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More Than Just Appellate Counsel

Rx for Excessive Damages: A Legal Treatment Plan

It’s time for your checkup!



Topics

- Discussion Points
  - Why defend damages?
  - Reasonable Value
  - Collateral Sources
  - Picking Apart Plaintiff's Plan
  - Anchoring

Why Defend Damages?

- Get a real value for economic damages:
  - Determine causally related needs
  - Determine "reasonable value"
  - Consider collateral sources
  - Estimate a judgment under 50-A

- Provides a basis for negotiations and the foundation for trial

Traditional Damages Model

- Traditional defense approach to compensatory damages defense
  - Reactive approach
  - Match plaintiff's experts - if they get a life care planner, we get a life care planner
  - Do not put on defense damages experts or present defense numbers at trial

Taking Back Control

- Don’t wait: Defendant can anchor the value
- Challenging the plaintiff’s damages model
- Rethinking experts
- Targeting items of damages
- Bringing reality back to the courtroom
- Legal challenges

Goal

- This is not a race to the bottom
- Comprehensive, strong and credible damages defense

If you don't believe it, they can't!

Reasonable Value

Reasonable Value Discovery

- Early damages discovery
  - Itemized liens
  - Complete health insurance files
  - School, therapy or home health records, if applicable
  - Liens or litigation funding

Reasonable Value And The Law

- Do not accept plaintiff's values
- In New York, a plaintiff should only be allowed to recover the amounts *paid* for medical care.
- Kastick v U-Haul Co., (292 AD2d 797 [4th Dept 2002])
  - Hospital received payment from No-fault and Medicare and wrote-off the balance.
  - Plaintiff argued damages should include the written-off amounts
  - 4th Dept held the written-off amount "is not an item of damages for which plaintiff may recover because plaintiff has incurred no liability therefor."

Use "Reasonable Value" Where Collateral Sources Are Uncertain Or Do Not Exist

- Keep the discussion outside the collateral source rule
  - Reasonable value
    - Reasonable value is not necessarily what was billed or what was paid on the plaintiff's behalf
    - Change the language
    - Growing number of courts are accepting the argument that reasonable value is what is generally paid in the marketplace

Collateral Sources

Using Collateral Sources

- CPLR 4545 entitles you to an offset!
- Applies to:
  - Uninsured
  - Insured
  - Pension benefits
  - Medicare
  - Medicaid

Making An ACA Argument

- Understanding where argument is most beneficial
  - Prosthetics cases
  - Orthopedic injuries
  - Significant medication expenses
  - Medicare not involved
  - To address non-home care items where Medicaid involved

- Establish that it is reasonably certain
  - plaintiff will have access to health insurance in the future
  - plaintiff's insurance will cover the items in plaintiff's life care plan

Making An ACA Argument

- Liciaga v. New York City Transit Authority, 2024 WL 3882279 (2d Dept 2024)
  - **Issue**: Whether defendant could present evidence at a post-trial collateral source hearing of private insurance available to the plaintiff in the future, even though plaintiff was currently uninsured
  - **Holding**: Yes
  - **Key parts of the decision**:
    - Plaintiff could reduce his own future medical expenses by millions of dollars by procuring an insurance policy available to him pursuant to the ACA
    - A reasonable plaintiff would act in his own economic self-interest by taking the minimally burdensome steps required to obtain available insurance coverage
    - The plaintiff's contention that it is improper to expect him to perform an act that he is required to perform under federal law is, therefore, without merit
    - To the extent that a plaintiff can mitigate his or her damages by procuring insurance coverage that would offset some portion of his or her future medical expenses, he or she cannot simply decline to do so without a plausible explanation and avoid potential consequences

Life Care Plan v. Insurance

Life Care Plan	Insurance Plan
Complications / Hospitalizations	Covered
Drugs and Supplies	98.4% covered
Wheelchair	99.7% covered
Home Accessories and Equipment	97.5% covered
Health Evaluations	Covered
Case Management	Covered
Medical Routine Coverage	Covered
Medical Services	Covered
Orthotics/Prosthetics	Covered
Therapies	35.1% covered

Picking Apart Plaintiff's Plan

Bringing Reality Back To The Courtroom

- Confronting the collateral source rule
  - Understand your venue
  - Look for ways to open the door
  - Look for ways to circumvent the collateral source rule

Life Care Planning v. Case Management

SPECIAL SERVICES						
Description/Service: *(Recommended by)*	**Age Initiated:**	**Through Age:**	**Frequency:**	**Cost:**	**Annual Cost:**	**One Time Cost:**
1) Case management *(Stephen Glass, MD)*	Present	LE	Estimate 24-36 hours/year average	$130-$145 (Midpoint: $137.50)	$4,125	
2) Guardianship Services *(Stephen Glass, MD)*	18	LE	Initial set up: ..... 1st 3 months: ..... Monthly average charge thereafter	$5,000-$15,000 (Midpoint: $10,000) ..... $1,000/month ..... $500-$750 (Midpoint: $625)	.... $7,500	$10,000 ..... $3,000 .....
Rationale:						
1) For coordination and implementation of medical and home care needs, advocating for goods and services, identification of resources, assistance with hiring/firing of in-home caregivers, crisis intervention, etc. To be used as needed. 2) For oversight of Elliot's financial needs.						
Cost Sources:						
1) Whitmire and Associates, Sound Options/MaryLynn Pannen, RN, Comprehensive Home and Companion Services 2) Unlimited Guardianship Services, Inc./John Jardine, Guardianship Services of Seattle						

What Is Case Management?



CMSA
CASE MANAGEMENT SOCIETY OF AMERICA

Standards of Practice for Case Management

"Case Management is a collaborative process of assessment, planning, facilitation, care coordination, evaluation, and advocacy for options and services to meet an individual's and family's comprehensive health needs through communication and available resources to promote patient safety, quality of care, and cost-effective outcomes."

What Does A Case Manager Do?

The Professional Case Manager is responsible for being patient-centered and is held accountable to maintain the education and skills needed to deliver quality care. The professional case manager should demonstrate knowledge of health insurance and funding sources, healthcare services, human behavior dynamics, healthcare delivery and financing systems, community resources, ethical and evidence-based practice, applicable laws and regulations, clinical standards and outcomes, and health information technology and digital media for effective and competent performance.



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Case Management v. Life Care Planning

Q. Okay. Did you look at any of the amounts that had been paid for the various services that Elliot has already received in calculating those costs in the future?

A. No. I looked at them. I did not consider them, not consider what was paid. That's not what we do in the Life Care Plan.

Q. As a case manager, you would be looking at that in dealing with individual resources and managing those resources, correct?

A. Yes. We would be looking at, again, what we can get for our medical dollar.

Q. Right. So as I understand it, case management is dealing with helping these disabled people get the care and services they need in the real world, and then life care planning is creating a plan for litigation that may or may not be followed up, but does not include actually working with the client to get the goods and services; is that fair?

A. That's fair.

Case Managers Coordinate Benefits

Q All right. There is no claim, there is no litigation, here is a gentleman who has got a lot of future care needs and you have determined what those future care needs are, now how are we going to pay for them. Would you consider one means by which some of the services and benefits that he needs would be paid for would be through the acquisition of a health insurance policy?

A If he was coming to me as a case manager, yes.

Additional Challenges To Billed Rates

- Expose and undermine plaintiff's cost sources
  - Demonstrate all medical costs are derived with regard to insurance
  - Demonstrate plaintiff's data sources come from insurance data
  - Demonstrate plaintiff's expert has no personal knowledge of the data or how it was collected
  - Demonstrate plaintiff's expert is relying on hearsay
  - Demonstrate plaintiff's expert is merely a conduit for someone else's opinion

Looking Under The Economist's Hood

- Medical Consumer Price Index
  - Based on insurance data

Medical care methodology

The CE tracks consumer out-of-pocket spending on medical care, which is used to weight the medical care indexes. CE defines out-of-pocket medical spending as:

- patient payments made directly to retail establishments for medical goods and services;
- health insurance premiums paid for by the consumer, including Medicare Part B; and
- health insurance premiums deducted from employee paychecks.

While the weight of each CPI medical care related index is determined by out-of-pocket spending, price change reflected by the indexes measure the total reimbursement to medical care providers. This includes medical care payments made by private insurance companies, Medicare Part B, and Medicare Part D on behalf of consumers.

For example, in the **physicians' services** index, we consider the price of an office visit to be the patient's $20 copay, as well as the $80 insurance payment to the physician, for a total of $100. The $100 figure is used when calculating any price change.

Using Motions To Defend Damages

- Motions to consider
  - Preclude baseless life care plans or limit care claims
    - No foundation
    - No basis for pricing
    - Care not prescribed, desired, or feasible
  - Preclude reliance on billed rates
  - Preclude net-negative discount rates
  - Preclude baseless life expectancy opinions
  - Opening the door

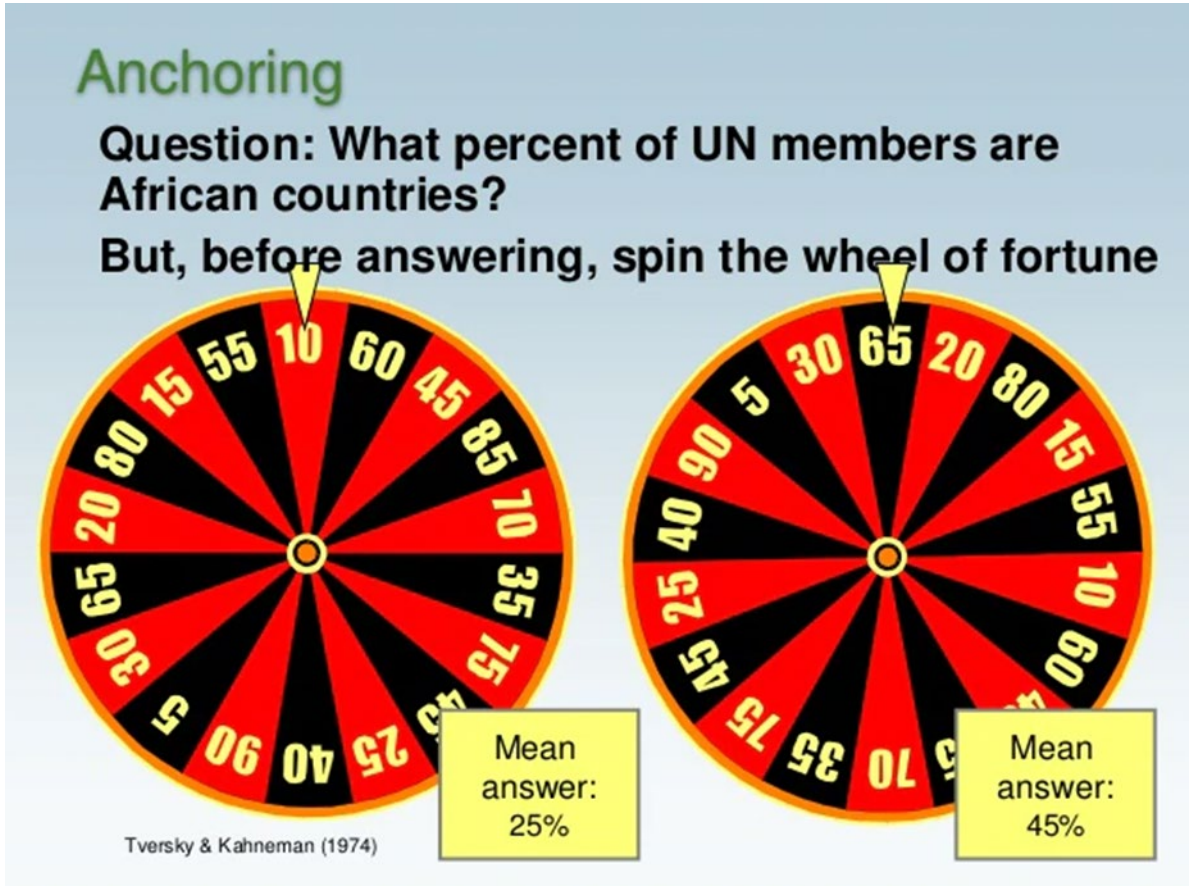
Anchoring

Anchoring

- What is it?
  - Based in psychology
  - People are unduly influenced by the initial number they encounter
  - People start with the recommended number and adjust up or down from that number
  - Anchoring effect can happen with completely arbitrary anchors

Anchoring

- What is it?
  - Tversky and Kahneman's classic study



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Anchoring

- Does it occur in litigation?
  - Studies consistently show plaintiff's use it to their advantage

Question: How did the jury arrive at the decision to award the plaintiff $20 million in damages?

> **Actual Juror #1:** *We came up with a percentage approach, and that's what we all discussed. We started with what she was asking for – $80 million, which seemed like a very high amount, and went down and down from there.*
>
> **Actual Juror #2:** *None of us had been on a jury before, so we had no idea where to start. What's a life worth? It would have been nice to have some precedent to go by, but we didn't. So, we started with what they gave us, and then took a percentage.*

Christina Marinakis, "How to Counteract the Anchoring Effects of a Plaintiff's Damages Request Jury Reliance on Plaintiff's Damages Ask," Law 360 (August 12, 2019).

Anchoring

- Research also shows that judges and mediators are susceptible to anchoring
  - Conklin, Michael, Combating Arbitrary Jurisprudence by Addressing Anchoring Bias, 97 Wash. L. Rev. 1 (2019)
- Common mediation anchors
  - Plaintiff's demand
  - Mediator's experience
  - Policy limits
  - Liens

Questions?

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