MAKING THE COMPLEX SIMPLE

Reaching a better resolution to a personal injury or wrongful death action is a complex matter, but one with a simple objective.

Provide plaintiffs and heirs with the better resolution of a case.

That means not only getting the optimal payout, but also gaining that in the shortest period of time with the least trauma, and deploying it in a manner that best serves the future needs of the plaintiff and heirs.

New York has the most comprehensive statutory scheme for personal injury and wrongful death actions. This scheme has often been used to delay resolution, and to produce a compromise based on either a single value or a defense provided valuation that incorporates their interpretation of the statutes.

Despite the comprehensive nature of the statutes, the courts have still been compelled to fill in voids and provide details on the application of the various statutes. And, despite these efforts, there continue to be significant questions and misinterpretations.

We have set out to simplify the complexities inherent in the statutes and case decisions by developing and employing integrated, comprehensive Award and Valuation systems that address all of the issues associated with Award development, valuation, and the addition of adjustments and interest.

- **We provide the expertise both related to the statutes and case decisions, and the operation of the systems.**

- **We address misconceptions with analysis, and provide our conclusions and opinions as the issues arise in valuation.**

- **We prepare input information and perform the Award development and valuation.**

- **We offer interactive systems that permit discrete adjustments of key variables, and real time adjustment to all affected aspects of the valuations. These changes include**

  - **Selection of different 10-Year Treasury rates.**
  - **Selection of first payment date. The statutes provide that the first payment is due on the date of the verdict. In settlement a different date can be chosen.**
  - **Application or removal of Collateral Source offsets.**
  - **Impact of changes in tax rates, as applicable.**
  - **Adjustment to Collateral Source valuations for expenses and fees.**

We have produced three discrete, comprehensive systems that address original 50A, amended 50A and 50B Awards and valuations, that address reasonable interpretations of open issues from the statutes.

That said, the trial attorney should understand the statutes and how they are affected by case decisions, and provide the overall guidance to the Award and Valuation process.

Selection and Application of Discount Rates

Most of the confusion arises from the determination and application of discount rates. The purpose of the discounting is to reduce a future stream of payments to a present value or an amount that, when invested, would produce the stream of future payments. Prior to the amendment to New York 50A, the discount rates were determined through negotiation after the verdict. Now they are determined by application of ".. the rate in effect for the ten-year United States Treasury Bond on the date of the verdict...".

First, as often noted, there are no ten-year Treasury bonds. Ten-year notes are auctioned each quarter, and the different issues often bear different stated rates. There are also yields at auction or the amount that a willing buyer will pay for the issue bearing a given market rate. It is often stated with one hundred as the base. That yield is a truer measure of the market at the time of auction. There are also daily, weekly, monthly or annual yields that reflect the average effect of trades in the market.

As there is no further definition of the rate "…in effect on the date of the verdict..." , the general practice to date has been to choose the daily yield on the date of the verdict.

Next is the application of the discount rate to each element of future loss. The rate in effect is to be used as the discount rate for all elements of future loss of 20 years or less, and an average of that discount rate for the first 20 years and 2 percentage points above that rate for each year after 20 years.

In the realm of unintended consequences, use of the yield on the date of the verdict has produced a situation where, when statutory inflation is applied to an Award element, the discounted future Award is greater than the Award before discounting. This is true for all original 50A and all 50B elements and for Pain and Suffering under Amended 50A. The effect occurs for elements with future loss periods of 20 years or less at a 10-Year Treasury rate at or below 3.625%, and for elements with future loss periods of 30Years at or below a 10-Year Treasury rate of 2.91%.

Finally, there is the question of the starting point for discounting the Award. Most single payment annuities are priced on a delayed first payment basis of at least 15 or 30 days . The tables most often used in valuation incorporate these delays. The statutes are clear that the first payment is due on the date of the verdict, or a -0- day delay. The important point is that selection of a table with a delayed first payment has a very subtle reductive impact on the valuation of future damages. You can use 2/10 of 1% for each 15 days as an approximation.

Adjustments and Collateral Source Offsets

There are two types of adjustments that can be applied to an Award. They are taxes applicable to lost or impaired earnings and Collateral Source offsets. Since the most common Collateral Source offsets are applicable against Lost or Impaired Earnings, Collateral Source offsets and taxes are often interrelated.

Taxes.

The statutes make specific provision for the application of taxes to Lost or Impaired Earnings in Medical Malpractice cases.

- In wrongful death actions, the jury will hear evidence on and determine the Federal, state and local taxes that the decedent would have been obligated to pay.

- In all other medical malpractice actions, The Court and attorneys will determine the application of Federal, state and local taxes.

There is no reference to the application of taxes in General Liability actions, and that has been interpreted to mean that taxes are not applicable. The Court has consistently applied the statutes to preclude unjust enrichment and, as there is no specific definition of the content of lost or impaired earnings, taxes might be applied as an expense reducing initial lost or impaired earnings.

Collateral Source Offset.

The statutes and decisions provide that the Court may determine whether some portion of past or future costs have or will be replaced or indemnified. These Collateral Source offsets will be applied to reduce the Award amount, if the Collateral Source payments are reasonably certain of payment. These payments should be employed to reduce the Award element amount if the only material condition to continued payment is the payment of any continuing maintenance, and if the payment does not result in a statutory lien in favor of the payer. The Collateral Source will be reduced by maintenance costs for the two years prior to the event of loss, and any continuing maintenance (e.g. premiums).

To Produce the reductive effect associated with future damages, the Collateral Source value should be factored for expected COLA or incorporated inflation, the future monthly payments should be reduced by continuing maintenance payments, and the stream should be discounted to arrive at the amount by which the element's discounted future Award is reduced. Past damages are to be reduced by past payments net of continuing maintenance.

Collateral Source offsets associated with Medical Malpractice lost or impaired earnings should be taken into consideration in determining the projected impact of taxes.

Determination of The Net Discounted Award

In all cases, plaintiff's litigation expenses (disbursements) are allocated to and deducted form the discounted value of the future Award, lump sums and past damages. That rate of deduction is determined by dividing litigation expenses by those items of loss and applying the resulting rate to reduce each future Award element, lump sums and past damages.

In 50A cases, the total fee is determined by applying the sliding scale of rates to the sum of discounted values of future Award elements, lump sums and past damages less litigation expenses. The resulting fee rate is then applied against the discounted value of each future Award element, lump sums and past damages that have been reduced by the litigation expense.

The statute sections detailing application of expense and fee rates to the Award make no reference to the handling of Collateral Sources. Logic would dictate that expense and fee rates should be applied against the Award prior to application of Collateral Source values, and that can be effected by applying those rates to reduce the value of Collateral Sources.

As confirmation, the net discounted element Award normally equals the total of the annual discounted payments when the element payments are not reduced by a Collateral Source. If the discounted value of the Collateral Source is reduced by expense and fee rates, the net discounted element Award very closely agrees with the total net of annual discounted values.

Treatment of Wrongful Death Claims

There would seem to be no particular difference between Medical Malpractice and General Liability Wrongful Death actions. But the Article of the statute covering Trial by Jury provides that

- In Medical Malpractice actions, the jury shall return the total amount of future damages for Loss of Services, Loss of Consortium and for elements of loss in Wrongful Death actions without reference to any periods over which those losses are to be paid (treatment as lump sums). Amended 50A specifies that future Loss of Services and Loss of Consortium, and elements of future loss in Wrongful Death actions be treated as lump sums.

  [Since there is no future Award, it would seem that future Collateral Sources cannot be applied to reduce future Awards.]

- In General Liability actions, the jury shall return the total amount of future damages by element and provide the period over which those Awards are to be paid. No special provision is made for Loss of Services, Loss of Consortium or elements of future loss related to Wrongful Death.

Initial monthly/annual payment amounts are determined by reducing an element's total future Award by Lump sums or the allowance for lump sums. [Under Amended 50A, lump sums other than future Pain and Suffering are determined by allocating 35% of the future loss to Lump sums and then discounting that amount to arrive at a lump sum. The future Award is reduced by the total 35%.]. That amount of future loss after deduction for lump sums is then divided by the total months over which the payments are to be made. The amount is then reduced by the expense and fee rates, and adjusted by the first future payment associated with Collateral Source offsets.

Application of Interest

Article 50 provides for the application of interest prior to verdict, from verdict to judgment and from judgment to payment. It specifies that the interest rate is 9%.

The statute provides that interest will " ...be computed from the earliest ascertainable date the cause of action existed, ...".

In personal injury cases, it is the date that liability is established. Under ordinary circumstances, the date that liability is established and the date of the damage Award are the same, and there is no pre-verdict interest. In bifurcated cases, the liability verdict predates the damage award and that is the date from which interest is applied. First, the total valued or discounted Award is further discounted back to the earlier verdict date to arrive at the base on which interest is to be calculated. The amount of interest is then added to the original valued total Award.

In wrongful death actions, the date of death is the earliest ascertainable date. As a result, there is always pre-verdict interest and discounting to determine the Amount to which interest is applied. There are different approaches associated with discounting different components of the Award.

- Past Damages. Each item of past damage should be discounted back to the date cost was incurred to remove any interest from the loss element. As an alternative, past damages should be discounted back to some reasonable intermediate date or a weighted average date.

- Lump Sums and Future Damages are to be discounted back to the date of death.

- Decedent's Conscious Pain and Suffering ends with death, and creates a special category of past damages. If the Amount is assumed to include some element of interest to the date of the verdict, the Award amount should be discounted back to the date of death. If it is purely a measurement of Pain and Suffering to the point of death then, it can be argued that the amount should not be discounted before interest is applied.

  [Some confusion has also been created by a misinterpretation of the phrase 'pecuniary losses'. The Court has set out that 'non-pecuniary losses' are not recoverable in New York, and has adopted the plain meaning of the words as damages "consisting of or measured in money". In addition, the statutes provide for compensation for Pain and Suffering, and the Court has recognized this and other items of non-economic loss.]

The process of discounting in wrongful death actions is to arrive at an amount to which interest is to be applied. The amount of interest is then added to the original valued total Award.

Pre-Judgment interest is applied on the valued Award plus pre-verdict interest to the date of the judgment. Interest to payment is applied on the valued Award, plus pre-verdict and pre-judgment interest.

Response to Complexity

We provide integrated, flexible, comprehensive Award and Valuation systems whose results are independently verifiable, and whose components can be reconciled back to the original Award.

Most of the other solutions to the complexity of valuations are based on simple or sets of simple worksheets that deal with distinct pieces of the valuation process. They make little or no allowance for adjustments in the form of Collateral Sources or taxes, and provide little or no flexibility to adjust variables to test their impact. Attachment A. details the prevalent approach to valuation.

Our Systems

We have developed and employ integrated, comprehensive Award and Valuation systems whose results are independently verifiable, and whose components can be reconciled back to the original Award. Changes in 10-Year Treasuries rates, first payment dates, the treatment of Collateral Sources, the treatment and application of taxes, and/or changes in the application of expenses and fees to Collateral Sources can be made directly and immediately. The systems

- Provide the ability to update and allocate Award elements, Collateral Source offsets and taxes between past and future damages,
- Provide the ability to produce and document a most complex future compensation scenario,
- Apply the treatment of Lost Services and Lost Consortium in accordance with the statutes,
- Automatically calculate the discount rate applicable to elements of future loss whatever the future period,
- Employ a formula to calculate the overall impact of statutory inflation and discount rates,
- Automatically calculate and/or apply expense and fee rates, and
- Produce the net valuation by element, and independently calculated first monthly payments.

Whenever key variables are changed, the results are shown on a valuation summary, and can be added to a comparison of a changed valuation to the original. This process can be repeated a number of times with each change compared to that original valuation.

The discrete sections of each system are

A. An Award Module where the Award is developed and allocated between past and future damages. It includes

  - An extended lost or impaired future earnings calculation including different wage and salary assumptions and components. The systems can incorporate past taxes paid or future taxes estimated, and as either expenses associated with salary generated or as a separate documented adjustment to lost or impaired earnings.

  - A capability to incorporate Collateral Source offsets at the Award stage. As a practical matter, past Collateral Sources are applied to reduce past damages.

  - The ability to allocate loss elements between past and future damages, including by months passed or as specific amounts.

  - In Wrongful Death actions, the ability to apply expenses and fees to the Award without discounting.

B. There are five different valuation worksheets. Three address the application of 10-Year Treasury rates to New York 50A, Amended 50A and 50B, and two provide for the selection of a different discount rate for each item of loss. They include the ability

  - To automatically classify future Loss of Services and Loss of Consortium as either lump sums or future damages in accordance with the statutes.
  - To calculate and apply taxes to future lost or impaired earnings.
  - To automatically calculate or allocate lump sums to the different elements of loss.
  - To calculate and apply future Collateral Sources to specific Award elements.
  - To automatically calculate the rate applicable to each element of future loss. (If the discrete discount models are used, the element input will include an individual rate.)
  - To automatically calculate each element’s discounted value, and to calculate and apply litigation expense and fee rates.
  - To adjust taxes for Collateral Sources associated with Lost or impaired earnings, and to apply expense and fee rates to reduce the Collateral Source valuation.
  - To automatically calculate each future loss element’s first monthly payment, as well as the first monthly payment from a Collateral Source.

C. There are three different report modules. They address New York 50A, Amended 50A and 50B. The reports follow common content formats, and include,

1. **Valuation Summary.** This report contains the total valuation in one or two pages together with footnotes associated with discount rates, taxes and Collateral Sources. The body of the report flows from left to right in the same manner in which the statute deals with the Award. From left to right, it lists
   a. The element description,
   b. Periods of future loss,
   c. Total Award,
   d. Lump sums and past damages,
   e. Net future Award prior to discounting,
   f. Deduction of the value of Collateral Sources,
   g. The discounted Award by element adjusted for application of expenses,
   h. Fees deductible from each element,
   i. The net discounted Award by element , and
   j. The first monthly payment for each element of future loss, net of any associated Collateral Source first payment.

   The various parts are totaled. Past damages and lump sums, as adjusted are carried over and added to the total discounted future Award, and reduced by impact of the fee.

   In Medical Malpractice Wrongful Death actions, the Valuation Summary will breakdown the Award in a similar manner, but without listing future periods or discounting the elements. As there are no future Awards against which to apply future Collateral sources it would seem that future Collateral Sources are not applicable.

   In the event that interest is to be applied to the Award, it will added at the bottom of the summary together with the amount to which it is applied, and the date from which it is added. Interest is then allocated between plaintiff and attorney. The footnotes incorporate any discounting, and the different parts and manner in which discounting is applied. It will also show the different levels at which interest is applied, i.e. pre-verdict, pre-judgment and pre-payments.[If Award Development has been employed, the system will calculate a weighted average date to which Wrongful Death past damages are to be discounted.]

2. **Payment Schedules.** The systems produce three sets of schedules

   • Future monthly payments by element and year, and as offset by a Collateral Source, together with a total of all monthly payments. This reflects the impact of statutory inflation on the monthly payments, where applicable.

   • Future annual payments by element and year, and as offset by a Collateral Source, together with a total of all annual payments by year and by element.

   • Discounted future annual payments by element and year, and as offset by a Collateral Source, together with a total of all discounted annual payments by year and overall. For those elements with which Collateral Source offsets are not associated, the total for all years will agree with the net discounted value for that element as it appears on the Summary.

3. **Reconciliation of the Award by Element.** The Negotiation Worksheet is simply a reconciliation of the Award by element. It takes each element's total future Award and deducts lump sums, the allocation of litigation expenses and fees associated with lump sums to arrive at the award prior to discounting. That amount is then factored by the period to produce an initial first monthly payment amount.

   The Award is then discounted and Collateral Source values associated with the element are deducted. Litigation expenses and fees are then deducted to produce the Net Award by element as it appears on the summary. The initial first monthly payment is then factored by expense and fee rates, and any Collateral Source first payment to produce the net first monthly payment, as it appears on the Summary.

If Collateral Sources and Taxes are to be applied to future Lost or Impaired Earnings, the future lost or impaired Earnings are first reduced by the total Collateral Source future payments to arrive at an amount to which taxes are applicable. The taxes are then determined and applied against the original future lost or impaired earnings.

The net Awards are totaled, and then reconstructed to the total Award before discounting and Past damages are added to arrive at a Gross Total Award, and cash distribution is summarized. If Award development is employed, the reconciliation will provide a breakdown of all of the past damage elements and adjustments.

[In those situations in which lump sums are calculated by discounting 35% of the element's future Award, a separate line item appears in the accumulation listing the impact of the discounting.]

4. **Variable Adjustments.** The report section incorporates a facility to alter certain key variables but not the basic Award components. (They can be changed in the various worksheets.) The variables can be changed a number of times and be reflected in the summary without changing the underlying valuation. When a change or set of changes are decided upon they can then be recorded as the basic valuation. The various changes include

- Selection of a single discount rate (for information the system produces and overall average discount rate for all elements of future loss), or a new 10-Year Treasury rate. In the latter category, the user can select from an array of prior monthly yields, from selected auction rates or yields, an individual 10-year Treasury yield, and/or selected from average rates or yields.
- Selection of a first payment date. The basic valuation is performed using the current date (date of the verdict) as the first payment date or -0- days. The overall first payment date can be delayed up to 90 days and the valuation will be based on that delay. With each 15 day delay, the future Award value is reduced by 2/10 of 1%. For 90 days the impact is 1.2%.
- If taxes have been applied against Lost or Impaired Earnings, the overall effective tax rate can be adjusted up or down 10 percentage points in 1/4% increments, or eliminated. The effect is automatically fed through the entire valuation process.
- If Collateral Source offsets have been incorporated, they can be removed from all affected parts of the valuation. If they have been applied to reduce taxes, that choice can be reversed.
- If Collateral Sources are included, their valuation can be adjusted for expense and fee rates.

Any or all of these adjustments can be applied at one time, and the effects will be shown on the Summary. Each iteration can be compared to the basic valuation. Up to five iterations can be held in the comparison. Variables can be tested without being added to the comparison. Application of any set of variables will replace the basic valuation and make available the array of reports and the application of interest.

Average Auction Rate/Yield Calculator. Built within the Variables section is a calculator that allows the user the option to generate average auction rates and yields, weighted average auction rates and yields and updated average and weighted average rates and yields. The user can incorporate any sequence or all the regular auction results since the passage of Amended 50A.

Regular auctions occur in the second month of each quarter, interim auctions a month or two months after the regular auction. When there is significant data, interim information is provided in an attempt to forecast of the next regular auction's yield. Weighting is used to place the greater emphasis on the more recent auctions.

5. **Rate of Return.** We have incorporated a facility that calculates the overall return on the stream of payments for each element of future loss. Those overall returns are the total payments divided by the net discounted value of the element. This is a way of measuring any tax advantage of periodic nontaxable payments. As mentioned on other occasions, the overall return is a function of the period

over which future payments are to be made, and the cost of the annuity that makes those payments. As a set of general rules, the plaintiff should look at the overall return by element to determine whether there is any real financial advantage attached to an annuity.

We have extended the capabilities to include proposals for investing various parts of the Award, and meeting discrete and periodic obligations.

6. **Buyout of Structure.** From time to time, the plaintiff may find that the sale of an annuity is necessary. While we do not recommend the use of factors to gain cash, we provide an extension of our valuation system to determine the value of offers to purchase some portion or all of the an annuity payment stream. If our system were used to value an Award, the valuation file can be used to determine the impact of a buyout based on the amount offered for each portion and the costs associated with the buyout.

Summary

All of this may be more than you ever wanted to know about Article 50 Verdicts, and you may be right. If this valuation is nothing more than a formalization of the verdict that the liability carrier or its broker performs, then you are certainly right.

As the Court and the insurers have recognized, the valuations and adjustments deal with real money. And, each adjustment produces a change in the Net Award and the attorney fees. You have only to think of the reaction of the Med/Mal carriers to Desiderio v. Ochs. They never thought that the jury Award would be anywhere in the realm of that returned, and later affirmed by the Court of Appeals as a matter of law. If the valuation were nothing more than the formalization of the Award, they could have relied on the settlement provisions of the statutes to achieve their objectives. Instead, their immediate response was to seek amendment to 50A. That, in turn, produced an even more complicated valuation system than previously existed.

The complexity introduced by the statutes has acted to force plaintiffs' attorneys to defer to the defense on the issue of settlement offers. As some plaintiffs' attorneys have stated, they wait for the defendant to make a settlement proposal because they are not equipped with the tools to perform the valuation before a verdict is reached. They know that they should have independent valuation and/or verification of the results, but, as long as the defense makes what appears to be a reasonable offer, they can wait for and rely on the apparent reasonableness of that offer.

For some time, we have recommended a more pro-active approach by the plaintiff to reach settlement by proposing settlement in a full Award/valuation format. In this way, the defendant would seem to be compelled to take a position that there are substantive issues of liability that prevent settlement or take issue with Award components or adjustments to be included, and/or the discount rate to be employed.

The plaintiff has the option of submitting an offer based on

- The Award. This concentrates on the components of the Award, the amounts of past and future losses and their duration.
- Initial Valuation. This values the elements without adjustments for taxes or Collateral Sources, and distributes the Award to past damages, lump sums, litigation expenses, attorney fees and net discounted Award.
- Extended Valuation. This includes Collateral Sources and adjustments for taxes.
- Extended Valuation with Interest. This incorporates the application of interest to some expected date together with any discounting to the point at which liability is determined. [In the event of settlement in other than wrongful death actions, application of interest seems to be contingent on filing for judgment and adhere to statutory time periods.]

In each case, the plaintiff can submit the Award or valued Award in report format. If the liability carrier subscribes to our service, plaintiff can also submit the offer in data file format.

Should the matter go to conference, we provide our clients with online access to the reports section, together with the latest data file for the case and instruction on system access and use. In this way, plaintiff can evaluate the impact of each proposed change in certain key variables,

- Selection and application of 10-Year Treasury rates. New rates can be selected from the average rate and yield schedule, as well as a new rate to be used in determining discount rates. The user can even select a single rate to be applicable tov all elements of future loss.

- Selection and variation of tax rates, as appropriate. The applicable tax rates (Federal, state and local) are determined in negotiation. The variables section lists the applicable overall rate and provides for 1/4% adjustments up and down from that rate. If Collateral Sources are associated with lost or impaired earnings, any tax impact associated with the Collateral Sources can be removed

- Application of Collateral Sources can be reversed.

- Deferred first payment dates can be applied.

When an adjustment is selected, the impact will be run through the entire valuation process ,including any impact on past damages, and will be shown on the Valuation Summary. It can then be detailed on a comparison of net impacts. The changes can then be applied to the Award, and the array of reports can be accessed with those changes.
As the valuation is all about the money that will be devoted to the plaintiff's needs and attorney fees, the valuation process should be central to both settlement and verdict.

Attachment A.

The Prevalent Rudimentary Approach

Many of the models employed to value Awards are rudimentary worksheets. In the order of execution, the user

- Applies lump sums to reduce each element's future Award.
- Determines a first monthly/annual payment by element, applies statutory inflation to arrive at successive annual payments and totals the payment amounts.
- Applies the annual discount factor and totals the annual discount amounts by element. Most employ lookup tables for determining the impact of discount rates for each year. Many of those rate tables apply 2-Digit (e.g. 4%) and 3-digit (e.g. 4.5%) discount rates. A user could interpolate to a 4-digit value. A different discount rate is calculated for each element with a different period beyond 20 years. The selection of a new 10-Year Treasury rate produces a series of new look-ups and new calculations.
- Many of the lookup tables provide for a delay in first payment of 15 or 30 days.
- Calculates and applies an expense rate and reduces element future damages, past damages and lump sums by that percentage.
- Calculates and/or applies the fee rate to each element of future damages, past damages and lump sums to arrive at a net Award and attorney fees.
- Collateral Sources and taxes are applied separately. The impact of Collateral Sources is also discounted separately.
- Post-Verdict interest is provided as a per day amount. The user then multiplies the amount by the days to judgment or payment. Discounting back from the verdict date, if any, is done on an item by item basis.

These result in a series of schedules that start with the Award carry on to application of lump sums, annual payments and discount values, and application of expenses and fees to arrive at a net Award. These schedules and the calculations do not seem to be independently verifiable. They are often unwieldy and execution of a simple change in 10-Year Treasury rate requires a reexecution of all the steps.