract would enhance team revenues.¹⁸⁴

An athlete's value in professional team sports is essentially the compensation a team is willing to pay and that the athlete is willing to accept, for the athlete's services pursuant to a player contract, subject to any league rules that would restrict the ability of a team and player to freely negotiate a wage at market rates.¹⁸⁵ Similar to an appraisal sales comparison approach, evaluating past and current earnings of comparable players can assist teams and player agents in determining a player's fair market value in the context of contract negotiations or salary arbitration.¹⁸⁶ So, in these respects, the sales comparison method for determining the value of an asset in an appraisal resembles the method used to assess an athlete's value. However, an appraisal values an asset as if it were being sold *today*; lost earning capacity calculations determine an athlete's value (or future earnings) over a period of years in the future, increased for inflation and reduced to present value.

A calculation of future lost earnings of an athlete in a professional sports career should take into account, to the extent available and reliable, all of the following data:

- (1) The athlete's established history of professional earnings, if any;
- (2) The average or median earnings of all similarly situated players;¹⁸⁷
- (3) The actual earnings of comparable players;¹⁸⁸ and

¹⁸⁴ *Id.* ("Among other factors considered by the judge were the concessions contracts, tax and other local financial incentives, competition from other professional and collegiate sports, interest and fan support in the community, value of player contracts and the caliber of the players, and the current record and prospects of the team.")

¹⁸⁵ See, e.g., Matuszewski, *supra* note 25.

¹⁸⁶ But see Michael A. McCann, *It's Not About the Money: The Role of Preference, Cognitive Bias, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459 (2006) (discussing the potential influence of behavioral tendencies on professional athletes in contemplation of contract offers).

¹⁸⁷ "[S]tatistics concerning the average earnings of persons in the victim's field might be used to estimate the quantity of his lifetime earnings potential." Joseph A. Kuiper, Note, *The Courts, Daubert, and Willingness-To-Pay: The Doubtful Future of Hedonic Damages Testimony Under the Federal Rules of Evidence*, 1996 U. ILL. L. REV. 1197, 1246 (1996). See also *Nolan v. Jefferson Downs, Inc.*, 592 So.2d 831, 840-41 (La. Ct. App. 1991) (finding that the evidence presented which showed that jockeys average \$35,000 to \$65,000 annually if they are up and comers, supported expert's choice of \$35,000 to represent jockey's earning capacity in the future as not unreasonable).

¹⁸⁸ See Chamallas, *supra* note 164, at 80 ("When plaintiffs have an established work history, the process of calculating loss of future earning capacity may be individualized, at least to the extent that projections are based on the specific occupation in which plaintiff

(4) The average professional career length of players in the athlete's sport or, more specifically, by position within the sport.¹⁸⁹

Because each player is unique, identifying the specific players who are most similarly situated or comparable to the plaintiff from whom a calculation of the plaintiff's lost future earnings may be based is critical. Any evidence, including expert testimony, regarding similarly situated or comparable players and the methodology used to calculate lost future earnings must of course satisfy Rule 702.¹⁹⁰

3. The Evidence and Expert Testimony in *Felder v. Physiotherapy Associates*¹⁹¹

The scope of comparable players was a point of contention in the *Felder* case.¹⁹² The expert testimony proffered at trial to establish the lost earning capacity of a AAA minor league player in the Brewers' organization, who had no record of any earnings at the major league level, consisted of two experts.¹⁹³ Al Goldis, who was the special assistant to the general manager of the New York Mets and had twenty-seven years experience in drafting, scouting, and developing players for major league baseball teams, testified about Felder's prospects for playing in the major leagues and the expected length of his career.¹⁹⁴ In Goldis' opinion, not only would Felder have made it to the major leagues, but he would have been the type of player expected to hit home runs and who other teams would pitch around.¹⁹⁵ To support his opinion, Goldis reviewed the Brewers' pre-draft scouting reports and minor league coaching reports on Felder.¹⁹⁶ He compared Felder

was employed. Economists will look to plaintiff's own earnings record as well as the average earnings in that occupation to determine both the base annual income and the projected increases in earnings.”).

¹⁸⁹ See, e.g., *Albrecht v. Indus. Comm'n*, 648 N.E.2d 923, 926 (Ill. App. Ct. 1995) (considering evidence of the average career length of an NFL offensive lineman in the determination of future earnings of an NFL offensive lineman for purposes of wage-loss differential under workers' compensation statute); *Nolan*, 592 So.2d at 840–41 (considering evidence that jockeys can ride into their forties and fifties so long as they are not injured and keep their weight down); Plaintiff-Appellant Chicago Bears Football Club's Reply Brief, *Chicago Bears Football Club v. Indust. Comm'n*, 726 N.E.2d 223 (1997) (No. 96 L 50719), 1997 WL 33767139 (arguing that player's "reasonable career expectancy" was eight years in workers' compensation case).

¹⁹⁰ See *supra* note 50 and accompanying text.

¹⁹¹ For a discussion of the causation issue in *Felder*, see *supra* Part II.A.2.

¹⁹² *Felder v. Physiotherapy Assoc.*, 158 P.3d 877, 882–83 (Ariz. Ct. App. 2007)

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 882.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* Goldis also noted that "the Brewers had promoted Felder all the way up from the rookie league to the AAA level, and that his next step would have been the major leagues." *Id.*

to major league players who hit fifteen home runs or more per season from 1981–1990 and he testified that Felder had more power than Frank Thomas, whom Goldis had drafted.¹⁹⁷ Based upon the fact that Thomas had been playing for approximately seventeen years, “Goldis testified that Felder’s career would have lasted between twelve and fifteen years.”¹⁹⁸

The other expert witness for Felder was player agent Slade Mead, who provided trial testimony regarding economic damages and the range of player salaries.¹⁹⁹ Mead testified that “he knew who Felder was even though he was not Felder’s agent, because as a first-round draft choice, Felder was a ‘very high-profile baseball player back when . . . he was being drafted and coming out of [Florida State University].”²⁰⁰ In support of his calculation of Felder’s expected future earnings, Mead selected two “comparable minor league players” who had moved on to the major leagues: Jeremy Burnitz and Geoff Jenkins.²⁰¹ Similar to Felder, Burnitz and Jenkins “were college outfielders, first-round draft picks, power hitters, and played for the Brewers.”²⁰² However, Burnitz and Jenkins had established themselves as successful major league players. Based on these two comparables, Mead estimated a seven year career for Felder and calculated his lost earnings to be \$27,790,440.²⁰³

In addressing what constitutes “reasonable certainty,” the Arizona Court of Appeals stated that the amount “must be supported by the best evidence available and the essential consideration is that ‘the jury must be guided by some rational standard.’”²⁰⁴ The Court of Appeals further explained:

For damage to a sports career, the evidence reasonably available will generally be what was presented at trial in this case—qualified expert testimony concerning the athlete’s prospects, statistics showing past performance, and comparative data concerning other athletes. We need not detail all of the evidence concerning Felder’s career. Suffice it to say that the jury learned in detail about his batting averages, fielding performances, and injuries between 1992 and 1998. The jury was provided with evaluations from minor league coaches and opinions from several experts with major league player development experience. The jury also heard about the economics of baseball

¹⁹⁷ *Felder*, 158 P.3d at 882–83.

¹⁹⁸ *Id.* at 883.

¹⁹⁹ *Id.* at 882.

²⁰⁰ *Id.* at 883 (quoting the testimony of Slade Mead).

²⁰¹ *Id.*

²⁰² *Id.* “Mead also presented evidence of how Felder’s minor league performance differed from Burnitz and Jenkins.” *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 887–88 (quoting *Short v. Riley*, 724 P.2d 1252, 1255 (Ariz. App. 1986)).

compensation, including how long a professional's career might be and what similar players were being paid.²⁰⁵

According to Professor Roger Abrams, the court's decision to uphold the jury's verdict and damage calculation is "not surprising" under this "permissive standard" and there was "no basis in the evidence" for the jury to select a \$7 million figure for Felder's lost future earnings.²⁰⁶ Abrams further notes that the record is devoid of any explanation of the basis for Goldis' estimate,²⁰⁷ that the court's opinion fails to indicate the precise data Mead relied upon, and whether there were other comparable players in addition to Burnitz and Jenkins who, like Felder, were first round draft choices with college experience.²⁰⁸

Nevertheless, both Goldis and Mead possessed knowledge and experience beyond that of the average juror and were certainly qualified to be expert witnesses.²⁰⁹ Further, their testimony, including the data and methodology they used, should have relatively easily satisfied both prongs of Rule 702 as their opinions were derived by reliable methodologies and assisted the trier of fact in making an assessment of Felder's lost earning capacity damages.²¹⁰ Once the requirements of Rule 702 are satisfied, it is up to the fact finder to weigh the credibility of the witnesses' testimony and the accuracy and reliability of the data

²⁰⁵ *Id.* at 888.

²⁰⁶ Abrams, *supra* note 14, at 201. In his article, Professor Abrams explains in detail the data compilation and methodology he used (relying heavily on performance statistics of existing major league players) in a wrongful death products liability suit against a drug manufacturer to calculate \$35,203,277 in non-discounted lost future earnings of a pitcher who was previously drafted in the third round and whose entire major league career consisted of a total of four and two-thirds innings in three relief appearances. *Id.* at 209–21.

²⁰⁷ *Id.* at 200. "Goldis's affidavit simply concludes that in his judgment Felder would have made it to the Major Leagues." *Id.* at n.35.

²⁰⁸ *Id.* at 200 n.36. Professor Abrams also notes that "Goldis in his deposition offered his opinion that Felder would have had a major league career of 10–15 years, significantly more than the average player career of 7–8 years for someone who has had a full year of Major League service." *Id.*

²⁰⁹ "The function of an expert is to 'provide testimony on subjects that are beyond the common sense, experience and education of the average juror.'" Felder, 158 P.3d at 888 (quoting *Adams v. Amore*, 895 P.2d 1016, 1018 (Ariz. Ct. App. 1994)).

²¹⁰ *Doe v. McFarlane*, 207 S.W.3d 52, 64 (Mo. Ct. App. 2006) ("If the subject on which the expert intends to testify is one which lay jurors are not inclined to be familiar with, so the opinion would be helpful to the jury, it is not a valid objection that the expert's opinion goes to the ultimate issue for the jury to decide, or that the expert's opinion invades the province of the jury. On the other hand, if the subject is one of everyday experience, where the jurors are competent to decide the issues, then opinion testimony is properly rejected.") (quoting *Guzman v. Hanson*, 988 S.W.2d 550, 554 (Mo. Ct. App. 1999) and noting that the subject about which expert testified—the use of celebrities to endorse or otherwise gain commercial advantage in the marketplace—is not a subject of everyday experience with which a lay juror would be inclined to be familiar, and thus it is not a valid objection that his opinion embraced issues of ultimate fact such as intent).

and methods upon which the calculations are based.²¹¹ Given that Mead's estimate of Felder's lost future earnings was just under \$28 million, it appears that the jury was skeptical of the comparables used by Goldis and Mead because it awarded Felder only one-fourth of that amount (\$7 million), and reduced it by thirty percent to account for Felder's comparative fault.²¹² Perhaps the jury believed that a AAA minor league player who was a former first round draft pick was higher on the EPR than most minor leaguers, but was also lower on the EPR than the two established and successful major leaguers being used as comparables. The jury may also have been persuaded by the testimony of the defendant's experts, who both testified that Felder did not have "a bright future in baseball" and that "Felder's chances of making the major leagues were slim."²¹³

To rebut the testimony of Goldis and Mead regarding Felder's baseball career and earnings, defendant's expert Steve Phillips compiled data from 1993–2004 of more than four hundred "outrighted" players who were cut from a team's major league forty-man roster, and which evidenced that "only 21.3% of outrighted players advance to the major leagues and only 3.4% of outrighted players remained in the major leagues for more than three years."²¹⁴ In other words, because Felder had been previously outrighted, the defendant chose to compare Felder to other outrighted players and believed them to be the most similarly situated players.²¹⁵ Felder objected to this evidence on relevance grounds, arguing that it was a "statistical analysis which talks about odds" and a general manager "does not draft or refuse to draft a player based on the odds."²¹⁶ Felder also argued

²¹¹ See, e.g., *Logerquist v. McVey*, 1 P.3d 113, 131 (Ariz. 2000) ("Questions about the accuracy and reliability of a witness' factual basis, data, and methods go to the weight and credibility of the witness' testimony and are questions of fact It is the jury's function to determine accuracy, weight, or credibility."); *McFarlane*, 207 S.W.3d at 67 (finding it reasonable, in a right of publicity case, for expert "to use the experiences of other celebrities—both of whose endorsement careers, [the expert] testified, had started out similarly to [the plaintiff's] with local appearances—to form an opinion about [the plaintiff's] potential endorsement opportunities. That his testimony about [their] experiences was anecdotal and not verified by documentation may affect the weight to be given [the expert's] opinion, it does not destroy the reliability of that information as a source for comparison").

²¹² *Felder*, 158 P.3d at 884.

²¹³ *Id.* at 883. The defendant's expert witnesses were Eddie Epstein, who worked for several teams in major league baseball and had experience evaluating players' performance by statistical calculation, and Steve Phillips, who was formerly the General Manager of the New York Mets. *Id.*

²¹⁴ *Id.* at 889.

²¹⁵ The defendant argued to the trial judge: "We've chosen [to] compare him to other outrighted players. We believe those are similarly situated players. And if you don't allow it, you substitute your judgment for the jurors.'" *Id.*

²¹⁶ *Id.*

that the players were not comparable to Felder because they did not have the same skill sets, they did not play the same position, all were not first-round draft picks, and some of them played in college, some in high school, and some neither.²¹⁷ The trial court excluded the outright data comparison, expressing concern that Felder would not have had a chance to review and analyze the underlying data supporting the data compilation due to the timing of the defendant's motion to admit the evidence shortly before the trial began.²¹⁸ Even though the trial court excluded the data compilation, the trial court permitted Phillips to testify about "the significance of being dropped from the 40-man roster and that few outrighted players have ever advanced to the major leagues."²¹⁹ As such, and given that the outright data comparison included players from different positions and sixty-three percent of the players on the chart were pitchers, the court concluded that the trial court did not abuse its discretion in excluding the data compilation.²²⁰

However, the trial court's questioning of the relevance of the data essentially because it presented the "odds" of an outrighted player advancing to the major leagues is rather curious. In cases involving lost earning capacity damages, expert economists frequently use published data on labor participation rates by age, gender, education, and race to show the probability or odds that the plaintiff "will be alive, in the labor market, and actually employed at any future age."²²¹ Indeed, all data used as a basis for an estimate of an athlete's future earnings, including player comparables, in essence presents the "odds" that the plaintiff will eventually have a successful career as a professional athlete.²²² Moreover, comparing a minor league baseball player to specific players who have had successful careers at the major league level might actually be less reliable in answering that question than evidence of a percentage chance or odds. The more pertinent question concerns the reliability of the data; data showing all outrighted players and the percentage of those players who advanced to the major leagues, and then the percentage of those who stayed in the majors longer than three years, is certainly

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 889–90.

²²⁰ *Id.* at 890.

²²¹ See Jennings & Marcurio-Jennings, *supra* note 168, at 62.

²²² *Felder*, 158 P.3d at 889 ("[W]e have to look at [Felder] as an individual. And the only way to do that is to compare him to the players that are most similar to him as opposed to a wide universe of people dropped from the 40-man roster [Physiotherapy's] witness has not done a player by player comparison I don't think we ought to get into the statistics because they're not meaningful. There's no way that the jury can use or interpret those statistics.")

relevant, but the data would be more *reliable* if it was limited to outrighted players who shared substantially similar attributes and skills as Felder (i.e., were outfielders, power hitters, former first round draft picks, and played the same number of years in the minor leagues). Nevertheless, these are matters of weight, not admissibility, and can be fully explored in cross-examination.²²³

For a comparable player grouping to be reliable, it must not be too broad or too narrow and the fact finder must feel comfortable that the plaintiff is in the same “galaxy” as the comparable players. A very narrow scope of comparable players, for example the two players chosen by Felder’s experts, does not give the fact finder much flexibility in formulating an assessment of damages. Conversely, if the scope of player comparables is too broad, for example the *entire list* of players who were outrighted over an eleven-year period, the fact finder can be left with too much leeway and nothing more than “a shot in the dark” at the plaintiff’s lost future earnings. Lastly, depending on the particular case, data of individual comparable players may not even be the best available evidence to support an estimate of lost future earnings with reasonable certainty, as will be seen in the discussion of the calculation of Oliver’s damages in the next section.

If nothing else, *Felder* demonstrates how vital it is for experts to be thorough and precise in the specific data being used, the compilation of that data, and the methodology employed to calculate an athlete’s lost earning capacity. Further, to the extent the expert uses and relies on comparable or similarly situated players to support an estimate of future earnings, the specific players chosen by the expert can make or break the jury’s willingness to accept that expert’s estimate. It is also helpful to a jury if the expert estimates a low and high end range of future lost earnings with a detailed explanation of how both ends of the range were calculated, as opposed to providing one specific lump sum estimate, given that such a very small percentage of highly talented athletes even end up establishing careers as elite professional athletes and the wide disparities in compensation earned by those few individuals.

²²³ See *Doe v. McFarlane*, 207 S.W.3d 52, 67 (Mo. Ct. App. 2006) (“[T]o the extent there were things about Greer’s and Bernstein’s experiences that differed from Twist’s potential experiences or other evidence—like Twist’s actual endorsement deals or the deals of other hockey players—that tended to discredit Brooks’s testimony, those are matters of weight that were fully explored on cross-examination.”).

III. CALCULATING LOST EARNING CAPACITY IN *OLIVER V. NCAA*

This Section explains the data compilation and methodology I used to calculate Andy Oliver's lost earning capacity as a result of his wrongfully being declared ineligible to play college baseball for Oklahoma State University (OSU) because he had a lawyer represent him in negotiations with the professional club that drafted him out of high school two years earlier. I was retained as an expert witness to opine at trial on the legality of the no agent rule, including the legality of its application to Oliver, and to opine on the lost earning capacity damages incurred by Oliver as a result of having been declared ineligible to compete.²²⁴ The lawsuit began almost an entire year in advance of the 2009 Major League Baseball amateur draft for which Oliver would have been draft-eligible as a junior. The judge held a bench trial six months prior to the draft, during the week of January 5, 2009, to decide on both: (1) Oliver's request for declaratory judgment that the no agent rule is invalid on its face or that the rule's application to Oliver was arbitrary and capricious or a breach of the obligation of good faith and fair dealing owed to him, and (2) Oliver's request for injunctive relief to reinstate his eligibility.

From a lost earnings standpoint, Oliver's situation is distinguishable from that of Felder's in two very important respects. First, Oliver was a college baseball player without any professional playing experience whatsoever. Second, Oliver's claim involved a *diminished* opportunity to earn as a professional whereas Felder's claim presented a *lost* opportunity (because his eye injury prevented him from ever playing again). As was the case in *Felder*, the damages analysis did not require an economist, accountant, or income/wages expert; it required somebody possessing knowledge about valuing the marketability of a baseball player for the draft and the factors that go into scouts' evaluations of baseball players—just as a valuation or appraisal of a house does not require an economist or accountant, but rather somebody with knowledge about determining the market value of homes and the various tangible and intangible factors that would affect its marketability if it were sold (i.e., location, décor, lots of kids in the neighborhood, swimming pool, landscaping, etc.). Determining Oliver's damages was akin to an asset valuation or appraisal based upon a reasonable estimate of the market value of the asset if it were sold, and in Oliver's situation, if he were drafted.

²²⁴ Much of the information in this Part was extracted from the various expert witness reports prepared and filed in the case, on file with author.

The two-step burden of proof discussed in Part III presented the two overarching issues I had to address from a lost future earnings standpoint: (1) determining whether the suspension in fact caused a reduction of Oliver's opportunity to earn money as a professional baseball player, and, if so, (2) determining the present value of that reduced chance with reasonable certainty.

A. Proving the Factual Cause Link

Oliver was suspended indefinitely by OSU at the end of his sophomore season in the spring of 2008 for a violation of the NCAA's no agent rule that occurred in 2006 when he was originally drafted out of high school; he was suspended from competing in the post-season that year. In October of 2008, OSU requested reinstatement of Oliver's eligibility, and in December the NCAA rendered its reinstatement decision whereby it suspended him from competition for the entire 2009 baseball season and charged him with a year of eligibility.²²⁵ This "sit a year/charge a year" penalty meant that Oliver would have had only one year of eligibility remaining after the 2009 season, which would have effectively made him what is known as a "senior sign" for the 2010 draft, thus substantially reducing his value for that draft because drafted seniors do not have the leverage that a drafted junior has of being able to go back to school for his senior year. The suspension of Oliver for an entire season during his draft-eligible year and the charging of him with a year of eligibility *solely* on the basis that his lawyer was present with members of Oliver's family at a meeting in 2006 with personnel of the club that drafted him to discuss the prospects of signing a contract, was unprecedented.²²⁶

The NCAA's reinstatement decision presented an interesting hypothetical: Assuming that the no agent rule was found to be invalid and/or invalidly applied to Oliver, what impact, if any, would a wrongful suspension in which Oliver was and would be unable to compete cause a reduction in Oliver's value in the upcoming draft?²²⁷ The hypothetical posed here also presented

²²⁵ See NCAA Eligibility Case Report dated December 3, 2008 (on file with author).

²²⁶ At the time when Oliver's lawyer had contact with the club that drafted Oliver in 2006, it appears that the NCAA had previously applied its no agent rule to a college baseball player only one time, and that was five years prior thereto where a player was only suspended for six regular season games at the beginning of his freshman year. For a discussion of the NCAA's application of the no agent rule and how it detrimentally impacts college baseball players more so than players in other sports that have a draft, see Richard T. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, 7 VAND. J. ENT. L. & PRAC. 215 (2005).

²²⁷ Oliver needed to be prepared for the possibility that the judge could rule in his favor on the declaratory action but deny his request for injunctive relief, which would

an interesting factual cause issue at the time of trial. At first glance it may seem counterintuitive to be inquiring about whether Oliver would lose any value in a draft that had yet to occur, not knowing where he would be drafted, but it is essentially no different than determining unknown future pain and suffering, future medical expenses or future lost wages in a personal injury case where the injury has already occurred and liability has been established.

The question at the time of trial was whether and to what extent Oliver had been and would be damaged as a result of wrongfully being declared ineligible, which could be determined based upon an estimation of both (1) where Oliver would have been drafted absent the wrongful suspension, and (2) the suspension's effect on his "draft stock" (i.e., the number of draft slots affected). Interestingly, the answer to that question is the same both before and after the draft and does not vary depending upon where Oliver would ultimately be drafted. In other words, knowing where Oliver would ultimately be drafted provides little assistance because, regardless of where he would ultimately be drafted, the factual dispute is the same—the dispute centers around where Oliver *would have been drafted* absent the suspension and *how many slots lower* he was drafted because of the suspension. So even if, at the time of trial, we could determine the precise round and slot where Oliver would be drafted and whether he would ultimately sign a professional contract and for how much, it still would not answer the questions of whether the suspension diminished his chance of being drafted higher and how much that diminished chance is worth.²²⁸

In the days, weeks, months, and years leading up to each annual draft, scouts from all thirty MLB clubs evaluate all of the draft-eligible prospects throughout the United States, Canada, and Puerto Rico. As part of that evaluation process, scouts assess and heavily scrutinize prospective draft candidates' "tools" as well as their makeup and character (i.e., "intangibles").²²⁹

require an assessment of his damages for being wrongfully withheld from competition during his *entire* draft-eligible junior season.

²²⁸ It is worth noting that Oliver was not claiming an interest in a future professional sports career; he was seeking compensation for the damages incurred from unfairly and unjustly being declared ineligible. Therefore, any authority for the proposition that an interest in a future professional career does not rise to the level of a legally protected right or a constitutionally protected property right is not applicable because Oliver was not claiming a property interest or a property right subject to constitutional due process protection.

²²⁹ See *supra* Part I.B. for a discussion of the various factors that determine a player's tools and intangibles.

With so much competition for the few slots at the top of the draft, scouts look for any reason they can to draft one player over another, and a player's intangible values impact those decisions.²³⁰ The better the draft prospect (i.e., the higher the player is on the EPR), the more important the intangibles become to the clubs.²³¹ It is true that every player's draft stock can be and is affected by any number of future contingencies and factors, both tangible and intangible, that may or may not occur (for example, injuries, improvement or diminishment of skills, good or bad performance, false allegations of criminal activity, etc.).²³² However, those contingencies and factors have no bearing whatsoever on any damage attributed to being declared ineligible due to a wrongful suspension. The task was to isolate the impact of the suspension on Oliver's draft stock, all other things being equal. If a suspension of a top draft prospect during his draft-eligible year in fact causes *some* harm to a player's draft stock, the amount of the harm would certainly vary depending upon the length of the suspension.

Although Oliver was an amateur college baseball pitcher, as a top draft prospect he was fairly high on the EPR at the time of trial. Oliver was drafted out of high school and was heavily recruited by the top college baseball programs. As a six-foot three-inch left-handed pitcher who throws consistently in the low- to mid-ninety miles per hour range, Oliver was undoubtedly considered a top prospect by professional scouts for the 2009 draft.²³³ Three weeks before the draft, he was highlighted on

²³⁰ See *supra* note 38 and accompanying text.

²³¹ Charles Robinson, *Social Networking a Potential Trap for Prospects*, YAHOO! SPORTS (April 7, 2010, 3:35 PM), <http://sports.yahoo.com/nfl/news?slug=cr-socialnetworking040709> ("One [professional football] coach said his team has gotten particularly adept at collecting information from networking sites. The team combs through pictures, goes through archived 'comments' sections, breezes through friend lists for other potential contacts, and spends untold amounts of time dissecting pages of information based on the potential draft status of a player.").

²³² See, e.g., Associated Press, *Jury Awards \$225,000 to Former Michigan Player*, ESPN.COM (Feb. 19, 2009), <http://sports.espn.go.com/espn/wire?section=nfl&id=3920026> (discussing a former Michigan football player and 2005 first round draft pick of the Indianapolis Colts, Marlin Jackson, who was awarded \$225,000 in a lawsuit against a fellow student who claimed the football player assaulted him with a bottle in 2003; Jackson claimed that the false accusation hurt his reputation in NFL pre-draft interviews, and according to his attorney, "the jury award is roughly equivalent to the difference in income from being picked one or two spots higher in the draft").

²³³ Major League Baseball's 2009 scouting reports summarized Oliver as follows:

Oliver got a lot of attention when he was suspended by the NCAA for being represented by an agent, then got the suspension overturned in court. He's had an up-and-down junior season performance-wise, but scouts love his fastball-changeup mix. He can crank the heater up to 98 mph and the change is a plus pitch as well. More than anything, his fastball command is what makes him so intriguing, and it's his bread-and-butter, making up for the lack

MLB.com as one of the top two left-handed college pitchers available for selection.²³⁴ In his freshman season in 2007, Oliver had a 6-1 win-loss record and a 5.52 ERA.²³⁵ The following summer he pitched in the prestigious Cape Cod League where he had a 1.41 ERA and fifty-four strikeouts in forty-five innings and was named the tenth-best professional prospect in the league by *Baseball America*, the most widely-recognized and reputable amateur baseball publication.²³⁶ In his sophomore season in 2008, he was one of the nation's top college pitchers when he earned first-team All-Big 12 honors, was named a second-team All-American by *Rivals.com*, ranked third in the Big 12 and sixteenth nationally with a 2.20 ERA, and led Oklahoma State (and ranked third in the Big 12) with ninety-six strikeouts.²³⁷ The following summer he pitched for Team USA and had a 2-0 record with a 0.93 ERA in four starts, recorded twenty-four strikeouts in 19.1 innings, and helped lead the United States to a 24-0 record and a gold medal at the world championships.²³⁸ *Baseball America's* college player ranking for the 2009 draft, as of September 19, 2008, had him ranked eighth out of all college players.²³⁹ Taking into account high school players, it would be reasonable to assume that, as of that point in time, he would be ranked fourteenth, fifteenth, or sixteenth among college and high school draft eligible players combined.

Given all of this evidence, it was reasonable to conclude that Oliver's intangibles value would be reduced as a result of being declared ineligible by the NCAA for violating the no agent rule. Oliver was suspended from competing in the 2008 college post-season and lost the opportunity to perform for scouts in an intense, competitive, and high-pressured post-season environment. Scouts were left wondering how he would have compared

of a breaking ball. Lefties who throw that hard and command the ball that well aren't common, so he should go quickly on Draft day.

2009 Draft Reports, MLB.COM (Apr. 24, 2009), <http://mlb.mlb.com/mlb/events/draft/y2009/reports.jsp?content=oliver>.

²³⁴ See Jonathan Mayo, *Draft Report: Scouting for Southpaws; Oklahoma State's Oliver Taking Long, Winding Road to Pros*, MLB.COM (May 13, 2009, 10:00 AM), http://mlb.mlb.com/news/article.jsp?ymd=20090513&content_id=4720060&vkey=news_mlb&fext=.jsp&c_id=mlb.

²³⁵ *Andrew Oliver Pitching Statistics*, THE BASEBALL CUBE, <http://www.thebaseballcube.com/pitching/O/Andrew-Oliver.shtml> (last visited Sept. 28, 2010).

²³⁶ For information about *Baseball America's* content, see <http://www.baseballamerica.com/help/about-us/> (last visited July 3, 2010).

²³⁷ *Player Bio: Andrew Oliver*, http://www.okstate.com/sports/m-basebl/mtt/oliver_andrew00.html (last visited Sept. 28, 2010).

²³⁸ *Id.*

²³⁹ *Prospects Plus*, BASEBALL AMERICA (Sept. 19, 2008), <http://prospectsplus.baseballamerica.com/college/2009/267141.html> (subscription required).

against other players whom they had the opportunity to see compete in that environment and what exactly Oliver did wrong such that the NCAA would take the drastic measure of declaring him ineligible and suspending him in his draft-eligible junior season. Moreover, associating with sports agents has a negative connotation and Oliver was disciplined by the national collegiate sports governing body because of it, and it received national media attention.²⁴⁰ Such attention causes an athlete's stock to drop in the eyes of potential employers.²⁴¹ An amount that would compensate Oliver for his reduced intangibles value would reflect the difference between his 2009 draft status with and without the reduction.

As far as an evidentiary basis for estimating Oliver's draft value, I determined that the use of comparables would not be a practical or reliable basis for estimating an amateur baseball player's draft value. Performance statistics of amateur baseball players are not very predictive of future performance or success as a professional and cannot be compared to the performance statistics of professional players in any meaningful way. Also, each draft year is different, with a different pool of draft-eligible players, which includes both high school and college players of all positions, and some draft years have a much stronger talent pool than others. Moreover, because baseball has a minor league system in which drafted players typically spend a few years developing their skills, clubs do not tend to select players in the draft based upon current needs on their major league rosters; they select the next best available player regardless of position. Thus, attempting to draw any meaningful comparisons between a top college pitching prospect and players drafted in previous years or current professional players tends to be an exercise in futility.

I relied on *Baseball America's* most recent rankings of college and high school baseball prospects for the 2009 draft, which are based upon the editors' evaluations of players as well as input from professional scouts and college coaches. For the purpose of computing damages in this case, the rankings data served as a

²⁴⁰ Indeed, the attention given to the suspension is the first statement made in the summary section of Major League Baseball's scouting report on Oliver. *2009 Draft Reports*, supra note 233.

²⁴¹ See, e.g., *NFL Draft Prospect Andre Smith Fires Alvin Keels as Agent*, SPORTS BUSINESS DAILY (April 14, 2009) ("[Andre] Smith was originally viewed as one of the top picks in the Draft, but his stock has dropped after he was held out of the Sugar Bowl for alleged contact with an agent and after he left the NFL Combine early. In early February, Smith was ranked No. 2 by Web site NFLDraftBlitz.com, but yesterday he was ranked No. 6 and is not among the nine players who have accepted invitations to the NFL Draft.").

substitute for individual scouting reports on Oliver and was actually a more reliable source because *Baseball America* compiles numerous scouting reports on all of the top prospects eligible for the draft, and the rankings are a culmination of all of those scouting reports. The rankings provide the most objective source for evaluating what is otherwise a highly subjective draft selection process. Thus, the rankings provide a *reasonable* basis and quite possibly “the best evidence available” to estimate where Oliver would be drafted absent any suspension, assuming all other things being equal and that Oliver continued to perform as he had been. In both its September and November rankings, *Baseball America* had Oliver projected to be drafted in the middle of the first round.²⁴²

B. Proving the Amount of the Lost Future Earnings with Reasonable Certainty

1. Lost Signing Bonus

I calculated the damages based upon an estimation that Oliver’s reduced intangibles value would lower his draft status by a range of a quarter of a round (approximately seven slots) to three-quarters of a round (approximately twenty-two slots). I deemed this to be a conservative estimate, as there are fifty rounds in the draft. Also, with such a huge pool of draft-eligible players to choose from, which includes high school seniors and junior college players, a player’s intangibles are often the key factor that separates one player from another on a club’s draft board, especially when it comes to players at the top of the draft board. Using *Baseball America*’s ranking of the middle of the first round as a starting point, which would be the fifteenth slot, and reducing it by a range of seven to twenty-two slots, Oliver’s adjusted draft status would place him in the range of the twenty-second slot to the thirty-seventh slot (in the supplemental first round) for the 2009 draft.

To determine a range of compensation that would compensate Oliver for his reduced intangibles value in the 2009 draft, I used the signing bonuses from the 2008 draft and adjusted them by ten percent for inflation. Ten percent was used because over the previous three drafts, first round signing bonuses had increased by an average of ten percent annually. The fifteenth pick in the 2008 draft received a signing bonus of

²⁴² In the November rankings, Oliver was No. 16 overall (including both high school and college draft prospects) and No. 8 on the college list. Oliver was ranked No. 8 on the college list in the September rankings as well. See Jim Callis, *Ask BA*, BASEBALL AMERICA (Oct. 6, 2008), <http://www.baseballamerica.com/today/prospects/ask-ba/2008/266992.html>.

\$1,730,000, which, adjusted for inflation, would be equivalent to a signing bonus of \$1,903,000 for the 2009 draft. The twenty-second pick in the 2008 draft received a signing bonus of \$1,419,000, which, adjusted for inflation, would be \$1,560,900 in the 2009 draft. The thirty-seventh pick in the 2008 draft received a signing bonus of \$970,000, which, adjusted for inflation, would be \$1,067,000 in the 2009 draft. Therefore, I estimated Oliver's lost signing bonus to be in the range of \$342,100 (\$1,903,000 minus \$1,560,900) and \$836,000 (\$1,903,000 minus \$1,067,000).

2. Lost Wages

Because it was unknown whether Oliver would prevail on his request for injunctive relief to restore his eligibility for the 2009 season, a calculation needed to be made to reflect Oliver's damages in the event he only prevailed on the declaratory action and lost on his claim for injunctive relief, which then would not have reinstated Oliver's eligibility. Based upon all of the evidence that Oliver was considered to be a top draft prospect, I opined that it was more likely than not that Oliver's sitting out from competition during the entire season of his draft-eligible year would have a substantial detrimental impact on his draft status that would cause him to slip in the draft beyond the first round.²⁴³ In that event, the available data evidences that Oliver's opportunity of reaching the major leagues would become substantially reduced, such that it would no longer be probable. Data compiled by *Baseball America* in 2002 of all players drafted from 1965 to 1995 shows that a majority—64.9%—of players drafted in the first round played in the major leagues.²⁴⁴ However, the percentage chances of playing in the major leagues significantly drops to 41.6% in the second round, 31.1% in the third round, 23.8% in the fourth round, 23.1% in the fifth round, 15.5% in the sixth through tenth rounds, and 8.6% in the eleventh through fifteenth rounds.²⁴⁵ Therefore, an estimate of Oliver's damages in the event he remained suspended for the

²⁴³ Approximately one week after the preparation and filing of my damages report, the NCAA heard Oklahoma State University's appeal to have Oliver reinstated. As a result of that appeal, Oliver's eligibility was restored and his suspension was reduced from a full season to seventy percent of a season, which would have required him to sit out forty games of a fifty-six game season. See Aaron Fitt, *Headed to Trial: Oliver Case May Have Lasting Ramifications*, BASEBALL AMERICA (Dec. 22, 2008), <http://www.baseballamerica.com/today/college/on-campus/2009/267366.html>.

²⁴⁴ *Will He Play in the Big Leagues?*, BASEBALL AMERICA ONLINE—2002 DRAFT PREVIEW (compiled by Allan Simpson) (on file with author).

²⁴⁵ *Id.*

season had to reflect not only the loss in draft signing bonus²⁴⁶ but also the loss of wages over the course of a major league career.

If Oliver did not compete during his entire draft-eligible season, there was a high probability that he would have been drafted lower than the second round.²⁴⁷ Based upon the statistics showing that it was no longer probable that Oliver would make it to the major leagues, an estimate of Oliver's future lost wages would approximate his future lost salary income for each year of lost service time in the major leagues. For purposes of determining this amount, a few reasonable assumptions had to be made: (1) Oliver would have at least average skill as a pitcher over the course of his career, (2) Oliver would receive at least an average salary for a pitcher for each year of service time in the major leagues, and (3) Oliver would serve at least the average number of years of service time in the major leagues for a pitcher.

The USA Today Baseball Salaries Database²⁴⁸ contains year-by-year data of salaries for all major league baseball players on opening day rosters and disabled lists.²⁴⁹ Using the data from the 2008 season, I calculated the average salary for a pitcher based upon number of years of service in the major leagues, which is set forth in the chart below. For the first three years of

²⁴⁶ Adjustments were also made to the estimated range of Oliver's lost signing bonus to reflect the difference between the signing bonus he would receive absent any suspension (that of a fifteenth pick) and the signing bonus he could reasonably expect to receive if he remained ineligible for the *entire* 2009 season.

²⁴⁷ See *Hall v. Univ. of Minn.*, 530 F. Supp. 104, 106 (D. Minn. 1982). The impact on a player's draft stock of not playing for an entire season is evidenced by the fallout of a lawsuit involving James Paxton, a hard-throwing left-handed college pitcher like Oliver. Paxton was drafted by the Blue Jays in the supplemental first round as the thirty-seventh overall pick in the 2009 draft, elected not to sign, and returned to the University of Kentucky (UK) for his senior year. Based upon a blog post ambiguously suggesting that an agent acting on Paxton's behalf may have communicated with the Blue Jays about a contract, UK insisted that Paxton submit to questioning by the NCAA or face expulsion from the team. Before the start of the season, Paxton was rated by Baseball America as the seventh-best college baseball prospect available for the 2010 MLB Draft. Paxton ended up leaving UK and playing for an independent league team where he had limited playing time in which to showcase his talents in time for the 2010 draft. As a result, Paxton ended up slipping to the fourth round in the June 2010 draft. See Patrick Sullivan, *Paxton Gives Up Fight, Leaves UK*, LEXINGTON HERALD-LEADER (Feb. 27, 2010, 8:07 AM), <http://www.kentucky.com/2010/02/27/1159206/pitcher-who-sued-uk-leaves-team.html>; *Baseball America Names Paxton a Top Pro Prospect*, LEXINGTON HERALD-LEADER (Feb. 27, 2010, 8:07 AM), <http://www.kentucky.com/2009/09/18/940423/baseball-america-names-paxton.html>.

²⁴⁸ USA TODAY SALARIES DATABASE, <http://content.usatoday.com/sports/baseball/salaries/default.aspx> (last visited June 20, 2010).

²⁴⁹ *Id.* ("Figures, compiled by USA TODAY, are based on documents obtained from the MLB Players Association, club officials and filed with Major League Baseball's central office. Deferred payments and incentive clauses are not included. Team payrolls do not include money paid or received in trades or for players who have been released.").

service, I omitted players signed from Japan, as many of them have signed multi-million dollar major league contracts far beyond the wages paid pursuant to the league's minimum salary rules that bind players during their first three seasons under what is known as the "reserve system."²⁵⁰

| Years of Service | Number of Pitchers | Average Salary |
|------------------|--------------------|----------------|
| 1 | 91 | \$429,260 |
| 2 | 79 | \$467,927 |
| 3 | 49 | \$581,175 |
| 4 | 37 | \$1,810,698 |
| 5 | 31 | \$2,683,387 |
| 6 | 23 | \$4,694,420 |
| 7 | 21 | \$5,531,547 |
| 8 | 22 | \$6,906,479 |
| 9 | 14 | \$4,253,452 |
| 10 | 17 | \$6,873,529 |
| 11 | 10 | \$7,240,617 |
| 12 | 4 | \$8,000,000 |
| 13 | 9 | \$5,385,022 |
| 14 | 4 | \$8,901,781 |
| 15 | 3 | \$7,604,450 |
| 16 | 3 | \$8,925,061 |
| 17 | 2 | \$5,835,514 |
| 18 | 2 | \$4,500,000 |
| 19 | 1 | \$8,000,000 |
| 20 | 3 | \$9,533,515 |
| 21 | 3 | \$10,666,667 |

Research shows that the average number of years of total service time for a major league player is 5.6 years.²⁵¹ In accordance with the assumption that Oliver would serve the average number of years in the major leagues for a pitcher, an amount representing his future lost wages would be the sum total of the average annual salaries for a major league pitcher for the first five years of service time. Further, I made an

²⁵⁰ For an excellent summary of the rules pertaining to Major League Baseball's reserve system, salary arbitration system, and free agency system, see Abrams, *supra* note 14, at 205–09.

²⁵¹ Sam Roberts, *Just How Long Does the Average Baseball Career Last?*, N.Y. TIMES, (July 15, 2007), <http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html>. See Abrams, *supra* note 14, at 216 (finding the mean career of a pitcher on a Major League Roster to be seven years and 124 days, based on all pitchers who ended their Major League careers after 2002 season who had at least ten starts in one Major League season).

assumption that the plaintiff would spend three years in the minor leagues and thus would not have started his major league career until four years later (in the year 2012). Therefore, Oliver's future lost wages would be the total of the annual salaries he would receive in each of years 2012, 2013, 2014, 2015, and 2016.

Research also showed that major league salaries had increased each year for the previous four years, and the average increase over the previous four seasons was 5.75% annually.²⁵² Using the 2008 average salary figures in the chart above and compounding those figures at an annual rate of 5.75% to account for inflation, I estimated Oliver's salary for his first five years of major league service to be as follows:

| Year | Service Time | Salary |
|------|--------------|-------------|
| 2012 | 1 year | \$536,836 |
| 2013 | 2 years | \$618,842 |
| 2014 | 3 years | \$812,810 |
| 2015 | 4 years | \$2,677,988 |
| 2016 | 5 years | \$4,196,877 |

The total future lost wages were then reduced to present value based upon a conservative low-risk investment rate of return. As of December 5, 2008, the five-year U.S. government bond yield was 1.67%.²⁵³ The future lost wages, reduced to present value based upon a 1.69% yield and compounded each year, was as follows:

| Year | Salary |
|------|-------------|
| 2012 | \$501,455 |
| 2013 | \$568,287 |
| 2014 | \$733,795 |
| 2015 | \$2,376,799 |
| 2016 | \$3,661,911 |

²⁵² 2008 salaries increased from the previous year by 3.6%; 2007 salaries increased from the previous year by 4.6%; 2006 salaries increased from the previous year by 8.9%; and 2005 salaries increased from the previous year by 5.9%. While I briefly mention the calculations made in the *Oliver* case to adjust his future earnings for inflation and present value, an in-depth discussion of this subject is beyond the scope of this Article.

²⁵³ Historical Five Year Bond Data, FED. RES., http://www.federalreserve.gov/releases/h15/data/Business_day/H15_TCMNOM_Y5.txt (last visited Oct. 6, 2010).

Therefore, I estimated Oliver's total future lost wages, increased for inflation and reduced to present value, at \$7,842,247.

A fair criticism of this estimate of future lost major league wages would be that it assumes a player with more than a fifty percent chance of making the major leagues (those drafted in the first round) *will* make the major leagues and a player with less than a fifty percent chance (those drafted in the second round or lower) *will not*. This estimate also awards the *full* amount of the estimated future lost wages and thus does not accurately reflect the extent to which the suspension caused a *reduction* in Oliver's chances of making the major leagues. In some respects, this resembles the "all or nothing" rule.²⁵⁴ My estimation of Oliver's lost future wages, from a causation standpoint, is the result of a straight application of the traditional but for test. In other words, but for the wrongful suspension, Oliver would not have lost the chance at a major league career, which seems to be the standard that was utilized in *Felder*.²⁵⁵

However, a more precise application of loss of chance principles would calculate Oliver's lost future wages to reflect the reduced chance of making the major leagues that resulted from the suspension. As discussed in this Article, assessing diminished chance in terms of a percentage with any degree of precision is usually extremely difficult, if not impossible, to do. But here, the available data particularly lends itself to a reasonable approximation of a loss of chance percentage using a proportional damages method as follows:²⁵⁶

- (1) Calculate the total wages Oliver could reasonably have expected to earn before the suspension, which equals the total future lost wages, increased for inflation and reduced to present value, of \$7,842,247 (as determined above).
- (2) Calculate the reduced chance percentage. Before the suspension, Oliver's percentage chance of making the average major league salary was 64.9% (as a projected first round pick).²⁵⁷ After the suspension, based upon an estimate of being drafted lower than the first round, his percentage

²⁵⁴ For a discussion of how the lost chance doctrine alleviates the perceived unfairness of the all or nothing rule of tort recovery, which provides that the plaintiff may only recover if she can prove that the defendant's conduct more likely than not caused the unfavorable outcome, see *supra* Part II.A.1. If the plaintiff meets this burden she recovers one hundred percent of her damages, and if she does not meet this burden she recovers nothing.

²⁵⁵ For a discussion of the but for test, see *supra* Part II.A.2.

²⁵⁶ See *supra* Part II.B.1.

²⁵⁷ See *supra* Part IV.B.2.

chance of making the average major league salary dropped to anywhere from 41.6% to 8.6% depending upon the round.²⁵⁸ The difference results in a diminished chance in the range of 23.3% to 56.3%.

(3) Multiply the amount determined in step one by the reduced chance percentage determined in step two, which equals a range of \$1,827,243 to \$4,415,185.²⁵⁹

C. The Settlement Entered After the Draft

On February 12, 2009, the trial court granted Oliver's request for declaratory and injunctive relief, invalidating the no agent rule and immediately restoring Oliver's eligibility for the 2009 season.²⁶⁰ The judge thereafter scheduled a trial to determine damages for mid-October, four months after the 2009 June draft.

Oliver was drafted in the second round with the fifty-eighth pick by the Detroit Tigers.²⁶¹ While it is very typical for top college draft prospects to progressively improve their performance each year in college, Oliver's performance in 2009 was much worse than in 2007 and 2008. In 2009, Oliver posted a 5-6 record with a 5.30 ERA and opponents batted .274 against him.²⁶² A worse performance during the season of any player's draft-eligible year than in previous years can cause a player to be drafted lower than he otherwise would have been drafted, and how much lower would depend upon the extent of the worse performance. A player's statistics can influence a scout's evaluation of a player's potential to play in the major leagues.²⁶³

²⁵⁸ See *supra* Part IV.B.2.

²⁵⁹ An alternative calculation in step three would be to determine a range for each year separately (for 2012, 2013, 2014, 2015, and 2016) by multiplying the diminished chance percentage range by the average salary for each year, because the average salary for each year was increased for inflation and reduced to present value on a compounded basis.

²⁶⁰ See *supra* note 6 and accompanying text. The NCAA filed a motion *in limine* before trial to exclude my testimony on the grounds that it did not meet the admissibility standard under Rule 702 and further on the basis that I was not qualified as an expert. See Defendant National Collegiate Athletic Association's Motion in Limine to Exclude Purported Expert Testimony, *Oliver v. NCAA*, 920 N.E.2d 203 (Ohio Ct. Common Pleas 2008) (No. 2008-CV-0762). The trial court denied the motion, noting that "the admissibility of expert testimony must be made on a case-by-case basis, reviewing the expert's knowledge, skill, experience, training and education" and "the determination of whether a witness possesses the qualifications necessary to give expert testimony and introduce evidence also lies within the sound discretion of this Court." Judgment Entry, *Oliver v. NCAA*, 920 N.E.2d 203 (Ohio Ct. Common Pleas 2009) (No. 2008-CV-0762).

²⁶¹ See *Andrew Oliver Pitching Statistics*, *supra* note 235.

²⁶² *Id.*

²⁶³ See Alan Schwarz, *The Great Debate*, *BASEBALL AMERICA* (Jan. 7, 2005), <http://www.baseballamerica.com/today/features/050107debate.html>. In a 2005 interview conducted by *Baseball America*, two longtime scouts and two baseball statistics experts

Oliver's uncharacteristically poor performance could explain why he was drafted much lower than projected at the start of the season, and even lower than the lowest pick I estimated he would have been drafted taking into account the reduced intangibles value (the thirty-seventh slot). Thus, Oliver's reduced intangibles value, combined with a worse than expected performance during his draft-eligible season, caused him to drop from a projected middle of the first round pick at the start of the season to the fifty-eighth pick in the 2009 draft.

Oliver signed with the Tigers and received a \$1,495,000 signing bonus.²⁶⁴ Oliver and the NCAA reached a settlement one week before the scheduled damages trial, whereby Oliver was paid \$750,000 and the trial court's order invalidating the no agent rule was vacated.²⁶⁵ Thus, we will never know whether a jury would have decided that the NCAA's wrongful suspension in fact caused Oliver a diminished chance of being drafted higher or what value the jury would have placed on that loss of chance. Nevertheless, it provides a unique case study for discussing the computation of lost earning capacity damages of an amateur player fairly high on the EPR. In the end, Oliver's gross compensation equaled what he would have received had he been drafted as originally projected because his signing bonus and settlement amount, combined, equates roughly to the signing bonus a player drafted in the middle of the first round can reasonably expect to receive. Oliver was called up by the Tigers and had his first start in the major leagues just one year after being drafted, which, if nothing else, proves that all the scouting reports on him were accurate.

CONCLUSION

Athletes claiming damages for lost earning capacity in a professional sports career have a steep burden to overcome—which I have delineated in this Article as a two-step burden. Demonstrating that they possess substantial prospects as a professional athlete in the court room as opposed to on the court is a whole different ball game. Claims for lost future earnings in

discussed the value of player statistics to scouts in evaluating players. *Id.* According to Gary Hughes, the Cubs' assistant general manager and a scout for more than thirty years with many clubs, "[y]ou show up at a game and the first thing you get is a stat sheet and you look at it." *Id.* Eddie Bane, the Angels' scouting director and a former top pitching prospect himself, agrees: "I'm going to pick up the stat sheet—I'm going to look at the strikeouts and walks. I'm going to look at the batting average. I'm going to know all that stuff because I've been on the computer." *Id.*

²⁶⁴ See *Andrew Oliver Pitching Statistics*, *supra* note 235.

²⁶⁵ See Associated Press, *Oliver Receives \$750,000 Settlement*, ESPN.COM (Oct. 8, 2009), <http://sports.espn.go.com/ncaa/news/story?id=4543864>.

a professional sports career involve making predictions about a future career that only a small fraction of the population is able to attain. However, the athlete need not prove that he *would* attain it, but only that he once had the *chance* to attain it and that chance was either lost or reduced. Courts have struggled with articulating any definitive standard for determining when the defendant's actions in fact caused a loss, but their holdings seem to suggest an application of the traditional but for analysis. As discussed in this Article, the athlete's claim can be viewed with more precision within the constructs of the loss of chance doctrine, assessing the athlete's chances before and after the breach, which can also accomplish a more fair and adequate allocation of fault in proportion to the extent of the harm.

Determining the amount of lost future earnings, by definition, is "speculative" and simply cannot be proven with complete certainty. Recognizing this, the law imposes a lesser, but nebulous, standard of "reasonable certainty." As the cases referenced in this Article demonstrate, it is an extremely fact-intensive inquiry whereby the devil is in the details: the reliability of the evidence, the knowledge of the experts, the methodology, procedures, and calculations used by the experts, and the data compilations upon which they are based. In some cases, the athlete may be so high on the earning potential range (EPR) with an established earnings history that it can be relatively easy to meet both burdens or, conversely, the athlete may be so low on the EPR that doing so is nearly impossible. While a future earnings assessment of an athlete in a professional sports career is, in many respects, akin to an appraisal process, and thus the use of player comparables is a viable methodology in some cases, the *Oliver* case demonstrates the complexities inherent in calculating lost future earnings for top draft prospect amateur athletes who are shown to be fairly high on the EPR.