Telling the Damages Story: Effectively Proving Damages at Trial

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TELLING THE DAMAGES STORY:
EFFECTIVELY PROVING DAMAGES AT TRIAL

CHRISTOPHER F. HOLBROOK, ESQ.

1. Effective trial lawyers are story tellers
    a. Storytelling
        i. Everyone has a story to tell
        ii. Have to know your client's story
        iii. In order to know what their damages are – have to know their life story
    b. Get to know the injured party
        i. Should know their personal life and history
        ii. Upbringing, spouses, children, hobbies, jobs etc.
        iii. Want to connect plaintiff to the jury when illustrating harm sustained
2. Facts are important. The law is important.
    a. *Both are meaningless to a jury without the context of a story*
3. Why?
    a. Stories are attention getters
        i. More interesting than reciting medical charts etc.
    b. People remember stories
    c. People identify with stories
4. Need proper ammunition
    a. Ovid (Roman poet):
        i. "qui non est hodie cras minus aptus erit" (*"he who is not prepared today will be less so tomorrow")*
    b. Need to be prepared with:
        i. Defendant's conduct/safety rule violation
        ii. Knowledge of client
        iii. Knowledge of medical history

iv. Proper expert workup (economic loss, future meds etc)

5. Where to start
    a. Need a theory
        i. Know what your damages case is about
        ii. If you cannot figure out what your damages story is about, most assuredly, the jury will not know either
    b. Story must make sense
    c. Should be compelling and easy to follow
    d. Evidence must be consistent with your theory
    e. *Should never be the scatter-shot approach*
        i. Defendant example: it was degeneration. But if it was causally related the surgery was not needed. If the surgery was needed then she made a great recovery. If she did not make a great recovery the plaintiff miscalculated medical costs and lost earnings.
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7. Defendant's conduct
    a. Accountability: defendant harmed plaintiff and needs to be held accountable
    b. Even in "damages only" trial it is relevant
        i. Defendant cannot admit harm and walk away with no repercussions
        ii. The type of negligence often bears on the injury
8. Burden of proof
    a. Remember burden of proof applies the same to both liability and damages
    b. More likely than not that this was substantial factor in harming the plaintiff
9. Defendant's conduct always relevant
    a. What about a "minor impact" case?
        i. Defendant conduct still relevant to damages story
        ii. Defense can argue all day long that you can not hurt anyone at 5mph-10mph
        iii. So is it safe to text and drive as long as you are going between 5mph-10mph?
        iv. Is it ok to not pay attention when going 5mph-10mph?
        v. Would anyone be ok with their child being in a crash if it was with a vehicle going "just" 5mph-10mph?
10. Defendant's conduct relevant to amount of money damages
    a. Consider:
        i. When def. says that plaintiff is asking for too much money he is saying what he believes.
        ii. They say it because they don't place a value on p's well-being. If they did, they would not have broken the safety rule that put P in this position.

iii. They say it's because they are protecting their own interests. Their money. Look at the steps they have taken to protect that. Fine lawyers. Expensive doctors. A 2 week trial.

iv. How come that same effort did not go into the selection of who would be driving their trucks?

v. Because roadway safety was not important to them. That is why. And that is why p got injured. And that is why we are here.

11. <u>New York law regarding defendant's conduct and damages awards</u>

a. You have proven the defendant is responsible

b. You have proven the plaintiff is harmed

c. You now want to empower the jury to send message in their verdict regarding defendants disregard for safety and compensate your client

d. Court of Appeals has made distinction between punitive damages and compensatory. It is punitive that are intended "to deter [the] wrongdoer and others similarly situated from indulging in the same conduct in the future." *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 489, 491 (2007).

e. In addition, you can't make blatant "community safety" arguments to prejudice the jury. See, e.g., *Norton v. Nguyen,* 49 A.d.3d 927 (3rd Dept. 2008); *Halftown v. Triple D Leasing Corp.,* 89 A.d.2d 794 (4th Dept. 1982).

f. Can't frame argument as to the community. The court of appeals has established that the plaintiff "[must] be able to point the finger of responsibility at a defendant owing, not a general duty to society, but a specific duty to him." *Johnson v. Jamaica Hospital,* 62 N.Y.2d 523, 527 (1984) (citing *Kalina v. General Hospital of Syracuse,* 13 N.Y.2d 1023 (1963)).

g. Cannot ask the jury to place itself in the plaintiff's shoes in determining damages. See, e.g., *Wilson v. City of New York*, 65 A.d.3d 906 (1st Dept. 2009); *Liosi v. Vaccaro*, 35 A.d.2d 790 (1st Dept. 1970).

h. Look to foreseeability as relevant to the defendants conduct argument.

    i. PJI 2:12 defines "foreseeability"

        1. Negligence requires both a reasonably foreseeable danger of injury to another and conduct that is unreasonable in proportion to that danger. A person is only responsible for the results of his or her conduct if the risk is reasonably foreseeable. The exact occurrence or exact injury does not have to be foreseeable; but the injury as a result of negligent conduct must be not merely possible, but probable.

    ii. *There is negligence if a reasonably prudent person could foresee injury as a result of his or her conduct, and acted unreasonably in the light of what could be foreseen.* On the other hand, there is no negligence if a reasonably prudent person could not have foreseen any injury as a result of his or her conduct, or acted reasonably in the light of what could have been foreseen.

i. Ok to argue that the injury would not have occurred had the defendant chosen a safer alternative. As an example, the Appellate Division, Third Department discussed the statements made by plaintiff's counsel during summation in a premises case, to the effect that the accident would not have occurred had the defendant's employees performed floor cleaning after business hours and while

the store was closed. The Third Department held that counsel's arguments, in the context in which they were made, constituted a fair comment on the evidence because they were relevant to the issue of foreseeability. *Winter v. Stewart's Shops Corp.*, 55 A.d.3d 1075 (3rd Dept. 2008).

12. Using term "full and fair"
    a. Def. does not get to choose which items they feel like being responsible for
    b. If negligent, law requires compensation to be full and fair. Hits on all areas of verdict sheet
    c. No one questions amount of money to repair a car. How much more is a person's health and well-being worth than a car?
13. Who should bear the burden of these losses?
    a. If compensation not full then the plaintiff, not the def. At fault, bears the burden
14. Anchor numbers
    a. Need a number to anchor to
    b. That number should rarely (if ever) be past medical expenses
    c. Consider whether even admitting them into evidence.
        i. Do they assist in telling the damages story?
        ii. What are you actually recovering (offsets etc.)
15. Using the anchor number
    a. Use your economic workup to bolster the pain and suffering
    b. "The economic losses pale in comparison to the losses sustained in this woman's life. What sum of money fairly compensates her for the loss of enjoying what should be the prime of her life? "
16. Never stretch your damages case and sacrifice credibility
    a. Be upfront with the jury
    b. Your client should do the same

c. Impossible to effectively tell the damages story if credibility is compromised
    i. "*before you know what to believe, you have to know who to believe"*
    ii. "*if you can't trust the messenger, you can't trust the message*"
d. Reason why defendants should be wary of telling their story through a suspect DME
e. Reason why plaintiffs should avoid "over-pleading"
f. Common issues
    i. Plaintiff has made good recovery
        1. Must embrace the facts
        2. Don't stretch your credibility
        3. Juries like the injury/recovery story – use it to your benefit
        4. People embrace stories of people overcoming adversity – it is interwoven in the fabric of American culture
    ii. Surveillance
        1. Often a good explanation
        2. Not the whole story (just a slice of the footage)
        3. Plaintiff is not going to let defendant take away experiences they want their children to enjoy
        4. Might pay the price afterwards (look for chart to support)

17. <u>In every trial there is a point where both sides' "stories" are compared</u>
    a. Jurors want to "pick a side"
    b. It is one of two things. Which makes more sense?
        i. *In a civil action we ask ourselves what is more likely to be the case? Not what is 100% the case. Not what is beyond a reasonable doubt. It is ok to have doubt. Just what is more*

likely. The judge will tell you the definition of preponderance of evidence.

ii. *You need to take the credible evidence, the believable evidence and divide it. One side is the plaintiff. One side is the defendant. If it weighs even the slightest to the plaintiff – the verdict is for the plaintiff.*

18. Def. theme is lawsuit lottery? You are in Suffolk/Nassau/ Westchester.
    a. Revert back to defendant's conduct and not taking responsibility
    b. Flip the theme. What has P won? A lifetime of pain and suffering? Through no fault of his own can never get a good night sleep or play ball with his kid? If this is a lottery – who is buying a ticket for that?
19. Plaintiff has "baggage" and def. tries to frame case around that
    a. Back to def. conduct
        i. Def. does not get a free pass because plaintiff committed a crime 8 years ago
        ii. That is just another excuse def. is attempting to use to avoid responsibility
        iii. Pain and suffering. They don't discriminate. Rich or poor. Saint or sinner. And the law does not discriminate either.
        iv. Ask yourself why def. would want you to consider this?
20. Damages Story
    a. Starts in voir dire
    b. Outlined in opening
    c. Brought to life in direct
    d. Contrasted in cross-examination
    e. Summarized in closing
21. Case Law
    a. Good discussion by court of claims regarding life care plans and economic analysis
    b. *Dupont v. State of New York*, *867 N.Y.S.2d 16* (No. 108040, April 22, 2008)

"In order to determine the total cost for each life care plan, and to assess the amount of loss earnings Kayla will suffer, both parties presented the testimony of experts. For purposes of the life care plan, the parties stipulated to a life expectancy for Kayla of 16 years from November 29, 2006.

***25** David L. Hopkins is a self-employed actuarial economic consultant. He applies mathematics, statistics, statistical modeling and basic financial theory to situations where it is necessary to determine how much money must be set aside today, or on a regular basis, to provide the appropriate funding for various future payments. He has been working in this field for the past 26 years. He has evaluated the economic impact of a personal injury in thousands of cases, and he has testified just over 400 times in several states, including New York. In this particular case, based upon the complete disability of Kayla, he determined a loss of earning capacity for a normal work-life period, taking into consideration the reduced life expectancy, and he calculated the projected cost of the medical care and her needs, with appropriate increasing factors for inflation over time. To project the future cost of Kayla's medical care, he included an inflationary increase the same as for the projected earning capacity of 3% per year; however, he also included an additional option which provides for a more significant increase of 6 ½ %, based upon his opinion and calculations that medical costs have been increasing at a higher rate than overall inflation.*

The loss of earning capacity includes a consideration for changes to the level of earnings that occur in a normal working career due to inflation, merit and productivity, and life cycle changes. Mr. Hopkins utilized statistics from the U.S. Department of Commerce, Bureau of Census, to determine average earning levels for females by educational attainment and age grouping. He applied a 3% inflationary factor based upon statistics from the Department of Labor, Department of Commerce, and the Economic Indicators Publication. Mr. Hopkins initially determined Kayla's normal life expectancy and then her work-life expectancy, based upon educational attainment. He referenced the educational background of Kayla's parents, who both have high school diplomas, and statistics indicate that the anticipated educational level for a child is generally equal to, or better than, the parents. Mr. Hopkins, therefore, utilized a working life beginning after a high school diploma, and alternatively an Associates Degree and a Bachelor's Degree, and continuing until a normal retirement age of 65. An additional allowance of 20% was made for fringe benefits. Included in the fringe benefits was health insurance coverage, employer contributions, and other insurance, a portion of the mandatory contributions to Social Security and FICA, and pension or retirement benefits. A deduction was also made for Kayla's personal consumption expenses, that portion of her income that would be spent on food, shelter, clothing, etc., which varies upon educational attainment from 38% for a high school graduate, 34% with an Associate's Degree and 30% with a Bachelor's degree. The reduction for taxes range from 10% with a high school diploma, 12% with an Associate's Degree and 14% with a Bachelor's Degree. No deduction was made for FICA contribution. The personal consumption deduction, Mr. Hopkins only applied to the period of time from Kayla's life expectancy through to normal retirement age, as he reasoned that during her lifetime she would be consuming or incurring those expenses.

***26** Mr. Hopkins' report reflects that the future lost earning capacity with inflation, if Kayla entered the work force with a high school diploma would be $3,530,416, $4,464,920 with an Associate's Degree, and $5,688,779 with a Bachelor's Degree. With*

Kayla's life expectancy reduced to roughly age 30, that earning capacity, less personal consumption and income taxes, would be $2,684,216 for a high school diploma, $3,438,718 for an Associate's Degree, and $4,455,853 for a Bachelor's Degree.

On cross-examination, Mr. Hopkins acknowledged that he did not take into account that the life care plan provides for all of Kayla's medical care in calculating her personal consumption deduction or the fringe benefit calculation. Mr. Hopkins explained that he didn't take that into account because he viewed the life care plan as reflecting the additional cost of medical care as a result of the personal injury Kayla suffered and the anticipated costs may not cover all of her needs over time. In explaining why he did not consider the FICA employee contribution in his calculations, Mr. Hopkins stated it was because the contribution also has a value for the employee, which he has already included in the level of lost earning capacity. Mr. Hopkins reiterated that no personal consumption deduction should be made during Kayla's life expectancy, because she will be still incurring those expenses for her daily living.

Utilizing the life care plan prepared by Ms. Patterson, Mr. Hopkins calculated the annual costs year by year and then calculated the future costs for Kayla's care at home and in a facility. Some of the items calculated include one-time costs and others are regular costs that reoccur annually. Measuring the costs Ms. Patterson set forth for the duration of Kayla's life expectancy, he included an across-the-board 3% inflationary factor for each year after the first year, and alternatively a 6.5% increase. Mr. Hopkins breaks down the costs on a year-by-year basis in his report, and a larger sum is shown for the first year and again at age 21 to accommodate the one-time costs. Based on his calculations, the total future costs, to age 30, for at-home care with a 3% inflationary increase would be $11,177,739. At a 6.5% inflationary increase, the future cost would be $14,569,939. The total cost for facility care, with a 3% inflationary increase, is $5,364,060 until Kayla reaches age 30, and $6,764,847, with a 6.5% inflationary increase.

Defendant presented the testimony of Dr. Lawrence M. Spizman, a full-tenured Professor of Economics at the State University of New York at Oswego. He has worked at that university since 1977. Dr. Spizman specializes in labor economics, forensic economics and law, and economics. Forensic economics, Dr. Spizman described, as a subarea in the economics field which takes data and information and projects losses. As of December 2006, when this claim was tried, Dr. Spizman had worked on 37 cases that year, assessing personal injury and/or wrongful death or wrongful termination damages. Dr. Spizman has testified in other cases as an expert witness. Dr. Spizman compiled a report[45] *calculating the expected loss of earnings and future medical costs and then did a revised report, based upon the parties' stipulated life expectancy to age 29.87. Based upon that life expectancy Dr. Spizman calculated Kayla's lost earning capacity to that age. Dr. Spizman utilized a model which projects the probability of Kayla obtaining different educational levels, from not finishing high school, to getting a high school diploma, to completing some college getting a Bachelor's Degree, Master's Degree, or a Ph.D. The probabilities at either end are small, with the greatest probability (54.8%), that she would have obtained a high school diploma. He then took the probability of the various educational attainments and looked to statistics from the Census Bureau to determine potential earnings for a female in different age groups. Based upon this information, he prepared tables reflecting the various educational attainments, the age earning profiles for females at the different educational levels, and arrived at Kayla's*

projected earning loss, with adjustments for personal consumption, growth rates, and a "smoothing process."[46] *He also added 4.3% for fringe benefits for retirement and savings. He based this upon data for all civilian workers by major occupational and industry groups. Dr. Spizman did not provide an addition for the cost of health insurance as all of Kayla's medical care is covered by the life care plan, and he felt it would provide a double recovery for her health expenses. Personal consumption expenses were deducted for all of Kayla's work-life expectancy, which in Dr. Spizman's proposal is the same as her life expectancy, based on his reasoning that the life care plan provides, in options 2 and 3, for Kayla's residential care and, thus, she will not incur typical living expenses. He calculated self-consumption levels for a one person, female, family-unit at 97.7 %, with the percentage decreasing as income increased utilizing the Patton–Nelson Personal Consumption Tables 2000–2001.*

***27** In Table 3 of Dr. Spizman's report, he sets forth the probability of attaining various educational levels, the earnings for the various educational levels, and the adjustment for probability to calculate a total earnings capacity loss of $95,023. This is a present-value calculation, after adding fringe benefits and deducting personal consumption.*

*Dr. Spizman also calculated the future cost for Kayla's care through her life expectancy, based upon the **life care plan** prepared by Mr. Stickney. He utilized the cost to meet Kayla's needs as set forth in Mr. Stickney's **life care plan**, calculating in a growth rate for each component, based upon the Consumer Price Index for medical care services and then projected that out into the future 16 years. The cost for each component of the **life care plan** is set forth on a year-by-year basis with the cumulative totals. Table 1 of his report is a compilation of all the cumulative calculations for each component and option of the **life care plan**. Tables 4 through 14 break down the cost of each component of the **life care plan** for the three options and includes a growth rate of 2.65% for projected future medical evaluations and therapeutic modalities, based upon the medical care component of the Consumer Price Index. A growth rate of only 1.39% was used for wheelchair needs, accessories, and maintenance. Utilizing the medical care commodities component of the medical care Consumer Price Index, Dr. Spizman used a 2.93% growth rate for aids for Kayla's independent function, home furnishings and accessories, and supply needs, and 3.66% for medication. He increased the cost for in-home care and facility care to 4.09%, again based upon the nursing home services component of the Consumer Price Index. The costs for transportation for Kayla are only increased by .82%, based upon a less than 1% growth rate, according to the Consumer Price Index. The growth rate for physicians' services is 3.53%. From Table 1, Dr. Spizman calculated the total cost for total in-home care for Kayla at $6,278,313. The cost for Kayla's care at a skilled nursing facility is $2,778,725, and for Mr. Stickney's blended care in Option 3, Dr. Spizman calculated the cost to be $6,064,523.*

On cross-examination, when questioned about limiting Kayla's loss of earning potential to her reduced life expectancy, Dr. Spizman noted that in his original report[47] *he calculated Kayla's loss of earning capacity to normal retirement age, which, for a high school graduate, he assessed at roughly 51 years or $544,947. This calculation includes fringe benefits through life expectancy and takes the personal consumption deduction throughout her work life expectancy, assuming all Kayla's needs would be met by placement in a residential skilled nursing facility in Mr. Stickney's options 2 and 3. Instead, if Kayla receives 24–hour in-home care, no personal consumption deduction*

should be taken during her life expectancy and, as a result, her total loss of earnings capacity would be $979,000. Dr. Spizman could not calculate the present value of that number at trial. He agreed that since his economic analysis is based upon the costs set forth in Mr. Stickney's report, if there were errors in that report, his economic analysis would also be incorrect.

***28** The Court finds that Kayla's loss of work expectancy should be calculated to a normal retirement age of 65 years. Loss of earning potential would not be compensatory if calculated only to her shortened life expectancy (see Doe v. State of New York, 189 A.D.2d 199, 206). It is very unlikely that, without the catastrophic injuries Kayla suffered, she would have only worked until age 30. The Court also finds suspect that a worker with a high school education will leave the work force at age 50.92, as calculated by Dr. Spizman, almost 17 years before being eligible for Social Security Benefits. The Court finds that, based upon her parents' educational background, Kayla would have acquired at least a high school education. Although, as Dr. Spizman calculated this loss, the percentage likelihood that Kayla would have attained a higher degree is factored into the total work-loss expectancy.*

Both experts set forth average earning levels for females in various age ranges with a high school education. Mr. Hopkins had a range of earnings beginning at the age of 18 at $20,580 up to $32,324 for the age range of 60 to 64 years. Dr. Spizman had a range of earnings beginning at $18,285 up to $26,511 for the age range of 55 through 64 years. Given these ranges of earnings, the Court has averaged the two to arrive at a range of earnings at the following ages:

*Both experts used similar percentages of annual inflationary increases, and the Court accepts the 3% per year increase for a high school graduate. A percentage of lost earnings also requires factoring in the loss of fringe benefits. Fringe benefits include payments an employer would have made to retirement accounts, health insurance, life insurance, contributions to Social Security, and FICA taxes. Mr. Hopkins calculated in 20% for fringe benefits. Dr. Spizman calculated in 4.3%, reasoning that he excluded the cost of health insurance since most of Kayla's medical needs are being met by the **life care plan**. The Court takes issue with the exclusion of health insurance benefits, as at best, the **life care plan** only covers a small portion of Kayla's working life, and this portion of the award is to compensate her for the loss of benefits she could have earned but for the injuries suffered at the hands of defendant. The Court finds the 20% inclusion for fringe benefits appropriate.*

Deductions from projected earnings are made for personal consumption expenses and income taxes. The deduction for personal consumption should be made only for Kayla's projected work life beyond her life expectancy, or from 30 until age 65. Dr. Spizman, using the Patton–Nelson Personal Consumption Tables 2000–2001: Updated and Revised assessed that, on average, 97.7 % of income for lower income wage earners is spent on self-consumption. Mr. Hopkins assessed that 38% of a high school graduate's income is spent on personal consumption and 10% on income taxes. There is no indication from his testimony or his report how Mr. Hopkins came up with the 38% personal consumption expenses. However, the Court finds the 97.7 % deduction high. Instead, the Court finds that an average of the two is more appropriate and calculates that 67.85% of Kayla's projected future earnings as a high school graduate would have

been spent on personal consumption and income taxes.

***29** Based upon the foregoing, the Court finds that Kayla's loss of future earnings is $1,582,422(R).*

*Each expert's economic analysis of the **life care plans** are problematic. Each expert utilized the **life care plans** as set forth in total by Ms. Patterson and Mr. Stickney. Although the Court finds Ms. Patterson's **life care plan** more complete and appropriate, there were certain components that need to be removed or adjusted, as described above. Mr. Hopkins takes an annual inflationary increase for all items in Ms. Patterson's **Life Care plan** of either 3% or 6.5%. Dr. Spizman utilized a different percentage for each component of the **Life Care Plan**, as each service or item has a different rate of historical inflation. This seems a more accurate approach. Accordingly, based upon the adjustments described above to Ms. Patterson's **Life Care Plan**, and including the inflationary rates identified by Dr. Spizman for each component of the **Plan**, the Court finds the future cost for the following services/items throughout Kayla's life expectancy: Medical Care:$ 957,600 Therapeutic Modalities:$ 466,575 Supplies and Equipment:$ 311,000 Wheelchairs:$31,134 Nursing Services:$8,445,000 Home Modifications:$ 156,435 Transportation:$ 174,000 Security:$9,645 Total Cost for the **Life Care Plan** for At Home Care: $10,551,389 Total Lost Earnings: $1,582,422(R) The Court awards $1,200,000 for past pain and suffering and $1,500,000 for future pain and suffering. Recapitulation: Past pain and suffering:$1,200,000 Loss of future earnings:$1,582,422 Future Medical and Related Expenses:$10,551,389 Future pain and suffering:$1,500,000 Total award for future damages:$13,633,811 TOTAL AWARD: **$14,833,811** Since the amount of future damages exceeds $250,000, a structured judgment is required (CPLR 5031).[48] Let judgment be held in abeyance pending a hearing pursuant to CPLR Article 50–A and to determine collateral source issues (CPLR 4545[a]). The Court encourages the parties to agree upon an attorney fee calculation and the discount rate to be applied to formulate a structured settlement of their own (CPLR 5031[f]).[49] In the event that the parties cannot reach such an agreement, each party will submit a proposed judgment in writing, conforming to the requirements of CPLR 50–A, within 120 days of the date this Decision is filed with the Clerk of the Court. A hearing will thereafter be scheduled at the mutual convenience of the parties and the Court with regard to the collateral source issues and the structured judgment. To the extent claimant has paid a filing fee, it may be recovered pursuant to Court of Claims Act § 11–a(2). All motions made at trial and not heretofore ruled upon denied."*

An Introduction to Economic Damages

Presented by
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Managing Director
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Why Retain an Economic Expert

- To evaluate economic losses
- To help assess exposure

The But-For Scenario

- What the world would have been like, but for a particular incident
- The role of assumptions
- Jury charges
- Reasonable degree of economic certainty or probability

Typical Incidents

- Personal injury (Med Mal / Labor Law)
- Wrongful death (Med Mal/Labor Law)
- Constructive discharge, discrimination, harassment, failure to promote, etc. (employment related matters)
- Wrongful incarceration

Common Elements of Economic Damages

- Lost earnings
- Fringe benefits (e.g., health coverage, retirement benefits, stock options, etc.)
- Services
  - Household
  - Parental nurturing
  - Special care services

Common Elements of Economic Damages (continued)

- Future medical costs (life care plans)
- Compensation for Excess Taxes (tax gross up)

Lost Earnings and Fringe Benefits

- Adults
  - Documentation of earnings (or lack thereof)
  - Statistical data
  - Union records
  - Undocumented workers
- Children
  - Educational attainment of parents and siblings
  - Lifetime earnings

Lost Services

- What types of services would a person have provided, but for an incident?
- Quantity (number of hours per week person would have provided such services)
- Duration of services
- Determining the economic value of such services

Future Medical Costs

- The role of your economist
  - Project how much costs of care will increase each year going forward
  - Reduce future costs to present value
- The role of your life care planner
  - Determine what types of care are needed
  - Determine the frequency of the care that is required
  - Determine the current cost of the necessary care

Issues Related to Trial Testimony

- Collateral Sources (50A / 50B)
- Personal Injury – Med Mal (CPLR 4111)
- Wrongful Death – Med Mal
- Hard copy exhibits versus electronic displays

OAS
OCCUPATIONAL ASSESSMENT SERVICES, INC.

Telling The Damages Story:
Effectively Proving Damages at Trial

Occupational Assessment Services, Inc.

Edmond Provder, C.R.C.

EDMOND PROVDER, C.R.C.

CERTIFIED REHABILITATION COUNSELOR
DIPLOMATE, CERTIFIED LIFE CARE PLANNER,
AMERICAN BOARD OF VOCATIONAL EXPERTS

OCCUPATIONAL ASSESSMENT SERVICES, INC.

What is an Employability & Earning Capacity Evaluation?

An evaluation conducted for forensic purposes that evaluates an injured or disabled persons ability to work and earn money given their residual functional capacity.

When do you need an Employability & Earning Capacity Evaluation?

- **Permanent** Injury in an adult or child
- Residuals of the injury negatively effects the Plaintiff's ability to work at pre-injury job
- Policy $300,000 or above
- Need to establish pre-injury earning capacity
- Need to establish work life expectancy (ability to work until age 70)
- Receiving Social Security Disability

WHY USE A VOCATIONAL EXPERT?

- Assess the effect of a person's medical impairment
- Determine the worth of the case
- Move the case toward settlement by justifying the amount of the demand
- Provide attorneys with a tool for trial
- Document case damages in an objective, clear and demonstrative manner

Who are Vocational Experts?

- Vocational rehabilitation specialists
- Training and experience working with traumatic and congenital disabilities
- Experience in counseling and placing disabled in jobs
- Locate employment opportunities for the disabled despite their limitations
- Knowledgeable in the types of employment opportunities and earnings of these jobs for the disabled
- Knowledge of local and national labor market
- Familiarization with state and federal wage information

Vocational Expert Qualifications

- Master's degree in rehabilitation
  - professional degree
- Certified rehabilitation counselor
  - national certification
- American board of vocational experts
  - 400 forensic rehabilitation experts
- International association of rehabilitation professionals in the private sector
  -forensic rehabilitation
- Practitioner
  -"hands on" experience working with wide range of disabilities
  – job analysis and placement experience

Verdict

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- Plaintiff – Escobar
- Verdict - $166 Million
- Injuries – Permanent Blindness and Brain Damage
- Age – Infant
- Post-Injury Earning Capacity - $0

Case Types

- Adults or children who are permanently disabled
- Automobile accidents
- Medical malpractice
- Products liability
- Premises liability
- Personal injury cases

Types of Disability

- Torn medial meniscus
- Herniated cervical or lumbar disc
- Spinal cord injury
- Upper and lower extremities amputations
- Loss of vision - blindness or loss of one eye
- Loss of hearing
- Traumatic brain injury
- Emotional limitations

Definition of Disability: Social Security Disability

*experience, physical and/or mental disabling condition that will preclude him/her from the national market for at least one year. (Social Security, 1981)

- Kerner v. Flemming, 283 F.2d 916 (2d Cir. 1960)

*Vocational Experts are professionals educated, trained, and skilled in job placement and are knowledgeable about labor market conditions. VE's are asked to formulate vocational opinions about the specific job opportunities of a person based on their age, education, background, work experience, and medical condition.

Earning Capacity

- What a person is able to earn while expected earnings are what a person is expected to earn. Actual earnings are what a person actually earned. (Horner & Sleznick, 1999)
- Ability of an individual to select an occupation they are qualified to perform or will be qualified for in the future
- Ability to earn money

Determining Loss of Earning Capacity

- What Plaintiff **could have** earned if they would not have been injured?
- What Plaintiff could earn after they were injured?
- What Plaintiff could earn after they were injured?
- Difference is the ***Loss of Earning Capacity***

Records Requested for Employability Evaluation

Collecting data and facts specific to Plaintiff

a) Medical Records – Treating, Consulting & IME

b) Hospital Records – Discharge Summary, Operative Records

c) Work Records

d) Wage Records Information – Income Tax, W2, Union Pay Scale

e) School Records

PLEASE PROVIDE THE FOLLOWING INFORMATION TO US FOR AN INITIAL EVALUATION

NARRATIVE REPORTS: **All records *must be* indexed and in a BINDER in order by: Please do not send Liability Information**

1. HOSPITAL RECORDS:
   Copy of admission sheet and discharge summary:
   Diagnostic tests – MRI, CT scans, EMG studies
   DO NOT send bills, nurses' notes, charts or hand written reports, which cannot be used.
2. PHYSICIANS RECORDS:
   Treating and consultant physician both plaintiff and defendants
3. EMPLOYMENT RECORDS:
   Job description and personnel file.
4. WAGE INFORMATION:
   Income Tax records for three (3) years prior to accident to present date if working after accident and W-2 forms
5. DEPOSITION TRANSCRIPT:
   If client was deposed
6. PSYCHOLOGICAL / PSYCHIATRIC REPORTS:
   Reports on any psychological tests that were carried out
7. ECONOMIST REPORT
8. IF CHILD, SCHOOL RECORDS:
   Entire records (not just grades)
9. Day In The Life Video Tapes / Surveillance Tapes

Standard Employability & Earning Capacity Evaluation Methodology

1. Record Review

2. Standard Vocational Diagnostic Interview

3. Vocational Analysis – Plaintiff's past relevant work

a. Classifying evaluee's past employment occupations – Dictionary of Occupational Titles "DOT" & O*Net

1. Physical Demands
2. Worker Functions
3. Specific Vocational Preparation (SVP)
4. Skill Level
5. General Educational Development

4. Vocational Testing – computerized aptitudes - Spanish

Standard Employability & Earning Capacity Evaluation Methodology –PART II

5. Vocational Diagnosis and Assessment of Residual Employability (VDARE) process

A. Transferability Skills Analysis – OASYS computer program
1. Classic Method (Work Field, SVP, MPSMS)
2. Analyze work history – skills, aptitudes, & skill level

B. Synthesizing data and information with an emphasis on his/her ability to return to work.

6. Labor Market Access (LMA) analysis
a. pre & post injury worker trait vocational profile
b. Plaintiff's ability to enter labor market
c. identifying the reasonable consequences and problems related to plaintiff's work ability & noting jobs, if any, can perform.

7. Review Materials – formulate vocational expert opinion

8. Labor Market Research – determine whether jobs exist that Plaintiff can perform within vocational capacity.

VOCATIONAL EVALUATION ASSUMPTIONS

1. Records complete & accurate
2. Cooperative & complied throughout vocational evaluation
3. Did not intentionally exaggerate or give false information regarding physical or psychological symptoms
4. History & information given during standardized vocational diagnostic interview truthful & accurate
5. Pre-accident vocational functioning is estimated within the average range based educational & occupational history
6. Physical & emotional conditions & resultant reduction vocational capacity are permanent

VOCATIONAL TESTING

a. Aptitude - Computerized

b. Skills - Clerical, Supervisory

c. Achievement Testing - WRAT 4, TABE

d. Coordination & Dexterity - Purdue pegboard, VAB Manual

e. Career Scope - standardized, timed interest & aptitude test - GATB

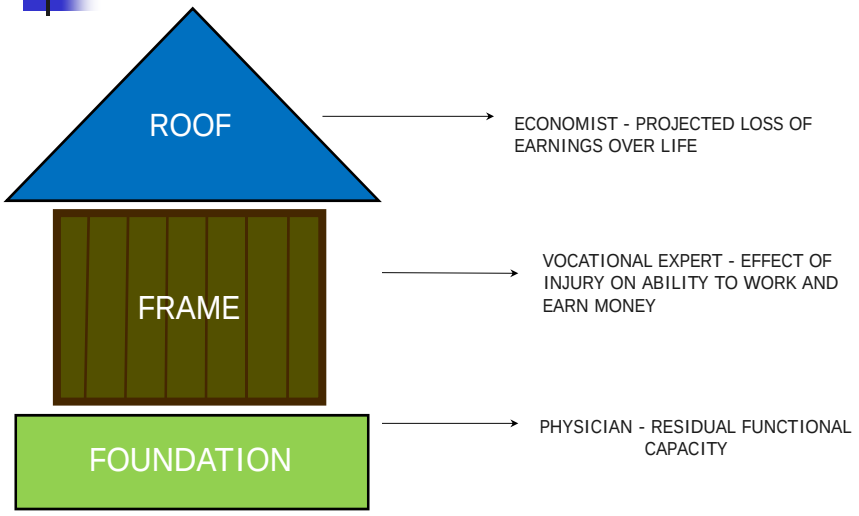
Norm Group Selection - Age, Occupation, Male/Female, Education

EMPLOYABILITY OPINION

1. Ability perform past relevant work
2. Pre-injury earning capacity
3. Transfer skills
4. Ability perform Sedentary, Light, Medium, Heavy, or Very Heavy Work on a sustained, full-time, regular, competitive basis
5. Employability/unemployable - Local Jobs listing & Wages
6. Post-Injury earning capacity - Establish work life expectancy - special circumstances

The ***secret*** sauce to develop your case damages

House of Damages: Three Part Damages Process



Physical Capacities Evaluation

Client's Name: WC#
Date of Birth: Date of Injury:

Instructions: Please describe physical capacities. This information will be used for vocational planning. You may mark "N/A." Make all comments above your signature on page 3.

Based on an 8-hour workday, 5 days per week:

Occasionally = 1/3 of workday
Frequently = 2/3 of workday
Continuously = more than ½ of workday

1. Full Work Day Capacity: and Consecutive Capacity:

Sitting:	____ hours	Sitting:	____ hours
Standing:	____ hours	Standing:	____ hours
Walking:	____ hours	Walking:	____ hours

2.

CLIENT IS ABLE TO:	Not at all	Occasionally	Frequently	Continuously
Jump				
Climb stairs				
Climb hand over hand				
Bend				
Stoop				
Reach				
Crawl				
Kneel				
Twist/rotate				
Balance				
Push/pull				

Household Services Evaluation

- Hours per week household tasks **cannot be performed**
- Additional hours per week necessary to be able to perform household tasks
- Number of hours of work done under considerable **pain and distress**
- The Dollar Value of the Day, Time Diary Analysis, 2013 Dollar Valuation

Life Care Planning

Definition: "A dynamic document based upon published standards of practice, comprehensive assessment, data analysis and research, which provides an organized, concise plan reflecting current and future needs with associated costs for individuals who have experienced catastrophic injury or have chronic care needs."

Life Care Planning : 5 Step Process

- Record Review
- Life Care Planning Interview –ADL Charts
- Development of Life Care Plan
- Geographical “Live” Specific Cost Research
- Formulation of Life Care Plan Opinion

Life Care Planning – Types of Impairments

- Adults or Children
- Spinal Cord Injuries – Paraplegics & Quadriplegics
- Brain Damage Babies
- Blindness
- Amputations
- TBI
- Reflex Sympathetic Dystrophy – CRPS
- Failed Back Syndrome

Life Care Plan Research: Range of Costs

- 3-5 Local Vendors
- Local Fees or Costs
- Prescription Drugs
- Live Research
- Research Must be Documented

The LCP Medical Recommendation Form - Medical Foundation

* Record Review
* Life Care Planning Interview - ADL Charts
* Development of Life Care Plan - Physician Foundation
* Geographical “Live” Specific Cost Research Survey
* Formulation of Life Care Plan Opinion

Medical LCP Recommendations

Medical Life Care Plan Recommendations

Evaluee: Rebecca Smith **Date:**_____

Physicians Name _____

PROJECTED EVALUATIONS

1. Does Ms. Smith require rehabilitation plan development 1 every 5 year? Yes____ No_____

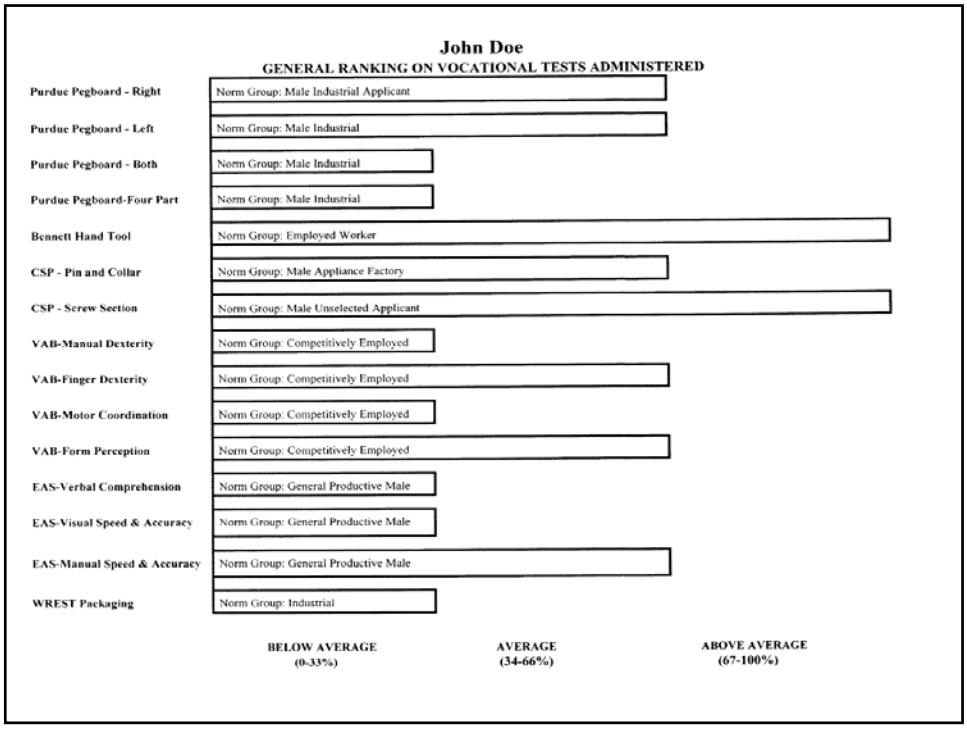
If No what is your recommendation? _____

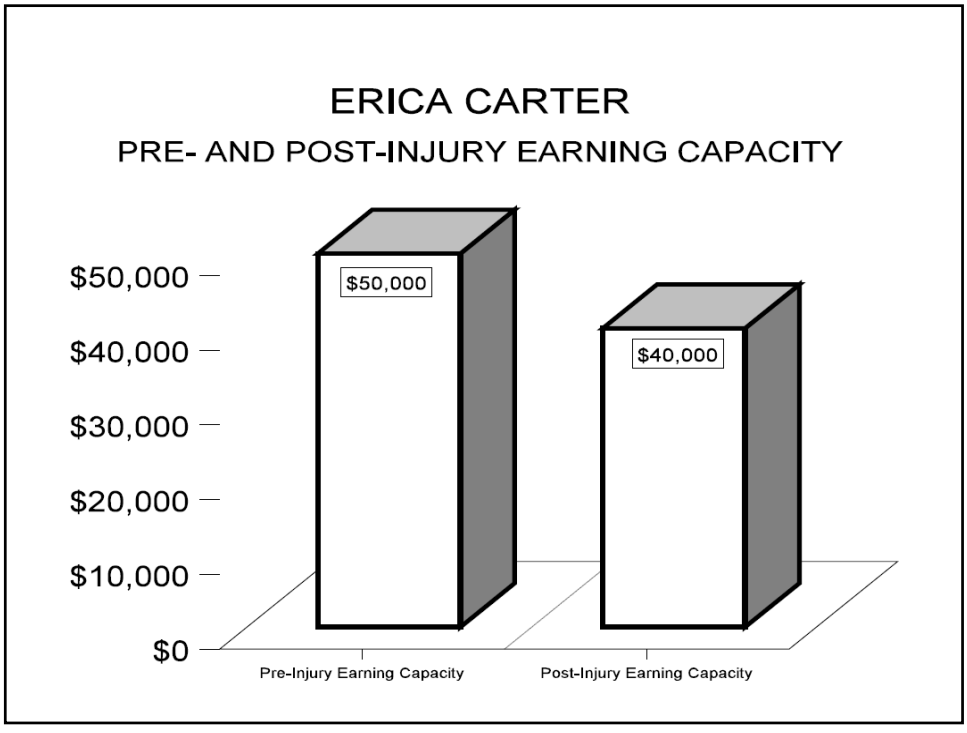
2. Does Ms. Smith require a physical therapy evaluation on a yearly basis? Yes____ No_____

If No what is your recommendation? __

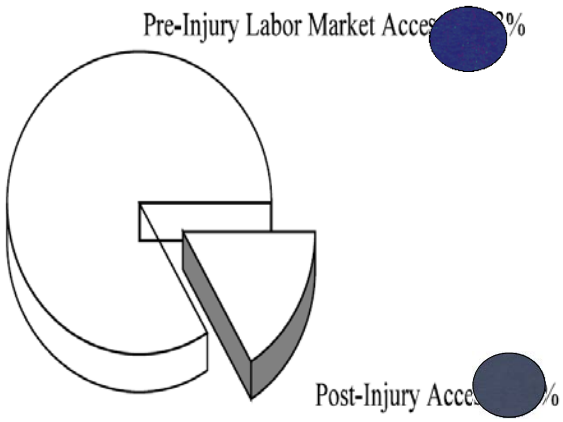
Demonstrative Evidence

- Vocational Testing Results Chart
- Pre-Post Injury Earning Capacity
- Diminished Access to Labor Market
- ADL Chart
- Life Care Chart - Home Care


John Doe
GENERAL RANKING ON VOCATIONAL TESTS ADMINISTERED
Purdue Pegboard - Right
Norm Group: Male Industrial Applicant
Purdue Pegboard - Left
Norm Group: Male Industrial
Purdue Pegboard - Both
Norm Group: Male Industrial
Purdue Pegboard-Four Part
Norm Group: Male Industrial
Bennett Hand Tool
Norm Group: Employed Worker
CSP - Pin and Collar
Norm Group: Male Appliance Factory
CSP - Screw Section
Norm Group: Male Unselected Applicant
VAB-Manual Dexterity
Norm Group: Competitively Employed
VAB-Finger Dexterity
Norm Group: Competitively Employed
VAB-Motor Coordination
Norm Group: Competitively Employed
VAB-Form Perception
Norm Group: Competitively Employed
EAS-Verbal Comprehension
Norm Group: General Productive Male
EAS-Visual Speed & Accuracy
Norm Group: General Productive Male
EAS-Manual Speed & Accuracy
Norm Group: General Productive Male
WREST Packaging
Norm Group: Industrial
BELOW AVERAGE
(0-33%)
AVERAGE
(34-66%)
ABOVE AVERAGE
(67-100%)


ERICA CARTER
PRE- AND POST-INJURY EARNING CAPACITY
$50,000
$40,000
$30,000
$20,000
$10,000
$0
$50,000
$40,000
Pre-Injury Earning Capacity
Post-Injury Earning Capacity

VALERIE DUDA
Labor Market Accessibility



Labor Market Access - Loss of 80%

NAME: John Brown
DATE OF BIRTH: 3/10/91
DATE PREPARED: 4/3/14

ACTIVITIES OF DAILY LIVING*

Activity	Dependent/Independent
Feeding	
Fix meal	Dependent
Open cans/jars/tubes/boxes	Dependent
Open containers/packages/empty contents	Dependent
Use manual or electric can opener	Dependent
Use microwave	Dependent
Use stove/oven (turn on/use)	Dependent
Refrigerator/cupboard accessible	Dependent
Open refrigerator	Dependent
Open drawers	Dependent
Transport items short distance	Dependent
Use fork/spoon/knife	Dependent
Cut with knife	Dependent
Butter bread	Dependent
Eat soup with spoon	Dependent
Make sandwich/light meal	Dependent
Reaching meal area	Dependent
Eat meal	Dependent
Get drink	Dependent
Drink from cup/glass with/without adaptation	Dependent
Hygiene	
Reach sink area	Dependent
Reach/turn faucets	Dependent
Brush teeth	Dependent
Wash and dry self	Dependent
Use shower	Dependent
Use tub	Dependent

NOTE: Limitations on activities of daily living are derived from both observed/reported disabilities and projections into the future based thereon.

Page A-1

NAME: Jennifer Drake
DATE OF BIRTH: 5/6/58
DATE PREPARED: 3/1/13

LIFE CARE PLAN - HOME CARE

Facility/Home Care Recommendations	Age/Year Initiated	Age/Year Suspended	Hours/Shifts/ Days Attendance of Care	*Base Cost Per Year
Home Attendant - Live-In Care	52 11/11	Life Expectancy	24 hours per day, 7 days per week	$69,350 - $82,125 at $190 - $225 per day

*** All growth trends to be determined by economist.**

**** Price quotes obtained from: Comprehensive Home Care Services of New Jersey, Visiting Angels, & Bayada Nurses**

Page B-11

Verdict #1

- Plantiff – J Stuart
- Verdict - $5,003,801,54
- Lost Earnings - $1,277,710
- Injuries – Comminuted Fracture Left leg, Multiple Surgeries
- Education – High School
- Occupation – Cable Television Installer
- VE Option – Cable Television Installer
- Post-Injury Earning Capacity - $10,580 - $17,455 per year

Verdict #2

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- Plaintiff – K Patrick
- Verdict - $4,700,000
- Lost Earnings - $1,700,000
- Injuries – Degloving Injury Dominant Hand
- Age – 34 Education – 11th Grade
- Occupation – Seaman
- VE Option – Unemployable
- Post-Injury Earning Capacity - $0

Verdict #3

- Plaintiff – D Brown
- Verdict - $3,912,329
- Lost Future Earnings - $2,598,829
- Injuries – Fx Pelvis, Fx Rt. Wrist & Back
- Age – 30 Education – HSG
- Occupation – Iron Worker
- VE Option – Unemployable
- Post-Injury Earning Capacity - $0

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Verdict #4

- Plaintiff – F Aaron
- Settlement - $3,100,000
- Lost Earnings - $2,598,829
- Injuries – Fx tibia, fibia & toes
- Age – 29 Education – HSG
- Occupation – Iron Worker
- VE Option – Unemployable
- Post-Injury Earning Capacity - $0

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Verdict #5

- Plaintiff – D Blacker
- Verdict - $3,000,000
- Injuries – Fx calcaneus, RSD tibia
- Age – 38 Education – HSG
- Occupation – Bricklayer
- VE Option – Unemployable
- Post-Injury Earning Capacity - $0

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Verdict #6

- Plantiff – S Allen
- Verdict - $39,333,000
- Lost Future Earnings - $4,750,00
- Injuries – Severe Brain Damage, Multiple Fx
- Age – 12 Education – 6th Grade
- Occupation – None
- VE Option – Unemployable
- Post-Injury Earning Capacity - $0

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