

*Opposing Perspectives on the Tort Settlement Process –
Legal and Practical Considerations*

I. The Settlement Package (pre-litigation)

A. Economic Damages

1. *Past Wage Loss* (See Appendix “A” for Std. Jury Charge 8.11C)
 - From D/A until return to gainful employment
 - Proofs include physician OOW notes, pay stubs and tax returns
 - Medical opinion(s) re ability to return to work and/or ability to perform existing job functions

2. *Future Wage Loss & Expert Evidence*
 - Projection based upon when plaintiff will be able to work
 - Vocational and economic loss experts

 - Life Care Experts
 - Life expectancy (See Std. Charge 8.11G)
 - Costs of care

 - Bottom-line” summation with respect with to future income loss. See DeHanes v. Rothman, 15 N.J. 90, 96 (1999) (distinguishing between economic and non-economic unliquidated damages and permitting the summation as to economic damages to suggest an aggregate sum if consistent with expert testimony and if the jury is advised that aggregation is not to be considered evidence).

3. *Household Support & Assistance*
 - Proof issues and ability to quantify

4. *Medical Bills*
 - Past Medical Bills (See Std. Charge 8.11A)
 - Future Medical Bills (See Std. Charge 8.11I)

5. *Motor Vehicle-Related Damages*
 - Property Damage (deductible reimbursement)
 - Rental Expenses

B. Non-Economic Damages

1. *Types of Recoverable Damages*

(See Appendix “A” for Std. Jury Charge 8.11E)

- Pain & Suffering
- Emotional Distress
- Humiliation
- Aggravation of Pre-existing Condition (See Charge 8.11F)
- Loss of Consortium (See Charge 8.30B)

2. *Medical Evidence Proofs*

- Narrative reports (“Captain of the Ship” opinions)
- Objective vs. Subjective Testing
- Physical Therapy Notes
- New Jersey State Disability and SSI favorable determinations
- Certifications of Permanency (for Verbal Threshold cases)
 - Statutory Requirements (See Appendix “B” – Sample Cert)
 - Impact of Rios v. Szivos, 354 N.J.Super. 578 (App.Div. 2002) - Court held that physician's certification of plaintiff's permanent injuries did *not* preclude summary judgment of action under statute governing recovery of non-economic losses resulting from automobile accident.

3. *Proving Damages with Impact upon Activities of Daily Living*

- “The List” (see Appendix “C”)
- Keeping a plaintiff’s diary (ability to “refresh” recollection)
- Photos of Injuries/Scenes - **Authentication of a pertinent photograph requires testimony establishing that: (1) the photograph is an accurate reproduction of what it purports to represent; and (2) the reproduction is of the scene at the time of the incident in question, or in the alternative the scene has not changed between the time of the incident in question and the time of the taking of the photographs.** State v. Wilson, 135 N.J. 4, 15 (1994). See also Garafola v. Rosecliff Realty Co., Inc., 24 N.J. Super. 28 (App. Div. 1952) (photograph of scene of accident inadmissible since taken two years thereafter, during which interim, particulars at the scene had changed such that the photograph did not “truly represent the conditions present at the time of the incident in question”). A witness must identify the persons, places, or things shown in

the photograph. State v. Wilson, 135 N.J. at 14, but it is not necessary that the photographer be produced (Kellam v. Akers Motor Lines, Inc., or that the date of the photograph be established (Ellis v. Rosenberg). Since “the ultimate object of an authentication is to establish its accuracy or correctness, ... any person with the requisite knowledge of the facts represented in the photograph ... may authenticate it.” State v. Wilson.

- “Day in the Life” Videos - Historically, where motion pictures were introduced, testimony was required to detail the methods of taking, processing and projecting the film. State v. Wilson, 135 N.J. at 14. “More recently, however, it appears to have become more generally recognized that, as with the still photograph, the reliability and accuracy of the motion picture need not necessarily rest upon the validity of the process used in its creation, but rather may be established by testimony that the motion picture accurately reproduces phenomena actually perceived by the witness.” State v. Wilson, 135 N.J. at 15; Persley v. Transit Bus, 357 N.J. Super. 1, 14 (App. Div.), cert. den. 177 N.J. 490 (2003). The authentication requirements for videotapes are no different than those for films. State v. Wilson, 135 N.J. at 16; Suarez v. Egeland, 330 N.J. Super. 190, 194-95 (App. Div. 2000); State v. Nemes, 228 N.J. Super. 597, 603-604 n.3 (App. Div. 1988), cert. den. 114 N.J. 473 (1989). See also Velazquez v. Jiminez, 336 N.J. Super. 10, 42 (App. Div. 2000), aff’d on other grds. 172 N.J. 240 (2002), stating that “[i]t is well settled that properly authenticated films or videotapes are admissible.” And see 2 *McCormick on Evidence*, §214 (4th ed. 1992).
- Use of lay witnesses and family doctors (See Appendix “D”)

4. *Defense Rebuttal*

- Surveillance Evidence (“Good Day” Argument)
- Defense Medical Exam (IME)
 - Symptom Magnification
 - Refusal to Undergo Treatment (Std. Charge 8.11B)

5. *Possibility of Punitives?* (N.J.S.A. 2A:15-5 & Std. Charge 8.60)

C. Negotiation Tactics

1. Know your case and your client!
2. *Accurate case valuation* (credibility important)
 - Managing the client's expectation – use of Jury Verdict Sheets & County Bar Associations media (ie.. *The Barrister* and *Straightword*), Initial Defense Reports
 - Claims computers and valuation programs
 - Utilizing outside sources to determine the value of the case
 - *New Jersey Law Journal* verdicts and settlements
 - Jury Verdict Searches - www.jvra.com
 - Westlaw/Lexis databases
3. *Time-Unit Rule* – See R. 1:7-1. See Botta v. Brunner, 26 N.J. 82 (1958); Gilborges v. Wallace, 153 N.J. Super. 121 (App.Div. 1977), aff'd in part and rev'd in part 78 N.J. 342 (1978); Cox v. Valley Fair Corp., 83 N.J. 381 (1980)(counsel permitted to argue to the trier of fact the appropriateness of its employing a time-unit calculation of its own devising for fixing any element of unliquidated damages). See also Friedman v. C& S Car Service, 108 N.J. 72, 74 (1987).
4. Policy Limits and Threat of “Bad Faith”

POSSIBILITY OF MOCK SETTLEMENT NEGOTIATION (TIME DEPENDENT)

II. Evidentiary Considerations (litigation-focused)

A. “Boardability” of Damages

1. Hard Numbers and Jury Multiplication Theory
2. WC Benefits & Healthcare liens
3. Paid vs. Payable?

B. Motion Practice

1. Streamline issues
2. Create settlement leverage

**C. Admission of Evidence at Trial (“Preponderance of Evidence”)
(See Appendix “A” for Standard Jury Charges 1.12G & 1.12H)**

D. Credibility of Witnesses (See Std. Charges 1.12K & 1.12L)

III. ALTERNATIVE DISPUTE RESOLUTION (ADR)

A. Advantages

1. Relaxed, neutral atmosphere
2. Cap on damages (ie... no “runaway” jury)
3. Quick & controlled closure
4. Confidentiality in process and settlement (*no* publicity)
5. Client relations

B. Disadvantages

1. Potentially Expensive
2. Poor result, if binding
3. No guarantee of settlement

C. When to Consider?

1. Beginning vs. End of Discovery
2. Court-Mandated/Compulsory (Rule 4:21A) v. Private Forum

D. Who to Consider?

1. Practicing attorneys/judges/professionals (See Appendix “E”)
2. Specialization of subject matter involved

E. What to Consider? (choosing the Proper Form of ADR - goal driven)

1. Mediation (informal)
2. Arbitration (binding vs. non-binding & high/low)

F. Miscellaneous Considerations

1. Pre-arbitration submissions (private vs. shared)
2. Decision-maker accessibility (live vs. telephonic)
3. Some cases *cannot* be mediated (liability disputes)

IV. DOCUMENTING/MEMORIALIZING THE SETTLEMENT

A. Release Considerations

1. *Drafting considerations*
 - Who drafts agreement?
 - Defense Requirements
2. Multiple parties (limited vs. general releases)

B. Structured Settlements

1. Paid in v. Paid out
2. Read the Agreement (potential to be misleading)
3. Carrier Incentive to Structure
4. Considerations for structuring:
 - Protecting client from him/herself
 - Future medical benefits/life care
 - Income stream (especially if unable to work)
 - *Tax Benefits* - All payments to the plaintiff or beneficiaries are income tax free pursuant to Internal Revenue Code Section 104(a)(2), as long as defendant pays proceeds directly to annuity/structure at time of settlement

C. Court Approval

1. Minors (Rule 4:44-3)
 - Friendly hearings
 - 5k Monetary threshold (Rule 4:48A)
 - Surrogate Accounts
2. Incompetents & Estate Involvement

D. Distribution Statements

1. Administrative Office of the Court Requirements
(See Appendix "F" – Sample Distribution Statement)
2. Cost & Fee Allocation & Sliding Scale (R. 1:21-7 & RPC 1.5)
3. Signed and Acknowledged

V. **SUBROGATION LIEN HANDLING & RESOLUTION**

- A. Evaluating the lien holder – strength of subrogation entitlement (Pereira v. Roediger decision)
- B. Presenting an evaluation and/or analysis of lien holder's risk
- C. Negotiating the lien holder to accept less than the statutory deduction
- D. Evaluating and presenting the risks to worker's comp carriers lien holders should the case not settle – requirement to pay future medicals should third party suit not settle
- E. Medicare
 - 1. Conditional Payment Liens
 - 2. Set-Aside Trusts & Section 111 of Medical Secondary Payor Statute
 - 3. Professional Medicare experts – Outsourcing to complete due diligence requirements