Panel Discussion - Translating Theory into Practice: The Valuation of Noneconomic Damages in Real Life

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Panel Discussion - Translating Theory into Practice: The Valuation of Noneconomic Damages in Real Life

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PROFESSOR OCCHIALINO:† We now change focus. This morning we heard a great deal of theory. Now we seek to learn how that theory gets translated into practice. We have invited five distinguished New Mexico lawyers to speak. I will start the discussion with a single question and will recognize audience members who want to ask questions as the panelists converse among themselves.

I don't think it is happenstance that the plaintiffs' lawyers are on the left and the defense lawyers are on the right. On one side, is Kathy Love, who is a lawyer with McGinn, Carpenter, Campbell, Montoya, and Love, a law firm that mostly represents plaintiffs in personal injury litigation. Next to Ms. Love is Jim Branch, also a litigator who largely represents injured persons. Next to Mr. Branch is Pat Sullivan, who also identifies himself as a member of the plaintiffs' bar. On the other side is Andy Schultz. Mr. Schultz is the managing partner of the Rodey Law Firm. Mr. Schultz does both plaintiff and defendant work, but he more often represents defendants in personal injury actions. Next is Luis Stelzner who usually represents defendants. But Mr. Stelzner is here wearing another hat as well. He is one of the finest mediators in New Mexico. I hope he will provide insights as to how one mediates cases that involve noneconomic injuries that have to be valued in order to facilitate settlement.

I'll start by asking the plaintiffs' lawyers to explain how they value a case involving substantial noneconomic damages. I presume that you look at the likelihood of proving liability, and then you determine the economic injuries and resulting damages, which may not be too complicated. But then, do you struggle with the issue of valuing the noneconomic injuries, and how do you do so?

MR. SULLIVAN: What Ted said is exactly right. You have to look at liability, the hard damage or the economic damages, and then the noneconomic damages. I mean, in theory, if your case is worth $100 and you have a fifty percent chance of

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** Moderator. Lee and Leon Karelitz Chair in Evidence and Procedure, University of New Mexico School of Law.


winning at trial, you settle it for $50. But, between our side and that side agreeing
on what the chances are of winning at trial, sometimes there’s room for debate.
There’s not always. You can’t look it up in a book and say, “This kind of case gets
won.” There are a lot of factors that come into play.

We talked about some of the inequities earlier of the Tax Code.\textsuperscript{2} If you’ve got a
nice plaintiff, your case is probably worth more than if you represent a jerk. That’s
something that comes into play, too. Or if the defendant is a nice guy, as opposed
to a problematic person.

I do a lot of medical malpractice cases. There are a lot of cases where the doctor
really is negligent, fell below the standard, but he or she is a nice doctor, they come
across well, they’re well meaning, they’re caring, and a lot of juries just give them
a pass because they didn’t mean to do it. It would be murder if they did, but—you
know what I mean? So there are a lot of things that come into play besides just
liability which you have to look at, and that gets affected by a lot of things you can’t
quantify. Then there are the economic damages, which, oftentimes, there’s a debate
about those. One side can get an economist and say they’re one thing; someone can
get an economist and say they’re different. I think George Rhoades’ numbers
oftentimes are different than Brian’s numbers.\textsuperscript{3}

MR. STELZNER: That’s why they’re both in business.

SULLIVAN: That’s right. And so even the economic damages aren’t always
something you can agree on. But oftentimes those are an easier number to come up
with. And then the noneconomic damages, which I guess we’re going to talk about,
that comes into play, too. And those vary tremendously, and oftentimes I think those
vary by the skill of the lawyer who’s arguing them. Oftentimes, I have cases where
most of the damages are noneconomic. And those are tough cases. You have to be
able to argue those.

I had a case I tried last summer involving an eighty-two-year-old man who died.
So there were no lost wages. The only damage was the value of his life aside from
his earning capacity. He was in ill health, he had lots of problems, he probably was
only going to live two or three more years. So how do you value that loss? The
defense didn’t want to value it very high, and so we had to go to trial and try that
case. And that’s what I spent the whole trial talking to the jury about, because there
were no economic—hard economic—damages, it was all, “How do you value this
gentleman’s life, who is eighty-two? He’s got a couple years left to live.” and those
kinds of issues.

OCCHIALINO: Ms. Love, how do you focus on the noneconomic damages and
their value when you’re trying to work out a potential settlement or assess the value
of a case if it goes to trial?

MS. LOVE: Well, those considerations necessarily require a really careful
examination of a lot of things, including how likeable your client is or your plaintiff
is, and the circumstances. And frankly, I think juries will take into account how
terrible the circumstances were in determining a lot of the noneconomic damages

\textsuperscript{2} See generally Laura Spitz, Taxing the (Dis)Embodied Mind: At the Intersection of Tort Reform and the

\textsuperscript{3} See infra discussion by Mr. Schultz regarding Dr. Rhoades; M. Brian McDonald, The Value of Life and
because they have to evaluate them somehow. And, of course, they’re going to grab onto whatever they can.

We also have to take into account where we’re suing. I currently have a case involving a young man who suffered from schizophrenia, who lived on an Indian reservation in New Mexico and didn’t work. He was just getting to the age where he was beginning to deal with his disease and beginning to live with it. So, I think that eventually he probably would have been able to hold a job and would have been able to lead a very productive life. But, of course, the way we evaluate most of our damages in this society is based on what the profession of the deceased was, what they did for society, what they did for us. And with this case, it’s going to be really important for me to find jurors who understand different cultures and different ways of valuing life.

My client repeatedly tells me—she’s the mother of this deceased kid, and she repeatedly tells me—“You people in this Western world don’t look at it the same way we do. We lost a member of our community. We lost part of our world history in this tribe. We’ve lost a family member who was there with us for every single thing that we ever did as a family.” So, it’s going to be really important for us in evaluating the value of this case to take those things into account and find a jury who’s going to understand those issues.

OCCHIALINO: You heard Dr. McDonald talk about how to value noneconomic harm in economic terms, and one of our speakers suggests that may be an oxymoron. Do you have to use those kinds of experts to value enjoyment of life damages or the value of a human life apart from economic losses?

MR. BRANCH: Yeah, you do. It’s the way you do it that ends up being the difficult decision. I’ve used Brian a number of times in cases, and had him testify at trial, and he puts on the economic base. The problem you run into is a tactical problem at trial; how far do you really want to push the envelope.

OCCHIALINO: Sena is the case that allows for this loss of enjoyment?

BRANCH: That’s right. And that’s the case that allows the economists. And there’s a real question still in New Mexico: Can your economist actually put a number value on that or not? I think the safer course, and what most plaintiffs’ lawyers do, because you don’t want to risk an unnecessary appellate issue, is you don’t do that. You don’t push that envelope. And I don’t think it makes that big a difference in outcome. I think the jury, if they’re going to believe that the noneconomic damages are real, and they’re going to adopt any of the economist’s approaches as to how to deal with noneconomic damages, they’re going to do that, and then they’re going to either buy your argument or not buy it in closing argument. And there are cases in which it’s noneconomic damages. If you have objective evidence of the noneconomic damage, you have someone—I had a case recently: I had a kid who was badly electrocuted. He had sixteen surgeries, he had three amputations, you know those kinds of cases. And you talk to a jury or you go to settle a case like that, where a jury can plainly see what your client has gone

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4. See generally McDonald, supra note 3.
7. Id.
NEW MEXICO LAW REVIEW

through, and it is a much different noneconomic loss case than one where you've got a real whiny client: he's got migraines, he's overweight, he doesn't exercise, he doesn't go to physical therapy, but he complains all the time. And that person thinks he's got a million zillion dollars in noneconomic loss. And you're sitting there, and you're trying to deal with that person, and you're trying to tell him, "Look, I've got a guy with a triple amputation who's had sixteen surgeries, and his noneconomic loss may not be worth more than a couple of million dollars, and you think I'm going to get you two million dollars because you don't go to physical therapy, you're overweight, and you whine a lot?" Jurors are not stupid. And this doesn't take place in a world that's fictional or written right out of Waiting for Godot or something. These people use common sense, and I think the lawyers use common sense. Nobody would evaluate those two cases the same. I think that's a logical consequence of what we do.

OCCHIALINO: Mr. Schultz, I think that Mr. Branch said that he often uses Dr. McDonald, and that the defense lawyers have their own person. Is this Dr. Rhoades?

MR. SCHULTZ: Yes.

OCCHIALINO: It must pose tactical problems after Dr. McDonald testifies that the average value of a human life statistically is between 5.1 and 6.1 million, for you to bring in your own expert, who might then say, "No, Dr. McDonald is wrong. It's only 3.5 million."

LOVE: We'll take it.

OCCHIALINO: Do you have difficulty trying to counter Dr. McDonald's evidence? Do you use your own economist, or do you just cross-examine the plaintiff's expert?

SCHULTZ: Well, both of those are good questions. When the whole issue of hedonic damages being an element of recoverable damages first started to develop, when the first question went up through the courts, what was ultimately decided was who can testify about that. I was the losing lawyer in the Astec case. We argued strenuously that an economist had no business testifying about that, that you might as well call in a philosopher and a rabbi, because they can do just as good a job in telling that to the jury. And obviously, that was wildly unsuccessful.

BRANCH: Can I do that in my next case with you?

SCHULTZ: So now that economists are allowed, defense lawyers are faced with—I think the issue that comes up every time is—do you want to bring in your own economist who will counter someone like Dr. McDonald's numbers? The problem with doing that, of course, is once your economist comes in and gives a number, you've set an automatic floor. It's going to be very difficult for me to argue to a jury that my case is worth less than my own expert has just testified. Or, do I want to bring in an economist? One of the reasons defendants use George Rhoades from Colorado, there's no great mystery, is that Dr. Rhoades is one of the few economists who will come in and testify that Brian McDonald has no business standing up telling a jury, because you really can't value life. All the comments that were made earlier today about why these studies are flawed, it's what we pay Dr.

9. See McDonald, supra note 3, Part II.
Rhoades to stand up and say. During lunch, Jim made the comment, "Well, that depends on how serious the case is." That really determines whether we want to set a floor, or whether we just want to cross-examine on the very concept.

The last thing I'll say, Ted, is it's very interesting, plaintiffs and defense lawyers don't sit down this casually all the time, but what they do in evaluating a case is not real different than what we do. We have the same problem of convincing our clients, we have the same problem convincing the jury, and we look at the exact same factors. One of the biggest issues, I think, for us in noneconomic damages is something that Jim hit on, which is: How real is it? Is it just a question of somebody complaining of being depressed, but yet they've never seen a therapist, they take no drugs, they have a history of psychiatric and psychological problems; or is it a case of someone being in a perfectly normal life that gets into an accident, and from that point on their life truly is different, and they have evidence to back it up? Is it a question of someone complaining about pain in their shoulder, or is it someone that went through a horrendous grease fire and that now has visible scars to show a jury? We're going to view those cases phenomenally differently, as I'm sure my folks across the aisle are going to do the exact same thing, in how much we think those cases are worth.

BRANCH: I think an important point here, too, is one thing that Andy said. Nobody wants to put the bottom dollar on the table at the wrong time. There's some poker playing that goes on in here, and defendants don't want to tell us what their economic floor is and put Dr. Rhoades' opinion to me early in the game. If they do that, then we've already established the range of negotiations, haven't we? If I know what their guy is going to say and they know what mine is—now, what Professor O'Connell suggests is the earlier we do this, the more cost efficient and everything. I agree with that one hundred percent. But that's not what happens in the real world. It should happen that way, ideally; they have all my numbers, I have all their numbers, and we get to negotiating right away. But what happens is there's poker playing that goes on in between there that I don't think is cost efficient. And the poker playing is about, well, "I don't want to tell Jim"—and I'm not saying Andy does this, or anybody else, it's just a fact of life—"I don't want to tell him what my floor numbers are, because he's then going to adopt those as the bottom dollar for settlement purposes. As long as I can keep that off the table, that is, the closer we get to trial, the better off I'm going to be postured in negotiations. If I can get through one or two mediations without having to disclose that number, and only get feedback from Jim Branch because he's not so smart and he'll keep giving me his numbers and bidding against himself, well, that's great." But there's all this other stuff that goes on. It's not just a matter of saying, "My economist says this and yours says this;" it's when they say it, and where you are, whether you—and this brings us to Luis—Luis, do you see this in mediation?

STELZNER: Oh, absolutely. I just want to take off on something else that you said earlier, Jim, that's sort of implicit in what everybody's saying. Juries really do

exercise common sense. There's a lot of talk about the system being in crisis and the system being broken down and all that sort of stuff. But for the vast majority of cases, I don't know if it's eighty percent or ninety percent of the cases, juries are usually pretty right on. You can dispute the margins, what juries do in a particular case, but they're usually pretty right on. There are certainly outliers, we all know. And talking about the Sandoval case, I have personal experience with the Sandoval case because I mediated a piece of that case, not the Chrysler piece of it, but the Highway Department was sued as well, as a defendant. I can't tell you everything that went on in the negotiations, but I can tell you that in settling the case with the Highway Department, which was a defendant, a much lesser defendant than Chrysler, the individual, the driver of the vehicle who was intoxicated, substantially intoxicated, he was speeding, and he ran the car off the road. The car rolled and burst into flames. There were two women in the back seat who were terribly burned and killed and died horrible deaths in the car. They were trapped in the car. Two guys in the front seat, including this driver, managed to escape. The driver had some physical injury, but relatively little. In the settlement that we did with the Highway Department, that driver got zero, okay? Zero. And he dismissed his case against the Highway Department. I can tell you that because it wasn't confidential, and anybody who wanted to find out could find out. So that was the evaluation that was made of that case. And you can talk about whether he should have gotten something or what he should have gotten, but that was the resolution in the mediation of that case.

But just going to mediation again, what mediators try to do is both to use the—if there's such a thing—the typical verdict: what you can expect that a jury might do in this case, the typical settlement in this type of case, and every case is different, so there is nothing that's typically arranged. And use the outlier as well. And what do you use the outliers for? The outliers are to scare people a little bit. Because one of the reasons that both sides try to settle cases is that that's the way you get certainty in the system, by settling, and hopefully settling as early as possible. Those outliers are always there. There's always that risk to both sides, and both sides have to be concerned about it. That's how some of these issues come up in mediation.

About the economic damages and their role in mediation, just as Jim and Pat and Ms. Love said, when you have serious injury with significant medical procedures that the individuals had to go through, and significant obvious pain and suffering, the classic case being a severe burn case, anybody who's ever heard any testimony or any description of the kind of—the burn is the least of the individual's problem. It's the treatment of the burn that's horrible pain and suffering. That becomes a serious factor in the settlement. Can you put a number on it? No, because ultimately when you settle a case, there is no one number divided up by emotional distress, pain and suffering, economic damages. There's one number that the plaintiff gets. But does it affect settlement, and does it affect what a jury might do in a verdict? It certainly does.

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Just as Jim said, if you have a plaintiff—and this may not be fair in terms of what we know, what many people know about the real injury that people get from psychological injury, from emotional injury—the practical matter is that pure emotional distress, pure emotional injury is, maybe you can call it undervalued, but it certainly isn’t highly valued in our system, not at settlement, and I don’t think in most cases by juries, unless you’ve got serious physical injury that goes with it. I’m interested in seeing if the plaintiffs’ lawyers have a different perspective on it. But you get serious pain and suffering, that’s seriously valued. You get somebody who seems to be—they may truly believe they’ve got pain and they’re suffering and that their life is a disaster, but if you can’t put something tangible to that it has little value for settlement purposes, and I suspect it can actually be counterproductive in the case when you’re presenting it to a jury.

BRANCH: In the garden-variety case, from Professor O’Connell’s situation on leveraging pain and suffering, how do you leverage pain and suffering, say, versus punitive damages, assuming you have a bona fide—it’s going to get past summary judgment—punitive damage claim. In helping resolve the claim, which has the greater leverage?

STELZNER: Well, I think pain, real pain and suffering, as opposed to—are we talking pain and suffering, the result of the misconduct versus the really bad conduct?

BRANCH: Yes.

STELZNER: Well, both of them obviously have a role, but I think the pain and suffering has a more significant role, at least in settlement.

SCHULTZ: Well, I think I disagree. Most defendants are afraid of a jury verdict coming back finding their client responsible for punitive damages. I mean, there’s a huge fear.

AUDIENCE MEMBER: Which are uninsurable in New Mexico—punitive damages are uninsurable?

STELZNER: No, they can be insured—depends on the language of the policy. There has to be an express exclusion in the policy.

SCHULTZ: But it’s not so much the insured or insurability. It’s just the fact that there is now a piece of paper, a public piece of paper, finding the client responsible for punitive damages. Most clients want to avoid that. So I think that, in and of itself, can have a big impact on what they want to do. I would agree with Luis though, the question of just pain and suffering, from the defense point of view, I think oftentimes it’s the tail wagging the dog. That there’s this core value to the case, and the more the plaintiffs are pumping up these noneconomic values, the defense views that as, well, that’s just the way they’re trying to inflate the total value of the case. Because if we ultimately go to mediation with Luis, the day may start with the plaintiffs giving us a detailed breakdown on each element of damages, but by noon, we’re just passing back and forth one number.

BRANCH: What are my ethical restraints on that? Am I committing malpractice if I don’t pump up those noneconomic losses. Am I doing my client a disservice? Or, do I have an ethical constraint that if I really don’t believe—and can I inject my own moral view in it, as to what I believe and don’t believe, to make a decision about what I’m going to do about noneconomic damages?

SCHULTZ: Now, there’s a good question.
STELZNER: What are you guys trying to do?

LOVE: I think as a lawyer you have an ethical duty to be honest about your evaluation of the case. But, of course, there’s a range. The jury is going to have the same problem that we have as lawyers figuring out what amount of money they would award for those punitive damages. I think that there are a lot of things that you can do to maximize noneconomic damages to sort of put the jury in the shoes of your client and make them understand exactly what your client suffered in terms of pain and suffering and other noneconomic damages. So I don’t think that it’s unethical or irresponsible to—I don’t even think it’s pumping up your client’s noneconomic damages by going in and saying, "Well, you know, with the evidence that we have and the testimony that we’re going to present from the mother, or the nurses who were there and watched this kid suffering," I don’t think it’s unethical or irresponsible to say the jury is going to really feel for him, and think about what they would have felt had they been in that person’s shoes. I think it’s perfectly appropriate, and it’s a good tool for settlement if you can line up your witnesses in advance of mediation and sort of give clues as to what’s coming at trial.

BRANCH: Can a lawyer tell their client, “You better go see a psychiatrist, because if I don’t have this documented...”? Now, the client is not telling you that they need to see a psychiatrist or that they need the psychological counseling, but you’re telling them they need it because you need to have objective evidence of that for your noneconomic damages. Is there an ethical dilemma with that?

SCHULTZ: Yeah, I think at that point I would view that as crossing the line.

LOVE: I look at it a little bit differently. If I have a client who seems to really need psychological counseling, I’m going to say, “Get into it if you think you need it,” not for the case, but the client’s own well-being. Certainly, I would never suggest that somebody go into counseling just to help a lawsuit, never.

PROFESSOR LIND: I have a question about how proof comes down when you actually try one of these cases in New Mexico. Does New Mexico allow the per diem argument for noneconomic damages?

STELZNER: Yes.

LIND: And the time value argument?

STELZNER: Yes.

LIND: But not the golden rule?

STELZNER: Not the golden rule, that’s correct.

OCCHIALINO: The per diem argument is a closing argument that says something like, “The figures demonstrate that my client is likely to live for 10,500 days. Perhaps twenty-five dollars a day would not be too much. If we multiplied that out, it would come to this. I’m not urging you to use this figure, I’m just suggesting it as a possibility.”

BRANCH: But you cannot say in closing, “Put yourself in my client’s shoes.” That’s going to cause you a mistrial.

STELZNER: Let me just go back to the question that Jim asked. You also have to remember that there often is a punitive element to compensatory damages. That

goes back to what folks were talking about here. You may have a jury that doesn’t award punitive damages, but if they feel that the conduct was really bad, or if they really don’t like the defendant, or if the defendant has a history that the judge has allowed to come in of allowing these kinds of things to happen, there’s going to be a punitive element to the compensatory damages.

BRANCH: That’s especially true in wrongful death cases, where the wrongful death instruction particularly says that you can consider the aggravating circumstances of the cause of death. So, you get in that conundrum there. Do you just go with that, or do you—I mean, you’ve got a drunk-driver-who-killed-your-client kind of case where you clearly are likely to get punitive damages, do you argue just under the aggravating circumstances of the wrongful death, or do you really want to push for the “punies”?

AUDIENCE MEMBER, MS. MOSTOLLER: I like the particular perspective on Professor O’Connell’s proposal in the context of the leverage changes and the gamesmanship. Particularly, I’m interested in the requirement on plaintiff to both prove gross negligence on the noneconomics, and then also adding the heightened burden of proof beyond a reasonable doubt, because that seems to be an unfair change of leverage, to me, just on the surface. I wonder what your perspectives are?

SULLIVAN: Absolutely. I’ll give you a perfect example. I’ve tried numerous wrongful death cases, mostly involving older people who don’t have lost wages. In all my wrongful death cases, I’ve never put any economic damages into evidence, none. All my cases are tried on noneconomic damages, the fact that this is a human being who died, and you can’t do that. So, if I had to prove gross negligence and beyond a reasonable doubt, that means I could go around killing people every day as long as I was just negligent, not grossly negligent. If I were grossly negligent, you would have to prove it beyond a reasonable doubt; otherwise, I could just walk around, not keep my place safe, having older people die, children die all the time. What’s the big deal, right? They’re just kids and old folks; their lives really don’t matter. That’s what we’re down to. That’s why these arguments of caps of $250,000 on noneconomic damages make my stomach sick. We want to say to the stay-at-home mom, “Your lives aren’t worth very much. I don’t value stay-at-home moms. Do you guys? I think they don’t do much of anything in this world. I don’t think old folks are very valuable either. Kids, we don’t need them. They don’t bring in any money. Kids cost us money.” That’s what George Rhoades would tell us: “Kids cost us money. We did you a favor because don’t you know it costs $250,000 to get a kid through college? We did you a favor, buddy.” Those kinds of things just make me nuts; they make me crazy.

OCCHIALINO: Professor O’Connell, I wouldn’t say that you make him nuts, but you have at least triggered a little noneconomic harm over here. I wonder if you’d like to react.

PROFESSOR O’CONNELL: Let’s say I’m nudging him. Keep in mind that this extraordinary misconduct, provable beyond a reasonable doubt, only arises when

14. Id.
the plaintiff has been made economically whole, which is a very significant advantage when people have been seriously injured.

AUDIENCE MEMBER: And when they haven’t.

OCCHIALINO: Ms. Mostoller wants to follow up.

MOSTOLLER: My main concern, though, with the whole package is that we have some really strong incentives for plaintiff to take whatever number gets presented in the 180 days, and we have this established gamesmanship. It seems to me that in the package there’s incentive for the defense to lowball.

O’CONNELL: Well, they can’t lowball. They’ve got to agree to affect a major medical disability policy on the plaintiff. You can’t lowball workers’ compensation offers. The statute provides what has got to be offered. If you come in with anything less than a full major medical disability policy, you don’t get any advantage in tort.

AUDIENCE MEMBER, MR. WOLD: What about the death of an older person? How would you answer this—the person dies a horrible death and before anybody can get to him, he’s dead, so there’s very little medical damages, no economic damages, so for that person, the insurance company makes a ten-dollar offer?

O’CONNELL: No, they can’t make a ten-dollar offer, because the statute provides that the claimant, in this case the executor, has a right to either noneconomic loss or the flat amount of $250,000. It might be $500,000. That’s up to the statute. But there’s a very substantial amount that’s available for people who have not suffered significant economic loss.

OCCHIALINO: Professor Finley wants to join in here.

PROFESSOR FINLEY: I wanted to ask the panelists to address some of the practical differences that caps would make in your case selection, settlement strategy, mediation advice, and trial strategy. First, for the existing capped medical malpractice system in New Mexico, what difference has it made? Then, for other types of tort claims, if noneconomic damages in particular were capped at, say, the California model or the federal proposal at $250,000, what would be some of the practical indications? How would it affect your case selection strategy, your settlement strategy?

BRANCH: Well, what happens with caps is, you can’t settle cap cases. Nobody has an incentive to settle them. So, you end up going through mediation and all these processes, you never—if you have a cap case and you have somebody who is twenty years old who clearly fits the top of the economic loss, say under our $600,000 medical malpractice cap, that clearly is entitled to the $600,000—that’s not going to settle for $600,000. What the insurance company comes in there and does, they start at $600,000 and negotiate you down. They would never settle a case for $600,000; if the doctor in that medical malpractice case was drunk and operating and watched your client bleed to death on the operating table, they would not give you $600,000 for that claim.

STELZNER: Sorry, Jim, I have to disagree with you, and I’m very careful not to disagree with Jim in most cases, because he can usually kick my butt. But I think the cap does affect settlement exactly the opposite of the way Jim says, absent constitutional challenges to the cap. The cap makes it much easier to settle a case, frankly, because the plaintiff can’t start higher than the cap except when you have significant future meds. Just so people know, our medical malpractice cap is
$600,000 plus future meds.\textsuperscript{15} So, you can add to the cap if there are significant future meds; and there certainly are, in many instances—an additional lump sum amount up front in settlement for the future meds. So that certainly is still a big variable.

O'CONNELL: But not future wage loss?
SULLIVAN: Everything but future meds is capped at $600,000.
STELZNER: Yeah, so there's a cap. And I will tell you, I have mediated cases—med mal cases—that have settled at the cap. Maybe Erla Lutz would kill me for saying it, but we have done that.
BRANCH: I have settled a few at the cap, but it is such a rare thing.
STELZNER: Right. But where they affect it is, unless they're prepared to challenge a cap or unless there are significant future meds, the plaintiff has to start out at $600,000, as opposed to, in most instances, the plaintiffs can start out, good plaintiffs' lawyers like these guys don't, but the plaintiff can start out virtually wherever they want to start out, within some limitation. I think where it doesn't have any effect are cases which are clearly not cap cases. In other words, you have a med mal case, even if liability is clear, where the damages are obviously substantially less than $600,000. It has no effect there. But I do differ with Jim on this one.
O'CONNELL: But Jim's point is that the defense starts at—the plaintiff starts at $600,000, but where does the defense start?
STELZNER: Well, the defense starts with—the difference it makes for the defense is that they don't have the huge upside risk that they have in other cases, especially where the damages are big.
O'CONNELL: And that has to affect their bargaining position.
STELZNER: Oh, of course it does. But that doesn't mean they don't settle at or close to the cap for cases that are higher than cap cases. In my experience, they do.
AUDIENCE MEMBER: Yeah, and that's the interesting debate about the med mal effect in New Mexico. Now, what about for other types of tort, products liability, or—
BRANCH: We have no caps on most other—
FINLEY: What is the affect for every tort claim in New Mexico to have a cap of $250,000? How would that affect, in your view, case selection, strategy, and settlement?
BRANCH: Well, we have the Tort Claims Act.\textsuperscript{16}
OCCHIALINO: What we also have besides a med mal cap is the Tort Claims Act, government liability. Government liability is capped by legislation.\textsuperscript{17} There's only one other cap that's now in existence in New Mexico, and that is a cap on hotel liability for valuables that are left in the room. That's capped at $1,000.\textsuperscript{18}
BRANCH: And because of the cap, I quit taking those cases.
OCCHIALINO: Professor Finley, I think you're asking what would happen if the legislature set a $250,000 cap on everything for noneconomic harm.

\textsuperscript{15} NMSA 1978, § 41-5-6(A) (1992).
\textsuperscript{16} NMSA 1978, § 41-4-1 (1981).
\textsuperscript{17} Id.
\textsuperscript{18} NMSA 1978, § 57-6-1 (1953).
FINLEY: Yes, that is exactly what I’m asking.

OCCHIALINO: Ms. Love, would you like to start?

LOVE: Well, I think it depends a lot on what the actual damages are in the case. Because the way that we evaluate cases is—I’m just not interested in leading plaintiffs or clients down a path where they’re not going to end up getting anything out of litigation, and they’re going to end up absolutely miserable being in it. So my understanding, for example, and this is going back to the med mal stuff over in Texas, is that with the caps that they’ve instituted, a lot of people just aren’t able to afford to even recover for their injuries. So I’m afraid—I’m really concerned that that’s going to happen all over the country. So we have to evaluate up front, which we do anyway, our cases really carefully to make sure it’s going to be worth the client’s while to go through all the hell of litigation, and all the expense, in order to get what minimal amount the cap allows.

OCCHIALINO: Mr. Schultz, do you have a defense perspective on this?

SCHULTZ: I don’t think it would change much from what Luis said about med mal cases. I don’t think that would mean that they would refuse to settle at the cap at all, but it certainly gives us greater comfort as to where we can. I view it as just analogous to, in a bad faith type case, representing a company for policy limits.

SULLIVAN: But the problem is—I’ll go back. What Jim said is right. There are no extra contractual damages under a cap. Let’s say you’ve got absolute liability, the drunk doctor kills a patient, a thirty-five-year-old woman with three kids and a husband. The damages clearly exceed $600,000. If they don’t offer the $600,000, and the plaintiff takes the case to trial and gets an award of ten million dollars, you know what they pay you? $600,000. So, out of the goodness of their heart, some people will pay you the cap. But I can tell you under the state Tort Claims Act, they will not pay you the cap, ever. They won’t pay the cap, because, why should we? We get interest on our money while we hold it; the worst that can happen at trial is we have to pay you the cap, and it’s going to cost you money to go to trial. So why should we pay the cap of $400,000? You should take $250,000 or $300,000, because it would cost you $50,000 to try the case. You’re going to be without the money for two more years, and so there’s a discount. They absolutely extract that from you, because if you go to trial and win you can’t get more than the cap, unlike the bad faith case, where you can get extra contractual damages. And those should be written into caps.

OCCHIALINO: Dan Shapiro has a question.

AUDIENCE MEMBER, MR. SHAPIRO: In this $250,000 noneconomic cap that’s being imposed, what does that do with children in terms of lost future earnings? Is that a noneconomic damage, or is that an economic damage, and is it capped or not? Because I could see you actually getting more money under New Mexico law if, in fact, it’s treated as a lost economic damage. So, I don’t know what the effect of—

19. See NMSA 1978, § 41-4-19(3) (2004) (providing that the state’s liability cannot exceed $400,000 “to any person for any number of claims arising out of a single occurrence for all damages other than property damage” and medically-related expenses).
BRANCH: I think the effect would be that it is economic damages because it's lost wages. Noneconomic damages are going to be pain and suffering and those kinds of intangibles, I think.

SHAPIRO: So I think what we'll do is we'll skip the old guys and just go with the damaged babies, and then we'll be better off.

BRANCH: Well, they're going to write off us baby boomers soon enough.

STELZNER: You are an old guy, Jim.

BRANCH: We're on our way out.

AUDIENCE MEMBER, MR. CHAPPELL: I have a comment on that as somebody who has done both defense and plaintiffs' work. A cap of $250,000 would severely limit the cases that a plaintiffs' lawyer could take and put the plaintiff at a very severe disadvantage, because, in the whole scheme of things, if you've got a case for a third of the $50,000, your costs that you can spend to prepare this case are also capped, your attorney's fees. On the defense side, to defend against the cap, there is no limit on the defense costs. You could spend $250,000 or $500,000 defending the case to keep it under the $250,000 cap. So, you have put the parties at a significant disadvantage, because one has an attorney fee cap, the other one doesn't, and you've taken away the risk. I think that would severely limit the cases that attorneys could take under those circumstances.

STELZNER: Although, just one comment. I don't disagree with that. From the defendant's perspective, there's going to be effectively a cap on what the attorney's fees are going to be unless there's some really broad policy reason. Because what the defendants are going to look at is, if my maximum exposure is $250,000 plus whatever the economic damages are, I'm not going to spend $250,000 to defend this case.

AUDIENCE MEMBER, CHAPPELL: Well, they do, because of the system.

STELZNER: I want those clients. Who are they?

AUDIENCE MEMBER, CHAPPELL: The insurance company factors into their loss base because they spend—and so therefore, they get to raise their premiums to recover for their loss experiences last year.

STELZNER: Well, I still say I want that client. Give me some names.

AUDIENCE MEMBER: I think most plaintiffs' lawyers in the room have sat through sessions where they've been told, "I'd rather pay it to Andy than pay it to your client," in those bald terms. It is the way it is.

STELZNER: Sure, but people say lots of things in the course of litigation, much of which you have to discount substantially.

OCCHIALINO: Mr. Stelzner, we've heard plaintiffs and defendants, and it sounds like it's a zero sum game here in mediation. But we also heard today that there are tax consequences, for example, of the way that cases settle. I wonder if, as a mediator, you look for this sort of external source to provide additional assets—"It's not going to be out of out of defendant's pocket; the IRS will pay the difference if we structure this properly." Does that become a factor in your thinking, and do lawyers present these alternatives to you?

STELZNER: The answer is yes, in my experience. Whenever we get into those sorts of things I start professing very loudly that I know nothing about tax law, and I can't even fill out my own tax returns. But certainly—I've seen it more in employment cases, where the parties apparently can agree. I've seen both defendants and
plaintiffs agree to this, that you can characterize for purposes of the settlement agreement what the compensation is for. And again, I don’t know anything about tax law, but apparently there is magic language that does that. The defendants always insert language into the settlement agreement that says, “We’re not responsible for what happens if the IRS declines to characterize it the way you do,” and it’s the plaintiff’s responsibility or the plaintiff’s tax lawyer or tax accountant’s responsibility for working that out. But, yes, that’s something that I’ve seen particularly, as I’ve said, in employment cases.

SCHULTZ: Jim and I whispered about this just briefly after that presentation this morning, but what Luis said is not uncommon. Near the very end of the settlement, you’re pretty close on the dollar amount. Luis will come back into the room and say, “Okay, plaintiff says they’ll take X amount,” and you have to agree to characterize the dollars as, whatever.

BRANCH: Personal injury or—

SCHULTZ: Yeah. Very, very few defendants will actually care. It’s not their money. Their concern is, “We’ve agreed to pay you X.” In virtually every release that I prepare, we include a paragraph that says, “We’re making no representation whatsoever as to the tax consequences; plaintiff is representing they aren’t relying on us for anything.” In other words, “Here’s your money, good luck.” Because all we’re doing is handing you the check. However you want to characterize it, no skin off our nose. So, if that will get the case settled, fine.

LOVE: The classic situation is where you have a sexual harassment case and you frame the claims as battery, for example.

SULLIVAN: Right.

LOVE: I think that’s perfectly appropriate.

SCHULTZ: Because we’re already denying liability anyway, so—

LOVE: Right, right.

DR. FELDMAN: Your conversation may have already overtaken what I wanted to ask to follow up on Professor Finley’s question, which is, I want to take out the mediation component for just a minute. When you’re sitting and you’re thinking about pleading a case, you want to stay within the ethics rules, you’ve got to plead in good faith, but if you’re not pleading differently in the presence of a cap, why not? You ought to be, it seems, within the limits. I write in the area of legal ethics, as well, and one thing I worry about with caps is that it exerts pressure on people not to plead in good faith. Just like you talk about recategorization in a settlement, while I don’t have the same issues with it, in a pleading you’re representing in a complaint that you can back up the claim. So, you’re filing a pleading, either in a med mal case where they impose a $250,000 or a $500,000 noneconomic cap, can you imagine how that would affect your pleading strategy? Would it?

BRANCH: Well, it would affect your pleading strategy—this is me on the plaintiffs’ side—if I were going to constitutionally challenge it, I would want to set up my pleadings in a way so that I could begin the challenge process on the due process or equal protection or whatever arguments I’m going to make.

20. See Spitz, supra note 2.

FELDMAN: That, I understand. And it would also affect, therefore, case selection, because you’d be looking for the right case.

BRANCH: Sure, right.

FELDMAN: But I’m saying, let’s assume that a constitutional challenge doesn’t work, for the sake of argument, and so now you’re stuck with the cap.

SULLIVAN: My guess is it would. It kind of goes back to what Dan said about a child, and arguing that lost wages are an economic damage, and use that to get out of the cap. That’s why I just fundamentally oppose caps, if you didn’t already get that. They create problems, because cases should be tried on the truth. You should never present anything you plead—present any case in any way you don’t honestly believe is right. Caps force you to go in weird ways. Oftentimes, if I were to try a case of wrongful death of a child, I may not make a claim for lost wages because it’s silly. No one is going to get the money, and that’s not what the death is about. That’s not why it’s wrong to kill a kid—because he can’t go off and make $500,000 as a teacher later. That’s not what the case is about. So why make it about that? You should try the case on what it’s about. When an older person dies, I shouldn’t have to put in, “Oh, they could have gone back to work and made minimum wage as a greeter at Wal-Mart.” That’s not why it’s wrong to have an old person die, on a safe place of business. So I shouldn’t be trying it on that. I should try it on what this person’s life was about, and why it was wrong for them to die, and what are the real issues in the case. You shouldn’t have a cap sitting here making you argue things that are stupid and that are wrong. And juries get it. I mean, Luis is right. Eighty to ninety percent of the time, juries get it exactly right. No system is perfect, and some juries are going to get it wrong for the nice doctor that really malpracticed and, say, get him off the hook. Some juries are going to award a plaintiff too much money. That’s going to happen. But most of the time, it’s not. Juries basically get it. If you go into trial and you try something stupid as a plaintiffs’ lawyer, they’re going to know that. So cases should be tried on what’s true, and we should just allow juries to evaluate the facts and the evidence and come up with a verdict that’s honest and reflects the community’s values and not something that’s constrained. And that’s just because it creates problems. In fact, now it’s word games and how can you manipulate the system. That’s wrong. We shouldn’t do that.

BRANCH: The other thing about all of this that bothers me, and it follows right on what Pat said, and that is to what extent are jury systems a democratic institution and part of the democratic structure of our society that we should honor? To the extent that we put caps on those things, we’re saying we do not trust our common people in this country in a democratic institution to decide things, because, that’s what it’s about.

AUDIENCE MEMBER, MS. HAWK: Those are the people who are voting for the caps, though.

STELZNER: I just want to say something. What I am hearing recently, and “recently” being the last year, is that the drum beat of criticism of the system and the drum beat of tort reform is affecting juries. And that’s democratic; that’s very democratic. Some of us here may think they’re wrong, but that’s how democracy works. I’m not sure that it’s affected juries yet in New Mexico at the high end damages cases, but boy, I’m hearing from plaintiffs’ lawyers and defense lawyers,
and it may be anecdotal, but I think it’s real, that juries are being affected on a day-to-day basis by the political discussion about tort reform.

AUDIENCE MEMBER: There is data on that in Texas. That’s clearly happening there.

PROFESSOR BLUMSTEIN: I would like to ask Pat, when you say that you want to try the case for the eighty-two-year-old person who has been killed, in a wrongful death case, and you want to talk about the real issues, which is the worth of their life—now, suppose you had twenty of these cases and there are twenty people, do you think they all should be worth the same, or are they worth different?

SULLIVAN: They are worth different, I think, because all people—I don’t think there is a universal value of human life. It depends on lots of factors. One factor would potentially be the age of the patient, the kind of relationships they have, those kinds of factors. So I don’t believe that we should write down in a book that human life is worth X and it applies to all people.

STELZNER: Their physical and mental health is certainly an issue.

SULLIVAN: Exactly. That’s why I think juries are good. Juries will value different lives differently, for a variety of reasons. I think that is valid. So I don’t think all lives are valued equally. I personally don’t have a problem with that, but some people may.

AUDIENCE MEMBER: If you take away the economic dimensions, then you’re saying that someone who is ill is worth less, from a jury point of view, than someone who has been healthy for the last three years?

SULLIVAN: It depends, and that’s what you talk to the jury about. Some person may have an illness, but despite that they’re able to go out and do wonderful things, and we would, as a society, value that life highly. Somebody may be healthy and be a slug and do nothing with their life, and the jury may say, “You’re healthy, but…. So I think those things do come in. I think juries get all that, and I think that’s what should be presented to a jury, and that’s how they should value those things.

OCCHIALINO: Mr. Sullivan, is it your argument that Dr. McDonald probably should not be an expert, but the philosopher and the rabbi should?

SULLIVAN: That’s possibly true. I’ve used Brian in cases where I’ve had lots of economic harms, but I’ve never called an economist in one of my wrongful death cases. I’ve always felt that—I love Brian to death, but I feel that I can argue the value of life better than Brian can. I just think that’s more of a lawyer’s job to do that than to have Brian do that. So, I’ve never had an economist in any of my wrongful death cases. I’ve always argued it myself.

LOVE: I think where the economists come in handy is getting over this hump of thinking that if the value of life has to be minimized to, like, a million dollars—which I think is generally the thinking in federal court, I don’t think that there’s been a verdict higher than a million dollars for the value of life in federal court—and so the thinking is that if we can present to juries that our government itself, and manufacturers, companies, and our society, value a life much higher than a million dollars, it’s useful in getting the average up so that then the jury can

decide whether they want to go low or high based on these other factors, and what
the person has done with their life, what the person valued their own life at.

STELZNER: I just want to make one other comment on the noneconomic kind
of issues that Pat and Kathy are talking about. I’ve certainly seen, and there are a
few other old geezers around the table here who have probably seen the same thing,
but in the last certainly ten to fifteen years, the value of life that juries and
settlements using jury verdicts have attributed to the elderly, and I mean the very
elderly in some instances, has increased very substantially. I think that’s partly
because plaintiffs’ lawyers have done a much better job of being able to articulate
to juries what those noneconomic values are. I’m not sure that I’m prepared to say
that juries have put the same value on an eighty-five to ninety-year-old person that
they would put on a thirty-five-year-old mother or father of three kids. But certainly,
that area has increased. I’m not sure I’ve seen the same thing with respect to little
kids, yet. Is there that same trend, do you guys find, or is it still way low because
of the uncertainty?

BRANCH: Are you talking about the death of a child?

STELZNER: The death of a child, yes.

LOVE: Certainly with infants, it’s still way low. It starts increasing as you have
some things that you can latch onto that demonstrate what this person’s life might
have been like.

STELZNER: Potentially, yes, exactly.

OCCHIALINO: We must stop. I thank these five panelists for their time and their
insights. We academics have learned a great deal from the practicing lawyers, and
I hope that they’ve learned and will learn a little from us.