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## It's where you finish that matters



By Paul Walsh

In virtually every mediation I've done, the defense attorney (Defendant) begins with "The Plaintiff's demand is too high." Unsurprisingly, the initial demand is always higher than the ultimate settlement number. The Defendant responds in kind with an initial lowball offer. In turn, counsel for the Plaintiff (Plaintiff), with equal incredulousness, asserts "the defense offer is insulting." Thus, begins the obligatory posturing that is part and parcel of the very negotiation process. The key to successfully settling cases is to shift to and maintain focus on the case and fundamentals, not on each and every move. Negotiate to the value of the case. The final number is the only one that matters.

So how do you decide what the right settlement number is on the case? Valuing and settling BI cases is as much an art as it is a science. To fully assess the strength of the same consider the following:

### I. Liability

- A. Likelihood of verdict for the Plaintiff
- B. Contributory negligence
- C. Nature and severity of the accident
- D. Photos, surveillance and anticipated influence of same e.g. horrific, gruesome
- E. Character, reputation and credibility of parties involved

### II. Non-economic damages

- A. Pain, suffering and inconvenience
  - i. Type, nature and mechanism of injury
    - a. Photographs and anticipated influence of same
    - b. Plaintiff's prior medical history
  - ii. Type and length of treatment rendered
    - a. Hospitalization, length of same
    - b. Surgery(s)
    - c. Casting, braces, ambulatory assistance required, etc.
  - iii. Prognosis
  - iv. Residual impairment or disability
- B. Loss of consortium, companionship
- C. Cosmetic disfigurement if applicable
- D. Loss of life's pleasures, etc.

### III. Admissible special damages

- A. Medical expenses
- B. Out of Pocket expenses
- C. Wage loss
- D. Future damages i.e. future medical costs, impaired future earnings, etc.

### IV. Punitive damages

Increasingly, recklessness is pled with claims for punitive damages. While often the defense feels the same is unwarranted, the question is whether the Court will dismiss this claim before trial. If not, it's a problem because this claim is a gateway for the admission of inflammatory evidence. This may well overshadow what the defense perceives the relevant facts to be in defending against liability and/or compensatory damages. The most obvious examples are the cases emanating from one being "over-served" resulting in significant harm to an innocent Plaintiff in the wrong place at the wrong time. The potential fury associated with these cases cannot be underestimated. I remember long ago, a Judge was asked about the chances of getting a recent DUI recipient a break. His humorous but effective response was pure gold. He said, "You'd have better luck trying to get someone off for murder."

### V. Delay damages

These are often overlooked but in cases with significant value or cases that have aged, these can be significant. Prime + 1%, even though not compounded, on a 7-figure case can add a couple or more hundred thousand dollars. This gets even worse for the defense if that is excess exposure.

### VI. Conclusion

The aforementioned are general considerations in assessing a BI case. The key, is to identify what the real driver or drivers are and weigh the same accordingly. That, in conjunction with considerations relating to the actual litigation itself i.e. venue, Judge assigned, and key pre-trial motions. Insurance coverage issues i.e. policy limits, reservation of rights and potential coverage denial must all be factored in. This should add clarity for all as to the target settlement number.

Undoubtedly, parties need to protect their respective positions within reason, leaving room to move at a later date in the event the Mediation isn't successful. That said, maintain focus on identifying the driver(s) in the case and negotiating to the value of the case as opposed to how much the other side moved. The only number that matters is the final one. ■

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