DAMAGES, LIENS AND SUBROGATION IN SETTLEMENT NEGOTIATIONS

IV.

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A. Assessing and Allocating Damages

1. Vehicle Damage and Diminished Value

- Vehicle Owner can claim vehicle lost value even after repair.
- Claim is based on diminished market value.
- If the vehicle is not a total loss (cost of repair is less than ~75% of the vehicle's value), the measure of damages is the difference between market value at the time of the crash and after the damaged vehicle has been repaired.
- Damages are measured by the cost of reasonable repairs necessary to restore the automobile to its original condition **together with the diminution in value of the injured property after repairs are made**. *Averett v. Shircliff*, 218 Va. 202, 206-208, 237 S.E.2d 92 (1977).
- Lay testimony is admissible to establish vehicle's value.
- By statute, value also established by NADA guide and "other published sources for vehicle values regularly used in the automobile industry".
- Expert testimony is a good idea if the claim is substantial. Va. Code Ann. *§ 8.01-419.1.*
- If vehicle is a total loss, damages are vehicle's fair market value immediately before crash.

2. Paid vs. Billed Medical Services - Collateral Source Rule

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- Collateral Sources of payment are Inadmissible at Trial.
- Collateral sources are sources of payment other than the defendant or defendant's insurer.
- Collateral sources include health insurance, medicare, medicaid, worker's compensation, disability insurance, sick leave and vacation pay, comp time, personal time, and self-pay patients.
- For an opinion affirming the right of the plaintiff to submit the full bill despite health insurance write-offs, see *Radvany v. Davis*, 262 Va. 308, 551 S.E.2d 347, 348 (Va. 2001).
- Black letter law in Virginia that a party (usually the defendant) may not introduce evidence of sources of payment collateral to the tortfeasor.
- Collateral source rule excludes evidence of payment by health insurance, medical expense coverage, medicaid, medicare or workers compensation. *Acuar v. Letourneau*, 260 Va. 180, 189, 531 S.E.2d 316 (2000) (quoting *Schickling v. Aspinall*, 235 Va. 472, 474, 369 S.E.2d 172 (1988).
- It is well-settled that an injured person is entitled to recover all damages caused by a defendant's negligence. See *Lawrence v. Wirth*, 226 Va. 408, 309 S.E.2d 315, 318 (Va. 1983) (citing *Blair v. Eblen*, 461 S.W.2d 370 (Ky. 1970)).

PRACTICE POINTER:

> For HMO's which do not generate a bill, hire a certified medical billing specialist to create a bill. See, Va Code 8.01-413.01(B). The bill is admissible if submitted in the form of an affidavit from the preparer and submitted to the opposing party within 30 days of trial.

- A loss of earnings claim may not be diminished by evidence of such as sick leave, vacation pay, and short or long term disability. *See, Va. Code 8.01-35.*

3. Medical Bills

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a. Past Medical Bills

- Can the injured Plaintiff offer admissible testimony about need for future care?
- Yes, if defendant does not object.
- No, where defendant objects to the introduction of medical bills and defendant's evidence will raise a substantial contest as to either the question of medical necessity or the question of causal relationship.
- The court may admit the challenged medical bills only with foundation expert testimony tending to establish medical necessity or causal relationship, or both, as appropriate. *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908, 914 (1989).
- *McMunn* held that proof of medical expenses by the introduction of bills through the sole testimony of the plaintiff requires consideration of four major components:

  (1) authenticity,

  (2) reasonableness in amount,

  (3) medical necessity, and

  (4) causal relationship.
- Whether a particular treatment is medically necessary and is causally related to a condition resulting from some act or omission on a defendant's part, can usually be determined only by a medical expert qualified in the appropriate field who has studied the plaintiff's particular case. See *McMunn*, 379 S.E.2d at 914.

b. Future Medical Bills

- See Virginia Model Jury Instruction 9:00(5) below.
- Best to use expert testimony to establish future medical bills.
- Can the injured Plaintiff offer admissible testimony about need for future care?
- I would not try unless the future care is *de minimus*.

4(a). Loss of Earning Capacity

- Earning capacity is to be distinguished from loss of earnings.

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- Earning capacity is defined as the ability to earn money.
- One can experience an increase in earnings after an accident and still present viable evidence of lost earning capacity.
- This would be particularly true for someone whose education or experience would likely have lead to significant promotions or even a new career resulting in a significantly higher pay scale.
- Calculate loss of earning capacity by figuring out:
    a. Work life expectancy, and
    b. Loss of earnings over work life due to injury.
- Work-life expectancy is not measured by the date one departs from the labor market; instead, it examines the number of uninterrupted years an individual would be expected to participate in the labor force.
- Work-life expectancy considers contingencies for not working, including the probabilities of dying, becoming disabled, or leaving the labor market.

4(b). Factors to Consider in Quantifying Loss of Earning Capacity

i. Age and Life Expectancy of Plaintiff

- Age of the Plaintiff is an important consideration in many respects.
- The death of a young child, who is without a history of earnings, and whose earning capacity is speculative, is usually worth considerably less than the death of a working parent, particularly a high wage earner.
- But due to life expectancy and accumulation of healthcare expenses, a serious injury with lifetime medical needs is usually valued higher for a young person than for an older person.

8.01-419. Table of life expectancy

The following **table** (below is excerpted) shall be received in all courts and by all persons having

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power to determine litigation as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the following columns:

AGE	BOTH SEXES	MALE	FEMALE
20	58.4	55.8	60.8
25	53.6	51.2	56.0
75	11.7	10.5	12.5
90	4.8	4.3	5.0

- These tables are admissible in court where the plaintiff has made a claim for permanent injury and loss of future earnings and/or loss of earning capacity.
- Most judges prefer that you mark only the line entry for the age of the plaintiff as the exhibit, as the other data is irrelevant.
- You may be able to secure a stipulation from your opponent and therefore you will not need this table as an exhibit.
- The defendant can attack the life expectancy projection by showing that the plaintiff's health, constitution and habits result in a diminished life expectancy.

- Once the life expectancy is admitted, the plaintiff may then argue for loss of earnings and loss of earning capacity up to the end of the plaintiff's "work life".
- Loss of earning capacity is case by case basis because some workers may never retire.

ii. Evaluation of Education and Work History

- These are considerations in evaluating vocational capabilities of a client, both pre-injury and post-injury.

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- The individual client's education and professional training, along with their employment history, provides a basis for evaluating their pre-injury worker traits.
- Theses traits include skills, abilities, aptitudes, and characteristics that are relevant to the work place.
- The physical and intellectual requirements of the individual's past work can be assessed by creating a worker trait profile utilized for a Transferrable Skills Analysis in the vocational assessment.

iii. Potential Vocational Re-Training Costs

- If an injured worker is a candidate for a retraining program, the costs associated with the completion of the program, along with lost wages during the duration of the program can be assessed as damages.
- This would be relevant when a retraining program would mitigate loss of earning capacity.

REAL WORLD EXAMPLE OF DAMAGE CALCULATION WITH RETRAINING

Due to injury, a hands on construction supervisor was physically limited from performing his prior work. But with enrollment into and completion of a 9 month computer assisted drafting (CAD) program, he was employable as a CAD technician. Because his earnings as a construction supervisor had been somewhat variable, but his employment as a CAD drafter was full time, he was able to return to employment as a CAD technician earning as much as he had earned previously as a construction supervisor. Damages would be include the cost of tuition and supplies and 9 months of lost wages.

- See Virginia Model Jury Instruction 9:00(7) below for loss of earnings instruction.

5. Pain and Suffering

- Read *Kondaurov v. Kerdasha*, 271 Va. 646, 629 S.E.2d 181 (2006).
- Plaintiff and her dog were in a vehicle which overturned.
- Plaintiff suffered little physical injury.

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<u>OPINION</u> (Mental Anguish and Emotional Distress)

- *We have held, for well over a century that mental anguish may be inferred from bodily injury.*
- *It is not necessary to prove it with specificity.*
- *Mental anguish, when fairly inferred from injuries sustained, is an element of damages.*
- *In the present case, the plaintiff suffered physical injury, albeit remarkably slight.*
- *Plaintiff was clearly entitled to be compensated in damages for her emotional distress.*
- *Emotional distress can be inferred from the physical impact she sustained in the accident.*
- *Such distress might include shock and fright at being struck three times, turned over, left hanging upside down in her seatbelt and experiencing physical pain.*
- *It might also include anxiety as to the extent of her injuries, worry as to her future well-being, her ability to lead a normal life and to earn a living.*
- *It might include fear of disability, deformity, or death.*
- *Such factors were proper subjects for the jury's consideration because they might fairly be inferred from the physical impact of the collisions upon her person.*
- *They might also be taken into account as factors causing exacerbation of her pre-existing mental and physical conditions.*
- See Virginia Model Jury Instruction 9:00(2) below for what the jury will hear in the case.

Virginia Model Jury Instruction 9.000 (*General Personal Injury and Property Damage*)

- This Virginia model jury instruction summarizes the claim for compensatory damages.

If you find your verdict for the plaintiff, then in determining the damages to which he is entitled, you shall consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendant:

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(1) any bodily injuries he sustained and their effect on his health according to their degree and probable duration;

(2) any physical pain [and mental anguish] he suffered in the past [and any that he may be reasonably expected to suffer in the future]

(3) any disfigurement or deformity and any associated humiliation or embarrassment;

(4) any inconvenience caused in the past [and any that probably will be caused in the future];

(5) any medical expenses incurred in the past [and any that may be reasonably expected to occur in the future;

(6) any earnings he lost because he was unable to work at his calling;

(7) any loss of earnings and lessening of earning capacity, or either, that he may reasonably be expected to sustain in the future;

(8) any property damage he sustained.

Your verdict shall be for such sum as will fully and fairly compensate the plaintiff for the damages sustained as a result of the defendant's negligence.

- This model jury instruction makes provisions for past and future losses, including wages and medical bills and pain and suffering/mental anguish/emotional distress.

B. Medical Provider Liens - Va. Code Section 8.01-66.2

Statutory Liens for Medical Providers:

- If perfected, must be paid from third party recovery.
- Hospitals & Nursing Homes- $2500.00
- Physicians, Chiropractors, Nurses, Physical Therapists, Pharmacies - $750.00
- Ambulance Services - $200.00

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- Medical provider liens are inferior to the lien of the attorney. See: 8.01-66.3.
- To perfect its lien, a provider must provide written notice to the injured person or his attorney and name the provider and assert a lien.
- Written notice is not required for Medicaid (8.01-66.9) or Medicare, which have what are considered "super liens".
- Must honor assignment even if attorney has not endorsed the assignment so long as client signed.

Query:

1. Can a hospital claim that each physician or nurse is entitled to $750 on top of the hospital's $2500?

2. And if one has two separate trips to the same emergency room for the same accident, does the hospital get to claim $5,000?

C. ERISA (Subrogation) Liens

- ERISA stands for Employee Retirement Income Security Act.
- Ascertain if client's health insurance is a qualified, self-funded healthcare plan.
- Self-funded means that the medical bills are paid from funds contributed by the company and its workers, and not by insurance purchased by either the company or the employee.
- Medical bills paid by qualifying self-funded plans are required to be reimbursed from a

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personal injury settlement.

- Free Erisa assists in determining if plan is self funded http://www.freeerisa.com/.
- Best to secure the fund's plan documents from the plan administrator to verify plan is self funded.
- Ask for Summary Plan Description and relevant annual reports and form 5500 tax forms.
- Section 1024(b)(4) requires plan administrator to furnish plan documents on request
- Penalty for failure to provide plan documents when requested.
- Large employers like hospital corporations, banks and grocery store chains use self funded plans.
- Local government plans are excluded from ERISA.
- *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 133 S. Ct. 1537 (2013).
- *McCutchen* confirmed an ERISA compliant plan's right to collect from third party recovery.
- *McCutchen* also held that if the ERISA plan did not address attorney fees, as a matter of equity the plan must share in the costs of litigation, including counsel fees.
- Unfortunately, since *McCutchen,* almost every plan does address attorney fees and requires reimbursement without sharing cost of attorney fees.
- Self funded (ERISA) plans request reimbursement by letter to the insured.
- Advise client to look for a letter from a 3rd party collector, such as The Rawlings Company.

D. Mandatory Insurer Reporting - Medicare

- Federal law requires all insurance companies issuing settlement checks to secure the SSN of the plaintiff and report that information to Medicare. If the liability insurer does not report the SSN of the plaintiff to Medicare, the insurer can be liable to Medicare if the settling party thereafter wrongfully uses Medicare to pay for accident-related

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medical care.

- Be on the lookout for a letter from the liability insurer requesting the SSN for Medicare.
- Complete the enclosed Medicare reporting form and return it to the insurer.
- But do not consent to adding Medicare as a payee on the settlement check, even if your client is an eligible recipient.

E. Tips for Successful Mediation

- Mediation is voluntary.
- Mediation involves a neutral person who attempts to convince the parties to reach a settlement.
- Prepare the client for a potentially frustrating "back and forth" over many hours.
- Insist that the claims adjuster with the money attends the Mediation. Best to have a pre-mediation settlement offer to gauge the position of the insurance company.
- Make sure you and your client are on the same page with the value of the case.
- Do not reveal everything up front to the Mediator. Keep some of your aces close to your vest.
- Understand that you may not reach a settlement.
- Make sure that you and your client are aware of any requests for confidentiality regarding the identity of the defendant and the amount paid BEFORE you conclude the settlement discussions.
- If you reach a settlement, draft a preliminary settlement confirmation and add that the check must be delivered within whatever time period you feel is reasonable.

F. Addressing Pending Liens in Settlement Negotiations

- Determine all of your client's outstanding bills and liens prior to the Mediation.
- Do not forget you may have to deal with Medicare, ERISA, FEHBA, Medicaid, and out of state providers who are not subject to Virginia's anti-subrogation statute.
- Calculate your costs.

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- Using unpaid bills, your costs and attorney fee, review the realistic range of settlement with client prior to the Mediation.
- Calculate the client's "net" based on a range of numbers representing possible settlements.
- Once the claim settles, attempt to negotiate reductions of the unpaid amounts and liens.
- Make sure that you have written confirmation of any lien reduction.

G. Subrogation

- Subrogation is the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to the loss covered by the policy.
- Simply stated, it is the right of an insurer to claim reimbursement from a third party settlement or verdict for payments made to its insured.
- Subrogation is commonly encountered in auto litigation with uninsured (UM) and underinsured motorist (UIM) claims. Here, the at-fault party is either unknown, uninsured or has less insurance than the injured party ("underinsured"). If there is a known individual (not a John Doe), the UM or UIM carrier will make a payment to its insured, conditioned on the right to "subrogate" or stand in the shoes of the plaintiff and file suit against the uninsured or underinsured defendant. *See, Va. Code § 38.2-2206 (G)*.

PRACTICE POINTER:

Never settle a claim against an underinsured defendant without following the procedures set forth in *Va. Code § 38.2-2206 (K) and (L)*, which require communication and paperwork between the plaintiff, defendant and UIM insurance carrier. Likewise, never take any payment from an uninsured motorist without the consent of the UM carrier if you intend to make a UM claim.

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- Virginia's anti-subrogation statute applies to health insurers - Virginia Code Section 38.2-3405.
- This statute prevents many health insurers from attempting to recoup monies paid for treatment related to a liability claim.
- Virginia also prevents the medical expense auto carrier from claiming subrogation rights.
- The anti-subrogation statute has limits - Medicaid, Medicare, ERISA, FEHBA or where the medical care was provided out of state are all excluded.
- The anti-subrogation statute also excludes disability policies.

H. Practical Tips for Restarting Stalled Negotiations

- If your demand did not include information about the defendant pleading guilty to a traffic charge stemming from the crash, review the traffic court records of the jurisdiction where the crash occurred. If indeed the defendant pleaded guilty, provide proof to the adjuster.
- If you have subpoena power, subpoena the other party's criminal record from the Va. State Police. If you do not have subpoena power, then search the criminal conviction records in the local courts to look for convictions and also prior alcohol-related offenses.
- Provide evidence of structural damage to you client's vehicle in cases where the visible damage appears minor.
- If the adjuster harps on the minor property damage or notes there were not many visits to doctors or therapists after the crash, provide the insurance adjuster with excerpts from *Kondaurov v. Kerdasha*, 271 Va. 646, 629 S.E.2d 181 (2006) cited above.
- If your client has incurred at least $12,500 in combined loss of earnings and medical bills, send them to the adjuster.
- Va. Code §8.01-417(C) requires the claims adjuster to provide you the defendant's policy limits and the current addresses of the driver.
- If the policy limits are low in relation to the damages, send a demand letter noting you

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will settle within the policy limits.

- Include an extra copy the settlement demand letter for the defendant so that he/she is on notice that you will settle within the limits and if there is an excess verdict.
- Potentially, if the liability insurance company does settle within the policy limits, and you receive a verdict for more than the policy limits, the defendant will be on the hook for the excess. This opens the liability insurer to a claim of bad faith, which it will want to avoid.

I. Structuring Settlements

- A structured settlement is one that invests some or all of the settlement proceeds.
- There can be substantial tax benefits to structuring the settlement.
- The earnings on the amount invested in the structured settlement accumulate tax free.
- However, with the very low interest rates we have experienced in the recent past, the earnings on the structured settlement are modest.
- A structured settlement is good for clients, who for any number of reasons, cannot manage money.
- The financial entity which invests the settlement money should be triple rated for financial security.
- The financial entity which takes your money to invest in the structured settlement will usually sell the structure to a related entity which then holds it and must pay out as agreed.
- The payout can be structured any way you wish.
- You can combine periodic payments with lump sum payments and configure the payout schedule as works best for the client.
- Once the funds are invested, the client no longer controls the money.
- Once the client agrees to a structured settlement and the money is invested, it will be nearly impossible to then reverse course.

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- There are firms which will purchase the client's stream of income for a discounted lump sum, a practice which is fraught with potential headaches.

AUTO INSURANCE BAD FAITH CLAIMS IN VIRGINIA

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