VALUATION AND SETTLEMENT OF BODILY INJURY CASES

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J. Michael Conley
Kenney & Conley, P.C.

Co-authored with:

Peter M. McElroy
Cosgrove, Eisenberg & Kiley, P.C.

INTRODUCTION

Evaluation and settlement of personal injury cases is neither art nor science. Rather, it involves a combination of objective and subjective factors along with a little bit of intuition or guess work. Preparation of the file is of paramount importance. Maintaining open communication with all participants is essential. Managing expectations -- of the insurer, and of the plaintiff and opposing counsel -- will set the stage for reaching agreement on the value of the case, and obtaining a settlement. Settlement of personal injury cases is essentially an evaluation of risk tolerance -- the insurer's evaluation of the likelihood of a judgment substantially more than an available settlement, and the victim's willingness or ability to decline a substantial offer and risk a defendant's verdict or a verdict for less than the amount offered.

Settlement value, therefore, is driven primarily by exposure. In other words, damages, damages, and damages! It is only when the plaintiff's damages are such that a miscalculation by the insurer can be very expensive, that the plaintiff's counsel truly controls the settlement process. This is not to say that low or modest damage cases do not settle. On the contrary, such

cases are the bread and butter of most busy tort practices and routinely settle. However, where damages are known within a reasonable range and the facts do not enable plaintiff's counsel to demonstrate a risk of open-ended damages, the settlement process is largely controlled by the insurer. Even in the clear liability case, the insurer is able to make an offer outside the lower end of a plaintiff's desired settlement range without incurring any risk other than a marginal damages increase and the cost of defending the case.

Accordingly, the role of the plaintiff's attorney is to seek to identify and articulate to the insurer the subjective open-ended aspects of a case in order to create an understanding of risk, while at the same time educating the plaintiff to the realities of the current settlement climate.

It is very important for a plaintiff's attorney to approach both claims personnel and defense counsel with an eye towards establishing a long-term relationship that will impact not only the outcome of the present case, but also will affect future cases and clients other than the ones immediately at issue. Negotiation is communication, and there is no substitute in negotiation for cordiality, respect and trust. This can begin with recognition that claim representatives and defense attorneys have their own jobs to do and represent adversaries, but not enemies. A plaintiff's attorney who works to establish a reputation for being willing and able to competently try cases when necessary, but also for being reasonable and trustworthy, has a distinct advantage in settlement negotiations compared to a novice attorney or a lawyer with a lesser reputation. This reputation and established track record is a benefit to all of an attorney's clients; thus, all of an attorney's clients' interests are advanced by conduct consistent with developing such a reputation.

Similarly, defense counsel should view the initial contact with a plaintiff's attorney as potentially the first step on the road towards settlement. There is no rule that says defense

counsel cannot be honest, open and cordial to plaintiff's attorney. On the contrary, earning the respect of plaintiff's counsel begins with this first contact. In a perfect world, personality would play no role in the ultimate resolution of a personal injury claim, but we neither live nor practice law in a perfect world. Nonetheless, the value of a case is ultimately based upon objective discussions with plaintiff's attorney. Minimizing antagonistic discourse, whether oral or written, will help to focus on the real issues of liability and damages which should drive any settlement discussions.

MANAGING CLAIMANT / VICTIM'S EXPECTATIONS

In addition to forming one's own evaluation of the case, and advocating to the insurer, it is important to keep in mind that no case is settled unless the plaintiff agrees to the settlement. It is important from the outset of the attorney-client relationship to manage client expectations in a way that will enable the client to make sensible decisions when the case ripens for settlement. This can be one of the most difficult aspects of the settlement process. On the one hand, creating or allowing unreasonable expectations at the beginning of the relationship can make it very difficult to settle the case when the time comes. On the other hand, the realities of competition for good plaintiffs' cases, with ubiquitous television and print advertising and accompanying puffery – which has evolved from targeting only new claims to targeting clients who have already retained counsel -- have combined with insurance industry advertising focused on perceived excessive jury awards, to leave many in the public with the perception that tort claims are necessarily easy and lucrative. A new personal injury client may well arrive with this misconception. The initial contact cannot focus too much on doom and gloom or else the attorney will lose the client. Nonetheless, it is essential to utilize early meetings to begin the process of educating the client to the realities of the system. Ultimately, a realistic understanding of the case, along with confidence in the attorney, will enable most clients to make difficult and yet sensible settlement decisions.

There are, however, accident victims who for a variety of reasons are intransigently unreasonable or simply not manageable. These are the clients who are most likely to prefer friends' or neighbors' suggestions to the advice of their attorney, to change attorneys as a result of others' promises, or forego reasonable settlements requiring counsel to try cases that, on balance, ought not to be tried. Such an unwanted trial is rendered even more unpleasant by the

reality that stubbornness or avarice are difficult to conceal in a witness and seldom forgiven by a jury. A plaintiff's attorney should try to recognize or avoid clients who will have difficulty following advice and/or engaging in constructive negotiations.

Another aspect of managing client expectations is that clients should be educated early and often about the concept of medical liens and their increasingly unfair impact on plaintiff's cases. It is extremely helpful during settlement negotiations if the claimant already has an understanding of the issue of liens and is not required to absorb this as a new concept at the same time as being asked to moderate his or her financial expectations in the settlement process.

WORKING WITH THE CLAIMS DEPARTMENT

In dealing with insurers, it is helpful to have some understanding of the role and authority of the claim representative. It is necessary to recognize that these persons are working within and constrained by the requirements of a bureaucracy. While authority varies among insurers, most professional claims representatives consider their role to be to identify and fairly settle meritorious claims. There is no productive reason to ascribe any other motive to a claims professional, and nothing to gain by being personally aggressive or discourteous. When dealing with the insurer, it is the task of plaintiff's counsel to facilitate the settlement process by motivating the claims representatives to advocate settlement to their superiors and also to equip the claims representative with the back-up information to make the argument persuasive.

TIMING OF SETTLEMENT

As a generalization, there are two opportunities to settle a case. First, before filing a law suit, in negotiations with the insurer's claims department; and second, at or near the pre-trial conference after the parties have had sufficient discovery to analyze a case in suit. Nonetheless, all communication between a plaintiff's representative and insurers or defense counsel is part of and relevant to the negotiation and settlement process.

Cases of clear liability and understandable damages may present an opportunity to settle directly with the insurer's claims department without filing a lawsuit. Routine motor vehicle accident cases, cases with finite damages as discussed above, and cases with minimal insurance coverage may be appropriate for consideration for an early settlement. Moreover, some premises (slip, trip and fall) cases are best presented out of suit for early compromises, and counsel should be very selective of which of these cases go beyond and into suit.

Another factor that may mitigate towards settling out-of-suit, even understanding the necessity of substantial compromise, is where there is information regarding the claimant, ranging from criminal record to simply unpleasant or unsympathetic personality, which would hurt settlement prospects if exposed during the discovery process.

Counsel should be selective in identifying cases to pursue in this manner because unsuccessful efforts out of suit may sacrifice months of accumulated interest as well as create delays that adversely affect client confidence. It is helpful to explain to clients the decision to hold a case out of suit by explaining the benefits of an earlier settlement with lower out-of-pocket disbursements than may accompany an in-suit settlement, as weighed against the downside risk of delay.

Most cases of any complexity or with significant damages (complex cases without significant damages should not be cases at all) are best placed in suit. Complex cases need to be in suit before becoming ripe to settle for a variety of reasons. Serious damages require exploration through discovery. In addition, severe subjective losses are best considered by considering the party and his/her ability to sympathetically articulate what has happened. In such cases, defendants will also need the opportunity to examine the facts and have counsel determine whether there are any potential joint tortfeasors who should be contributing to the settlement.

VENUE

Any issue recognized to effect the likelihood of success or potential judgment value logically impacts questions of settlement. This is true with issues of venue. In Superior Court cases, venue is a significant consideration in settlement. For example, a case filed in Middlesex County, reputed to have the highest plaintiffs verdicts, will have greater settlement value than the same case pending in Bristol County which has earned a reputation as a comparative wasteland for plaintiffs' verdicts. In general, the influence of venue on settlements mirrors the prevailing wisdom as to the most desirable jury pools in which more urban or cosmopolitan counties (Suffolk, Middlesex, Hamden) are more desirable for plaintiffs than more rural counties (Bristol, Berkshire).

Another aspect of venue selection is whether the case should be in Superior Court or District Court. Many routine cases -- unspectacular accidents causing soft tissue injuries -- have not proven to be good jury cases, and this fact has not been lost on the insurers. Plaintiffs in such cases might find District Court judges more receptive. A judge, after all, will likely approach such cases with the same frame of reference as plaintiffs counsel or defense counsel, recognizing

the existence of liability and that each case has a value range. Similarly, judges might be fairer in assessing cases of serial injury or aggravation of pre-existing condition, by applying the legal rules favoring the plaintiffs in such cases without becoming suspicious or disinterested due to the prior condition or prior accident.

There are many cases in which the defendant is guilty of only "innocent negligence." Despite a defendant's clear deviation from an objective standard of care, a jury might identify with the defendant and be disinclined to find for the plaintiff. Similarly, a flawed plaintiff lacking in personal appeal may fare better with a judge than a jury. Intra-family cases, such as a passenger injured in a family car, or a trip and fall on a relative's property, may be good cases by all objective criteria, but nonetheless receive a hostile reception from jurors who are troubled by the concept of suing family members. These cases would normally be less troublesome to a judge who would be more likely to find based upon the facts and law without becoming distracted by the parties' relationship. All of these factors affect the plaintiff's downside risk - the risk of an unwarranted defendant's verdict - and are recognized by defense counsel and insurers as well as by plaintiff's counsel. The prospect of a bench trial mitigates the plaintiff's risk and thus solidifies the plaintiff's settlement position. Moreover, unlike a "one-day/one-trial" jury, most District Court judges hearing civil cases will have developed a track record providing the parties some predictability of outcome. Finally, the potential for two trials (and attendant risk and delay) in cases in which a Superior Court *de novo* appeal is available may cause either or both parties (but probably plaintiffs more than defendants) to moderate their settlement positions.

INVOLVEMENT OF DEFENSE COUNSEL

A defense attorney begins the evaluation of a case by reading the plaintiff's complaint. Notice pleading in Massachusetts has allowed plaintiffs to file "bare bones" allegations. At least in Superior Court actions, the requirement of a detailed civil action cover sheet provides invaluable information at the start of litigation.

The defense counsel should scrutinize the civil action cover sheet for the elements of damages detailed by plaintiff's counsel. These should include hospital and doctor bills, lost wage information, property damage, and some evaluation of consequential damages. These latter damages may include loss of function, scarring, and disfigurement. In addition, pain and suffering falls within the ambit of these damages. They are, of course, the most difficult to evaluate as they are the most subjective of damages in any plaintiff's case. They are frequently considered the "multiplier" in the evaluation of a personal injury claim.

The complaint will also inform defense counsel as to who is suing, and who is being sued. The complaint will reveal whether the defendant is an individual or a corporate entity. If counsel has been retained directly by the defendant, the process of knowing the client and having their trust is off to a good start. If, on the other hand, defense counsel is assigned by an insurer to the defense, the initial evaluation of the claim must begin by creating a relationship with the defendant. It is essential that defense counsel meet the client at the earliest opportunity. Whether that client is an individual, or represented by a corporate entity, counsel must begin the process of knowing and managing the client. There is no substitute for face-to-face interaction. Trust develops as relationships grow. The client appreciates the effort, and defense counsel will be the beneficiary of the information which flows from open lines of communication.

In the majority of instances in Massachusetts, insurance policies reserve to insurers the right to settle bodily injury claims without the consent of the insured defendant. However, it is defense counsel's responsibility to represent the interests of the insured, who is his client. The "blurring" of the line between the defendant's interest and that of his insurance company should be clarified at every opportunity by defense counsel. Comprehensive preparation of the file and of the client will always inure to the benefit of the insurer. Informed case evaluations flow from this process.

"Pitbull tactics" neither enhance nor diminish the value of a personal injury. Aggressive representation by defense counsel does not require obnoxious conduct. There is nothing more persuasive than a fact. Obtain and study medical information concerning the plaintiff. Consider the nature of the treatment rendered, as well as its timing. Be conversant in discussing the type of injury, the usual course of recovery for such an injury, and how the plaintiff's recovery has progressed. Examine the special damages. If medical billings are excessive, point that out. If wage loss claims are "soft" bring that to the attention of plaintiff's attorney.

SETTLEMENT COMPONENTS

Understanding the components that comprise a settlement evaluation is essential. The insurer and defense counsel will request from plaintiff's counsel a detailed list of special damages, including documentation of medical bills and wage loss claims. Tax returns, W-2 forms, and affidavits from employers should, at a minimum, be supplied in support of any claimed loss of earning capacity. Medical reports and expert opinions regarding causation, disability periods, and residual incapacity will be requested from the plaintiff. If they are unavailable, inquiry should be made to plaintiff's attorney as to how these elements of a personal injury claim will be presented at trial. It is not unfair for defense counsel to ask the plaintiff how

the case will be proven. A request for the identity of witnesses supporting the plaintiff's liability and damage positions should be asked for early and then frequently thereafter.

Parties to any case need to understand and be prepared to discuss the components and calculation of damages, but it is a mistake for either side to focus exclusively upon records and numbers at the expense of considering the human aspect of the case, which will surely receive the jury's consideration. Any evaluation of the settlement value necessarily involves an evaluation of the parties themselves. A simple, hardworking, God-fearing plaintiff who has been injured due to the alleged negligence of a massive, faceless corporation will, on balance, have a higher settlement value assigned to the claim than if injured by a simple, hardworking, God-fearing, individual defendant. Attorneys must recognize that jurors are charged with deciding factual issues, and those facts are provided by testimony from real people. Human nature is not checked at the entrance to the jury room. Jurors carry their sympathies and prejudices with them when they cross that portal. Attorneys, therefore, must determine at an early stage of the proceedings whether their clients are likeable, believable, and can withstand the scrutiny they will receive from the opposing attorneys. Similarly, an important factor in any case is the plaintiff's ability to fully describe his or her damages without appearing to whine or exaggerate. There are plaintiffs who by their nature are positive and sympathetic and can articulate damages without alienating a factfinder. For most, however, such a presentation is the product of careful preparation. To be effective in advancing the prospects of settlement, this preparation must occur before depositions, recorded statements, and insurers' medical examinations, rather than being reserved for trial preparation after settlement efforts have failed.

It is the plaintiff's obligation in a settlement process to identify, explain and document the objective and subjective components upon which counsel expects the defendant to make a

settlement offer. Conversely, plaintiff's counsel needs to be conscious of any offsets to which a defendant is entitled, such as personal injury protection offsets in motor vehicle accidents. Defense counsel should, likewise, share relevant information. A realistic evaluation by both sides will not be achieved by playing "hide the ball". Negotiations towards a settlement are advanced by open discussion of all facts and circumstances. In general, the plaintiff's job is to extend and open up damages while the defendant's task is to limit or narrow potential damages. It is also helpful to understand the rights of both parties so that negotiations can focus on appropriate issues. For example, it is not at all helpful for a defendant or insurer to seek discounts for collateral sources for which the defendant is not entitled to any reduction.

So-called special damages include medical expenses and lost wages. Preparation for settlement includes gathering the bills, determining what is paid, and determining the amount of any liens. Counsel must be able to advise the plaintiff of the amount of liens and amounts of unpaid medical expenses so that the client can evaluate a proposed settlement with an understanding of the amounts available to keep. Lost wages and lost earning capacity must be calculated and documented through employer letters or lost wage statements, tax returns, and medical confirmation of the absences. Defendants / Insurers should not be expected to fully credit wage loss not susceptible of clear documentation, such as self-employment wages, underground economy income, or projected business profits or opportunities. Moreover, plaintiff's counsel should be prepared to adjust lost wage demands to reflect the absence of income tax.

Plaintiff's counsel should also present and document, and the parties should be prepared to discuss and value, hospital time as well as disability periods for total, partial, and residual. In addition it is necessary to evaluate the experience and suffering of the individual claimant during

these periods. There is no rule-of-thumb as how to value disability periods, and none is suggested here. They are, however, helpful in presenting and understanding settlement positions. If the claimant's attorney and defense counsel or claim representative are speaking the same language and looking at the same items, it is much easier to identify sources of controversy. In some cases, for example, there is no dispute as to the components of settlement – i.e. the parties are in agreement as to the special damages, periods of total and partial disability, and the extent of residual impairment. In those cases, the only issue is how to value the damage components the existence and duration of which are not in controversy. In other situations, discussing the settlement component parts may reveal discrepancies in disability periods, the existence or non-existence of residual symptoms or special damages, or other differences which may be addressed or narrowed by further documentation. Accordingly, the utility of the recognized settlement components is as a framework for discussion. Counsel should however, elevate the discussion beyond a simple mathematical exercise. In closed-end cases, plaintiff's counsel should be seeking to highlight the most sympathetic aspects of the case such as difficult or poignant times caused by an injury, or particularly intrusive or embarrassing procedures or testing. In all cases, plaintiff's counsel should work to identify and emphasize the components that enhance damages and create risk. These might include surgeries and other intrusive treatment (EMGs, cortisone steroid injections, epidurals, nerve blocks), residual impairment or limitation (which should be detailed in narrative as well as numerical form), poor or guarded prognosis (which also requires specific description), potential for future treatment or surgery, and residual disfigurement. The plaintiff's task is to cause the insurer to consider what a sympathetic jury could do with such subjective elements of damage.

It is similarly important to develop and document a theory of liability even where liability seems clear. If liability is the strong point in a plaintiff's case it is helpful to articulate and document the liability case in hopes that it will be seen as an egregious situation rather than a more mundane case of innocent negligence. Similarly, if liability is controversial, a thoughtful, well-reasoned, well-documented presentation may help the defendant understand the risk of an adverse verdict and motivate the defendant to moderate its settlement position.

DEALING WITH WEAKNESSES

Most cases have some problems. Dealing with the problems in a settlement context is less an exercise in concealment or finesse than an opportunity for advocacy. For example, a person with a history of back injuries and /or related claims, may not, on the surface, be the most desirable plaintiff. On the other hand, it is easy to argue that such a person as a result of his/her history is vulnerable to reinjury or exacerbation and thus is the last person one would want to see victimized by an accident. What could be more reasonable than positing that a person with advanced degenerative disc disease is almost certain to be severely harmed by a trauma to the spine or connective tissues and to be harmed more severely than a person with fewer pre-existing problems? On the other hand, it would be folly to pretend that the problems did not exist and hope the insurer does not find out. Insurers' indexing system will frequently reveal a history of claims. Additionally, references in medical records may give clues to past injuries, and radiology reports will certainly disclose pre-existing degenerative conditions. Finally, discovery conducted by experienced defense counsel will ordinarily identify prior injuries or claims.

Moreover, constructive settlement negotiations depend upon defense counsel and insurance representatives understanding the plaintiff's demand. This includes an understanding that the plaintiff recognizes and understands the problems in the case and that those problems

have been taken into account in the demand figure. Otherwise, the defendants' settlement position may be affected by the fact they feel entitled to reduction in value based on issues that the plaintiff has not yet disclosed or discussed.

JOINT TORTFEASORS / RELEASES

While plaintiff's counsel will focus on the collective liability of all defendants, defense counsel should also value a case based on the number of defendants involved. If several blameworthy parties are joined, the responsibility should be divided among the defendants. A ranking of defendants for culpability should be done at the earliest opportunity. Then, counsel should marshal facts to support that ranking, especially if counsel represents the least culpable party. Defense counsel can enter settlement negotiation with two adversaries. One is the plaintiff, and the other may be one or more co-defendants. Two objectives should be outlined in these circumstances. The first is to reduce the overall exposure presented by the plaintiff's liability and damage factors. The second is to limit one defendant's responsibility to the plaintiff as compared to the conduct and responsibility of the co-defendants. Defense attorneys will, at times, find themselves representing a client who is primarily responsible for plaintiff's dramatic damages. In that circumstance, counsel must recognize this position, and devise a method of dealing with it. Ignoring reality is not an option.

It is permissible for a plaintiff to arrive at separate settlements with joint tortfeasors. Plaintiff's counsel should be sure that the release only runs to the settling defendant. The release and settlement will be enforced against co-defendants claims for contribution so long as the settlement was entered into in good faith. G.L. c. 231B s. 4; see, *Slocum v. Donahue*, 44 Mass. App. Ct. 937 (1998); *Noyes v. Raymond*, 28 Mass. App. Ct. 186 (1990).

Counsel considering separate settlements must distinguish between joint and several liability on the one hand and derivative liability on the other hand. In a claim based upon *respondeat superior* or other vicarious liability, the release of an agent or servant will ordinarily operate to release the principal/master as well. *Elias v. Unisys Corp*., 410 Mass. 479 (1991).

Plaintiff's counsel should consider carefully the tactical consequences of a separate settlement. Settling separately with the most culpable defendant will leave counsel the often difficult task of proceeding with the case against marginal or secondary defendants. These defendants may be emboldened by the addition of an "empty chair" defense and changes in the comparative negligence formula flowing from the deletion of a significant party defendant. The chance of ultimate settlement may actually be diminished. A less culpable defendant/insurer may realize more risk and be more inclined to settle when faced with the prospect of being adjudicated one percent negligent as an adjunct to a verdict against a clearly liable co-defendant whose attorney is working to share the blame, as compared to the threat of defending on its own a thinner liability case with only one adversary, and knowing that the separate settlement will be credited against any adverse result. See *Boston Edison Co. v. Trisch*, 363 Mass. 179 (1973).

Settling separately with a marginal defendant may also be inadvisable. Plaintiff's counsel should recognize that the attorney(s) / insurer(s) for the most culpable defendants are usually actively engaged in pursuing contribution from co-defendants. A separate settlement between the plaintiff and a marginal co-defendant may have the unintended consequence of undermining defense counsel's efforts to coordinate a global settlement. Consequently, such separate settlements may best be considered, if at all, prior to trial and after settlement efforts have failed.

AUTOMOBILE ACCIDENTS

Car crash cases, more than any type of case, have an expectancy of settlement. Cases that do not settle are typically cases with special problems. One such problem, however, can be the failure of the plaintiff's counsel or the plaintiff to recognize that even clear liability cases have some risk. More than any other type of case, plaintiff's motor vehicle cases need to be concerned about jurors identifying with the defendant's conduct, at least in "innocent negligence" cases. Good trial cases, and therefore good settlement cases, involve issues of drunk driving, accidents caused by big scary trucks, accidents caused by recklessness and not mere negligence of the defendant, and accidents that involve very heavy property damage. The degree of property damage is extremely important when the plaintiff has suffered soft tissue injuries or other invisible injuries. In a nutshell, photographs of significant motor vehicle damage may be the best corroboration for a plaintiff's subjective complaints of pain. Conversely, plaintiff's counsel should be wary of the risk inherent in any case where the plaintiff has suffered a significant injury in the absence of substantial damage to the vehicle.

Due to the low minimum auto insurance coverage limits required by the Commonwealth, motor vehicle accidents often settle early due to injuries greater than the available coverage. The coverage limits must be disclosed by the insurer upon written request. G.L. c. 175 s. 112C.

In cases in which injury value clearly exceeds disclosed insurance coverage, counsel should not release the tortfeasor without first making reasonable inquiry into the availability of other coverage. For example, if the police report or investigation reveals that the responsible operator was operating an unknown vehicle registered to someone who does not reside at the same address as the defendant, one can obtain through the Registry of Motor Vehicles the identity of insurers for vehicles in the defendant's household and present optional bodily injury

claims to those insurers. Other exploration requires the availability of a formal discovery process in which the defendant is required to explain the accident under oath. It is important to explore with a defendant whether he or she attributes the accident to third parties within the defendant vehicle, other operators, or adverse road conditions. In addition, if the defendant is driving within the scope of employment, this may provide both additional insurance and an additional defendant.

If the value of an automobile accident claim exceeds the tortfeasor's bodily injury coverage limits, there may be a claim for underinsured motorist coverage. It is important for the claimant to request and receive prior permission from the insurer providing underinsured motorist coverage. It is not necessary to complete the bodily injury claim before proceeding with the underinsured motorist claim. *Aetna Cas. & Surety Ins. Co. v. Faris,* 27 Mass. App. Ct. 194, 536 N.E. 2d 1097 (1989). Nor is it essential to collect all of the available bodily injury coverage in order to access underinsured coverage, although the underinsured claim will proceed and be valued as if the claimant had received the entire amount of the tortfeasor's bodily injury coverage. *MacInnis v. Aetna Life & Cas. Co*., 403 Mass. 220, 526 N.E.2d 1255. (1988). (The *MacInnis* case presents a very helpful discussion of the mechanics and rationale of the permission process, but should be reviewed with an understanding of subsequent changes to the law and standard insurance language governing underinsured motorist coverage.

Next to damages in a plaintiff's evaluation of a settlement value is the egregiousness of the defendant's wrongdoing. This is important for a number of reasons. One is the infusion into the case of risk that an angry jury may render a punitive verdict pushing the damages outside of the range otherwise contemplated by the insurer. In addition, the more blameworthy the defendant's conduct the less concern there need be for issues of comparative negligence or jury

scepticism as to the plaintiff's subjective damage claims. It is important to understand that in cases of innocent negligence (e.g., a mother bringing her children home from school skidding on snow or ice causing a low damage/no damage collision with another vehicle), a plaintiff's damage claim will also receive more scrutiny, as compared to a case with a more culpable defendant. Even when such cases present clear liability on paper they include some risk of a "no negligence" finding from a jury.

In defending a motor vehicle accident claim, the defendant's counsel should, at a minimum, possess a police report. Try to obtain copies of the PIP file from the plaintiff's own carrier as it may reveal information that has not been provided by plaintiff's attorney. Counsel for the defendant should make his client's negligence as innocent as possible. Juries can still be convinced that "accidents do happen without someone's fault." It is good practice, if the facts support it, to compare your client's conduct favorably with the majority of the drivers on the roads of the Commonwealth. If a juror may evaluate the defendant's conduct as the result of a situation of "there but for the grace of God go I", a defendant's verdict is more likely. Negotiations are driven by risk factors. If the plaintiff can be convinced by defense counsel that a defense verdict is a real possibility, the plaintiff's incentive to compromise and reach a settlement will be enhanced.

In a Massachusetts accident, the defendant is typically entitled to an exemption from liability to the extent of PIP payments. G.L. c. 90, s. 34M. Because the law establishes an exemption rather than a subrogation mechanism, negotiations typically are phrased in net terms and the plaintiff need not be concerned about subrogation issues (which are taking place among the insurers without the plaintiff's involvement). When, however, an accident involves vehicles of insurers from outside of Massachusetts to which the exemption does not apply, a PIP carrier

would nonetheless have subrogation rights against the plaintiff's recovery or the defendant's insurer. It is very important to specify in negotiations and in any resulting release whether or not the settlement figure includes the PIP carrier's subrogation interest. Otherwise, the plaintiff may conclude a settlement and then find that the PIP carrier has an unanticipated and yet legitimate claim against the proceeds. Because the plaintiff has released the defendant, PIP carrier subrogation interest would have to come from the plaintiff's proceeds and not from the defendant or defendant's insurer.

PREMISES CASES

At the risk of repeating considerations outlined above, the analysis of premises cases must begin with an evaluation of the parties and the relationship between the parties. The same property defect accident and injury will have disparate settlement values depending on who is involved. Is the defendant a homeowner, a landlord, a commercial establishment? Is the plaintiff a visitor, a vendor, a customer? Is the plaintiff handicapped, elderly, a child (and, if a child, how well behaved and supervised)? If the defendant is an absentee landlord who owns but rarely manages his property, the price of the plaintiff's case has just risen. In a landlord/tenant case, responsibilities of the parties may be contained in the lease that would be dispositive on some issues of liability. For example, if the plaintiff/tenant was responsible for maintenance on the premises and is injured by some condition contained within the premises, a contract defense may nullify the tort action. Conversely, if the landlord's contractual duty of maintenance is breached, the negligence which underlies that breach will be enhanced in the eyes of the factfinder.

A plaintiff in a premises case needs to be able to identify and document the defect or condition causing the accident, to specifically address how the substandard condition produced

the accident, and to deal with comparative negligence arguments (the "Watch where you're going" defense).

LANDLORD/TENANT

In the landlord/tenant setting the settlement balance may swing in favor of the plaintiff due to a defendant's strict liability. Strict liability in tort may be created by conditions such as the presence of lead paint on the premises. G.L. c. 111, s. 199. Similarly, violations of the building code or sanitary code can be used to identify a defendant landlord's breach of the Implied Warranty of Habitability. See *Crowell v. McCaffrey*, 377 Mass. 443, 386 N.E.2d 1256 (1979). In those instances, defense counsel must focus the settlement evaluation exclusively on the plaintiff's asserted damages, and the relationship of those damages to the condition that is said to have caused them. Strict liability eliminates major concerns for a plaintiff, but does not eliminate the need to prove causation and damages. Plaintiff's counsel can and should be cognizant that liability without more cannot support a substantial recovery.

SNOW AND ICE ON THE PREMISES

These cases are usually a plaintiff's nightmare. The requirement in Massachusetts that liability be premised upon an "unnatural accumulation" of snow and/or ice, see *Aylward v. McCloskey*, 412 Mass. 77 (1992), serves to cull most of these claims from ever reaching litigation. Dramatic injuries may convince plaintiff's attorney to take the case, but liability will be the battleground. Defense counsel should obtain weather charts, plowing and sanding records, receipts for shoveling, and photographs of the area as minimum steps in preparing the defense. Retaining a forensic meteorologist should be considered. Experienced plaintiff's counsel will acknowledge that rarely do these cases present clear liability, and a significant discount from full settlement value must be expected. If plaintiff's counsel believes a particular snow and ice case is unaffected by these prevalent problems, special attention should be given to presenting and explaining this view to the defendant's representatives.

FALL DOWN ACCIDENTS

All parties should recognize that jurors have a healthy measure of skepticism when asked to decide in the plaintiff's favor on most fall down claims. The best explanation for this is that almost everyone has fallen at some point in their lives, and rarely have they looked to blame someone other than themselves. Creating a picture of the plaintiff as someone who abdicates personal responsibility while faulting the defendant is a tested and true defense strategy.

Defense counsel should also examine the relationship of the parties involved in these cases. Frequently the plaintiff is a family member or a close friend of the defendant. The jury may be led to believe that the claim has been brought only for the "money." Plaintiff's counsel

must recognize that jurors are not oblivious to such factors, and the likelihood of a significant verdict in such a claim is not great.

Recently, the open and obvious rule has been given renewed viability by the Supreme Judicial Court. See *O'Sullivan v. Shaw*, 431 Mass. 201 (2000). In a fall down case, defense counsel should focus his and the plaintiff's attention on the lack of any "hidden danger" created by the defendant's conduct. On the other hand, most defendants will deny in deposition the existence or recognition, let alone the obviousness, of a dangerous condition alleged by the plaintiff.

Defense counsel should seek to eliminate, or at least minimize, any anger that might be directed at the defendant for creating or allowing the existence of the condition that injured the plaintiff. An examination of why the plaintiff was at the accident site and what occurred at the time of the accident must be carefully explored. A plaintiff who falls down stairs while entering a store frequented by hundred of customers on a daily basis, all of whom have not fallen, will have a difficult time establishing liability. Conversely, if the defendant's stairs are dirty, poorly lit, and demonstrate a general lack of care by their owner, the plaintiff's chance of recovery will be enhanced. It is also very helpful to a plaintiff in settlement negotiations as at trial to identify violations of the state building code, sanitary code or other published standards that can be presented to bolster the liability case.

DOG BITE

Because most dog bite (or dog-related injury) cases are, by statute, subject of strict liability, such cases must focus on damages. Only on rare occasions can the defense even argue that the plaintiff was committing a trespass or was teasing, tormenting, or abusing the dog that

bit him. (See, M.G.L. c. 140, s. 155). Frequently, the trauma of the event is the most significant element of the plaintiff's damages. Scarring is the most common residual result of a dog bite. Both the scars and the trauma will, more typically than not, diminish with time. The settlement value of these cases may likewise be diminished as the time between the incident and the negotiations towards settlement grows longer. To maximize values, dog bite cases should be presented and litigated as expeditiously as possible.

PRODUCTS LIABILITY

Products liability cases are necessarily major damage cases. The economics of presenting such cases precludes rational pursuit of a claim for modest injuries. As in any other case, the identity or appeal of the plaintiff, and manner in which the plaintiff encountered the defective product are significant factors. Moreover, most products liability cases in Massachusetts should also be pursued as violations of the Consumer Protection Act of M.G.L. c. 93A. If there is clearly a demonstrable defect, a timely and thorough 93A letter – directed towards the conduct of the manufacturer or provider of the product, not towards the claim settlement practices of the insurer – can create pressure for an early settlement. However, the complexity of liability issues and severity of injuries in most products liability cases generally require full discovery and evaluation of the plaintiff's claim before the case ripens for settlement.

There also is a distinction between cases arising from manufacturing defects as compared to cases focusing on design defects. In a design defect case, the plaintiff is challenging the defendant's entire product line, and a defendant may be extremely resistant to acknowledging any problem. On the other hand, in a case focusing on a genuine manufacturing defect, a

defendant may be more receptive to addressing a problem that relates to a specific item or small group of products.

In evaluating products liability claims for settlement, defense counsel should keep in mind, at all times, the cost to plaintiff's attorney for successfully prosecuting such a claim. Focus should be directed to the plaintiff's conduct in using the product. If you represent the maker of a defective household product, you should expect the settlement value to be greater than for an identical injury caused by an industrial machine. Again, jurors can be expected to relate their own experience to the issues in the case. Injuries sustained in an industrial setting are frequently considered "less threatening" to the overall safety of the public than those caused by defective household or consumer products.

Defense counsel should recognize that the best defense will be built upon the scientific and engineering prowess of the defendant itself. Practitioners who engage in products liability litigation typically know one another, at least on a local or regional level. Due to the general complexity of these claims, other settlement factors should be considered beyond the scope of this work.

CONSTRUCTION SITE ACCIDENTS

Construction site accidents are rarely simple. Most construction site accidents will involve at least potential responsibility on the part of several contractors or subcontractors, the duty of which is dependent in part upon the various contractual obligations. In addition to involving multiple defendants, a construction case will usually also provoke a variety of claims for contribution and indemnification among the various subcontractors (including the plaintiff's/victim's employer on an indemnity theory, even though the direct claim against the

employer would be precluded by the Workman's Compensation Act). Plaintiff's attorney must identify and document a case against the primary defendants and be patient while the defendants' attorneys identify, organize and develop the various claims for contribution and indemnification. Construction site accident cases are usually amenable to settlement for a variety of reasons, including: the plaintiff is an injured worker; the defendants are generally corporate entities; there are commonly contractual or regulatory standards applicable to the alleged transgressions; and there are a number of defendants and insurers available to contribute to a settlement.

As discussed above, defense counsel must examine a particular defendant's conduct in the context of the plaintiff's claim, as well as in comparison to those who comprise the co-defendant pool. When the claims are ready for settlement, it is typical for defense counsel to agree in advance upon apportionment of responsibility among the defendants and insurers. This enables the defense to present a united front when negotiating claim value with the plaintiff's attorney.

WORKERS COMPENSATION SETTLEMENT APPROVAL

Whenever there is a worker's compensation lien, these claims cannot be settled without the presentation of an M.G.L. c. 152, s. 15, petition for approval of settlement. Those requirements will be dealt with in a separate section of this work.

Whenever there is a civil action (a "third party case") arising from an injury at work with respect to which the plaintiff received worker's compensation benefits, the worker's compensation insurer has a lien on the file. This is a primary lien in the sense that the worker's compensation insurer is entitled to receive all of its payments (less cost of collection) and the injured worker is entitled to receive any excess after the insurer is reimbursed.

The worker's compensation insurer's right to reimbursement extends beyond the date of settlement. Accordingly, a settlement will often result in a suspension or reduction of the worker's compensation insurer's obligation to pay benefits. *Hunter v. Midwest Coast Transport*, 400 Mass. 779 (1987). In order to reach an informed settlement decision, counsel must be conscious of both the amount of lien at the time of the settlement, as well as the prospect and magnitude of future medical expenses.

The settlement of a claim upon which a worker's compensation lien exists must be approved by either the court or the Division of Industrial Accidents to ensure that the Workers Compensation insurer is properly reimbursed.

MINOR SETTLEMENTS

Claims involving minor plaintiffs present unique considerations. All counsel must determine that the action has been brought in the name of an appropriate person, be it a parent, guardian, or next friend. While a defendant will closely examine the conduct of the child who was injured, it is extremely difficult to "blame" the child for having been injured in situations that only the "wisdom of age" could have mitigated. The settlement value will be enhanced in cases with residual impairments, due to the extended life expectancy of the minor child.

Defense counsel should explore the relationship of the named plaintiff to the child, to determine whether it is likely that any compensation will be utilized for the child's benefit. If it can be demonstrated that a jury might consider a named plaintiff a spendthrift, or someone not acting in the true interest of the child, the settlement value will be dramatically reduced.

Once a settlement has been agreed upon, all counsel should seek settlement approval pursuant to the provisions of M.G.L. c. 231, s. 140C ½. If the claim of the minor plaintiff has

been settled before the filing of a complaint, a "friendly suit" must be filed by plaintiff's attorney in order to obtain a position on the docket for a hearing on the settlement's merits. Approval of a settlement provides security to the parties, the injured, and counsel against efforts to criticize or rescind the settlement when the child/victim reaches the age of maturity.

In preparing the minor settlement for approval, counsel must identify the judge to whom the settlement would be presented and gather information concerning the expectations and preferences of the judge. For example, some justices will routinely approve settlements with the parents receiving money on behalf of their children. Other justices require the establishment of a formal trust. In addition, judges vary as to the scrutiny given to liability and damage issues in a proposed settlement. To avoid multiple trips to court, and possible embarrassment of the attorney or the client, plaintiff's counsel should confer in advance with the clerk to ensure that the minor settlement is being presented in a manner consistent with the preferences of the sitting justice.

CASES FOCUSING ON RESPONSIBILITY FOR THE CONDUCT OF OTHERS

Special problems exist in cases in which the defendant's liability is premised upon the misconduct of a third party. The most prevalent example of such a case is a Dram Shop case – an action against a tavern or liquor store for serving alcohol to a minor or intoxicated person who later causes an accident. Factors in the evaluation of a Dram Shop claim will include the age of the plaintiff, the history of alcohol intake, the activities of the plaintiff before the arrival on the defendant's premises, and the plaintiff's activities and behavior while on the premises and after leaving the defendant's establishment. Consideration should also be given to whether the victim/plaintiff is the intoxicated person or an innocent third party. Where the victim is the

intoxicated person, plaintiff's counsel must anticipate resistance from insurance representatives and factfinders based upon the victim's voluntary consumption of alcohol. When the intoxicated person/victim is not a minor, there is a statutory restriction limiting the plaintiff's ability to cut/recover against the Dram Shop to cases in which a plaintiff can prove serious and willfulness conduct on the part of the defendant in the service of alcohol. M.G.L. c. 231, s. 85T. This limitation does not, however, restrict recovery in a wrongful death case in which the intoxicated victim did not survive his or her injuries. *Zeroulis v. Hamilton American Legion Associates,* 46 Mass. App. Ct. 912 (1999). These cases are extremely fact-intensive, and plaintiffs must expect that defense counsel will scrutinize the victim's medical records for signs of past or chronic alcohol abuse. Both sides must aggressively investigate the case, including interviewing as many witnesses as possible. It is not uncommon for the plaintiff to have friends testify that he or she was over-served. The defense will seek testimony from patrons unfamiliar with the plaintiff that the plaintiff was neither obviously impaired nor displayed visible signs of intoxication while on the premises.

In cases alleging inadequate security, the perpetrator of the assault is infrequently identified and almost never solvent or insured. Moreover, the plaintiff will often have scant information, if any, concerning the activities of the perpetrator leading up to the assault. Thus, liability evaluation in the settlement context is a fact-intensive exercise, testing the ability of plaintiff's counsel to develop evidence from which to infer the activities of the perpetrator and to demonstrate how better security would have prevented the assault. In addition, demonstration of actual indifference on the part of the defendant property owner (ordinarily either a landlord or commercial establishment) may enhance settlement value.

In Dram Shop cases, and sometimes in negligent security cases, valuation and settlement questions may be affected by counsel's decisions with respect to the intoxicated person or perpetrator. In a security case in which the perpetrator is known, plaintiff's attorney may make the strategic decision to leave the criminal offender, if identified, out of the civil action. The wisdom of having "an empty chair" at the defense table is a frequent subject of debate between plaintiff's and defense counsel. If the plaintiff elects not to include the perpetrator as a defendant, the security service or premises defendant may choose to implead the perpetrator. When the assailant is a direct defendant, there is a possibility that he or she may cooperate with the plaintiff out of the sense of remorse. Such a perpetrator/defendant may unload on the defendant in an attempt to purge himself or herself of guilt. This presents a wild card in the settlement process.

Another consideration from the plaintiff's standpoint is the fact that a jury will ultimately make one damage award, and will not be asked to allocate among defendants. A plaintiff may keep the perpetrator in the case in hopes that the jury will be focusing on the assailant when assessing damages and be generous or even punitive in its damage award.

Actual settlements with perpetrators in security cases are beyond rare. In contrast, however, in a Dram Shop case there is almost always a possibility of settlement with the drunk driver causing an accident. Such cases provide a myriad of tactical considerations. On the one hand, a settlement may induce cooperation on the part of the drunk driver who is thereby insulated from liability. On the other hand, it is more difficult to present the case to the jury focusing on the liquor establishment to the exclusion of the intoxicated driver. If the plaintiff does separately settle with the drunk driver or assailant, the defense will discover and try to

exploit the terms of that settlement. At a minimum, the amount of the settlement is crucial. If very low, and it is admitted to the jury, defense counsel can argue that the "real" defendant has paid very little for his or her culpability. The question that follows this is, "Why should a defendant once removed be held more responsible for the injuries plaintiff has suffered?" Alternatively, if the separate settlement is substantial, this provides the defendant a cushion against a large verdict and presents a disincentive to settlement. In general, therefore, plaintiff's counsel should consider carefully before separately settling with such primarily responsible parties and proceed with only full understanding of the impact of such settlements on the settlement process and in the courtroom.

CONCLUSION

As stated at the outset of this chapter, the process of evaluating and settling personal injury claims involves both objective and subjective elements. The focus of counsel and their clients on the factors of risk and exposure will pave the path to fruitful settlement negotiations. There is an old expression in the personal injury claims business that "the best case is a closed case." Diligent preparation, fair evaluation, and open and honest communication will, more often than not, obtain that goal for the parties.