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August 2020

INTELLECTUAL PROPERTY LITIGATION

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Beyond Fault

By Dan Thompson

Left unchecked, bad facts can lead to liability and runaway damages. The right damages expert can keep the cost of liability from skyrocketing.

Choosing the Right Damages Expert Could Potentially Make or Break Your Case!

Making the correct decision to hire the most suitable damages expert can be as critical to winning your case as it is to ascertaining the facts of liability. Rightly so, litigators focus on liability as that is the crux of why a suit



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is launched in the first place; however, far too often, damages are treated as an afterthought that can leave litigators scrambling at the last minute to mitigate their client's potential exposure of damages.

Damages can be described as the holy trinity of needs claimed by the plaintiff(s). For example, they may be claiming a need for goods and services based on their alleged injuries caused by the accident or incident, hence it is expected that a life care plan (LCP) will be prepared by a certified life care planner (CLCP). Plaintiffs may also be claiming a need for loss of earnings, as they are no longer able to sustain a living, necessitating the services of a vocational rehabilitation (VR) expert. Finally, you

need an economist to ascertain the present-day value of what the plaintiffs are claiming due to their alleged economic losses. It has been my experience that most economists can confidently crunch the numbers supplied to them to make the appropriate discounts, but to do that, they rely on the CLCP and the VR expert to formulate their opinions; and therefore, attention needs to be focused on those two key areas to make the difference in mitigating damages.

If you hire the right expert, he or she can address both the LCP and the VR component of the plaintiff's alleged damages. Insurance companies are increasingly cost-conscious, so they are seeking budgets before experts are retained. Therefore,

why hire two experts to complete the same exercise of combing through the plaintiff's medical file to address his or her LCP and loss of earnings, when one expert could save your client money and, if your expert is persuasive, he or she can convince a jury on relevant issues in both areas. In other words, in for a penny, in for a pound!

Life Care Planning—From Fledgling Industry to Scientifically Based Trade

Vocational rehabilitation can trace its origin back to 1637, when the Hotel-Dieu in Québec was the first hospital offering rehabilitation services. From 1787 until 1851, individuals with hearing impairments were educated, which initiated diversity in education and that helped introduce American Sign Language; however, life care planning is relatively new. Damages experts can potentially be subjected to a *Daubert* or *Frye* challenge just as liability experts can be, depending on the jurisdiction. The right damages expert can help you prepare deposition questions and help with cross-examination to ensure that what the plaintiffs are asking is not only reasonable and necessary, but that their methodology is sound. Did they obtain three quotes to ensure their pricing is reasonable? Did they consult the plaintiff's treating physicians to ensure there was a medical basis to their recommendation or did they arbitrarily recommend the goods and services? A savvy expert can help you navigate those waters and help you succeed in diminishing credibility and attacking the foundation to their expert's methodologies.

In the past, the defense bar would hesitate to disclose a CLCP's opinions, as they feared that would set a floor for damages. In other words, if the plaintiffs were seeking \$20 million in damages, but the defense expert says the plaintiffs only need \$2 million, that is still \$2 million that had to be paid. Defense attorneys would rather pick holes in the plaintiff's plan by ensuring their CLCP's information is privileged. Although that technique is sound, jurors are becoming more sophisticated. The defense bar is learning the importance of having the appropriate messenger articulate how the plaintiffs overreached, and let the jury decide what is reasonable and necessary. At a recent DRI Product Liability Conference, distinguished speakers

discussed the merits of making sure your experts are experienced enough not just to provide yes or no answers, which was the typical playbook of the past. Experts need to be able to thwart potential traps that

litigators can put them in and ensure that they can stick to their opinions.

There has been an uptick in cases as businesses slowly reopen from their COVID-19 closures. In addition, historically, there

has always been a backlog of the court's docket in most jurisdictions, so both sides are finding ways to mediate or compromise their claims and find ways to settle. A compelling argument by a good damages expert can smooth the path to settling the case, which ultimately is in all parties' best interests.

Vocational Rehabilitation Has Evolved as Jobs Have Changed

Vocational rehabilitation is a dynamic process consisting of a series of actions and activities that follow a logical, sequential progression of services related to the total needs of a person with a disability. The process begins with a referral and ends with the successful placement of the individual in employment. (In Canada, CASEWAS is a professional organization dedicated to helping people with disabilities and disadvantages return to or remain at work. <https://cavewas.com>) While certainly laudable, the Department of Labor's Dictionary of Occupational Titles does not include new occupations such as bloggers, YouTubers, and other technology-based careers that have evolved in recent years, and O*NET never gained enough traction to overhaul the system completely. Therefore, you need an expert who is privy to addressing those burgeoning industries.

Social Media Reinforces People's Abilities

I find it amazing in today's social media-savvy society, that plaintiffs do not put a gag order on their clients. I'm amazed how people claim that they'll never work again and how they need a whole assortment of goods and services, and yet, such assertions clearly do not reconcile with their postings on Facebook, Twitter, Instagram, and Snapchat, depicting them climbing the slopes of Kilimanjaro or shoveling snow off their roof.

There Is More Emphasis on Having More Credentials

So, what makes a good damages expert? Knowledge is power. Typically, the more credentials you have, the more credibility you have. Organizations such as the American Board of Vocational Evaluators, the Commission on Rehabilitation Counselor Certification, and the International

Commission on Health Care Certification require a minimum of a master's degree or doctorate to be accepted. Having said that, experience trumps all. Most jurisdictions emphasize that the weight of an expert's opinion is accepted not only by their credentials, but also by their knowledge and experience.

Case Studies

Lawing v. Univar, USA, Inc., 781 S.E.2d 548 (2015), arose out of an explosion and fire at Engelhard in Seneca, South Carolina, which occurred when slag from a welding operation came in contact with pallets of sodium bromate. The three plaintiffs sustained severe burns and were treated at the Augusta Burn Center for several weeks after the accident. Univar, a leading chemical distributor, sold the sodium bromate to Engelhard. The plaintiffs claimed that the bags of sodium bromate were not properly labeled (under DOT and OSHA) or packaged (woven plastic bags were not sufficiently ignition resistant). The trial was consolidated and bifurcated—all three plaintiffs' cases on liability began on October 20, 2008, in Oconee County, South Carolina. On November 17, 2008, the jury returned a verdict in favor of Univar on fifteen of eighteen causes of action and found in favor of the plaintiffs only on the claim for express warranty as to labeling. The damages phase began on December 1, 2008. The jury returned a verdict for \$6.1 million on December 12, 2018, to all three plaintiffs, including two loss of consortium claims. This was a victory for the defense, because the medical bills and economic loss claims exceeded \$7 million, claims for projected future medical expenses were \$4 million, and plaintiffs' counsel asked

the jury for \$50 million. Also, Univar's co-defendants settled before trial for \$4.5 million, which should result in a set-off for most of the jury verdict. The key to this defense win? An experienced damages expert.

In the 2020 case, *Gusman v. Encana Corp. et. al.*, (Cause No. 51577, 118th Judicial District of Howard County, TX), most of the defendants were dismissed from the case on summary judgement; however, despite being offered a substantial offer before trial, the plaintiffs insisted on a multi-million-dollar settlement, and that was partly fueled by their LCP, which exceeded \$13 million. Mr. Gusman sustained complete quadriplegia as a result of his injuries, and the plaintiffs argued that not only would he die if he did not receive the \$13 million outlined within their LCP, but that he would never work again. This case was primarily predicated on liability; however, any jurors who were determined to award a judgement solely based on the severity of injuries and not on the liability facts were quickly swayed by compelling testimony. For example, Mr. Gusman's past medical costs fell far short of the needed amount according to the plaintiffs' experts. In addition, much of the LCP's requirements were speculative at best and, although they based their life expectancy projections on the University of Alabama's National Spinal Cord Injury Statistical Centre (NSCISC), they totally ignored the lifetime costs that were on the same quick fact sheet. See Figure 1.

Lifetime Costs

The average yearly expenses (health care costs and living expenses) and the estimated lifetime costs that are directly attrib-

utable to spinal cord injury vary greatly based on education, neurological impairment, and pre-injury employment history. These estimates do not include any indirect costs such as losses in wages, fringe benefits, and productivity (indirect costs averaged \$72,955 per year in 2016 dollars). See Figure 1.

The average yearly expenses (health care costs and living expenses) and the estimated lifetime costs that are directly attributable to spinal cord injury vary greatly based on education, neurological impairment, and pre-injury employment history.

Life Expectancy

The average remaining years of life for persons with spinal cord injury have not improved since the 1980s and remain significantly below life expectancies of persons without spinal cord injury. Mortality rates are significantly higher during the first year after injury than during subsequent years, particularly for persons with

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Figure 1

Severity of Injury	Average Yearly Expenses (in 2016 dollars)		Estimated Lifetime Costs by Age at Injury (discounted at 2%)	
	First Year	Each Subsequent Year	25 years old	50 years old
High Tetraplegia (C1-C4) AIS ABC	\$1,079,412	\$187,443	\$4,789,384	\$2,632,164
Low Tetraplegia (C5-C8) AIS ABC	\$779,969	\$114,988	\$3,499,423	\$2,152,458
Paraplegia AIS ABC	\$526,066	\$69,688	\$2,341,988	\$1,536,976
Motor Functional at Any Level AIS D	\$352,279	\$42,789	\$1,600,058	\$1,129,365

Data Source: Economic Impact of SCI published in the journal *Topics in Spinal Cord Injury Rehabilitation*, Volume 16, Number 4, in 2011. ASIA Impairment Scale (AIS) is used to grade the severity of a person's neurological impairment following spinal cord injury.

the most severe neurological impairments. See Figure 2.

What is intriguing is that the average yearly expenses (health care costs and living expenses) and the estimated lifetime costs that are directly attributable to spinal cord injury vary greatly based on education, neurological impairment,

In addition, research identifies that PTSD can be treated and resolved with a few weeks or months with cognitive behavioral therapy, undercutting the argument that any plaintiff with PTSD would need intensive counseling *for life*.

ogy used for the NSCISC's Fact Sheet. For example:

- Costs were from their 2011 study and adjusted to 2016 U.S. dollar amounts. For example, the NSCISC 2017 Spinal Cord Injury Facts and Figures Cost Data were drawn from a 2011 University of Alabama Study, and the costs were adjusted to 2016 U.S. dollars using the Consumer Price Index.
- Direct costs were defined as charges directly related to the spinal cord injury and the total study population was 735 individuals with spinal cord injury.
- The study population included a random sample of 508 people treated within the University of Alabama's model system. Data included all charges during a calendar year that were directly resulted from the spinal cord injury.
- Charges were verified through third-party confirmation.
- Free goods and services were costed using fair market value data.
- An additional cohort of 227 people with spinal cord injury were randomly enrolled in the study to provide first-year-after-injury data on EMS, acute care, and rehabilitation hospital expenses. In addition, new data was incorporated from NSCISC's database with regard to acute care charges for people treated within the University of Alabama's model system.
- Attendant care hours per day were based on participant's reports. The cost of attendant care was based on the 2009 national average cost per hour for home health aids at \$21.00 per hour, daily

nursing home rates were based on the 2009 National Average of \$198.00 per day. Those costs were adjusted to 2016 U.S. dollar values for their 2017 report.

- A total of 430 re-hospitalizations were identified. Hospital costs were based on a case-weighted statewide average cost-to-charge ratio considering urban and rural costs in the state where re-hospitalization occurred.
- The results were sectioned into four neurologic categories: C1-C4 ASIA "A" and "B"; C5-C8, ASIA "A", "B" and "C"; T1-S5, ASIA "A", "B" and "C" and ASI "D" at any level. People requiring ventilation were placed within the C1-C4 category, regardless of injury level.

What is significant from this information is that even SCISC's data is skewed because it takes into consideration cost of living, which people would have to incur regardless of an injury. Again, having an expert who can identify the data and interpret it is critical to success.

Tactics and Understanding

In my experience, the most effective deposition only took less than an hour because the lawyer emphasized all the elements that a damages expert could not espouse on such as a diagnosis or prognosis; whereas, tactics such as the plaintiff bar's Reptile Theory resulted in an eight hour ordeal. A less experienced expert may get trapped into biting on hypotheticals or bullied into providing a plaintiff-friendly answer purely due to the repetitiveness of their questions.

In some instances, a doctor may testify that the plaintiff needs expensive, ongoing,

psychological counseling due to a post-traumatic stress disorder (PTSD), and yet, the patient's file won't reflect that diagnosis. In addition, research identifies that PTSD can be treated and resolved with a few weeks or months with cognitive behavioral therapy, undercutting the argument that any plaintiff with PTSD would need intensive counseling *for life*.

Sometimes, pricing is reflected in U.S. dollars because the plaintiff was injured in the United States, without recognizing that the person had long since moved back to China, where goods and services are less expensive if projected in Chinese renminbi.

In a case where \$300 million was at stake, and defendants who were being sued in a head-injury case, the CLCP testifying for the injured party was also the administrator of the long-term care facility recommended in his plan. It's a conflict of interest for CLCPs connected to service providers to use their reports as a way of sending themselves business, so that conflict of interest disqualified him and his expert testimony. Adding another and even uglier level of malfeasance, the facility he ran and wanted

to subject the plaintiff to had numerous patient-abuse charges pending against it. Once those facts were presented, the basis for the \$300 million claim evaporated.

A case may hinge on the mechanics of a sports wheelchair versus chairs designed for daily use. The plaintiff had tumbled out of his sports chair in a parking lot and was seeking a huge sum from the parking lot owner to cover the cost of treating his injuries and their aftermath. The plaintiff used a wheelchair in the first place as he'd suffered a spinal cord injury more than three decades earlier, and he had been living with paraplegia since then. His sports wheelchair came equipped with small casters and a 10" back. Based on that configuration, he possessed great balance, and if he had he used a chair with larger casters, his wheel would not have caught in the pavement, and he would not have fallen to cause his injuries. None of that was initially mentioned when he sued an office supply chain after a wheel of his chair caught in a crack at a store parking lot and he fell forward, landing on his knee.

Plaintiffs create day-in-the-life videos in an attempt to illustrate how horribly affected

the person's life is due to their injuries. However, these videos can lose their power when questioned. For instance, a video that shows the plaintiff, a preacher, being treated by his psychiatrist—who is a para, loses much of its effect when the defense asks why the preacher couldn't continue his inspiring ministry from a chair. If his own doctor could maintain his practice after sustaining paraplegia, surely he could rely (as he always had) on the power of his voice?

Sometimes, it's a matter of knowing that Medicare has created L codes to identify costs for specific prosthetic components; and therefore, it is easy to identify if the plaintiff's CLCP's cost projections are reasonable and necessary.

Not to Be Overlooked

Controlling damages is a vital part of any sound defense strategy. Determining what services are needed and what they should cost is a complex field into which no defense team should wander without a knowledgeable guide. Hiring the right damages expert can significantly increase your chances of winning your case!

and pre-injury employment history. Those estimates do not include any indirect costs such as losses in wages, fringe benefits, and productivity, so indirect costs averaged \$74,509 per year in 2017 dollars. When you drill down further, it is interesting to discover that several studies were included in the synopsis of the research methodol-

Figure 2

Age at Injury	Life Expectancy (years) for Post-Injury by Severity of Injury and Age at Injury										
	No SCI	For Persons Who Survive the First 24 Hours					For Persons Surviving at Least 1 Year Post-Injury				
		AIS D—Motor Functional at Any Level	Para	Low Tetra (C5–C8)	High Tetra (C1–C4)	Ventilator Dependent Any Level	AIS D—Motor Functional at Any Level	Para	Low Tetra (C5–C8)	High Tetra (C1–C4)	Ventilator Dependent Any Level
20	59.6	53.0	45.9	40.3	34.0	10.6	53.4	46.4	41.3	35.3	18.1
40	40.7	35.3	29.8	25.0	20.9	8.5	35.6	30.3	25.8	22.2	13.0
60	23.2	19.6	16.0	13.3	11.1	3.7	19.8	16.5	14.1	12.5	7.9

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