

CHAPTER SIXTEEN

**THE PRECISE ART OF
PRESERVATION**

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[16.0] I. INTRODUCTION

Preservation is an important consideration at literally every stage of a medical malpractice action, from pretrial discovery and jury selection through post-trial practice and the entry of judgment. If you want the appellate court to consider a particular issue, you must "preserve" it by making a timely objection or argument on the record.

From the plaintiff's perspective, should a particular juror be excluded for cause because she works at the same hospital as the defendant-doctor? Make a record. Is it prejudicial to the defense to have a catastrophically injured infant plaintiff (or adult plaintiff who cannot meaningfully assist in the presentation of his or her case) continuously present in the courtroom? Make a record outside the presence of the jury and suggest that the plaintiff be brought into the courtroom only at the point when an expert neurologist will describe his or her injuries.

Has defendant failed to call the physician who examined plaintiff at defendant's request? Ask for a missing witness charge as soon as it is apparent that the witness will not be called, and take an appropriate exception if it is denied. Is the injured plaintiff, who can no longer work, receiving Social Security or other disability benefits that could be set off against the verdict as collateral source reductions under N.Y. Civil Practice Law and Rules § 4545(a) (CPLR)? Make sure the defendant's answer has raised the collateral source rule as an affirmative defense, and make a timely request for a collateral source hearing, together with a request for a reduction in the lost earnings award for the income taxes that plaintiff would have paid, in accordance with CPLR 4546.

The foregoing examples present just a few of the many and varied contexts in which preservation issues can arise. This chapter discusses common preservation issues and offers suggestions for how an appropriate record may be made.

[16.1] II. IMPORTANCE OF PRESERVATION

Trying a successful case means thinking ahead to a possible appeal and protecting the record accordingly, for whether an issue is properly preserved can often make the difference in how an appeal is decided. Neglecting to make an appropriate offer of proof or request to charge, or failing to make a timely objection or motion for a mistrial, can mean that the appellate court will not consider an otherwise valid issue. A party may not stand mute when evidence is admitted or excluded at trial and then argue on

appeal that the trial court's ruling was erroneous. Nor may a party claim that a particular charge—as, for example, a missing witness charge—should have been given if no request was made for it at trial.¹ The first question the bench in such a case likely will ask is: "Isn't there a preservation problem here?"

For cases that may potentially reach the Court of Appeals, preservation is a jurisdictional prerequisite. Thus, even if an issue is novel, represents a conflict between the appellate divisions or otherwise satisfies the requirements for review by the Court of Appeals, the Court cannot consider the issue if it was not raised in a timely manner in the trial court.²

Although the appellate division has a broader "interests of justice" jurisdiction which, in appropriate circumstances, permits it to review unpreserved error that is particularly egregious or "fundamental," this power is rarely invoked. In most cases, the failure to preserve an issue means that the appellate division will decline to consider it as well. The appellate divisions have heavy caseloads and, like all courts, are to some extent results-oriented. Therefore, if the appellate division does not want to consider a particular issue, the fact that an error was unpreserved provides an obvious rationale for declining to reach it.

[16.2] III. OFFER OF PROOF

Where the trial court refuses to allow a particular witness to testify or excludes a document or picture from evidence, make an offer of proof as to what the excluded evidence would have shown. Counsel, of course, can summarize what a witness's testimony would have been, but the better practice, if the trial court allows it, is to have the witness testify outside the presence of the jury. (If the court does not allow the witness to testify, that ruling itself can be emphasized on appeal as an example of the court's prejudicial conduct.)

Having the witness testify allows appellate counsel to make a more convincing argument as to what the effect of his or her testimony likely would have been. For instance, suppose the trial court, in an action alleging that a failure to render timely treatment for anaphylactic shock resulted in the decedent's death, excludes the testimony of the defendant-hospital's expert pulmonologist on the ground that it is cumulative of the testimony of the defendant's expert allergist. The pulmonologist, however, would have

¹ See *People v. Bresler*, 218 N.Y. 567 (1916).

² *Id.* at 571.

offered far more detailed testimony than the allergist as to the effects of a seizure suffered by the decedent, which resulted in a lack of oxygen to his brain. In addition, the pulmonologist would have testified that the decedent had already suffered irreparable brain damage prior to the point at which, allegedly, defendant's personnel negligently failed to administer epinephrine to reverse the effects of the anaphylactic reaction.

In such a case, the pulmonologist's testimony, outside the presence of the jury, as to how the allergic reaction in the decedent (who, in this example, also suffered from asthma) would have caused swelling of the airway, mucous plugging and the inability to bring oxygen into the lungs or eliminate carbon dioxide would be far more persuasive than defense counsel's summary and would enable the appellate court to determine that the testimony would indeed have been different and therefore not cumulative. Thus, the appellate court might be inclined to find an "improvident exercise of discretion" by the trial court in excluding the testimony of the pulmonologist and order a new trial.

The same reasoning would apply to a case involving neurological impairment of an infant at birth, where the trial court excludes the testimony of defendant-obstetrician's vocational rehabilitation specialist as cumulative and duplicative of the testimony of his or her pediatric neurologist. In this example, the vocational rehabilitation specialist would have testified as to specific training programs available to the child and specific job openings that would likely be available in the area, while the neurologist testified primarily as to the child's physical limitations and need for ongoing therapy and the like.

In either example, if defense counsel merely objects to the exclusion of the testimony, with no offer of proof, appellate counsel will be reduced to arguing generally that the excluded evidence would have been relevant and that its exclusion was prejudicial. At a minimum, therefore, even if the trial court in such a case does not allow the witness to testify outside the presence of the jury, counsel should make as detailed a record as possible. If the expert has prepared a report, the report can be marked for identification—another important aspect of preservation.

Marking for identification documents, pictures and other tangible items that are excluded from evidence enables the appellant to get the excluded evidence before the appellate court.³ Often, having the actual excluded evi-

³ See *Fruit-Coburn Corp. v. Niagara Frontier Transp. Auth.*, 180 A.D.2d 222, 234, 585 N.Y.S.2d 248 (4th Dep't. 1992).

dence available in the record or at the oral argument is far more effective in establishing prejudice and, therefore, in providing a basis for reversal, than a description in a brief. This notion is demonstrated in *Castro v. Alden Leeds, Inc.*,⁴ where plaintiffs were injured when a canister of swimming pool chemicals exploded, apparently after the canister's contents had been exposed to moisture and formed a volatile gas. The trial court excluded a 300-page book produced by the manufacturer, the Monsanto Industrial Chemical Company, which described the chemical's properties in detail. This book had been provided to the defendant-distributor, and plaintiffs contended that, on this basis, defendant had notice of the chemical's dangerous properties. On appeal after a defendant's verdict, plaintiffs had the Monsanto book bound as a separate volume of the record on appeal. Thus, the appellate court could see firsthand the extent to which the book "contained critical information about the notice Leeds had of the potential hazard posed by the chemical."⁵ On the basis of this and other errors, the Appellate Division reversed and ordered a new trial.

Another example of the importance of marking excluded evidence for identification can be drawn from a wrongful-death action in which plaintiff seeks to portray the decedent as a devoted father who would have provided valuable moral and educational guidance to his children. Suppose, however, there is evidence that plaintiff had to obtain a filiation order to compel the decedent to support his children. Obviously, such an order would tell a completely different story about the kind of father the decedent was than the plaintiff's description. If the trial court excludes the order of filiation based on plaintiff's testimony that at the time of his death the decedent was living with the family and supporting his children, defense counsel should ask that the order of filiation be marked for identification. The appellate court may well conclude that evidence that the decedent had to be ordered to provide for his children is relevant to the issue of loss of guidance. More specifically, the jury could potentially find that a father who had to be ordered to support his children and who initially had denied that they were his would not be likely to provide particularly valuable "guidance."

4 144 A.D.2d 613, 535 N.Y.S.2d 73 (2d Dep't 1988).

5 *Id.* at 615.

[16.3] IV. OBJECTION TO PRESERVE THE ISSUE,

[16.4] A. Improper Questions and Trial Court Rulings

A basic guideline with respect to an adversary's examination of witnesses is "when in doubt, object." The court may agree that a particular question is improper and sustain the objection. Similarly, exceptions should be taken to adverse trial court rulings and, if the court permits, the reasons you believe the court is wrong placed on the record. At a minimum, if you do not prevail in the trial court, timely objections and exceptions will permit the appellate court to consider the effect of improper questions or trial rulings and whether your client was unduly prejudiced thereby.

Thus, for example, in a wrongful-death action where grief and loss of companionship are not compensable, defense counsel should not hesitate to object to the plaintiff-widow's testimony that her husband was her "best friend," that they "did everything together" and how she "misses him." Likewise, defense counsel should object to the admission of photographs of the decedent playing with his young children as unduly sympathetic and irrelevant to any pecuniary loss in a wrongful-death action. Conversely, plaintiff's counsel should object to the exclusion of the pictures on the ground that they show what kind of father the decedent was and are therefore relevant to the issue of loss of parental guidance.

In either event, once the objection is made on the record, the issue is preserved. An appeal from a final judgment brings up for review "any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected."⁶ In this regard, it is essential that objections be made on the record.⁷ Even extensive colloquy in chambers or at sidebar that is not recorded by the court reporter will not be part of the record on appeal, thereby foreclosing appellate review.

[16.5] B. Loss of Parental Guidance

With respect to the foregoing example of loss of parental guidance, it is important to remember that this is considered a *pecuniary* loss because of the possible economic harm to the children in later years. The purpose of loss-of-guidance awards is to compensate a decedent's children for their

6 CPLR 5501(a)(3).

7 See *Horton v. Smith*, 51 N.Y.2d 798, 433 N.Y.S.2d 92 (1980).

loss of income as adults stemming from a lack of educational, moral and intellectual nurturing by their parents.⁸ Awards for loss of parental guidance are not intended as a substitute for damages for grief or loss of companionship; thus, evidence that a deceased parent, while alive, took his or her children to the movies or bought them toys does not necessarily support an award for loss of guidance. Defense counsel should be particularly mindful of this distinction and be prepared to object to the submission of the issue of loss of parental guidance to the jury if the only evidence of guidance concerns companionship and recreational activities. Plaintiff's counsel, conversely, should be careful to protect the record by offering evidence that the decedent helped the children with their homework, took them to museums and provided moral guidance on such matters as relationships with their peers, dating and so on.

Defense counsel also should be prepared to object to the submission to the jury of loss of parental guidance in the case of a severely disabled child and offer proof that the child would never be capable of gainful employment and therefore could not have benefited from the "guidance" of his or her deceased parent. Ultimately, an award for loss of parental guidance reflects a loss that can affect the child's future well-being and acknowledges the role of parents in providing children with educational and intellectual nurturing. Accordingly, from defendant's perspective, such an award should be inapplicable in the case of a child who would not be capable of gainful employment.

[16.6] C. Errors in the Charge

Preservation is particularly crucial where errors in the charge are concerned. A party claiming that the trial court should or should not have given a particular charge to the jury—as, for example, a missing witness charge or a *Noseworthy* charge entitling plaintiff to a lesser burden of proof in a wrongful-death action—must first have made a timely objection or exception in the trial court.⁹ In the case of a missing witness charge, the request must be made before the close of evidence.¹⁰

In the case of a *Noseworthy* charge, defense counsel should be prepared to argue that N.Y. Pattern Jury Instruction 1:61 (PIJ) should not be given in unmodified form.¹¹ Using the example of the alleged failure to render

8 Thomas L. Wyrick, *The Economic Value of Parental Guidance*, 3 J. Legal Econ. 81 (July 1993).

9 See *Noseworthy v. City of New York*, 298 N.Y. 76 (1948).

10 See *Carrero v. Gen. Fork Lift Co.*, 36 A.D.3d 577, 578, 828 N.Y.S.2d 176 (2d Dep't 2007).

11 See *Imbierowicz v. A.O. Fox Mem'l Hosp.*, 43 A.D.3d 503, 841 N.Y.S.2d 168 (3d Dep't 2007).

appropriate treatment for an anaphylactic reaction discussed above in § 16.2, defense counsel would argue that the *Noseworthy* charge should be limited to any communications the decedent might have had with the emergency personnel treating him but should not extend to the issues of departure from accepted practice and proximate causation, about which the decedent would not have been able to offer any relevant evidence.

The reason a timely objection is required, of course, is to give the trial court an opportunity to correct an erroneous charge. If the error is not pointed out, the court does not have the opportunity to do so.¹² Like trial rulings, any errors in the charge or refusals to charge as requested are brought up for review under CPLR 5501(a)(3), provided the appellant objected. A failure to object followed by an attempt on appeal to raise the unreserved error concerning the charge typically will meet with a judicial response similar to that set forth in *Chazon v. Parkway Medical Group*.¹³

[A]t no time did counsel for the appellants complain, in time for the trial court to cure the alleged defect, that the evidence had not been adequately marshaled, that the contentions read to the jury (in the precise form drafted and requested by their counsel) were unsatisfactory, or that there was anything wrong with the verdict sheet. In consequence, these issues are unreserved for this court's review.¹⁴

When objecting to the charge, make your objections specific and focus on the particular language or concept that you believe is erroneous. A general exception, such as a statement excepting to all the ways in which the charge differs from your requests to charge, is insufficient.¹⁵

[16.7] D. Inconsistency in Jury Verdict

An objection to a jury verdict on the grounds of inconsistency must be made *before* the jury is discharged so that the issue can be resubmitted to the jury if the court agrees that there is an inconsistency. Of course, recog-

12 See *Gilliland v. Delaware & Hudson Co.*, 207 A.D. 509, 202 N.Y.S. 710 (3d Dep't 1924).

13 168 A.D.2d 660, 563 N.Y.S.2d 488 (2d Dep't 1990).

14 *Id.* at 661–62 (citations omitted).

15 See *Hamilton v. Rafanopoulos*, 176 A.D.2d 916, 575 N.Y.S.2d 531 (2d Dep't 1991); *Rogers v. Long Island R.R. Co.*, 29 A.D.2d 47, 285 N.Y.S.2d 803 (1st Dep't 1967), *aff'd*, 22 N.Y.2d 918, 295 N.Y.S.2d 47 (1968).

izing an inconsistency at this point may be difficult, as noted in a well-known dissent in a N.Y. Court of Appeals' case:

[T]he requirement which the majority would impose, that counsel have explored all facets of the inconsistency in the immediacy of the reporting of the verdict, is unreal. . . . in this case, involving nine parties, three separate theories of recovery and a general verdict, such a requirement is patently unreasonable. To expect counsel, at the peril of his client's rights, to fathom the myriad lines of reasoning which the jury might have followed in reaching their conclusions, all in the spontaneity of the tension-filled moments after the pronouncements of the verdicts, is to make our preservation practice a test of gamesmanship rather than a fair procedural device.¹⁶

Despite the validity of these observations and the potential difficulty of noting an inconsistency in the "tension-filled moments" after the verdict has been returned, it is not enough to raise the issue after the jury has been discharged or in the post-trial motion. The objection must be made while the issue can still be sent back to the jury for further consideration.

If the objection is not timely, the appellant is left to argue that a particular finding is against the weight of the evidence or unsupported by the evidence. Such an argument usually is not as forceful or persuasive as pointing out an inconsistency between two different findings—as, for example, findings in a medical malpractice action that the defendant's negligent recommendation for a procedure caused the injury but that the procedure itself did not cause any damage. Furthermore, depending on which court you are in, the appellate division may not permit a party to characterize an inconsistency as an "against the weight of the evidence" argument.

The Second Department has tended to be very strict in this regard. The Third and Fourth Departments have taken a more liberal approach, permitting a party to raise an inconsistency as against the weight of the evidence where the arguments are inextricably intertwined.¹⁷ In *Skowronski*, for example, the Fourth Department stated that although the plaintiff failed to preserve the issue of inconsistency before the jury was discharged, the

16 *Barry v. Manglass*, 55 N.Y.2d 803, 812-813, 447 N.Y.S.2d 423 (1981) (6-1 decision) (Fuchsberg, J., dissenting).

17 See *Skowronski v. Mordano*, 4 A.D.3d 782, 771 N.Y.S.2d 625 (4th Dep't 2004); *Lochhart v. Adirondack Tr. Lines*, 305 A.D.2d 766, 767, 759 N.Y.S.2d 567 (3d Dep't 2003).

plaintiff nevertheless preserved the contention that the verdict was against the weight of the evidence.¹⁸ The court held that because the issues of inconsistency and weight were inextricably intertwined, it was "a distinction without a difference."¹⁹

The First Department's position is unclear. For many years, it appeared that the First Department had also adopted the liberal approach. More recently, however, the court seemingly has moved closer to the Second Department. In *Sims v. Comprehensive Community Development Corp.*,²⁰ the First Department found that the defendant's claim that the verdict was inconsistent was unpreserved for appellate review because of defendant's failure to raise the inconsistency before the jury was discharged. The court further held that the defendant could not "avoid the consequence[s] of its failure to preserve this inconsistency argument by characterizing it as an argument addressed to the weight of the evidence."²¹

Only a year prior, however, in *Gavitt v. Cimaita Construction Corp.*,²² although the court declined to address the issue of inconsistency, it stated, "This is not a case where the weight-of-evidence and inconsistency arguments are inextricably interwoven."²³ Thus, *Gavitt* seems to indicate that the First Department was adopting the approach followed by the Third and Fourth Departments. In fact, for years it appeared the First Department was willing to be more forgiving on this issue, as evidenced in *Vera v. Bielomatik Corp.*²⁴ There, the First Department commented that the "disbanding of the jury without plaintiff's noted objection here obliterated neither his right to seek a new trial, nor the court's capacity to grant it, where the interest of justice manifestly requires it."²⁵

Similarly, the Second Department's current position is unclear. On the one hand, many cases reiterate the traditional strict rule that the inconsistency objection must be made before the jury is discharged.²⁶ Other cases,

18 4 A.D.3d 782.

19 *Id.* at 782 (quoting *Lochhart*, 305 A.D.2d at 767).

20 40 A.D.3d 256, 258, 835 N.Y.S.2d 163 (1st Dep't 2007).

21 *Id.* at 258.

22 33 A.D.3d 406, 821 N.Y.S.2d 766 (1st Dep't 2006).

23 *Id.* at 407.

24 199 A.D.2d 132, 605 N.Y.S.2d 75 (1st Dep't 1993).

25 *Id.* at 134.

26 See, e.g., *Simmons v. E. Nassau Med. Group*, 260 A.D.2d 463, 688 N.Y.S.2d 209 (2d Dep't 1999).

never, have held that a jury's findings that a party was negligent but that such negligence was not a proximate cause of the accident are inconsistent and against the weight of the evidence when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause.²⁷

Further, although the Second Department in *Steginsky v. Gross*²⁸ held that the contention that the jury verdict was inconsistent was not preserved for appellate review because the plaintiff did not raise the issue before the jury was discharged, the court went on to state, "In any event, the issues are not so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause."²⁹ Thus, it appears that the Second Department would forgive a failure to preserve the issue of inconsistency if the two arguments are inextricably interwoven.

In the end, whether an appellate court will forgive the failure to preserve inconsistency may simply depend on how strong or obvious the inconsistency is. Nevertheless, it is always preferable, regardless of where the case is pending, to raise the objection before the jury has been discharged in order to foreclose any argument that it has been waived.

The issue of inconsistency is particularly likely to arise in complex medical malpractice actions involving different defendants and numerous theories of liability. In these cases, it is advisable to consider any potential inconsistencies that may arise before the jury returns its verdict. If, when the verdict comes in, there is any doubt as to the existence of an inconsistency, counsel should ask the court to hold the jury for a few minutes so that the verdict can be reviewed for inconsistency and a timely objection made.

[16.8] E. Conduct of Court and Opposing Counsel

Other preservation issues concern the conduct of the trial court and opposing counsel. A particularly difficult tactical issue is posed by a trial court's excessive intervention at trial—as, for example, when a court takes over the questioning of a witness, makes repeated observations on the quality of the evidence or admonishes one side but not the other to "move on" or "get to the point." Certain judges, over the years, have gained a degree of notoriety in this regard, and in some cases the appellate division

²⁷ See, e.g., *Rodriguez v. Elmori Sch. Dist.*, 37 A.D.3d 448, 829 N.Y.S.2d 221 (2d Dep't 2007).

²⁸ 46 A.D.3d 671, 847 N.Y.S.2d 593 (2d Dep't 2007).

²⁹ *Id.* at 595.

has found their conduct so egregious that it has directed a new trial before a different judge."³⁰

In such cases, obviously, the affected party may be reluctant to object, for fear of further antagonizing the court. Yet, some kind of record is essential. Fortunately, it need not be extensive. Additionally, having objected once, you need not repeat objections relating to the same subject matter.³¹ The Court of Appeals, in *People v. Yut Wai Tom*,³² stated, "In these circumstances it must suffice that [counsel] enters an objection to the improper conduct at a meaningful time during the trial and has not previously encouraged the objectionable conduct."³³

If such an objection is not made, however, the appellate division likely will conclude that the issue has not been preserved, unless the trial court's conduct was so egregious that the appellate division decides to invoke its infrequently used "interests of justice" authority. The appellate court's propensity to conclude that the issue is not preserved absent an objection is illustrated in *Camperlengo v. Lenox Hill Hospital*.³⁴ There, plaintiff contended that the trial court, through its questioning, had favored the defendants. On plaintiff's appeal from a judgment in favor of the defendants, the Appellate Division affirmed on the ground that the issue was unpreserved: "Plaintiff's contentions that the Trial Judge willfully acted to sabotage her case and ensure a defense verdict are unpreserved for appellate review, since plaintiff did not render that complaint, in any form, prior to rendition of the verdict."³⁵

Objections must similarly be made to prejudicial comments in summation, or the aggrieved party must move for a mistrial on that basis, if the

³⁰ See *Pickering v. Lehrer, McGovern, Bovis, Inc.*, 25 A.D.3d 677, 811 N.Y.S.2d 696 (2d Dep't 2006); *Allstate Ins. Co. v. Albino*, 16 A.D.3d 682, 792 N.Y.S.2d 518 (2d Dep't 2005); *Travelers Indemnity Co. v. Mohammed*, 14 A.D.3d 710, 788 N.Y.S.2d 615 (2d Dep't 2005). These cases all involved the same trial judge. In *Pickering*, the Appellate Division ordered a new trial based on the judge's "excessive intervention into the trial proceedings, which improperly excluded evidence potentially favorable to the plaintiffs and, at times, evinced a clear bias in favor of the defendants"; in *Allstate*, he was criticized for his "expressed negative opinion of the insurance industry as a whole"; and in *Travelers*, the Appellate Division held that the cumulative effect of his conduct was to deprive the defendants "of a fair hearing."

³¹ See *Nissen v. Rubin*, 121 A.D.2d 320, 322, 504 N.Y.S.2d 106 (2d Dep't 1986); *In re Ivory*, 255 A.D. 1046, 21 N.Y.S.2d 6 (2d Dep't 1940) (citing *Church v. Howard*, 79 N.Y. 415, 421 (1879)).

³² 53 N.Y.2d 44, 439 N.Y.S.2d 896 (1981).

³³ *Id.* at 56.

³⁴ 239 A.D.2d 150, 657 N.Y.S.2d 894 (1st Dep't 1997).

³⁵ *Id.*

the comments are made, rather than waiting until the end of the summation. As with prejudicial conduct by the trial court, a party cannot gamble on the outcome of the trial and then register objections only after an adverse verdict has been returned. Appellate courts consistently decline to reach the issue of prejudicial comments in summation if the issue is not preserved. The Fourth Department, in *Holtz v. Aldridge*,³⁶ summed up the necessity of a timely objection as follows: "Plaintiff's sole contention on appeal is that various remarks by defense counsel in summation were so unfair and prejudicial as to require a new trial. Plaintiff failed to move for a mistrial until after the jury rendered its verdict, and thus the motion was untimely."³⁷

The First Department similarly made short shrift of the appellant's contentions in *Balsz v. A & T Bus Co.*,³⁸ where "[d]efendant's argument that it was deprived of a fair trial by plaintiff's summation was not preserved by a motion for a mistrial, or by specific objections addressed to most of the comments in question."³⁹

In the well-known case of *Berkowitz v. Marriott Corp.*,⁴⁰ even though the Appellate Division found that prejudicial comments in plaintiff's attorney's summation warranted reversal, it made a point of noting that it would have been better for defense counsel to object during the summation and not afterward. Notably, although appellate courts in other cases like *Berkowitz* have been willing to overlook the failure to object to comments made in summation and order a new trial "in the interest of justice,"⁴¹ such cases are rare.

36 256 A.D.2d 1198, 683 N.Y.S.2d 451 (4th Dep't 1998).

37 *Id.* at 1198 (citation omitted).

38 252 A.D.2d 458, 675 N.Y.S.2d 604 (1st Dep't 1998).

39 *Id.* at 458.

40 163 A.D.2d 52, 558 N.Y.S.2d 511 (1st Dep't 1990) (among other comments, counsel argued that there was no reason for defendants to obtain experts from Suffolk County, except that they could not locate a physician who would support their case "from here to Suffolk County," and "after that, boy, it's Europe").

41 See, e.g., *Stewart v. Olean Med. Group, P.C.*, 17 A.D.3d 1094, 1096-1097, 795 N.Y.S.2d 420 (4th Dep't 2005); *Kennedy v. Children's Hosp. of Buffalo*, 288 A.D.2d 918, 919, 732 N.Y.S.2d 926 (4th Dep't 2001); *Reynolds v. Burghazi*, 227 A.D.2d 941, 942, 643 N.Y.S.2d 248 (4th Dep't 1996); *Kohlmann v. City of New York*, 8 A.D.2d 598, 184 N.Y.S.2d 357 (1st Dep't 1959).

[16.9] V. STRATEGY ISSUES

Other preservation issues might be described as strategy issues. One such issue, for example, is the question of whether the defense should call its own economic expert. Although defense counsel may be inclined to view such a move as a concession of damages, in many jurisdictions, including California, it is common for defendant to call an economist. Any prejudice inherent in the fact that the defense has called an economist can probably be dissipated by appropriate comments in summation or an instruction from the trial court that the defendant's calling an economist is not a concession that damages should be awarded.

Defense counsel should not make the mistake of thinking that by cross-examining plaintiff's economist they can accomplish the same result as by calling their own economic expert. An economist's figures rarely will change radically on cross-examination. At the appellate level, if the only evidence in the record is from plaintiff's economist and the jury's awards for pecuniary loss correspond to the economist's testimony, appellate counsel will have a difficult time prevailing on an argument that the verdict is excessive.

In *Kavanaugh v. Nussbaum*,⁴² for example, the Appellate Division affirmed an award of lost earnings to a neurologically impaired infant based on the plaintiff's economist's testimony, where the "defendants adduced no evidence as to what [the infant] might have earned over the course of his lifetime in a vocational setting."⁴³ Additionally, in *Altman v. Alpha Obstetrics & Gynecology, P.C.*,⁴⁴ the court affirmed a \$3 million award for lifetime lost earnings for an infant plaintiff "[b]ased upon the testimony of the plaintiffs' economist and the [defendant's] failure to rebut that testimony."⁴⁵ Similarly, in *Reed v. City of New York*,⁴⁶ the court repeatedly emphasized that plaintiff's evidence was uncontested "due to defendant's utter failure to present any expert testimony or semblance of a defense as to damages."⁴⁷

Some economists are *forensic economists* who, instead of simply "crunching the numbers" a little differently by using a more modest infla-

42 129 A.D.2d 559, 514 N.Y.S.2d 55 (2d Dep't 1987).

43 *Id.* at 563.

44 255 A.D.2d 276, 679 N.Y.S.2d 642 (2d Dep't 1998).

45 *Id.* at 278.

46 304 A.D.2d 1, 757 N.Y.S.2d 244 (1st Dep't 2003).

47 *Id.* at 6.

job. A forensic economist might show, for example, that the business plaintiff intended to enter, likely would have failed.

In *Stringile v. Rothman*,⁴⁸ plaintiff recovered a judgment of \$2 million for wrongful death, based on the supposed profits of a Ford dealership that the decedent was about to open at the time of his death. The Appellate Division reversed and ordered a new trial on the ground that evidence of the future profits was too speculative. At the retrial, defendant called a forensic economist who did a detailed study of market conditions at the time and testified that, based on the experience of Ford dealerships in areas with a similar socioeconomic base, the decedent's business likely would have failed. The jury at the retrial awarded \$130,000 for wrongful death, of which \$70,200 was for lost earnings. Although plaintiff appealed on the ground of inadequacy, this award was affirmed on appeal, since it was supported by the testimony of defendant's economist.⁴⁹

Although every case will not be so dramatic, the point of having a forensic economist is that it at least gives the appellate division a different way of viewing the evidence. The opinion of defendant's economist may prevent an automatic deference to findings based on plaintiff's expert's testimony, as in *Kavanaugh, Altman* or *Reed* on the ground that there is no other evidence of lost earnings in the record.⁵⁰

Calling an economist for the defense is particularly important in cases subject to CPLR article 50-A, which applies to all medical malpractice actions and actions for wrongful death based on medical malpractice commenced on or after July 26, 2003. Although an extended discussion of the permutations and pitfalls of article 50-A is beyond the scope of this chapter,⁵¹ it should be emphasized that defendant must call an economist to testify as to the applicable growth and discount rates. All damages for wrongful death, future loss of services and future loss of consortium in article 50-A cases are to be paid as a lump sum,⁵² which means that the damages will be reduced to present value. Thus, the choice of the discount

48 142 A.D.2d 637, 530 N.Y.S.2d 838 (2d Dep't 1988).

49 See *Stringile v. Rothman*, 175 A.D.2d 281, 572 N.Y.S.2d 918 (2d Dep't 1991).

50 See *Kavanaugh*, 129 A.D.2d 559; *Altman*, 255 A.D.2d 276; *Reed*, 304 A.D.2d 1.

51 For more information on this topic, see Kenneth Mauro, *New CPLR Article 50-A: Old Problems Resolved—New Complexities Created*, *The Nassau Lawyer* (Apr. 2005), available at www.nassaubar.org/newsletter.cfm.

52 CPLR 5031(b).

rate can dramatically affect the amount of damages that defendant will actually have to pay.

EXAMPLE

Assume an earnings loss of \$50,000 for 30 years at a 3.5% growth rate. Possible discount rates, on a hypothetical verdict date of March 3, 2008, include 4.40%, the then-current 30-year Treasury rate; 4.17%, calculated on the basis of the statute; and 3.50%, the then-current 10-year Treasury rate. The resulting present values differ significantly: \$1,297,957, \$1,339,985 and \$1,473,933.⁵³

Expert testimony is also essential with respect to future economic losses in medical malpractice cases not involving wrongful death. Under CPLR 4111(d), pertaining to itemized verdicts in medical malpractice actions:

[T]he court shall instruct the jury that if the jury finds a verdict awarding damages it shall in its verdict specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element, including but not limited to medical expenses, dental expenses, podiatric expenses, loss of earnings, impairment of earning ability, and pain and suffering. In all such actions, each element shall be further itemized into amounts intended to compensate for damages which have been incurred prior to the verdict and amounts intended to compensate for damages to be incurred in the future. . . . In itemizing amounts intended to compensate for future economic and pecuniary damages other than in wrongful death actions, the jury shall set forth as to each item of damage, (i) the annual amount in current dollars, (ii) the period of years for which such compensation is applicable and the date of commencement for that item of damage, (iii) the growth rate applicable for the period of years for the item of damage, and (iv) a finding of whether the loss or item of damage is permanent.

Defense counsel, therefore, are well advised to offer the testimony of a life-care planner as to the initial annual cost in specific categories of damages such as medical care and therapies, as well as the starting point of a

53 This example is taken from a lecture delivered by Fred Goldman, Ph.D., to the Medical Defense Bar Association in March 2008.

services of a psychiatrist? At what age would the infant plaintiff have been employed, so as to establish the starting point for an award for lost earnings? Providing the jury with a starting point for a particular loss will paint a different picture and may lead them to adopt a different starting point for the purpose of awarding damages for future economic loss. At a minimum, having credible evidence in the record that the future costs of caring for the plaintiff will be substantially less than plaintiff's experts claim may provide an impetus for the appellate court to order a new trial unless plaintiff stipulates to a reduction in damages.

Another strategy-related preservation issue concerns the use of a forensic psychiatrist or psychologist to explain unusual behavior by the plaintiff that might not otherwise be comprehensible to the jury. For example, in a case where plaintiff was raped but delayed reporting the incident, plaintiff's attorney might call a psychologist specializing in rape trauma syndrome to explain the psychological basis for such conduct and that such delays are, in fact, relatively common. Defense counsel may similarly consider calling a forensic psychologist to explain such behavior as stemming from "secondary gain syndrome" and the effect that litigation can have on certain persons' perceptions of their injuries.

In either event, a record is established and the testimony elicited provides appellate counsel with support for the arguments advanced on appeal. An appellate court will be more likely to consider an argument that the damages are excessive when there is evidence from defendant's expert explaining what the plaintiff could earn in a vocational setting or explaining secondary gain syndrome than where arguments are merely advanced by appellate counsel that plaintiff did not prove that he was incapable of any kind of work, etc.

[16.10] VI. POST-VERDICT ISSUES

[16.11] A. Collateral Source Hearing

At some point before the entry of judgment, defendant should request an Article 50-A hearing and a collateral source hearing under CPLR 4545(a); otherwise, plaintiff may argue that the issues have been waived.⁵⁴ If a collateral source hearing is not requested immediately after the verdict or in a post-trial motion, then prior to the entry of judgment defendant should approach plaintiff about trying to resolve the issue without a hearing. If

⁵⁴ See *Ventriglio v. Active Airport Serv. Inc.*, 257 A.D.2d 657, 682 N.Y.S.2d 915 (2d Dep't 1999).

the parties cannot resolve the offsets between each other, then defendant should notify the court. A failure to do so before the entry of judgment may be deemed a waiver.⁵⁵

In *Wooten*, the Appellate Division, Fourth Department, with two justices dissenting, held that the collateral source rule must be pleaded as an affirmative defense but ameliorated the possible harshness of such a ruling by allowing the defendant to amend its answer on appeal.⁵⁶ The majority concluded that notwithstanding the failure to raise the issue as an affirmative defense, the defendant had raised it in a timely manner by seeking discovery and moving to fix the amount of the setoff and that, accordingly, there was no surprise or prejudice to the claimant.⁵⁷

In *Bongiovanni v. Staten Island Medical Group*,⁵⁸ the court held that

any application for a set-off utilizing a collateral source of payments must be either requested verbally immediately after the jury renders a verdict which includes loss of earnings, or as part of the written single post-trial motion contemplated by CPLR 4406 which shall be made within 15 days of the jury verdict in accordance with CPLR 4405.⁵⁹

Subsequently, however, two appellate courts held otherwise. The Appellate Division, Fourth Department, in *Wooten*,⁶⁰ ruled that a request for a collateral source hearing would be timely if it were made before the entry of judgment and that the 15-day rule of CPLR 4405 did not apply to collateral source setoffs. Similarly, in *Firmes v. Chase Manhattan Automotive Finance Corp.*,⁶¹ the Appellate Division, Second Department, citing *Wooten*, indicated that it disagreed with the conclusion reached in *Bongiovanni*. The court reasoned that CPLR 4405 imposes a 15-day deadline upon post-trial motions "under this article," meaning CPLR article 44.

⁵⁵ See *Wooten v. State of New York*, 302 A.D.2d 70, 753 N.Y.S.2d 266 (4th Dep't 2002).

⁵⁶ *Id.*

⁵⁷ See also *Woods v. Kurz*, 258 A.D.2d 932, 685 N.Y.S.2d 361 (4th Dep't 1999); *Ferrara v. Bronx House*, 163 Misc. 2d 908, 622 N.Y.S.2d 864 (Civ. Ct., Bronx Co. 1994).

⁵⁸ 188 Misc. 2d 362, 728 N.Y.S.2d 345 (Sup. Ct., Richmond Co. 2001).

⁵⁹ *Id.* at 366-367; see also *Loperena v. City of New York*, No. 16541/91, 2002 WL 31163423 (Sup. Ct., N.Y. Co. 2002).

⁶⁰ 302 A.D.2d 70.

⁶¹ 50 A.D.3d 18, 852 N.Y.S.2d 148 (2d Dep't 2008).

ment concluded that it is not governed by the 15-day deadline applicable to other post-trial motions.

Thus, in the Second and Fourth Departments, at least, defense counsel need not include a request for a collateral source hearing in a motion to set aside the verdict. However, there is no "down side" to doing so, provided the defendant possesses the necessary information at that time to support the request for a hearing. And, in fact, given the minimal effort required to request a hearing, making such a request is advisable to minimize defendant's exposure to the extent possible.

Where, for example, an injury is severe and the plaintiff has been receiving and will continue to receive Social Security disability payments or other types of reimbursement, the failure to request a collateral source hearing can result in the loss of thousands of dollars in collateral source reductions that could otherwise have been set off against the lost earnings award. The request for a collateral source hearing can take the form of a sentence in a written post-trial motion or a statement on the record after the verdict has been returned.

Even though counsel cannot request a collateral source hearing until after a verdict has been returned, he or she is well advised to think ahead to the collateral source hearing well before the verdict. The safest practice is to assert the defendant's entitlement to collateral source setoffs as an affirmative defense and seek discovery on those collateral sources prior to trial. Doing so will foreclose an argument later on that the failure to request discovery prior to verdict constitutes a waiver.⁶²

[16.12] B. Effect of Tax Obligations on Amount of Award

Related to the issue of collateral source setoffs is the provision set forth in CPLR 4546, which instructs the court in a medical malpractice action to "reduce any award for loss of earnings or impairment of earning ability by the amount of federal, state and local personal income taxes which the court finds, with reasonable certainty, that the plaintiff would have been obligated by law to pay." A request for reductions under CPLR 4546 must be made before a judgment is entered, or it will be waived.

62 See *Bongiovanni*, 188 Misc. 2d 362; *Hoffman v. S.J. Hawk Inc.*, 177 Misc. 2d 305, 676 N.Y.S.2d 448 (Sup. Ct., Queens Co. 1998), *aff'd*, 273 A.D.2d 200, 709 N.Y.S.2d 448 (2d Dep't 2000).

Companion provisions under the N.Y. Estates, Powers and Trusts Law pertaining to wrongful-death actions based on medical malpractice provide that the jury, not the court, shall determine the effect of taxes the decedent would have paid:

(c) (i) In any action in which the wrongful conduct is medical malpractice or dental malpractice, evidence shall be admissible to establish the federal, state and local personal income taxes which the decedent would have been obligated by law to pay.

(ii) In any such action tried by a jury, the court shall instruct the jury to consider the amount of federal, state and local personal income taxes which the jury finds, with reasonable certainty, that the decedent would have been obligated by law to pay in determining the sum that would otherwise be available for the support of persons for whom the action is brought.⁶³

Thus, in these cases, the issue must be raised before the jury by offering the expert testimony of an economist or accountant, and if the evidence is excluded, an appropriate record should be made.

[16.13] C. Preservation of Issues Concerning Weight and Sufficiency of Evidence

The losing party should always move for judgment notwithstanding the verdict for a new trial on the grounds that the verdict is against the weight of the evidence. Such a motion will preserve the issues of the weight and sufficiency of the evidence for appellate review. At least one court, in *Ford v. Southside Hospital*,⁶⁴ held that where defendant had moved for a directed verdict at the close of plaintiff's case but did not so move at the close of all evidence, the issue was unpreserved for appellate review. Thus, defendant should move for a directed verdict at the close of plaintiff's direct case and then make a further motion at the close of evidence.

This is similar to the rule in federal practice, where a motion for judgment as a matter of law at the close of plaintiff's case is a prerequisite to a motion after the verdict, and the grounds are limited to those raised in the

63 N.Y. Estates, Powers & Trusts Law § 5-4.3(c)(i), (ii).

64 12 A.D.3d 561, 785 N.Y.S.2d 474 (2d Dep't 2004).

... MUST ALSO BE MADE AFTER THE VERDICT IN ORDER TO PRESERVE THE ISSUE. AS THE SECOND CIRCUIT HAS STATED, "TO PRESERVE FOR APPEAL A CHALLENGE TO THE DENIAL OF A PRE-VERDICT MOTION FOR JUDGMENT AS A MATTER OF LAW, A MOVANT MUST RENEW THAT MOTION AFTER THE VERDICT."⁶⁶

[16.14] D. Preservation of Issues Concerning Adequacy of Award

Lastly, although a motion to set aside the verdict arguably should preserve the issue of excessiveness or inadequacy of the award, even without a specific reference to damages, it is advisable to raise the specific issue after the verdict to avoid any question regarding preservation.⁶⁷

[16.15] VII. CONCLUSION

In the final analysis, decisions about whether to call a particular expert must be made on a case-by-case basis. With respect to objecting and making a record, however, certain rules are nearly universal:

- Adverse rulings and instructions and any failure to charge as requested should be preserved with an appropriate objection.
- A detailed offer of proof should be made concerning the exclusion of evidence.
- Inconsistent verdicts must be objected to before the jury is discharged.
- Timely motions addressed to the weight and sufficiency of the evidence should be made.

An appropriate rule of thumb might be to make an objection or appropriate record as to any conduct or ruling that seems objectionable; if it seems objectionable, it probably is. Although the timely preservation of issues will not guarantee success on appeal, it will at least ensure that an issue will be considered on the merits.

⁶⁵ Fed. R. Civ. P. 50(b).

⁶⁶ *Varda v. Ins. Co. of N. Am.*, 45 F.3d 634, 638 (2d Cir. 1995).

⁶⁷ See *Smetanick v. Erie Ins. Group*, 16 A.D.3d 957, 958, 792 N.Y.S.2d 223 (3d Dep't 2005).

ARE JURIES FAIR TO PHYSICIANS?

Linda S. Crawford, J.D.