

Early Case Evaluation and Risk Management

As outside appellate counsel, we are often called in to handle a case after the defendant has taken a “big” verdict. More

frequently than one might expect, we will find, after reviewing the entire record on appeal, that other steps could have been taken prior to the appeal to minimize, reduce and in some instances *eliminate* the risk of taking such a verdict. Perhaps the most significant area where arguments are unpreserved or not sufficiently developed and advanced is with respect to damages. All too often damages get put on the “back burner” with all of the attention focused on liability. Moreover, some defense counsel are reluctant to present a defense on damages, lest this be perceived as a concession of liability or a “floor” for damages. Yet, without a meaningful defense on damages, juries and appellate courts tend to adopt the numbers provided by plaintiffs’ experts. An inadequate evaluation or preparation for a defense on damages can also result in settlements that bear little relation to the actual value of a case.

This article will focus on analyses that can be applied pre-trial, during trial and post-trial to reduce the chances of taking a “big” verdict or to minimize the size of that verdict. Following these steps can guide the decision whether to proceed to trial or with an appeal, and can aid in better posturing a case during settlement discussions, as well as increasing the chances of success at trial or on appeal. In fact, as we have often seen, an early evaluation on damages and a full and complete preparation for a defense on damages can save literally millions of dollars!

Where Possible, Focus on Sustainable Value and Cost

In determining the actual value of a case, it is important to distinguish among four different values: (1) jury verdicts, (2) sustainable value, (3) present value, and (4) cost. In evaluating cases, the emphasis should be on sustainable value over jury verdicts and cost over present value. Sustainable value refers to the amount that will likely be upheld on appeal. Cost refers to how much it would ultimately cost to satisfy a judgment or settle a case.

While in some instances the jury’s verdict and the sustainable value will be the same, as will be explained below, that is not always the case. Sometimes, the amount that an appellate court would uphold on appeal is considerably less than the verdict. For example, jury awards for pain and suffering in “brain-damaged baby” cases involving catastrophic injuries can be in the tens of millions of dollars. Yet, in New York, for example, the most recent awards sustained by the appellate courts in such cases have not exceeded \$6.0 million. Thus, when determining the “value” of a case, emphasis should be placed on what ultimately would be sustained by an appellate court.

Focusing on cost can also be a useful tool in determining the “value” of a case, particularly during settlement discussions. The use of structured settlements and the purchase of annuities that will begin making payments at a future time when a particular loss will be incurred can significantly reduce cost. For example, assume a case involving a catastrophically injured three-year old child who was injured during a rollover accident that went to trial in 2010. Also assume the damages claimed by the plaintiff include lost earnings. Since this particular loss will not be incurred

until the child turns 18 or 21, corresponding to the time when the child would have entered the work force, an annuity can be purchased today that does not begin making payments until 2025 or 2028. An annuity purchased today that does not begin making payments until 15 or 18 years in the future costs considerably less than if the payments were to begin immediately.

Similarly, cost reductions can be obtained by delaying the commencement date for annuities for other economic damages such as medical expenses, equipment, and retirement benefits to correspond to the time when a particular loss will be incurred. For example, if an injured construction worker would have retired and begun receiving pension benefits from his union in 2035, an annuity can be purchased to begin making payments for an award of damages for lost pension benefits in 2035. Once again, the cost would be much less than if the payments were to begin immediately.

Such deferred payments should be considered not only in the context of structured settlements, but also in cases where, pursuant to statute, a structured judgment must be entered that will provide for payment of a portion of the future damages over time. Depending upon the law of the particular jurisdiction, defense counsel should be prepared to request an appropriate jury interrogatory as to the commencement dates for the different categories of future economic loss.

Rated age is another way to bring down the cost of an annuity, sometimes quite considerably. A rated age is assigned by an underwriter for a life insurance company based on an evaluation of how long the plaintiff is likely to live and indicates that the life insurance company is willing to take the risk of providing annual pay-



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ments at a lower cost than would otherwise be required. For example, an underwriter might conclude that a catastrophically injured 20-year-old, who would otherwise have had a life expectancy of 55 years and lived to age 75, is only going to live another 25 years. Accordingly, the underwriter will assign a rated age of 50. Since an annuity for a 50-year-old is less expensive than an annuity for a 20-year-old, the ultimate cost of settling the case will be less.

Pain and Suffering

Perhaps the most difficult award to predict, except in states that have imposed statutory caps, is pain and suffering. This, however, does not preclude a meaningful evaluation as to sustainable damages.

The first step, of course, is to determine whether the evidence supports the extent of the plaintiff's claimed injury, and demonstrates that it was proximately caused by the negligence of the defendant. The next step, in order to evaluate the likely sustainable value of a pain and suffering award, is to look at sustained awards in cases involving plaintiffs with similar injuries. In this regard, decisions by an appellate court reducing or increasing an award of damages for a comparable injury are the most useful in predicting sustainable value. Importantly, where a reported decision does not discuss the injury in detail, one can review the briefs and the record on appeal in that case at your local court's law library, as well as any available jury verdict reports, in order to make a valid comparison of the injuries.

The most effective comparisons are to cases involving similar injuries, but where the extent of the injury is greater than for your plaintiff. Other relevant factors include the impact of the injury on the plaintiff's lifestyle; the plaintiff's age; and whether the plaintiff had a pre-existing condition. For example, the sustainable value of a herniated disc or rotator cuff injury to an elderly plaintiff with a sedentary lifestyle will likely be less than in the case of a young, previously athletic plaintiff who can no longer play sports as a result. On the other hand, if the injury results in the loss of an elderly plaintiff's ability to live independently, the "loss of enjoyment of life" aspect of pain and suffering

can be substantial. Again, it is essential to look beyond just the facial similarity of the injuries and look to other related factors in making effective case comparisons.

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can allow for greater appellate scrutiny and provide for a tighter range of awards, such as in Michigan and New York, or the standard can be looser, permitting a wider variation in awards, such as the "shocks the conscience standard." California, for example, applies the "shocks the conscience" standard. A verdict meets this standard if it suggests passion, prejudice, or corruption on the part of the jury. See *Buell-Wilson v. Ford Motor Co.*, 73 Cal. Rptr. 3d 277, 305 (Cal. Ct. App. 2008). Case comparisons are permitted, but do not set thresholds for certain injuries. See *Seffert v. Los Angeles Transit Lines*, 364 P.2d 337, 343 (Cal. 1961).

In contrast, Michigan permits appellate courts to review jury awards based on objective factors, including (1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; (2) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and (3) whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions. See *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 (Mich. 2004). "[W]hen a verdict is unsupported by the

record or entirely inconsistent with verdicts rendered in similar cases, a reviewing court may fairly conclude that the verdict exceeds the amount required to compensate the injured party." *Id.*

Thus, in jurisdictions with a stricter standard of review, such as Michigan and New York, analyzing sustained awards in comparable cases is an indispensable tool in reducing the size of pain and suffering awards. Case comparisons, however, can also be useful even in jurisdictions where the courts allow a wider variation in verdicts and are less willing to disturb a jury's award. If a number of jury verdicts for similarly injured plaintiffs fall within a similar range, a strong argument can be made that the court should be objectively guided by the collective conscience of the community as reflected in those verdicts, as opposed to a trial judge's subjective belief that an award shocks his or her conscience. Likewise, an award that dramatically exceeds that range may support an argument that the jury was improperly swayed by "passion" or "prejudice"—particularly if there were other errors during the trial. For example, in a recent New Jersey case involving a \$50 million pain and suffering award to an infant, the New Jersey Supreme Court held,

Standing alone, if that verdict had been awarded by a fairly impaneled, dispassionate, and unbiased jury, based on adequate and appropriate testimony and evidence, the award might well be sustainable. In the end, however, our concerns about the improprieties that infected this trial call the verdict into question because this historic and extraordinary damage award cannot be separated from those errors.

See *Pellicer v. St. Barnabas Hospital*, 974 A.2d 1070, 1091 (N.J. 2009).

Thus, in addition to challenging the nature and extent of the plaintiff's claimed injury, effective case comparisons can provide credible arguments during settlement discussions, and can be utilized on post-trial motion and appeal to bring down the jury's pain and suffering award.

Economic Losses

Economic losses typically include such damages as lost earnings, medical

expenses, loss of services, loss of guidance, loss of retirement or pension benefits, and the like. Paradoxically, while economic losses can be easier to predict than pain and suffering awards, this is often the area where the most money is needlessly lost due to an inadequate, incomplete, or non-existent defense. In the absence of presenting contrary evidence and testimony to challenge the plaintiff's claims, juries and the appellate courts tend to defer to the numbers proposed by the plaintiff's experts.

The importance of presenting contrary evidence is rather dramatically demonstrated by *Stringile v. Rothman*, 530 N.Y.S.2d 838 (App. Div. 1988), a wrongful death case decided several years ago in New York. There, the decedent had planned to open a Ford dealership with his nephew. Following the decedent's death, the nephew opened the business, but it lost money for the next three years until it was taken over by another person who ultimately attained financial success. At the first trial of the action, the court allowed evidence of the gross sales and profits of the successor business. Notably, the defense did not present a case on damages, other than to cross-examine the plaintiff's witnesses. The jury awarded \$4.5 million for wrongful death, of which \$1.2 million was for lost earnings. The trial court reduced the award to \$2.0 million for wrongful death, but found that the award of \$1.2 million for lost earnings was supported. On appeal, the Appellate Division held that the evidence of the gross sales and profits of the successor dealership was too speculative and remote to be probative on the issue of lost earnings, and ordered a new trial on the issue of damages for wrongful death.

Prior to the retrial, the defendants retained new counsel, who hired a forensic economist and undertook an extensive demographic study of Ford dealerships in neighborhoods similar to that where the decedent had planned to open his business. This expert concluded that during the time period in question—the early 1980s—Ford dealerships in comparable neighborhoods typically lost money or even went out of business. On the basis of his testimony, the jury at the second trial awarded a total of \$130,000 for wrongful death, of which

\$70,200 was for lost earnings—a difference of \$4,370,000 from the original award for wrongful death! The Appellate Division subsequently affirmed the award on appeal. *Stringile v. Rothman*, 572 N.Y.S.2d 918, 919 (App. Div. 1991).

While presenting an aggressive defense on damages does not guarantee such dra-

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matic results in every case, *Stringile* demonstrates the defense benefits and importance of “telling a different story.”

Telling a Different Story

Typically, in a case involving a severely injured plaintiff, the plaintiff's attorney will call a “life care” planner who will testify as to the various types of medical treatment, equipment, supplies, and medications the plaintiff will require over the course of his or her lifetime, as well as the cost of such items. Defense counsel should be prepared not only to challenge the various items included in the life care plan, but should consider retaining their own life care planner to present to the jury. Similarly, if it appears that the plaintiff is capable of working, the defense should consider retaining a vocational rehabilitation consultant to testify as to the types of work the plaintiff is capable of performing and the salary the plaintiff could obtain in those lines of work. While this is contrary to conventional thinking that cautions against presenting a defense on damages out of a concern about inviting a finding of liability, the downside leaves the defense susceptible to a much higher verdict that will be much more difficult to challenge on post-trial motion or on appeal. Losing the ability to make an effective challenge to economic

awards can be very costly since economic awards often compromise over half of the jury's total award. Thus, minimizing economic awards can result in significant cost savings when having to pay on big verdicts.

Generally, states have adopted one of three approaches to the plaintiff's burden of proof for economic losses. Some states have adopted the reasonable probability rule, requiring that to recover for such losses the plaintiff must prove more than a mere likelihood or possibility, but that such losses are more probable than not to occur. See, e.g., *Hashimoto v. Marathon Pipe Line Co.*, 767 P.2d 158, 164 & n.9 (Wyo. 1989). Other states require proof with reasonable certainty, but have equated reasonable certainty with reasonable probability. See, e.g., *Palanki v. Vanderbilt University*, 215 S.W.3d 380, 391 (Tenn. Ct. App. 2006). At least one state has defined reasonable certainty as akin to “clear and convincing evidence” otherwise known as the 75 percent standard. See *Kihl v. Pfeiffer*, 848 N.Y.S.2d 200, 207 (App. Div. 2007). Whichever standard applies should guide the damages analysis, defense at trial, and arguments on appeal.

Thus, in conducting a damages evaluation, each and every item of claimed economic loss should be viewed from an appellate perspective asking the questions: can the plaintiff or did the plaintiff prove that an item of damages has a reasonable basis in the plaintiff's needs or with reasonable certainty? Can or did the plaintiff prove with reasonable certainty that he or she can no longer work or work at a job with a commensurate salary? Can or did the plaintiff prove with reasonable certainty that he or she will need future surgery? Can or did the plaintiff prove with reasonable certainty that he or she would require a home health aide 12–14 hours a day? A thorough and proper review of plaintiff's expert depositions, expert reports, trial testimony, consultation with defense experts, and production of such experts at trial, can not only chip away at the plaintiff's numbers, but it can also lay the foundation for a successful appeal on those issues.

Punitive Damages

While in the past punitive damages were

difficult to predict, in the last 25 years, the United States Supreme Court has issued a series of decisions limiting the size of punitive damage awards as a matter of constitutional due process. Many states have followed suit by similarly limiting punitive damage awards based on constitutional concerns or by passing legislation imposing caps on punitive damage awards. These developments provide the defense with more opportunities to predict and limit the size of punitive damage awards. See Curt Cutting, Punitive Damages: Inching Towards Predictability, CLAIMS MAGAZINE (June 18, 2010) (last visited August 2, 2010) <http://www.claimsmag.com/Exclusives/2010/6/Pages/Punitive-Damages-Inching-Towards-Predictability.aspx/>.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Supreme Court announced a three-part test to evaluate a punitive damages award: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm and the punitive damages award; and (3) the difference between the remedy and the civil penalties authorized or imposed in similar cases. In *State Farm v. Campbell*, 538 U.S. 408 (2003), the Supreme Court then expanded on *Gore*'s logic by noting that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425. In that case, the Supreme Court suggested that where compensatory damages were substantial, punitive damages should perhaps be limited to a one-to-one ratio with punitive damages. Since *State Farm*, in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), the Court has held that punitive damages could only support a one-to-one ratio in federal maritime cases.

In response to these Supreme Court cases, state courts have also begun to set flexible, albeit more predictable limits, on punitive damage awards. See, e.g., *Hall v. Farmers Alliance Mut. Ins. Co.*, 179 P.3d 276, 286 (Idaho 2008) (finding a 35:1 ratio constitutionally excessive and affirming a reduction to a 4:1 ratio); *Goddard v. Farmers Ins. Co.*, 179 P.3d 645, 667, 670 (Or. 2008) (concluding that the constitutional maximum punitive damages ratio was 4:1,

and not the jury-awarded ratio of 24:1); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 308–09 (Tex. 2006) (finding 4.33:1 ratio constitutionally excessive and remanding for constitutionally permissible remittitur). Many jurisdictions have also attempted to limit punitive damage claims by subjecting them to a heightened burden of proof, such as clear and convincing evidence. See, e.g., *Southeast Environmental Infrastructures LLC v. Rivers*, 12 So. 3d 32, 48 (Ala. 2008). At least one state, Colorado, requires proof beyond a reasonable doubt to establish punitive damages. See *Coors v. Security Life of Denver Ins. Co.*, 112 P.3d 59, 65 (Colo. 2005), citing COLO. REV. STAT. ANN. §13-25-127(2). Each of these developments provides more opportunities for defense counsel to challenge punitive damage awards at trial and on appeal.

Furthermore, in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), the United States Supreme Court vacated a punitive damages award on procedural grounds. In that case, Philip Morris sought to vacate an award for punitive damages based on the trial court's failure to instruct the jury that it could not seek to punish the company for injury to other persons not before the court. In vacating the punitive damage award, the Supreme Court held that while a showing of harm to others was relevant in assessing the reprehensibility of the defendant's conduct, the Constitution's Due Process Clause forbids the use of punitive damages to punish a defendant directly for harm inflicted on nonparties. *Id.* at 353. According to the Court, "to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation" by allowing the jury to speculate as to such matters as how many other victims existed, and how seriously they had been injured. *Id.* at 354. The Court, therefore, emphasized that it was constitutionally important that juries be given proper legal guidance to provide assurance "that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 355.

Following the *Williams* case, other courts have vacated and remanded punitive damage awards where the lower court did not give a proper limiting instruction.

See, e.g., *Estate of Schwarz v. Philip Morris Inc.*, 348 Or. 442 (2010); *Frankson v. Brown & Williamson Tobacco Corp.*, 886 N.Y.S.2d 714, 721–22 (App. Div. 2009). Thus, defense counsel should pay particular attention to the plaintiff's closing arguments and the court's instructions and object, on the record, to any attempts to go beyond the bounds of permissible argument. The failure to raise a proper and timely objection and request to charge can result in a waiver. See *Buell-Wilson*, 73 Cal. Rptr. 3d at 323.

Thus, while the law is still developing in this area, there are more opportunities to raise successful challenges to punitive damage awards than in the past and more ways to attempt to limit the size of punitive damage awards.

Structured Judgments, Collateral Source Offsets

Many states have enacted legislation that allows a defendant to pay out portions of a future damages award in installments rather than paying the full sum at once. The purpose of these statutes is to reduce the overall costs associated with paying damage awards. For example, in Colorado, in any medical malpractice action wherein the future damages award exceeds \$150,000, the court must enter a judgment providing for the periodic payment of the future damages award. COLO. REV. STAT. ANN. §13-64-203.

Thus, in evaluating the likely exposure in a particular case, after the range of potential awards is analyzed, the applicable structured judgment statute should be applied to determine the cost for each potential outcome. As is sometimes the case, this may reveal that the plaintiff's demand exceeds the actual cost of satisfying a judgment assuming the worst-case scenario. Explaining this during a mediation can be a powerful tool in demonstrating the plaintiff's unreasonableness and in enhancing defendant's credibility with the mediator, thereby increasing the chances of a more favorable settlement.

Structured judgments, however, while helpful in reducing cost compared to lump sum payments, are often not as flexible as structured settlements. For example, a structured judgment statute might require certain lump sum payments or payments

over a certain number of years. They may also require that periodic payments begin immediately, even though the particular loss (as, for example, lost earnings in the case of an infant plaintiff) will not be incurred until a future date. Structured settlements do not have such limitations, and the parties can tailor lump sum payments to correspond to anticipated future needs, such as the purchase of a new customized van every five years or a further hip replacement 15 years in the future. Structured settlements can also delay the commencement date for certain annuities and take advantage of the plaintiff's rated age. Often, by working backwards from the plaintiff's claimed needs, astute defense counsel along with a skilled structured settlement broker will be able find a way to provide more benefits to the plaintiff while paying less. Of course, in such a case it will be necessary to overcome plaintiff's counsel's motivation to decline such an offer because it reduces his or her overall fee. Sometimes that can be accomplished by requiring that the plaintiff himself be present when the structured settlement offer is made.

Consideration must also be given to the types of collateral source offsets available, which will vary from case to case and jurisdiction to jurisdiction. In one case we recently handled the collateral source offsets alone exceeded \$1.0 million. Additional offsets may be available for settlements by co-defendants; apportionments for culpable conduct by the plaintiff and non-parties who contributed to causing the plaintiff's injury; and, with respect to an award for lost earnings, the income taxes the plaintiff would have been required to pay. The effect of each of these potential offsets should be considered when determining the "value" of a case, as well as during settlement discussions.

Case Example

The following is an example from a case we handled to demonstrate how all of the foregoing analyses can be put together and utilized in settlement discussions.

In a New York medical malpractice case involving severe brain damage to an infant during delivery, the jury returned a verdict with the following approximate awards:

past pain and suffering \$2.0 million; future pain and suffering \$20 million; lost earnings \$4.6 million; and medical expenses \$29 million, for a total award of \$56.6 million. The jury also apportioned our client 25 percent liability and the co-defendants settled after the verdict. In New York, CPLR Article 50-A provides a statutory scheme

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for periodic payments of judgments in medical malpractice cases. New York General Obligations Law §15-108 also provides a nonsettling defendant with a set-off for the greater of the settlement amount or the settling defendant's apportioned share of the liability. Article 50-A incorporates such a set-off in its structured judgment calculations. For the sake of brevity, without addressing the precise mechanics of how these complex statutes actually work, after applying both statutes in this case, the projected cost of satisfying a judgment against our client was approximately \$8.0 million (compared to 25 percent of \$56.6 million, which would have been approximately \$14 million).

Next, we considered each of the jury's awards. Pursuant to CPLR 5501(c), New York courts must review pain and suffering awards to determine whether they deviate materially from what has been determined to be reasonable compensation. New York adopted this standard in 1986 to replace the "shock[s] the conscience" standard with the goal of tightening the range of awards for similarly injured plaintiffs. See *Reed v. City of New York*, 757 N.Y.S.2d 244, 247 (App. Div. 2003). As a result, case comparisons are an essential tool for obtain-

ing reductions of jury verdicts on post-trial motion and on appeal in New York.

To date, there has yet to be a medical malpractice case in New York involving an infant where an appellate court has sustained more than a total of \$6.0 million for past and future pain and suffering. Thus, it can reasonably be assumed that on appeal, the \$22 million pain and suffering award would be reduced to at least \$6.0 million. Furthermore, in this particular case, the infant plaintiff was not as severely injured as the plaintiff in another recent case where a New York appellate court reduced the pain and suffering award to \$4.25 million. See *Flaherty v. Fromberg*, 849 N.Y.S.2d 278 (App. Div. 2007) (complete description of the jury's awards and injury obtained from Record on Appeal). Thus, it seemed highly likely that the sustainable value of the award for pain and suffering would not exceed \$4.25 million.

With respect to economic awards, New York courts apply the "reasonable certainty" standard of review, which they equate with clear and convincing evidence. See *Schultz v. Harrison Radiator Division General Motors Corporation*, 683 N.E.2d 307, 311 (N.Y. 1997); *Kihl*, 848 N.Y.S.2d 200, 207 (App. Div. 2007). A review of the trial transcript in this case revealed that the plaintiff failed to prove various items of economic damages with reasonable certainty. For example, the jury awarded lost earnings based on the assumption that the plaintiff would not be able to work at all in the future. None of the plaintiff's experts, however, testified that he was incapable of working in the future. In addition, the plaintiff's life care planner included in his life care plan a greater number of sessions of physical, occupational and speech therapy than the plaintiff had been receiving, and there was no medical testimony that such additional therapy was necessary. The plaintiff's life care plan also included the cost of numerous medical devices, supplies, and medications that lacked any foundation in the evidence and were not related to the plaintiff's injury at birth. Thus, we were able to determine that the sustainable value for lost earnings was more likely to be \$1.5 million and that the sustainable value for medical expenses was more likely to be \$20 million.

After determining the likely sustainable value, we then applied the structured judgment statute and the set-off for the settling defendants' 75 percent apportioned share of the total liability. This reduced the cost of satisfying a potential judgment in the case from \$8.0 million to approximately \$2.0 million. Significantly, \$2.0 million was the limit of the primary policy in this case. Furthermore, the \$2.0 million projected cost does not even take into account potential collateral source reductions or the possibility of obtaining a dismissal or a new

trial on appeal. When adding these additional factors, we made a strong and credible argument that the settlement value of the case was *below* \$2.0 million dollars. Thus, what at first appeared to be a case significantly implicating the excess policy became a case that did not reach the excess policy and permitted some savings off the primary policy.

Conclusion

An early case evaluation can be an indispensable tool in high exposure cases. It can

help determine when to settle a case, suggest the right numbers to put on a case, and support a credible argument to bring down the plaintiff's demand. It can also lay the foundation for a stronger defense on damages during trial and a stronger appeal. As such, it protects against having to unnecessarily pay more than a case is worth. In short, employing this approach, in conjunction with a strong defense on liability, will reduce the size of your payouts and save you more money in the long run. 