PERSUADING ON DAMAGES IN SETTLEMENT NEGOTIATIONS

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I. INTRODUCTION

To engage in good faith settlement negotiations and achieve a full and fair settlement for a client can be an exasperating experience. The work is at worst an inexact science, but at best is a rewarding and beautiful art form. Successful settlement negotiation requires some, but not all, of the same advocacy skills required of the lawyer in a jury trial.

A. THOROUGH TRIAL PREPARATION IS KEY TO SUCCESSFUL SETTLEMENT NEGOTIATIONS

It is axiomatic that thorough trial preparation is the key to the successful negotiation of any type of lawsuit. Thorough trial preparation begins with the initial client interview and from that point forward every action and reaction should be calculated towards effective presentation of the client's case in the courtroom. Realization by the opposition that your case is ready for trial and will be effectively presented is a prime motivator to settlement.

The most important aspect of trial preparation is attention to detail. Trials are won or lost one fact at a time. Percy Foreman, one of the greatest trial lawyers ever to grace an American courtroom lifted the juries' minds and spirits on the wings of his eloquence. However, underlying that powerful persuasion was the inevitable fact that when Percy Foreman rose to voir dire a jury panel, he possessed more in depth knowledge about both the facts and law of his case than his adversaries. Percy was a complete devotee to attention to detail, both factually and legally. Having achieved that reputation among his peers and adversaries early in his career, settlements and pleas came easily and generally on his terms.

Much of what we do in court is effective reaction. Through the presentation of our case on direct we control the action and the flow of evidence to a large extent. However, every trial has its surprises and it is the advocate who is most thoroughly prepared, i.e., most familiar with the details of the case who is generally best qualified to react to the unanticipated. The vital nature of attention to detail extends to every minute aspect of the case whether it bears on liability or damages. Make attention to detail a normal routine in your trial preparation and it will bring you a reputation that will serve you brilliantly in settlement negotiation.

B. TWO GENERAL RULES OF THUMB

To achieve a decent settlement at the optimum stage of the case (with the least expenditure of time, costs, and resources), you should follow two general guidelines:

1. Give total attention to developing and understanding the meaningful details of the case. In other words, know the social value of the case, its issues, and its human strengths and weaknesses.
2. Maintain absolute and strict integrity in the adversarial negotiating process. Be true to your word, and negotiate honorably and professionally.

C. WHY SETTLE?

Settlement of any case before a jury verdict is advantageous for many reasons. It eliminates the element of uncertainty and risks present for every trial, whether in a products liability, professional negligence, automobile accident, or slip and fall case. A fair, safe settlement will provide an immediate money payment to the injured plaintiff. In every wrongful death or serious tort case, the plaintiff's injuries are catastrophic. Settlement funds can be the basis for a new and optimistic outlook for the plaintiffs and their families. With congested court calendars, delays in receiving a "credible trial date," delays occasioned by post-trial motions and appeal, are postponed recovery of money can be unnerving and depressing to severely injured and economically depressed clients. In almost all personal injury cases, the proper preparation and trial of the lawsuit involves many expenses. A timely settlement can result in a safe net recovery to the client that is comparable to or greater than the net recovery of the "ultimate and best probable outcome."

D. ADAPT YOUR PERSONAL STYLE TO THE CLIENT'S CASE AND THE TRIANGLE OF PROOFS

Although settlement negotiations vary with each case and with each individual attorney or adjuster, the personality of the plaintiff's attorney must be adaptable to the peculiar circumstances of the case and the settlement. Each attorney has an individual style that can be molded into the settlement prospectus and settlement approach in the preparation and trial of the case. However, the client's individual case, the backgrounds of the parties, the witnesses, the circumstances of the accident, the legal liability, the aftermath or the causally related damages, the chances of a favorable verdict, and the probable lower and upper limits of recovery are the important factors that must guide you in fashioning the best settlement.

E. WILLINGNESS TO LITIGATE

One of the most important elements which every litigator considers is the competence of opposing counsel. In addition to a reputation for courtroom competence and professional integrity, it is crucial, in order to achieve top dollar settlements, to earn a reputation for willingness to hear the buzzer, i.e., the intestinal fortitude to take the jury verdict.

Unfortunately, many lawyers who hold themselves out to an unsuspecting public as trial lawyers are nothing more than case brokers. Any lawyer who acquires a reputation that they will take whatever they can get in settlement before they broker the case out to a real trial lawyer, is doing injustice to their client, their profession and the civil justice system. It is only the attorney who has the reputation for litigating, the courage to accept a verdict, and the wherewithal to fight the often extraordinary expenditures by the other side who will consistently achieve top dollar settlements in their cases.

II. HOW TO EVALUATE A CASE - PLAINTIFF'S PERSPECTIVE

A. WHO GOES FIRST?

Generally, the plaintiff should initiate settlement discussions. It is certainly appropriate for the plaintiff's attorney, who has the obligation to recover a fair settlement or a just verdict on behalf of the client, to begin the discussions. However, in this age of "enlightened good faith," a safer claims practice by the defense is to offer the policy limits of the insured in a no-win serious injury or death case when the small limits are obviously insufficient. "Throwing in the policy" is not a sign of weakness but a true showing of the force and effect of an insurance carrier's affirmative duty of fair claims practice. This practice is also an honest discharge of the carrier's fiduciary responsibility to its insured.

Even if a case has a 50-50 chance of recovery, an insurer with a relatively small policy and an excess damages potential should protect its insured by making a reasonable offer in good faith rather than "stonewall" with a "no pay" or "nuisance value" offer.

B. WHEN IS THE TIME RIPE?

No hard and fast rules dictate a particular time or stage at which a case should or should not be settled. The cardinal rule must be stated in the negative: a case should not be settled unless you have complete information and a full opportunity to evaluate the client's case.

Do not speculate as to the future physical condition of the client unless all treatment has concluded and a reasonable waiting period has elapsed for the appearance of undiagnosed or potential problems (such as subtle brain damage or post-traumatic arthritis). Even though parents, friends, relatives, and other interested attorneys may urge immediate settlement of an obvious liability case for a youngster, resist pressure to "turn over" the case. All future physical or psychological ramifications must first be carefully analyzed by the medical and legal team on behalf of the injured plaintiff.

Do not evaluate or attempt to "throw out" a figure until the treating and consulting doctors have given a final discharge and diagnosis. The doctors must decide that the injuries have "plateaued," or reached a point at which they can be diagnosed and all future risks can be medically evaluated and opined.

Several types of clients should raise danger signs to the conscientious trial attorney: people with head injuries, children with unresolved problems, and elderly people. In handling any plaintiff with a head injury, remember that a very minor concussion with true brain damage can be masked by other symptoms, and a final medical diagnosis may not be made for at least six months to one year after the accident. A young child with a serious scar, fracture, or internal injury may not know the true extent of future treatment or disability until

reaching puberty. If the treating doctor is not sure of a prognosis, waiting is the best course of action. Another genre of personal injury cases that should not be settled without very careful consideration to the nature and extent of injuries and the prognosis concerns the elderly. With any serious trauma to a joint, the risk of post-traumatic arthritic development exists but often cannot be determined in the first six months. X-ray analysis is required over a period of nine to twelve months. Particularly in the case of an elderly tort victim, the so-called "simple soft tissue injury" can, over time, result in the painful development or aggravation of arthritis.

To properly time the initial settlement demand, you should fully understand the biomechanics of the trauma and resulting injuries, the nature and extent of the plaintiff's injuries, all past medical treatment, and the nature and extent of all reasonably predictable risks of future complications (such as the need for future treatment or surgery).

In complicated cases, such as those concerning products liability or medical negligence, where the legal liability and causation may not be clearly focused until pretrial discovery is completed, you might be wiser not making any settlement demand even though the defense shows an apparent willingness (or ploy) to seek out what you view as "the value" of the case. Never feel intimidated into tossing out some "ballpark figure" just to appear knowledgeable and in control of the settlement situation.

It is usually best to conduct a preliminary evaluation of the case early for the purpose of aiding the insurance company in establishing their reserves properly. This coincides with the defendant insurance company's need to set up a proper reserve to cover the limits of the claim. Also, if the liability and damages picture is clear, an early settlement demand can establish the basis for a future claim of bad faith or excess liability against a defendant's insurer.

A few situations might suggest commencing late settlement negotiations. By making a demand too early for too little, you may alert the defense that the plaintiff considers the case less worthy than the defendant's original expectation. Premature negotiations can result in a psychological disadvantage that will diminish the likelihood of a reasonable settlement. Certain defense attorneys do not evaluate their cases until just before or at trial. Not surprisingly, many insurance companies do not make their best offer until the last possible moment. Many trial attorneys and writers believe that, in dealing with such attorneys and insurance companies, it is better to make settlement overtures just before or even after the start of trial.

Consideration of early but unhurried settlement discussion should be a general rule. Delay may result in additional expenses to the client and a lower net recovery. A late settlement demand may foreclose the possibility of an excess liability claim. It will also cause defense counsel and the defendant's insurance carrier unnecessary delays in forwarding and conducting a "hard evaluation" of the claim. The late bid may even mislead or give the wrong message to the defense as to the true value of the lawsuit or the professional skills of plaintiff's counsel.

C. WHEN IS THE CLIENT'S INFORMED CONSENT OBTAINED?

Another important rule to follow in the timing of settlement is not to make a demand before obtaining the client's informed consent and authorization. It appears unprofessional and inherently suspect, in the event a subsequent dispute arises with the client, to call an adjuster or adversary and discuss the specific value of the case without first securing some prior range of authority from the client.

You must transmit to the client all offers of settlement made by the insurance adjuster or defendant's counsel. Of course, the client retains the final option of settlement or trial. When an offer of settlement is made, advise the client immediately of the amount offered and also give recommendations. You may have no opinion on rejecting or accepting the offered amount, but it will always be difficult to remain totally neutral in discussing monetary sums with the client. You are paid for your experience and well-reasoned advice. If you have no strong opinion, explain your neutrality so the client can make an informed decision.

When advising a client not to accept an offer, always make it very clear that you cannot guarantee that a better result would be reached by a jury verdict. It is best in this age of burgeoning legal malpractice cases to confirm settlement recommendations and discussions in writing.

Give clients as close an approximation as possible to what a settlement offer means to them in the "net" dollars and cents settlement check. Explain what portion of the settlement will be paid to you for attorney fees and costs. If clients are told they will net $10,000 in their pocket out of a gross settlement of $15,000, the clients will remember and demand the exact net sum. In this scenario, however, there may be paid or unpaid costs of $3,000, netting the client only $7,000 after your one-third fee has been taken from the

net settlement after costs. Underestimating the accumulated paid/unpaid costs can be very embarrassing and damaging to the attorney-client relationship. Thus, try to make estimates as exact as possible. In that way, the client is rewarded for relying on your estimated settlement disbursements and also has renewed faith and confidence in you.

In large or complex tort litigation, advise the client of the ongoing and cumulative effect of costs. Clients seem truly surprised when they see the extent of costs to investigate the liability that appeared to them as obvious and without doubt. If the case necessitates large costs, the client should periodically be sent a status letter as to the accumulated costs along with copies or synopses of the experts' reports and evaluations. A very easy way to do this is to "cc" or copy your client on all correspondence in the case. This practice often obviates the need to explain to a client why the expert was paid so much for a one-page report, why a good case has become less than rosy, and why the clear liability is now in doubt. This constant communication will also assist in explaining why the plaintiff's previous hard-line settlement posture might have to be reevaluated. Equally important in terms of excellent attorney-client relations, the client must be kept fully informed of the progress of the case. More than 90% of grievances filed against attorneys are grounded in poor attorney-client communications. Aside from the obvious professional and ethical considerations in keeping clients fully aware, there is also the consideration that a satisfied and happy client is the best source of new business referrals.

D. WHAT ARE THE STAKES?

It is important to determine at the outset the liability insurance coverage of a defendant, especially if a defendant is impecunious or without assets which are subject to execution to satisfy judgment. If such defendant has a relatively small liability policy and it is obvious from the injuries that the value of the case will exceed this minimal policy limit, announce the situation to the insurance carrier at once. Although the precise value or an exact range of values for a settlement demand cannot be known, it is often easy to determine that a case exceeds a given policy limit. In cases where serious injuries and damages are immediately recognizable, such as death or total disability, it is important to establish the ultimate policy limits with particular care paid to discovering all levels of coverage.

When the insurance carrier shows reluctance to reveal coverage limits in a serious case, you should file suit immediately to discover the total limits of all insurance, and whether "additional," "excess," or "umbrella" liability policies exist.

E. WHEN TO EXPEND COSTS?

In the words of King Lear, "nothing ever becomes of nothing." Some attorneys in New Jersey have likened the valuation and preparation of a case to an Atlantic City slot machine: If you put in nickels you will probably get a nickel jackpot; if you put in dollars, you may eventually come up with the three-bar signal for a "big" verdict or settlement payoff.

Prepare your case fully, and do not skimp on the costs of the initial investigation. In most instances, spend the most time and do the most intensive investigation when you first accept the case. The opening settlement negotiations will thus begin at a high point. If the money and effort is not invested in the case until immediately before trial, you will usually be too late with too little.

Using the slot-machine analogy, the three bars symbolize liability, damages, and collectability. First, determine whether there is collectability, that is, whether a settlement or judgment can be satisfied through either insurance coverage or assets owned by the defendant which is subject to execution on the judgment. Secondly, the liability bar must come up for your client to be a winner and collect any damages. The liability investigation of any tort claim must be undertaken vigorously and with professional assistance. It is the most important aspect of the case. After investigating your client, verify allegations about the accident, determine exactly what mechanism brought about the accident and the injuries, theorize about all possible causes, secure experts to support the theory, anticipate the defenses, and research the law.

Finally, carefully evaluate damages. The treating and consulting doctors, physical therapists, rehabilitation counselors, the rest of the client's health care team, the client's employer and colleagues, and the client's family should all be part of this evaluation. Information you must obtain includes the extent and nature of all the client's injuries, disabilities, and impairments, and the potential for remissions, exacerbations, and future risks of medical conditions or complications. Additional experts or medical authorities may be

retained to support the claim for injuries or lost income. Then, determine whether there is collectability of this amount of damages, that is, whether a settlement or judgment can be obtained from insurance coverage or assets. Once the three pictures are showing (liability, damages, and collectability), you can arrive at a value for the final payout: What is the case worth in settlement?

F. CASE EVALUATION: WEIGHING A STEER IN OKLAHOMA

The process for arriving at a settlement value is sometimes like the Oklahoma method of weighing a steer: Balance a long fence-pole on a rock to make a teeter-totter; place a steer of unknown weight on one end; find a rock that is the approximate weight of the steer and place it on the other end; when the steer and the rock balance, guess the weight of the rock to thereby estimate the weight of the steer.

What any case is worth revolves around what an average jury in that venue will award given the details of a particular case. It also depends on what a trial and appellate court will sustain and not remit or reduce as excessive. Most formulas are unrealistic and unworkable. For example, some infamous adjusters used a "three times the medical" equation which is so blatantly absurd as to be unworthy of discussion. Do not utilize multipliers or arbitrary formulas whereby "specials" are multiplied to determine a fair value for settlement.

Many settlement evaluation strategies have been proposed by attorneys. One of the most famous is "the Sindell Method," which is based on a 100-point system of case evaluation. It considers six factors: liability (with a point value of 1 to 50); the injuries (1 to 10); the valuation of the individual plaintiff (1 to 10); the individual defendants (1 to 10); out-of-pocket expenses (1 to 10); and the plaintiff's age (1 to 10). A total point value of 100 is then divided into the "probable verdict" with the instructions, "determine the most probable jury verdict obtainable in this case. Base your opinion on verdicts returned in similar cases in the jurisdiction where this case would be tried. Divide the probable verdict you select by 100 and multiply the division answer by the total point value of the case."

This process results in the "suggested settlement value." The procedure may sound a little like the Oklahoma teeter-totter. However, using point values for the important aspects of the case is very good discipline for any attorney, especially a younger and less experienced one. This approach is certainly more rational than to rely on gut reactions, feelings, or hunches that some attorneys and adjusters try to impose on injured plaintiffs.

G. SEGMENTAL EVALUATION AND PROOF OF DAMAGES

The segmental approach has been developed by the author as a means of promoting discovery of all evidence pertaining to each element of damage; providing a full evaluation of each element; locating witnesses and documentation for each element; providing a framework for settlement negotiations, and as an order of proof at time of trial. Discover all evidence regarding each element. There are six types of evidence which should be given careful consideration with respect to each individual element of damage. These include lay testimony, expert testimony, documentary evidence, demonstrative evidence and judicial admissions in pleadings.

1. Plaintiff's testimony

It is crucial to keep the plaintiffs involved at every phase of evidence development for the reason that the plaintiff who fully understands the recoverable elements of damage in the case and the sources of evidence can be a very valuable assistant in creating and developing evidence.

2. Lay witnesses

Review with the lay witnesses each element of damage and each segment and determine precisely which lay witnesses can testify with respect to each element of damage. After accumulating all of the lay testimony on a given element, decisions can be made as to the most effective witness or witnesses to offer proof as to each element.

3. Expert witnesses

There are two categories of expert witnesses, i.e., those who are naturally in the case such as the treating physician or those who are hired for the purpose of giving evidence in the case. In recent years the hired experts have become the rule rather than the exception. The primary key with respect to the hiring of experts is to make certain that the person hired is the most thoroughly qualified expert obtainable within the most narrow possible field of expertise which pertains directly to your case.

4. Documentary evidence

All documents of every nature pertaining to both the damages and liability aspects of your case should be discovered, carefully reviewed, and organized for instant retrieval. Those which are determined to be useful as exhibits in trial should be reviewed to determine if there is any way to make them more presentable to a jury, such as enlargement. The predicates for admissibility should be reviewed, the most effective witness to sponsor the documents selected, and the most advisable place in the order of proof carefully chosen.

5. Demonstrative evidence

Two categories of demonstrative evidence include those which exist and those which can be created. With respect to each piece of demonstrative evidence consider how to enhance the exhibit so as to make it more persuasive as part of a cogent presentation. In the circumstance where the demonstrative evidence is not adequate, consider the creation of computer-generated graphics, medical illustrations, blow ups of relevant portions of medical text or medical records, and the use of models for demonstrative purposes.

6. Pleadings

Remember as part of the proof which can be discussed in settlement negotiation to consider the admissions which have been made on discovery either on request for admissions or on other forms of judicial admission by the opponent.

H. THE METHOD OF UTILIZING THE SEGMENTAL APPROACH

The seminal concept is to understand that every element of damage is separate and distinct from every other element, should be supported by its own body of evidence, and provides a separate basis for recovery of damages. For example, we tend to argue physical pain and suffering as if this constitutes one element of damage. In fact, physical pain and suffering is a completely separate and distinct element from mental anguish, which has its own elements of proof, provides a separate basis for argument, and provides a separate basis for recovery. Even though physical pain and mental anguish are often submitted together to the jury, they still should be proven, argued and quantified separately by the plaintiff's attorney.

The method of utilizing the segmental approach to damages is to consider each element with your client and with the lay witnesses and experts separately by discussing each element of damage as it relates to each segment of occurrences as set out below. A discussion of the relevant segments will help to clarify the system.

The following are the standard segments which are utilized by the author in reviewing each element of damage. The applicability of the segments will vary from case to case. Some of the segments will obviously have no relevance to many cases and some additional segments may have to be considered depending upon the facts of the particular case being evaluated. However, the following is submitted as a useful framework for review of most cases.

The method of utilization is to ask the plaintiff to consider each separate element of damage at each individual segment of time as follows:

1. Pre-impact terror. The plaintiff should be asked to discuss fully the mental anguish which occurred prior to the impact. For example, the plaintiff may have seen the oncoming 18-wheeler, realized that it was not going to be able to stop and realized that the plaintiff had no means to extricate himself and was about to be severely injured or killed. The first segment will apply only to the element of mental anguish.

2. Instant of impact-occurrence. Ask the plaintiff to direct their attention back to the particular instant of the crash and describe all of the physical pain which they suffered at that time. After concluding a full discussion of physical pain and suffering, then review fully the mental anguish suffered by the plaintiff at that time, then the physical disability or any other element that may apply to this time frame.

By way of example of the distinct differences between the elements of damage, consider the following case: A man and his wife were involved in an accident in which the axle of a tractor cut through the right side of their small vehicle. The man was driving the vehicle and his wife was a passenger in the right front seat. At the time of the impact, the plaintiff was thrown forward into the steering wheel and he suffered a severe blow to the head. As he slowly regained consciousness he realized that he was unable to move. After calling out to his wife several times and receiving no answer, he was finally able to turn his head slowly to the right until he saw his wife, who had been decapitated.

This scenario allows us to distinguish between the physical pain and suffering and mental anguish which he suffered at the time of the occurrence. The physical pain was that which accompanied the thirteen rib fractures, the fractured left foot, two fractured scapulae and the severe disc injury at C-6, C-7.

The mental anguish which he suffered was that which naturally accompanies physical pain, the legitimate fear of quadriplegia when he was unable to move his body from the neck down, the shock and horror which he experienced upon seeing his wife's condition, and the fear and terror which he experienced as he lost control of his vehicle and was thrown about as his car spun out of control.

If this type of analysis is successfully carried through each of the 26 segments listed herein, at the conclusion of the analysis, there will be a considerable body of evidence accumulated with respect to plaintiff's physical pain and suffering and a separate body of evidence accumulated with respect to mental anguish.

3. Post impact-unassisted. In many cases there are periods immediately following the impact or occurrence when the plaintiff is injured and without assistance. This time frame should be explored for the possibility of pain and suffering and mental anguish damages such as when the plaintiff is trapped in the vehicle with no means of extrication and no assistance.

4. Period of peril. Quite often, following an accident, there is a period of peril which provides a basis for additional recovery, particularly in the area of mental anguish. This is especially true with respect to accidents which occur on freeways or other heavy traffic areas. Consider for example, the following actual case: A construction worker was riding a motorcycle when he struck a section of road which had just been asphalted and the workers had forgotten to set the barricades before leaving the site. The front wheel of his motorcycle buried in the asphalt and he was propelled over the handlebars, did a flip and slid for seventy feet on his back across the fresh asphalt. The large motorcycle continued end over end and landed on top of him, breaking his left leg and pinning him under the bike. A gas line broke and gasoline spilled over him. He attempted to lift the bike but found that he was unable to move his body from the waist down. He looked up in terror as the car which had been following him was bearing down on him, unable to stop. The car finally stopped after hitting the motorcycle, with the plaintiff looking up into the car's undercarriage and the front wheels of the car less than six inches from his head.

This type of scenario lends itself to a careful analysis of the mental anguish which he endured during the period of peril i.e., the time frame during which he was helplessly unable to extricate himself from beneath the motorcycle. The plaintiff experienced fear of paralysis when he was unable to move his body from the waist down, fear of a spark setting his gasoline-soaked clothing on fire, fear of being run over by the automobile, and the mental anguish which naturally accompanies the intense pain which he was experiencing from the injuries.

5. During rescue. Quite often there is severe physical pain and mental anguish experienced by the plaintiff during rescue. For example, the plaintiff who experienced thirteen rib fractures, a broken foot, two fractured scapulae and a severe injury to his neck, was dragged a distance of thirty to forty feet away from the car by well-meaning rescuers who were fearing an explosion. The intense pain which accompanied this episode provides a basis for recovery at time of trial.

6. At the scene-first aid. Careful examination of the patient and witnesses should be done with respect to the type of first aid which was rendered at the scene. This is frequently painful, rendered without anesthetic, and is a source of considerable physical pain and suffering and mental anguish.

7. At the scene-professional aid. This is often a good source for discovery of EMT's or other medical witnesses who can verify the physical pain and suffering and the mental anguish experienced by the plaintiff at the scene.

8. During transportation. Often the ambulance drivers and accompanying EMTs will be an excellent source of mental anguish and physical pain and suffering proof for the plaintiff. For example, the man with the severe neck injury was transported from the scene with his head held in place by sandbags. At the local small town hospital he was advised that he must be transported to Houston by MediVac jet and from the airfield to the hospital by helicopter. During this time he was assuming that he was quadriplegic and experiencing all of the mental anguish concomitant with such an assumption. He underwent testing for 24 hours before he was advised that he had a severe spinal shock and was not quadriplegic. However, the 24 hours of mental anguish during which he experienced the very legitimate fear of quadriplegia is an important source of mental anguish proof which can be easily lost without careful evaluation of the case. By the time

the case was ready for trial three years later, it would be very easy to forget to cover this type of proof about a matter such as quadriplegia which was no longer in the case. That is why the segmental approach to the proof of damages provides a format for recalling and discovering all aspects of the type of proof which should be argued at settlement conference and presented to the jury at time of trial.

9. Emergency room care. Careful attention should be paid to the care which was rendered to the plaintiff in the emergency room which often is a source of considerable pain and suffering and mental anguish to the plaintiff. Remember that the purpose of the emergency room staff is not to relieve the pain of the plaintiff and, in fact, much of the early testing that is done in the emergency room is a source of considerable pain and suffering. The lack of information provided to the plaintiff and the worried concern over the nature and extent of the injuries and disabilities to follow are a substantial source of mental anguish to the plaintiff.

10. Time to first relief. The operative word here is relief. An effort should be made to determine through medical proof when the plaintiff obtained actual relief from the physical pain and suffering. Relief of pain is not the goal of the medical team in early treatment and the medical team is careful not to give a premature diagnosis. Thus, the mental anguish which accompanies the plaintiff's lack of knowledge as to the nature and extent of disability is also very intense and provides a basis for recovery of substantial mental anguish damages.

11. Differential diagnosis. Pain is one of the most important tools used by healthcare providers in the process of differentiating between the potential causes of a physical anomaly. Therefore, the healthcare providers do not attempt to alleviate pain during the early stages of diagnosis. With this in mind, the actual relief of pain and the accompanying mental anguish may be postponed for several hours, particularly in a complex injury case, until the doctors have reached a critical differential diagnosis as to the full nature and extent of all injuries suffered by the plaintiff. This provides an excellent source of medical proof as to the nature, extent and duration of the physical pain suffered by the plaintiff in the early stages of the treatment.

12. Major vs. minor injuries. When a major injury is suffered by the plaintiff, there is often a tendency on the part of those treating the patient to fail to record adequately the lesser injuries, since they are small by comparison. For example, the accident which fractures the plaintiff's leg and also causes an injury to the lower back. The early hospitalization period will be focused on the leg fracture and little or no attention will be paid to complaints of pain in the back. When there is subsequently a claim for a back injury, the record is void of any complaints or treatments concerning the back injury. Therefore, it is essential that the plaintiff be advised to register all complaints of every nature with the healthcare providers including nurses who are recording the complaints in the nurses notes, doctors making rounds and on visits at the doctor's office. In this manner, the back injury, which may turn out to be the more significant of the injuries in terms of long range effects, will be properly documented by the healthcare providers and will not be subject to questioning at time of trial or settlement negotiation.

More significantly, when a major injury such as a spinal cord trauma occurs, the attorneys evaluating the case have a tendency to overlook the lesser injuries in the evaluation and proof of the case. Consider the quadriplegia case in which the plaintiff also suffers a fractured medial malleolus, a tibial fracture, eleven rib fractures, a fractured humerus and a cerebral concussion, in addition to the lumbar spinal cord injury. One way to evaluate this case is to eliminate the spinal cord injury from the evaluation and evaluate separately all other injuries. After this exercise, compute the value of the spinal cord injury and add it to the total value of the other injuries. If the other injuries, without quadriplegia, total $50,000, add this amount to the value of the quadriplegia case, support these damages with documentation and arguments and discuss them separately in the settlement demand letter and settlement negotiations.

An effective means to insure inclusion of minor injuries in case evaluation, proof and argument to the jury is to do a full body medical illustration which indicates every injury which the plaintiff sustained. A thirty by forty inch drawing of the body illustrating each of the injuries provides a very effective framework for the medical witness to move through the medical testimony by explaining each injury and expounding on their effects on the plaintiff.

13. Treatment-therapy. A careful analysis should be made with the plaintiff and with the therapist as to the type of treatment which the plaintiff received and the type of therapy which the plaintiff is undergoing. For example, in the case of the motorcycle rider who was thrown on the asphalt and slid on his back for a distance of seventy feet, the treatment consisted of twelve betadine scrubs. These scrubs were conducted by having the plaintiff grasp the rungs of the hospital headboard and putting a towel in his mouth to keep him

from screaming as the nurse applied the antiseptic betadine, and removed the asphalt from his back with a brush and with tweezers. The process was so painful that it had to be spread over twelve separate sessions because the plaintiff's back was so raw and it was too painful for him to endure more than a few minutes at a time. This treatment appeared in the medical records as a simple entry "beta X-3" on four separate entries. The plaintiff was a very macho construction worker who would never admit to suffering pain of any type. However, the medical records were reviewed by a nurse-paralegal who recognized that a betadine scrub for someone with asphalt embedded in his back would be a very painful experience. Therefore, the nurse who administered the scrubs testified that on each occasion that the plaintiff had "cried like a baby". The use of nurses as paralegal assistants in the law office has become an extremely valuable tool in the personal injury practice. There are a very large number of nurses who are currently entering law school and who can be hired to work as paralegals or nurse law clerks while they are attending school. They can be very valuable in precisely the type of analysis that makes up the segmental evaluation of damages.

14. **Between therapy treatments.** A discussion with the plaintiff will often reveal that when therapy treatments are painful such as the betadine scrubs, the time between treatments is a period of considerable mental anguish knowing that the painful treatments are soon to follow.

15. **Patient decision-making.** In serious injury claims the patient is often called upon to make very serious decisions. In a recent case, a 27-year-old truck driver had to decide whether to have his left leg amputated or suffer the possibility of death from gangrene. The possibility of death was characterized as 50-50. He was given 24 hours by the doctor to decide. The jury would have little problem identifying with the extreme mental anguish which a patient must endure in deciding whether to risk death or have a major limb amputated. This is the type of analysis which does not show up in a medical record but which emerges from a careful interview with the plaintiff.

16. **Informed consent.** It is the law in most states that the doctors must now carefully inform the patients as to the adverse consequences which may result from the surgery. Doctors make excellent witnesses in this regard because they are very pleased to advise the jury that they followed the law and told the plaintiff that the possible consequences of his surgery included death, brain damage, paralysis and, in the event of the necessity of a blood transfusion, the possibility of contracting AIDS. The doctor then leaves the patient to contemplate these possibilities during the last eighteen to twenty-four hours prior to surgery. Enduring informed consent will invariably raise the anxiety level of the patient and is an excellent source of proof by the doctor of the mental anguish which the patient endured prior to surgery.

17. **Preoperative testing.** Review carefully the type of testing which was done on the patient prior to surgery. It is often the case that the preoperative testing is more of a source of physical pain and suffering and mental anguish than the surgery itself. For example, the myelogram is worse than the laminectomy.

18. **Surgery.** As a result of the medical negligence boom over the last twenty-five years, surgeries are often done with either a local anesthetic or a spinal block in order to avoid the dangers of a general anesthetic. Never assume that the plaintiff was not awake and aware of what was transpiring during surgery. If a general anesthetic is not used, there may have been a very high level of mental anguish endured by the plaintiff during the surgical process itself.

19. **Post operative recovery.** Any time the body sustains a major insult such as surgery, there will be considerable evidence of the post operative physical pain and mental anguish. If you represent the plaintiff prior to the surgery make certain that a proper record is kept of all of this type of damage and that a complete medical record is maintained by the nurses on duty. This is accomplished by having the plaintiff carefully apprise the healthcare providers of all of the pain and suffering and mental anguish which plaintiff is experiencing throughout the hospitalization.

20. **Prosthetic frustration.** If the plaintiff has required an amputation or has the loss of use of a limb to such an extent that a prosthesis is required, there is a considerable amount of frustration involved in attempting to properly utilize a prosthesis. This frustration translates into mental anguish and should be properly documented, evaluated and proven in trial.

21. **Rehabilitation process - physical therapy.** Subsequent to a severe injury there is a considerable amount of physical pain involved in the physical therapy process in order to rebuild the body to its prior condition. There is also a very high level of frustration, humiliation and mental anguish which accompanies the type of physical therapy which is often required by an injured plaintiff. The therapist should be carefully interviewed with respect to this type of proof

22. Rehabilitation process-vocational rehabilitation. The primary focus here will be the elements of damage of mental anguish and damage to wage earning capacity. The mental anguish aspect consists primarily of the frustration which accompanies the inability to perform the task which previously provided the ability to earn a wage. Damage to wage earning capacity will focus on precisely those functions which the plaintiff could perform prior to the injury which the plaintiff can no longer perform after the injury and which bear on the ability to earn a wage. During the period from the injury to time of trial, it is not necessary to prove actual wage loss but only damage to wage earning capacity. Quite often, if the plaintiff has returned to work prior to trial, he may be earning the same amount of money as before the injury and the actual wage loss will be nominal. However, proof should reflect that the plaintiff endured damage to wage earning capacity as a result of the injury. In submitting past wage loss, the plaintiff is undertaking a greater burden of proof than is necessary. Past damage to wage earning capacity is a lesser burden of proof and offers more opportunity for the plaintiff to seek recovery.

23. Return home - duties. This element of damage is the reasonable value of household services which the plaintiff was able to perform for the benefit of the spouse which plaintiff can no longer perform after the injury. The element of damage of loss of consortium should also be carefully considered when discussing the plaintiff's return home after the injury.

24. Recreation - physical disability. The plaintiff should list and be carefully questioned with respect to all of those activities which the plaintiff could previously perform which he or she can no longer perform after the accident. This particularly bears on recreation such as hunting, fishing, bowling, jogging or all other activities which the plaintiff can no longer perform which do not bear on wage earning capacity. This provides the basis for recovery for the element of damage of physical disability for the plaintiff.

25. Return to workplace. Co-workers and job supervisors should be interviewed with respect to the inability of the plaintiff to perform the usual tasks of a workman in the job which plaintiff had prior to the injury. It is this inability to perform the usual tasks of a workman which constitutes damage to wage earning capacity, regardless of the current earnings of the plaintiff.

26. Future damages. As the interview is being done with respect to each segment and element of damage, careful consideration should be given to the nature and extent of future damage. There is a tendency on the part of many plaintiff's attorneys to simply prove future medical bills, future damage to wage earning capacity and not offer sufficient proof with respect to such items as future pain and suffering, mental anguish, physical disability, loss of consortium and the other general elements of damage.

I. METHOD OF EVALUATION

1. Quantify proof of each element.

Consider and elicit information concerning each element of damage as to all witnesses who were present during each segment, all documentation that exists, all demonstrative evidence which is either available or may be created to demonstrate the damages, all pleadings which may contain judicial admissions pertaining to that segment and the availability of expert witnesses or the necessity to hire expert witnesses in order to prove the damages.

A chart should be maintained with respect to each element of damage which will, at the end of the evaluation, contain all of the proof which is available. For example, as physical pain and suffering is reviewed in each of the 26 segments all of the plaintiff's testimony concerning the pain which he or she endured during each of those segments should be listed. In addition, all documentary evidence, demonstrative evidence, lay witnesses and expert witnesses which may be used to prove the physical pain and suffering in each segment should also be listed. Upon completion of the evaluation of physical pain through all segments, there should be a tremendous body of facts, witnesses, documentation and demonstrative evidence which will bear on the proof of physical pain and suffering. After the analysis is complete, a body of proof should be quantified with respect to every applicable element of damage in the case.

As these damages are charted, it is possible to review the charts and determine which elements of damage are not sufficiently provable with your current quantum of evidence. Assume that the complete analysis has left the plaintiff short of proof on reasonable value of nursing services. Consider whether expert testimony should be offered by nurses who have treated the patient or whether an expert nurse should be obtained to testify as to the reasonable value of nursing services. Determine which doctor should testify as to the necessity of hiring a nurse if the wife had not rendered the nursing services. Analysis of the six types of

evidence with respect to each element of damage reviewed at each segment of the occurrences, should provide a sufficient quantum of proof to evaluate that element of damage for settlement purposes or to prepare the evidence for trial.

2. Other factors to consider. Obviously in evaluating the claim, consideration must be given to numerous other factors including the forum, the judge, the opposing counsel, the jury venire in the area, the credibility of your plaintiff and all of your witnesses, the credibility of the defendant and all of the defendant's witnesses, the willingness of opposing counsel to litigate the case, your own willingness to litigate the case, the track record of the insurance company with respect to settlement versus trial, the cost of litigation versus the potential for increasing recovery, the likelihood of recovery considering the liability aspects of the case, the likelihood of a partial settlement which would allow settlement with one party and roll the dice with the other, the likelihood of appeal, the law controlling the case and plaintiff's desire to litigate or settle. This is not intended to be an all inclusive list but is rather intended as illustrative of the type of factors which need to be considered with respect to each settlement.

3. Comparables. Depending upon what is available in your own jurisdiction, a study of comparable recoveries in this type of case are helpful as a tool to convince the defendant to pay the amount which you are demanding, as a standard against which to measure your own demands, and as a means of demonstrating to the plaintiff that your demand is within the normal area of recovery for this type of injury.

4. Per diem evaluation. The per diem argument is certainly one of the most useful and powerful which can be made in a catastrophic injury case. In fact, some jurisdictions which do not allow the per diem argument, proscribe it on the basis that it is unfair to the defendant. However, even in the jurisdictions which do not allow an argument based upon a per hour or per day rate of recovery for the plaintiff, it is still a useful tool for purposes of evaluating the plaintiff's claim.

5. Verdict potential range. Evaluate a high/low range within which you anticipate the verdict will be returned by the jury in the case. Try to keep your high/low range as narrow as possible, for example, $80-100,000 rather than $50-100,000. After determining the high end verdict potential, factor in the liability aspects. For example, if you are in a comparative negligence jurisdiction and you determine that the high end verdict potential is $1,000,000 with a 20% negligence likely on the plaintiff, the high end verdict potential for the plaintiff is $800,000. The $800,000 obviously should always be your goal in settlement negotiation since that is the likely top dollar recovery which you will obtain in the case.

The low end verdict potential should be the amount below which you are willing to go to trial. If you determine that this is $600,000 in the previous example, then you try to settle the case in the range $600,000-800,000. If the $800,000 can be achieved, excellent; if the $600,000 cannot be achieved, litigate the case.

A supplemental approach for evaluating any personal injury case is to obtain empirical data on verdicts returned in similar cases in the same jurisdiction. One source is the Jury Verdict Research Project in Solon, Ohio. For a minimal cost, the verdicts for plaintiffs with similar injuries are computer researched nationwide and the fair jury range is provided on a report. Another place to begin is any local or state jury verdict reporter, or a compilation of jury verdicts.

Refer next to the Personal Injury Evaluation Handbooks. These eight volumes of three-ring binders, which are updated periodically, evaluate and categorize jury verdicts and probable verdict ranges depending on the type of injury and the amount of treatment. Jury verdicts range between a certain high and low point. As a true advocate, you should always provide the best effort to determine what "the best" means in dollars to your client.

J. HOW MUCH TO DEMAND?

Having consulted all the above sources, prepare to make a calculation of the settlement demand. If a given case is worth $100,000 or is in a range of a $75,000 "low" to a $125,000 "high," be aware that some "negotiating room" or "softness" must be left in your initial demand. For this hypothetical case, make a demand of $140,000, a figure that is not "way outside of the ballpark" of predictable highs and lows.

Some attorneys believe in demanding double or triple the actual value of the case. Unless the adjuster or defense attorney behaves in a totally unreasonable manner, do not make such demands in negotiating an evaluated case. Make a demand that is fairly close to the ultimate settlement value. Avoid the "Mt. Everest" approach (start very high and slide down) or the "Fortune Cookie" approach made famous by Walter Matthau in the movie of the same name (start high, hoping the defense will make an offer, thereby establishing two

poles between which anyone can "split the difference"). Another apt analogy is to be certain that your initial settlement demand is "in the ballpark". It is not necessary to be in the right section, and certainly not the right seat, but the failure to get in the ballpark plays into the hands of the opposing counsel. For example, a $500,000 demand on the $100,000 case leaves the defense counsel the opportunity to advise the insurance carrier that he has no choice but to try the case. Defense counsel is in a no-lose position since all he has to do in order to prevail is to hold the jury verdict under your $500,000 demand. Likewise, the claims supervisor does not have to be concerned that the verdict will exceed the demand which he rejected. Therefore, there is absolutely no pressure on the defense side to settle the case. Such a demand will often draw no offer from the defendant. An attorney's credibility and a client's sincerity are established in the initial settlement demand.

K. WHEN AND WHAT DO YOU TELL THE CLIENT?

Before any demand is made, the settlement range or value that you have established should be fully discussed with the client. All factors considered in the evaluation process should also be explained to the client. The client may add helpful and previously overlooked facts or examples of "lost enjoyment of life" that will support the demand. Once the client has approved the demand and authorized you to seek settlement for a certain "take figure," the settlement demand should be made with some room for negotiating.

L. WHAT TO REMEMBER? A DOZEN MEANINGFUL DETAILS

Before beginning to bargain, know what the case is worth--$5,000 or $5 million. There is no absolute right price in any case; settlement figures often shift according to many variables. Value flows from the prediction of what a given jury will give and a given court will permit under the case circumstances. Yet juries and courts are far less predictable than any of us would like to believe. Thus, determining the value of a case is often an art that is difficult and hazardous even for a seasoned and reasonably prudent trial attorney. Some important factors to remember in determining the value of a case include:

1. Nature of Liability

This component is sometimes most important for arriving at the value range for a case. For example, a passenger in a two-car accident, with the same injuries as the driver, is considered more of an "innocent victim," thus assuming a different posture asking a jury, "How much will you award me?." A pedestrian standing on the corner when a car jumps the curb is in a much different position asking a jury for damages than a pedestrian who crosses the street against a light or between cars.

2. Injury and Resultant Loss

The ultimate basis on which all value is predicated is the extent and nature of the injuries: Are they minimal or catastrophic? Most cases are somewhere in between. Refer to past jury verdicts in cases involving similar injuries.

3. Economic Versus Human Losses

Losses are sometimes characterized as "economic" or "human." "Economic" damages are easily verifiable out-of-pocket losses (such as medical bills, past and future lost wages, property damage, past and future therapy, treatment, medication) that can be added and totaled. These economic losses and damages will be observed, remembered, and calculated by the jurors and are literally a "total dollar amount" or "gross number" that will be submitted to the jury for consideration.

In contrast, "human losses" are those intangible damages (such as loss of enjoyment of life, mental anguish, and pain and suffering) that cannot be arithmetically measured by a jury or trial lawyer. In some states the trial lawyer is not allowed to total them up in final argument. They cannot be "put on the board" or suggested to the jury in states such as New Jersey, which prohibits attorneys from suggesting pain and suffering monetary awards to the jury. In Texas, we are fortunate to be able to advise the jury as to the amounts which we suggest as being proper with respect to each element of damage. We should not presume to tell a jury the precise amount to be awarded, but should suggest that justice requires certain minimum levels and then advise them as to what that minimum amount is. They should constantly be reminded that establishing the proper amount of damages to be awarded as compensation in the case is strictly their duty; however, helpful guidelines should be given by the attorney since jurors look to lawyers for guidance on such matters.

Economic damages also include loss of future profits, the decrease in earning capacity or ability to earn income, and the likelihood of the loss of one's job or other prospects in the future. When loss of future

income and other future losses are not based on reasonable medical probability and certainty, or do not have sufficient foundation, they are often characterized as economic damages.

4. Quality of the Litigants

A person who is respectful of the court, all counsel, and the jury will often be a better plaintiff. This client will enhance the case value relative to a loud, outspoken, and litigious plaintiff. Juries are composed of everyday people. As human beings they will respond positively to good people and negatively to people with bad qualities. A difficult plaintiff deserves some attention as to a possible "discount." In the same vein, a "target" defendant, such as a large corporation, increases the potential for a jury verdict rather than a defendant with whom the jury sympathizes.

Some hometown corporations, however, do enjoy excellent reputations. Especially in products liability cases, a corporation with a good reputation for producing quality goods will sometimes present a serious obstacle. Other factors external to the merits of the case include cases against a municipality where jurors believe a verdict may increase their taxes. Jurors may perceive that a utility might review and raise their rates if a large verdict is rendered. Also, in medical negligence cases, nurses are traditionally popular and sympathetic figures with jurors, and jurors perceive that a big dollar malpractice award may raise their own health care costs.

5. Quality of Expert Opinion

The treating doctor's report, of course, is the medical foundation of any personal injury case and is often given the greatest weight by hearing officers at ADRs (alternative dispute resolutions), early settlement panels, arbitrators, trial courts, and the jury. Often a defendant's "independent medical examiner", a misnomer which should never be used by plaintiff's counsel, will set forth the injury in more definitive and graphic terms than the plaintiff's own treating doctor. Such a description only adds value to the plaintiff's case. Always consider what the expert has said, and picture how the expert will explain this opinion from the witness stand. Some doctors are less than convincing and tend to become withdrawn, conservative, and unsure in the public verbalization of their written opinions.

6. Venue Delays and Controls of Verdicts

You must make an objective, unemotional analysis of the venue and the trends of verdicts in that county in the past year or two. Consider whether trials come rapidly or with much delay in the given court. Are the pretrial settlement conferences, settlement panels, or ADR hearings populated by ultraconservatives or "other settlement hazards"? What are the policies of the trial court and the appellate courts toward acceptance of verdicts in personal injury cases involving similar facts and damages?

7. Trial Judge

What kind of trial judge will preside over the case? Professor Irving Younger said that knowing the trial judge is like "knowing your pitcher before you step up to the plate." Find out if the trial judge is understanding and tolerant of scheduling snafus and the logistical problems in trying a personal injury case. If not, is the judge a merciless tyrant who will try to "fast pitch" or "bully" you and your client? Is the judge so injudicious and jaded as to give non-verbal messages to the jury? Does the judge use favorite or form-book jury instructions on liability, proximate cause, or damages?

8. Attorneys

An important factor in deciding the value of the case involves the reputation, standing, and ability of all trial attorneys involved. If the defense attorney is one who comes to battle to the death, who is a scourge on cross-examination and a curmudgeon on summation, research the counsel's track record. Realize that the presence of such a figure may have some depressing effect on the value of the case. Some defense counsel may aggravate and incite the jury to give a punitive award. If, however, the defense attorney is reasonable and has had a fair share of wins and defeats, a fair settlement can probably be negotiated. If the defense attorney does not like to get verdicts, tends to capitulate, has a grating personality, and gives a less than thorough preparation, the value of the case should be influenced in a salutary manner.

9. Evidential and Legal Questions

Always be aware of changes in laws on liability and damages. Examples include the law concerning recoverability of damages for "increased risk," or "tax-free awards," or "reduction to present value of future losses." If your case involves the risk of increased medical complications, research both the law in that area and the recoverable damages. Likewise, if evidence of post-accident repair exists, but is arguably

inadmissible, weigh such a factor in assessing the strengths and weaknesses of your case and the flexibility of your settlement demands.

10. Deflationary or Inflationary Issues

Sometimes the circumstances of your client's involvement in an accident can inflate or deflate the value of a case. For instance, if plaintiff and his girlfriend are "living together, but unmarried," and the jury panel comes from a rural community, expect a provincial reaction. If the defendant was caught driving under the influence of alcohol and drugs, and was also found to be a member of the Ku Klux Klan, the value of the case may be inflated.

The human attitudes and reactions of the average jury panel will vary from county to county. If deflationary or inflationary issues will cause a reaction in potential jurors who can be peremptorily challenged, calculate whether they should be excluded from the jury because of their specific bias. If, however, the deflationary or inflationary issues will cause a reaction in almost any U.S. citizen, then peremptory challenges will be ineffective. Plaintiff's counsel must then make serious adjustments.

11. Practical Considerations

In addition to assessing the details surrounding the case in its ideal state, consider the logistics and practical considerations of actually trying the case. You must handicap the running of the trial in the real world. You must assess the costs of producing witnesses and demonstrative evidence. For example, assume a case has a settlement value of $75,000 and the client is willing to accept this gross amount after being advised of the net settlement (approximately $45,000 to $50,000). Yet, the defense offers only $70,000, and a trial will accumulate up to $10,000 in additional costs. The practical consideration or the cost justification of the trial must then be realistically discussed with the client. Think of the trial of the case as a business venture in which you and your client are business partners.

12. The $64,000 Question

The best way to sum up any case is to ask what my firm's Plaintiff Team calls "the $64,000 Question": "How and in what ways have this accident and the resultant injuries affected your client's life?" If you can walk a mile in your client's shoes; if you can take the time to sit and eat and talk with your client and family in their home; if you can truly understand the impact on your client's life and family, you will have a true picture of what the case is really about to your client. By walking a mile in your client's shoes you will be able to achieve theme development, a more empathetic understanding of your client's plight, and a more realistic case evaluation.

III. SETTLEMENT CONSIDERATIONS FROM INSURANCE COMPANY VIEWPOINT

A. UNDERLYING PRINCIPLES OF NEGOTIATION

We often hear speeches approaching settlement negotiations from the viewpoint of the plaintiff. However, it is more important to understand what motivates insurance companies to settle because, after all, they have the money. Understanding a few basic propositions about the insurance industry is helpful in achieving maximum recoveries in settlement negotiations.

1. The first proposition is that insurance companies want to settle cases.

It is not economically feasible for insurance companies to litigate cases to a conclusion, particularly considering the extremely high cost of defense since the advent of the partner, multiple associates, multiple paralegal team utilized in defending a simple case. Therefore, the role of the negotiator from the plaintiff's viewpoint should be to simultaneously motivate and assist the insurance carrier to pay full compensation for your client's claim. If you understand this from the inception, you will be more successful in settlement negotiations.

2. The second proposition is that insurance company representatives generally do not become emotionally involved in their settlement negotiations.

The primary function of an insurance claims supervisor is to convert open files to closed files. The easiest way to accomplish this is through settlement of the case with the plaintiff's attorney, at a fair and reasonable compensation for the plaintiff.

Occasionally, an insurance claims representative, either in response to a perceived insult or threat by either a plaintiff or plaintiff's counsel, will decide that this case is going to be tried in order to make some point. The insurance company representative, in the vast majority of cases is simply doing an 8 to 4 job, five days per week, which consists of closing claims files. If you take the attitude from the plaintiff's viewpoint

that you will assist them in accomplishing the closing of your client's file by accurately evaluating and thoroughly documenting your case you will find that settlements are achieved with greater ease for greater sums of money.

3. The third proposition is that the higher up the hierarchical ladder you go at an insurance company, the easier it becomes to achieve a settlement.

The toughest person to deal with at an insurance company is the newest property damage adjuster who is absolutely intent upon saving $50.00 off of a scratch on the car because of the presence of rust. That adjuster's goal is to get out of property damage claims by showing his superiors how tough he can be.

The other side of the coin is that the Vice-President in charge of claims has all of the authority needed to settle a case and, having arrived at this exalted position, has been burned a few times at the courthouse and is both agreeable and authorized to pay more money than those further down the ladder.

4. The fourth and most significant proposition is that in settlement negotiations you must deal directly with the person who has the authority to settle your claim.

Determine at the inception of negotiations the amount of settlement authority of the person with whom you are negotiating and whether that authority is sufficient to encompass your demand. It is a waste of time to negotiate a $25,000 claim with an adjuster who has $10,000 authority. All of your persuasive brilliance is wasted since the decision maker, i.e., the claims supervisor with the $25,000 authority will hear none of your forensic gems but will make their decision based solely upon a written memo in the file created by the adjuster with $10,000 authority.

If you are to achieve maximum results, regardless of the amount of money for which you are negotiating, the basic principles are 1) to sit across the table and negotiate directly with the individual who has the authority to settle the case within your demand, and 2) sufficiently document your claim so as to help that person to fully compensate your client.

B. UNDERSTANDING AND UTILIZING INSURANCE COMPANY FEARS

There are a number of concerns which are universal among claims supervisors in the liability insurance industry, the understanding of which will allow plaintiff attorneys to more effectively negotiate for a full settlement.

1. Closed Claim Review

Closed claim files are periodically reviewed for the purpose of evaluating settlements completed by the claims department. A reviewer examines the plaintiff's claim, the documentation of which supports the claim and the amount of money paid in settlement by the claims supervisor. If the amount of the settlement is not fully supported by documentation in the closed file, the claim supervisor's settlement practices may become suspect which could result in a review of all of his or her files. If a pattern of payment without documentation is revealed, the responsible claims person may be fired. Therefore, the basic proposition is that the claims personnel, in order to protect themselves from criticism on closed claim review, can only pay the damages which they can adequately document. If you wish to maximize your recovery prior to trial, you must assist the claims supervisor to fully compensate you by fully documenting your claim in order to protect them from such criticism.

2. Inadequate Reserves

Insurance companies are periodically reviewed by insurance commissions in order to assure that they are maintaining adequate reserves to compensate their outstanding claims while maintaining a picture of overall solvency. If an insurance company is found by the insurance commission to be under-reserving their files, the commission may require an across-the-board increase in reserves, i.e., increase the reserves on every individual file of that company within the commissioners' jurisdiction. This requirement of increases in unhypothecated funds can be financially detrimental to the investment side of the insurance company and will cause major criticism of the claims department by management.

If you wish to assist the claims personnel in paying you top dollar in a case, be certain that they adequately reserve the file from the inception. If you withhold information as to the nature and extent of your client's damages and the file is under-reserved due to a lack of knowledge on the part of the insurance carrier, you may be forced to try a lawsuit which should have been settled to the benefit of all concerned. For example, if you have a $100,000 claim which the insurance company believes is only worth $10,000 and they reserve their file accordingly, when you arrive at the courthouse steps and surprise them with the $100,000

value of your case, the claims supervisor may be left with no alternative but to try the case. This is because the supervisor can always contend that this was another of those many runaway jury verdicts; such an explanation may be far easier than attempting to justify paying $100,000 on a claim which had been reserved for only $10,000.

Therefore, in order to achieve full settlement and not foreclose your possibility of a maximum offer from the insurance carrier due to inadequate reserves, assist the insurance company by advising them early and often as to the value of your case. It is a good practice to ask the insurance company if they have adequately reserved the file. They will not tell you the amount of the reserves but you may approach it by advising them that this claim is definitely in the high six figures range and I trust that you have reserved it accordingly. This places no restrictions on your settlement negotiation range but it does let the insurance carrier know that they are dealing with a case that must be appropriately reserved in the high six figure range.

3. Excess Liability

The major fear of every insurance company is the possibility of being successfully sued by their insured for an amount in excess of their liability limits. It is absolutely crucial in negotiating with a company which is refusing to tender policy limits in a case which has the prospect of an excess liability recovery that you document your case as thoroughly as possible. The reason is that your documentation in the primary case becomes evidence for the jury in the excess liability claim.

In most jurisdictions, in order to successfully recover on an excess liability claim, it is necessary to prove the following five elements:

1. A clear case of liability;
2. A demand within policy limits;
3. A negligent or willful refusal to settle within policy limits;
4. A jury verdict in excess of policy limits; and
5. Proof that the defense of the case was completely under the control of the insurance carrier.

Documentation is crucial when attempting to negotiate for full policy limits in order to pressure the insurance carrier into a tender of policy limits. In most jurisdictions the test of whether the insurance company was negligent in failing to pay the demand within policy limits is "whether a reasonable prudent business man in the conduct of his own business, presented with the facts which the insurance company knew or should have known, would have paid the plaintiff's claim?"

The language "...presented with the facts which the insurance company knew or should have known,..." renders all of the documentation which you presented to the insurance company in the primary case relevant evidence in the excess liability claim. Therefore, there is no area of settlement negotiation where it is more crucial to fully document your claim than when you are attempting to set up an insurance carrier for either full policy limits tender or an excess liability recovery. Imagine the opportunity to present as part of your evidence in the excess liability case your demand letter, documentation in support of the demand letter, video settlement brochure, graphics and any other data which you presented to the insurance company in settlement negotiation which contain facts which the insurance company knew or should have known. When this possibility of such a potential presentation in an excess liability claim is pointed out to the insurance carrier in the primary case, a tender of full policy limits will most often follow.

4. Bad Faith Pressure Points

The same principles which apply to the excess liability discussion also apply to efforts by the plaintiff's attorney to predicate a bad faith case against the insurance carrier. It is crucial to thoroughly document all of your efforts to make a full presentation of the plaintiffs claim in order to show that the insurance carrier was fully advised as to the liability and damages aspects of the plaintiff's claim at the time when they made the bad faith refusal to pay. Again, such documentation in the primary case should be carefully designed and drafted with the view that it may be evidentiary in the bad faith case.

IV. SETTLEMENT NEGOTIATIONS

A. PREPARE FOR TRIAL AND NOT SETTLEMENT

There is a fundamental principle of boxing that applies to litigation: When you step into the ring, don't look around for a place to fall! A professional fighter does not enter any arena with the expectation of taking a dive. Prepare every case for trial and not for settlement. If all parties to the litigation do their job, settlement will be an incidental happening on the way to trial.

For an insurance company to "pay what it owes," liability must be established. Defendants in personal injury cases always argue that there is comparative or contributory on the plaintiff, no negligence on the defendant, or no causation. You must anticipate the defenses, and investigate the case trying to establish convincingly clear liability in the mind of the insurance company against the responsible defendant. Try to reduce to a minimum any affirmative or mitigating defenses to be raised against the plaintiff.

B. AVOID MISUNDERSTANDINGS

The first contact with an insurance company representative most often involves the discussion of how much a case is worth. The companies generally hold aside money to cover possible contingent losses on each case, and therefore the adjuster is usually interested in setting up a "reserve." These reserves are usually set shortly after an insurance company makes an initial contact with the plaintiff or plaintiff's attorney.

Make it very clear from the outset that the defendant's insurance company should make no attempt to contact the client. Letters of representation should be sent immediately to all known defendants and their insurance carriers. Some unscrupulous insurance companies will suggest a "quickie" settlement figure to an unrepresented or allegedly unrepresented plaintiff. If the plaintiff agrees with the insurance company representative that $5,000 would be attractive, the adjuster will interpret the agreement as "an acceptance," or at least plaintiff's "willingness" to accept a $5,000 settlement. This interpretation can distort and ultimately make unsettleable a case with an obviously fair settlement range. To avoid such misunderstandings, you should be very firm and take prompt action if any attempt is made to breach the attorney-client relationship and to discuss the plaintiff's claim without your knowledge.

It is wise to meet in person with the insurance company representative as soon as possible to give an immediate idea of the seriousness of the case. If such a meeting cannot be mutually arranged, then schedule a telephone call to fully explain the seriousness of the injuries and frankly and candidly discuss liability and supporting facts. The primary purpose of this initial visit is to aid the insurance company to establish realistic reserves.

Give no "range of value" at this initial meeting. A case can certainly be characterized as serious, moderately serious, extremely serious, or catastrophic, without agreeing to an adjuster's range of values. Be very firm and professional in stating that a settlement demand or range will be forthcoming as soon as the entire case has been adequately evaluated. If the adjuster bandies about figures, remember to confirm the substance of your conversation in writing. If a figure is dangled by the adjuster, characterize the insurance company's effort to evaluate as premature, or leave an escape or contingency clause: "If the client's physical condition worsens, or future problems develop, then this case may be worth more than your preliminary estimate."

C. BE PROFESSIONAL

The integrity of the trial attorney is always on the line. Never misrepresent facts to anyone, including an adjuster. Just as a case is tried before a court with absolute honesty, professional courtesy, and mutual respect, the facts represented to an adjuster with frankness and candor should be only those you are ready to prove. To state a fact that is not true or that cannot possibly be proven will earn you the disdain of the adjuster, the individual insurance company, and probably every other adjuster in the claims field. An attorney who threatens suit and never follows through, who boasts of victories but has never achieved a favorable jury verdict, or who makes a "rock bottom" demand of money and then caves in for a substantially lower figure has absolutely no credibility. The ability to negotiate fairly with any adjuster would be seriously and permanently damaged if you engaged in such tactics.

Trust and confidence are the precious chemicals that must be maintained in perfect balance, not only between an attorney and client, but between any two negotiating parties. The priceless qualities of truth and fairness must also be held up through all stages of the pre-suit and suit negotiations. Settlement discussions often revolve around the reputation and integrity of the trial attorney representing the injured plaintiff. If you are experienced in the personal injury field and recognized by your peers (and particularly insurance adjusters) as a fair, competent, and trustworthy adversary, then an insurance company will be more willing to offer a fair settlement.

D. MY PLACE OR YOURS?

Some attorneys maintain that all settlement negotiations should be carried out in the office of plaintiff's counsel. Psychologically, they prefer to have the insurance adjuster sitting in front of their desks rather than vice versa. Yet it is not undesirable to meet at an insurance adjuster's office, but only for the preliminary courtesy call regarding the proper establishment of reserves. Negotiations are best held in your own office, the turf where you are comfortable and in control. The second choice would be at a third-party site, such as a mediator's office or if conditions allow, borrow the jury room at the courthouse for the meeting. Third, a neutral site such as a hotel conference room may be used. Fourth, opposing counsel's office is generally a better choice than the last resort, which is the insurance company's own turf. Wherever the in-person conference is held, be prepared to present your client's case as if you are going to trial or deposition. No interruptions by phone calls or other matters should deflect the attention of the negotiators. Have documentation to support all representations made, and demonstrate the reasonableness of the evaluation. Some attorneys, even at this stage, like to prepare what is called a "settlement brochure" or "settlement brief." These brochures usually include tasteful but dramatic photos of the plaintiff; documents illustrating the accident and the theory of liability; citations of case law, statutes, and other authorities relating to liability; and documentary proof of the damages (e.g., X-rays, medical bills and reports, hospital records, excerpts from medical texts, and proof of lost wages).

E. SHOULD YOU PLAY OUT YOUR HAND?

It is impossible to give any concrete rules as to what information should or should not be divulged to an insurance adjuster during pretrial settlement negotiations. Such rules are determined by the facts of the case and the integrity of the insurance company and its representative. The scope of information given by plaintiff's attorney to an adjuster should generally follow the rules of discovery. There is no reason to withhold any information before suit that a defendant will be able to obtain during discovery.

Attorneys with little or no experience in personal injury cases should attempt to confer with fellow ATLA attorneys to determine which insurance companies and adjusters are sincere in trying to settle cases. Most "front line" adjusters have a limit on their authority to pay claims. Some claims people are not well respected and generally do not get substantial limits of authority. You should know which insurance companies undertake settlement negotiations with a serious intent to bring the case to a fair conclusion and which use the discussions merely to obtain information for file filler. The latter companies end up delaying the suit, the day of trial, and their ultimate payment on the claim.

When elderly plaintiffs are involved, some insurance adjusters like to delay with the macabre idea that the plaintiffs may not outlive the claim. If you get even a hint of such foot dragging or stalling, you should file suit immediately and request an expedited trial date from the presiding judge.

Even if settlement negotiations with an insurance company do not culminate in a fair settlement or at least the beginnings of fair negotiation, always keep the overtures on a professional level. It is often advantageous to file suit and reinstitute the settlement negotiations with an attorney. If necessary, obtain the assistance of an early settlement panel, an independent arbitrator, or the trial court to spur a recalcitrant or reticent insurance company.

The same rules of honesty and integrity with clients certainly apply to dealings with counsel who represent an insurance carrier. Most defense counsel are experts in the field of personal injury litigation and can usually evaluate legal liability and probable jury verdicts much better than adjusters for insurance companies.

F. NEGOTIATION SKILLS

Ninety-nine percent of all cases settle. The reason for negotiating is to come to a fair and reasonable settlement. The intent of negotiations is not to emblazon or immortalize one side. Always try to negotiate from a position of strength and not weakness. The following strategies and tactics for negotiation are offered as suggested procedures.

G. TEN COMMANDMENTS

In The Art of Advocacy: Settlement, by H.G. Miller, the author sets forth Ten Commandments of Settlement:

1. Thou shalt not spurn settlement as being beneath thee,
2. Thou shalt respect thy enemy,
3. Thou shalt treat thy client as thou wouldst be treated,
4. Thou shalt not bargain as if thou were born yesterday,
5. Thou shalt not evaluate each case as if it were the last one in your office,
6. Thou shalt know the law,
7. Thou shalt seek the counsel of elders and experts,
8. Thou shalt keep abreast of modern ways,
9. Thou shalt not be a hero,
10. Thou shalt think settlement.

H. ELEVEN GENERAL ORDERS

In addition to these Ten Commandments by Miller, consider "Vesper's Eleven General Orders." Like the General Orders of the United States Marine Corps for standing sentry duty, these principles will serve to safeguard your client's valuable payload and your professional stock in trade.

1. Semper Fidelis: Always Be Faithful and Honorable

Remember that your reputation is more valuable than any single case or client. Maintain maximum credibility at all times. If a client authorizes you to settle and you tell the adversary or the court that the case is settled, and then your client changes his mind, you are honor bound to keep your word and either convince your client to accept the offer or withdraw from the case. The client's change of mind, for whatever reason, should never cause you to break a promise. Usually, a settlement arrived at under such circumstances was fair in your opinion. But a plaintiff may become depressed or filled with second thoughts, suffering from "buyer's remorse" syndrome. That is, having bought the settlement, the plaintiff then tries to use you to extract "a little bit more" than what was negotiated as fair and adequate. If you know any undiscovered facts that would deflate the client's claim if presented in court, keep those confidences, advise the client in writing, maintain the settlement position as reasonable, and let the client obtain other counsel.

2. Semper Paratus: Always Be Prepared

Gather and have ready for reference all necessary information before entering into settlement negotiations or in-person conferences. Likewise, have as much necessary information as possible to answer the usual set of interrogatories on time, before instituting suit. Be prepared for depositions, pre-trial or settlement conferences, and trial. Your constant state of preparedness will be a factor for the defense in evaluating your client's case.

3. Serve No Demand Before Its Time

Investigate and gather all the facts about liability and damages. Do all legal and medical research before stating any figure or range of figures to your adversary.

4. Don't Be a Phony

Misrepresenting facts will leave you morally and pragmatically out of the game. Contemporaries and clients will eventually distrust everything you say.

5. Loose Lips Sink Ships

Remember that once a settlement figure is thrown out, that figure will stick. A case can be haunted by any number suggested by an attorney, investigator, paralegal, or secretary handling the case. Whoever is involved in the settlement process can prejudice or poison the settlement posture. Therefore, do not suggest a figure unless you have carefully evaluated the client's case and the client has granted you authority to settle for such an amount. Never casually discuss settlement figures.

6. Nothing is "Off the Record"

Even idle talk in a courthouse hallway may be referred to and referenced by an adversary as a negotiating or demand figure. Be deadly serious at all times when discussing your case, and do not let slip your opinion of the real settlement value.

7. Beware of the "Stonewall"

Do not close your eyes to the stonewallers of the profession. The courthouse should not become a branch office for the insurance company. Insurance carriers often have come to the negotiating table with a "no budge" or "no compromise" position. In their infinite wisdom they have determined the only true value for

the case. Despite early settlement panels, arbitrators, trial courts, or fair team assessments of the settlement value, these carriers will demand that their figure be taken or left.

Advise your client fully and as soon as possible of the tactics and overall strategy of such an insurance company. The "take it or leave it" position can often infect the trial judge with a feeling of frustration and may leave the judge much more disposed to view with disfavor throughout the trial the party that refuses to negotiate in good faith.

8. Corraggio! Be Courageous

If the proposed settlement figure is unreasonably low, do not be frightened to give your professional judgment to the client or the court. Leave the decision to your client whether to risk a jury trial or take the insurance company's proffered "last offer." If the client decides that the settlement offer is too low and that the costs and time of a trial are justified, and if you agree with that rational and thought-out assessment, then try the case!

9. Never Appear in an Unauthorized Position

Do not arrive in court for any conference without authority to settle the case or to make recommendations for settlement proposals. Credibility of the firm and the trial attorney is critical. The trial court should not be used as a sounding board or testing ground. Always have the client present or "on call" during court conferences.

10. Know Your Adversary

Demand and maintain an atmosphere of mutual professional respect and trust. Do not allow egos to "poison" the professional atmosphere. Always stay on an ethical, professional, and objective level.

11. Be Decisive

Make a firm demand, set definite time limits, and try to maintain a position of "one price" or "price as marked." A credible reputation lets the defendant representative know that your figure will remain reasonable. If you promised to supply information within a week, do so. If you requested information or a response within a week, demand that such time limits be met. Reinforce and strengthen negotiation positions with as much information as is necessary to make the demand reasonable. Do not increase settlement demands by great amounts unless the settlement factors have improved. Conversely, do not "bid against yourself" or reduce the demand by great amounts unless circumstances have substantially changed.

V. USING AND ATTACKING THE ANNUITIST

A. THE ADVENT OF THE ANNUITIST

"Annuitists" are being employed with increasing frequency by the insurance defense bar as "expert" witnesses to counter plaintiff's economic expert's testimony in tort cases involving future losses.

Knowledgeable plaintiff's attorneys are learning that there are several ways in which a well-qualified "annuitist" (not merely any annuity salesperson) can be used as an effective offensive weapon. In this paper, we will offer ways to refute testimony offered by the opponent's annuitist as well as illustrate some positive aspects of utilizing an annuitist for the plaintiff.

B. WHAT IS AN ANNUITIST?

Most often the "annuitist" is merely an annuity broker who can testify to the current actual cost in the "market place" of a given set of future periodic payments or stream of income. Alternatively, an annuitist can determine what future payments could be purchased with a given amount of money.

C. ANNUITISTS FOR THE DEFENSE

Annuities, commonly speaking, are single-premium insurance contracts. Typically, an annuity is used when future periodic payments are purchased with a lump sum in a structured settlement. Annuity sales people typically testify that an annuity can be purchased to replace a tort victim's lost wages -- often at a cost that is a fraction of the amount sought for adequate compensation of future losses.[1] Traditionally,- annuitists have only been utilized by the defense bar to sabotage the work of the plaintiff's expert economist.[2] One method of attacking the annuitist for the defense is by moving that his testimony be excluded on Motion in Limine.

1. Motion In Limine. A well prepared approach to the annuitist on deposition concerning qualifications, factual basis of the testimony, the reasoning behind his inquiry into an annuity purchase for the plaintiff, and, in some states, the use of the statutory discount rate in arriving at his financial conclusions, may predicate a Motion in Limine concerning the annuitists' testimony. Armed with a deposition transcript,

counsel should present a comprehensive Motion in Limine. Most jurisdictions acknowledge the following grounds for a Motion in Limine:[3]

a. Lack of Qualifications. An annuitist lacking special training and/or expertise in mathematics, statistics, or actuarial sciences does not really qualify as an expert to render an opinion on the present value of an income stream even under federal rules.[4] Without additional training, an annuity or insurance salesperson who contacts an insurance company to obtain current price quotations, is merely serving as a conduit of information formulated by true expert actuaries and investment managers.[5]

One goal of the cross-examination of the annuitist on the deposition by plaintiff's counsel is to establish whether the "expert" is merely an annuity salesperson, which is often the case, or whether the witness is truly an annuitist.

In this regard, also determine whether the witness is proposing that the annuity should be purchased through him. If so, it gives him a substantial financial interest in the outcome of the litigation, i.e., the substantial brokerage commission which he anticipates on the sale of the annuity.

b. Facts Not in Evidence. The annuitists' testimony is based on facts not in evidence. These include the annuity prices that annuity sellers quote in the market, interest rates and inflation rates not in evidence, and life expectancy figures not in evidence. Often an unprepared "expert" will not be able to testify knowledgeably about these factors and this will serve as an attack on the predicate for his testimony. Since these facts are not normally relied on in calculating present value, they will prevent an expert opinion.[6]

c. Irrelevance. The cost of an annuity is often irrelevant, as is the annuitist's testimony. There is not evidence that the plaintiff's award will be used or should be used to buy an annuity. Further the testimony is without a foundation and, thus, irrelevant unless the defendant can show that the plaintiff has agreed to buy an annuity with the damage award.

To further predicate this, the plaintiff should testify that he has no interest in purchasing an annuity because he is totally unsophisticated in the area of investments and, having heard of such recent financial disasters as the stock market crash, the collapse of the savings & loans and, depending on the plaintiff's degree of sophistication, the recent problems with junk bonds, the plaintiff has no intention of turning his jury award over to "professionals" in the hopes of having funds to meet his future financial needs.

Such testimony is very effective in demonstrating to the jury during cross-examination of the annuitist that the major purpose of the defense in presenting this hired gun to testify as to the value of an annuity is an attempt to reduce recovery of the rightful amount to which the plaintiff is entitled under well established common law principles.

d. Confusing. Insofar as the testimony is offered to show the present value of a future income stream, it is often confusing, since an economist or a statutory present value table will instruct the jury about the need to reduce future losses to present value.

e. Statutory Discount (required in some states). The price of an annuity in a state that requires the use of the statutory discount rate in reducing gross future wages to present value is irrelevant unless it is based on the statutory discount rate.[7]

The comprehensive Motion in Limine will anticipate occasionally creative defense arguments. First, faced with solid legal grounds for exclusion, the annuitist may offer testimony through the back door, ostensibly to impeach the testimony of the plaintiff's economist. This maneuver lacks merit unless the economist has unequivocally rejected the use of annuities as loss-replacement instruments.

Defense counsel may also argue that a relatively cheap annuity should be considered in setting a per diem amount for future pain and suffering.[8] In many states, juries are not required to reduce future pain and suffering amounts to present value. Annuity evidence is thus irrelevant to the jury's consideration of future pain and suffering awards.

2. Cross-Examination. Plaintiff's counsel may have to rely on cross-examination of annuitists in cases where Motions in Limine have not been granted. Courts are split on whether annuitists should be allowed to testify.[9]

Annuitists will generally concede a lack of expert economic qualifications. (Counsel should obtain this concession early enough to incorporate into a Motion in Limine.) Counsel should also present the following facts on cross-examination, in addition to specific issues that individual cases present:

a. Taxability. Taxability may reduce certain annuity investments. While the stream of commerce in structured settlements is tax free to the plaintiff, the purchase of an annuity postjudgment, as

proposed by the annuitist has very substantial taxation consequences to the plaintiff which should be clearly shown to the plaintiff.

Remember that under §104(a)(2) of the Internal Revenue Code, a $1,000,000 award paid in cash to the plaintiff is nontaxable, if it involves personal physical injury. However, if the annuitist's advice is followed by the jury and they award $100,000 which is used to purchase an annuity which would generate a $1,000,000 string of income, $900,000 of that stream of income is taxable to the plaintiff as interest.

Thus, it is crucial to demonstrate to the jury, on cross-examination of the annuitist, the extreme tax consequences of the purchase on an annuity to provide the future income stream to the plaintiff.

b. Reversionary. Annuities may be "refundable" if the beneficiary dies, which not only prevents payment of annuity benefits to heirs, but also gives a windfall to the company from which the annuity was purchased.

c. Rated Age. Annuities may be based on the insurance industry's "rated age," which reflects the shorter life expectancy of many victims of injurious torts rather than on an average life expectancy; this reduces the price of the annuity.

d. Guarantee Funds. In some states, no insurance or insolvency fund protects a beneficiary from a defaulting or bankrupt annuity provider.

e. Time Frame of Price Quoted. The purchase of an annuity does not adequately diversify the investment, as a prudent investment strategy would require, and is thus a greater risk than other investments.

f. Risk Tolerance. Annuitists, as professional investment advisors, may achieve high earnings by taking greater risks. Because annuitists may thus do more with less, they may well testify that a low award is adequate. A typical injury victim, in contrast, will need to invest a larger lump sum to derive the benefits of the same ultimate income stream.

D. ANNUITIST FOR THE PLAINTIFF

1. When to Consider Using an Annuitist. Anytime substantial future damages are to be sought for an injured party, the services of annuitist should be considered.

An annuitist involved in determining the prices to be charged for various annuities or one with special expertise in mathematics and/or actuarial sciences might be able to provide a more concrete testimony as to the discounted value for the loss of future wage earning capacity than an economist. An economist must base his analysis on certain subjective assumptions concerning inflation, future earning capacities, applicable discount rates, etc. These subjective assumptions may be more subject to discrediting by effective cross-examination. The annuitist is testifying as to the actual price of a currently available contract to produce a future stream of income as opposed to an opinion based on economic assumptions investment potentials.[10]

After the economist has formed an opinion as to the future financial needs of the plaintiff, an annuitist can be effectively used to translate those future payments into an amount which currently could purchase a contract to produce those future payments. The plaintiff's attorney can utilize this information to formulate demands, negotiate at a settlement agreement, or to convince the jury of the amount currently necessary to provide for plaintiff's future needs.

2. Effective Utilization of an Annuitist's Assistance. The following are ways in which an annuitist might be helpful to the plaintiff's case.

a. When Determining Settlement Value. After the medical, therapeutic and economic experts have assisted the attorney in determining the future financial needs of a plaintiff, an annuitist can determine the amounts necessary to purchase contracts designed to provide the specified amounts at appropriate times. The risks of investments and of relying on less than the maximum security available can be eliminated if a proper structured settlement can be achieved.

b. Composing a Demand Letter in Terms of a Structured Settlement. If the plaintiff and the plaintiff's attorney determine that guaranteed future payments as a part of the settlement would be appropriate, the demand letter can be composed to express the acceptable terms of the structured portion desired.

c. Negotiating a Settlement. When part of an offered settlement is to involve future payments, an annuitist can assist in obtaining the maximum security available as well as maximizing the benefits available within the amount for which the defense is willing to settle. Subtle points such as the best form of annuity - joint or single, level or increasing, type of guarantees, etc.

d. Establishing a Meaningful Present Value of Future Damages at Trial. As discussed above, the direct testimony of a plaintiff's annuitist as to the true amount necessary to purchase an annuity contract designed to purchase a future stream of income with judgment, not settlement dollars, could be more convincing to a jury than the hypothetical opinions of an economist or the "low ball" quotes of a defense annuitist.

e. Refuting the Defense's Annuitist's Testimony. When the defense has announced an annuitist as one of the testifying experts, the plaintiff has the opportunity, on direct, to establish their own present value. The annuitist testifying for the plaintiff can establish the acceptable level of security of the annuity company to be used, the structure acceptable to the plaintiff, and the real cost of a non-settlement annuity (i.e., an annuity purchased with judgment dollars). The defense annuitists often use the same quotations given for a structured settlement offer. These are not the same rates as non-settlement annuities. Additionally, the quotation may be stale.

f. Cross-Examination Assistance. An annuitist can be very helpful to plaintiff's attorney by assisting during the cross-examination of the defense annuitist. Areas to be paid particular attention are:

1) The security of the companies quoted;
2) The correct rates used (settlement rates or judgment dollar rates);
3) The cost of a contract to produce the stream of income testified as necessary by the plaintiff's economist;
4) The appropriateness of the form of the annuity quoted; and
5) Bias of the defense expert.

3. Qualifications Helpful in Assisting Plaintiff. To assist the plaintiff's attorney to maximize the plaintiff's recovery, an annuitist should be appropriately qualified.

a. Market Knowledge. To be of meaningful assistance, the annuitist must know what the market values of annuities at various levels of security cost currently.

b. Actuarial Knowledge. Although not necessary, the annuitist can be extremely helpful in assisting the plaintiff's attorney to understand the variances in costs for different forms of annuities and which forms would maximize the available benefits for that plaintiff.

c. Legal Knowledge. Obviously, the more accurate the knowledge concerning the laws applicable to annuities, personal injury settlements and judgments possessed by an annuitist, the more beneficial assistance he/she is able to offer the plaintiff's attorney.

d. Research Ability. The ability to research the financial security of the annuity companies and the current status of the applicable state and federal laws concerning annuities could be invaluable to the attorney. If the annuitist additionally can research alternate available investments, the attorney's effectiveness can be increased.

e. Identify with Plaintiff and His Needs. Above all, any experts hired by plaintiff's attorney should possess a high degree of empathy and desire to use their expertise to maximize recovery.

E. PITFALLS TO AVOID

1. Confusing the Annuitist's and the Economist's Jobs. The plaintiff's economist cannot replace the medical expert or the therapeutic expert who works with the plaintiff in determining future medical and therapeutic needs. The economist uses his findings to determine an opinion as to the probable future costs of these needs and probable future income that the plaintiff would have achieved but for his/her injury.

The annuitist can take the resulting determination of future financial needs and determine, at the settlement stage or at the judgment stage, the present cost of an acceptable contract designed to produce those future payments. Additionally, the annuitist can help determine the form and the criteria of the contract necessary to give the plaintiff maximum available benefits and security.

2. Rated Age vs. Maximum Length Guaranteed Payments. The cost of an annuity contract based upon the life of an individual is an insurance company's promise to pay that individual "as long as they live". Certain "guarantees" can be contracted for, such as "life with 20 years certain". This means that the annuity will pay for 20 years whether or not the annuitant lives for 20 years, and after 20 years, for as long as the annuitant lives thereafter. Naturally, the tables for life expectancy are established for each company based on the contracts they have paid in the past and/or other data. These are not consistent from company to company. Additionally, certain types of injuries have yielded reduced life spans from those otherwise expected.

For example, a "normal" 5-year old male might have a life expectancy of 67.5 years with one company but, after injury, only a 27 year life expectancy. The same company might also have a 27 year life expectancy for a "normal" 49-year old male. The insurance company naturally would charge more for a contract in which they anticipate paying X-dollars for 67.5 years than one in which they anticipate paying X-dollars for only 27 years. Thus, in this case the injured 5-year old male could purchase a life annuity for the same price as a 49-year old "normal" male. This process is called "rating up" the 5-year old to the equivalent rates for a 49-year old.

Seemingly, "rating up" would always result in increased benefits for the same cost or reduced cost for the same benefits. However, if a 40-year certain guarantee is to be built into the annuity, we would then be requiring the insurance company to pay for 40 years instead of the expected 27 years. This would result in an increased cost. The balance of obtaining the maximal security and the maximal benefits for the minimum cost is a delicate balancing act.

3. Structured Settlement Annuities vs. Post Judgment Annuities. Plaintiff's attorney must remember that annuitists historically have been annuity salespersons retained by defense attorneys to "structure" future payments to appear to be large recoveries which, in fact, were not large in present value. Thus, when an annuitist for plaintiff or defense purports to give an opinion at trial, the figures should not be based on the quotations given for structured settlement offers. Those rates are less than the rates given for "non-settlement" annuities. Additionally, tax aspects over the "future value" of the dollars provided by the same annuity after judgment as it would have provided as a structured settlement.

4. Confusion of Assumptions. Economists' assumption of interest rates and discount value may indicate that a given return could be expected. This must always be tempered by the statistical reality that, in over 90% of the cases of recoveries of large lump sums, the recipients were penniless in five years.(11) The guarantees of a reasonable return of an annuity have social value, both for the individual recipient and for society. A lump sum recovery is not always worth more to a plaintiff than a properly designed annuity would be.

F. CONCLUSIONS

In every case involving substantial future financial needs, the assistance of a structured settlement specialist (preferably any attorney) should always be considered after these future needs have been determined. After consideration, if the decision is to use one for plaintiff, do not settle for a mere annuity sales person. Assistance in formulating an acceptable settlement value, negotiating a settlement, testifying for plaintiff, or assisting in cross-examination are potentially areas in which plaintiff's attorney can be greatly benefitted by the special knowledge of a well qualified annuitist. It is the opinion of the author that structured settlements are the wave of the future in personal injury and wrongful death dispute resolution and it is incumbent upon the personal injury attorney to gain a working knowledge of this dynamic area of the law. Through affirmative use of the structured settlement predicated upon a clear understanding of the methods of funding and the tax implications, the knowledgeable plaintiff's attorney can present to his client a viable alternative to lump-sum settlement which may serve the client's needs far more effectively than any other type of dispute resolution. The insurance industry is heavily geared for paying large sums of money in structured settlements in the future. The wise plaintiff's attorney will be fully prepared to receive those sums.

VI. PREPARING A SETTLEMENT DEMAND

It should be obvious from the foregoing discussion that the documentation which you provide to an insurance carrier will establish the parameters within which the case will be negotiated. An insurance carrier will pay no more than you can document because the claims supervisor will not run the risk of facing criticism in a closed claim review due to faulty documentation.

Space limitations preclude a thorough discussion herein as to the contents of a settlement demand letter. However, a basic premise is that in your settlement demand letter you should discuss each and every element of damage separately and append the supporting documentation for each element to the demand letter.

Inexpensive graphics can be obtained and appended in a budget brochure through the use of the numerous sets of medical illustrations that are available in the marketplace. The simple act of xeroxing from the Ciba collection a simple medical illustration which graphically illustrates your client's injury and appending the graphic to your demand letter, enhances the documentation of your case. Appended hereto as

appendix A is a list of recoverable elements of damages. Create such a list for your own jurisdiction and use it as a check list as you are preparing your settlement demand letter to make certain that you are including a discussion of every conceivable type of damage for which your client is entitled to recover.

Therefore, when approaching settlement negotiations, consider the following principles:

1. Thorough trial preparation is the key to successful settlement negotiation.
2. The most important aspect of trial preparation is attention to detail.
3. Always project your willingness to litigate the case.
4. Carefully evaluate each and every element of damage individually.
5. Establish a format for thorough and complete evaluation of damages such as the segmental approach discussed herein.
6. Evaluate the case from the insurance companies viewpoint;
   - Remember that insurance companies want to settle cases;
   - Claims representatives are merely doing their job and will pay what you can document;
   - The higher up the ladder that you negotiate, the more likely you are to receive top dollar; and
   - You must deal directly with the person who has the authority to settle your claim.
7. Document your files in such a way as to allay any fears by the claims supervisor of a closed claim review.
8. Assist the claim supervisor in establishing adequate reserves.
9. Carefully document an excess liability case in order to achieve a tender of policy limits.
10. Carefully document any claim in which bad faith damages are a possibility in a subsequent action.

Finally, it is more important to negotiate smart than to negotiate tough. You will achieve better results in settlement negotiations if you consider the problems facing the insurance claims personnel and help them solve their problems so as to enable them to pay you top dollar. Remember that the person with an open checkbook, a poised pen and the authority to fully compensate your client is not your enemy.

Every settlement brief or brochure should have as many photographs, pictures, drawings, or illustrations as can help the reader to simply and quickly understand the plaintiff's position on liability, causation, or damages. The old axiom that "one picture is worth a thousand words" is quite true. It may be beneficial to place before and after photographs of the client in the brochure. Also effective are selected photographs of the client's activities and hobbies before the injuries were suffered; then, in contrast, use selected photographs of how the client's life has been affected by the accident. What may be seen by some as "hokum," "showy," "vaudeville," or "soap-opera stuff" seems more a humanistic approach to individualizing your claim for damages. If the client was immobilized in a wheelchair or a cast, or used a cane, show that device in a photograph. A surgical implant or prosthetic implement can be depicted by the manufacturer's literature and advertisements. The fact that a grizzly adjuster, jaded defense attorney, or jaundiced judge may snicker at such photographs does not deflate the human value of the client's claim. Do not be afraid to illustrate the truth.

A. INTRODUCTION

The introduction to a settlement brief or brochure should give some humanistic factors and historical background of the plaintiff, plaintiff's family, the happening of the accident, and the damages. In the very beginning of the document an original photograph of the client or of some dramatic part of the case will be quite effective.

It is often impossible to answer when the trial judge asks the oft-repeated question: "What kind of appearance does your client make?" The introduction should, if possible, quote some past accolades or accomplishments of the client. Such a pedigree shows not only that your client is believable, but also is likeable (and will thus be liked by the jury).

B. SYNOPSIS OF FACTS

In this section, set forth succinctly but in detail the facts that explain why each defendant is responsible. State why your client has no contributory or little comparative negligence. Quote extensively from such sources as depositions, interrogatories, and signed statements.

In addition, to assist the judge or mediator in evaluating a claim, use a diagram. If possible, make sure it is to scale. Employ photographs of the damage to vehicles, pictures of the accident scene, diagrams of

the machinery, definitions of medical terms in complex injury or negligence cases, and excerpts from liability experts. Cite briefly any important case law or statute that establishes legal liability. Through a logical, clear presentation, the reader (whether a trial judge, settlement mediator, arbitrator, or the insurance company's claims personnel) should see very clearly why the defendant will lose and the plaintiff will win on liability.

C. DAMAGES

This part of the brief or brochure should contain an itemization of each injury to each part of the body; an itemization of all medical expenses, out-of-pocket expenses, and past and future lost income; and a succinct recitation of the past and future care and treatment.

If possible, recite the injuries in terms of their priority or seriousness. Note what injuries, if any, are permanent and to what extent they disabled or impaired the client's life and enjoyment of life. Then, explain succinctly and chronologically all the treatment and care received by the client and all the care that will be required in the future. It should then be possible to itemize all medical expenses, out-of-pocket expenses, lost income and future lost income, or lost income earning capacity. Again, refer the reader to pertinent pages and lines of expert opinions to emphasize and substantiate the damages claim.

D. EVALUATION AND DEMAND

This section may be the most important part of the entire workbook. An objective presentation of the facts of the accident and the damages will have little impact if the adjuster turns to the back page and finds no supporting documentation for your demand. A net opinion or a net evaluation is simply that. Explain how the values were calculated, and from what sources or reasoning process the values were found. If the case was presented at a case evaluation clinic, say so and identify the attorneys who participated. It is not a crucial secret, nor should it be an embarrassment. If the case has been presented to a mock jury or a group of attorneys, mention it. You should be proud of going to the time and effort to carefully and professionally evaluate the client's claim. If source books have been referred to, cite them and the appropriate pages. The injuries, past and future lost income, past and future pain and suffering, and future risks of complications should be analyzed, itemized, and categorically evaluated. Indicate what the analysis shows a local jury verdict will produce on behalf of your client. Then state the exact demand.

E. THE APPENDIX

The appendix of a settlement workbook should be tabulated for easy reference. Anything noted in the other sections should be referenced by a supporting document, report, record, diagram, map, or X-ray. Tying the case together in the form of a compact brochure or brief results in a professional packaging and proper "marketing" of the client's claim. You have thus assisted defense counsel to understand the case. The insurance personnel who analyze the claim now have all the facts in one place. The plaintiff is now much closer to achieving a reasonable settlement.

As a final point, do not be shy or secretive with the work product. Always provide copies of the brochure or brief to the client. When appearing at a settlement conference, the mediator usually has a limited amount of time. Try, if possible, to have the settlement document sent to the judge ahead of time, so he will have at least one week to read it and think about each section, especially the demand.

The settlement brochure or brief is like your appellate brief if prepared well, it will speak for itself. If a medical, safety, or engineering analysis is necessary, it may be necessary for you to prepare a trial brief, a medical brief or a product safety brief, all of which should be presented to the trial judge ahead of time. Remember to update the settlement brochure or brief if new reports or facts are developed or discovered.

F. VIDEOTAPING A SETTLEMENT PRESENTATION

A settlement brochure or brief is absolutely necessary if a videotape settlement presentation is anticipated. Videotape or film can be used very effectively in showing the client's case to an adjuster or defense attorney. Even photographs or slides can assist the attorney in making an effective settlement presentation. You can photograph, film, or videotape the re-enactment of how the accident occurred, as well as the aftermath and the damages. The artistic way to present a short film strip or videotape to the mediator and adversaries is usually best left to the professional talents of "day-in-the-life" film crews. However, after such a videotape showing, even if extra videotapes are made available to the defense and its adjustor or supervisors, keep a "hard copy" of a brochure or brief that each member of the defense team can take and refer back to easily.

It is human nature to thumb through a book, brief, or brochure and look at the illustrations, photographs, and the bottom line demand. Remember, it takes more time and inclination to put a videotape in a VCR and fast forward to the desired passage.

VII. CONCLUSION

Ultimately, with tact, courage, and hard work, all personal injury trial attorneys can develop their negotiating skills to the point where cases can be fairly evaluated and settled. Those cases that are ultimately tried should not be the result of your failure to do everything in your client's best interest to avoid the hazards and variables of trial by jury.

A trial by jury is a vindication of the client's case and the ultimate recovery of fair and reasonable value for the client's compensation. It is not a vindication of your ego or opinion, although your professional judgment should not be ignored. Every case should not be surrendered or turned over to a consensus opinion or to the court. Sometimes a court will suggest a figure that is too low. Many times an older or younger lawyer fearful of a jury trial will recommend acceptance of an amount that is unreasonably low.

There are times to show compromise and to take a settlement. Those times are when the best interest of the client are fully served by the settlement, considering all ramifications. There are times to summon courage and reject offers that are not fair. Do not be headstrong or unreasonable. Moreover, to be a truly great trial lawyer, bring all faculties to the art of negotiation. Perceive or learn to perceive from others when a case should be settled and how to use negotiating skills to effect that settlement. There is an old saying, "Settle your losers and try your winners." If both plaintiff and defense did that, all cases would be settled. Attorneys need to understand their psychological strengths and needs and the psychology of their opponents. With a balanced and thorough approach, with absolute fidelity to the client, and with courage and prudence you can move unimpeded toward the goal of a fair and just settlement.

APPENDIX

SAMPLE SETTLEMENT DEMAND

June 2, 2008

Ms. Grace G. Gordon, SCLA
Senior Claims Supervisor
Manhattan Casualty Insurance Co.
P. O. Box 9992
Jacksonville, Florida 32222

Mr. Jackson M. Montgomery
Montgomery, Montgomery & Little
14 Greenway Plaza, Suite 2004
Houston, Texas 77006

RE:
Insurer: Manhattan Casualty, Inc.
Claim No.: R2971
Claimant: Maxwell Hubbard
Insured: Weeks Bros. Trucking Co.
D/A: November 20, 2005

Dear Ms. Gordon and Mr. Montgomery:

I. SETTLEMENT DEMAND

We have reviewed all of the information presently available in the captioned cause in order to evaluate this case for settlement purposes in conjunction with our mediated settlement conference currently scheduled for June 16, 2008.

The case is set for trial on Monday, October 13, 2008. However, due to the obvious nature of the negligence on the part of your insured and the fact that we have obtained a very thorough diagnosis and prognosis regarding our client's medical condition, we are able to fully evaluate the case at this time.

Based upon the following review of the liability and damages aspects of this case, we are offering to settle all claims arising out of this tragic occurrence for the cash sum of Five Million Dollars ($5,000,000.00) or a combination of cash and a structured settlement of equal value. Our opinion is predicated upon the following factors:

II. FACTUAL SYNOPSIS

On Sunday, November 20, 2005, Maxwell Hubbard was riding as a passenger in his 1987 GMC pickup proceeding south on F.M. 2004 in Brazoria County, Texas, twelve miles south of Alvin. Max was asleep in the passenger seat while his pickup truck was being driven by his co-worker, William Benjamin Mansfield. Benjamin's visibility on that early morning was hampered by heavy fog.

As they approached the point where F.M. 2917 forms a T intersection from the west with F.M. 2004, Benjamin Mansfield was confronting a yellow flashing traffic control signal, indicating that he had the right of way but should proceed with caution. At the same time, Robert Jones was traveling eastbound on 2004 facing at least five traffic devices which indicated that he was required to stop: two flashing red lights, a stop ahead warning sign, a stop sign and a large barricade with arrows indicating that the road was ending.

As Mansfield drew closer to the intersection, he saw the Weeks Bros.' eighteen wheeler flatbed truck pull into the southbound lane of F.M. 2004 directly in front of Mansfield's truck, as Jones disregarded all five traffic signals. Mansfield attempted to take evasive action but the right side of the pickup truck collided with the cab of the eighteen wheeler with such incredible force as to completely destroy the pickup truck by smashing the passenger side with such force as to rip the camper and the top off of the pickup. The passenger's door against which Max Hubbard was leaning as he slept was completely torn from the vehicle as the hood of the pickup truck smashed directly into Max's face and upper body.

Traffic in the eastbound lane of F.M. 2917 is controlled by a stop sign and two flashing red lights indicating that the vehicles should come to a complete stop before proceeding with caution. Robert Jones, the driver of Weeks Bros.' eighteen wheeler, failed to obey both the stop sign and the red flashing lights on the morning of November 20, 2005. As a result, Maxwell Hubbard suffered unbelievable injuries which are detailed herein, and his future, despite his extreme personal courage, integrity and survival instincts, has been virtually destroyed.

On trial of this case, Plaintiff will show that the negligence of Robert Jones, acting in the course and scope of his employment with Weeks Bros., caused the devastating injuries to Max Hubbard and the lifetime of damages which will flow therefrom. Therefore, Plaintiff is seeking legal damages from Weeks Bros. and Robert Jones, based upon joint and several liability.

III. PARTIES

A. PLAINTIFF MAXWELL HUBBARD

Maxwell Hubbard is a highly intelligent 34-year-old man who will be able to describe his injuries and disabilities resulting from this tragic incident in a very articulate and persuasive manner. Mr. Hubbard had an IQ of 158 and prior to the collision enjoyed a wide range of possibilities as to the manner in which he could pursue a successful and happy life. Mr. Hubbard's options have been severely narrowed by this tragedy and he will have no difficulty in gaining both the empathy and the understanding of a jury as to the nature and extent of the alteration of his lifestyle and the reduction in the quality of his life as a result of the negligence of Robert Jones. Max's obvious permanent disabilities, his miraculous survival of this brush with death and his obvious outstanding courage in overcoming this devastating event will make him an excellent and admirable witness before a Brazoria County Jury.

B. DEFENDANT ROBERT BRADLEY JONES

Robert Bradley Jones, the driver of the eighteen wheeler owned by the Weeks Bros. Trucking Company, is not going to be a sympathetic figure in the eyes of the jury. Immediately after the collision, Mr. Jones made no effort to assist Benjamin Mansfield or Max Hubbard and did not call the police or ambulance despite the serious nature of the injuries to Mr. Hubbard. At no time did Mr. Jones approach the pickup truck in an effort to assist the injured parties or even to determine the nature and extent of the injuries which his negligence had inflicted on Mr. Hubbard.

C. DEFENDANT WEEKS BROS. TRUCKING COMPANY, INC.

Weeks Bros. Trucking Company, Inc. is an Oklahoma corporation which has full responsibility for the actions of its negligent driver, Robert Bradley Jones, under the doctrine of Respondeat Superior.

IV. FORUM

A. HONORABLE FRANKLIN BURGESS

Suit is on file in the State District Court in Brazoria County, Texas before the Honorable Franklin Burgess. Throughout his several years of experience sitting as a District Judge in Brazoria County, Judge Burgess has shown himself to be an intelligent and fair-minded jurist who will maintain a trial record free of error. This obviously inures to the benefit of all parties since no one wants to try this case more than once.

B. JURY

In the event we are unable to reach a settlement at the mediated conference on June 16, 2008, we will submit the dispute to a jury in Brazoria County, which, for the past twenty years, has been the largest verdict area in the United States for the award of damages in personal injury litigation. A Brazoria County jury of hard-working citizens will have no difficulty in computing and awarding a very substantial seven or eight figure verdict to compensate Maxwell Hubbard for the lifetime of damages which he will suffer as a result of the negligence of Robert Jones.

V. LIABILITY

A. NEGLIGENCE OF JONES

This is a clear case of liability with respect to the negligence of Robert Jones for the reason that he clearly failed to yield the right of way to the vehicle driven by Benjamin Mansfield. As he approached the intersection of F.M. 2917 and F.M. 2004, Mr. Jones confronted at least five traffic control devices indicating that he was required to stop. He ignored a stop ahead warning, two red flashing lights, a stop sign, and a directional barricade sign indicating that FM 2917 was ending at this intersection.

Ignoring all five traffic devices, Jones pulled the Weeks Bros.' eighteen wheeler into the southbound lane of F.M. 2004, directly into the path of the plaintiff's vehicle. In addition to the failure to heed the traffic control devices, the evidence from the police and witnesses in the area will indicate that there was very heavy fog at the time of the collision and Mr. Jones failed to maintain the proper lookout.

B. LIABILITY OF WEEKS BROS. TRUCKING COMPANY., INC.

At the time and on the occasion in question, Robert Jones was working in the course and scope of his employment with Weeks Bros. Trucking and was clearly their agent. Under the doctrine of respondeat superior, Weeks Bros. is directly liable for the negligence of Jones, which caused the devastating injuries to Maxwell Hubbard.

VI. EVIDENCE ON DAMAGES

A. SYNOPSIS OF PERSONAL INJURIES

a. Transection of the Aortic Arch
b. Closed Head Injury
c. Organic Brain Syndrome
d. Coma
e. Blindness - Right Eye
f. Multiple Facial Bone Fractures
    1) Fracture of Medial orbital walls;
    2) Fracture of Lateral orbital walls;
    3) Blow-out fracture - left orbit;
    4) Blow-out fracture - right orbit;
    5) Fracture of Bilateral zygomatic arches;
    6) Fracture of Bilateral ethmoid sinuses;
    7) Fracture of Nasal bones;
    8) Fracture of Nasal septum;
    9) Fracture of Maxillary antral walls;
    10) Bilateral pterygoid plates;
    11) Bilateral LeFort III facial fractures;
    12) Open nasal ethmoid complex fractures.

g. Multiple Comminuted Open Mandibular Fractures
    1) Fracture of right mandibular symphysis;
    2) Fracture of left mandibular symphysis;
    3) Fracture of right mandibular condyle;
    4) Fracture of left mandibular condyle;
    5) Refracture of right mandibular symphysis.
h. Damage to Cranial Nerve VII
i. Trauma to the Teeth and Mouth
j. Additional Head Injuries
    1) Multiple lacerations, intraoral, face;
    2) Lacerated tongue and oral-gingiva;
    3) Lacerated left ear;
    4) Bilateral auditory canal lacerations with significant hemorrhage;
    5) Bilateral raccoon eyes with subconjunctival edema and hemorrhage;
    6) Restriction on ability to open mouth;
    7) Retrobulbar hemorrhage;
    8) Bilateral preseptal edema.
k. Chest Injuries
    1) Eight rib fractures - right;
    2) Eight rib fractures - left;
    3) Widened mediastinum.
l. Chest and Lung Complications
    1) Pneumonia;
    2) Atelectasis;
    3) Bilateral pneumothoraces;
    4) Bilateral plural effusion;
    5) Extensive subcutaneous emphysema.
m. Right Ulnar Fracture
n. Right pelvic fracture
o. Gross deformity right hip joint
p. Right Patellar fracture
q. Right segmental tibial fracture
r. Loss of Hearing in Right Ear
s. Extreme Depression

B. MEDICAL EVIDENCE

1. Personal Injuries

a. Transection of the Aortic Arch

It is truly a miracle that Max is alive because the Aortic Arch, a major vessel to the heart was ninety (90%) percent transected for a period of approximately forty-eight (48) minutes.

The aorta, the main trunk of the body's arterial system, transports blood from the heart to all parts of the body. Injuries to the aorta are usually lethal. Over 80% of patients with aortic wounds bleed to death before they reach the hospital. A 1958 autopsy study showed that only 19.6% of patients with aortic wounds survive the immediate post injury. Some of these patients subsequently died from their aortic damage; the others died from associated injuries. Most patients died from hemorrhage before they reach the emergency room. (Parmley, L.F., Circulations 17:953, 1958). Those few who arrive at a hospital usually present with large amounts of blood in the chest and in profound hemorrhagic shock from inadequate blood circulation.

The surgical repair, i.e., attachment of a Dacron graft, includes the hazard of prolonged occlusion of the artery which may result in paraplegia. The medical witnesses will testify that Max was literally at death's door after forty-eight minutes of extensive internal bleeding and that the only reason that Max survived such a devastating trauma to the heart was his extraordinary physical condition prior to the accident.

The medical services rendered by the cardiac team at John Sealy-UTMB were superb. They not only saved Max's life, but also did an excellent and highly efficient surgical graft which is functioning well. With your express agreement, we sent Max to one of Houston's outstanding Board Certified cardiovascular specialists, Thomas L. DeBauche, M.D., who found, much to our relief, that:

I have told Mr. Hubbard that at the present time there is absolutely no evidence that he has any continued cardiovascular disease. His aortic graft will have healed over by this time, and he does not require any special considerations regarding his graft. This, in fact, at the present time is probably the strongest place on his aorta. He will not have to worry about cardiovascular problems in the future except as might present with the normal consequences of aging and other processes. He is at no further cardiovascular risk for having been through this surgery and has no need for specific considerations regarding his cardiovascular status.

b. Closed Head Injury - Organic Brain Syndrome

Max was not so fortunate with respect to the sequelae of the closed head injury which he suffered in the collision. The severe blow to the head which was of sufficient severity to fracture all of the major bones in his face, also battered his brain with sufficient force to cause permanent organic brain damage. The blow put Max into a coma for two and one-half days and he awoke with retrograde amnesia and post rank amnesia of two to three days; classic symptoms of severe closed head injury.

With your agreement, we sought a neuro-psychological evaluation of the effects of Max's closed head injury. Once again, we sought to have Max evaluated by only the most qualified health care providers in the Houston area. Dr. Larry Loggan, head

of Project ReEntry, and a widely respected neuropsychologist, evaluated Max's closed head injury and offered the following opinions and findings:

The results of neuropsychological assessment are highly consistent with a history of traumatic brain injury. As a result of the accident which he suffered on November 16, 1991, Mr. Hubbard has a diagnosis of Organic Brain Syndrome and Major Depression. Hubbard report, pg. 7.

Dr. Loggan diagnosed in Max Hubbard the following symptoms of organic brain syndrome:

a. bilateral frontal impairment which is having an adverse effect on executive functioning;
b. difficulty with concentration and attention span;
c. poor awareness of cognitive deficits;
d. significant memory impairment;
e. difficulty attending to visual details;
f. inconsistency in speed of information processing;
g. substantial difficulty planning and organizing work efficiently;
h. moderately deficient rote verbal memory; and
i. difficulty with retrieval of new information.

The good news is that Dr. Loggan feels that Max is an excellent candidate for rehabilitation and concludes:

> If and when he completes a comprehensive cognitive rehabilitation program, he probably will be able to return to competitive employment although he may not be able to produce the same level of income that he has in the past. In order to overcome a lot of the neuropsychological deficits, Mr. Hubbard is in serious need of both cognitive rehabilitation and individual psychotherapy.

Dr. Loggan has projected the type of rehabilitative care and counseling which Max will need in order to adjust his life in conformity with the Organic Brain Syndrome and in order to return to employment as a productive member of society. The projected rehabilitative costs are $207,100.00.

c. Blindness - Right Eye

Max has two major sources for the legal blindness in his right eye. Medical evidence indicates that Max suffered damage and thickening of the right optic nerve and that the right eye was punctured by bone splinters. While Max maintains peripheral vision on the right side, he has total blindness across ninety percent of the cone of vision and is rendered legally blind in the right eye.

We obtained a neuro-ophthalmological examination of Max's right eye by an outstanding Board Certified specialist, Dr. Conrad Moore. Dr. Moore has advised Max that there is nothing which can be done to increase the visual acuity or rehabilitate the right eye in any fashion. We have requested a written report from Dr. Moore, however, he wishes to see Max for one additional visit before doing such report.

d. Multiple Facial Bone Fractures

The severe blow which Max took directly in his face resulted in the following multiple facial bone fractures:

1) Fracture of Medial orbital walls;
2) Fracture of Lateral orbital walls;
3) Blow-out fracture - left orbit;
4) Blow-out fracture - right orbit;
5) Fracture of Bilateral zygomatic arches;
6) Fracture of Bilateral ethmoid sinuses;
7) Fracture of Nasal bones;
8) Fracture of Nasal septum;
9) Fracture of Maxillary antral walls;
10) Bilateral pterygoid plates;
11) Bilateral LeFort III facial fractures;
12) Open nasal ethmoid complex fractures.

Despite the obvious need for both a maxillofacial surgeon and a plastic surgeon to properly rebuild Max's shattered face, he was not seen by either at UTMB. We had agreed that he should see both specialists and in attempting to locate outstanding doctors in both fields, we were fortunate to be referred to Dr. Michael Eisemann, who is Board Certified in both plastic surgery and otolaryngology and who specializes in both maxillofacial and plastic surgery.

Dr. Eisemann diagnosed an untreated nasal fracture and depression of the right frontal bone, a right orbital enophthalmos with depression of the right globe; a nasal airway obstruction with nasal septal deviation and nasal pyramid deformity; centric posterior occlusion and loss of a number of anterior teeth with loss of bone substance. With respect to the initial maxillofacial surgery, Dr. Eisemann has indicated that Max needs the following:

Septorrhinoplasty -	$4,500
Enophthalmos Reconstruction -	6,000
Right Lower Lid Reconstruction -	2,800

The $13,300 listed above represents the doctor's fee for the first round of reconstructive surgeries which Dr. Eisemann will undertake. With the addition of the hospital, anesthesiology, and radiology costs it is anticipated that an additional $20,000 will be required for these three surgeries, bringing the total to $33,300.

Dr. Eisemann indicates that the second round of maxillofacial surgeries will involve the right frontal bone fracture and the right temporal bone fracture. After maxillofacial reconstruction is completed, Dr. Eisemann will undertake plastic surgery to correct as much of Max's present scarring and the additional scarring which will result from the new surgeries as possible. At this time, we have not obtained an additional cost estimate for the second round of maxillofacial surgery or the plastic surgery which will follow.

e. Multiple Comminuted Open Mandibular Fractures

1) Fracture of right mandibular symphysis;

2) Fracture of left mandibular symphysis;
3) Fracture of right mandibular condyle;
4) Fracture of left mandibular condyle;
5) Refracture of right mandibular symphysis.

The refracture of the right mandibular symphysis occurred at UTMB when a doctor, attempting to examine Max's teeth pulled his lower lip with such force as to refracture the right mandibular symphysis. At this time the fracture still exists but between Dr. Eisemann and Dr. Reed, hopefully this additional fracture will be corrected.

f. Damage to Cranial Nerve VII

Cranial Nerve VII is the facial nerve which contains both motor fibers and sensory fibers. The motor component is of greater clinical importance since it innervates all of the muscles of facial expression. Thus, paralysis of these muscles is a particularly distressing symptom which Max is having to endure. The sensory fibers are components of the facial nerve which conveys taste sensations from the anterior two-thirds of the tongue.

The facial nerve moves from its nucleus in the brain stem, branches out in numerous directions in order to innervate the muscles of facial expression. These muscles include the occipito-frontalis muscle within the scalp and the platysma, a thin layer of muscle beneath the skin in the front of the neck. When the facial nerve is damaged traumatically, as in Max's case, a condition called Bell's Palsy results.

The clinical picture of Bell's Palsy is characteristic. The corner of the mouth droops, the normal creases and folds of the skin of the face are flattened, and the eyelids will not close. Because the lower eyelid droops, tears often spill onto the cheek. Another manifestation of Bell's Palsy is that food collects between the teeth and the cheeks and saliva may drip from the corner of the mouth. In Max's injury, the trigeminal nerve was also damaged which results in a loss of sensation on the right side of his face.

Since Max's damage included the petris part of the temporal bone, the taste sensation from the anterior two-thirds of his tongue has been impaired.

Additionally, one of the small branches of the facial nerve known as the stapedius acts to draw back the stapes, one of the tiny bones of the hearing apparatus. In Max's case, paralysis of the stapedius has resulted in hyperacusis, a painful sensitivity to loud noises.

Max is suffering from a peripheral facial palsy which includes damage to the orbicularis muscle which squeezes the eyes shut. Since Max is unable to completely shut his right eye, he experiences difficulty with constant irritation of the eye due to dryness and irritation during sleep. The Bell's Palsy, when traumatically induced, is permanent. Therefore, Max is confronted with a lifetime of loss of sensation in the face, inability to control the right eyelid, deprivation of taste sensation in two-thirds of his tongue, painful sensitivity to loud noise, and paralysis of facial muscles which result in both unsightly and embarrassing disfigurement of his face.

g. Trauma to the Teeth and Mouth

The blow to the face, in conjunction with the mandibular fractures, resulted in the fragmenting of several of Max's teeth. He inhaled and swallowed several of the fragments which remain in his lungs at this time. The multiple displaced fracture of the teeth have resulted in the following:

1) Four incisors fragmented;
2) Two canine teeth fractured;
3) Teeth fragments in lungs.

Dr. Eisemann referred Max to Dr. Gerald M. Reed, a Board Certified Oral Surgeon, who expressed urgency concerning the need to undertake immediate repair of the major problems with Max's mouth, teeth and gums. Dr. Reed states:

> In this case the fractures of the upper and lower jaws were reduced by bar reduction and the teeth wired to stabilize the jaws during the healing process. Fracture root tips and teeth are left alone. With the mouth being wired shut there is not ability to have any oral hygiene and massive decay occurs during the many weeks healing period. Also in this case the jaws could not be set properly for the bite and replacement of the condyles. The bones heal out of proper alignment and the condyles being displaced do not allow for proper centric and vertical of the teeth.
>
> Dr. Reed made the following findings on x-ray and visual examination:
>
> 1) Fracture loss of several teeth;
> 2) Massive decay of many teeth;
> 3) Generalized pockets of infection in bone;
> 4) Periodontal disease of most of remaining teeth;
> 5) Bone deterioration;
> 6) Infection;
> 7) Rampant decay - multiple teeth decayed down to bone line due to inability to provide oral hygiene;
> 8) Shifting of the teeth;
> 9) Teeth sheared off at the bone line due to trauma;
> 10) Normal ability to open mouth three to four inches reduced to one inch;
> 11) Presence of pain in the mouth explains inability to eat resulting in 80 pound weight loss.

Dr. Reed suggested the following treatment plan for Max which will be undertaken in three phases:

Phase 1:

> Prophylactic readiness of the mouth for decay elimination and control of the periodontal problems. This is done in conjunction with exercises and appliances for physical therapy to stretch muscles and increase the patient's ability to open the mouth so that treatment can be instituted.

Phase 2:

> Debridement of all decay and removal of any teeth or tooth roots unable to be salvaged simultaneous with placement of dental implants and bone grafts to:
>
> 1) Save the bone from resorption
> 2) Provide anchors for the attachment of future prosthesis.

Phase 3:

Rehabilitative reconstruction of the dental arches for function and cosmetics with prosthetic replacement for the teeth.

Dr. Reed estimates that these procedures will take twelve to fourteen months and may take even longer if graft healing and implants do not progress as anticipated. He will also coordinate with Dr. Eisemann with respect to the plastic surgery so that the number of surgeries which will have to be performed on Max can be held to a minimum. The anticipated cost for the dental aspects of this case will be between the range of $35,000 to $40,000 plus at least 15,000 for hospital, anesthesiology and radiology costs.

The urgency of correcting Max's immediate problems was stated by Dr. Reed as follows:

Time is of the essence in the commencement of this patient's treatment both for the patient's inability to eat but also for the rapid deterioration of the teeth, possibility of acute infection, and conservation of bone structure vital to the success of the case.

h. Additional Head Injuries

The additional head injuries which Max suffered include the following:

1) Multiple lacerations, intraoral, face;
2) Lacerated tongue and oral-gingiva;
3) Lacerated left ear;
4) Bilateral auditory canal lacerations with significant hemorrhage;
5) Bilateral raccoon eyes with subconjunctival edema and hemorrhage;
6) Restriction on ability to open mouth;
7) Retrobulbar hemorrhage;
8) Bilateral preseptal edema.

Fortunately most of these problems have resolved without long term sequelae. The restriction on Max's ability to open his mouth more than one inch due to the misalignment of his facial bones has combined with his severe dental problems to make eating a major chore. The constant pain in his mouth has also reduced his eating to the point where he has now lost a total of eighty pounds since the accident.

i. Chest Injuries

1) Eight rib fractures - right;
2) Eight rib fractures - left;
3) Widened mediastinum.

The severe blow to Max's chest which transected his aortic arch, also fractured sixteen ribs and widened his mediastinum. This proved to be extremely painful to Max when it became necessary to use a rib separator in order for the cardiac team to reach the operative field for the aortic arch repair. Max describes the spreading of his sixteen fractured ribs as indescribably painful. Obviously, nothing could be done to repair the rib fractures so Max is now destined to go through life with a greatly weakened rib cage which restricts his ability to lift heavy objects without severe pain in his chest. The significance of this to Max is that he was a drywall installer prior to the accident and customarily lifted very heavy 4 x 8 boards on a regular basis, a function he can no longer perform.

j. Chest and Lung Complications

Due to his severely weakened condition in the hospital, Max developed the following chest and lung complications:

1) Pneumonia - this condition, combined with his other lung complications, caused the medical team grave concern during Max's early hospitalization.

2) Atelectasis - the partial collapse of Max's lungs resulted from both the pleural effusion and the pneumothoraces. This led to extreme difficulty in breathing and caused grave concern to Max during his hospitalization. Not only was he having difficulty breathing but the gasping for breath caused an exacerbation of the pain involved in the 16 rib fractures.

3) Bilateral pneumothoraces - a pneumothorax is a puncturing of the pleura, undoubtedly caused by the fractured ribs, which allows air into the pleural cavity, resulting in partial collapse of the lungs. Removal of the air from both pleural cavities was a very painful experience for Max.

4) Bilateral pleural effusion - This obviously resulted from puncturing of the pleura by the rib fractures and simply exacerbated both the pain and the overall complications which Max experienced as result of the devastating blow to the chest.

5) Extensive subcutaneous emphysema.

k. Right Ulnar Fracture

The major significance of the fracture of the right arm is that it serves as an indicator of the devastating physical injuries which Max endured and the pain which he was enduring in the hospital. The fracture of the right arm was not diagnosed until Max's sixteenth day of hospitalization.

l. Right Lower Extremity Fractures

Max has a permanent limp and a permanent diminution in the utilization of the right lower extremity due to the multiple fractures which he suffered from the pelvis down to the tibia.

1) Right pelvic fracture - The fracture of the pelvis has caused a misalignment in the right hip which contributes to the severe limp which Max has in his gait.

2) Gross deformity right hip joint - The deformity of the right hip joint also contributes to the misalignment of the right lower extremity and will be exacerbated by age and arthritis.

3) Right Patellar fracture - Max is under the care of Dr. Arthur Jansa, a highly qualified Board Certified Orthopedic Surgeon who is currently seeking to determine whether Max has bone fragments in the right knee. Dr. Jansa is of the opinion that the right lower extremity does not need any further orthopedic work at this time with the possible exception of bone fragments in the knee.

4) Right segmental tibial fracture - This fracture has been successfully pinned through the use of an intramedullary nail and is not causing any particular problem at this time.

m. Extreme Depression

Extreme depression which was diagnosed at UTMB is currently being evaluated by the neuropsychologist, Dr. Larry Loggan. In his neuropsychological evaluation Dr. Loggan states:

> In the area of emotional functioning, he reported significant levels of depression and anxiety and indicated that he is having difficulty falling asleep and staying asleep.

Under the heading of behavior observations, Dr. Loggan made the following observation:

> Although Mr. Hubbard's mood and affect were jovial during much of the evaluation, he became sad and morose when talking about the impact of the accident on his life and circumstances.... At times he became teary-eyed and his voice quavered during the discussion of his injuries, but he seemed embarrassed by his emotional reactions.

In the personality assessment of Max Hubbard, Dr. Loggan states that:

> Mr. Hubbard is experiencing very high levels of emotional distress as a result of the injuries that he sustained in his accident of November 20, 2005. He is experiencing a particularly high level of depression and grief as a result of the injuries which he sustained and the major changes in his life situation that have resulted. Most of the time he experiences a very strong underlying feeling of gloom and despondency.... In reality, he is experiencing very intense emotional distress as a result of the grief, depression, and loss of self esteem that he has suffered.

n. Reduction of Hearing in Right Ear

Dr. Eisemann has determined that Max appears to have a slight right conductive hearing loss. At this time we do not have a prognosis with respect to the future condition of the hearing loss.

2. Surgical Procedures - Past

a. DATE: 11-20-05
DIAGNOSIS: Traumatic Aortic Arch Disruption
PROCEDURE NO. 1:
Repair of traumatic aortic arch transection with No. 20 double velour woven dacron graft.
PROCEDURE NO. 2:
Left atrial to aorta Biomedicus bypass.
PROCEDURE NO. 3:
Diagnostic Peritoneal Lavage
DOCTORS:
Dr. J. B. Zwischenberger - Faculty
Dr. Anthony J. DeRiso,III - Assistant
DIAGNOSIS: Gross Deformity Right Hip Joint
PROCEDURE NO. 4:
Closed Reduction of Right Hip
DOCTORS:
Dr. William Phillips - Faculty
Dr. Kelly Sandiford - Resident
DIAGNOSIS: Right segmental tibia fracture
PROCEDURE NO. 5:
Placement of Long Leg Splint and Foot Plate on Right Lower Extremity
DOCTORS:
Dr. William Phillips - Faculty
Dr. Kelly Sandiford - Resident
PRE-DIAGNOSIS: Multiple cranial facial trauma
PROCEDURE NO. 6: Direct Laryngoscopy
PROCEDURE NO. 7: Tracheoscopy
PROCEDURE NO. 8: Tracheostomy
PROCEDURE NO. 9:
Examination of Head and Neck Under Anesthesia
PROCEDURE NO. 10:
Lavage and Closure of Multiple Facial Lacerations
POST-OP DIAGNOSIS:
1) Bilateral LeFort II Fractures;
2) Multiple comminuted, open mandibular fx.
3) Open, nasal ethmoid, complex fractures;
4) Intra-oral and lip lacerations;
5) Multiple complex facial fractures;
6) Laceration of left ear;
7) Possible bilateral temporal bone fx.
DOCTORS:
Dr. Chester L. Strunk, Jr. -Faculty
Dr. Bruce A. Scott - Resident
Dr. Denise V. Guendert -Assistant

****

b. DATE: 11-23-05
DIAGNOSIS:
Right Segmental Tibia Fracture
Right Patellar Fracture
PROCEDURE NO. 11:

Closed Reduction, Statically Locked Intramedullary Rodding, Right Tibia With Proximal and Distal Interlocking Screws.

PROCEDURE NO. 12:

Open Reduction and Internal Fixation, Right Patellar.

DOCTORS:

Dr. E. Burke Evans - Faculty
Dr. Carl Hicks - Resident
Dr. Maxwell Prud'Homme - Assistant

****

c. DATE: 11-28-05

DIAGNOSIS:

PROCEDURE NO. 13:

Left Subclavian Central Venous Catheter Placement

****

d. DATE: 11-29-05

DIAGNOSIS:

Severe Facial Trauma With Bilateral LeFort II Fractures;
Bilateral, Orbital, Blow-Out Fractures;
Optic Nerve Damage On Right Side.

PROCEDURE NO. 14:

Repair of Facial Fracture Using Open Reduction and Internal Fixation and Facial Degloving Approach.

PROCEDURE NO. 15:

Intermaxillary Fixation of the Mandible.

PROCEDURE NO. 16:

Open Reduction and Internal Fixation of the Mandible.

PROCEDURE NO. 17:

Right Lower Canine Tooth Extraction.

PROCEDURE NO. 18:

Left Medial Canthal Tendon Repair.

PROCEDURE NO. 19:

Bilateral Nasal Antral Windows.

PROCEDURE NO. 20:

Repair of Multiple Facial Fractures With Open Reduction and Internal Reduction.

PROCEDURE NO. 21:

Septoplasty and Cartilage Harvesting.

PROCEDURE NO. 22:

Bilateral Orbital Blow-out Fracture Repair With Repair of Inferior Orbital Rims and Then Cartilage Replacement to Repair the Orbital Floors Bilaterally.

PROCEDURE NO. 23:

Open Reduction and Internal Fixation of Multiple Facial Fractures.

DOCTORS:

Dr. Chester Strunk - Faculty
Dr. Francis B. Quinn - Faculty
Dr. Lane Smith - Resident
Dr. Daniel Slaughter - Assistant
Dr. Paul Fulmer - Assistant

SURGICAL REPORT:

1) Near complete blindness in right eye - 20/400;
2) Free floating segment of symphyseal area with bilateral parasymphyseal fractures;
3) Two plates established on mandibles;
4) Lower and upper compression plates;
5) Completely comminuted free floating zygomatic bone;
6) Severely comminuted zygomatic arches;
7) Orbital rims extensively fractured; corrected with mini plate and compression plate;
8) No change in vision post-surgery other than ease of movement of right eye.

DIAGNOSIS:

Multiple Facial Fractures;
Bilateral Blow-out Fracture.

PROCEDURE NO. 24:

Examination of Right Eye Under Anesthesia.

DOCTORS:

Dr. Wayne March - Faculty Surgeon
Dr. Marsha Soechling - Resident Surgeon

****

e. DATE: 12-5-05

DIAGNOSIS: Right Ulnar Fracture

PROCEDURE NO. 25:

Placement of Long Arm Cast -Right Arm

DOCTORS:

Dr. Maxwell Prud'Homme

3. Health Care Providers

The nature and extent of Max Hubbard's injuries were so devastating that to date he has been seen by approximately eighty (80) doctors whose names appear in his medical records. In addition, there were innumerable nurses, EMTs and therapists who combined efforts to save Max's life and assist him in beginning his rebuilding process. The following is a list, in chronological order, of the principle health care providers who have served Max Hubbard:

a. AMOCO CHEMICAL EMS
BILL TURNIPSEED
TIM MARTIN
MR. FERNANDEZ

b. CITY OF ALVIN EMERGENCY MEDICAL SERVICE
216 WEST SEALY
ALVIN, TEXAS 77511
713-388-4360
JIM TOTTY
CRAIG LARIVIERE

c. HERMANN HOSPITAL LIFE FLIGHT (OUTPATIENT)
6411 FANNIN
HOUSTON, TEXAS 77030-1501
713-797-3770
DWIGHT PEAKE, M.D. - FLIGHT SURGEON
GEORGIE BROWN - R.N.
RICHARD HOLLIS - EMT

d. UNIVERSITY OF TEXAS MEDICAL BRANCH HOSPITAL
GALVESTON, TEXAS 77550-2766
409-772-2626
A total of 68 doctors appear in Max's chart at the University of Texas Medical Branch. The following are the doctors who participated in the 25 surgical procedures.

e. BURKE EVANS, M.D. - ATTENDING PHYSICIAN
MAXWELL PRUD'HOMME, M.D. - ATTENDING RESIDENT
CHESTER STRUNK, M.D.
WAYNE MARCH, M.D.
MARSHA SOECHLING, M.D.
DANIEL SLAUGHTER, M.D.
FRANCIS B. QUINN, M.D.
LANE F. SMITH, M.D.
DR. ZWISCHENBERGER
WILLIAM PHILLIPS, M.D.
DENISE GUENDERT, M.D.
BRUCE SCOTT, M.D.
KELLY SANDERFORD, M.D.
CARL HICKS, M.D.
ANTHONY J. DeRISO, III
PAUL FULMER, M.D.

f. ST. MAXWELL MEDICAL CENTER
TIM SCANLAN, M.D.
V.P. OF MEDICAL AFFAIRS
CSJ HEALTH SYSTEMS
3600 E. HARRY
WICHITA, KS 67218
316-689-5303
E. D. KATER, M.D. RADIOLOGIST
3600 EAST HARRY
WICHITA, KANSAS 67218
316-689-6000

g. CENTRAL KANSAS RADIOLOGICAL GROUP CHARTERED
1100 S. CLIFTON - SUITE B
WICHITA, KANSAS 67218
316-686-4150

h. DOCTORS - WICHITA, KANSAS
DR. JOHN R. PROVENZANO
ORAL & MAXILLOFACIAL SURGERY
1515 S. CLIFTON, SUITE 120
WICHITA, KANSAS 67218
316-681-3757
JANE DRAZEK, MD.

ORTHOPEDIC SURGEON
3600 E. HARRY
WICHITA, KS 67218
(316) 689-4974
ROBERT CLARK, M.D.
PLASTIC SURGEON
7015 E. CENTRAL
WICHITA, KS 67206
(316) 652-9333
DOUGLAS K. STIGGE, O.D.
OPTOMETRIST
1202 MORO
MANHATTAN, KS 66502
913-539-6051

i. HOUSTON - FUTURE MEDICAL
GERALD M. REED, D.D.S.
DIPLOMATE - AMERICAN BOARD OF ORAL IMPLANTOLOGY/
IMPLANT DENTISTRY
3634 GLEN LAKES LANE
MISSOURI CITY, TEXAS 77459
713-499-3993
LARRY LOGGAN - NEUROPSYCHOLOGIST
NATIONAL ACADEMY OF NEUROPSYCHOLOGIST
7707 FANNIN, SUITE 200
HOUSTON, TEXAS 77054
(713) 797-6773
CONARD MOORE - NEUROOPHTHALMOLOGIST
DIPLOMATE - AMERICAN BOARD OF OPHTHALMOLOGY
7000 FANNIN, SUITE #S-10
HOUSTON, TX 77054
(713) 797-9100
MICHAEL EISEMANN - OTOLARYNGOLOGIST/PLASTIC SURGERY
DIPLOMATE - AMERICAN BOARD OF OTOLARYNGOLOGY
DIPLOMATE - AMERICAN BOARD OF PLASTIC SURGERY
6550 FANNIN, SUITE 2119
HOUSTON, TX 77054
(713) 790-1771
THOMAS DeBAUCHE - CARDIOLOGIST
DIPLOMATE - AMERICAN BOARD OF INTERNAL MEDICINE
DIPLOMATE - AMERICAN BOARD OF CARDIOVASCULAR DISEASE
11301 FALLBROOK, SUITE 130
HOUSTON, TX 77065
(713) 890-8588
ARTHUR M. JANSA - ORTHOPEDIST
DIPLOMATE - AMERICAN BOARD OF ORTHOPEDIC SURGERY
1213 HERMANN DRIVE
SUITE 470
HOUSTON, TEXAS 77004
(713) 521-9541

4. Follow-up Care

It is obvious from a review of the UTMB medical records that, despite the number of doctors in attendance, Max Hubbard received the absolute minimum medical care during his hospitalization due to his lack of medical insurance. While it is true that the medical staff saved Max's life, it is also true that despite the devastating injuries to the bones in his face, Max was never seen by a maxillofacial surgeon; despite the obvious devastation to his teeth, he was never seen by an oral surgeon; despite the obvious damage to his optic nerve resulting in legal blindness in the right eye, he was never seen by a neuro-ophthalmologist; despite the diagnosis of a closed head injury, he was never seen by a neuropsychologist; despite the loss of hearing in his right ear, this was never treated by an otolaryngologist; and despite the obvious multiple scarring, Max was never seen by a plastic surgeon.

On discharge, Max was unable to obtain any additional medical care either in the form of medical follow-up or rehabilitative therapy despite the fact that upon discharge from John Sealy, Max was advised that he should see the following medical specialists for follow-up care:

1) Oral Surgeon for the extensive dental repair;

2) Otolaryngologist for the loss of hearing in the right ear;

3) Ophthalmologist for the blindness in the right eye;

4) Neuropsychologist for the closed head injury;

5) Orthopaedic Surgeon for follow-up on the multiple fracture repairs;

6) Cardiologist for regular checks on the dacron graft on the aortic arch;

7) Plastic surgeon for the repair of the scarring; and

8) Axillofacial surgeon for resetting and restructuring of the bones in the face.

C. SPECIAL DAMAGES

1. Medical Expenses Accrued:

CITY OF ALVIN EMERGENCY MEDICAL SERVICE 10-13-91	$ 70.50
HERMANN HOSPITAL LIFE FLIGHT OUTPATIENT 10-13-91	$4,104.25
UNIVERSITY OF TEXAS MEDICAL BRANCH HOSPITAL 10-13/11-16-91	$94,756.88
UNIVERSITY OF TEXAS MEDICAL BRANCH HOSPITAL - PHYSICIANS BILLING	$18,020.00
PROFESSIONAL BUILDING PHARMACY 11-11-91 Tall Crutches, Platform Attachment, Reacher, Bath Sponge	$138.25
CENTRAL KANSAS RADIOLOGICAL SERVICES	$70.00
DR. JOHN R. PROVENZANO 12-11-91, 4-6-92	$100.00
ST. MAXWELL MEDICAL CENTER - 12-11-91	$162.00
DOUGLAS K. STIGGE, O.D. NORBERT E. STIGGE, O.D. 3/26/92 - Eyes	$256.68
MANHATTAN MEDICAL SUPPLY	$160.63
DR. DUNSFORD - UTMB PATHOLOGY 11/1/91, 11/4/91, 11/11/91	$77.25
DR. HARRISON, UTMB PATHOLOGY 11/1/91, 11/4/91, 11/11/91	$37.50
DR. LUCIA, UTMB PATHOLOGY 11/1/91	$36.75
DR. BRITT FELTNER	$63.00
DR. LARRY LOGGAN	$3,200.00
DR. CONARD MOORE	$180.00
DR. MICHAEL EISEMANN	$250.00
DR. THOMAS DEBAUCHE	$1,295.00
TOTAL PAST MEDICAL	$122,978.69

2. Medical Expenses (Future)

To date we have not been able to fully determine the nature and extent of the medical expenses which will be required in order to help Max reach his maximum medical and psychological recovery. This is because much of the medical repair will have to be done in phases, the nature and extent of which cannot be determined until each preceding phase is completed.

Due to Max's inability to open his mouth more than one inch, it will be necessary for Dr. Reed to conduct the initial surgery under general anesthesia in order to relax the ligaments and open Max's mouth to reach the operative field. Additionally, due to the extremely painful nature of the implantation surgery and the nature and extent of the dental work that will be required, each of his surgeries will have to be conducted under general anesthesia.

Dr. Reed will work closely with Dr. Eisemann in an effort to conduct much of the dental work in conjunction with the maxillofacial repair in order to avoid the necessity of placing Max under a general anesthetic any more than absolutely necessary. However, based upon information presently available we know that Max Hubbard's future medical will consist of at least the following:

a.	Psychotherapy, rehabilitation and vocational:	$207,100
b.	Maxillofacial (1st round)	33,300
c.	Oral Surgery	50,000 - 55,000
d.	Plastic Surgery	Unknown

Minimum total $290,400

3. Damage to Wage Earning Capacity

Dr. Larry Loggan did an extensive vocational rehabilitation evaluation on Max Hubbard which predicated his projections of damage to wage earning capacity. Dr. Loggan has determined that Max's total loss of wages over his work life expectancy will be $394,331, predicated on the assumption that Max receives all of the necessary medical, psychological, and neuropsychological treatment that he will require in order to return to competitive employment. Dr. Loggan states that "if he does not receive the necessary rehabilitation, reasonable medical/vocational probability is that he will never be able to participate in competitive employment."

D. GENERAL DAMAGES

Considering the permanent brain damage which Maxwell Hubbard has suffered herein, this is an excellent case for use of the per diem argument. A per diem calculation, which we will present through our expert witnesses will be to the effect that Max Hubbard, as of June 16, 2008, has a life expectancy of 40.5 years and a work life expectancy of 31 years.

For purposes of calculation of future damages, Max has a life expectancy of 40.5 years or 14,783 days, calculated from October 13, 2008, the date of the trial setting herein. When computing his damages on an hourly basis we calculate at 16 waking hours per day for a total life expectancy of 236,528 conscious hours of life expectancy.

1. Physical Pain and Suffering

Max Hubbard has experienced so many different types of physical pain and suffering as a result of this tragedy that it will take at least three to four hours of testimony in order to cover them in detail for the jury.

Max has endured the obvious physical pain that accompanies a dislocated hip, a pelvic fracture, a shattered knee cap and fractured tibia; the incalculable pain of enduring the separation of the rib cage in order to repair the aorta when Max had sixteen rib fractures; the pain associated with the smashing of every major bone in the face; the pain associated with the internal injuries including massive blood loss and enduring total physical pain throughout one's body to such an extent that a simple fracture of the right arm goes unnoticed for a period of fifteen days.

In addition to the pain which Max has suffered in the past, he endures pain every day of his life. The pain associated with the numerous injuries to his mouth is so extensive that he has been unable to eat with the resulting loss of eighty pounds.

In addition to the obvious physical pain which Max is continuing to suffer on a daily basis, he also must look forward to suffering one of the worst forms of pain over the next twelve to fourteen months as he undergoes $50,000 - $55,000 worth of dental work to repair the teeth that have been fractured, sheared off at the bone line and decayed due to the lack of dental hygiene while his mouth was wired shut. Since the maxillofacial surgery was not timely conducted during his hospitalization at John Sealy, Max can also look forward to the refracturing of facial bones in order to reset them in proper alignment as well as treatment of the condyle symphysis which was refractured during his stay at John Sealy.

2. Mental Anguish

We anticipate that the minimum amount which we will ask a jury to award for compensation for the multiple types of mental anguish which Max Hubbard experiences on an hourly basis will be $5.00 per hour for future damages for the remainder of his life.

Max was diagnosed at John Sealy Hospital as suffering from extreme depression. In the neuropsychological workup conducted on Max, Dr. Loggan describes Max's emotional distress as follows:

> He is experiencing very high levels of emotional distress as a result of the injuries that he sustained in his accident on November 20, 2005. He is experiencing a particularly high level of depression and grief as a result of the injuries which he sustained and the major changes in his life situation that have resulted. Most of the time he experiences a very strong underlying feeling of gloom and despondency.

Proof of mental anguish will require a total of three to four hours of evidence which I will not detail herein because the nature and extent of the devastation resulting to Max's life and outlook on the future is obvious. We will prove the mental anguish which obviously accompanies the physical injuries which he has endured, his extreme concern over his inability to earn a living; his emotional problems arising from the obvious need for an additional $300,000 worth of medical and psychological care which he is unable to afford; and his loss of self esteem which is particularly exacerbated by the feeling that his looks are repugnant to those with whom he comes in contact. We will discuss his obvious fear of death and the various forms of mental anguish such as embarrassment, humiliation, frustration, stress and social stigma which attach to his devastating injuries.

3. Physical Disability

With respect to the element of physical disability, we anticipate asking the jury to award on the same basis as the mental anguish since his physical disability is extreme, obvious and permanent.

We will prove that Max can no longer participate in the numerous means of enjoying life which occupied considerable time prior to the injury. Our proof will include his inability to hunt, fish, shoot firearms, race motorcycles, bowl, read, social activities, and the many other means that Max had of enjoying life before this injury.

In describing Max's physical disability Dr. Larry Loggan stated as follows:

> He has had a significant decrease in his energy and enthusiasm about life. Previously he was a very exuberant and active young man who had a zest for life and enjoyed it to its fullest. Now he has lost interest in many of the normal activities which he enjoyed previously and is unable to participate in most of them. Even a sedentary pleasure like reading is unavailable to him due to his limited abilities to concentrate. As a result of his depression he is experiencing significant disturbances in sleep and appetite.

4. Disfigurement

There are numerous elements which a jury may consider with respect to Max Hubbard's disfigurement including the facial scarring, the scarring on his back, leg, stomach and throat; the unusual gait in the form of a heavy limp due to severe injuries to his right lower extremity; the distorted angle of his facial features; the inability to smile; the inability to close his right eye; the inordinate rapid weight loss and the loss of teeth. All of these contribute to an overall appearance of Max which is considerably different than his appearance prior to the accident. Each of these elements will be considered carefully by the jury when deciding upon the amount of money to be awarded Max for his obvious disfigurement.

In his neuropsychological analysis of Max Hubbard, Dr. Loggan states the following with respect to Max's disfigurement and the effect which it has on him:

> Mr. Hubbard has experienced a severe decline in his self concept. Prior to his injuries he was a relatively self-confident young man who felt good about his physical appearance, intellectual abilities, and social skills. Now he feels ugly and unattractive and feels extremely insecure about his ability to provide for his financial needs in the future. Although Mr. Hubbard's mood and affect were jovial during much of the evaluation, he became sad and morose when talking about the impact of the accident on his life and circumstances. He was particularly upset about the disfigurement of his face and lamented that no woman would ever be interested in marrying a man who looked like him.

We will offer considerable evidence with respect to the social stigma which Max endures on a daily basis as a result of the disfigurement.

VII. JURY VERDICT POTENTIAL

A.	ACCRUED DAMAGES	
	1) Physical Pain and Suffering	$148,800
	2) Mental Anguish	$148,800
	3) Physical Disability	$148,800
	4) Disfigurement	$148,800
	5) Medical	$122,978
	6) Damage to Wage Earning Capacity	$18,755
B.	FUTURE DAMAGES	
	1) Physical Pain and Suffering	$236,528
	2) Mental Anguish	$2,365,280
	3) Physical Disability	$946,112
	4) Disfigurement	$1,892,224
	5) Future Medical Expenses	$275,400
	6) Damage to Wage Earning Capacity	$375,576
C.	TOTAL VERDICT POTENTIAL:	$6,843,053

VIII. STRUCTURED SETTLEMENT DEMAND

We have discussed the possibility of settling this case on the basis of a structured settlement. In order to be certain that we have a clear understanding prior to attempting to negotiate a structured settlement, we feel that it is important for you and your client to be fully aware, that in addition to the foregoing provisions, we will only consider a structured settlement which includes the following provisions:

1. Plaintiff reserves the right to approve the life insurance company from which the annuity is purchased. This must be an A+ Superior XV, A.M. Best rated company.
2. We agree to use a § 130 Qualified Assignment, however, Plaintiff reserves the right to approve the assignee. It is our usual position not to approve a mere shell company as an assignee. However, this may be subject to approval based upon the strength of the annuity company.
3. Any annuity used as a qualified funding asset must be at least a 30 year certain and life with the claimant as the annuitant;
4. We will consider at least a 3% annual increase in the structure so as to hedge against inflation;
5. The cost to the liability insurance carrier of Defendants' proposed package must be disclosed to the independent structured settlement specialist utilized by Plaintiff herein in order to provide a basis for the comparative shopping of the structure so that the maximum benefits may be achieved for Plaintiff.

Our independent structured settlement specialist has already obtained several quotes providing numerous alternatives for our client. . All brokers involved in this claim should be apprised in advance that the annuity will be placed with the company which provides the best benefit package structured in the manner most cost effective for the plaintiff.

If you have any questions with respect to any of these prerequisites to negotiation of the structured settlement, please feel free to call on me and we will attempt to reach a mutual understanding so that the insurance carrier's structured settlement specialist and the independent specialist utilized by the plaintiff will be shopping for the same type of structured settlement. It has been my experience that if we can have a clear understanding in the beginning as to what the plaintiff's minimum requirements are with respect to a structure, that this will save a considerable amount of wasted effort by your structured settlement specialist shopping for the wrong type of annuity and will also expedite the resolution of this claim.

IX. CONCLUSION

This case is set for mediated settlement conference on Monday, June 16, 2008 at which time we will offer additional evidence as to the devastating injuries which currently plague Max Hubbard as a result of the negligence of the defendant. As is my customary practice, we will make every reasonable effort to reach a fair and equitable settlement of this case at the mediated settlement conference. If we are unable to settle the case in mediation, we are perfectly agreeable to taking our chances before a Brazoria County jury on October 13,2008.

In order to fully prepare this case for trial on October 13, 2008, we will all have to spend considerable sums of money and expend a lot of time, effort and energy in trial preparation. This we are certainly willing to do. However, what we are not willing to do is to expend large sums of money and effort on trial preparation and then settle the case on the courthouse steps. Since this is no more in your interest than in ours, we should agree that if we are not able to settle the case on June 16th, we should terminate settlement negotiations and ask a jury of fine citizens from Brazoria County to resolve our dispute.

If you feel that any other information which we have is necessary in order to help you reach a determination as to the value of Max Hubbard's damages lawsuit, please call me immediately and we will Fed Ex it to you prior to our June 16th meeting.

Your cooperation in this matter is greatly appreciated.

Sincerely,

Howard L. Nations

ENDNOTES

1. Sedwick & Judge, The Use of Annuities in Settlement of Personal Injury Cases, 41 Ins. Counsel J., 584 (1974). [The authors give three examples of successful defense structuring. In the first, the insurer had an estimated liability of $500,000.00. Demands had reached $1 million. The settlement was structured at an actual cost to the insurance company of $180,000; a savings of $320,000.00. The second and third cases involved brain damage cases; one a child, the other a housewife. Both were settled for substantial savings. The insurer realized an additional savings by the early death of one of the recipients. A fortuitous event for the defendant because the reversionary interest was retained by the insurer and resulted in "a substantial return of funds to the insurer".]

2. See 41 Ins. Counsel J., 584 (1974).

3. Letter Ruling 8333035, Private Letter Ruling May 16, 1983. The Service has consistently taken the position that knowledge is not determinative in deciding a question of constructive receipt, but that unqualified availability is decisive. Rev. Rul. 6-126, 1968-1 C.B. 194; Rev. Rul. 73-99, 1973-1 C.B. 412; Rev. Rul. 74-37, 1974-1 C.B. 112; and Rev. Rul. 76-3, 1976-1 C.B. 114; all set forth conclusions consistent with this position. See Appendices A and D.

4. See, e.g., Krause, Arguments For and Against The Use of Structured Settlements, Sixteenth Annual SMU Air Law Symposium, 75 (Feb. 18-20, 1982).

5. Keene & Ross, Structured Settlements, Business Insurance, April 28, 1980 at 25.

6. Manglesdorf, Structured Settlements in Review: The Fundamental Concept, 4 Am. J. Trial Advoc., 559 (1981). "The size of the insurance company is based on its policyholder reserves and is classified by Best in increasingly large categories of I to XV. Best also issues an annual rating of all the life insurance companies based on the caliber of management. The ratings go from 'A+' (excellent) or 'A' which indicates the next best managed companies to 'B+' (very good), 'B' (good), 'C+' (fairly good), and 'C' (fair)." Best can be contacted by writing to:

A.M. Best Co.
Ambest Road
Oldwick, N.J. 08858

7. Danninger, Johnson & Lesti, The Economics of Structuring Settlements, 19 Trial, 42 (1983).

8. Letter Ruling 8333035, Private Letter Ruling May 16, 1983. The Service has consistently taken the position that knowledge is not determinative in deciding a question of constructive receipt, but that unqualified availability is decisive. Rev. Rul. 6-126, 1968-1 C.B. 194; Rev. Rul. 73-99, 1973-1 C.B. 412; Rev. Rul. 74-37, 1974-1 C.B. 112; and Rev. Rul. 76-3, 1976-1 C.B. 114; all set forth conclusions consistent with this position.

9. Davis & Stroud, How to Plan a Personal Injury Suit, & Tax'n For Law. 12 (1979). [From the contents of the pleadings or settlement papers, the service will categorize the recovery into taxable and non-taxable items such as lost wages and personal injury damages. If the taxpayer cannot rebut the interpretation of the service the taxpayer is bound to that interpretation.]

10. [Tex. Rev. Civ. Stat. Ann. Art. 4671.]

11. Welcher, Structured Settlement Expert as Defense Economist, FOR THE DEF., June 1983, at 27.

12. See, e.g. Holcomb, Using an Annuitist at Trial, FOR THE DEF., Aug., 1986, at 8; Kolts, Use of Structured Settlement Expert Proves Effective, FOR THE DEF., Oct. 1983, at 4; Moore.

13. The law governing the testimony of an annuitist varies by jurisdiction. A partial collection of relevant cases appears in Annotation. Cost of Annuity as a Factor for Consideration in Fixing Damages in Personal Injury or Death Action, ILL. TRIAL LAW, A.M., June 1988, at 63.

14. United States v. Tomasion, 784 F.2d 782, 786, (7th Cir. 1986; See also, FED.R.EVID. 701(b) & 702.

15. Middleton and Shaffer, How to Counter the Biases of Annuity Witnesses, 25 TRIAL June 1989, at 73.

16. FED.R.EVID. 703 and advisory committee's note to Rule 703.

17. See, e.g., GA. CODE ANN. Sec. 51-12-13 (1982) (future earnings discounted to present value at 5 percent annual interest rate).

18. See, e.g., Botta v. Brunner, 138 A.2d 713 (N.J. 1958); Annotation, Per Diem Basis for Determining Damages for Pain and Suffering, 3 A.L.R. 4th 940 (1981); 22 AM. JUR. 2d Damages, Sec. 1006 (1988).

19. Annuity-cost testimony was allowed into evidence as relevant in Vicksburg & Meridan R.R.Co. v. Putnam, 118 U.S. 545 (1886); Guinn v. Kansas City S.R.R.Co., 547 P.2d 1310, 1314 (Okla.Ct.App. 1962). But see (annuity cost not admissible) Taylor v. Burlington R.R.Co., 787 F.2d 1309, 1315 (9th Cir. 1986); Diede v. Burlington N.R.R.Co., 772 F.2d 593, 596, (9th cir. 1985); Farmers Union Federated Coop. Shipping Ass'n. v. McChesney, 251 F.2d 441. (8th Cir. 1958); Herman v. Milwaukee Children's Hosp., 361 N.W. 2d 297 (Wis.Ct.App. 1984); State v. Guinn, 555 P.2d 530, 547 (Alaska 1976).

20. Curry, Doyle and Roth, Carl, Use of the Economist/Annuitant, Personal Injury and Wrongful Death Institute, 1987, State Bar of Texas