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Defending a Client with a Big Name or a Bad Reputation Post-COVID-19

I. Defense Strategies

There are numerous ways to evaluate the potential settlement and verdict value of a claim. These include assessing the strengths and weakness of a particular claim, the type of claim and venue in which the claim is brought, and researching jury verdict results, which may provide information as to exposure.

Case considerations – Assessing the value of a case will involve using the foregoing information in each case to arrive at a settlement and verdict value for a case. There are a variety of factors to consider in examining a claim.

After the conclusion of a trial, the parties have the option to appeal the verdict to the respective Appellate Division, and request that the court increase or decrease any award that the plaintiff may have received. Below are several examples:

In *Gonzalez v. New York City Tr. Auth.*, N.Y. Slip. Op. 06338 (2d Dept. 2011), the plaintiff sustained a knee fracture, causing swelling and limited range-of-motion, with the need for a potential knee replacement in the future. The Appellate Division, Second Department ordered the reduction of the jury's award for past pain and suffering from \$1.5 million to \$400,000 (for a period covering at least eight years).

In *Smith v. Manhattan and Bronx Surface Transit Operating Auth.*, 58 A.D.3d 552, 872 N.Y.S.2d 107 (1st Dept. 2009), the Appellate Division, First Department affirmed the jury's award of \$100,000 for past pain and suffering as just and "reasonable compensation," *Ibid.*, 58 A.D.3d at 552. The plaintiff therein suffered severe damage to her left knee, including tears of the medial and lateral menisci, a torn ligament, torn cartilage, and damage to the patella, with permanent osteochondral defect, followed by ineffective arthroscopic surgery. At trial, plaintiff's surgeon testified that she would

need a knee replacement operation, and that her condition was permanent and would worsen over time.

See also, *Luna v. New York City Transit Authority*, 111 AD 3d 551 (1st Dept. 2013)(affirming verdict in plaintiff's favor for \$1 million for plaintiff's anticipated life span of 34 years where plaintiff sustained "a torn meniscus in her right knee, underwent arthroscopic surgery, was unable to work for three months, used a cane for more than one month, underwent 12 extremely painful sessions of physical therapy, continues to experience significant pain requiring her to take medication and limit her activities, and has permanently aggravated and activated arthritis in her knee that is progressive. In addition, her doctor explained that she sustained a permanent partial disability and that it is "most probable" that she will require a future knee replacement").

II. Effects of COVID-19 & Case Consideration

Use the foregoing information in each case to arrive at a settlement and verdict value for a case, based on such factors as:

- liability,
- the plaintiff's age (and life expectancy),
- the injury,
- the venue,
- plaintiff's counsel (reputation and trial experience),
- the likelihood that plaintiff and/or the insured will make a good witness at trial,
- extent and cost of medical treatment,
- lost wages,
- past and future medical expenses,
- past jury awards in the venue for the injury sustained (and whether the juries are generally considered "pro plaintiff" or "pro defendant"),
- "pain and suffering" and the impact of the injury on the plaintiff's activities of daily living,
- what will be blackboarded at trial.

Other considerations may include the skill and reputation of the plaintiff's attorney, and whether the medical evidence might allow a defense that the injury claimed was not caused by the accident in question.

Polls show that there is a stronger bias against big corporations during the pandemic than pre-pandemic.

Will need closer evaluation and questioning of potential jurors to determine what effect if any COVID-19 has had on them and how they see our client or evaluate case.

Verdict Research

Attorneys will use verdict search reports to put a value on a case Plaintiffs' counsels will select a few verdicts or settlements from publications. We do not place a lot of value on these types of reported verdicts/settlements as they only include information for cases which are often several years old and have a comparatively different fact pattern. Additionally, the parties and counsel are different. Normally, only high verdicts or cases where the jury finds in favor of the defendants are reported.

As stated, utilize knowledge and expertise as well as reviews of appellate decisions when evaluating the potential settlement and verdict value of a case. Arriving at an informed decision as to the recommended settlement range for a given claim, and its estimated verdict value based on numerous factors.

Trial Scheduling

The standards and goals date are the date, assigned by the Clerk of Court, the case is expected to be resolved or tried.

Once an answer is filed, a party (usually plaintiff) files a Request for Judicial Intervention ("RJI") to request a preliminary conference so that the parties can schedule depositions and other discovery. Once an RJI is filed, the Court automatically issues a Note of Issue date ("NOI"), the date that discovery should be completed. The date is usually one year and three months after the RJI is filed. A second date, a standard, and goals date, is the date the case should be completed is usually assigned to the case. The standards and goals date are usually one year and three months after the note of issue in New York venues. The standards and goals date may change depending on when the plaintiff files their note of issue.

III. Reptile Theory

The Reptile Theory is an effort to invoke that portion of the brain which deals with survival – fight or flight, influence by fear, shock, or anger.

This strategy is being used by the plaintiffs' bar to improperly shift the focus of the case to the "community" as a whole and to distract the jury from the applicable law and the conduct of the plaintiff. The strategy is referred to as "Reptile" because it's designed to trigger the "reptilian" part of the human brain which has a primary instinct of self-preservation. Self-preservation (survival) impulse will ultimately win out over another considerations, including the force of logic and evidence. Jurors are encouraged to fear

for themselves, their community, and their families, thus 'awakening the reptile' and moving them into survival mode. This result in large verdicts.

Plaintiffs' attorney identifies a "safety rule" which they claim defendant violated. Instead of a standard established by a jury instruction, the plaintiff's attorney then argues the rule violation harmed not only the plaintiff, but also the jury's community. The courtroom becomes the safety arena: damages enhance safety and decrease danger and jurors are the guardians of community safety.

"Safety rule + Danger = Reptile" is the core formula.

A verdict for the plaintiff will make the community safer because it will prevent the defendant or others similarly situated from harming the juror, his/her family, or someone close to the juror.

We still focus our trials on reminding the jury not to let sympathy influence their verdict. But how effective is this when the Reptile is being employed? Reptile teaches the jury the case is about them, the jurors, and the community each juror represents. The plaintiff's case is merely the vehicle to bring the jury power to make a change.

With the COVID-19 pandemic, plaintiff's counsel has begun to combine Reptile Theory and COVID-19 to equal large awards, which play to the anger/sympathy.

To combat the Reptile Theory, prepare your witnesses, object at deposition, educate your judge, and limit the narrative and discovery to the specific facts of the case and not the "community." Personalize your client and keep an eye out for punishment verdicts.