



# Evaluating Damages in Catastrophic Injury Cases: A Primer for the New LNC

*Elizabeth K. Zorn, BSN, RN, LNCC and Brian M. Zorn, Esq.*



**P**ersonal injury in a negligence action is defined as any harm caused to a person (Black's Law Dictionary, 2014). A tort is a "civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages" (Black's Law Dictionary, 2014). Types of personal injury tort claims include medical malpractice, slip and fall, labor law (work injuries), vehicular accidents, product liability, and toxic torts, among others. Catastrophic injuries, as the name implies, involve significant physical and/or cognitive deficits, typically resulting from serious injuries to the brain or spinal cord (e.g. paralysis), serious burns, loss of limb(s) or death.

Damages in a personal injury tort claim are the money the defendant(s) pays for injury or loss caused by negligent acts (Black's Law Dictionary, 2014). The potential recovery in catastrophic injury cases is substantial due to the high costs of plaintiff's lifetime medical care needs, diminution in earning capacity resulting from the injuries, and the monetary value attached to significant pain and suffering and functional loss.

The stakes are high for both sides when a catastrophic personal injury case goes to trial. Plaintiffs risk a defense verdict with no award to cover future medical needs or lost income. Defendants risk a high jury verdict. Thus, many of these cases ultimately settle before trial. Before settlement, each side conducts its own evaluation of the potential case value. Below is an introduction to the basic economic and non-economic damages recoverable in a catastrophic injury case, the usual methods used to assess such damages, and the role of the Legal Nurse Consultant (LNC) in evaluating a catastrophic injury case.

## ECONOMIC DAMAGES

Economic damages are actual dollars losses that can be calculated. They include past and future lost wages, third

*The potential recovery in catastrophic injury cases is substantial due to the high costs of plaintiff's lifetime medical care needs, diminution in earning capacity resulting from the injuries, and the monetary value attached to significant pain and suffering and functional loss.*

party liens, and medical and other out of pocket medical expenses resulting from plaintiff's injuries.

## NON-ECONOMIC DAMAGES

Non-economic damages are intangible losses for which there is no mathematic basis for valuing (Glannon, 2010).

The main non-economic damage categories include physical pain and suffering, and mental or emotional harm. Some states have imposed caps on non-economic damages.

*Physical pain and suffering* pertains to the plaintiff's conscious physical discomfort resulting from the injuries. The dollar amount is generally proportional to the severity of the pain and length of time the injured party has suffered and will likely suffer in the future. Plaintiffs with catastrophic injuries often suffer from severe chronic pain. For example, plaintiffs with significant burn injuries are likely to suffer substantial pain at the outset and throughout painful treatment procedures over a long time period. Other considerations when evaluating this element of damages include the extent to which pain is adequately controlled with medications or invasive procedures such as a spinal cord stimulator. Adverse effects of treatment the plaintiff is caused to undergo for injuries are compensable. For example, some plaintiffs experi-

ence adverse side effects from analgesic medications including gastric, kidney or liver problems or somnolence impairing daily activities. Plaintiffs who undergo invasive treatments for pain, such as spinal injections, may suffer complications such as infection or nerve injury from these procedures.

*Mental or emotional harm* is defined as "any impairment of the functioning of a person's mind, especially when the impairment has resulted from something external, such as an injury" (Black's Law Dictionary, 2014). In a catastrophic injury case, mental harm may result from direct injury to the brain tissue controlling emotions or cognitive function, or from adverse emotional responses to severe physical injuries. Many plaintiffs with catastrophic injuries require intensive care, which is sometimes associated with "ICU psychosis" (Epstein, 2014). This may include auditory or visual hallucinations induced by certain medications. Another known sequela of catastrophic injury is post-traumatic stress disorder (PTSD) which "is characterized by intrusive thoughts, nightmares and flashbacks of past traumatic events, avoidance of reminders of trauma, hypervigilance, and sleep disturbance, all of which lead to considerable social, occupational, and interpersonal dysfunction" (Sareen, 2017). Recent attention has focused

## Wrongful death damages include decedent's conscious pain and suffering from the negligent acts, their distributees' economic loss resulting from the death, and in some states their emotional harm from loss of a loved one.

on post-intensive care syndrome (PIS): as many as 40% of ICU survivors and family members experience physical, psychological, and/or cognitive dysfunction (Hoffman and Guttendorf, 2015).

Depression and anxiety are two common sequelae of chronic pain (Rosenquist, 2016). Plaintiffs who sustain substantial brain injuries but maintain an awareness of their impaired functioning, may suffer emotional distress related to this loss.

Plaintiffs who survive severe hypoxic-ischemic brain injuries are at risk for significant neurological sequelae, including altered levels of consciousness and seizures (Weinhouse, 2013). Severe head injuries can result in traumatic brain injury (TBI). Moderate to severe TBIs are associated with neurological and functional impairments (Hemphill, 2016). Plaintiffs sustaining brain injury of any type often have chronic cognitive deficits.

Plaintiffs with catastrophic injuries often cannot engage in the same daily, recreational or avocational activities as before the injuries, or they do so with pain and limitations.

Some states allow recovery for loss of enjoyment of life, defined as "detrimental changes in a person's life, lifestyle or ability to participate in previously enjoyed activities and pleasures in life" (Black's Law Dictionary, 2014).

**Loss of consortium claim** may be brought on behalf of the non-injured spouse for economic and noneconomic losses. Economic losses are for the services the injured spouse can no longer perform such as indoor and outdoor household maintenance, assistance with activities of daily living or transportation. It also includes emotional losses, such as "affection, comfort, companionship, and sexual society" (Glannon, 2010). Filial consortium is a child's care, solace, affection, and companionship given to a parent; paternal consortium is a parent's care, solace, affection and companionship given to a child. While some states recognize the latter claims, most have restricted loss of consortium recovery to spouses (Glannon, 2010).

### DAMAGES IN WRONGFUL DEATH CASES

Wrongful death damages include decedent's conscious pain and suffering from the negligent acts, their distributees' economic loss resulting from the death, and in some states their emotional harm from loss of a loved one. Some states do not allow recovery for emotional harm, which means the potential recovery is more limited. For example, New York only allows recovery for pecuniary (monetary) injuries. (N.Y. Est. Powers & Trust Law, 2017). Some states allow damages for emotional pain and suffering for pre-impact terror just prior to death

when it can be established that the individual was conscious, even for a brief period of time and knew death was imminent, such as an airline crash or electrocution victim.

### EVALUATING DAMAGES IN CATASTROPHIC INJURY CASES

Assessment of damages requires evaluation of medical records documentation, parties' deposition testimony, monetary loss documentation, third party liens, expert opinions and independent (defense) medical examiners' reports.

**Medical records:** Documentation about the nature and consequences of plaintiff's injuries is derived from numerous types of medical records including those from hospitalizations, out-patient procedures, physician offices, physical therapy, occupational therapy, speech-language therapy, mental health practitioners, chiropractors, prescription records and wholistic health providers, among others.

**Deposition testimony:** The plaintiff is questioned in detail under oath about the nature and extent of the injuries, and must produce a list of all health care providers providing treatment for these injuries. The plaintiff must also provide information about any pre-existing medical problems, including prior illness or disease impacting the same body part or system. Finally, plaintiff will be questioned about the impact of the injuries on activities of daily living, and ability to engage in prior vocational and avocational activities. If there is a loss of consortium claim, the spouse will testify about the loss of services resulting from plaintiff's injuries.

**Monetary loss:** Plaintiffs with catastrophic injuries commonly assert a claim for monetary (economic) loss from lost wages and out of pocket medical expenses. The plaintiff must

produce numerous records to support the existence and value of alleged economic losses, including where applicable, income tax documents, wage and benefit statements, pension statements and medical bills.

**Third party liens:** Since plaintiff must pay any liens and other reimbursement claims out of the settlement proceeds, the existence and amounts of all liens or reimbursement claims are necessary to evaluate damages and formulate an appropriate settlement demand. The most common liens or reimbursement claims are from Medicare, Medicaid, self-funded ERISA plans (provided by certain employers) and workers compensation. However, there may be others and it is important to elicit information about all potential liens or reimbursement claims as early as possible. It is also important for the attorney to determine whether any lien or reimbursement claim can be reduced and, if so, by how much.

## EXPERT EVALUATIONS

Experts are critical in establishing damages in a catastrophic injury case. In some cases, such experts may be treating physicians.

**Neuropsychology** is a subspecialty of psychology that “applies principles of assessment and intervention based upon the scientific study of human behavior as it relates to normal and abnormal functioning of the central nervous system.” (American Psychological Association, 2010). Plaintiffs with severe hypoxic or traumatic brain injuries often suffer significant cognitive deficits or personality changes. Neuropsychologists are skilled in assessing such brain injuries, commonly utilizing a battery of tests that evaluate the following function categories (Malik, 2017):

- Intellectual functioning
- Academic achievement
- Language processing

- Visual-spatial processing
- Attention and concentration
- Verbal/visual learning
- Memory (short and long term)
- Executive functions
- Speed of processing
- Sensory perceptual functions
- Motor speed and strength
- Motivation
- Personality assessment

The neuropsychology expert conducts a battery of tests over several hours, and summarizes the plaintiff’s deficits based upon testing results. The expert also identifies those deficits that likely resulted from the plaintiff’s injuries. Given that most individuals do not undergo baseline neuropsychological testing, the expert must base opinions on whatever pre-morbid documentation of cognitive and interpersonal functioning exists. This includes evaluation of prior academic records and achievement, and previous employment responsibilities and job performance evaluations in comparison to post-injury capabilities. The neuropsychologist may also review post-injury medical treatment records and interview close family members about premorbid personality traits to evaluate personality changes resulting from a catastrophic injury.

All neuropsychologists are not created equal; there are many educational paths and credentials. The skilled LNC will look for multi-year clinical residencies and other advanced preparation when vetting a potential testifying expert.

A **vocational rehabilitation expert** may be used where plaintiff claims lost or diminished wages because the injury precludes plaintiff from continuing pre-injury employment at all, or at the same level. This expert would assess whether plaintiff is employable and, if so, in what potential capacities and to what extent.

The assessment is based on multiple factors including, among others, education, work experience, functional limitations and the types of jobs, if any, available for plaintiff’s assessment profile. The assessment includes current wages for such jobs, the number of hours plaintiff could work, accommodations needed, training or education required, and the cost of such training or education. The assessment may also include a functional capacity evaluation, a “battery of standardized assessments that offers results in performance-based measures and demonstrates predictive value about the individual’s return to work” (The American Occupational Therapy Association).

**Life care planners** (LCP) typically are nurses or vocational rehabilitation specialists. They prepare life care plans, assessments of the annual health care and related needs over plaintiff’s lifetime with associated costs. This detailed cost analysis is based on review of pertinent medical records, assessment of the plaintiff and plaintiff’s home or outside living facility, consultations with plaintiff and responsible relatives, consultations with key health care providers, and reference to applicable resources for care and equipment costs. Several professional associations provide standards of practice and other resources for life care planners, including the American Association of Nurse Life Care Planners ([www.aanlcp.org](http://www.aanlcp.org)) and the International Association of Rehabilitation Professionals ([www.rehabpro.org](http://www.rehabpro.org)). Standards of LCP practice require that assessments performed by the life care planner should not exceed scope of practice of the planner’s professional licensure or certification, e.g., RN, LICSW, CRC.

The **economist** provides three main types of projections: 1) future health care and related costs; 2) lost future earnings and benefits; and 3) loss of



household services. The projection for future health care and related costs typically is based on the life care plan cost analysis and takes into account inflation and life expectancy, among others factors.

**Independent (defense) medical examiners** may be requested; the defense is entitled to a physical and/or psychological examination by a health care provider of their choice. Examiners typically possess clinical expertise in the type of injury plaintiff sustained. For example, a plaintiff alleging cognitive injuries might be examined by a neuropsychologist. Defense counsel provides the examiner with the plaintiff's medical records and applicable imaging studies before the exam. After the exam, the examiner provides a report to defense counsel that includes an opinion regarding the cause, nature and extent of plaintiff's injuries. This report is then produced to plaintiff's counsel. The procedural rules related to independent medical exams vary with state law.

## JURY VERDICT/SETTLEMENT SEARCHES

Jury awards and settlement amounts for particular injuries vary with the trial venue. Thus, each side may conduct jury verdict and settlement searches to determine previous awards and settlement amounts for similar injuries in the same state or geographical area, utilizing fee-based web programs such as Verdictsearch, Thompson Reuters Westlaw™ or Lexis Advance®. In high damage cases, it is especially helpful to research appellate court decisions related to whether an award was either inadequate or excessive. This gives the attorneys the award range appellate courts deem appropriate for a particular injury.

## SETTLEMENT

**Structured settlements** provide periodic payment streams (e.g. monthly,

yearly) and/or future lump sum payments. Potential benefits provided by structured settlements, among others, include payments (including principal and interest) are exempt from federal and state income taxes under IRC § 104(a)(2); payments can be timed to arrive when needed to meet anticipated specific future expenses; payments can continue for plaintiff's life eliminating the risk of plaintiff outliving the funds; inflation escalators can be built in; and age-rating may be available to enhance the payments available for a given cost.

**A Medicare Set-aside Arrangement (MSA)** is an account in which money from plaintiff's settlement proceeds is set aside to pay future medical expenses for related injuries that would otherwise be covered by Medicare. Such future Medicare-covered expenses and when they will arise can be determined by an MSA specialist. If a life care plan has been prepared the expenses can easily be extracted from it. The MSA can be funded either by a lump sum payment or structured payments that deliver funds to the MSA account when they will be needed according to the MSA specialist's analysis.

It is important to note that under the present applicable statutory and regulatory scheme, whether MSAs are required for liability settlements involving Medicare beneficiaries (other than in Workers Compensation cases) remains unclear and a source of disagreement among personal injury attorneys. Therefore, future developments regarding MSAs should be monitored closely.

**Special needs trusts (SNTs)** preserve certain public benefits -- Medicaid and SSI -- for those in need of assistance because of a disability. Funds in an SNT are not considered "available" to the injured person in determining qualification for or continuance of such public benefits and, therefore, do not disqualify plaintiffs from receiving such benefits.

Personal injury attorneys typically consider SNTs whenever settling a personal injury claim for a plaintiff who is disabled and receives needs-based benefits such as Medicaid or Supplemental Security Income. Preserving such benefits can be financially beneficial, and in many cases the benefits are substantial. In addition, SNT funds can be managed in a secure and responsible way through the use of appropriate trustees. SNTs can be funded with structured settlements and thus get the positive features structures offer including the ability to eliminate the risk that beneficiaries will outlive their funds.

## THE LNC ROLE IN EVALUATING DAMAGES IN CATASTROPHIC INJURY CASES

Legal nurse consultants (LNCs) are integrally involved in assisting attorneys to evaluate damages in medical malpractice and other personal injury claims. Attorneys are most likely to seek LNC assistance with catastrophic injury cases of all types because typically they involve complex medical issues, voluminous medical records, and high stakes.

While the LNC role varies with the firm or attorney preferences, LNCs can participate in damages evaluation by:

- Identifying the relevant health care providers, periodically updating the medical records
- Preparing a chronology with medical records excerpts pertaining to damages
- Preparing a "pain and suffering" chronology
- Identifying those injuries resulting from the negligent acts, including whether there is aggravation of a pre-existing or latent condition
- Identifying the experts necessary to opine regarding damages and providing them with the necessary materials to evaluate damages

- Conferencing with the expert and the attorney about the nature of plaintiff's injuries and the impact on prior level of functioning
- Drafting the damages portion of interrogatories or similar discovery requests
- Providing the attorney with medical literature, anatomy drawings or medical terminology definitions to facilitate an understanding of the plaintiff's injuries
- Preparing and editing (plaintiff LNC) or evaluating (defense LNC) the damages portion of plaintiff's demand letter
- Conducting a jury verdict search
- Analyzing itemized liens and other reimbursement claims to determine which items are pertinent to alleged the injuries
- Participating in preparation of demonstrative evidence pertaining to damages for mediation or trial

## CONCLUSION

Skilled LNCs can provide enormous assistance in evaluating damages in catastrophic injury cases. Doing so requires in-depth review and analysis of the applicable medical records and other evidence, as well as a comprehensive understanding of the elements comprising economic and non-economic damages in the applicable jurisdiction. 🐾

## REFERENCES

- The American Occupational Therapy Association, Inc. Functional Capacity Evaluation (n.d.). Retrieved June 15, 2017 from <https://www.aota.org/About-Occupational-Therapy/Professionals/WI/Capacity-Eval.aspx>
- American Psychological Association (2010). Retrieved June 15, 2017 from <http://www.apa.org/ed/graduate/specialize/neuro.aspx>
- Black's Law Dictionary, (10th, ed. 2014)
- Epstein, N. E. (2014). Multidisciplinary in-hospital teams improve patient outcomes: A review. *Surgical Neurology International*, 5 (Suppl 7), S295–S303. <http://doi.org/10.4103/2152-7806.139612>

Glannon, J. W. (2010). *The Law of Torts*, 4th ed. New York, NY

Hemphill, J. (2016). Traumatic brain injury: Epidemiology, classification, and pathophysiology. In M. Aminoff, (Ed.), *UpToDate*. Retrieved June 15, 2017 from <https://www.uptodate.com/contents/traumatic-brain-injury-epidemiology-classification-and-pathophysiology>

Hoffman LA and Guttendorf J (2015). Post intensive care syndrome: risk factors and prevention strategies. *Critical Care*. AHC Media. <https://www.ahcmedia.com/articles/134820-post-intensive-care-syndrome-risk-factors-and-prevention-strategies> Retrieved 7/23/2017

Malik, A. (2017). Neuropsychological Evaluation. In S. Kishner (Ed.), *Medscape*. Retrieved June 19, 2017 from <http://emedicine.medscape.com/article/317596-overview>

N.Y. Est. Powers & Trust Law §5-4.3(a) (Consol. 2017)

Rosenquist, E. (2016). Evaluation of chronic pain in adults. In M. Aronson (Ed.), *UpToDate*. Retrieved June 19, 2017 from <https://www.uptodate.com/contents/evaluation-of-chronic-pain-in-adults>

Sareen, J. (2017). Posttraumatic stress disorder in adults: Epidemiology, pathophysiology, clinical manifestations, course, assessment, and diagnosis. In M. Stein (Ed.), *UpToDate*. Retrieved June 19, 2017 from <https://www.uptodate.com/contents/posttraumatic-stress-disorder-in-adults-epidemiology-pathophysiology-clinical-manifestations-course-assessment-and-diagnosis>

Weinhouse, G. & Young, G. (2013). Hypoxic-ischemic brain injury: Evaluation and prognosis. In M. Aminoff & R. Morrison (Eds.), *UpToDate*. Retrieved June 19, 2017 from <https://www.uptodate.com/contents/hypoxic-ischemic-brain-injury-evaluation-and-prognosis>



**Brian Zorn** is a Partner and senior trial attorney at Faraci Lange, LLP, a personal injury law firm based in Rochester, NY. He is a Fellow of the American College of Trial Lawyers. He is in The Best Lawyers in America under the medical malpractice law, personal injury and product liability sections, and he has been chosen by The Best Lawyers in America as the Medical Malpractice Lawyer of the Year in Rochester, N.Y.

twice and the Product Liability Litigation Lawyer of the Year in Rochester twice. Brian graduated from Syracuse University College of Law in 1977, and for the next year performed a judicial clerkship at the New York State Appellate Division for the Fourth Department. Since then, his personal injury practice has focused on individuals injured by medical malpractice, automobile accidents, defective products and defective premises. To enhance his understanding of such injuries and their impact on the injured individual's life, he attended anatomy courses, including complete dissection of a human cadaver, as well as autopsies and surgeries done by medical school faculty.



**Elizabeth Zorn, RN, BSN, LNCC** joined the Faraci Lange law firm (Rochester, NY) in 1995, providing medical expertise and research in defense of

medical malpractice and other personal injury cases.

A board certified legal nurse consultant with more than 30 years' experience in the legal field, Elizabeth is an active member of the American Association of Legal Nurse Consultants (AALNC), The American Association for Justice and the Monroe County Bar Association. In April of 2013, Elizabeth was named President of the American Association of Legal Nurse Consultants and represented the AALNC at a discussion about health care at the White House in 2012.

She wrote a chapter for AALNC's LNC Principles and Practice, 2nd (2003) and 3rd (2010) editions, several modules in AALNC's LNC Online Course, several JLNC articles, and edited AALNC's "Getting Started in Legal Nurse Consulting." She has served on many national AALNC committees and presented at professional and educational programs and webinars for attorneys and nurses. She has mentored multiple LNC interns at her law firm over the past 12 years. She is also currently serving on AALNC's Scope & Standards and Revised Online LNC Course Committees. From 2010 to 2014, Beth served on the AALNC board of directors. She can be contacted at [elzorn@faraci.com](mailto:elzorn@faraci.com).