III. DAMAGES

Compensatory Damages

Compensatory damages are designed to pay the injured party for his losses and make him whole to the extent money can do so. These damages may include property damage, medical bills, loss of earnings, bodily injury along with inconvenience, physical pain and mental suffering. The value of your claim will depend upon the seriousness of injury, the length of treatment, the past medical expenses, the past wage loss and any future injury, wage loss, loss or earning capacity or medical expenses.

The claim for compensatory damages are summarized in Virginia Model Jury Instruction 9.000.

General Personal Injury and Property Damage

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:

(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.

Note that the model jury instruction makes provisions for past and future losses, including wages and medical bills.

Punitive Damages

Compensatory damages are to be contrasted with punitive damages. While not a topic of this seminar, a brief discussion of punitive damages is necessary to understand how such damages differ from compensatory damages. Punitive damages are awarded to punish the wrongdoer for egregious conduct (intentional or "willful or wanton") and to deter others from such conduct. Virginia Code § 8.01-38.1 provides that the jury shall determine the amount of the punitive award, but the cap on any punitive damage recovery is $350,000.00. Nor are punitive damages to be awarded when the defendant is deceased, as there is no purpose to be served under such circumstances.

Punitive damages are most frequently encountered by the personal injury practitioner in drunk driving cases. Virginia Code § 8.01-44.5 authorizes a punitive damages claim if the greater weight of the evidence establishes that the defendant's conduct was so willful or wanton as to show a conscious disregard for the rights of others. The defendant's conduct shall be deemed sufficiently willful or wanton as to show a conscious disregard to the rights or others, and punitive damages may be awarded, when the evidence proves that (i) the defendant had a blood alcohol concentration of 0.15 percent or more by weight by volume when the incident causing the injury occurred, (ii) at the time he was drinking alcohol, he knew that he was going to operate a motor vehicle, and (iii) the defendant's intoxication was a proximate cause of the injury to the plaintiff.

A uninsured or underinsured motorist carrier defending a drunk driving claim cannot tell the jury that it (and not the drunk driver) will pay any award of punitive damages in an effort to reduce or eliminate such an award. *Allstate v Wade*, 265 Va 383 (2003) (punitive damage awards not only punish the wrongdoer, but also serve to protect the public and provide an example and warning to deter other from engaging in similar conduct).

The jury must state separately in its verdict the amount awarded as compensatory damages and amount awarded as punitive damages.

A. BODILY INJURY (NATURE AND EXTENT)

The single most significant component of compensatory damages will usually be the nature and extend of the bodily injury. This will usually be determined from the medical records.

Practice Pointer: You must read every word of the medical reports and records. Many attorneys fail to take the time needed to understand the nature and extent of injury. A good lawyer will make every effort to secure and then read every record generated by the client's treatment.

The claims adjusters will have the medical records reviewed by someone with a medical background. The claims adjuster will likely have a detailed memorandum prepared by this medical reviewer. You must be able to discuss the injuries and treatment in detail. In most cases, this should not present a problem, as you can look up medical terms online, and you can seek clarification from your client's physicians.

You must also ask the treating physicians if your client's injuries are probably permanent. If it is "more likely than not" (50.1% likely) that the injury is permanent, the physician should write a report describing the nature and extent of the permanent injury.

Be sure to look for errors in the medical records. Unfortunately, it is not uncommon for the medical history to omit any reference to the incident causing injury, to include an incorrect date of injury, or to refer to the wrong part of the body as being injured, such as referring to the client's right arm when it was the he left arm that was injured.

Practice Pointer: Under HIPAA, the patient has the right to demand his physician correct an error, or insert the patient's statement of fact into the record. This provision in HIPPA does not pertain to the opinions of the physician. *45 C.F.R. §164.526 et. seq.*

Pre-existing conditions and prior claims are fertile grounds for the defense bar. Inquire about prior injuries, prior claims and pre-existing conditions. It is important to ask at the initial interview to what extent the client has seen healthcare providers and/or made prior claims which might diminish the value of your claim. Most prior claims are entered into a master data bank maintained by the insurance industry. The claims adjuster with whom you will attempt to negotiate a settlement will have access to this data. You need to know at least as much about your client's history of prior injuries and claims as the claims adjuster.

Practice Pointer: Many people obtain regular care, also known as "maintenance" from chiropractors and other practitioners. This can reduce the value of a claim, especially if the maintenance was close in time to the collision and involved the same body part injured in the collision. This is particularly important if suit is filed as the

defense has subpoena power to secure these records.

Be aware that in the absence of an opposing expert, or in a case of straightforward injury, the plaintiff may testify to the causal connection between an automobile accident and injury even when medical testimony fails to establish causal connection expressly. *Todt v. Shaw*, 223 Va. 123; 286 S.E.2d 211 (1982). This tactic would likely fail if the defendant were to call an expert to testify that there is no causal connection. The need for the plaintiff to hire a medical expert is also necessary where the case is medically complex. *McMunn v Tatum,* 237 Va. 558 (1989).

B. MEDICAL BILLS (PAST AND FUTURE)

As stated above, medical bills are a component of the compensatory damages claim in any personal injury case. The bills represent an out of pocket expense which should be reimbursed by the defendant's insurance company. There is no provision in the law requiring the liability insurer to pay the medical bills as they are incurred. The bills should be totaled in a "demand letter" when the treatment is concluded. It is also critical that the attorney assess the need for future treatment and secure an estimate from the treating physician as to the lifetime costs of the future medical bills. Many physicians will need to be educated about the need to estimate the future medical expenses. You must advise the physician that so long as he can state that the future medical expenses are "more likely than not" or "50.1% probable", the testimony is admissible.

Practice Pointer: Do not expect the defendant's liability insurer to pay for medical bills one by one as they are incurred and submitted. While occasionally a claims adjuster will offer an unrepresented (pro se) party a few thousand dollars for the compensatory damages and agree to pay another few thousand dollars for future medical bills, this is a very bad idea and unless the injuries are very minor, any such offer should be rejected. This presents the problem of what to do if the client does not have health insurance or significant medical expense coverage through his own motor vehicle insurer to pay his medical bills as they are incurred. First, try to find a doctor who will accept the case on an "Assignment" which results in the bills being paid from the settlement or verdict. It is becoming more difficult to find physicians willing to take cases without up-front payment. The attorney accepting such cases must be willing to devote the necessary time to find proper treaters for the injured client.

The method of calculating a settlement by multiplying the medical bills x 3 is a thing of the past. You must understand the injury to interpret the significance of the

medical bills. For example, a single trip to the emergency room with several scans and tests and an overnight stay for observation can run up a medical bill of nearly $10,000.00. But if all the tests and scans are negative and if the client is discharged with no significant injury, the liability insurer will argue the medical bills do not represent much beyond dollar for dollar reimbursement. This analysis of case value by the insurance company may be countered by pointing out that human beings have fears and emotions for which compensation must be provided. On the other hand, a rib fracture can cause pain every time you exert yourself, even when you take a deep breath, cough or sneeze. Unfortunately, once diagnosed, there is little to offer in the way of treatment beyond prescription pain relief medication. Therefore, this very painful injury will have few medical bills to present in settlement. In both cases you can counter the claims adjuster's contentions, but only if you have interviewed the client about how the treatment and injury have affected him both emotionally and physically.

C. LOST WAGES (PAST AND FUTURE)

It is recommended that you advise your client at the initial interview to keep a log of the dates and hours missed from work due the injuries and medical visits. Unfortunately, visits to the attorneys office will not be reimbursed. A simple wage loss form can be provided the client, with a cover letter from you to the employer. It is important that the client understand the need to have his physician write disability slips for the time during which the client is unable to work. The liability insurer will want to see that the treating doctor took the client out of work on the days that the client is requesting reimbursement. The insurer will also want to see a signed wage loss form from the employer confirming the hours, rate of pay and days out of work. It is now very common for claims representatives to make telephone calls to the employer to verify the time out of work.

At the time you write your settlement demand letter, you must also determine from the treating physician if he anticipates the client will continue to miss more time from work. This could be due to future medical care or result from an inability to return to his former employment due to permanent injuries resulting in restrictions on work activities. These opinions must be secured in writing and discussed with the client.

You must then calculate the amount of the future wage loss. If the future losses do not involve a loss of employment or change which causes a decrease in earnings, you should be able to calculate the future wage loss yourself. If the injury caused a change of employment or a demotion with loss of earnings and benefits, you may need to retain a

vocational rehabilitation expert to compute the future losses.

PRACTICE POINTER: It is not uncommon for the treating doctors to be misinformed about the client's employment and the nature of any associated physical activity. Be sure you know from your client the full nature and extent of the employment activities and how the injury will affect his work day.

If the wage loss is substantial, the claims adjusters may ask for the client's tax returns. This is an issue for many self-employed clients whose tax returns tend to under report income. Conventional wisdom has it that jurors will not award for a wage claim which is not supported by tax returns. Clients should be advised that it will be difficult to recover lost income which has not been reported to the IRS.

Illegal immigrants are legally entitled to make a personal injury claim and their legality or immigration status is irrelevant. If filing suit, you may attempt to make a wage claim for past wages even if the client is an undocumented alien. *See*: *Peterson v Neme*, 222 Va. 477, 281 S.E. 2nd 869 (1981). In *Peterson*, a 1981 decision, there was evidence the injured housekeeper was illegal, but such status was declared both irrelevant and unduly prejudicial. *Peterson* noted the penalties for hiring an undocumented alien were civil and further held that excluding the past wage claim would not serve as a deterrent. But in 2002, the Unites States Supreme Court decided *Hoffman Plastic Compounds, Inc.v. National Labor Relations Board,* 535 U.S. 137 at 148-149; 122 S. Ct. 1275; 152 L. Ed. 2d 271 (March 27, 2002). The ruling held that the NLRB cannot award back pay to an undocumented alien because it is impossible for an undocumented alien to obtain employment in the United States without either the worker or employer directly contravening explicit congressional policies. The U.S. Supreme Court held that either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of Congress' enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its statutory obligations. In other words, when an undocumented alien is hired, someone is breaking the law, and Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. *See*: 18 USC § 1546. The Virginia Supreme Court has not yet ruled on how *Hoffman* and the Immigration Act of 1986 may affect its ruling in *Peterson.*

PRACTICE POINTER: The *Immigration Reform and Control Act of 1986* has expressly made it a crime for an alien to obtain employment with false documents. Given that the *Peterson* decision predates this federal law, and also specifically deferred ruling on the propriety of a future wage loss by an undocumented alien, it is advisable to drop any claim for future wage losses when filing suit. You will also want to file a motion *in*

limine regarding a past wage claim to ensure the trial court will exclude evidence of the plaintiff's status as an undocumented alien.

D. LOSS OF CONSORTIUM

Virginia does not recognize a loss of consortium claim for either spouse. This claim existed for the husband under English statutory law and was designed to compensate the husband for the loss of family and household services due to injuries to his wife. A viable claim for loss of consortium in Virginia will require an act of the legislature to repeal Va. Code Ann. § 55-36 (2010) which holds:

> [I]n an action by a married woman to recover for a personal injury inflicted on her she may recover the entire damage sustained including the personal injury and expenses arising out of the injury, whether chargeable to her or her husband, notwithstanding the husband may be entitled to the benefit of her services about domestic affairs and consortium...and no action for such injury, expenses or loss of services or consortium shall be maintained by the husband.

Likewise, there is no existing right of action for loss of consortium which can be maintained by the wife for injuries inflicted upon the husband. *Carey v. Foster*, 221 F. Supp. 185 (E.D. Va. 1963), aff'd, 345 F.2d 772 (4th Cir. 1965).

E. PAIN AND SUFFERING (PAST AND FUTURE)

1. Pain & Suffering Awards Require the Attorney To Know The Case

Today, many claims adjusters are offering only the medical bills, with perhaps a few hundred dollars for pain and suffering, even when the medical bills total thousands of dollars. While a minority of adjusters may actually believe that the injury did not result in pain and suffering, most adjusters are following company policy when offering these low sums. The insurer's experience is that many claimants will not want to take the time or spend the money to litigate. This is particularly true for *pro se* claimants.

The first step in evaluating pain and suffering is to secure a detailed statement of how the collision occurred. Jump start this process by securing and reviewing the police accident report to determine if the client reported injury at the accident scene. Always ask the potential client to describe the mechanism of injury, such as "my head hit the driver's side window." Also always ask what part of the body was injured and when the pain was first felt.

Not every collision will cause sufficient injury to justify legal representation.

Practice Pointer: Many insurers are fighting small claims, which are commonly referred to as MIST claims (minor impact - soft tissue injury) and you can find yourself spending far more hours than you expected on such claims. You may want to increase your attorney fee above the standard one-third to justify the time and effort expended on a small, but otherwise legitimate claim.

2. Argue Pain and Suffering Directly From the Medical Records

Review the medical records for objective findings which are consistent with a painful injury. It is common to find terms such as "spasm", "trigger points" and "limited or restricted range of motion." These findings are reproducible by any provider and are not solely dependent on the word of the patient. Also look for the type and amount of prescription strength medication consumed by the patient. The use of such medication is also consistent with a painful injury. It is common to find references to pain on a scale of 1-10 in the medical records. While the rating is from the patient, a high number that is consistent with other findings in the record can be useful.

3. Seek Facts About Activities of Daily Living (ADL)

It is important to discuss with the client how his daily affairs were affected by the injuries. For example, many clients have small children who require a great expenditure of energy, a serious issue for an injured client who cannot bend or turn his head or sleep. Other activities which are likely to cause pain are household chores, such as cooking, cleaning, vacuuming, laundry and grocery shopping. This author has found that physical therapy notes may be most helpful in identifying activities affected by the injury.

Be sure to ask if the injuries affected any holidays, birthdays, or special events. For example, an injury occurring before Christmas can disrupt long held plans for holiday trips, meals and events. Do not depend on the client to connect the disruption of these events to the injury claim. You must interview the client and ask detailed questions to explore this aspect of the injury claim.

F. DETERMINING COMPENSATORY DAMAGES - LOOK AT THE BIG PICTURE BUT DON'T FORGET THE DETAILS

1. The Big Picture

You must assess the accident in terms of impact, force applied to the occupants,

amount of property damage and the credibility of your client. A red flag should appear if your client now has pain from head to toe, but the client made no or few complaints at the accident scene and the collision appears to be very low impact. The claim must pass the "smell test." If it doesn't smell right, there are usually problems under the surface. However, many otherwise legitimate claims will come with less than spectacular property damage. Do not give up on every claim where the property damage is modest or even minimal. A good physician will not be dissuaded from supporting an injury claim just because the rear of the car looks intact. The issue is the force applied to the occupant, and the stiffer the car and the more it "holds its shape", the more force is likely transferred to the occupants. This can be a tough sell, but lay witnesses (such as family members and co-workers) can be invaluable in establishing the credibility of the client. In the end, the judge or jury will likely decide the damages based on how they view the client.

Practice Pointer: Where you have reason to believe the client was truly injured, but the property damage appears to be modest, consider hiring a damage appraiser. The appraiser can measure the frame for bending, inspect for damage behind the bumper covers (which are usually designed to pop back into place even in a significant impact), and look for uneven gaps around the doors and trunk. The appraiser may be able to document structural damage not readily apparent.

2. The Settlement Money Is In the Details

Do not forget about the law which gives you the right to argue damages. For example, case law provides that physical pain and mental anguish can be inferred from an injury. Even where the physical injury is slight, you may have a good argument for mental anguish and suffering. The following passage form a recent Virginia Supreme Court case is instructive:

> We have held, for well over a century, that mental anguish may be inferred from bodily injury and that it is not necessary to prove it with specificity. Norfolk & W. Ry. Co. v. Marpole, 97 Va. 594, 599-600, 34 S.E. 462, 464 (1899). Mental anguish, when fairly inferred from injuries sustained, is an element of damages. Bruce v. Madden, 208 Va. 636, 639-40, 160 S.E.2d 137, 139 (1968). ...[T]he plaintiff suffered physical injury, albeit remarkably slight under the circumstances, as a proximate result of the defendants' negligence. Thus, mental anguish could be inferred by the jury and would constitute an element of damages. The plaintiff makes no claim, however, that her mental state after the accident, and the deterioration of

> her physical condition, resulted from her relatively slight bodily injuries. Her claimed damages relate almost entirely to emotional trauma suffered as a result of the accident. The question remains: What, if any, limitations apply to the sources of emotional distress for which the plaintiff may be compensated in damages?
>
> Here, the plaintiff was clearly entitled to be compensated in damages for any emotional distress she suffered as a consequence of 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. *Kondaurov v. Kerdasha*, 271 Va. 646, 629 S.E.2d 181 (2006).

Jurors selected for your trial may come into the courthouse with the feeling that most plaintiffs are uninjured and are merely milking the insurance companies. A thorough review with the client and his witnesses, both lay and expert, can usually unearth facts which support credible arguments that the client really did suffer and really was injured. To overcome juror bias, the plaintiff will need to marshal all facts consistent with injury and apply them to the law as cited in these materials.

Practice Pointer: For the plaintiff to be successful at trial, jurors will need to identify with the plaintiff's predicament. Therefore the case should be presented with eye towards establishing that the injury suffered by the plaintiff was the result of conduct which could also threaten the jurors or their family. This theme should begin with effective *voir dire*, and be repeated in opening and closing. You cannot explicitly ask the jurors to put themselves in the shoes of the plaintiff. *Velocity Express v Hugen*, 266 Va. 188; 585 S.E.2d 557 (2003). Instead, you should gear your presentation to show how the defendant's conduct endangered the community at large, and not just the "litigious" plaintiff.