Chapter 4

USING EXPERTS FOR NEGOTIATING SETTLEMENTS

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Scope Note

In this chapter, the author addresses the use of experts in evaluating and settling civil cases. This includes the use of experts to assign value to a case; help in drafting a demand letter, complaint, and discovery requests; proceeding through alternative dispute resolution; and structuring an appropriate settlement. Helpful exhibits include a sample vocational expert's report, economist's report, accident reconstruction report, and case evaluation report.

§ 4.1 PRELIMINARY CONSIDERATIONS

This chapter focuses on the use of experts in evaluating and settling civil cases. It is written from the perspective of a plaintiff's attorney whose practice principally concerns personal injury cases.

Any attorney who expects a reputation for obtaining favorable jury verdicts and favorable settlements in medical malpractice cases, products liability cases, premises liability cases, or automobile tort cases, must be prepared to locate and retain the best available experts. Many seasoned attorneys agree that the key to a successful and profitable practice is careful "case selection." If an attorney does not spend the necessary time, money, and resources to evaluate a potential case properly *before* signing the fee agreement, then his or her file drawers will soon be filled with neglected files.

Ethical Commentary

In recent years, both the Supreme Judicial Court and the Board of Bar Overseers have signaled increased concerns over neglect of client matters. *See, e.g., In re Brown*, 12 Mass. Att'y Disc. R. 23, 28 (1996); *In re Keefe*, 7 Mass. Att'y Disc. R. 138 (1991). In *In re Kane*,

13 Mass. Att'y Disc. R. 321 (1997), the Board of Bar Overseers expressed "substantial concern that existing sanctions for neglect are inadequate" (*In re Kane*, 13 Mass. Att'y Disc. R. at 326) and adopted guidelines that established "stiffer sanctions for neglect and lack of zealous representation, especially where aggravated by recidivism, misrepresentations, and failure to cooperate with Bar Counsel's investigation." *In re Kane*, 13 Mass. Att'y Disc. R. at 327.

Before obtaining an expert opinion, it is essential to provide your expert with all pertinent documents and all relevant facts. However, before you share any documents or information with your expert, be aware that a trial judge may someday order you to produce copies of all letters and documents that your expert reviewed, even if some of the documents include your mental impressions or attorney work product. In *Suskind v. Home Depot Corp.*, No. 99-10575-NG, 2001 U.S. Dist. LEXIS 1349, at *2–3 (D.Mass. Jan. 2, 2001), Chief U.S. Magistrate Judge Robert B. Collings held that the duty of disclosure mandated by Fed.R.Civ.P. 26(a)(2)(B) includes the duty to disclose all materials that a party's attorney provided to the expert that were "considered" by the expert, including the "mental impressions, conclusions, opinions or legal theories of an attorney" traditionally protected from discovery pursuant to Rule 26(b)(3).

Ethical Commentary

Counsel's disclosures of information to experts are governed by Mass.R.Prof.C. 1.6(a): "A lawyer shall not reveal confidential information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." This rule gives counsel some discretion to determine what disclosures to experts are necessary to advance the case. Clients should be generally informed about counsel's dealings with experts and should be asked to consent to the disclosure of particularly sensitive or personal information. To be effective, such consent must be given "after consultation," defined by Mass.R.Prof.C. 9.1(c) as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

When evaluating a potential case, do not be tempted to rely on an "informal" opinion from a "friendly" doctor or family relative. Every case has its subtleties. It is critical that your expert carefully review all pertinent documents and facts. It is also reasonable to expect that your expert may need to search medical literature before providing you with his or her opinion. If your expert fails to do a

thorough analysis at the beginning of the case, the stage is set for a potential disaster.

When representing a plaintiff, you may need experts to establish each and every element of your case. In cases involving permanent disabilities and loss of earning capacity, three different experts may be necessary. Obviously, you will need a medical expert's opinion that your client sustained a permanent partial disability. In addition, you will need a vocational expert to determine what occupations your client is capable of performing. You will also need an economist to quantify your client's loss of earning capacity. See **Exhibits 4A** and **4B** for sample vocational and economic reports.

This chapter will explore in detail some of the important roles that "experts" can play in a civil case from the initial stage of case selection through case settlement or trial.

§ 4.2 NETWORKING WITH ATTORNEYS TO FIND EXPERTS

When evaluating a case, it is often helpful to consult other attorneys who have handled similar cases. Lawyers Weekly is a good place to start when trying to locate other attorneys who have been successful with a particular type of case. In this author's experience, most attorneys in Massachusetts are extremely generous with their time and advice.

If you are a member of the Association of Trial Lawyers of America (ATLA), many services are available to help you evaluate and prepare your cases. The ATLA "Exchange" will put you in touch with attorneys across the country with similar cases. Several years ago this author handled a products liability case involving a defective fan blade in a pickup truck. Through ATLA Exchange this author located an attorney in Michigan who had recently settled a similar case against the same manufacturer. Within 24 hours the attorney forwarded his entire file with the complaint, interrogatories, request for documents, and deposition transcripts. His file also contained key discovery documents such as internal corporate memoranda and industry test data. The most helpful document in the file was his engineer's expert report. Within a week this author was able to retain the engineer to aid in the drafting of a demand letter based on G.L. c. 93A. The expert also helped to prepare the draft complaint and discovery requests that were attached to the demand letter. When the manufacturer received the demand letter, it was obvious that this was a strong case and that this manufacturer knew, and feared, the expert. The case settled without ever filing the complaint. This

example underscores the importance of networking with other attorneys to prepare your case effectively for settlement or trial.

§ 4.3 SELECTING EXPERTS: USE OF EXPERT SERVICES OR EXPERT DIRECTORIES

Legal periodicals are filled with the names of countless self proclaimed experts. A recent Trial Magazine contained names of more than a hundred experts in such topics as archery, aviation, boating and marine safety, chiropractic, construction equipment, electrical accidents, fires, flammable fabrics, hospitals, human factors, machine guarding, pharmacology, polymers and plastics, propane explosions, skiing, slip and falls, and snowboarding. There were even "natatorium" (indoor swimming pool) experts.

About fifteen years ago, one of this author's clients was injured aboard a cruise ship when she slipped and fell on a "slippery" deck. This author relied on an expert witness service for the selection of a maritime expert. The service found "Captain Bob," who readily provided a report and assurance that this was a great case. At the pretrial conference the opposing attorney took this author aside and explained that "Captain Bob" had lost his license several years previously. When this dilemma was explained to the trial judge, he looked down from the bench and said "Son, don't feel bad, when I was young I had worse cases." On one other occasion an expert service provided a "slip and fall expert." Although the expert was eager to accept a retainer and quick to issue a favorable written report, it became evident during trial preparation that this expert had never inspected the accident scene. Having been burned on two occasions, this author decided that if an expert cannot be found by networking, then it is a good sign to refuse the case.

Ethical Commentary

Have you ever been tempted to call a particularly impressive expert currently retained by one of your opponents about a new case you are considering? In *Erickson v. Newmar Corp.*, 87 F.3d 298 (9th Cir. 1996), a defendant's judgment was reversed and a new trial ordered because defendant's counsel had consulted with an expert for the plaintiff about an unrelated case. Regardless of the attorney's actual motive, the court stated that "attorneys must use their common sense to avoid conduct which could appear to be an improper attempt to influence a witness who is about to testify." *Erickson v. Newmar Corp.*, 87 F.3d at 303.

Some experts will write reports with the express understanding that they will never testify at trial. It may be a costly mistake to retain an expert who is not willing and prepared to go to trial. Some such experts are well known to the defense bar. Selecting one of them is a signal to the defendant that you are not prepared to go the distance. If the case does not settle early on, you will then be forced to hire a second expert. Your expenses will skyrocket.

To select a qualified expert, it is important to choose from among experts who have testified in other cases successfully. An effective means of finding these is networking with other attorneys. Many attorneys will generously share information on experts.

Ethical Commentary

If your expert previously served as an expert for your opponent in another matter, there may be disqualification issues on the horizon. Courts may disqualify an expert who has been exposed to relevant confidential information of the opposing party. *See Grant v. Lewis/Boyle, Inc.*, 408 Mass. 269, 271–72 (1990); *City of Springfield v. Rexnord Corp.*, 111 F.Supp.2d 71 (D.Mass. 2000) (disqualification denied because no relevant confidential information involved). Prudent counsel should consider the potential costs of retaining an expert who may later be disqualified.

You must be certain that the expert will work with you throughout the case. After your expert writes the initial opinion letter, he or she must be available to meet with you as necessary on short notice to make sure that you have a thorough understanding of the case, and to respond to your opponent's expert reports.

A strong and persuasive testifying expert witness often means the difference between winning and losing a case. Therefore, it is extremely important to meet with potential experts before selecting them for your team. Although an expert may look great on paper, the personal interview may convince you that the expert will not make a favorable opinion on a jury.

§ 4.4 PRIVATE INVESTIGATORS

When a new case comes into your office, it may be wise to retain the expert services of a well qualified and experienced private investigator. An investigator can obtain witness statements and preserve important evidence so that you can position your case for settlement or trial. In some cases, nonparty witnesses can make or break your case. Factfinders rely heavily on the testimony of disinterested witnesses. To determine if a witness supports your client's case, the

investigator should interview the witness before his or her memory fades, and should preserve the testimony with a signed witness statement. An investigator can also take photographs of accident scenes before there are any unexpected changes.

Ethical Commentary

Even if the private investigator is an independent contractor, Mass.R.Prof.C. 5.3(b) requires counsel to "make reasonable efforts to ensure that the . . . [investigator's] conduct is compatible with the professional obligations of the lawyer." *See* Mass.R.Prof.C. 5.3 cmt. 1. Rule 5.3(c) further provides:

> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Mass.R.Prof.C. 5.3(c).

If the target defendant is a corporation, it may be tempting to interview some of the corporate employees ex parte. Rule 4.2 of the Massachusetts Rules of Professional Conduct prohibits communications by a lawyer or his or her "investigative agent" with a person the lawyer knows to be represented by another lawyer. The comments to the rule, as amended on June 5, 2002, clarify that

> [i]n the case of an organization, [Rule 4.2] prohibits communications by a lawyer for another person or entity concerning the matter in representation only with those agents or employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the organization to make decisions about the course of the litigation.

Mass. R. Prof. C. 4.2 cmt. 4. The Supreme Judicial Court, in decisions issued in 2002 and 2003, discussed the application of this prohibition in some detail,

concluding in *Clark v. Beverly Health & Rehabilitation Services, Inc.*, 440 Mass. 270 (2003) that former employees fall outside the scope of the rule's prohibitions on ex parte contact. *See also Patriarca v. Ctr. for Living & Working, Inc.*, 438 Mass. 132 (2002); *Messing, Rudavsky & Weliky, P.C. v. President of Harvard Coll.*, 436 Mass. 347 (2002). In reaching this conclusion, however, the court emphasized that other ethical requirements must be observed during the conduct of an ex parte interview, noting in particular Mass. R. Prof. C. 4.1 (duty of truthfulness to third parties), Mass. R. Prof. C. 4.3 (dealings with unrepresented persons), Mass. R. Prof. C. 4.4 (duty to refrain from unfair or illegal means of obtaining evidence), and observance of applicable privileges. *Clark v. Beverly Health & Rehab. Servs., Inc.*, 440 Mass. at 278–79.

Ethical Commentary

Both the Massachusetts and federal discovery rules restrict expert discovery to designated discovery methods. Similarly, restrictive rules have been interpreted as precluding ex parte communications with an opponent's experts. *See Erickson v. Newmar Corp.*, 87 F.3d 298, 301–02 (9th Cir. 1996) (collecting authorities). Counsel who contact an opponent's expert ex parte, either directly or through an investigator, risk being charged with violating Mass.R.Prof.C. 1.2(a), 3.4(c), and 8.4(d).

§ 4.5 ACCIDENT RECONSTRUCTION EXPERTS

At the start of a case involving an accident, you should also consider retaining an accident reconstruction expert.

> Accident reconstruction is a means of determining the most probable scenario for how an accident has occurred. A reconstruction is done by examining and interpreting the physical evidence from an accident; correlating that information and comparing it with statements from witnesses and parties; analyzing all of this material; and thereby determining what seems the most likely chain of events.
>
> A reconstruction is different from an investigation conducted by a police officer who initially responds to the accident scene. Typically that officer simply gathers basic data, recording that an accident occurred at a certain place and time and that certain individuals and vehicles were involved. An accident

reconstructionist uses this information to analyze the mechanics and dynamics of the collision process.

Gerard D. Murphy, *Accident Reconstruction, in Massachusetts Motor Vehicle Torts: Liability and Litigation* 7-1, 7-1 (MCLE, Inc. 1994 & Supp. 1998, 2001).

The accident reconstruction expert can prepare scaled diagrams, charts, photographs, videotapes, videotape reenactments, and computer simulations, as well as three-dimensional models. These important pieces of demonstrative evidence can be included in settlement packages, or can be used as exhibits or chalks at trial.

Bear in mind these key points when using an accident reconstruction expert:

- Utilize the accident reconstructionist as early in the case as possible.
- Prepare a file of the information the reconstructionist will need and have it ready to forward; the specialist's analysis will be related to the quantity and quality of information collected and provided.
- Maintain a good working relationship with the expert and make sure that you have a clear understanding of the expert's analysis while preparing a strong strategy for the case.
- Talk extensively and in depth with the expert; this will preclude any surprises in testimony and ensure that the attorney and expert are on the same wavelength, with the ultimate goal of benefiting the client.

Gerard D. Murphy, *Accident Reconstruction, in Massachusetts Motor Vehicle Torts: Liability and Litigation* 7-1, 7-14 to 7-15 (MCLE, Inc. 1994 & Supp. 1998, 2001). See **Exhibit 4C** for a sample report prepared by an accident reconstruction expert.

§ 4.6 PREPARING FOR *DAUBERT* CHALLENGES

There is a misconception that a good attorney can obtain a settlement in any case based solely on his or her reputation. However, any attorney will do a disservice to the client and to himself or herself if that attorney expects to resolve a case without supportive experts. In this author's experience, if an attorney cannot find well qualified experts to establish negligence and causation, the defendant and its attorneys will be more than eager to defend the case through trial. Never assume that just because your case is in suit, you will have the option to cut your losses and settle a weak case for "nuisance value." The harsh reality of this business is that you will be forced to try your weak cases!

In order to withstand motions under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), motions for summary judgment, and motions for directed verdict, your expert opinions must be rock solid. Your experts must be credible, seasoned, and available to you on short notice so that they can help you navigate your case through the litigation process.

For example, until recently, it was generally assumed that a plaintiff could satisfy his or her burden on causation simply by obtaining a report from a medical doctor specifying that the injury or disease was caused by the defendant's negligence. However, ever since *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Commonwealth v. Lanigan*, 419 Mass. 15, 641 N.E.2d 1342 (1994), it is clear that in order to withstand *Daubert* motions, an attorney will need to show that the expert's opinion concerning causation is based on a reliable or valid theory or process. The trial judge has a "gatekeeper role" in determining whether the process or theory underlying a scientific expert's opinion lacks reliability. In *Lanigan*, the court held that the ultimate test is the reliability of the theory or process underlying the expert's testimony. Liacos, Paul J., *Handbook of Massachusetts Evidence* 393–94 (7th ed., revised by Mark S. Brodin & Michael Avery, Little, Brown & Co. 1999).

Most recently, in *Canavan's Case*, 432 Mass. 304, 733 N.E.2d 1042 (2000), the Supreme Judicial Court noted that opinions regarding medical diagnosis and causation are classic examples of testimony that should be subject to a *Lanigan* analysis. The proponent of the expert evidence can lay an adequate foundation by establishing general acceptance in the scientific community, or by showing through an alternative means that the evidence is reliable or valid. In *Canavan*, the Supreme Judicial Court explained that expert opinions based on clinical experience and personal observations are subject to a *Lanigan* analysis; "Of course, even though personal observations are not excepted from *Lanigan* analysis, in many cases personal observation will be a reliable methodology to justify an expert's conclusion. If the proponent can show that the method of personal

observation is either generally accepted by the relevant scientific community or otherwise reliable to support a scientific conclusion relevant to the case, such expert testimony is admissible." *Canavan's Case*, 432 Mass. at 313–14, 733 N.E.2d at 1050. With a supportive opinion from a reputable and strong expert, you will be well prepared to make the commitment of time and resources necessary to handle the case successfully to a settlement or through trial. If your opponent knows that you have retained qualified experts and that you are aggressively preparing the case for trial, then you have increased the likelihood of a settlement.

§ 4.7 USING EXPERTS TO PROVE CAUSATION AND DISABILITY

In most automobile tort cases, the principal expert is the orthopedic surgeon who is needed to establish the causal connection between the accident and the injury. Unfortunately, you cannot assume that your client's treating physician will agree to be your testifying expert. Some treating physicians refuse to testify at trial. A surprising number of treating physicians even refuse to write the expert's report. If the treating physician refuses to cooperate, you may be forced to retain another expert to prepare your case for settlement or trial.

Even if the treating physician is willing to provide a written report, you will probably need to spend some time and effort explaining to that physician the legal distinctions among "certainty," "probability," and "possibility."

> The fact that a witness expresses his opinion by stating that given causes of a condition are "consistent with" his observations does not render the testimony inadmissible. Where other evidence is introduced tending to prove the cause, such expert testimony is relevant to show that the expert or scientific evidence is not inconsistent with the claimed cause.

Liacos, Paul J., *Handbook of Massachusetts Evidence* 390 (7th ed., revised by Mark S. Brodin & Michael Avery, Aspen Law & Business 1999) (citing *Commonwealth v. Nadworny*, 396 Mass. 342, 359, 486 N.E.2d 675, 686 (1985)). However, an opinion expressed as a mere assertion of a possibility of a causal connection is insufficient alone to sustain a finding. *Goffredo v. Mercedes-Benz Truck Co.*, 402 Mass. 97, 520 N.E.2d 1315 (1988) (directed verdict was proper where witness expressed opinion in terms of possibilities rather than probabilities). On the other hand, in *Blood v. Lea*, 403 Mass. 430, 530 N.E.2d 344 (1988), the Supreme Judicial Court explained that a medical expert's assessment of a

"probable" causal link between the alleged negligent act and the injury was sufficient to submit the case to the trier of fact. Liacos, Paul J., *Handbook of Massachusetts Evidence* 390–91 (7th ed., revised by Mark S. Brodin & Michael Avery, Little, Brown & Co. 1999).

Ethical Commentary

A claim for emotional distress may waive the patient-psychotherapist privilege under G.L. c. 233, § 20B(c) (privilege waived if "the patient introduces his mental or emotional condition as an element of his claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected"). If a plaintiff client has a history of psychotherapy, counsel should review with the client this waiver issue so the client can make an informed decision about whether to claim emotional distress as an element of damages. *See* Mass.R.Prof.C. 1.2(a), 1.4(b).

§ 4.8 USING EXPERTS TO HELP VALUE THE CASE

Although no one knows for certain what a jury will award in any given case, most clients depend on their attorneys to give them a range of case values. In a case of eminent domain, it is relatively easy to explain that the jury is likely to award damages somewhere between the values set by the taking authority's and the landowner's appraisers, respectively. The valuation of a personal injury case is much more subtle and subjective. However, your case will never move off your desk unless you and your client come to grips with its "settlement value." Each case has a range of fair settlement values. For example, in *Fishman v. Brooks*, 396 Mass. 643, 487 N.E.2d 1377 (1986), the plaintiff relied on expert testimony from an experienced tort lawyer and an experienced claims adjuster to establish the fair settlement value of the underlying tort claim. To determine the fair settlement value of a personal injury case, most attorneys will discuss their cases with other experts (experienced plaintiffs' and defense attorneys) and they will also conduct a verdict search to locate jury verdicts in similar cases.

Jury Verdict Research (JVR) in Horsham, Pennsylvania, is one of several companies that holds itself out as an expert in the valuation of personal injury and employment discrimination cases. For more than 35 years, JVR has provided plaintiffs' and defense attorneys, insurers, and governmental agencies with case specific evaluations of the compensatory value for personal injury claims. The

JVR database contains more than 175,000 personal injury verdicts and settlements reported from across the United States. For a set fee, a plaintiff or defense attorney can obtain an independent evaluation. Although such an evaluation does not set the value of the case, it is a valuable tool for evaluating the case properly. See **Exhibit 4D** for a sample case evaluation. The "Massachusetts, Connecticut, Rhode Island Verdict Reporter" provides subscribers with copies of case summaries of similar cases. On a less formal basis, most attorneys regularly scan the pages of *Lawyers Weekly* and surf the Internet to find case reports of similar cases.

An independent case evaluation and a package of similar cases can help when negotiating with the insurer. Many insurers mistakenly believe that demand figures are simply "pulled out of the air." However, an independent evaluation will show the adjuster that you have carefully evaluated the case and that there is a good faith basis for your initial demand figure.

In a recent article in the *Boston Law Tribune*, Paul G. Garrity, a principal of ADR Solutions, Inc. and former Superior Court judge, advised:

> As anyone knows, valuation is not a science and perhaps it is not even an art. In 2001 the usual bodily injury case is not valued, if it ever was, by a multiple of specials, that is, medical costs and lost earnings. Most defendants—the ones with the checkbook—value a case by periods of total, partial and residual disability plus medical expenses and lost wages. They then multiply the total of those numbers by a fraction representing their hunch about liability. My advice is to take an experienced attorney to dinner and obtain a second opinion by his or her sense of what the case is worth.

See Garrity, *Alternative Dispute Resolution*, Boston L. Trib., Feb. 19, 2001, at 6.

Ethical Commentary

Counsel's obligation of truthfulness in statements of fact to others applies to the negotiation of a settlement. Mass.R.Prof.C. 4.1. Misrepresentations during settlement negotiations may result both in disciplinary action and liability for fraud and legal malpractice. *See Slotkin v. Citizens Cas. Co. of N.Y.*, 614 F.2d 301, 307–12 (2nd Cir. 1979). Counsel should be careful not to misrepresent an expert's opinion or any other material fact in negotiations. However, "estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim" are not

considered to be statements of fact "under generally accepted conventions in negotiation." Mass.R.Prof.C. 4.1 cmt. 2.

§ 4.9 USING EXPERTS TO HELP DRAFT INITIAL DEMAND LETTER

After you "value" your case, it is usually appropriate to prepare a detailed demand letter. It may be helpful to have your expert review the demand letter to be certain that your facts and theories have a solid basis. More often than not, the demand package should contain written reports from your medical experts. In addition to reports of surgical operations and hospital discharge summaries, an expert medical report should nail down causation and permanency.

It is sometimes helpful for the demand package to include detailed medical illustrations of your client's injuries and/or surgeries. Many companies sell "canned" versions of "herniated discs" or "fractured femurs." If the injury is moderate to severe, however, it is often helpful to retain a medical illustrator to develop an appropriate number of customized illustrations directly from the films (x-rays and MRIs). The treating physician can sign off on the completed illustrations' authenticity. These illustrations will then become an integral part of your settlement package.

In some cases you may want your demand package to include a day in the life video. Even if your case does not justify the expense of a professional "Day In The Life" film, you should not overlook home videos. In some significant cases, it may be worth the added expense to retain an expert to prepare a 3D animation or reenactment of the accident. Working in tandem with an accident reconstruction expert, a videographer with expertise in 3D animation can prepare this key piece of demonstrative evidence.

Before the videographer puts the animation, computer simulation, or video reenactment into final form, you must monitor the production to be certain that you have satisfied the foundation requirements. In general, see *Lally v. Volkswagen*, 45 Mass.App.Ct. 317, 698 N.E.2d 28 (1998). The foundational requirements for computer simulations are addressed in *Commercial Union Ins. Co. v. Boston Edison Co.*, 412 Mass. 545, 591 N.E.2d 165 (1992). There must be an adequate showing that "(1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate (and disclosed to other parties so that they may challenge them); and (3) the program is generally accepted by the appropriate community of scientists." *Commercial Union Ins. Co. v. Boston Edison Co.*, 412 Mass. at 549–50, 591 N.E.2d at 168. However, this final component may be questionable following the decisions of *Daubert v. Mer-*

rell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and *Commonwealth v. Lanigan*, 419 Mass. 15, 641 N.E.2d 1342 (1994).

In *Calvanese v. W.W. Babcock Co.*, 10 Mass.App.Ct. 726, 730, 412 N.E.2d 895, 899 (1980), the court stated that in determining whether to admit a videotaped test the trial judge must determine "whether the evidence is relevant, the extent to which the test conditions are similar to the circumstances surrounding the accident, and whether the [experiment, demonstration or reenactment] will confuse or mislead the jury." However, videotapes are inadmissible if the admission of the tape would result in prejudice. In *Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993), the plaintiff's car suddenly veered off the road into a telephone pole. The court held that the defendant's video was not admissible because the risk of misunderstanding was "great" and the conditions were not similar: "The issue for us is whether the demonstration is sufficiently close in appearance to the original accident to create the risk of misunderstanding by the jury, for it is that risk that gives rise to the special requirement to show similar conditions." *Fusco v. General Motors Corp.*, 11 F.3d at 264.

If you decide to do a Day in the Life video or a reenactment of the accident, it is important to review the law to make sure that you have taken all of the necessary steps so that the video will be admissible at trial. However, even if a video never gets admitted into evidence, it can be a very important tool for settlement negotiation.

§ 4.10 USING EXPERTS TO HELP PREPARE THE COMPLAINT AND DISCOVERY REQUESTS

If a case cannot be settled without filing suit, your experts will provide invaluable help with your initial discovery. When the complaint is filed you should also serve a detailed set of interrogatories and a request for documents. Be certain to consult with your experts while preparing your discovery requests. Every industry has its own language, and your expert can customize your discovery.

Many significant auto cases involve collisions with large trucks. If your case involves a tractor/trailer you may need to retain an expert with specific expertise in such cases. Federal highway regulations create uniform standards of safe travel on interstate highways. In Massachusetts, the violation of a Federal Motor Carrier Safety Regulation by an interstate truck driver is evidence of negligence. *Thurston v. Ballou*, 23 Mass.App.Ct. 737, 505 N.E.2d 888 (1987). Therefore, if you represent an individual injured by a tractor-trailer, a set of well-crafted discovery requests, referring to specific sections of the Federal Motor Carrier Safety Regulations, may prompt a call from the adjuster suggesting further settlement discussions or mediation before either party expends unnecessary legal expenses.

§ 4.11 SELECTING AN ARBITRATOR OR MEDIATOR

If your case cannot settle through the traditional negotiation process, you should consider the expert services of a mediator or an arbitrator. The selection of a mediator or arbitrator is very much like the selection of any other expert. You should obtain the curriculum vitae of any potential mediator or arbitrator, and you should then network with other attorneys to see if they can recommend a "neutral." You need to know whether the neutral has a reputation for low or high awards, and whether he or she is respected by the plaintiffs' and the defense bars.

Mediation is an amazing process if it is handled by a well trained and skilled mediator. Mediation can be a disaster, however, if the mediator is not willing to work hard throughout the process to do everything possible to resolve the case.

A good mediator should be willing to disclose his or her "batting average." It is appropriate to ask the mediator how many mediations he or she has conducted in the past year, and how many of those cases settled. The mediator should also be able to provide you with several references so that you can do your own background check.

After selecting a qualified expert mediator, to make a forceful and convincing presentation at the mediation, you should prepare your case as if you were going to trial.

§ 4.12 USING EXPERTS TO PREPARE FOR MEDIATION

In most cases, the expert will not be present at the mediation. However, in order to prepare your "opening" or "case description," be sure to discuss all of your theories with your experts. Before the mediation, furthermore, you should give your own expert copies of the defendant's expert reports. Your expert can then provide you with facts and opinions to use at the mediation.

It can be helpful to have your expert accompany you to the mediation session. Although the expert will not testify, it is useful for him or her to be available to answer questions that arise during the process. If an expert can help explain a key point to the mediator, then the mediator may be able to convince your opponent that your case is rock solid and that the case should be settled.

If the case does not settle as a result of the mediation, you should have a good idea of the issues preventing settlement. After the mediation you should meet with your experts and address these issues head on to see if a supplemental report can be prepared and forwarded to your adversary for one last effort at settlement.

If mediation is not successful, and if your adversary is not impressed by your expert's supplemental report, it may be a good time to take the pretrial audio visual deposition of your expert. Under Mass.R.Civ.P. 30A(m), a party may take the audio visual deposition of a person whom he or she intends to call at trial either as a treating physician or as an expert witness. If you have a strong and articulate expert, the video deposition will highlight his or her strengths and therefore the strengths of your case. The defense attorney will send a copy of the video to the claims adjuster. This should increase the likelihood of a favorable settlement. Even if the case does not settle, you are now one step closer to being totally prepared for trial.

§ 4.13 USING FOCUS GROUPS AND MOCK TRIALS TO PREPARE FOR SETTLEMENT OR TRIAL

If you cannot settle your case through negotiation or mediation, it may be useful to bring your case to a focus group or to do a mock trial. This type of lay "expertise" will help focus your attention on the strengths and, more importantly, the weaknesses of your case. This author has found that a carefully prepared mock trial helps bring focus to the critical points of a case. Often the comments of a mock jury bring a sense of realism to the case and help in recommending a realistic settlement value to clients. In any event, once you have worked up your case for a mock trial, your unsettled case will be well prepared for trial.

§ 4.14 USING EXPERTS TO EVALUATE STRUCTURED SETTLEMENTS AND PROTECT ELIGIBILITY FOR PUBLIC BENEFITS

Even if you and the opposing party agree on a settlement figure, you still need experts. In a significant case, the insurer may give your client the option of a lump sum payment or a structured settlement. At this point, this author advises clients to consult immediately with an investment advisor and a tax attorney to evaluate the true value and tax consequences of a structured settlement. If the client then decides to take some or all of the settlement in the form of a

"structure" it is important to retain an actuary or economist to examine the proposal carefully and determine the actual cost or present value of the structure. Finally, if your client decides to accept a structured settlement, you may need to retain experts to determine the ratings of the proposed annuity companies and to ensure that the closing documents meet industry standards regarding constructive receipt, secured creditorship, assignments, guarantees, and other issues. Before your client signs the settlement agreement and release, your file should contain a formal opinion letter from your expert certifying that the documents do in fact conform to current industry standards.

If your client currently receives Medicaid, Medicare, Social Security Disability Income, or Supplemental Security Income, you will need to retain experts to assess the consequences of a lump sum settlement as opposed to a structured settlement, third party supplemental trust, or special needs trust, and "(d)(4)(A)" or payback trusts. Some legal experts believe that if these trusts are properly drafted and administered, they can be used to shelter tort recoveries so that the funds can be used for the client's benefit while permitting the client to continue eligibility for vital public benefit programs. *See* Margolis & Benson, *Maintaining The Safety Net: Planning And Settlement Options For Disabled Plaintiffs To Protect Eligibility For Public Benefits*, J. Mass. Acad. Trial Att'ys, Fall 1998, at 27. If your client receives any of these benefits, you should consider consulting with a qualified attorney well before the eve of settlement, so that you can ensure your client's continued eligibility.

EXHIBIT 4A—Vocational Expert's Report

ARTHUR J. O'SHEA, Ph.D.
VOCATIONAL CONSULTANT
LICENSED PSYCHOLOGIST
289 HILLCREST ROAD
NEEDHAM. MASSACHUSETTS 02492-4026
TEL. (781) 449-6886
FAX (781) 449-7564

June 9, 1998

Edward C. Bassett, Jr., Esquire
Mirick O'Connell
1700 BankBoston Tower
100 Front Street
Worcester, MA 01608-1477

Re: _____

Dear Mr. Bassett:

I interviewed -----, at your request, on May 27, 1998, for purposes of evaluating her vocational prospects. She was very cooperative throughout our meeting. She was born on September 17, 1952.

Educational and Vocational Background: Ms. ----- graduated from _____ High School in 1970, having completed the college prep course with A and B grades. She said she went on to [COLLEGE] and graduated in 1972 with an associate's degree in accounting. She said that she maintained a B average while at the same time working 40 hours a week.

While still in high school, Ms. ----- began working at ----in [TOWN], a retail store, as a cashier and stock clerk. She remained there until February 1973. In May 1972, while still working at -----, she found employment at ----- Bank and Trust Company in [TOWN], starting as an accounting clerk. Her duties included wiring funds, keeping fixed asset records, and performing general clerical duties. After about 18 months she was promoted to the position of accounting officer, where her duties were to prepare monthly and annual regulatory financial reports. At that time she did most of her reports by hand.

About 1981 or 1982 Ms. ----- became a vice president and controller of -----, working directly under the treasurer. She had a staff of about 20 and was responsible for all financial reporting, accounts payable, fixed assets, reconciliation of the bank's daily ledger, and preparation of the bank's daily cash position. She

also had several staff to work on record keeping for the -----, the bank's holding company, which was made up of four banks, with ----- being the largest. By 1984 or 1985 the holding company had made more acquisitions and consisted of nine banks, a real estate subsidiary, and a computer subsidiary. Around this time Ms. ----- became vice president and controller of the holding company, with a staff of about five. She was responsible for keeping the financial records of the holding company and setting administrative policies for the various banks so that all would follow the same procedures. She was also responsible for running stockholder meetings and for preparing regulatory reports for the Securities and Exchange Commission and the Federal Reserve.

In April 1987 the Bank purchased -----, resulting in the elimination of Ms. -----'s holding company's position. She went back to the ----- bank, which became the _____Bank, as vice president and controller.

In September 1987 Ms. ----- resigned from the Bank and joined the ----- Bank, which at that time was being organized. She became the chief financial officer with the title of vice president and controller. The bank opened in December 1987 and has experienced substantial growth. She remained there until February 1998. She said that the ----- Bank was bought by ----- in February 1996 but that her job duties did not change significantly at that time except that there no longer were stockholders, for whom she had to prepare reports. Also, she could not make decisions on her own but had to conform to ----- procedures.

Ms. ----- said that she resigned from her job at the ---- Bank in February 1998 because on her return to work after her accident she did not feel that she was able to work the very long hours needed to do the job. She felt that 35 to 40 hours represented her maximum capacity, not the 50 or 60 hours she regularly worked prior to her accident. She said that at times she would work 70 to 80 hours, for example, during the ----acquisition of -----. She has not worked since resigning in February. In a letter dated April 24, 1998, -----, president and chief executive officer of ----- Bank, wrote that when Ms. ----left the bank in 1998, she was Executive Vice President and Chief Financial Officer, with an annual salary of $96,000 plus a year-end bonus. Her 1997 bonus was $16,331. He pointed out that she was responsible for managing the bank's investment portfolio, asset/liability management, planning and budgeting, tax management, risk management, auditing, compliance, the accounting department, training, and human resources management. She was also the clerk and treasurer of the bank and its two subsidiaries. She had significant interaction with the ----- Corporation in [TOWN], with frequent trips to [TOWN] for meetings. She would generally work between 60 to 80 hours per week, with 80-hour weeks common, especially during quarterly and year-end financial statement planning and budgeting, and special projects.

Mr. ----- further wrote that when Ms. ----- finally returned to work, she was a totally different employee. A previously vibrant, energetic, and hard working executive who would work 60–80 hours a week had been totally changed. She was in constant pain and by 3 p.m. totally fatigued so that her work hours were reduced to 35 to 40 hours. She was unable to travel with any reasonable frequency to the parent corporation because the four-hour car trip caused significant problems. This caused significant problems with the bank's ability to coordinate financial matters with the parent corporation. He said that at times he would meet ----- and she would be in tears because of pain and fatigue and her feeling that she was letting the bank down. He said that he was unable to find a management position that would require only a 35 hour week since all required substantially more hours in the bank. The only alternatives he could find were customer service and administrative positions that would pay no more than $25,000 to $30,000 a year. Finally, he stated that the bank, due to her long-term meritorious service, agreed to provide her with 18 months of salary continuance along with her medical benefits package.

In the mid-1980s Ms. ----- began attending [COLLEGE], taking courses off and on, as her work duties permitted. She finally graduated in May 1996. She started a master's in business administration in January 1998 at [COLLEGE], majoring in human resources. She said that as part of her duties at ---- she was responsible for human resources and found that she enjoyed this aspect of her work. Also, she feels it is less labor intensive. She hopes to complete her program in the spring of 1999 by taking classes this summer.

Limitations: Ms. ----- was injured on October 12, 1996, in [TOWN]. While riding on a funicular car, a cable snapped and the car fell down out of control. Two people were killed in the crash, and Ms. ----- fractured both legs and both hips and shattered her left kneecap, which had to be removed.

Ms. ----- describes herself as prior to her accident being an extremely active person. She attended an aerobics class three times a week, refereed grade 5 and 6 basketball games, umpired Little League, and also played in a basketball league. She also enjoyed skiing, waterskiing, and other physically demanding sports.

What follows is Ms. -----'s description of her current condition. Her left leg is more problematic than the right. The left leg is one half to one inch shorter than the right, and her gait is noticeably off. She had blood clots in her left leg, which led to a rehospitalization soon after her discharge. Her left leg is stiff, especially in the knee area. As a result, it is difficult for her to go up and down stairs, with going down being more difficult. She is unable to run any longer and finds it almost impossible to carry anything of weight up or down stairs because she must keep one hand on the rail. She said that her doctor has told her she is likely to develop arthritis in the leg.

Ms. ----- has rods in the upper part of both legs from the knee to the hip. As a result, she has restricted range of motion. She has not had a hip replacement but has four large screws in her hip. She has a constant dull ache in the hip, which worsens if she walks or stands for any length of time. She estimated that her pain level in her left hip is between 1 and 5 on a scale of 0 to 10, on which 0 represents the absence of pain and 10 represents excruciating pain. She usually takes Tylenol two or three times a day to control the pain but at times takes it more often. She has no restrictions or stiffness in her right leg or right hip. I felt that Ms. ----- was being very open and honest in describing her current condition. There did not appear to be any attempt to exaggerate her problems.

When I asked Ms. ----- why she could no longer work 60 hours a week, she said that her body is tired and that she lacks the kind of stamina she had before her accident. She feels that she has made a maximum effort to return to her pre-accident lifestyle, not wanting to give up anything she had worked so hard to earn. She goes to a gym three times a week to walk and ride a stationary bike. At the present time she sleeps about eight hours a night, whereas prior to her accident she required only about six hours of sleep.

In a report dated May 1, 1998, Dr. -----, one of Ms. -----'s treating physicians, wrote that he was not surprised that she had left her demanding position as chief financial officer at the ---- Bank, given her injuries. He did not feel that she would necessarily hurt herself if she were to engage in an occupation or position that required a more reasonable 35 to 40 hours work week but doubted that she would be comfortable working 60 hours a week. He felt that, because of her left patellectomy, he would accord her a 9 percent impairment of the whole person and a 2 percent impairment of the whole person regarding the mild atrophy of her left thigh muscles and an additional 4 percent impairment of the whole person due to restricted range of motion of her left knee. He felt that all of the impairments added up to a total of a 15 percent figure for the permanent impairment. He did not advocate removing the bilateral femoral rods and bilateral screws from her lower extremities. Finally, he noted that she has some extensive permanent scarring from her incisions, with somewhat increased risk for future thrombophlebitis, having had it once.

Vocational Assessment: It is my opinion that Ms. ----- has sustained a very severe vocational loss as a result of her accident on October 12, 1996. At that time she was very successfully employed as vice president and chief financial officer of the ----Bank. She had worked her way up through the ranks to her executive position and was just about to earn her bachelor's degree at the time of the accident. As indicated above, she held a position with many responsibilities that required her to work extremely long hours, up to 80 hours a week. When she attempted to resume this schedule, she was unable to sustain it, as reported by the president of the bank, Mr. -----. In addition, Dr. ----- states that he does not

feel that she is capable of working the long hours she once did. It should be noted, too, that not only was she working extremely long hours, but she was also frequently working under intense pressure to prepare reports in a timely fashion and to meet the expectations of a frequently changing ownership of the banks where she was employed. I feel that it is an indication of the quality and intensity of her work that she was able to survive and continue on in spite of changes that were going on. In light of Dr. -----'s report and my interview of Ms. -----, I feel that she will no longer be able to carry out the duties of a chief financial officer and must pursue a different career.

I discussed with Ms. ----- her thoughts with regard to a new career. She expressed an interest in two areas, one teaching at a community college or doing human resources work. I feel that by the time she completes her MBA, she will be qualified to pursue either career. Teaching, which appears to be her first preference, would provide her with a very flexible schedule. Typically, community college instructors are responsible for between 12 and 15 hours of instruction per week. However, each semester lasts only about four months. Instructors have a choice as to whether to teach during the summer or not. In addition, preparation time can be allocated by the individual instructor as she sees fit. Except for the 12 to 15 hours a week in the classroom, Ms. ----- as a community college instructor would be able to structure her schedule according to her capacity. There also is no heavy lifting in such work, and the instructor can alternate sitting or standing as necessary.

With her experience in human resources administration, Ms. ---- has a good background for work in this area. However, I am concerned that except at the lower level of jobs, for example, as an employment interviewer, she would be required to exceed her 35 to 40 hour a week limit. As Mr. ----- pointed out in his letter, he could not find anything at the bank except at levels far below what she was accustomed to in her previous work. It would seem that she is very much overqualified for such positions and that there would be some difficulty in her adjusting to such positions after having been in charge for so many years. As a result, while I feel that she may be capable of certain entry level administrative positions, I feel that community college teaching would offer her a more satisfying experience and work that is much more appropriate, given her medical condition as described by Dr. -----.

Sincerely,

Arthur J. O'Shea
Vocational Consultant

AJO/wg

EXHIBIT 4B—Economist's Report

COMMONWEALTH RESEARCH GROUP, INC.
230 Beacon Street
Boston, Massachusetts 02116
Telephone 617-536-3146
Telefax 617-266-8133

An Evaluation Of the Net Economic Loss
To Jane Doe

Prepared for:

Edward C. Bassett, Jr., Esq.
Mirick O'Connell, DeMallie & Lougee, LLP
1700 BankBoston Tower
100 Front Street
Worcester, MA 01608-1477

August 7, 1998

CRG File No. 98-818

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I

INTRODUCTION

A. OBJECTIVE

This report presents the results of an analysis performed to determine the net economic loss to Jane Doe as a result of injuries that she received on October 12, 1996. The components of her loss that we have evaluated here consist of the present values of Ms. Doe's net lost earnings capacity, including her annual bonuses, her employer's contributions to her 401(k) plan, and her employer-paid benefits. We have not attempted to evaluate her future medical care costs here, even though her physician states that she will require continued monitoring for potential complications[1] because we cannot be certain of the extent of future medical care that she will need. Nor have we included considerations of the market value of household services that she may now find more difficult or even impossible to do. Finally, this evaluation is limited to Ms. Doe's economic damages, and does not consider other aspects of damages that she may have incurred.

B. BACKGROUND

Jane Doe was born on September 17, 1952. She graduated from Grafton High School in 1970, where she completed the college preparation course. After her graduation from high school she attended Becker Junior College, where she graduated in 1972 with an Associate's degree in Accounting. While studying at high school and junior college she held several jobs -- as a cashier and stock clerk -- working up to 40 hours per week. After graduating from Becker Junior College, she found employment as an accounting clerk at The Money Bank. She was soon promoted to the position of Accounting Officer. In 1981 she became a Vice President of the bank, and its Controller. In 1987, the Bank of the North purchased the Conifer group (the holding company of the Money Bank) and her job was eliminated. In September 1987 Ms. Doe joined Stone Bank as a Chief

[1] Letter dated May 1, 1998 from Charles Medic, M.D., Fallon Medical Center – Gold Star Boulevard (508-852-0600) to Edward C. Bassett, Jr., Mirick, O'Connell, 1700 Bank Boston Tower, 100 Front Street, Worcester, MA 01608-1477.

Financial Officer with the title of Vice President and Controller. During her employment at Stone Bank she also attended Nichols College, graduating from that college in May 1996.

On October 12, 1996 while visiting Quebec City in Canada, Ms. Doe was riding a funicular car, when the cable snapped and the car fell down. Two people were killed in this accident; Ms. Doe fractured both her legs and both hips, and shattered her left kneecap. After recovering from her injury she returned to work but found that she was no longer able to work long hours or travel extensively. Now, she can work only 35 to 40 hours per week instead of 60 to 80 hours per week as she used to do. Eventually, realizing that, due to her physical limitations, she could no longer perform the physical functions required for the position of Executive Vice President, Treasurer and Chief Financial Officer, she resigned from her position. Stone Bank tried to keep her by finding a position for her that would not require long hours and travel, but the only position that would give her some flexibility would have been a lower, clerical position. In February 1998, Ms. Doe resigned from the Stone Bank. Because of her long-standing employment history with the bank and her working ethics, Ms. Doe received an 18-moth severance package. Her treating physician wrote that, given her injuries, he is not surprised that she had left as an Executive Vice President, Treasurer and Chief Financial Officer at the Stone Bank.[2]

In January 1998, Ms. Doe started a Master's of Business Administration program at Fitchburg State College. She is expected to graduate in the spring of 1999, after which she intends to teach at the junior college level. Table 1 of the appended tables summarizes the relevant key events in Ms. Doe's life.

C. SUMMARY AND CONCLUSIONS

The assumptions and methodology described in Chapter II have been used in the performance of this analysis and the preparation of the appended tables. Table 2 summarizes the assumptions used in making this evaluation. Table 3 presents the evaluation of Ms. Doe's prospective lost earnings capacity through her statistical work life expectancy, while Table 3A presents it assuming that she would have worked continually until the age of 65 years. Her lost annual bonus is evaluated in Tables 4 and 4A, while Tables 5 and 5A

[2] Ibid.

evaluate the lost employer's contribution to her 401(k) retirement plan. Ms. Doe's residual earnings capacity is evaluated in Tables 6 and 6A. Table 7 summarizes the net economic loss to Jane Doe. This is reproduced below:

NET ECONOMIC LOSS TO JANE DOE
OVER HER STATISTICAL WORK LIFE EXPECTANCY

	June 30, 1998 Present Value (1) (1998 dollars)
Lost Earnings Capacity	$1,154,665
Lost Employer's Contribution to 401(k) Plan	$79,509
Lost Annual Bonus	$128,268
Total Lost Earnings Capacity	**$1,362,441**
Residual Earnings Capacity	$382,299
Net Economic Loss	**$980,142**

NET ECONOMIC LOSS TO JANE DOE
ASSUMING CONTINUAL WORK TO AGE 65

	June 30, 1998 Present Value (1) (1998 dollars)
Lost Earnings Capacity	$1,556,956
Lost Employer's Contribution to 401(k) Plan	$103,023
Lost Annual Bonus	$167,518
Total Lost Earnings Capacity	**$1,827,497**
Residual Earnings Capacity	$517,198
Total Net Economic Loss	**$1,310,298**

II

ECONOMIC ANALYSIS

A. THEORY OF DAMAGES

An individual's net loss of earnings resulting from an injury or similar harm due to others is defined as the present value of his/her lost earnings capacity adjusted by his/her residual earnings capacity. The net economic loss to Jane Doe consists of her net lost earnings and benefits received as an Executive Vice President, Treasurer, and Chief Financial Officer at Stone Bank where she was employed, exclusive of any income taxes she would have paid. Residual earnings in this case, are the earnings that she can now expect to receive given the limitations she now experiences since the occurrence of the incident.

The components of Ms. Doe's economic loss include her wages, the Stone Bank matching contribution to her 401(k) plan, and her annual bonus, which with her other employer-paid benefits represented an important part of Ms. Doe's total compensation package. These are discussed below, and are also described in more detail in the appended tables.

B. ASSUMPTIONS

The determination of net lost earnings capacity of an individual requires the formulation of number assumptions. These include the wages and benefits that the person would have earned barring the detrimental accident; the growth of such wages and benefits over time; the percentage of those wages that would have been paid in federal, state and local income taxes, and the length of time the person would have remained active in the labor force. Finally, an appropriate discount rate to determine present values must be chosen. These assumptions are discussed below, and are also described in the appended tables.

1. Work Life Expectancy

We have analyzed Ms. Doe's economic loss over two future time periods: (1) through the end of her statistical work life expectancy, and (2) until her 65th birthday. The participation of an individual in the labor force can be interrupted for a number of reasons. Illness, long-term work layoffs, childbirth, and additional education may all cause

temporary departures from the labor force. For the population as a whole, a statistic known as the "work life expectancy" has been calculated by the U.S. Department of Labor that accounts for the probability of these interruptions occurring. Using data obtained in 1979 and 1980 (the most recent available) the Bureau of Labor Statistics has published such work life expectancies for men and women by race, labor force status, and years of schooling completed.

The "work life" statistic is the age which, if used as the termination of projections of continual earnings, will result in a present value of those earnings that is the same as if year-by-year probabilities of employment were used up to the age of 72 of an individual's life. When projecting Ms. Doe's statistically expected end of work, we used August 31, 1999 as a starting date. At that time Ms. Doe will be 46 years old and will have a Master's degree. A 46-year old female with a Master's degree has a statistical work life expectancy of 12.6 years.[3] Thus, Ms. Doe's statistical end of work life as of the date that her severance package ends, August 31, 1999, is April 7, 2012.

Because her position at the time of her injury was very secure (and it is obvious that she would have been paid even for extensive periods of illness), we have also evaluated her economic loss assuming that she would have received pay and benefits without interruption until her 65th birthday, on September 17, 2017. Both of these results are presented in the appended tables, with these presented in Tables 3A, 4A, and 5A for lost earnings capacity, and Table 6A for residual earnings capacity.

2. **Income Taxes**

Federal, State and local income taxes must be deducted from wages in determining an individual's lost earnings capacity. Our staff has analyzed 1993 governmental statistics from the Internal Revenue Service and has derived the following equation for total income tax rates on income ranging from $10,000 to $80,000 per year:[4]

State and Federal Income Tax Rate	=	0.07948 (2.546)	+	0.000000134655 * (income) (17.274)

[3] U.S. Department of Labor, Bureau of Labor Statistics, Worklife Estimates: Effects of Race and Education, Bulletin 2254, February 1986, Page 14.

[4] The Staff of Commonwealth Research Group, inc. Technical Memorandum No. 96-03.

This equation was used to evaluate taxes paid on all earned income in these analyses. (Values in parentheses are "t-statistics", whose values indicate that their associated coefficients are statistically valid).

3. Discount Rate

To evaluate Ms. Doe's economic loss, the present value of past and future losses must be taken as of an appropriate date. In this case we have chosen June 30, 1998. This present value is obtained for each year by discounting the yearly value using an appropriate discount rate. Here, we have used the real (i.e. inflation-adjusted) average rate of return to three-year US. Treasury notes over the past 30 years, or 2.38 percent per year.[5]

C. EVALUATION OF NET ECONOMIC LOSS

1. Lost Earnings Capacity

Ms. Doe was employed at Stone Bank since its founding in 1987. At the time of her accident in 1996 she was an Executive Vice President, Treasurer and Chief Financial Officer. Had she not been injured, she would most probably have remained employed at this position at Stone Bank – or in a similar position – until her statistically expected end of work life, on April 17, 2012.

a. Base Salary

In 1998, Ms. Doe's compensation at the time of her leaving was $96,000 per annum (in 1998 dollars). We assumed that she would have remained at her position and that her future compensation would have remained the same in real terms. Upon leaving Stone Bank in February 1998, Ms. Doe received an 18-month severance package. Thus, we projected her lost earnings as an Executive Vice President, Treasurer and Chief Financial Officer at Stone Bank starting in August 31, 1999, the date of termination of her severance package, until the end of her statistically expected work life in April 7, 2012.

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[5] U.S. Department of Commerce, Bureau of the Census, Economics and Statistics Administration, *Statistical Abstract of the United States, 1996*, U.S. Government Printing Office, Washington D.C.

b. Employer-Paid Benefits

Employer-paid benefits represent a significant part of total compensation. Ms. Doe was a full time employee at the Stone Bank, receiving a full benefits package that represented 23.91 percent of her base salary and which included the following benefits:[6]

1. Legally-required benefits
2. Insurance (including health insurance)

Her legally-required benefits are comprised of Social Security, federal and state unemployment insurance, and workers' compensation insurance payments made by her employer. Insurance benefits include the average amount for health, dental, and long-term disability insurance paid by employers in the service industry.

2. Additional Compensation

In addition to her salary, Ms. Doe received an annual bonus, and her employer matched her contributions to a 401(k) plan. In the past, her annual bonus amounted to between 8 and 15 percent of her salary. We therefore assumed, in projecting her lost future compensation, that her bonus would have been 12 percent of her salary on average, or $11,520 per year in 1996 dollars. We used this amount and projected Ms. Doe's lost annual bonuses from August, 1998 until the last full year of her statistically expected end of work life, 2011.

Stone Bank also contributes to its employees' 401(k) plans, matching 70% of the employee's annual contribution. Ms. Doe was contributing $9,500 annually to her 401(k) pension plan, and we assume that Stone Bank matched 70 percent of that contribution – or $6,650 per year. Assuming that Stone Bank would have continued to make its contribution to Ms. Doe 401(k) we projected Ms. Doe's loss of the bank's matching contribution, from February 28, 1998, the date of her resignation from Stone Bank, until the statistically expected end of her work life, April 7, 2012.

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[6] U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1996*, U.S. Government Printing Office, Washington, D.C. 20402, Table 669, Page 430.

3. Residual Earnings Capacity

Residual earnings capacity is defined as the earnings capacity that the person can perform now, after the accident, given her physical limitations caused by injuries received in the accident. Ms. Doe was forced to leave her former employer, Stone Bank, in February 1998 because she was no longer able to travel and to work the hours required for her position as an Officer of the Bank. Because of Ms. Doe's long and meritorious service, the bank provided her with a eighteen months of salary (exclusive of her annual bonus), along with her medical benefits package, as severance pay. This will expire in the end of August 1999.

Ms. Doe started a Master's in Business Administration program in January 1998 at Fitchburg State College and she expects to graduate in the spring of 1999. After she receives her Master's degree, she would like to pursue a career as a teacher in a junior college. This position could provide her with a flexible schedule, allowing her to structure her schedule according to her physical capacity. In such a teaching position, she will have a more relaxed work schedule, much of which will be under her control, and will be able to alternate sitting or standing when actually teaching or meeting with students.

a. Base Salary

We assume that Ms. Doe will graduate from Fitchburg State College in the spring of 1999 and will receive a Master's degree in Business Administration. We assume that she will find a position as an Instructor at a Community College. Since she will not have a terminal (Ph.D.) degree and will be without prior teaching experience, we assume that she will get a position as an Instructor (rather than that of Associate or full Professor). Teachers' earnings vary according to the type of institution, geographic area, and field. According to a 1995-1996 survey by the American Association of University Professors, the average salary for full time Instructors was $30,800 in 1995 dollars ($33,660 in 1998 dollars).[7] We used this amount in projecting Ms. Doe's residual earnings capacity, which we projected until her statistically expected end of work life on April 7, 2012.

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[7] U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 1998-99 Editions*, page 169, U.S. Government Printing Office, Washington, D.C. 1998.

b. Employer-Paid Benefits

We assume that, once employed as a full time instructor at the community college, Ms. Doe will received the following benefits:

1. Legally required
2. Insurance (including health insurance)

Again, the legally-required benefits consist of Social Security, federal and state unemployment insurance, and workers' compensation insurance payments, made as benefits by the employer. Governmental statistics show that the above-cited benefits in the Service producing industry represent 20.65 percent of the salary.[8]

[8] U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1996* U.S. Government Printing Office, Washington, D.C. 20402, Table 660, Page 430.

III

SUMMARY AND CONCLUSIONS

Jane Doe's net economic loss resulting from the injuries that she sustained in her accident on October 12, 1996 consists of the present value of her lost wages, employer-paid benefits, and annual bonuses from Stone Bank, where she was an Executive Vice President, Treasurer and Chief Financial Officer, less her expected wages and employer-paid benefits as a junior college teacher. Her lost wages and benefits as well as her residual wages and benefits are evaluated from August 1999 to (a) the end of her worklife expectancy on April 7, 2012, and (b) her 65th birthday on September 17, 2017. In each case, her lost annual bonus is evaluated from the date of her resignation from the bank in February 1998.

Using the methodology and assumptions described in Chapter II, the June 30, 1998 present value of the various components of Ms. Doe's economic loss are as follows:

NET ECONOMIC LOSS TO JANE DOE
OVER HER STATISTICAL WORK LIFE EXPECTANCY

	June 30, 1998 Present Value (1) (1998 dollars)
Lost Earnings Capacity	$1,154,665
Lost Employer's Contribution to 401(k) Plan	$79,509
Lost Annual Bonus	$128,268
Total Lost Earnings Capacity	**$1,362,441**
Residual Earnings Capacity	$382,299
Total Net Economic Loss	**$980,142**

NET ECONOMIC LOSS TO JANE DOE
ASSUMING CONTINUAL WORK TO AGE 65

	June 30, 1998 Present Value (1) (1998 dollars)
Lost Earnings Capacity	$1,556,956
Lost Employer's Contribution to 401(k) Plan	$103,023
Lost Annual Bonus	$167,518
Total Lost Earnings Capacity	**$1,827,497**
Residual Earnings Capacity	$517,198
Total Net Economic Loss	**$1,310,298**

EXHIBIT 4C—Accident Reconstruction Report

Gerard D. Murphy

ACCIDENT RECONSTRUCTION CONSULTANT

45 EASTERN POINT DRIVE
SHREWSBURY, MA 01545

TELEPHONE 508-791-2870
FACSIMILE 508-363-4430

April 24, 2000

Attorney Edward C. Bassett, Jr.
MIRICK, O'CONNELL, DeMAILLE & LOUGEE
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1700 Bank of Boston Tower
100 Front Street
Worcester, Massachusetts 01608-1477

RE: _____

Dear Attorney Bassett:

As requested, I initiated reconstruction services in this accident last month. Those services involved examination of a file of information that you forwarded which included copies of Depositions of [Operator of Vehicle #1], [Operator of Vehicle #2] and [Passenger in Vehicle #2], some color lasercopies of photographs depicting the Datsun and the scene, as well as a copy of the [TOWN] Police Accident Report and the operators report filed by the operator of the Dodge Van, [Operator of Vehicle #1]. In addition to my examination of the file information, on March 30, 2000, I also visited the accident locus and initiated measurements of the area for the purpose of constructing a scale diagram of the intersection. Once this was done I obtained database information on both of the vehicles involved and a similar Dodge Van currently in the Massachusetts Cleaning Service fleet. I then proceeded to utilize all of this information for my analysis and reconstruction resulting in some initial observations and opinions which I am forwarding to you.

1. The accident occurred on March 17, 1997, at Route 1A (Main Street) and the intersection of Winter Street, [TOWN], MA.

2. The accident involved two vehicles, a 1995 Dodge Van driven by [Operator of Vehicle #1] of [address] (vehicle #1) and a 1980 Datsun driven by [Operator of Vehicle #2] of [address] (vehicle #2)

3. The [TOWN] Police report listed the time of the accident as being "16:42" hrs. or 4:42 pm. The report also identified the light conditions as "dawn or dusk". The same police report listed the weather and road conditions as being "cloudy and rain" and the road surface was reported to be "wet" at the time of the accident.

4. The [TOWN] Police identified the Dodge Van ([Operator of Vehicle #1]) as travelling south on Main Street (Route 1A) and the Datsun ([Operator of Vehicle #2] vehicle) making a left turn from Winter Street onto Main Street. The [TOWN] Police report also stated that the [Operator of Vehicle #2] Datsun (vehicle #2) "entered the intersection, blocking travel path and lane of veh#1 causing collision to occur."

5. [Operator of Vehicle #2] (driver of vehicle #2) and [Passenger in Vehicle #2] (a passenger in vehicle #2) were identified in the [TOWN] Police report as having received injuries as a result of the collision.

6. Ms. [Operator of Vehicle #2], the operator of the Datsun, stated during her deposition that she did not have a driver's license at the time of the accident but she had been issued a learner's permit. She stated that she had the learner's permit for approximately five years and had driven locally around Belmont off and on during that period of time. On the day of the accident, she picked up [Passenger in Vehicle #2] before they both drove to MCI Cedar Junction.

7. Ms. [Operator of Vehicle #2] stated that it was raining at the time of the accident and when she got to the intersection, she remembers stopping for the stop sign. She further stated that she looked to her left and there were no cars coming. She then looked to the right and noticed two cars coming. She goes on to state that she entered the intersection and waited for the two cars on her right to pass by. It was then, according to her, that [Passenger in Vehicle #2] told her a van was coming on her left and advised Ms. [Operator of Vehicle #2] to step on the gas.

8. Ms. [Operator of Vehicle #2] stated that she was able to see approximately 50 to 100 yards (150 to 300 feet) to her left, where the van came from but after that point a "dangerous curve" limited her view. She stated that she had no difficulty seeing to her right but pulled into the intersection before the two cars had passed. She said she had to stop to wait for them to pass and insists she was at a complete stop at the point of impact.

9. [Passenger in Vehicle #2] confirms that [Operator of Vehicle #2] picked her up at her house. After leaving the jail she remembers coming to the stop sign. She stated that she remembers stopping and apparently put her seat belt on at this point. She also remembers that she and Ms. [Operator of Vehicle #2] were

laughing and talking while they were at the stop sign. She said that Ms. [Operator of Vehicle #2] saw no cars coming and began to take a left. It was as they were turning that she saw the van approaching on their left and instructed Ms. [Operator of Vehicle #2] to hurry, however at the same time the other cars were approaching on their right. She said the first time she saw the van was as they were already pulling into the intersection.

10. [Operator of Vehicle #1] during his deposition said that he was traveling south on Route 1A at approximately 40–45 mph and as he approached the intersection the car pulled out directly in front of him. He estimated he was no more than 60–80 feet away from the vehicle when he first saw it. He stated that he braked when he first saw the vehicle but began to skid because of the wet roadway. He estimated his speed at impact at 15 to 25 mph and that he stopped at the point of impact. He estimated the other vehicle ([Operator of Vehicle #2] Datsun) spun 90 to 120 degrees and ended up on the island facing north. [Operator of Vehicle #1]'s testimony was also consistent with the operator's report he filed on 3/18/97, the day after the accident. Additionally, in that report, [Operator of Vehicle #1] stated that the Datsun knocked over a street sign before coming to rest on the traffic island.

11. [Passenger in Vehicle #2]'s testimony is consistent with [Operator of Vehicle #1]'s about the movement of the Datsun after impact. She also remembers that they knocked over a sign. She stated that they were moving very slowly when they were struck. She also stated that after the impact, the van had stopped at the point of impact. Ms. [Passenger in Vehicle #2] also remembers seeing some tiremarks in the roadway from the van after the impact. She estimates the length to be approximately the length of a car or a little longer.

12. Photographs of the damaged Datsun taken after the accident illustrated a moderate to heavy amount of contact damage to the left side of the vehicle in the area of the driver's door. The PDOF or force direction for the damage illustrated is approximately a 9–10 o'clock direction, as you sit in the drivers seat.

13. Utilizing the deposition testimony, the pictures of the damaged Datsun and measurements of the intersection from the scene layout conducted on March 30, 2000, an analysis was conducted employing the EDCRASH/EDSMAC algorithm. **That analysis indicates that the speed of the [Operator of Vehicle #1] Van was approximately 17–20 mph and the speed of the [Operator of Vehicle #2] Datsun was approximately 10–15 mph at the time of the impact.**

14. Since [Operator of Vehicle #1] was skidding for some distance before impact, he would have been slowing down up to the point of impact. Using the distances of 60–80 feet that [Operator of Vehicle #1] estimated he was away from the Datsun when he first noticed it and using the speed/energy that he

would have lost over that distance and combining it with his speed at impact, **[Operator of Vehicle #1] was traveling approximately 37–40 mph when he first began to skid.**

15. The posted speed limit for that area of Route 1A is 45mph. [Operator of Vehicle #1] certainly was not exceeding that limit. Bearing in mind the weather conditions, [Operator of Vehicle #1] appears to have been exercising due care as he was approaching the intersection of Winter Street.

16. When the [Operator of Vehicle #2] Datsun started into the intersection, the southbound [Operator of Vehicle #1] vehicle would have been some point north of the eventual impact point. His exact position, however, is dependent on his speed. At a speed of approximately 40 mph, [Operator of Vehicle #1] would be travelling at approximately 58 feet per second for every second of travel on his approach.

17. [Operator of Vehicle #1] estimated that there was less than 2 seconds from the time he first saw the Datsun and the impact. Using the impact speeds of the Datsun and the distance accelerated to reach the impact area would require approximately 2–3 seconds of time. In either case (2 or 3 seconds), the [Operator of Vehicle #1] Van was anywhere from 116–180 feet from impact when the [Operator of Vehicle #2] Datsun pulled into the intersection.

18. There was no time for the [Operator of Vehicle #1] Van to **avoid the impact** based upon his position when the [Operator of Vehicle #2] Datsun pulled into the intersection. However, [Operator of Vehicle #2] had a clear and unobstructed line of sight to the north (or her left) for over 500 feet based upon my own examination of the intersection and for 50 to 100 yards (150–300 feet) based upon her own testimony.

19. Given the proximity of the [Operator of Vehicle #1] Van and the two northbound vehicles (to the right) Ms. [Operator of Vehicle #2] should never have entered the intersection as there was traffic approaching in both directions and because she could not complete the maneuver without stopping. She was therefore required to stop her vehicle on Route 1A, completely blocking the southbound lane until the northbound traffic passed.

20. The cause of this accident is the action of the operator of the Datsun, [Operator of Vehicle #2]. It appears that she was unaware of the position of the [Operator of Vehicle #1] Van until she had already pulled into the intersection and then it was too late. In addition, Ms. [Passenger in Vehicle #2], the only licensed operator in the vehicle, also bears some responsibility for neglecting to notice the approach of the traffic and then instructing Ms. [Operator of Vehicle #2] to make her left turn.

21. The [TOWN] Police issued a citation to the operator of the Datsun ([Operator of Vehicle #2]) for "Failure to use care at intersection". (Citation # E1718188) There were no citations issued to the operator of Vehicle #1, [Operator of Vehicle #1].

22. I have also found several sections within Chapter 89, and the CMRs that relate to right of way at an intersection. Two CMRs that directly relate to the movement of the Datsun are as follows, 720 CMR Section 9.06 (6) **Obstructing Traffic** & 720 CMR Section 9.06 (9) **Care in Starting, Stopping, Turning or Backing.** Additionally, Chapter 89, Section 9 also prohibits a driver from entering an intersection without stopping and thereby blocking vehicles and the intersection. It is apparent from the deposition testimony of both drivers and [Passenger in Vehicle #2] that the Datsun pulled into the intersection in violation of the aforementioned statutes.

Subsequent to my review and analysis of this information and the foregoing observations, I have several conclusions and opinions:

1. The Dodge Van operated by [Operator of Vehicle #1] was not exceeding the posted speed limit and appeared to be exercising due care as he approached the intersection of Winter Street and Route 1A.

2. Approaching the stop sign at the intersection of Route 1A and Winter Street, a driver pulls up to the intersection and stops, as required by the law. The topography allows for over 500 feet of available sight distance to the north (or left) and at least 1,000 feet to the south (or right).

3. [Operator of Vehicle #2] (the driver of the Datsun) and [Passenger in Vehicle #2] (her passenger) were apparently engaged in some conversation while stopped at the stop sign for Winter Street and Route 1A. They were apparently stopped there long enough for Ms. [Passenger in Vehicle #2] to put on her seat belt. This conversation and passage of time may have provided a distraction or some confusion before the vehicle entered Route 1A.

4. The driver of the Datsun, [Operator of Vehicle #2], and her "instructor" should never have initiated a left turn on Route 1A and entered the intersection while traffic in both directions (northbound and southbound) were too close to complete the maneuver safely.

5. When the [TOWN] Police issued a Citation after their investigation of this accident, they cited the only driver that bears any responsibility for its outcome, [Operator of Vehicle #2]. Additionally, [Passenger in Vehicle #2] also bears some responsibility for [Operator of Vehicle #2]'s actions as she was the only

licensed driver in the vehicle and [Operator of Vehicle #2] was operating under her authority.

If you have any questions or there is anything further that you require in this matter, please advise me.

Very truly yours,

Gerard D. Murphy

EXHIBIT 4D—Independent Case Evaluation*

Jury Verdict Research® Case Evaluation

VERDICT ANALYSIS

Note: The values and/or probabilities in this evaluation will be outdated after 12/31/2001.

Case Information

Case Name:	_____ v. _____; _____
Report Date:	March 05, 2001
Plaintiff Name:	_____

Case Summary

A 48-year-old male suffered a cervical vertebra fracture with 8 percent permanent impairment and chondromalacia when his vehicle was struck from the rear by a vehicle driven by the male co-defendant in the course and scope of his employment with the defendant.

Geographic Information

State:	Massachusetts
County:	Suffolk
Type:	Metropolitan

Plaintiff Information

Age:	48
Sex:	Male
Race:	Caucasian

Marital Status:	Married with Two Minor Children
Occupation:	General Laborer

Defendant Information

Defendant Type:	Multiple Defendants

Liability Information

Liability Type:	Vehicular
General Liability:	Rear-End Collision
Specific Liability:	Rear-End Collision, Plaintiff in Front Vehicle,
Admitted Liability:	No

Expense Information

To-Date Medical Expenses:	$18,000
Future Medical Expenses:	$3,800
To-Date Wage Loss:	$21,000

Injury Information

Base Injury Value for Injury		
Vertebra Injury, Cervical Fracture, Age 18+		**$145,406**
Wage Loss	[84%]	$17,640
Permanent impairment: 8%	[55%]	$79,973
Multiple Injury Reduction	[-35%]	$-85,057
Final Adjusted Base Injury Value		**$157,963**

* *

Base Injury Value for Injury		
Knee Injury, Chondromalacia, Age 18+		**$77,172**
Wage Loss	[85%]	$17,850
Multiple Injury Reduction	[-40%]	$-38,009
Final Adjusted Base Injury Value		**$57,013**

* *

TOTAL BASE INJURY VALUE:		**$214,976**
Geographic Region: Suffolk, Massachusetts (Metropolitan)	[0%]	$0
Multiple Defendants	[-7%]	$-15,048
Plaintiff Occupation: General Laborer	[3%]	$6,449
Plaintiff Race: Caucasian	[0%]	$0
Medical Conflict: Denial of Some Inj. and Impair. Contested	[-14%]	$-30 097
Accident Reconstructionist: Both	[-7%]	$-15,048
Economist Witness: For Plaintiff	[13%]	$27,947
Medical Expert Witness: Both	[-4%]	$-8,599
Total Case Specific Adjustments to Injury Value:		$-34,396
PROBABLE VERDICT AMOUNT:		**$180,580**

Basic Recovery Information

BASIC RECOVERY PROBABILITY:	**63%**
Multiple Defendants	39%
Plaintiff Occupation: General Laborer	1%
Plaintiff Race: Caucasian	0%
Medical Conflict: Denial of Some Inj. and Impair. Contested	0%
Accident Reconstructionist: Both	-17%
Economist Witness: For Plaintiff	24%
Medical Expert Witness: Both	-17%
Total Case Specific Adjustments to Recovery Rate:	30%
PROBABILITY OF A PLAINTIFF VERDICT:	**82%**

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