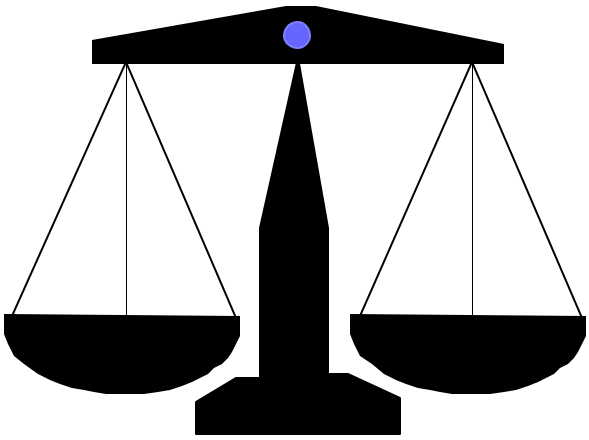
# LITIGATION UPDATE:
# KEEPING PACE WITH NEW DEVELOPMENTS



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## Presentation of Damages

1. Plaintiff testifies that he has recently worked as an automobile mechanic and, until his accident, had planned to open his own shop. However, his injury has allegedly occupationally disabled him. He has made a claim for both past and future lost wages in the amount of $1 million. Although both he, and his attorney, are pleased with the persuasive manner in which he testified at trial, no documentary proof was offered in support of his lost earnings claim. Defense counsel timely objected to the insufficiency of proof of lost earnings and, upon the close of evidence, seeks to dismiss that claim. Should plaintiff now be concerned about dismissal of this claim?

Yes. In Razzaque v. Krakow Taxi, Inc., the Appellate Division, First Department, 238 A.D.2d 161, 656 N.Y.2d 208 (1977) dismissed a plaintiff's award for past and future lost wages as "…entirely speculative" holding:

> Initially, plaintiff's testimony of prior part-time employment, and new employment acquired on the day of the accident, was vague and unsubstantiated by any tax returns or W-2 forms. Thus, plaintiff's past or future earnings were never established with reasonable certainty.

The Razzaque rationale was recently affirmed in Delvalle v. White Castle System, Inc., 277 A.D.2d 13, 715 N.Y.S.2d 57 (1st Dept. 2000). The Appellate Division found that the award for past and future lost wages was based solely on plaintiff's testimony regarding his prior employment and unsubstantiated by any tax returns or W-2 forms. This, combined with a current employment of less than two weeks, was an insufficient foundation for the award to stand. In Galaz v. Sobel & Kraus, Inc., 280 A.D.2d 427, 721 N.Y.S.2d 623 (A.D. 1st Dept. 2001), the Appellate Division again sustained the trial court's preclusion of plaintiff's testimony

as to his alleged loss of future income from a business he intended to open since the plaintiff offered:

> no objective evidence of the alleged business he claimed he was about to open and he had not worked as a mechanic for 11 months prior to the accident. He offered no evidence, beyond his self-serving testimony of his intention to return to work as a mechanic, of any job opportunities and offered no explanation as to why he was not working as a mechanic at the time of his injury.

However, where the plaintiff shows a consistent pattern of earnings – and particularly where the defendant does not challenge such testimony – dismissal may be avoided [Grinnell v. City of New York, 244 A.D.2d 171, 663 N.Y.S.2d 844 (1st Dept. 1997). For a thorough discussion of how a Court handles loss earning claims, see Coniker v. State of New York, 2002 W.L. 32068270 (NY Ct Cl).

Although each case will ultimately depend on its own facts, this discussion should at least alert the practitioner of the need to adequately substantiate his lost earnings claim so that it has credibility beyond plaintiff's self-serving testimony.

2. Plaintiff represents an undocumented alien and, at trial, he presents reliable proof of his client's past and future lost earnings. Defendant offers no proof in mitigation of plaintiff's economic damages but instead argues that plaintiff's status as an undocumented alien (who is not legally authorized to work in this country) precludes any recovery for lost wages. Does plaintiff have a problem?

Probably not; but recent case law does present some concerns.

Previously, Courts have allowed an undocumented alien to recover lost wages. In Collins v. New York City Health & Hospitals Corporation, 201 A.D.2d 447, 607 N.Y.S.2d 387, the Appellate Division, Second Department ruled that:

> …the award of summary judgment with regard to the decedent's lost earnings was improper inasmuch as the record fails to establish, as a matter of law, that any wages which the decedent might have earned would have been the product of illegal activity (see Public Adm'r of Bronx County v. Equitable Life Ins. Society of U.S., 192 A.D.2d 325, 595 N.Y.S.2d 478; Spadaccini v. Dolan, 63 A.D.2d 110, 407 N.Y.S.2d 840, 1 Misc. 2d 659).

More recently, in Majlinger v. Cassino Contracting Corp., 766 N.Y.S.2d 332 (S. Ct. Richmond Cty) Justice Christopher Mega cited the United States Supreme Court decision in Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 122 S. Ct. 1275 (2002) and held "by a parity of reasoning, that the court should not sanction recovery of lost wages by an undocumented alien for work not performed." In Hoffman, the National Labor Relations Board refused to award back pay to an undocumented alien who was unlawfully terminated for union activity "where it appeared that the worker had never been legally authorized to work in the United States."

This issue has divided the trial Courts. In Cano v. Mallory Management, 195 Misc.2d 666, 760 N.Y.S.2d 816 (S. Ct. Richmond Cty 2003) Judge Joseph Maltese refused to deny an illegal immigrant's right to bring a negligence action and specifically declined to expand the United States Supreme Court's holding in Hoffman. Likewise, in September, 2003, Nassau County District Court Judge Howard S. Miller allowed an undocumented alien's claim for unpaid wages but only to the extent of the minimum wage [see Ulloa v. Als All Tree Service, 768 N.Y.S.2d 556].

Hoffman does not appear to have altered New York law which permits an undocumented alien to recover lost wages but plaintiff should not be blind-sided at trial by such an objection.

3. Mr. A was seriously injured in an accident resulting from defendant's negligence. In preparing for trial, plaintiff's counsel referred Mr. A to a well-credentialed physician who

examined him and reviewed his complete medical records; and is now about to testify at trial concerning his findings, diagnosis and prognosis. . In formulating his opinions, the doctor relied upon the unadmitted reports and x-rays of Mr. A's treating physicians and is prepared to use those findings to bolster his testimony. Plaintiff's counsel also intends to offer those reports into evidence. Defendant objects to the doctor's opinions (which are based upon these unadmitted physician reports and tests) and to the introduction into evidence of the treating physician's records. Will defendant's objections be sustained?

(Probably) Yes. Before March 18, 2002, there was judicial authority for permitting plaintiff's testifying doctor to base his/her opinions on the reports of x-rays and MRI tests, although not in evidence. [Torregrossa v. Weinstein, 278 A.D.2d 487, 718 N.Y.S.2d 78 (2d Dept. 2000); Pegg v. Shahin, 277 A.D.2d 271, 654 N.Y.S.2d 395 (2d Dept. 1997); Cohn v. Haddad, 244 A.D.2d 519, 664 N.Y.S.2d 621 (2d Dept. 1997) ("thus, the reports of other physicians contained in each doctor's records generally would have been admissible in this case") Freeman v. Kirkland, 184 A.D.2d 331, 584 N.Y.S.2d 828 (1st Dept. 1992) ("nor did the trial court abuse its discretion in allowing into evidence the complete medical file of plaintiff's treating osteopathic physician, including records, reports and correspondence generated by other medical specialists and laboratories, where the treating physician's testimony at trial establish that the medical records related to the diagnosis and treatment of plaintiff's injuries")].

On March 18, 2002, the Appellate Division, Second Department decided Wagman v. Bradshaw, 292 A.D. 2d 84, 739 N.Y.S.2d 421 and reversed the trend toward the admission into evidence of hearsay physician reports and also restricted a testifying physician's reliance on such materials in support of his/her opinions. The Wagman court held:

- Plaintiff's treating chiropractor could not testify concerning the results of an MRI study contained within a report written by a non-testifying health care professional.

  The Appellate Division held that the "In this case, the MRI report was not, and could not have been, properly admitted into evidence, since the proponent thereof advanced no claim that the original MRI films were lost or destroyed and consequently unavailable."

- It is "reversible error to permit an expert witness to offer testimony interpreting diagnostic films such as X-rays, CAT scans, PET scans or MRI's without the production and receipt in evidence of the original films thereof or properly authenticated counterparts." The Court acknowledged, however, that "once the actual film is received in evidence, any qualified expert may opine an interpretation as to what it shows, since the opinion testimony is now based upon facts which are in evidence before the Court;" but cautioned that even where the actual films are received in evidence (once properly authenticated as business records) a "written report prepared by a non-testifying healthcare professional interpreting, the MRI films, such as the MRI report herein, is not admissible as evidence… (and is) …patently inadmissible hearsay;"

- Not only did the Court bar the treating chiropractor's testimony in support of the admission of the MRI report; but likewise barred his opinions "…that there were herniations, which opinion was at least partially based upon the written MRI report, without first establishing reliability of the written MRI report."

In Adkins v. Queens Van-Plan, Inc., 293 A.D.2d 503, 740 N.Y.S.2d 389 (1st Dept. 2002) the Appellate Division adopted this more conservative approach:

> The court erred in allowing the plaintiff's expert to testify regarding Adkins' medical complaints and to summarize and read statements and findings contained in the reports and records of Adkins' treating physicians, as those reports and records were not in evidence and the physicians did not testify at trial [see Flamio v. State of New York, 132 A.D.2d 594, 517 N.Y.S.2d 756; Deluca v. Kameros 130 A.D.2d 705; Nissen v. Rubin, 121 A.D.2d 320, 504 N.Y.S.2d 106 [also see: Vetti v. Aubin Contracting & Renovation, 306 A.D.2d 874, 761 N.Y.S.2d 903 ("the defendant contends that Supreme Court erred in admitting in evidence the petrographic analysis and accompanying test results. We agree. That document was hearsay and plaintiff made no showing that the document was subject to an exception).

The Wagman decision has also tightened an expert's ability to rely on material which is traditionally "of a kind accepted in the profession as reliable in forming a professional opinion."

Previously, the Court in Hambsch v. The NYC Transit Authority, 63 N.Y.2d 723, 480 N.Y.S.2d 195 (1984) recognized two limited exceptions of the rule requiring opinion evidence to be based upon facts in the record or personally known to the witness. An expert (1) may rely on out-of-court material if it is "of a kind accepted in the profession as reliable in forming a professional opinion"; or (2) if it "comes from a witness subject to full cross-examination on trial." Although the Hambsch court held that "to qualify for the 'professional reliability' exception, there must be evidence establishing reliability of the out-of-court material," that rule had been relaxed until Wagman. Since Wagman, the Appellate Courts have been more restrictive in their approach concerning the material which may be relied upon by a testifying expert in support of his/her opinions under this exception. The danger is that if a court determines that the material was improperly relied upon, the expert's opinions may be struck. See Brown v. County of Albany, 271 A.D.2d 819, 706 N.Y.S.2d 261 (3rd Dept. 2000) ("a medical expert's opinion was held properly excluded where the sole basis was reliance on a report of a non-testifying orthopedist who had treated plaintiff." There was no basis to establish the reliability of that report"). Also see Rosa v. Rinaldi, 270 A.D.2d 384, 704 N.Y.S.2d 891 (2nd Dept.); and contra: Greene v. Xerox Corp., 244 A.D.2d 877, 655 N.Y.S.2d 137 (4th Dept. 1997) where the Court allowed the testimony of a vocational rehabilitation expert based upon a labor market survey he had conducted by telephone.

Once again, these recent cases are brought to the practitioner's attention so that, at the very least, the anxiety felt when such an objection is made at trial will be tempered by an appreciation (and research) of the issues involved.

4. Plaintiff, a laborer, was severely injured when he fell from a scaffold on a construction project. He claims his injuries have prevented him from returning to work and that

he is occupationally disabled. Plaintiff's economist has opined that his inability to return to construction work will result in a multi-million dollar loss of projected future earnings. Although plaintiff's counsel did not submit his client to a vocational assessment, defendant made a demand for an evaluation of his future employability (which would serve to offset his future lost earnings claim). Plaintiff has objected. Will the motion court afford defendant a vocational examination?

It should. Previously, under Kavanagh v. Ogden Allied Maintenance Corp., 92 N.Y.S.2d 952, defendant was entitled to such an examination because plaintiff retained his own vocational expert. In our example, plaintiff has not. In Freni v. Eastbridge Landing Associates, 309 A.D.2d 700, 767 N.Y.S.2d 5 (1st Dept. 2003) the First Department held that a defendant is entitled to a vocational assessment of the (alleged) occupationally disabled plaintiff whether or not plaintiff has elected to have a similar examination [to the same effect: Smith v. Manning, 277 A.D.2d 1004, 716 N.Y.S.2d 844 (4th Dept.)].

5. Dr. Jones treated plaintiff for several years after his accident. He was subpoenaed for trial but has not responded. As an alternative, plaintiff's counsel subpoenaed, and produced at trial, Dr. Jones' office manager to authenticate and introduce as evidence - through the required statutory litany as set forth in CPLR §4518(a) –the doctor's treatment records. Are they admissible?

For the most part, Yes. Although hospital records are statutorily admissible via certification under the governing statute [CPLR§4518 (b)], physician office records do not enjoy the same statutory vehicle for admission. However, under Wilson v. Bodian, 130 A.D.2d 221, 519 N.Y.S.2d 126 (2d Dept. 1987) a physician's office records, once supported by the proper statutory foundation, "…are admissible in evidence as business records. Similar to hospital

records, it is the business and duty of a physician to diagnose and treat a patient's illness. Therefore, entries in the office records germane to diagnosis and treatment are admissible including medical opinions and conclusions." However, illegible entries in the records will not be admitted.

**Recent CPLR Amendments**

CPLR §3017 (effective: November 27, 2003) provides:

> In an action to recover damages for personal injuries or wrongful death, the complaint, counterclaim, cross-claim, interpleader complaint and third-party complaint shall contain a prayer for general relief but shall not state the amount of damages to which the pleader deems himself entitled.
>
> However, the pleading must state whether the amount of damages exceeds the jurisdictional limits of all lower courts. A defendant, however, may request a supplemental demand setting forth the total damages to which the pleader deems himself entitled; and this demand is to be provided within fifteen days of the request.

CPLR §4016 (effective: November 27, 2003) statutorily authorizes:

> In any action to recover damages for personal injuries or wrongful death, the attorney for a party shall be permitted to make reference, during opening statement and/or during closing statement, to a specific dollar amount that the attorney believes to be appropriate compensation for any element of damage that is sought to be recovered in the action. [See Tate v. Colabello, 58 N.Y.2d 84, 459 N.Y.S.2d 422 (1983)].

There are protections built into the statute for a defendant in that, if such a reference is made by plaintiff's counsel, "the court shall, upon the request of any party" inform the jury that the "attorney's reference to a specific dollar amount is not evidence," but merely argument and that the "determination of damages is solely for the jury to decide."

CPLR §3122 has been amended. CPLR §3122(a) requires that a written authorization by the patient accompany a subpoena duces tecum for the production of a patient's medical records.

Further, the subpoena must state in conspicuous bold face that the records shall not be provided unless the subpoena is accompanied by such an authorization.

CPLR §4111 (effective July 26, 2003) Itemized Verdict in Medical, Dental or Podiatric Malpractice Actions

CPLR §5031 (effective: July 26, 2003), revised Article 50A: Periodic Payment of Judgments in Medical and Dental Malpractice Actions. [Also see: Desiderio v. Ochs, 100 N.Y.2d 159].

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