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## **I. SELECTING THE PANEL OF EXPERTS**

### **1. OVERVIEW**

The use of expert testimony at trial has become the norm. However, the routineness of using an expert for personal injury litigation should not overshadow the basic issues involving their use. The decision that must be made in connection with expert testimony is compounded when multiple experts are called at the time of trial. A continual risk/benefit analysis for each expert to be called at trial should be undertaken throughout the dynamics of the litigation. Since each case presents unique circumstances, don't expect a set of general rules, which if followed, result in the best plan of action. Flexibility and constant reassessment of the multiple factors that go into the selection of multiple experts is the only rule which can apply to every situation. The following topics list several major issues which most often need to be confronted.

A good starting point is to review the evidentiary aspects of using expert witnesses at trial.

### **2. WHEN PERMISSIBLE**

#### **A. State Courts:**

Expert may offer testimony on issue which involves professional or scientific knowledge or skill not within range of ordinary training or intelligence. Selkowitz v. County

of Nassau, 45 NY2d 97, 408 NYS2d 10 (1978). Any 'expert' testimony that will assist trier of fact is admissible. Doukas v. America on Wheels, Inc., 154 AD2d, 545 NYS2d 928 (2d Dept. 1989).

B. Federal Courts:

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. (Federal Rules of Evidence ("FRE") 702).

### **3. OPINION**

A. State Courts:

Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and the reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion. (CPLR 4515).

B. Federal Courts:

The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. (FRE 705).

### **4. BASIS FOR EXPERT OPINION**

A. Documents that an expert will rely upon that are specific to the case must be in evidence. A separate foundation must be laid for these documents through testimony

of other witnesses or other authentication methods such as CPLR 4501 et seq., (i.e., police report, photos, measurements taken by police, weather reports, TV news film footage, key testimony from witnesses).

B. State Courts:

On occasion, an expert may rely upon material not in evidence if it is the type of evidence reasonably relied upon by experts in the field. People v. Stone, 35 NY2d 69, 358 NYS2d 737 (1974), but the opinion should not be based principally upon inadmissible material. Bordon v. Brady, 92 AD2d 983, 461 NYS2d 497 (3d Dept. 1983). Evidence must be based on methodology generally accepted as reliable in the scientific community. People v. Hughes, 59 NY2d 523, 466 NYS2d 255 (1983); People v. Leone, 25 NY2d 511, 307 NYS2d 430 (1969), Frye v. United States, 293 F.1013, (establishing standard of general acceptance in the scientific community). The rule of Frye was modified in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), creating a procedure whereby the Court decides after preliminary inquiry, whether to admit scientific testimony.

C. Federal Courts:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. (FRE 703).

## **5. FORM OF QUESTION "REASONABLE DEGREE OF CERTAINTY"**

A. Conclusions of expert must be sufficient to satisfy accepted standard of reliability. With a reasonable degree of certainty is one such standard, but it is not the only language to satisfy the standard. 'Reasonable degree of certainty' is not a "verbal straightjacket" by which an expert opinion is to be constrained. The New York Court of Appeals has said that any formulation which expresses as a whole that the opinion reflects an accepted degree of certainty is acceptable. Matott v. Ward, 48 NY2d 455 (1979).

## **6. LICENSURE OF EXPERT**

The expert's lack of a license affects only the weight of the testimony, not its admissibility. Eagle Pet Service v Pacific Employers Ins., 175 AD2d 471, 572 NYS2d 623 (3d Dept. 1991).

## **7. PLEADINGS: EXPERT RESPONSES**

A. State Courts: Of fundamental concern to the trial lawyer is the procedural right of a party to call an expert at the trial to present relevant expert testimony. This right may be severely limited by the proponent's failure to comply with discovery requests such as in a bill of particulars, interrogatories, and most importantly, the CPLR 3101(d) expert response. The scope of the expert's testimony will be limited by these discovery responses.

B. Federal Courts: Meticulous compliance with the Federal Rules of Civil Procedure and most importantly the local rules of the District Court, especially with respect to pretrial submissions, is critical. The federal court is notoriously strict in enforcement of applicable discovery rules.

## **8. THE ULTIMATE GOAL:**

To persuasively present a party's legal position at trial through an acknowledged authority. Getting there, however, takes considerable planning. Consider some of these issues before beginning the process of selection:

A. Thoroughly understand the topic being litigated. If you, as the attorney, don't understand every aspect of the technical facts and knowledge, you cannot expect to cover all of the necessary issues with the expert.

B. Don't think that the high retainer the expert requires will take over the responsibilities of identifying all potential legal issues. Most experts will not look at how their testimony will fit with the rest of the case. Most experts have little to no understanding of the rules of evidence, how discovery responses will limit the expert's testimony, or even identify the major issues in the case.

C. Will the expert be used to educate the jury or to provide opinion testimony or both?

D. Is a particular expert the appropriate witness to present an important topic? For instance, a pediatrician is not only permitted to testify about the standard of care involved with the resuscitation of a newborn as well as the consequences if the procedure is not done properly. However, would the issue of long term consequences and necessary medical care and treatment be better presented through a pediatric neurologist? Or, would a neonatologist, a pediatrician who specializes in newborn care, be more appropriate to present testimony about the resuscitation procedures? Should all three be used so that the issues are presented through the pediatrician who has acted as the primary care physician and through specialists who frequently consult with the pediatrician?

E. More is not always better. The more experts who are called to testify, the greater the potential for contradictory positions or statements. This factor will always dictate against the party who has the burden of proof.

F. Too much information may lose the jury (K.I.S.S.).

G. What are the individual expert's qualifications, prior testimony, advocacy skills, and commitment to the case, efforts and preparation?

H. How will the expert view his/her role in the case, an independent educator, an advocate, or an expert whose primary interest is protecting his/her image?

## **9. THINGS TO THINK ABOUT BEFORE SELECTING EXPERTS**

A. The economics of calling multiple experts

B. Strategies and trial tactics: are you making the trial more complex than necessary?

C. Do you really know the reason why the expert is being called or is it simply because you feel that's what other attorneys are doing?

D. Is the expert to be used to educate the jury, emphasize an issue or to entertain the jury?

E. Male or female?

F. Blending of academic experts with "in the trenches" experts.

G. Presentation style of each expert.

## **10. SELECTING AN EXPERT**

The process calls for continual analysis, reanalysis and adjustments. The following are some items to consider:

A. Research the topic to be presented, i.e. medicine, DNA, life care planning,

accident reconstruction.

B. Review discovery documents/trial transcripts from similar cases that have been litigated.

C. Make a list of all potential experts in each field.

D. Get recommendations, and review prior transcript testimony.

E. Establish direct communication with potential expert, get their CV/fee schedule.

F. Consider the following question: If he/she is so good in their field of expertise, why would they agree to become involved in a personal injury lawsuit?

G. Review qualifications, publications, articles in the field, prior positions taken by the expert on issues to be litigated.

H. Evaluate excess baggage expert brings to the court room.

I. Narrow your list down to the top three in each field.

J. Cooperation of expert with attorney and their staff.

K. Is the expert a team player or self-absorbed individual?

L. Meet with each expert.

## **11. WORKING WITH EXPERTS THROUGHOUT THE LITIGATION**

A. Don't assume the expert will take over any responsibility of preparing for trial.

B. Continually update the expert on all developments.

C. Share any facts, concerns or data with all experts.

D. Do they need to know the opinions of others in the case?

E. Providing experts will all information gathered from your adversaries'

pleadings, discovery responses and expert responses.

F. Discuss anticipated arguments from your adversary.

G. Role play: how would the expert advise your adversary to defend against your own expert's position?

## **12. SCHEDULING OF EXPERTS**

A. What is the game plan: to impress the jury, teach them or entertain them?

B. List most desired order of experts.

C. Will the necessary foundation for the opinions of each expert have been laid, (i.e. necessary records and documents in evidence, necessary facts in the record) before the expert takes the stand?

D. How much time will be necessary for each expert? (a few hours, a day, more than one day?) What is the anticipated length of cross-examination?

E. Judge's schedule.

F. Securing a firm date with the expert. Good luck!

G. Rethink the whole process after expert's (lack of) availability destroys your "most desired list".

## **13. FINAL PREPARATION**

A. Before preparing exhibits, obtain the expert's advice and enlightenment.

B. Will the expert use the intended exhibit?

C. Remind expert to bring their entire file.

D. Update the expert on the development of the issues at trial.

E. Have a final discussion or meeting with the expert.

#### **14. AT TRIAL**

A. Make appropriate adjustments to blend the expert testimony into the flow of the trial, i.e. shorten or lengthen the direct testimony, eliminates issues already discussed, emphasize or deemphasize issues, etc.

B. Will the jury understand the main issue to be discussed with the expert or will they lose the main point(s) in the details?

C. How will the witnesses responses fit with previous expert opinions and/or subsequent experts?

D. How will the expert's opinions compliment the opinions of past experts and what will the consequences be if the expert discusses topics intended for your subsequent experts?

E. Use consistent terminology.

F. Be precise when referring to prior opinions and testimony.

G. Will the expert be concluded before the end of the day? If not, will the expert be available to return the next day?

#### **15. CONCLUSION OF THE CASE**

A. Let the experts know what happened.

B. Thank the expert.

C. Offer the expert an opportunity to discuss all aspects of the case with you.

## **II. UNDERSTANDING THE LOSS AND PROJECTING**

### **THE FUTURE NEEDS OF THE CLIENT**

The evaluation of a plaintiff's personal injury case should be an analytical process that considers every factor which will ultimately reflect upon the value of the case. It is a legal forecast that takes into account the multiple disciplines of medicine, sociology, economics, insurance coverage and of course, the law. And while it cannot be considered an exact science, there are definite steps that can be taken to refine the art of evaluating a personal injury case. The one thing it is not, is a guessing game. Arriving at a value which has no basis in the facts of the case, is more of a reflection of emotion than a sign of strength and can only serve to prolong the litigation, undermine the legal process and reflect negatively upon the attorney's credibility and sophistication. When an appropriate evaluation is undertaken, it not only provides a game plan for the handling of the case, it also serves as a realistic goal for the resolution of the case. The following outline is an attempt to isolate several of the factors that must be considered and addressed, in arriving at a sound value for a case. Remember, however, that each case is as unique as people are individuals and that each case must be individualized and shaped according to its own unique factors.

Whether the initial purpose for evaluating a personal injury case is to answer the client's question of 'What is my case worth?', or to help set realistic expectations for the case, or to prepare a settlement demand, the process is the same. The attorney is attempting to predict what will happen if the case is not resolved by settlement and a jury must decide the matter. Putting aside for the moment the practical problems of

applicable insurance coverage and/or collectability, the attorney is asking him/her self: how much would a jury award the plaintiff in this case? Hence, the case is worth whatever a jury would award; assuming it can be sustained on appeal. Viewed in this light, the best place to start is with the New York Pattern Jury Instructions (“PJI”). The actual charge will give you the precise language that a jury will be given on the issue of damages. The comments following each charge are an authoritative compendium on every aspect of New York’s law on damages. I find it to be most helpful, in evaluating any personal injury case, to reread all the applicable sections of PJI before finalizing the process. This will serve to remind the attorney what the legal framework is in which the case must be analyzed and also stimulate the creative thinking which may be needed to insure no element of damages has been overlooked.

In brief, there are two basic elements to be considered in every personal injury case: ECONOMIC LOSS and NON-ECONOMIC LOSS (pain and suffering, loss of enjoyment of life). Each of these elements can further be broken into PAST and FUTURE damages. When each of these elements are finalized, they must be modified by the effects of time (economic impact of time on the damages), collateral source and CPLR Article 50A and 50B (structured judgments) to arrive at a reasoned evaluation of the case.

## **1. ECONOMIC LOSSES**

The evaluation of economic losses generally follows a more formalistic approach than does the non-economic loss evaluation. Be mindful that the attorney should not take the losses simply as they are presented. Often times, the plaintiff's counsel must be just that, a counselor to the plaintiff; a person who will consider potential elements of

losses that have not yet been identified or considered by the plaintiff, his/her family, or even their medical providers. Keep an open mind when making an assessment of these damages and strike the right balance between legitimate damages and overreaching. Never attempt to artificially inflate the plaintiff's damages. Any competent defense attorney will expose this ploy for what it is and the plaintiff will run the risk that the jury will deal with it accordingly. Just as importantly, the plaintiff's lawyer must be prepared to prevent the plaintiff and him/her self from embarking on a course of treatment or action which has as its primary motivation, the enhancement of the case value. Don't ever underestimate the intelligence of jurors! They can see right through these tactics. REMEMBER: What is in the best medical interest of the client will always be in the best legal interest of the client.

## **2. MEDICAL EXPENSES**

PJI 2:285. Damages - Personal Injury - Expenses Incurred

Plaintiff is entitled to recover the amount of reasonable expenditures for medical (and dental) services and medicines, including physician's charges, nursing charges, hospital expenses, diagnostic expenses and X-ray charges. If you decide for plaintiff on the question of liability, you will include in your verdict the amount that you find from the evidence to be the fair and reasonable amount of the medical (and dental) expenses necessarily incurred as a result of plaintiff's injuries.

## **3. PAST MEDICAL EXPENSES:**

This is by far the simplest element to calculate. It involves nothing more than adding up all of the past bills incurred for medical treatment. Examples of the typical bills to be looked at are:

- ◆ Hospital bills
- ◆ Doctor bills
- ◆ Therapy bills
- ◆ Transportation (ambulance, air transport, taxi cost, other related cost such as traveling to NYC for second opinions or testing)

There are two legal qualifiers to medical bills. The first is that they be “expenses necessarily incurred”, thus treatment that makes the plaintiff feel good. Expenses incurred for an “unaccepted form of treatment“ is not a lawful element of damage. Also, the amount charged by the health care provider must be “fair and reasonable”.

The more troublesome aspect of computing this element is identifying all the providers who have provided services to the plaintiff. Often times, the plaintiff is unaware of all the services he/she received in a hospital, let alone who will be billing for them. For example, a plaintiff involved in an auto accident and hospitalized for several days, may receive, in addition to the hospital bill and the attending doctor bill, bills from the radiologist who read the X- rays in the hospital, the anesthesiologist who attended the patient at surgery, and the cardiologist who was called in for a consult before surgery was performed on the patient. Each one of these services will be billed separately. The job of locating these bills can at times be made easier by requesting the health insurance carrier (whether it is Workers’ Compensation, No-Fault, Medicare, Medicaid, or the private carrier for the plaintiff) to provide records of payment. Most health care professionals know how to locate the proper payer of their bill for services without ever asking the plaintiff.

Most often the evaluation process is not undertaken until the plaintiff’s medical situation has somewhat settled down allowing a sufficient amount of time to elapse so

that the health care provider can get the bill out to the plaintiff or the appropriate health insurance carrier. Under these circumstances, it is just a matter of locating the bill. If, however, the evaluation process is being undertaken shortly after the service has been rendered, then allowances must be made for the services to be processed and billed.

Sometimes there will be discrepancies between the amount billed and the amount paid for medical services. This can occur since there are different rate schedules for the same type of treatment. The private pay rate is billed at the highest rate, while the Medicaid, Medicare, Workers' Compensation and No-Fault rates are among the lowest. The discrepancy between the amount billed and the amount eventually paid will usually occur when the service is billed at the wrong rate. If you are using the amount billed to compute your demand, make sure someone compares the amount paid to the amount originally billed before finalizing the demand.

#### PJI 2:285. Damages - Personal Injury - Expenses Incurred

If you find that the injuries plaintiff sustained are permanent, and that plaintiff will need medical, hospital or nursing expenses in the future, you will include in your verdict an amount for those anticipated medical, hospital and nursing expenses which are reasonably certain to be incurred in the future and that were necessitated by plaintiff's injuries. If you find that plaintiff is entitled to an award for medical (and dental) expenses to be incurred in the future, you will fix the dollar amount of expenses over the entire period that you find plaintiff will incur such expenses and include that amount in your verdict. In your verdict you will state separately the amount awarded for medical (and dental) expenses to date, if any, and, if you make an award for future medical (and dental expenses), you will state in your verdict the amount awarded and the period of years over which such award is intended to provide compensation. Do not state an amount per year but only a total amount for the entire period.

#### 4. FUTURE MEDICAL EXPENSES

Analyzing the cost of future medical care often requires the assistance of expert help from the treating physicians, as well as from specialized damage experts such as life care planners and economists. The attorney must know what the plaintiff's medical condition is, and whether it is permanent. Once this has been determined the next step is to identify what treatment the plaintiff will need. The final step is to price the incremental services needed. There are a host of factors that should be considered in arriving at the final amount, as will be discussed below.

a) Permanency: A plaintiff is to be compensated for the damages and injuries sustained. If a plaintiff's injury has completely resolved, the jury is to give an award of damages only for that period of time that the damages were incurred. If the injury has resulted in a permanent injury, especially if it will require ongoing treatment, the amount of damages for medical treatment will be markedly increased. It will be necessary to get a current medical assessment of the plaintiff's condition to make this evaluation. Generally, the plaintiff's treating physician will be in the best position to answer this question. His assessment will often be the most credible. A personal appointment should be made to meet with the physician to discuss the doctor's finding rather than simply writing and asking for a report on this issue. My fears include the possibility that the doctor will dictate his report at a time when he is attempting to clear his desk of "paper work" that he needs to get through and he treats this task as just another item he must get done before day's end, or that the patient's full history is not reviewed by the doctor before he prepares the report. I want to make sure that the doctor's report is not based in part on whether the patient is liked or disliked by the

doctor and/or whether the doctor has strong personal beliefs about our legal system. By meeting with the doctor face to face, hopefully, we will be able to make our own personal assessment of the doctor's bias and convictions about the patient and our legal system. After all, if the case does not settle, this is the witness that the jury will most likely hear from and will have to make his or her own assessment of. If the doctor has some personal attribute or attitude, this must be included along with all the other factors to be considered.

b) Prognosis: Prognosis is a medical prediction of the most probable future course of an injury. For instance many medical personnel will say that a patient who is recovering from a brain injury will continue to improve over the first year after the initial injury; progress over the next 2 years will be minimal and there will be no further improvement after 3 years. But different doctors have different opinions, which can vary according to the extent of the injury, the degree of improvement, the age of the patient and even the doctor's self image and confidence. Before any future medical cost factors can be projected, the prognosis must be determined.

c) Treatment: A determination must be made as to the amount and nature of the treatment the plaintiff will need. While this sounds like a matter which all physicians can agree upon, there is a wide range of what is considered to be appropriate medical treatment. For instance, a patient suffering from permanent paralysis may be told by their treating physician that after two years physical therapy will no longer be needed. The doctor may be of the belief that, any additional therapies will not improve the patient's functioning and would therefore be a waste of time and money. Other physicians may feel that ongoing therapy, while not improving function, is nonetheless

beneficial because it will maintain the level of function and not allow the patient to regress. Other physicians might feel that if a patient is permanently paralyzed it does not matter from a functional perspective that the patient's physical condition regresses somewhat. Some physicians may feel that the need for future medical treatment must include a cost benefit analysis, in other words, if the treatment is expensive and the benefits are minimal, the treatment is not reasonable. Yet others may believe that if treatment will benefit the patient even slightly, it is warranted no matter what the cost is. Once again, meeting with the physician in person will help the attorney resolve these issues.

If the attorney feels the treating physician is being unduly conservative and/or does not necessarily have the patient's best legal interest in mind, then the attorney must be prepared to recommend the patient to another physician for treatment and/or assessment. While it is my belief that an attorney should never recommend medical care providers based solely on legal considerations, there does come a time when the attorney must be prepared to intercede.

The attorney must determine whether the treatment being considered by the patient or the physician, is treatment which is customarily recommended for the condition the patient suffers from and is not a novelty, controversial or exotic form of treatment. To pursue this type of treatment jeopardizes the attorney's credibility with both the defense carrier as well as potentially, the jury.

An assessment must be made as to whether the treating physician is prescribing an aggressive form of treatment or whether the treatment is considered conservative in nature. There can be a vast difference of opinion between physicians as to when and

how the patient should be treated. Some physicians may prefer to treat a back injury with medication and rest; while others may find intense physical therapy beneficial and yet others may consider all forms of treatment, other than surgery, a waste of time. Knowing the beliefs of the treating physician can greatly assist in evaluating the future medical costs of the patient.

d) Overlooked/Untreated Injuries: Whenever a patient sustains multiple serious injuries, minor injuries may be undiagnosed and/or left untreated. An example of this may occur with a patient who sustains a life threatening head injury. The medical community will be understandably focused on saving the patient's life and treating the head injury. In the process, they may overlook a fracture to the patient's wrist since the injury was not life threatening, the patient was comatose and could not complain and/or, the injury simply did not manifest itself until weeks or months later. This is one reason that the plaintiff's attorney must itemize every complaint the patient has and correlate it to a medical diagnosis identified in the records and establish what course of treatment has been and is to be rendered for each injury. Hopefully, by reviewing it in the above fashion, overlooked injuries can be identified.

Similarly, a patient who sustains a severe orthopedic injury may be admitted to the hospital under the services of an orthopedist. After discharge from the hospital the patient may be followed by his orthopedist. The patient may have complaints of loss of memory, inability to focus attention, and problems with concentration and reading. The patient might have sustained a head injury with permanent sequela but the orthopedist, who is in a completely different specialty, is not making any recommendations that the patient be reevaluated let alone treated for this condition. Plaintiff's attorney may

suggest that the patient see his/her internist or family practitioner for a complete physical assessment. The internist is in a better position to evaluate the patient as a whole person and refer him to the appropriate specialist under these circumstances.

e) Age: Obviously, the younger a patient is, the more damages will have been incurred as a result of a permanent injury. However, young people, especially children, are able to minimize the consequences of their injuries by learning how to adapt to their injuries better than adults do. Trying to teach old dogs new tricks summarizes this concept.

f) Economic/Social Status: The activity level of the plaintiff will also have a bearing upon future medical needs. A jury is much more likely to accept aggressive ongoing therapies in a high school student athlete than an overweight middle aged computer operator or the unemployed housewife whose children are all grown.

g) Gender: Some members of the medical community attach more or less significance to a physical complaint depending on the gender of the patient. This can sometimes result in the condition being undiagnosed and/or underrated. An example would be complaints of temporal mandibular joint dysfunction. It has been stated that more women than men suffer from this condition, thus, if the complaint is made by a woman it may be overlooked as more psychological than physiological. Whereas, if made by a male construction worker who is more anxious to get back to work than to undergo treatment, the complaint is much more likely to be taken seriously and acted upon.

h) Advances in Medicine: The accepted form of treatment for a condition presently, may not necessarily be the same in the foreseeable future. An example of

this is a male patient suffering from incomplete paraplegia. As a consequence, there may be sexual dysfunction. Just one year ago, almost all physicians would say the condition is permanent. Now the typical defense question is, "have you tried Viagra?" In order to arrive at a durable evaluation of future medical needs, the attorney must be prepared to address the reasonable expectations of the medical community and how it will impact upon the plaintiff's future needs. Other examples include, advances made in spinal injuries, burn treatment, reconstructive surgery, orthopedic implants, genetic engineering, etc.

i) Plaintiff's Family Status: Many insurance carriers and jurors feel that if a plaintiff needs long-term medical care but is married, it is the moral and legal obligation of the spouse to care for the patient and that the cost of long-term nursing care should not be awarded. One prospective juror in a case involving a permanently injured husband stated: 'it is the wife's obligation to care for the disabled husband for the remainder of her life since she married him for better or for worse'. Since it was her duty to care for him, there was no need to award the husband for the cost of nursing services. Be prepared to defuse such stoic beliefs. The same arguments may also be made with respect to parents and children.

j) Prior Medical Condition: The plaintiff may have suffered from a pre-existing, non-related medical condition which has complicated and/or exacerbated the condition suffered as a result of the defendant's negligence. A good example of this involved a 38-year-old roofing foreman who fractured his lower spine during a fall, which resulted in paraplegia. The patient was an insulin dependant diabetic for several years before the accident. As a result of the injury the patient's diabetes was much more

difficult to control and required closer monitoring. In addition, it required more professionalized nursing supervision of the patient's ongoing medical treatment. Another example involved a paranoid schizophrenic who fell from a window, sustaining a fracture which resulted in paraplegia. In this case the patient's psychiatric treatment interfered with his orthopedic rehabilitation and his orthopedic needs severely impacted upon his psychiatric state.

k) Educational Level of Plaintiff: An uneducated/medically unsophisticated patient is more likely to need ongoing care and treatment at a higher level than an educated plaintiff. Imagine the difference between an illiterate day laborer who becomes paraplegic as a result of the defendant's negligence compared to a 35-year-old accountant who is married to a nurse.

l) Geography: The patient who suffers from osteoarthritic problems is more likely to need medical care and treatment if they live in Buffalo rather than if they live in Phoenix.

m) Type of Witness the Treating Physicians Will Make: Doctors are only human too. Some treating physicians are better able to express themselves than others and thus, will become more persuasive in their opinions. As mentioned earlier, some treating physicians are more cooperative than others and some see their role as a physician ending when the patient leaves their office, refusing to participate in any legal proceedings. Moreover, it is a well known fact that some doctors will use phrases like "excellent recovery", "good prognosis" and "no need for further treatment" to describe situations where the plaintiff is permanently disabled and nowhere near their previous level of functioning. And some doctors will term significant chronic pain as mild

subjective complaints. Once again, the attorney must not only assess these factors but be prepared to recommend retaining the appropriate physicians to assist in the proper presentation of all of the plaintiff's injuries.

n) Reality Testing: No matter how justified and properly documented certain medical needs are, a jury may not be ready to accept them. A good example of this was the farmer who sustained a bilateral traumatic amputation of his arms. Within one day of being discharged from the hospital, he went back to work on his farm. He learned new techniques to perform most of the work he had previously accomplished by using one mechanical prosthetic arm. Most of his treating physicians had indicated that he would gain more function and independence if he was fitted with bilateral, biomechanical electronic prosthesis. These units, at the time, cost approximately \$50,000.00 per arm; whereas the mechanical arm was a mere \$3,000.00. The electronic arms could not be used in a dirty, dusty environment and had a functional life expectancy of only 5 years. Knowing the farmer's propensity for work, there was no way a jury would seriously believe that if he were given the electronic arms, he would actually use them and/or they would serve some legitimate purpose for his station in life.

## **5. LOST INCOME**

As with medical expenses, lost income and/or wages must be approached from the perspective of past and future.

PJI 2:290. Damages - Personal Injury - Loss of Earnings - In General.

Plaintiff is entitled to be reimbursed for any earnings lost as a result of (his/her) injuries caused by Defendant's negligence from the time of the accident to date. Moreover, if you find that as a result of those injuries plaintiff has suffered a reduction in (his/her) capacity to

earn money in the future, then plaintiff is also entitled to be reimbursed for loss of future earnings.

Any award you make for earnings lost to date must not be the result of speculation; any award must be calculated from the number of days that you find plaintiff was disabled from working by the injuries and the amount that you find plaintiff would have earned had (he, she) not been disabled.

PJI 2:291. Damages-Personal Injury-Loss of Earnings Unrealized Occupation or Profession.

Plaintiff has offered evidence that at the time of the injury (he/she) was pursuing a course of training to become a [state occupation or profession]. If the injuries sustained by plaintiff (have interfered, are reasonably certain to interfere in the future) with plaintiff's training, you may award such damages as you find that plaintiff sustained because the injuries (delayed plaintiff, prevented plaintiff from) attaining the earning capacity of that (occupation, profession). In deciding this issue, you may consider plaintiff's talent, the training received, the opportunities and recognition already had, the future opportunities that (he, she) (has, was likely to have), as well as the likelihood, risks and contingencies involved in achieving success in the (occupation, profession).

## 6. PAST LOST INCOME

a) Wages: For plaintiffs who were working at the time of their accident, this component is relatively easy. Simply calculate the amount of lost wages that were not received as a result of the injuries. Included are those periods that the plaintiff used their personal sick leave and/or vacation time. Even though they received ongoing wages by doing so, they nonetheless have lost their sick leave and vacation leave which is valued at the same amount as their wages.

b) Lost Household Services: Although loss of household services is a compensatory item of damage, a plaintiff who relied upon the gratuitous services of

others from the point of injury to the trial, is not entitled to recover for the value of these past services since any award would not serve a compensatory function, Schultz v. Harrison Radiator Div. General Motors, 90 NY 2d 311.

#### PJI 2:295. Damages-Personal Injury-Loss of Business Profits

A plaintiff who is in a business that depends upon (his/her) personal supervision or effort may recover damages to reimburse (him, her) for profits lost as a direct result of (his/her) inability, because of injuries, to devote (his/her) personal skill, talent or ability to the business. Such damages do not, however, include profits resulting from plaintiff's capital investment or profits derived from the work of others employed in the business. If you find that plaintiff is entitled to recover, you will make a separate award for the amount of business profits lost by plaintiff as a direct result of plaintiff's inability, because of the injuries, to attend to the business.

c) Lost Income From a Business: This element is much more difficult to compute than lost wages. Often times the plaintiff who has an ongoing business at the time of the injury will not be able to show, without expert proof, that the business actually suffered a diminution of income. Many times existing employees, friends or relatives, cover the work performed by the plaintiff. Other times, the work is simply delayed until the plaintiff is able to return to work. Frequently, it is a professional expert who must evaluate any negative impact on the losses sustained by the plaintiff's business.

#### 2) Future Lost Wages/Income.

#### PJI 2:290. Damages–Personal Injury–Loss of Earnings–In General.

Any award you make for reduction of Plaintiff's earning capacity in the future should be determined on the basis of Plaintiff's earnings before the accident, the condition of

plaintiff's health, (his/her) prospects for advancement and the probabilities with respect to future earnings before the accident, the extent to which you find that those prospects or probabilities have been reduced by the injuries, the length of time that you find plaintiff would reasonably be expected to work had (he, she) not been injured, the nature and hazards of plaintiff's employment and any other circumstances which would have an effect on plaintiff's earning capacity.

Plaintiff is now \_\_\_\_\_ years of age and has a (life expectancy according to the mortality tables, work life expectancy according to the work life expectancy tables in evidence) of \_\_\_\_\_ more years. Such tables are, of course, nothing more than statistical averages. They neither assure that plaintiff will have the span of (working) life I have given you nor assure that plaintiff's span will not be greater. The figures I have given you are not binding upon you, but may be considered by you together with your own experience and the evidence you have heard in determining what plaintiff's (life, work life) expectancy is. If you find that plaintiff is entitled to an award for reduction in earning capacity in the future, you will fix the dollar amount of such reduction over the entire period that you find plaintiff will suffer such reduction and include that amount in your verdict. In your verdict you will state separately the amount awarded for loss of earnings to date, if any, and, if you make an award for loss of future earnings, you will state in your verdict the amount awarded and the period of years over which such award is intended to provide compensation. Do not state an amount per year but only a total amount for the entire period.

a)            Pre-Accident Work History: As the PJI charge indicates, future lost earnings are in part determined "on the basis of plaintiff's earnings before the accident". Thus the plaintiff's work experience, earnings and career path must be considered when projecting future income. A plaintiff who has a consistent work history will usually be said to sustain more future lost income than a plaintiff who has gone from job to job with several periods of unemployment. Yet there may be very legitimate reasons for a less

than consistent work history, such as the plaintiff who recently switched careers from a factory worker to a computer consultant after a period of retraining.

b) Age: Plaintiff's age obviously has an impact on his/her lost future income. For instance, a twenty-year-old junior college student may have virtually limitless career paths as opposed to a fifty-year-old truck driver. Obviously, plaintiff's age will also determine the number of years over which the lost income will be incurred resulting in higher awards for younger people.

PJI 2:292. Damages-Personal Injury-Loss of Earnings- Special Talent.

Plaintiff has offered evidence that (he, she) has been studying for a career (state career, e.g.: in opera, the theatre, music) for which (he/she) has special talent. A person who has special talents is entitled to recover damages for wrongful injury to the development of those talents. Plaintiff's recovery is not necessarily limited by the amount (he, she) actually earned before the injury. However, in deciding the amount of damage, you must consider the training already received by plaintiff, the additional training necessary, the success and recognition already realized, the opportunities likely to be available to plaintiff in the future, the risk and contingencies involved in achieving success, and the overall probability of success in the chosen field. In short, what is being valued is the probability that plaintiff would have in fact realized future earnings from (his/her) special talent.

For school age children who have not yet embarked on a work career, the jury may assess a value for future lost income; however, they are not permitted to speculate. Thus, any claim that the child was going to pursue a specific career, must be accompanied by credible proof to remove any claim that damages based on that career would be mere speculation. An example of this would be the plaintiff parents that claim their 8-year-old child was going to be a professional hockey player. On the other hand, the plaintiff would be able to produce proof to show what the average high school and/or

college graduate would earn and what the individual 8-year-old plaintiff will now be able to earn.

c) Pre-Accident Health: As the PJI charge indicates the plaintiff's pre-accident health has a bearing on the damages. A forty year old ironworker who is suffering from arthritic changes in his spine will probably not be successful in alleging that he has lost 25 years of wages as an ironworker from a permanent injury. It would be difficult to convince anyone that, but for his accident, he would have worked as an ironworker for 25 more years. Thus a different theory of damages would have to be used, such as ten years of lost income as an ironworker and fifteen years in a less physically demanding capacity.

d) Age of Retirement: The age at which the plaintiff will claim that he would have retired has a significant impact on lost income. Obviously the fewer years the plaintiff would have worked, the fewer years of lost income he /she will incur. There are various arguments which are used to project the age at which the plaintiff will retire. The federal government maintains work life expectancy tables. These tables statistically include all people in the work force including disabled people, healthy people, unhealthy people, those who have a propensity to work and those who do not. These tables will reflect a statistical analysis of when the "average" person leaves the work force. This can result in an argument that lost wages should be assessed only to, for instance, age 58 when the average U.S. citizen of plaintiff's age would leave the work force according to the tables. The common belief is that people will work until age 65, the historical retirement age of the 20<sup>th</sup> century. However, due to changes in the Social Security law, is it not reasonable to expect that a 40-year old plaintiff will be expected to work until

age 67. There may also be other factors such as the plaintiff's strong conviction that he/she would not retire until much after the normal retirement age. The attorney must determine what the appropriate work life expectancy is for his/her plaintiff. A secondary effect of work life expectancy on lost income is the economic fact that with adjustments for inflation, promotions and other effects that time has upon income, the last years of employment will always produce the most significant per year loss of annual income.

e) Permanency: Again, if the injury has left the plaintiff permanently disabled the value of lost income will be greater than a temporary period of disability.

f) Effect of Injury on Employability: There must be some relationship between the injury and the plaintiff's employment. A plaintiff who was employed as a grade school teacher will have more difficulty establishing future loss income as a result of a permanent injury to her shoulder than a woman who was previously employed as a floor nurse. However even the floor nurse must be prepared to address the claim that she could switch from a floor nurse position to a school nurse and be able to perform the work without her permanent injury interfering with the requirements of the job. It is in this realm that the services of a professional vocational rehabilitationist can be most useful. The expert will be able to provide the employment statistics that will demonstrate the small percentage of job openings available in the school nursing market compared to the floor nursing positions. Other eligibility issues can be discussed, such as the possibility that there exist educational prerequisites which the plaintiff may not possess or the discrepancy in pay which may further demonstrate that this defensive argument is flawed when applied to the facts of a given case.

g) Switching to a More Suitable Career: Frequently, the plaintiff will have been employed for several years in one field of work, such as construction, which his doctors now say he is unable to perform due to the injury. The treating physician may suggest that he find employment which requires less strenuous activity such as a desk job or working with computers. Of course you must expect under these circumstances that the defense will claim the plaintiff is not disabled from work, he need only switch careers, and that he has an obligation to mitigate his damages. You must be prepared to address these issues.

h) Returning to the Same Job or Earning More Now Than Before: Just because the plaintiff is able to return to the same job after sustaining a permanent injury, or was able to find new employment that actually pays more than his pre-accident job, it does not mean there is no future lost income. The circumstances surrounding the plaintiff's employment must be closely examined. For instance, the plaintiff may have returned to his job with the company owned by his father. It could be more likely that the plaintiff was rehired not in a competitive sense, but out of compassion by a relative. Here, the employment expert can demonstrate that the injury has resulted in rendering the plaintiff unemployable in the competitive market and that the income he/she is now receiving is not indicative of his/her residual earning capacity.

Counsel may also be confronted with the situation where the plaintiff is able to return to his/her previous employment, such as the grade school teacher who has a permanent shoulder injury, at the same level and pay. The employment expert will usually be able to demonstrate that this situation does not mean there is no lost future income and that government statistics record the fact that disabled people will, on

average, earn less over their work life due to more frequent and longer periods of absence from work, longer periods of time between jobs and a reduced work life expectancy all as a direct result of the injury.

i) Impact of Future Treatment: The plaintiff may be unemployable due to his injury, such as a result of chronic back pain, but once the plaintiff undergoes the surgery that his treating doctor recommends, he may be eligible to re-enter the work force. Here, the attorney should be prepared to discuss if, when (or why the surgery is not going to occur) and what effect it will have on the future employability. Often times under these circumstances close coordination between the plaintiff, his doctor and the employment expert must be undertaken.

j) Fringe Benefits: Benefits such as health insurance, life insurance, worker compensation, unemployment benefits, retirement plans, bonuses, FICA and other employer benefits are also a component of lost wages. For those who are totally disabled this can average from 10% to as much as 25% of the plaintiff's basic wages. Even where the plaintiff suffers partial disability from employment, or is able to find other full time work, he may no longer be eligible for the same level of benefits.

k) Loss of Household Services: Typically, a permanent injury will not only affect the plaintiff's ability to obtain or hold employment, it will inevitably restrict the type of unpaid work that we all do around the home, which may range from the usual household chores to such undertakings as major home remodeling. This is a separate element of damage which is compensable but "only for those services which are reasonably certain to be incurred and necessitated by plaintiff's injury" Schultz v. Harrison Radiator Div. General Motors, 90 NY 2d 311; see also comments to PJI 2:225.

## **II. PAIN AND SUFFERING**

The term 'pain and suffering' has been defined as encompassing all forms of non economic loss sustained by a plaintiff, including physical and emotional suffering and loss of enjoyment of life. While loss of enjoyment of life and emotional pain and suffering are compensable elements of loss, they are part of pain and suffering and are not to be considered separate and apart from 'pain and suffering'. The plaintiff is entitled to be compensated only if there is some level of awareness on the part of the plaintiff, and there must be some connection between the plaintiff's injury and the pain and suffering. No expert testimony is needed to establish the connection if the results are within the experience and observation of lay persons. See comments to PJI 2:280.

PJI 2:280 Damages – Personal Injury – Injury and Pain and Suffering.

If you decide that defendant is liable, plaintiff is entitled to recover a sum of money which will justly and fairly compensate (him/her) for any injury and conscious pain and suffering to date caused by defendant. (If there is an issue relative to the level of plaintiff's awareness, the following should be charged.) Conscious pain and suffering means pain and suffering of which there was some level of awareness by plaintiff (decedent).

PJI 2:280.1 In determining the amount, if any, to be awarded plaintiff for pain and suffering, you may take into consideration the effect that plaintiff's (decedent's) injuries have had on plaintiff's ability to enjoy life (have had on decedent's ability to enjoy life up to the time of death). Loss of enjoyment of life involves the loss of the ability to perform daily tasks, to participate in the activities which were a part of the person's life before the injury, and to experience the pleasures of life. However, a person suffers the loss of enjoyment of life only if the person is aware, at some level,

of the loss that (he, she) has suffered.

If you find that plaintiff (decedent), as result of (his, her) injuries, suffered some loss of the ability to enjoy life and that plaintiff (decedent) was aware, at some level, of a loss, you may take that loss into consideration in determining the amount to be awarded to plaintiff for pain and suffering to date.

## **1. PAST PAIN AND SUFFERING**

a. Medical Experts: Once again the quality of the treating physician's testimony will have the most significant impact on past pain and suffering. If the physician is cooperative, understanding, and willing to describe all aspects of plaintiff's injuries, the chances of receiving a higher award is greatly increased. Frequently, counsel will not be blessed with treating physicians who are always ready and willing to describe the injury in terms of pain and suffering. Under these circumstances, the attorney should contemplate alternative methods of establishing the degree of pain and suffering by using additional experts. It is my belief that an attorney should never interfere with the appropriate care and treatment of a plaintiff for his injuries. However, this is not to say that a plaintiff should not consider getting additional physicians involved for second opinions, consultations and/or purely expert testimony. This could mean retaining a physiatrist (a doctor of physical medicine and physical rehabilitation) who will provide testimony concerning the extent of the injury and consequences thereof, or retaining a psychiatrist, who will discuss the impact of the injury upon the plaintiff's emotional well being, rather than trying to have the plaintiff's orthopedic surgeon discussing these topics.

b. Demonstrative Evidence: In order for the jury to award damages for pain and suffering the jury must first understand the nature of the injury and its

consequences. Therefore, the attorney must demonstrate the injury and its consequences. There is a significant difference between medical tests, which are ordered for purposes of treatment, and those which will demonstrate the plaintiff's injuries. For instance, a plaintiff who has sustained a brain injury may have had adequate treatment without the necessity of having CT scans or PET or SPECT scans performed. These later tests would much more graphically display the injury leading to a better understanding of its consequences. Here plaintiff's attorney must not only evaluate the need for this type of testing, but must also consider the advisability of these tests if there are any adverse medical consequences. It is strongly recommended that a medical consultation be first obtained.

c. Lay-Witness Description: It is very difficult to have a plaintiff effectively describe his physical and/or emotional suffering without having him perceived as a complainer or a person seeking to "make money off the system". Therefore it is generally better to have lay, non-party witnesses describe the plaintiff as he was before the accident compared to what he is now. Sometimes plaintiffs have a large suitable circle of friends and relatives for this purpose and other times, they do not. This factor must be assessed in the overall evaluation of the damages.

d. Photographs and Films: Many times plaintiffs will have valuable videotape or photographs which can graphically depict the injury or course of recovery.

e. Nature of the Injury: Often times the nature and/or location of the injury can have a significant impact on the value. For instance, orthopedic injuries are much easier to demonstrate than neurological injuries, and if they are demonstrable there is less of a chance that issues such as credibility, or malingering will negatively impact on

the value of a case. Even the location of the injury can be important. A laceration to the leg will often times not be considered as painful as a laceration to the scrotum even though medically this may not be true.

## **2. FUTURE PAIN AND SUFFERING**

PJI 2:281. Damages-Personal Injury-Permanence-Life Expectancy Tables.

With respect to any of the plaintiff's injuries or disabilities that you find to be permanent, the plaintiff is entitled to recover for future pain, suffering and disability and the loss of (his/her) ability to enjoy life. In this regard you take into consideration the period of time that the plaintiff can be expected to live. In accordance with statistical life expectancy tables, plaintiff has a life expectancy of \_\_\_\_\_ years. Such a table, however, provides nothing more than a statistical average. It neither guarantees that plaintiff will live an additional \_\_\_\_\_ years or means that (he, she) will not live for a longer period. The life expectancy figure I have given you is not binding upon you, but may be considered by you together with your own experience and the evidence you have heard concerning the condition of plaintiff's health, (his/her) habits, employment and activities in deciding what plaintiff's present life expectancy is.

All of the elements listed under "Past Pain and Suffering", above, will apply to the assessment of future pain and suffering. In addition, the following elements should also be considered:

a. Permanency: Obviously, if the injury is permanent the jury's award is correspondingly larger than for a non-permanent injury.

b. Age: The age of the plaintiff will have direct bearing upon the number of years the plaintiff is expected to live with the permanent injury and thereby increase the damages.

c. Reduced Life Expectancy: No New York case has been found on the question whether shortening of life expectancy constitutes an element of damages, but see Downie v United States Lines Co., (CA3 Pa) 359 F2d 344; Rhone v Fisher, 224 Md 223, 167 A2d 773; Notes:15 Syracuse Law Review 14; and commentary at New York PJI 2:280.

d. Gender: For certain injuries, gender can have a significant impact on the damages. For instance, a facial scar is much more significant to a young woman than a young man.

e. Social Economic Status: When representing an injured party, the plaintiff's attorney must recognize society's attitudes, whether they are politically incorrect, unconstitutional, or simply unjust. If society is biased or prejudiced against certain individuals, this propensity must be taken into account. Some of these are very subtle biases. Take for example how many individuals believe that since \$100.00 means much more to a poor person than a rich person, the rich person should be awarded more money for the same injury which might be sustained by a poor person.

f. Pre-Accident Quality of Life: The plaintiff's quality of life before the accident will have a direct impact upon the claim of future loss of quality of life. If a plaintiff had a miserable quality of life before the accident the jury may find very little change caused by the injury.

PJI 2:325. Damages-Mitigation-Failure to Have an Operation

A person who has been injured is not permitted to recover for damages that could have been avoided by using means which a reasonably prudent person would have used to (cure the injury, alleviate the pain). The defendant claims that if the plaintiff submitted to an operation

(his/her) (injury, pain) would be (completely cured, greatly alleviated) and that such an operation is not dangerous.

The plaintiff claims that (he, she) declined to have the operation because it was (dangerous, too expensive). The burden of proving that the plaintiff failed to avail (himself, herself) of a reasonably safe procedure which would have (completely cured, greatly alleviated) (his/her) injury is on the defendant. If you find that the plaintiff is entitled to recover in this action, then in deciding the nature and permanence of (his/her) injury and what damages (he, she) may recover for the injury, you must decide whether in refusing to have an operation the plaintiff acted as a reasonably prudent person would have acted under the circumstances. In deciding that question you will take into consideration the evidence concerning the nature of the operation, the expense of such an operation and whether the plaintiff had sufficient funds or had insurance to meet that expense, the extent to which such an operation involves danger to the plaintiff, and the results to be expected from it. If you find that in deciding not to have an operation the plaintiff acted as a reasonably prudent person would have acted then the plaintiff is entitled to recover for (his/her) injuries, as you find them to be, without regard to the possibility of an operation. If, however, you find that the operation is one that a reasonably prudent person would submit to and that the operation would (cure the injury, relieve the pain), you will take that fact into consideration in arriving at the amount of damages that you award.

g. Future Medical Treatment: The impact of future medical care can alter the value of future pain and suffering. For instance, a laborer who has sustained a fractured heel may be in significant pain. However, if the bones in the foot are fused, the pain can be virtually eliminated resulting in a corresponding reduction in the value of pain and suffering. Thus, the date, time and necessity of the surgery must be evaluated when assessing future pain and suffering.

### 3. ADJUSTMENTS TO THE ELEMENTS OF LOSS

Once the four (4) components for past and future economic and non-economic losses have been estimated, various adjustments must be undertaken to arrive at a realistic appraisal of economic loss.

PJI 2:280.2. If your verdict is in favor of plaintiff, plaintiff will not be required to pay income taxes on the award and you must not add to or subtract from the award any amount on account of income taxes.

a. Income taxes: The general rule is that the plaintiff's damages for personal injury and loss of income resulting therefrom are not taxable (Lanzano v. New York, 71 NY2d 208). The exception is in medical, dental and podiatric malpractice cases. Pursuant to CPLR 4546, the court must make the appropriate reductions in a jury award for loss of income by the amount of federal, state, and local personal income taxes which the court finds with reasonable certainty that the plaintiff would have been legally obligated to pay. Similarly, in a wrongful death case caused by underlying medical, or dental malpractice "the jury must be instructed to find with reasonable certainty the amount of taxes that decedent would have been required by law to pay and to consider that amount in determining the sum that would otherwise be available for the support of the decedent's distributees". See PJI 2:320, et al and commentaries and EPTL 5-4.3.

b. Collateral Source: CPLR Section 4545 requires that in any action brought to recover damages for personal injury or wrongful death, where the plaintiff seeks to recover for medical care, dental care, custodial care or rehabilitation services, loss of earnings or other economic loss, the damages for these items must be reduced by any amounts, costs or expenses which "was or will, with reasonable certainty, be

replaced or indemnified from any collateral source". Certain adjustments for amounts paid by plaintiff, or to be paid, for premiums for such benefits are further adjustments that must be made. By statute, benefits received from social security, worker's compensation and employee benefit programs are to reduce the award for future damages. Obviously, it is important to reduce any claim for past and future damages by collateral sources; the failure to do so, will result in not only an unjustifiable demand, but also will reflect upon the attorney's knowledge.

c. Adjustments to be made by Economic Expert: When future damages are to be awarded over a considerable period in the future, various economic adjustments must be made to accurately reflect how time will affect each element of future loss. Most often, it is the professional economist who will make these calculations, adjusting for inflation on each component of loss (the medical rate of inflation might be much different than the rate for wages, both of which may be different than the rate of inflation for drugs). Further adjustments will have to be made for a protracted wage loss component. Government statistics and considerable economic research verifies that employees who continue to work in the U.S. labor market earn more money in their later years than they do as a young employee, for reasons varying from salary increases to promotions to greater efficiency.

d. Identity of the Defendant: It is an accepted principal that juries are more likely to award a plaintiff larger damages when the defendant is perceived as a large wealthy corporate entity as opposed to an individual of average wealth. Thus an attorney may want to consider who the defendant is when evaluating a case. Greater

value can be justified against an automobile manufacturer than when the defendant is a wage earner.

e. Identity of the Plaintiff: The plaintiff's own personality (and likeability) will have a significant impact on the value of the case. Clients who are likable, hard working, industrious, non-complainers tend to receive more money for their injuries than those who are perceived to be unlikable, malingerers or complainers.

f. Punitive Factors: Although it is extremely rare that a plaintiff is entitled to punitive damages, the value of the compensatory losses can be greatly enhanced if the defendant's actions are egregious, wanton or grossly negligent.

#### **4. COMPARATIVE FAULT**

After the total value of the case is computed and the appropriate adjustments are made, the total residual amount must be reduced by the percentage of fault the attorney believes the plaintiff will be found to be comparatively negligent.

#### **5. CPLR ARTICLE 50-A and 50-B**

The impact of Article 50-A and 50-B significantly alters the monetary value of future losses. After an appropriate demand for future damages has been calculated, the plaintiff's attorney must consider the effect of these provisions. Generally the professional economist will be able to compute the effect of Articles 50-A and 50-B on the projected value of future losses. Some economists, as part of their economic projections, will calculate three categories of losses: the undiscounted future damages; present day value, and the application of the statutory scheme on the undiscounted damages. The latter two categories are not necessarily the same since Articles 50-A and 50-B call for the defendant to purchase annuities to fund the pay out of future

damages the cost of which may not be the same as present day value. A thorough discussion of what would be the most appropriate method to use in evaluating a case (present day value or post 50-A or 50-B adjustments) should be thoroughly discussed with the economist.