Valuation and Beyond

Our business objective has been to develop and deploy Award and Valuation systems

- That incorporate the provisions of the various statutes that address New York General Liability and Medical Malpractice actions,
- That track sequentially with the statutes, where possible,
- That are internally verifiable,
- That are sufficiently flexible to meet reasonable, different interpretations of the statutes and decisions, and
- That can automatically evaluate different assumptions on discount rates or other Valuation variables.

The result is a sequence of programs that address Award development, application of adjustments and allocations between past and future damages, Valuation of the various Award elements and production of reports

- That summarize the Awards with offsets and taxes, as appropriate,
- That provide monthly and annual payment schedules by element,
- That provide annual discounted values by element, and whose totals agree with the valuation summaries, and
- That provide detailed reconciliations of future Award Valuations by element, and include summaries of cash obligations and detailed past damages.

Valuations of future damages are driven by discount rates for each element. Individual discount rates indexed to 10-Year Treasuries are automatically calculated using years and partial years beyond 20. The valuation incorporates -0- days, as the 1st. Payment is due on the date of the verdict per Amended 50A, and payments made in advance (verdict date) per Original 50A and 50B.

Amended 50A provides that the first payment date for future damages shall be the verdict date or such other date as specified in the returned verdict. Since the statute does not further specify how delayed payments will be handled, there seem to be three alternatives

- Ignore the future dates.
- Discount the payments to the future first payment date and use the resulting value as part of the base to allocate expenses and determine fees. That leaves the issue of prejudgment or prepayment interest. Interest should be applied only if the first payment date falls within the Judgment or payment dates, and only from the first payment date.
- Discount the payments to the future first payment date and then discount the value back to the date of the verdict. This has the effect of providing a value that would approximate an annuity cost, if purchased at the time of resolution. Prejudgment or prepayment interest would then be applied from the date of the verdict.

The remaining issue relates to Collateral Source offsets. Decisions and statutes provide that Collateral Source offsets be included, if the only material condition to payment of the offset is the payment of continuing maintenance, and if the payment of any benefit does not give rise to a statutory lien or right of reimbursement in favor of the benefit provider. If a future first payment date is employed, it could be argued that the future first payment date is an additional material condition.

In Med/Mal wrongful death actions future damages are treated as lump sums and the basic valuation does not include any discounting. This then leaves the treatment of Collateral Source offsets to be resolved. As there are no future payments, there is nothing against which to offset. As for past offset payments, they can be set against the related past damages. The system incorporates three options, inclusion or exclusion of Collateral Source offsets, or inclusion of past Collateral Source offsets only.

Application of Adjustments

Once the basic components of a future Award are settled, a series of Valuation variables can be applied against the
initial discounted future Award. Each affects the net future Award and in a few cases past damages.

- Different discount rates.
- Delay in initial first payment.
- Changes in taxes that may be applicable to Lost or Impaired Earnings.
- Application or removal of Collateral Source offsets and/or any tax adjustment associated with Collateral Source offsets.
- Application of expenses and fees to any discounted Award prior to adjustment for the value of a Collateral Source offset. The net effect is a reduction in the value of any Collateral Source offset, and it produces a total of annual discounted values for an affected future loss element that agrees with the Award summary.

Application of Interest

In wrongful death actions, pre-verdict interest is applied from the date of loss (death), or from the date when items of past damage were due. In both Medical Malpractice and General liability, discounting is in three parts

- Future damages and lump sums are discounted back to the date of death. While all future damages are treated as lump sums in Med/Mal actions, and as lump sums and future damages in General Liability actions, the values are discounted in the same manner back to the date of death.

- Past Pain and Suffering. It has been the practice to treat Pain and Suffering as non-pecuniary and apply interest only from the date of the Award verdict. There does not appear to be any support for this position, and analysis of case decisions seems to reach the conclusion that Pain and Suffering are pecuniary damages. (See our article on Pain and Suffering in this article index. This article has been downloaded numerous times.)

  The system offers three different methods of treatment for past Pain and Suffering. They could be excluded when calculating Pre-Verdict interest, they could be discounted back to death before pre-verdict interest is applied or pre-verdict interest could be applied without any discounting. As past Pain and Suffering relates to a period prior to death, discounting would appear not to be necessary.

- Other Past Damages. Individual items of loss should be discounted back to the date on which the loss was scheduled to be paid. In the alternative, a weighted average date for past damages can be used. The latter is now automatically calculated, if Award development is employed.

In bifurcated Personal Injury cases, the total Award is discounted back to the point at which liability was determined, based on the assumption that the Award incorporates some inflation for the period from determination of liability.

It would appear the discount rate should be the rate in effect on the date of the verdict. Interest is applied at the statutory rate of 9%.

Interest to judgment is applied on the total Award without discounting plus any interest prior to verdict. Interest to payment is applied on the total Award plus accumulated interest.

Interim Payments

This leaves the issue of payments between verdict and Judgment, and Judgment and Payment. As the payments are due on a regular monthly basis normally beginning on the date of the verdict, logic seems to dictate that

- The total of these interim payments be made at the time of Judgment or Payment,
- The net element Awards be adjusted for the discounted value of related interim payments,
- Interest be applied to the remaining element's Net Award from the date of the verdict to the date of the Judgment or Payment, as appropriate, and
- A weighted average interim payment date be developed. The date difference in months between the element's first payment date (normally the verdict date), and the Judgment or Payment date be divided in two. Total element interim payments are divided by total interim payments and the resulting percentage is applied to adjust the simple average months. The adjusted element averages are summed and applied to produce an average date from which interest is applied.

In addition to calculating interest on interim payments, the system provides a report reflecting the adjustment to Net Award and total payments for each future element.

Calculations to Judgment

The system produces a Judgment worksheet that incorporates interim payments. It details by element the impact of discounting, the Collateral Source offset adjustments, and application of expenses and fees. It also lists the details associated with Collateral Source offsets, and interest and any associated discounting. At the bottom, the components of the judgment are listed for the plaintiffs and their counsel.

A similar package is provided for Med/Mal Wrongful Death. It details by element the application of expenses and fees to arrive at net Awards. It details past damages, discounting of the various components of loss, and pre-verdict, prejudgment and pre-payment interest. At the bottom, the components of the judgment are listed for the plaintiffs and their counsel.

Future Payment Evaluation

As mentioned on other occasions, shorter term future damage payouts provide a marginal or no tax benefit. As the period between Verdict and Judgment or Payment extends, those shorter term benefits become more marginal. The tax benefit is the amount that a plaintiff would otherwise pay in taxes, if an annuity did not qualify for tax exemption.

In addition, low discount rates are likely to produce a Net Value that is greater than the cost of an annuity that would yield the scheduled payments. The lower the discount rate the greater the disparity. The Structured Settlement Protection Act dictates that the cost of annuities be provided by the defendant.

This system provides a way of evaluating net Awards by comparing them to annuity values, comparing total payments to net Awards and calculating the tax benefit (payments less net Awards times a tax rate) associated with any qualifying annuities.

Alternate Deployment of Awards

The system provides an evaluation of the use of a taxable trust as an alternative to use of annuities. This system makes a simple evaluation for all or some of the future Award elements. It assumes that the net element Awards are the cost of Annuities, and that, if invested in a trust that produced the same payment streams, would the result at the end of the payment period be a surplus or a deficit after application of expenses and taxes. As would be expected, longer term annuities (25 + years) have substantial tax benefits that offset the higher returns after tax gained from trust. The same is not true for future Awards of 15 years or less.

The trust proposal can be structured to incorporate only some of the future Award elements, to incorporate lump sums, past damages and/or interim payments or some parts, and the payouts can be set at any level and for any duration, and those payouts can be adjusted to meet unanticipated needs, while providing a level of protection for the Award proceeds.

The system uses

- Average AAA and BAA corporate yields
- Tax rates applicable to earnings or distributions
- Trust Administration costs
- Broker fees
- Tax accounting fees

It seems clear that the plaintiff should have the benefit of a well planned deployment of the Award that includes both annuities and alternate methods. In this way, principal can be protected, future needs can be better met while producing a better net return.

Strategic Approach

The use of annuities and alternate methods to protect and to provide for the plaintiff and/or his or her dependants would be a strategic approach to Award deployment.

Early Award development and Valuation including Collateral Source offsets and taxes as appropriate, and projection to a future Award resolution, Judgment and Payment could provide a resolution amount against which any settlement offer could be compared. This would also be a strategic approach.

Evaluation of the cost to resolution including valuation and interest, together with defense costs and insurer overhead when compared to a cost to settle might well yield early resolution to the benefit of all. In fact, if the parties each developed a projected resolution value using common ground, a range of values could be produced that lent themselves to single value offers and responses. These would be strategic approaches.

If there were a vehicle protecting and providing for a plaintiff that could be adjusted to meet unanticipated needs, there might be no need to sell some or all of an annuity at a high discount rate to meet that need. Use of that vehicle would be a strategic approach.

This entire Award and Valuation systems and subsystems lend themselves to a strategic approach. They are interconnected and driven by the same basic files. They can be accessed at any time, and used at any point in time to evaluate the Awards, interest and discounting.