

**STRATEGIES TO LIMIT ADVERSE EVIDENCE AND DAMAGES
– AND INSURER-ATTORNEY ROLES REGARDING THEM**

INTRODUCTION

Certain aspects of the claim adjustment and litigation system unwittingly support and enhance plaintiffs' injury claims. While some of these cannot be avoided, some can be in the right case. The purpose of this presentation is to point out to you some things which you and your attorneys can do to try to limit adverse evidence and therefore plaintiffs' damages.

I. VEHICLE DAMAGE.

Hopefully, the insurer will settle the plaintiff's vehicle damage claim. If the case then consists solely of claims for personal injuries:

- A. Any statement that either vehicle was "totaled" should be inadmissible. See the Brief which follows;
- B. The extent and dollar amount of costs to repair either vehicle may be inadmissible if it bears no relation to plaintiff's injuries.
- C. If the damage to plaintiff's vehicle was minimal, hopefully the insurer took photos preserving this evidence, which will hopefully be admitted.
- D. Some courts hold that photos of vehicle damage having no relation to plaintiff's injuries are irrelevant and therefore inadmissible. See the Brief which follows.
 - i) We know that insurers probably all require photography of vehicle damage for the P.D. claim. However, keeping injury claims in mind, if serious, possibly photos could be judiciously chosen.
 - ii) Often vehicles are damaged by causes other than the accident:

- a. jaws of life;
- b. tow truck operators;
- c. salvage yards;
- d. owners retrieving belongings.

Of course, these bear little or no relation to any injury.

II. OTHER OCCUPANTS' INJURIES.

Under the same reasoning and case authorities which hold the dollar amount and possibly photos of vehicle damage to be irrelevant to a plaintiff's injury, so also are injuries of other vehicle occupants, each of whom is in a different position, with different vehicle parts near them and affected differently by any contact between vehicles. See the Brief which follows.

III. CONSIDER ADMITTING LIABILITY, OR IF YOU FEEL PLAINTIFF BEARS SOME RESPONSIBILITY, CONSIDER ADMITTING NEGLIGENCE WHILE ALLEGING THAT PLAINTIFF WAS NEGLIGENT, WHICH NEGLIGENCE WAS EQUAL TO OR GREATER THAN YOURS.

An admission of liability further strengthens exclusion of evidence of vehicle damage, as the jury has no issue of apportionment of fault for the accident.

IV. MITIGATION OF DAMAGES.

If there is any basis to assert this defense, I believe it always helps:

A. For it to be submitted to the jury in the form of an instruction, the defendant is now required to prove the following:

- i) that a medical procedure or advice was not followed;
- ii) that plaintiff's failure was not reasonable;
- iii) the extent or portion of plaintiff's damages which could have been avoided. Greenwood v. Mitchell (Iowa 2001) 621 N.W.2d 200, 205.

B. When such an instruction is given, failure to mitigate is assessed by the jury as a

percentage of comparative fault against the plaintiff and they very often reduce damages as well. Tanberg v. Ackerman Inv. Co., 473 N.W.2d 193 (Iowa App. 1991) (jury assessed plaintiff 70% fault for failure to lose weight). McDonnell v. Chelly (Iowa App. 1994) 529 N.W.2d 611 (jury assessed passenger 40% fault for failure to lose weight and awarded damages of \$3,091 while medical expense was \$5,457 past, with future projections.)

- C. Even if an instruction is not given if the evidence shows that a plaintiff continued to complain, missed work, etc., after what would seem a normal healing period, your attorney can assert this in various ways, including during voir dire and opening and closing arguments.

V. WAIVE THE “PRESENT VALUE” RULE – IN THE RIGHT CASE.

- A. Iowa Code Sec. 624.18 provides that if a jury verdict includes awards for future items of damages (such as future medical expense, they must be adjusted “by the Court or factfinder” down to their present value.

- B. In response, the Courts always give the jury a fictional instruction telling them to make such an adjustment. The Iowa Uniform Jury Instructions on damages likewise set forth the fiction that the jury will make such adjustments.

- C. Case law on this issue shows that juries do not make such complex calculations, and the Iowa Appellate Courts generally affirm any result on any reasoning, including:

- i) offsetting inflation against interest (Schnebly v. Baker (Iowa 1974) 217 N.W.2d 708;
- ii) any interest rate “found by the jury” (Von Tersch v. Ahrendson (Iowa 1959) 99 N.W.2d 287; and

iii) the Court has faith in the jury. Von Tersch, supra; Schmidt, supra.

In the only recent case on this issue, Gleason v. Kueker (1a App. 2001) 641 N.W.2d 553, the Court concluded as follows:

While certain courts have questioned the wisdom of delegating such a complex economic calculation to a jury, others have noted that the use of economics in a litigation setting is in any event less than exact and the determination should be left to the sound discretion of the jury.

For the five most common items of damage submitted to a jury in a personal injury case, this means the verdict form contains ten blanks as follows:

Past medical expense	_____
Future medical expense	_____
Past loss of earnings	_____
Future loss of earning capacity	_____
Past physical and mental pain and suffering	_____
Future physical and mental pain and suffering	_____
Past loss of function	_____
Future loss of function	_____
Past loss of consortium	_____
Future loss of consortium	_____

Logic and experience indicate that the more blanks a jury is given to fill in, the larger the plaintiff's total verdict will be.

Waiving the illusory "present value" rule should mean the verdict form contains only two blanks – one for the injured plaintiff and the other for the spouse, as below:

For plaintiff John Doe _____
 For plaintiff Jane Doe _____

VI. ATTACK LOSS OF FUNCTION TO BOTH THE COURT AND JURY.

A. Years ago, ambitious plaintiffs' lawyers pleaded "loss of enjoyment of life" as a separate item of damage, and Iowa's Appellate Courts discussed it a few times in upholding large jury awards. Then in Poyzer v. McGraw (Iowa 1985) 360 N.W.2d 748, when it was directly challenged, the Iowa courts held that it was included in and duplicative of the concept of pain and suffering.

B. Although the Iowa court and the majority of states now recognize “loss of function” as separate from pain and suffering, there is much similarity or overlap.

C. Juries often award similar amounts for “loss of function” and “pain and suffering”.

D. The Uniform Instructions again rely on a fiction, by instructing the jury as follows:

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. ...

However, the sparse definitions include the following:

Loss of function is the inability of a particular part of the mind or body to function in a normal manner.

Physical and mental pain and suffering may include, but are not limited to, bodily suffering or discomfort.

Mental pain and suffering may include, but is not limited to, mental anguish or loss of enjoyment of life.

VII. IN THE RIGHT CASE, CONSIDER INTRODUCING EVIDENCE OF PLAINTIFF’S RECEIPT OF SOCIAL SECURITY DISABILITY BENEFITS.

A. Such evidence is probably not directly admissible in Iowa because of the Collateral Source Rule. See the Memorandum of Law which follows.

C. However, it could be admissible on the following grounds:

- a) Significant connection to lack of motivation to work;
- b) Impeachment;
- c) Curative disability or the rule of completeness, if plaintiff’s evidence emphasizes no income.

D. Additionally, statements by plaintiff in the Social Security application could be

admissible as impeachment.

E. Possible two-edged sword – a Social Security Disability award represents a Federal Government decision that plaintiff is incapable of “substantial gainful activity” or any gainful employment.

i) However, the actual decision may be based upon arbitrary and artificial guidelines.

VIII. ADJUSTMENTS TO MEDICAL BILLS.

Always obtain the records and introduce the evidence that medical bills were “adjusted” downward, and a smaller net amount accepted by the provider. See Iowa Code Sec. 668.13.

IX. YOUR ROLE.

Stephen D. Hardy