



PART IV

DAMAGES, LIENS AND SUBROGATION IN SETTLEMENT NEGOTIATION



VEHICLE DAMAGE AND DIMINISHED VALUE

- Owner can claim vehicle lost value even after repair
- Compensation measured by cost of reasonable repairs necessary to restore vehicle to original condition, combined with diminution in value of property after repairs
- Vehicle is considered a total loss if cost of repair $>$ $\sim 75\%$ of vehicle's value
- If a total loss, compensation is vehicle's fair market value immediately before crash



COLLATERAL SOURCE RULE APPLIES TO PAYMENT OF MEDICAL BILLS

- Collateral sources of payment are inadmissible at trial

- Established by case law
 - *Acuar v. Letourneau*, 260 Va. 180 (2000)

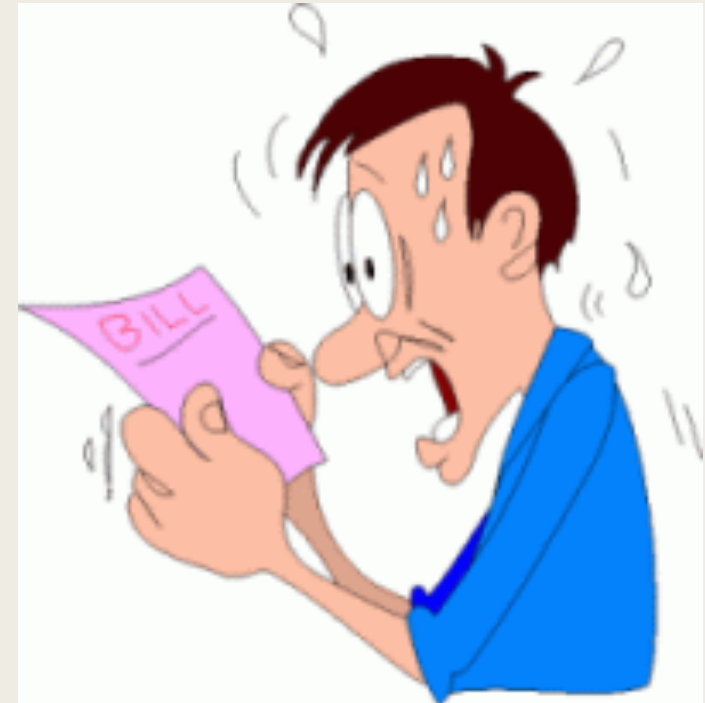
 - See page 66 in course materials

COLLATERAL SOURCE RULE APPLIES TO LOSS OF EARNINGS: VA CODE § 8.01-35

- Includes sources of payment other than defendant or defendant's insurer, such as:
 - Health insurance
 - Medicare
 - Medicaid
 - Worker's compensation
 - Disability insurance
 - Sick leave and vacation pay

PRACTICE POINTER: VA CODE 8.01-413.01(B)

For HMO's that don't generate a bill, hire a certified medical billing specialist to create a bill. 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.



MEDICAL BILLS: *MCMUNN V. TATUM*, 237 VA. 558 (1989)

- *McMunn* held that proof of medical expenses by the introduction of bills solely through the plaintiff's testimony requires consideration of:
 - (1) authenticity,
 - (2) reasonableness in amount,
 - (3) medical necessity, and
 - (4) causal relationship

MEDICAL BILLS

- Whether treatment is medically necessary and causally related can usually only be determined by a qualified medical expert who has studied plaintiff's case
- Injured plaintiff can offer testimony about need for future care, unless the defendant objects and will question the necessity or causal relationship of the treatment



LOSS OF EARNING CAPACITY

- Earning capacity is to be distinguished from loss of earnings
- One can experience increase in income after injury and still claim lost earning capacity
 - Example: someone whose education or experience would likely have lead to significant promotions or even a new career resulting in a higher pay scale
- Calculate loss of earning capacity by figuring out work-life expectancy and loss of earnings over work-life due to injury
- Work-life expectancy considers contingencies, including probabilities of dying, becoming disabled, or leaving the labor market

FACTORS FOR LOSS OF EARNING CAPACITY

- Age and life expectancy of plaintiff

- Table below (§ 8.01-419) admissible for permanent injury and loss of future earnings/capacity

<u>AGE</u>	<u>BOTH SEXES</u>	<u>MALE</u>	<u>FEMALE</u>
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

- The death of a young child, without a history of earnings, and whose future earnings are speculative, is usually worth less than death of a working parent
- But due to life expectancy and healthcare expenses, a serious injury with lifetime medical needs usually valued higher for a younger person

FACTORS FOR LOSS OF EARNING CAPACITY

- Evaluation of education and work history
- Potential vocational re-training costs
 - If injured worker is a candidate for a retraining program, the costs to complete the program, along with lost wages during program, can be assessed as damages



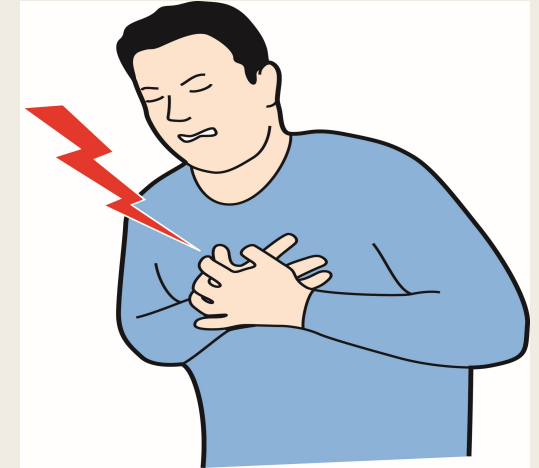
DAMAGE CALCULATION EXAMPLE

Due to injury, a construction supervisor was physically limited from performing his prior work. But with 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 variable, but his employment as a CAD technician was full-time, he was able to return to employment as a CAD technician earning as much as he had as a construction supervisor. Damages would include the cost of tuition and supplies, as well as 9 months of lost wages.



PAIN AND SUFFERING: *KONDAUROV V. KERDASHA*, 271 VA. 646 (2006)

- Plaintiff and her dog were in a vehicle that overturned
- Court's opinion:
 - Mental anguish may be inferred from bodily injury
 - 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



COMPENSATORY DAMAGES: JURY INSTRUCTION 9.000

- *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;*

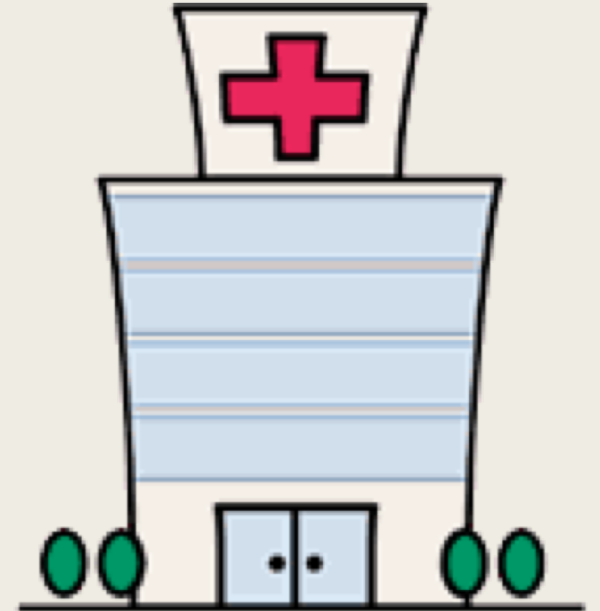
COMPENSATORY DAMAGES: JURY INSTRUCTION 9.000 (CONTINUED)

- *(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.*

STATUTORY LIENS FOR MEDICAL PROVIDERS

VA CODE § 8.01-66.2

- Hospitals & nursing homes- \$2500.00
- Physicians, chiropractors, nurses, physical therapists, pharmacies - \$750.00
- Ambulance services - \$200.00
- Can a hospital claim that each physician or nurse is entitled to \$750 on top of the hospital's \$2500?
- If one has two separate trips to the same emergency room for the same accident, does the hospital get to claim \$5,000?



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 medical bills are paid from funds contributed by the company and its workers, not by insurance purchased by either the company or the employee
- Bills paid by qualifying self-funded plans are required to be reimbursed from personal injury settlement
- Large employers like hospital corporations and banks use self funded plans

US AIRWAYS, INC. V. McCUTCHEN, 569 U.S. 88 (2013)

- *McCutchen* confirmed ERISA compliant plan's right to reimbursement from Plaintiff's recovery
- If plan so states, reimbursement not reduced for plaintiff's attorney fee
- ERISA plans must notify insured of subrogation claim

SUBROGATION

- The right of insurer to claim reimbursement from third-party settlement or verdict for payments made to insured
- Seen in auto litigation with uninsured (UM) and underinsured motorist (UIM) claims
- At-fault party is either unknown, uninsured, or has less insurance than injured party

Subrogation – Uninsured Motorist

- Where the uninsured defendant is known, UM insurer will make payment to its insured conditioned on right to “subrogate”.
- Subrogation allows plaintiff’s insurer to sue the uninsured defendant for any payments made to plaintiff.
- Subrogation will not be viable where the uninsured motorist is a “John Doe” and therefore unknown.

SUBROGATION UNDERINSURED MOTORIST

- The traditional rule is never take a payment from the liability insurer without consent of UIM carrier if you intend to make a UIM claim.
- For auto policies effective 1/1/16, never settle a claim with the liability insurer of an underinsured defendant without following the procedures in § 38.2-2206(K) and (L), which require communication and paperwork between plaintiff, defendant, and liability insurer.
- If you comply with Va. Code, you can accept liability limits and then litigate against UIM insurer AND the UIM insurer's right to subrogation is extinguished.



PENDING LIENS IN SETTLEMENT NEGOTIATIONS

- Determine all of your client's outstanding bills and liens prior to Mediation
- Don't forget you may have to deal with Medicare, Medicaid, ERISA, FEHBA, etc., who are not subject to Virginia's anti-subrogation statute
- Calculate your costs
- Review realistic range of settlement with client prior to Mediation
- Calculate client's "net" based on range of numbers representing possible settlements
- Once the claim settles, attempt to negotiate reductions of unpaid amounts and liens

MANDATORY MEDICARE REPORTING

Federal law requires all insurance companies to determine if claimant is eligible for Medicare, and if so to report it.

TIPS FOR SUCCESSFUL MEDIATION

- Mediator is a neutral person who attempts to convince parties to reach settlement
- Prepare client for a potentially frustrating “back and forth” over many hours
- Insist that the adjuster with the money attends the mediation
- Best to have pre-mediation settlement offer to gauge position of 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



TIPS FOR RESTARTING STALLED NEGOTIATIONS

- If defendant pleaded guilty and you didn't include information in demand, do so now
 - Subpoena other party's criminal record or search records in local courts
- Provide evidence of structural damage to client's vehicle when visible damage is minor
- If your client has incurred at least \$12,500 in combined loss of earnings and medical bills, send them to adjuster: Va. Code § 8.01-417(C)
 - Forces them to give you policy limits
- If policy limits are low relative to damages, send demand letter noting you will settle within the policy limits

STRUCTURING SETTLEMENTS

- Invests some or all of the settlement proceeds
- There can be substantial tax benefits
- Earnings on the amount invested accumulate tax free
- Structured settlement is good for clients who cannot manage money
- The financial entity that takes the investment money will usually sell the structure to a related entity, which then holds it and must pay out as agreed
- Once client agrees to structured settlement and money is invested, it is nearly impossible to reverse

