MAXIMIZING DAMAGES IN A TRUCK WRECK CASE:

REFLECTIONS ON WHY PIGS GET FAT AND

HOGS GET SLAUGHTERED

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State Bar of Texas
Prosecuting & Defending Truck
And Auto Collision Cases 2016
November 17-18, 2016
Houston, Texas

CHAPTER #13

Acknowledgement

I want to thank my law partner, Donna Aversano, for her intuition and insights. Also, there are numerous other consultants whose concepts I have embraced. There are too many to list, but if they read this paper, I am sure they will see their contributions. I hope they approve.

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1. INTRODUCTION:

This is one of the first papers I have written in years on a topic outside the areas of discovery and evidence. Ironically, however, the first CLE paper I wrote thirty five years ago was on handling truck wreck cases. A lot has changed with regard to truck wreck litigation in the intervening years. However, some of the reflections I talk about in this paper echo what I wrote about more than a quarter century ago.

Unlike most of my writing on discovery over the last 33 years, I have not attempted to write a scholarly, annotated paper. Instead, this is intended to be an overview of some of the reflections I have had over nearly 40 years of practice about recovering damages in a personal injury case, both with regard to trial and settlement strategy. These reflections have been informed and influenced by hours of study and even more hours of practical experience in representing personal injury clients.

My focus with regard to optimizing restoration damages to the plaintiff will not focus on trial tactics. Countless books and articles discuss this topic and it would be presumptuous for me to think that I could improve upon them. I cannot. There are an infinite number of philosophies, approaches and techniques involved in jury selection, communicating with a jury and telling the story. There is no silver bullet. I strongly recommend reading those references in their original language, without interpretation or editorial by someone such as myself. Instead, this paper will merely reflect on what I believe are critical considerations in taking and developing a trucking case (or for that

matter, any personal injury case) for resolution, either by trial or by settlement.

First, and foremost, I do not believe there are any hard and fast rules or guidelines for maximizing damages that apply in every personal injury case. Every case, every client, every setting, and every attorney (plaintiff and defense counsel) is different. Circumstances on the ground, so to speak, influence damages in a particular case as much as do the perceptions and biases of those who ultimately weigh and determine the facts. There are, however, some basic guiding principles that I believe bear note, and it is those guiding principles that I will attempt to address generally in this paper.

2. WHAT IS THIS TOPIC ABOUT AND WHY IS IT RELEVANT?

Oddly, it took me a lot of time to write this relatively short paper. Before putting pen to paper, I spent much more time thinking about the topic and what it really means. I was assigned the topic "maximizing damages." The more I thought about the topic, the more baffled I was by it. What does maximizing damages mean? Does it mean getting full "value"? Does maximizing damages mean making the damages as big as they possibly can get, and if so, what is entailed in that? Does it mean sending the plaintiff to care providers who will expand and enlarge the injuries and loss of function? Does it mean getting a lot of graphic artwork and technology to emphasize the damages? Does it mean finding economists who will "inflate" the numbers? I don't think so. If I am wrong, the reader should be forewarned. I am not going to be writing or talking about those things.

I believe the topic is best framed as “optimizing restorative damages” for the plaintiff. What strategies, arguments, and evidence will result in the largest recovery of restorative damages to the plaintiff?

When we consider that most cases settle (I have seen estimates as high as 90% or more), we are not only talking about maximizing damages at trial, but also maximizing damages for settlement. So, what difference, if any, does that make? Are the strategies for trial different than for settlement? I think not. I believe strongly that there is only one successful strategy for obtaining full restoration for the plaintiff. The plaintiff’s attorney must from day one prepare for trial and be committed to trying the case to a successful verdict. Anything short of this is certain to result in less than maximum restorative damages to the plaintiff.

Damages mean money. The job of the plaintiff’s attorney is to get the plaintiff all the money that the evidence can support. Some attorneys new to personal injury practice sometimes sound and appear embarrassed to talk about money, and mortified to talk about a lot of money. They believe saying they are seeking a lot of money will offend the jurors. If the plaintiff’s attorney is not talking about a lot of money, it is fairly predictable that the jury will not come up with it on its own, and if the plaintiff’s attorney wants to maximize damages, the plaintiff’s attorney had better be talking about large sums of money. The personal injury case is all about money, “what sum of money, if paid now in cash. . . “. This is how, in our society, individuals are compensated for wrong-doing that results in injuries. Vendettas, seeking a pound of flesh, will not be vindicated, as there is no blank allocated for flesh. Similarly, there rarely are lines on the verdict form for apologies. Social change, while it might be influenced by a large

verdict, is probably more effectively obtained through the legislative process. It may not be a lofty concept (it's more earthy than talking about "justice"), but when all the trappings are scraped away, it is not about justice, it is about obtaining as large a money damage verdict as the evidence will support and collecting it.

It is the plaintiff's attorney's job to find and compile all the necessary evidence to maximize the plaintiff's damages and present that evidence in a way that resonates with the people who will be writing the verdict or the check. Once the money has been collected, there will be plenty of time to have an extended philosophical discussion about justice. So, the paper is about considerations for getting the plaintiff all the money that the evidence will support.

There are a number of important considerations in recovering maximum damages for a truck wreck plaintiff, which is different than obtaining a large verdict. The goal is not to just get a big verdict. The goal is to get a big recovery. There is a tremendous distinction between the two. A big verdict may help the attorney's professional standing, marketability, and ego. It does nothing, however, for the plaintiff. The attorney's goal should be to get as large a money recovery as feasible into the plaintiff's pocket.

The question to answer should always be what sum of money will adequately compensate the plaintiff, not what amount will satisfy the plaintiff's attorney's ego or business plan. Sometimes, regrettably however, it seems the driving motivation for some attorneys handling a truck wreck case is that larger potential recoveries translate into larger attorney fees. The attorney who determines appropriate restoration of the plaintiff's damages by whether the attorney is satisfied with the size of the fee is

doing a disservice to himself, his client, and the profession. Maximizing damages is not about maximizing fees. Indeed, many of us who have handled truck wrecks most of our careers have, on more than one instance, reduced our fees to make sure the plaintiff was properly compensated. Yes, sometimes this is required to maximize the plaintiff's recovery. Maximizing attorney's fees, however, is not a focus of this paper. However, the subject of the attorney's perception and motivation is a subject that should be touched upon.

Many attorneys are drawn to truck wreck litigation because they perceive that the damages are going to be larger and there is likely going to be sizable limits. It is all relative. Yes, damages are usually more catastrophic than in a collision involving two passenger vehicles, and yes, there is a good chance there is going to be a larger insurance policy. However, the concept of taking truck wrecks with the strategy of merely to settle within the primary coverage is counter to the concept of maximizing damages for a given plaintiff. The attorney may be able to make a very good living, but it is unlikely the attorney's clients will be fully compensated. This is a failed model. I do not believe that a plaintiff's attorney should seek settlement, particularly pre-suit, prior to obtaining important information about the trucking company's safety systems and how they are implemented. Instead, if the plaintiff's attorney prepares the case properly, settlement overtures will be made to the plaintiff. That is when the plaintiff's attorney can and should consider settlement, because at that juncture there has already been a type of victory. The other side is aware of its exposure. Until the plaintiff's attorney has forced the defendant to acknowledge its exposure, maximum restorative damages

through settlement are an illusion. Maximizing recoverable damages for a plaintiff involves knowing if or when to settle.

Probably one of the most thought provocative presentations I have ever heard at a truck wreck seminar (or perhaps any seminar) was given by a defense attorney a few years ago, here in Texas. He started by saying, in a self-deprecating manner, that he had settled 7 cases in the past year for $1,000,000 each. One could sense the consensus audience reaction that this was a guy who really was not a trial attorney, but a potential ATM machine for plaintiffs. That was until his follow up. He continued, "I know some of you are thinking that I am an easy mark, and that I can be, and have been taken advantage of. The reason I have told you of these settlements is because each of those cases in which I paid out $1,000,000 was actually worth $10,000,000 or more. Rather than me being the easy mark, I identified each of the settling plaintiff's attorneys as the easy mark. I sized up each plaintiff's attorney, and for each case, I knew that the plaintiff's attorney did not want to do the hard work involved in obtaining the true value for the case. Additionally, that he or she would not or could not try the case, and that the attorney would think that $400,000 promptly deposited into his/her account was an incredible payday."[1] It was a startlingly harsh observation, and one that I have not forgotten. To truly obtain the optimum restorative damages for a truck wreck plaintiff, the plaintiff's attorney has to know the true value of the case and have the discipline and commitment to work until that value is achieved.

Truck wreck litigation is a unique practice area. Maximizing damages in a truck wreck case involves more than just finding and properly presenting all of the

[1] While stylistically in quotation marks, this is actually an editorialized paraphrase of the speaker's comments.

persuasive evidence of damages. Damages in a truck wreck case are influenced by selecting the right plaintiffs and the right case, suing (and settling with) the correct defendants, selecting the right theories of recovery, the right jurisdiction and venue, applying the correct legal theories and principles, and understanding the true extent of the plaintiff's injuries and what will be needed to compensate the plaintiff for the harms and losses she has sustained. It also means suing the entities with adequate coverage.

A number of attorneys mistakenly view truck wreck cases not as a unique genre, but merely as car wrecks with bigger injuries and larger insurance policies; hence, bigger recoveries. There are many reasons this is a misconception.

Car wrecks usually deal with the drivers failing to exercise ordinary care. From time to time, the plaintiff's attorney might pursue a theory of *respondeat superior* or permissive use, but, for the most part, the focus of the litigation is on the conduct of the drivers. Many attorneys who have made prosecuting truck wrecks their professional life work and passion, look at the area completely different. They know that truck wrecks must be differentiated from car wrecks. The issues are different. The issues are not focused on driver conduct, but systems failure. The truck driver may be as much a victim of the systems failure as the plaintiff. The wreck most likely did not occur merely because of driver error. Rather, the root cause is more likely than not bad, cynical decision-making by the company that put the driver behind the wheel. This conduct must be viewed against a vast background network of standards, codes, and regulations. Knowledge of industry standards, codes, and regulations is imperative, as is knowledge about when the regulations apply and when they do not.

Another important consideration is insurance coverage. In a car wreck case, the focus, once again, is on the driver's coverage, which usually is inadequate to cover the injuries and damages resulting from the collision. There may also be coverage through the employer, but unless the operation is sizable, this coverage also frequently is relatively inadequate. This means that in many car wreck situations the plaintiff actually is hoping to pursue an uninsured (UIM) motorist claim against its own employer. Regardless of which of these circumstances exist, the dispute revolves primarily around ordinary care of the driver. Insurance considerations in a truck wreck case are vastly different and much more complex. Also, as many attorneys who study this area will be quick to say, the insurance coverage is woefully inadequate for the carnage and devastation that is frequently wrought by a truck collision. A number of companies in the transportation chain can have insurance that is exposed in a truck wreck. This includes the trucking company, the owner/operator, the owner/lessor of the trailer or chassis, the broker or the shipper. It is beyond the scope of this paper to discuss these areas of liability. They are noted merely to raise the point that in a truck wreck case, there are multiple considerations for obtaining additional coverage, in the event that there are catastrophic damages.

Those plaintiff attorneys who fail to understand and appreciate the true issues in a truck wreck collision cannot possibly (absent dumb luck) optimize restoration for their clients. They may get a relatively large recovery compared to a car wreck recovery, but they likely will not approach optimization of the real damages that could be recovered in the case. To truly optimize restoration damages for a truck wreck plaintiff, the plaintiff's attorney must study and know the intricacies of trucking regulation, the

myriad trucking business models and the byzantine web of insurance coverage designed to protect all the members of the transportation chain. While it is infrequent that damages will influence liability, quite frequently it is liability and reprehensibility of conduct that influences damages. Also, the attorney must know and appreciate the true damages resulting from the life altering injuries visited upon individuals and families by a truck wreck. Lastly, the attorney must know that in order to truly optimize restoration damages for the plaintiff, taking on a truck wreck case will require tremendous effort, determination, resilience, resources, and commitment. The attorney should not be seduced by the adage "the bigger they are, the bigger they fall." Trucks can cause horrific carnage on the road, and trucking companies and their insurance carriers can and do hire teams of attorneys and experts to engage in scorched earth litigation. It is not an area for the lazy or the timid. It is also a great responsibility for the plaintiff's attorney to right the wrong and to obtain compensation and restoration for the plaintiff. Underestimating the adversary, the upcoming battle, or the responsibility of representing the plaintiff is counterproductive to the goal of maximizing the plaintiff's restorative damages.

3. PERSPECTIVE

I am the son of artists. Art and artistry has always informed my practice. My father was a master photographer. His talent and art was to capture the true character of his subject in portraiture. Growing up, I would sometimes watch my father at work. He would spend an incredible amount of time talking with his subject, learning about the subject, the subject's life, accomplishments, values, dreams, pleasures, and aspirations. Then, at long last, he would pose the subject and take his picture. It

fascinated me that more time was involved in the discussion than in the actual taking of the photograph. The photograph was a representation of the discussion as much as it was a reflection of the visual image. My father's photographs depicted souls.

About the time that Michelangelo finished work on the Sistine chapel, he began work on what various critics have characterized as some of his most magnificent sculptures. It was a series of sculptures referred to as the "Slaves." In his biography about Michelangelo, "The Agony and the Ecstasy," I.F. Stone relates that Michelangelo referred to the sculptures as "slaves" because he believed all that he was doing as a sculptor was freeing the figures from the stone in which they were encased. He was not a creator; he was a liberator. Many of the sculptures remained unfinished and there is controversy about whether this was intentional or not. Michelangelo is said to have left them unfinished to show the viewer the work that it took to achieve the finished product, and the product was in fact a dynamic object that was in the process of becoming.

Effective presentation of a plaintiff's injuries requires artistry. I am not necessarily referring to medical illustrations, photography, or computer animation. It requires the vision to see what virtues, values, or ambitions are encased within the plaintiff. It also requires the vision, ability, and passion to reveal and celebrate those virtues, values, and ambitions truthfully and transparently. Finally, it requires the vision to reveal, simply and elegantly, how the injuries inflicted on the plaintiff have thwarted the plaintiff's enjoyment of life, function, development, and ability and freedom to transcend and to become. Talent is required to effectively present a plaintiff's damages, but most of all, it requires an appreciation of life, respect for the dignity of the individual, intellectual curiosity, empathy and incredible amount of work and diligence.

The client is not the only one who the plaintiff's attorney should listen to in developing a damages strategy. While the trial attorney has to develop and have confidence in her ability to understand and communicate her client's injuries and damages, the attorney should constantly seek the perspective and input of others.

I am fortunate to be partners with a very skilled female attorney. She brings a different perspective to the analysis and damages in our cases. She has a defense background that aids us in seeing how a defendant might perceive and try to frame the plaintiff's damages. She also, from time to time, tempers bursts of testosterone that sometimes can distract me from the real goal of restoring the plaintiff's damages. For attorneys who handle cases alone, I wholly commend bringing in another attorney, either as a consultant or a joint venture to provide a different perspective on strategies and tactics.

Also, I am a strong believer in talking to trial consultants or jury consultants early in the case to help frame the issues, themes, and narrative that the plaintiff's attorney wishes to pursue. While these elements will continue to evolve throughout the case, this type of guidance helps in shaping the discovery that will yield a lot of the evidence that will be needed to maximize damages at trial.

Lastly, I believe in focus grouping issues throughout the development of the case. This does not have to be formalized focus grouping. It can merely be talking with groups of friends and acquaintances. The focus group is not a very reliable gauge about the amount that will be provided by a jury, but it is very helpful in getting a good perspective of whether and how the legal and damage theories resonate with non-lawyers.

4. THE GROUNDWORK:

A. It's about quality, not volume.

I have attended many seminars and conferences over the course of my professional career and read countless articles and texts on trial practice. I have studied legal concepts and complex psychological studies. However, one of the most thought provocative concepts I have been presented, has been one of the simplistic: It is important to have the time to dedicate to a particular case to truly and persuasively present the plaintiff's story and to maximize the plaintiff's damages. This is hard to do if the attorney has hundreds of active cases.

The attorney's business model is an important component of maximizing damages for each of the attorney's clients. The attorney needs to make the decision early on how to allocate time for each client's case and how much time needs to be allocated for the complete and effective development of each case.

There is another simple truth. To continue my apparent affection for porcine allusions: You cannot change a pig by putting lipstick on it. A pig is a pig. Similarly, a dog is a dog. Trying to maximize damages for a dog case is a failed model. It may seem valiant, or a way of demonstrating that the trial attorney is crafty and resourceful, but these rationalizations are illusory. It might work once or even twice, but as a practice, it is a loser. The attorney who truly is interested in maximizing damages needs to start with case selection. Choosing the right cases and choosing the right number of cases to focus upon is both a challenge and an art, but it is a core principle in maximizing damages for each case the attorney prosecutes.

B. It is not about getting the largest recovery. It's about getting the client what the client needs.

"Compensate" derives from the Latin, to counter-balance. In maximizing damages, the plaintiff attorney needs to be cognizant at all times about what is required to balance the plaintiff's loss, but also cautious about weighing the scales beyond this point. The guiding principal must be to restore the client. This does not necessarily mean that the recovery is the largest of its type in the community, the state, the country or the history of the world. What truly is important is that the client's losses (economic, emotional, and functional) are restored, nothing more nor less. That said, I almost always sincerely believe my client's losses are astronomical.

Balanced against what the client actually needs to be restored is the question of whether that goal actually can be achieved, at what cost, with what attendant risk and when under the circumstances surrounding the case. This is a fluid calculation that frankly is never ending and hardly ever satisfactorily solvable. The calculation, sadly, sometimes extends well beyond the final resolution of the case.

C. It starts with a mindset; Life is a blessing:

Each of us constantly has to think about what is the true meaning and value of life. We cannot get it from a book or another attorney's outline. We have to feel it. If the attorney for whatever reason does not truly believe and feel this, it is going to be very difficult to activate the jury to provide the compensation needed to fully restore the plaintiff. The plaintiff's attorney also has to appreciate what gives the plaintiff's life meaning. This is different for everyone. Oftentimes, the loss to a plaintiff is not in terms of what life owed the plaintiff, but what the plaintiff wanted and needed to

do for others to feel worthy of life. A plaintiff's attorney has to give serious thought to the notion of freedom; what it means and what it entails. Freedom is not only defined in our inalienable rights; it is our ability to choose. The freedom to choose, to make our own decisions, and to act on them, is perhaps one of our greatest gifts. Equally important are the virtues of respect and dignity. These are themes that, if properly framed, resonate with all human beings.

D. Life Experience:

Living life, loving, and losing are all personal experiences that assist a plaintiff's attorney to understand and articulate damages in a way that result in maximum restoration of losses for the plaintiff. A talented plaintiff's attorney might be able to get close based upon study alone, but to really nail it, nothing beats experience. I, for one, believe the artists who say that you have to have fully loved and lost to truly sing the blues. Ironically, the blues are often about inconsolable loss or irretrievable loss. A plaintiff's attorney must avoid being nihilistic. The effective plaintiff's attorney who hopes to maximize a recovery for his/her clients must be able to talk about resilience, transcendence, and hope. Experience in this regard is also invaluable. Sincerity and vulnerability are also key virtues. Jurors don't just see and hear; they feel. They can tell when a witness is lying, and they certainly can tell when an attorney does not truly believe in what he is asking the jury to believe.

E. It's not about sympathy and justice. It's about empathy, resonance, and activation.

The plaintiff's attorney has to be able to provide a compelling answer to the following question on the mind of every juror: "why should I care?" There

may be some among us who are motivated and energized by sympathy, but most of us are not. Take the example of the guy on the corner of a busy intersection with a sign, "Out of luck. Will work for $." Depending on the type of day we've had and our mood, we may drop a dollar in the can, or maybe not. In any event, few of us feel we have done the guy any real good. But change the scene a bit, the guy is no longer an anonymous stranger, but someone you know, a neighbor, a fellow congregant, a co-worker. Now it is personal, it is close to home. This guy could be you. There is fear. There is a feeling of empathy and a desire to really want to help. The above is an over-generalization and probably does not apply across the board, but it serves to make a point. The person you are trying to sell, to get to accept your argument, must feel that they have a stake in the matter, that they are part of the incident and could be sharing the damage and loss.

Do not let sympathy or bias influence your decision. This is the fundamental mandate to the jury. Yet, many plaintiff attorneys subliminally attempt the jury to ignore this instruction. The plaintiff's attorney wants the jury to empathize with the plaintiff's loss, to understand it, to feel it. It is not about dropping a dollar in the can of a stranger. The jury has to empathize with the plaintiff.

F. It's about loss of function.

Showing the jury a lot of medical illustrations about the injury is not motivating. It might be scary, repulsive, or perhaps informative, but it is not energizing. Similarly, a costly animation or day in the life video is not going to move the needle much if it fails to succinctly and elegantly communicate the key idea. A picture is worth a thousand words, sure, but creating a million words through animation, can sometimes

bury the essence of the concept. Focus, instead, on showing the jury how the injury has affected the plaintiff's function, her freedom of choice, her enjoyment of life, her ability to contribute to her family and society. This is an argument that resonates with the jury.

G. The Defendant's culpability influences damages.

Too many attorneys think that damages drive the results of a trial. Wrong. Before the jury can and will embrace damages, the jury has to be activated. Anger and resentment activates jurors and engages them. This is part of the reason it is so hard to get a jury motivated in a simple motor vehicle collision. There oftentimes is just momentary carelessness by a defendant driver. While the jury does not agree with the defendant's conduct, they are not threatened by it. They are not activated.

However, if you have a corporation who has made calculated decisions driven by profitability, including fudging on testing or lying about the results, or ignoring red flags, the jury can be engaged; particularly, if the corporation's conduct can be shown to potentially put everyone at risk. Once the jury is engaged, they are ready to listen to damages.

5. <u>INTAKE - CASE EVALUATION:</u>

A. This is the most important juncture in the case.

B. What is the story? The story drives damages. What is the case about? The key narrative is why the incident occurred, not what happened.

C. Understand what activates and motivates juries. Jurors rarely punish individuals and are not energized by simple acts of negligence.

D. What really set the chain of events in motion that resulted in the incident? Show bad, cynical decision-making. What was the critical turning point? What is the root cause?

E. Getting large damages that are not recoverable does little for the client. Don't waste the client's real recovery attempting to demonstrate damages that are not recoverable. A large verdict may boost an attorney's reputation, but only a large, recoverable judgment helps the client.

F. Too many attorneys wait until the end of the case, or after they have developed liability to begin developing damages.

Damages are not an afterthought. They must be at the forefront of the decision to accept and prosecute the claim.

G. To truly maximize damages you must like and believe the plaintiff. You must empathize with the plaintiff and the plaintiff's life. If you don't, you cannot expect for the jury to do so.

H. Even more importantly, and probably most importantly, you must earn your client's trust. You must work for it continuously. It is not a parlor trick. It is an existential requirement for maximizing the client's damages. The client has to trust that you believe the client, that you are honest with the client, that the client's best interest is your primary interest, and that you will not sell out your client. Only when you have this level of trust can you hope to maximize your client's damages.

I. Study the plaintiff and the defendant. What did the defendant know and do and why that injured the plaintiff, resulting in loss of freedom and function to live

the way the plaintiff was and could have lived but for the defendant's bad, cynical choices?

J. Don't be afraid of pre-existing conditions that were not actively limiting the plaintiff's enjoyment of life and function. Embrace them. A defendant cannot be held responsible for merely creating a condition. Similarly, a pre-existing condition that is not actively limiting the plaintiff's function should not disqualify the plaintiff from recovering restorative damages.

K. All pre-existing conditions are not created equal, nor do they have the same effect. Some pre-existing conditions can and should be disqualifiers for prosecuting the claim.

L. Avoid surprise; prepare**.** Get a complete medical and social history of the plaintiff. This is crucially important on the issue of causation. Trust but verify. Make sure that you investigate and know every aspect of your client and her life, as you would investigate a defendant;

M. Read and understand the pertinent case law.

N. Prepare the charge, and know the law behind the charge. The charge is your roadmap. It's not just talk; it's true.

O. Identify the landmines and avoid them. Do your research!

6. <u>INVESTIGATION and CASE DEVELOPMENT:</u>

A. Visit the scene; feel the occurrence. Visit the home; feel the life and the loss.

B. Acquire the stories. What is important and valued by the plaintiff? What would be saved if the home caught on fire?

C. Ask the same questions of the plaintiff that you would ask of prospective jurors. This not only provides you the guideposts for constructing the damage model, but it tells you which jurors will be receptive to the plaintiff's stories, achievement, loss, reconstitution, struggle, and reward.

D. Find witnesses who discuss what the plaintiff was like before, what the plaintiff had done and achieved, what contributions the plaintiff had made, and what ambitions the plaintiff had. These important facts always resonate with a jury better coming from a third party rather than from the plaintiff. The more dispassionate the witness (the less biased) the more compelling the testimony.

E. Know the medicine or learn it. Find care providers to help the plaintiff recover from her injuries, not only help recover for her injuries. Choose care providers that you would choose for family members. Seek the best. Focus on helping the plaintiff recover from her injuries. Build a life care plan that is fluid and operational, not just for the jury, but to assist the plaintiff throughout the rest of her life. Put together a plan to restore the plaintiff and to give the plaintiff the opportunity not just to survive but to improve.

7. <u>STRATEGY:</u>

A. Focus on the defendant's choices that robbed the plaintiff of her freedom of choice.

B. DAMAGES DON'T DRIVE THE CASE, LIABILTY DOES AND ANGER AND DISGUST DRIVE LIABILITY.

C. Don't engage the defendant where the defendant wants to stage the battle, which will be precisely at the time of the event. Focus the jury on the

decisions that the company made that set in course the events that led to the collision and why the company made those choices.

D. Don't worry about the defendant's attacks on damages. If the plaintiff's case is handled correctly, the defendant's arguments will be rejected by the jury. Really? The company that designed the business model that resulted in the collision that robbed the plaintiff of her freedom and enjoyment of life is to be believed and trusted in designing a care plan for the plaintiff? There is a theme here. The same corners the defendant choice to cut to save a buck in designing its reckless business plan, it is urging you to employ in setting aside money for a care plan. The defense strategy always is the same: Deny duty and responsibility; shift the blame; refuse accountability or shift it to the taxpayers. The same company that is fighting government regulation of the trucking industry tooth and nail invites you to embrace Obamacare as though it was dropped from heaven and will remain inviolate to the end of time. If the jury believes the defendant's damages arguments, it already has rejected plaintiff's case in chief.

E. Subtly (the art of sublimation) use large number anchors. Psychologists inform us that decision-making will be influenced by the anchors. Conversely, don't argue nickels and dimes, unless nickels and dimes are the maximum damages you can seek and recover. Refer back to our discussion on case selection.

F. Do not lead with damages. Don't oversell your case;

G. Don't discuss damages in detail until the jury is ready. Energize and activate the jury, so that the jury is primed to assist and restore the plaintiff. If done

right, the jury will be receptive to considering the maximum range of damages and embrace plaintiff's range of damages.

H. Celebrate the plaintiff's life, the good choices the plaintiff had made and the choices the plaintiff had wanted to make that his/her injuries will now delay or prevent him/her from making. Compare the plaintiff's choices to the defendant's choices. It is all about choices.

I. Don't dwell on loss. Focus the jury on what the plaintiff had prior to the collision. What tangible things the plaintiff had achieved and what promises the plaintiff could have fulfilled. Do not be apocalyptic. If all is lost and can never be recovered, the jury is unmotivated to attempt to balance the scales. Always emphasize hope, not loss. The damage theme should be about hope, resilience and redemption. Hope is uplifting and energizing. Vice President, Hubert Humphrey in his final and losing campaign against cancer famously said "it's not what they take away from you that counts, but what you do with what's left." Give the jury a reason to compensate. The reason to compensate is that if one is rescued to save him/herself, we all are rescued. Emphasize that the plaintiff has a lot of unfinished business, that she intends to keep living and giving meaning to life. The jury should be energized by the plaintiff's hope to assist her in assisting herself.

J. Be passionate. When you talk about damages, you should be channeling your client's anguish and hope. You must resonate with your client and your client's loss.

K. Be courageous. Fear pervades litigation. Own it; control it. If you have done your job right, the client will and should have total faith and confidence in

you. Put the client on your back and plow forward, hesitantly. Believe in your client. Believe in the client's loss. Believe in the jury. Be optimistic, and believe in yourself. Maximum damages more often than not will result.