

50B Valuation Dilemma

The Burbank Group

Over the history of New York Article 50, valuation was primarily a device employed after and occasionally during trial. During trial, the parties sought immediate basic valuations with any adjustments and enhancements to follow the verdict. This led to extended negotiations, substantial post-verdict interest and increases in cash by assignment of interim payments.

The plaintiff and the defense have often relied on annuity brokers to perform any valuation tasks. Most often, The brokers performed or contracted out the valuation tasks in anticipation of brokerage fees, and at no direct costs to the parties. This raises questions about the expertise and motivation of the evaluators and/or the adequacy of existing systems used to perform the evaluations.

Now the dilemma! As attorneys are responsible for best representing the interests of their clients, they must be conversant with the provisions of Article 50, related statutes and case decisions. At a minimum, they must determine that

- The provisions of the statutes are properly applied,
- The adjustments called for in the statutes are properly made, and
- The various reports and worksheets fairly represent the Award, the Valuation, and the adjustments and additions to the Awards and Valuations.
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For the most part, the available valuation systems are accumulations of separate, fragmented worksheets on which individual calculations are performed, perhaps with some documented adjustments, but without any reconciliation. The separate worksheets take the future Award, deduct lump sums and determine initial annual payments by element. Another worksheet is usually added to show the calculation of fees using the sliding rate scale for 50A Awards. Discounted values are produced by year for each element, and expense and fee rates are applied to arrive at Net discounted future Awards by element. The expense and fee rates are then applied to lump sums and past damages, and added to the discounted future damages to arrive at a total net Award. Cover sheets or affidavits may list rate assumptions in the valuation. The responsibility for application of the statutes, accuracy and documentation falls squarely on the attorneys, and without some form of reconciliation, the task is very difficult.

The genius of the statutory schemes under Article 50 are that, if followed, the overall valuation of an element's future stream of payments will agree with the total of the annual discounted values for that element. That works if both methods of calculation are employed, and if elements are not impacted by Collateral Source offsets. If adjustments to element Awards and Valuations are separately documented applied, the whole process is reconciled.

We have taken the statutory course to valuing damages. We have developed integrated systems that follow the flow of the statutes, have calculated total net discounted future Awards by element, have included monthly and annual payments, and discounted annual payments with totals by element, and incorporated documentation of Award components. In situations where Collateral Source offsets are applied, expenses and fees are over-allocated to net initial payments (initial monthly payment less initial monthly offset payment). By reducing the initial offset by expense and fee allocations, the total of annual discounted value will closely agree with the Net Award.

In addition, the basic award systems extend backward to include Award and Verdict worksheets, and forward to include post-verdict interim payments, judgment worksheets and interest.

To assist attorneys in becoming conversant in the process, we have

- Posted detailed explanations and interpretations of the statutes including case decisions,
- Included evaluations of indexed discount rates when used in conjunction with the various statutes,
- Posted a position paper covering the application of interest to Pain and Suffering in wrongful death actions, and
- Added how our systems apply the provisions of Articles 50A, Amended 50A and 50B in developing Awards, producing Verdict worksheets and payment details, and producing valuations together with adjustments and additions, payment schedules and reconciliations, together with interim payments, interest, judgment worksheets and evaluations of future periodic payments.

Somewhat surprising to us, the system operations have been the most popular downloads during the past year, even though they have been available for only the last 11 months.

	<u>Downloaded</u>
Systems Operation - NY50A Personal Injury	349
Systems Operation - NY50A Wrongful Death	345
Systems Operation - NY50B Personal Injury	297
Systems Operation - NY50B Wrongful Death	334

To date, the only challenges offered to our posted materials relate to interest on Pain and Suffering in wrongful death actions, and the only objection seems to be that it is in a direction that is opposite to prevailing practice, without citing any support for that prevailing practice. In most other conversations our advice has been sought to resolve new or more obscure issues related to the statutes and case decisions.

Unless there is fault with the explanations, attorneys can become conversant with the statutory provisions by reviewing the statutes and related case decisions or use the

explanations, outlines and systems operation summaries provided on our site.

That leaves the application of the statutes to Awards and Valuations,

- The content and components of verdict worksheets,
- The handling of adjustments,
- The independent verification of the net valuation,
- The application of interim payments and interest, and
- The content of judgments.

We provide separate systems for original 50A, amended 50A and 50B. The systems are comprehensive with documentation of all adjustments and reconciliation of the components.

We posted operable Award and Valuation demonstration models on our site. Only someone serious about operating these programs would undertake the difficult process of downloading and opening them. We now offer examples of most of the reports that are generated by our systems using a single data base for each system. The headings that starts with “To” will open each example set.

The various reports cover the entire range of needs related to Awards and Valuations. At any given time or in any given case, all of them may not be needed. Original and updated files can be stored and retrieved. In the event that variables warrant evaluation, the systems will produce different summaries reflecting the choice of variables. [The system will also generate side-by-side comparisons as variables are adjusted. If average rates are selected, a certificate listing the sources and calculations of average auction rates will be available.] The variables include different Treasury rates or averages, first payment date, choice of different tax rates, application of Collateral Source offsets and any associated taxes, or allocation of expenses and fees before or after application of Collateral Source offsets.

New York 50B Award Documentation

Award worksheets include adjustments for taxes and Collateral Source offsets, allocation to Past Damages, complex or simple Lost or Impaired Earnings, and periodic and discrete (lump sum payments) elements of loss.

[To New York 50B Award](#)

- a. Award worksheets (pages 1 and 2)
- b. Complex Lost or Impaired Earnings Summary (page 3)
- c. Detailed Lost or Impaired Earnings (pages 4 and 5)

It is worthwhile to note the following when examining these attachments

- ▶ The Award Worksheet can be updated as often as needed, and adjusted for the returned verdict, as necessary. The Award data can be transferred directly to the valuation.
- ▶ Future Loss of Consortium and Loss of Services are treated as any other elements of future loss.
- ▶ Future Wrongful Death damages are treated in the same manner as future personal injury damages. They are valued through allocation, adjustment and discounting.
- ▶ Lost or Impaired Earnings can be calculated using single rate of increase, or multiple rates of increase and other additions and adjustments to income. Taxes have not been extended by statute to 50B lost or impaired earnings.
- ▶ The components of Collateral Source offsets are listed at the bottom of the Award.

To New York 50B Verdict

- a. Verdict summary (page 1)
 - b. Schedule of periodic payments (pages 2 and 3)
 - c. Schedule of discrete payments (page 4)
- ▶ The verdict worksheet is derived from the Award, but excludes Collateral Source offsets.
- ▶ Other elements of loss, either periodic or discrete, are detailed by event or year. Discrete elements (those for which lump sums are scheduled) allow the user to enter a sequence of events where the interval between events is greater than one year (e.g. Corrective Surgery). They are not excluded from the award and verdict processes, but are converted to periodic events in the valuation.

New York 50B Award Valuation

The valuation summary follows the sequence of the statute from total future and past Award, to the Net Discounted Award to Plaintiff. The steps are

1. Adjustments for lump sum deductions and discounting as specified,
2. Application of inflation (4%) to all elements of future loss,
3. Discounting of future awards by element using rates indexed to the 10-Year Treasury or rates selected by the user,
4. Deduction of the net discounted future Collateral Source offsets,
5. Allocation of expenses to past damages, to lump sums and to discounted future damages, and
6. Calculation of fees by applying the selected fee to future damages by element, total lump sums and past damages.

Collateral Source offsets are detailed as footnotes (also on the Negotiation Worksheet).

Expense and fee rates are applied to each element's discounted value. There is no indication whether expenses and fees are applied before or after deduction of Collateral Source offsets. An option exists for applying the allocation prior to Collateral Source deduction (in essence reducing the discounted value of the Collateral Source by expenses and fees).

The total of discounted annual payments for each Element agrees with the Net Award per the Summary. Initial element payments are determined by dividing Awards net of lump sum adjustments by the periods over which payments are to be made, and reducing that amount by application of expense and fee rates. The valuation of Collateral Source offsets is extensively covered, but not the handling of offset payments. To effect application of a Collateral Source offset, the Award payments must be adjusted for Collateral Source offset payments. If done after allocation of expenses and fees, there will be an over-allocation of expenses and fees against Award payments, and a difference between total element discounted annual payments and the Net Award per the Summary. To restore balance, the initial offset payment should be adjusted for expenses and fees producing an increase in net payments, and restore close agreement.

Future payment schedules include

- ▶ Monthly payments by element by year reflecting the application of any statutory inflation associated with the element of loss. Adjustment to initial offset payments are listed as footnotes.
- ▶ Annual payments by element by year reflecting the application of any statutory inflation associated with the element of loss. Payments are totaled by element.
- ▶ Annual discounted payments by element by year reflecting the application of any statutory inflation and discounted by the rate associated with the element of loss. The totals for elements will agree or closely agree with the Net Award on the summary.

[To New York 50B Valuation](#)

- a. Valuation Summary (pages 1 and 2)
- b. Schedule of Future Monthly Payments by Element (pages 3 and 4)
- c. Schedule of Future Annual Payments by Element (pages 5 and 6)
- d. Schedule of Discounted Annual Payments by Element (pages 7 and 8)

The summary reflects the major provisions of the amendment. They are

- ▶ The first \$250,000 of future damages is to be treated as a lump sum. This lump sum is allocated across the elements of future loss in line with their relative size.
- ▶ Statutory inflation of 4% is applied to all elements of future loss.
- ▶ Discount rates are indexed to the 10-year Treasury rate in effect on the date of the verdict. For Elements with future periods of 20 years or less, the discount rate is the 10-Year Treasury rate, and for future periods greater than 20 years the weighted average of the 10-Year Treasury rate for the first 20 years and 2 percentage points above the 10-year for each year after 20. In the alternative, individual rates can be assigned to each element.

[To New York 50B Negotiation Worksheet](#) (Pages 1 to 7)

The Negotiation Worksheet (Reconciliation) provides a full reconciliation of the future damage Award to Net Discounted damages. It provides detailed amounts by element of loss, together with calculation basis. The various elements and adjustments are totaled, and the cash components are listed and totaled separately. The detail of past damages are also listed when Award development is employed.

[To New York 50B Post- Verdict](#)

The Valuation Summary will reflect the application of interest and any pre-verdict discounting associated with the application of interest. Post-verdict additions relate to payments due at and after the verdict and interest to judgment or payment.

- a. Interim Payments Worksheet (Pages 1 and 2)
- b. Periodic Payment Evaluations (Pages 3 and 4)
- c. Judgment Worksheet (pages 5 and 6)
- d. Valuation Summary with Interest (pages 7 and 8)

It should be noted that

- ▶ There is a separate frame for the application of interest. It includes application of any discounting to determine the amount on which any pre-verdict interest will be calculated. For bifurcated verdicts (liability at an earlier date than assessment of damages), the entire Award is discounted to the earlier date. For Wrongful Death, future damages and lump sums are discounted to the date of Death, past damages are discounted to a weighted average payment date, and there are options for inclusion (discounted or not) or exclusion of Past Pain and Suffering.
- ▶ There is also a separate frame for dealing with interim payments, i.e. those payments due between verdict and judgment or payment. As most, if not all, elements have payments due on the date of the verdict, the number of payments are uniform. Even though there is no specific references to future payment dates

returned in a verdict, a provision exists for dealing with such elements. [As an aside, the Valuation Summary contains three options relative to future payment dates, ignore the future dates, discount the Award only to the future dates or then discount that net value to the verdict date.]

There are several calculations related to interim payments,

1. Total interim payments discounted to an average payment date,
 2. Interest on those discounted payments,
 3. Total interim payments discounted to the verdict date and deducted from the element's net Award, and
 4. Interest on the adjusted net Award.
- ▶ The Interim Payment Worksheet lists each element's future Award with adjustments for interim payments and a summary of pay-outs.
 - ▶ The Evaluation Summaries take each element of future loss, sum up future payments, either impute or incorporate annuity costs, and calculate implied tax benefits. In this way, the benefits of annuities can be determined before final resolution. The evaluation can be performed as of the verdict date or after deductions for interim payments.
 - ▶ The Judgment Worksheet incorporates all of the components of the Award, adjustments and post-verdict additions and changes, in a format that facilitates completion of the judgment.

Conclusion

The primary objective in developing and deploying the comprehensive systems for Awards and Valuations is to provide the parties with the tools that will assist in gaining full, fair and timely resolution of a personal injury or wrongful death action arising in New York.

At each stage, the process of reaching resolution that is satisfactory to both plaintiff and defendant is one that is based on information and negotiation.

- ▶ **Before Trial.** One or both parties could seek settlement. While it may happen that the plaintiff is presented with a single amount to resolve all claimed losses, the only valid way to ensure that the amount is full and fair is to allocate, adjust and value. In that way, the negotiation can be quickly moved to resolution, if the parties agree.
- ▶ **During Trial.** The Court may seek quick resolution between the parties, and look to an initial valued Award to achieve it. If all parties are prepared to seek resolution, a fully valued Award might move the matter to earlier resolution.
- ▶ **At Verdict.** The jury is presented with detailed worksheets setting out the elements of loss, the amounts allocated to past and future damages, the periods related to

each, and the COLA or inflation factors affecting the Award elements. There is some indication that the incremental annual or event Award amounts should be detailed to assist the jury in resolution.

- ▶ **After Trial.** The parties may wait until any issue of appeal is resolved before commencing negotiation. At that time, a fully valued, allocated and adjusted Award could yield rapid resolution.

At each stage, the full understanding and informed consent of the parties is needed. How is informed consent gained without showing the plaintiff what he or she will get or the defendants what they will give up? How is full understanding obtained without explaining the variables and adjustments that affect the outcome?

Variable and Adjustment Description

Award

Allocation to past damages by element
Collateral Source Adjustments
Application of Taxes to Lost or Impaired Earnings
Reclassification of Service and Consortium Losses

Valuation

Selection and Calculation of discount rates
Application of Collateral Source offsets
Adjustment for over-application of expenses and fees to initial payments
Application of Expenses and Fees before or after Collateral Source offsets
Adjustment to initial offset payments for expense and fee over-allocation

Post-Verdict

Discounting Award for application of Pre-Verdict interest
Inclusion of elements of loss for Pre-Verdict Interest
Calculation of Average past damage date for W.D. interest discounting
Determination of the amount of Interim Payments due in cash
Discounting interim to an average date before application of interest
Adjustment of element's Net value for the discounted value of interim payments
Calculation of interest on adjusted Net Value

The Award and Valuation processes are neither the most important nor most difficult tasks in any personal injury or wrongful death case. The most important and difficult are the determination of liability and the amount of damages. But valuation is the culmination of those tasks.