How to De-Bunk and Explain Plaintiff's Voodoo Economics to Juries in Catastrophic Injury Cases

IADC Annual Meeting
Quebec City, Quebec
July 9-14, 2017

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I. Supplemental Damages Scenario

Additional Facts

After Lucy McReynolds was found, covered in boiling oil, her co-employee called 911. Emergency medical technicians with the local volunteer fire department arrived, removed her clothing, administered saline and pain medication, covered her with sterile dressings and transported her to the local hospital.[1] The hospital, a level III trauma center, did not have medical specialists on site, so Lucy was flown by helicopter to the University of Virginia Medical Center which had a burn unit. She was admitted to the Intensive Care Unit and for treatment of burns which covered 35% of her upper body, face, neck and arms requiring extensive skin grafting, for 73 days, resulting in hospital bills of $1,617,345.[2] During her hospital stay, she was treated for her preexisting diabetes, and also became septic due to a hospital based wound infection, requiring a readmission to the ICU. Physicians who treated her in the hospital also billed for a total of $375,000.

Wrongful Death Scenario (from Fact Pattern)

Ultimately, after a week of treatment, infection set in that would not respond to medication and she contracted sepsis. She passed away nine days after the incident from infection caused by the burns. She was surrounded by her five children when she passed.

Alternative Injury Scenario

Lucy survived her injuries, but remains permanently disabled. Upon discharge from the hospital, Lucy received daily in home health care, which provided assistance in dressing changes, intravenous antibiotics and activities of daily living (ADR's). One of her nieces quit her job at Arby's where she made $7.50 per hour, and moved in with her to assist when the home health nurse was not there, assisting Lucy with her activities of daily living, housekeeping and yardwork.

Lucy is no longer able to work and now receives as income only her monthly social security payments of $1482.00.[3] Prior to the accident, she worked 30 hours a week at the All Suites Hotel, earning $7.25 per hour, Virginia's 2017 minimum wage, or $217.00 per week before taxes. She averaged $20 per day in tips, which she never reported on her income tax. In an average year, she made around $10,875.00, or $906.25 a month. Virginia has not raised the minimum wage since 2009. Since she was injured at work, she received benefits from the All Suites Hotel's insurance carrier, which also paid all of her medical bills. She received temporary disability (TD) benefits equaling 66 2/3% of her regular wages based upon her earnings for the 52 weeks prior to the injury. She received TD benefits for 14 months and then was awarded permanent disability benefits which she will receive until she is eligible for Social Security at age 67. The employer's workers' compensation insurance carrier, which paid a negotiated rate for medical bills, has asserted a $356,000 lien on the hospital bill and $175,000 on the physicians' bills.

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[1] See, K Allison, K Porter, Consensus on the prehospital approach to burns patient management, Emerg Med J 2004; 21:112–114 (online at http://www.sciencedirect.com/science/article/pii/S0965230203000663); Cuttle L, et al. A review of first aid treatments for burn injuries. Burns (2009)(online at http://www.burnsjournal.com/article/S0305-4179(08)00352-5/fulltext).

[2] Treatment Costs of Severe Burn Injuries, http://www.paradigmcorp.com/blog/treatment-costs-of-severe-burn-injuries/. See, I. Sahin, S. Ozturk, D. Alhan, C. Açikel, and S. Isik, Cost analysis of acute burn patients treated in a burn centre: the Gulhane experience; Mirjana Milenkovic, M.A., C. Allison Russo, M.P.H., and Anne Elixhauser, Ph.D., Hospital Stays for Burns (Agency for Healthcare Research and Quality, January 2004).

[3] Todd Campbell, Americans' Average Social Security at Age 62, 66, and 70 (online at https://www.fool.com/retirement/2017/03/17/americans-average-social-security-at-age-62-66-and.aspx).

Lucy's treating physician, Dr. Smith, a plastic surgeon, noted in her chart that she believes Lucy will continue to require treatment, including further skin graft procedures for severe scarring caused by the burns, particularly on her neck and lower face. Lucy requires daily use of lotions and dressings. She is in constant pain. After meeting with Lucy's counsel, Dr. Smith referred her to Dr. Jones, a physician with expertise in neuroscience, radiology and psychology, who expressed the opinion that she has chronic, demonstrable pain. Dr. Jones examined the plaintiff and also relies upon fMRI brain scanning as support for his opinion, stating that the plaintiff demonstrates increased activity or blood flow in areas of the brain which objectively demonstrate pain.[4] Dr. Jones is now a retained consultant, and issued a report of his opinion. The plaintiff is treated, on referral by Dr. Smith, at a pain management clinic, where she was prescribed long term opioids to which she claims to have developed dependence. She is allergic to NSAIDS. Her pain physicians have suggested implantation of a pain pump, which Lucy has declined on several occasions. Lucy continues to have nightmares about the injury, and is unable to go into restaurants or hotels. She is on anti-anxiety medications prescribed by her treating family physician, but refuses to go for counseling as recommended.

Potential Economic Damages

1. Past medical bills:
    a. EMT charges: $12,500
    b. Emergency Room admission at local hospital
        i. Hospital: $7500.00
        ii. ED physician: $1250
    c. Life flight: $17,500
    d. UVA admission: $1,617,345.00
    e. Hospital physicians: $375,000.00

2. Future Medical Care (Life Care Plan): Required future care including monthly physician visits, yearly hospital admissions for scar revision and treatment, implantation and maintenance of a pain pump, treatment for infections, antibiotics and topical creams, assistance devices in bedroom, showers and bathrooms, psychologic counseling, and installation of an in home lap pool at $10,000. The report assumes 9.1 years at yearly cost of $67,250 or $611,975, with minimal reduction to present value due to her age.

3. Lost income: The plaintiff's economist projected that Lucy would work 30 hours a week until age 81.1, or 9.1 years, on the assumption that she had to work to make ends week and would not "retire." The total projected lost wages were $98,000, with minimal reduction for present value analysis and no use of any risk factors to reduce the total figure.

4. Lost household services: Plaintiff's economist projected that Lucy would have performed an average of 3.0 hours a day and that replacing those services in the future will cost $15.00 per hour, with total damages $147,825. Lucy did not hire anyone since her niece lives with her.

II. Analyzing Damages Case
    a. What are the potential claims and recoverable damages
        i. Wrongful Death action

[4] See, Gracely, R. H., Petzke, F., Wolf, J. M. and Clauw, D. J. (2002), Functional magnetic resonance imaging evidence of augmented pain processing in fibromyalgia. Arthritis & Rheumatism, 46: 1333–1343(online at http://onlinelibrary.wiley.com/doi/10.1002/art.10225/full). See also, Kevin Davis, Personal injury lawyers turn to neuroscience to back claims of chronic pain, ABA Journal Online Mar. 1, 2016 (http://www.abajournal.com/magazine/article/personal_injury_lawyers_turn_to_neuroscience_to_back_claims_of_chronic_pain).

1. Past income:
2. Future lost income capacity?
3. Other?

ii. Survival action
   1. Is there a separate claim for decedent's pain and suffering between injury and death? See, *McDavid v. United States,* 213 W.Va. 592, 584 S.E.2d 226 (2003)("We hold that in a wrongful death action, a decedent's beneficiaries may recover damages for a decedent's pain and suffering, endured between the time of injury and the time of death, where the injury resulted in death but the decedent did not institute an action for personal injury prior to his or her death.").
   2. Are there economic damages, such as medical bills or lost wages in time between injury and death?

iii. Claims by bystanders. See, *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521, 526 (1980)("The law should find more than pity for one who is stricken by seeing that a loved one has been critically injured or killed."). *Heldreth v. Marrs*, 188 W.Va. 481 425 S.E.2d 157 (1992) "[A] plaintiff who witnesses or has a sensory observation of a person closely related to the plaintiff suffer critical injury or death as a result of the defendant's negligence should be allowed to bring an action for negligent infliction of emotional distress.").

iv. Alternate scenario: action for personal injuries.
   1. Difference in damages available versus wrongful death.

b. Factual basis for damages

i) Past economic damages

(1) Medical damages

(a) Assemble and analyze all medical bills

(b) Identify the amount billed

(c) Identify the amount actually paid

(d) Identify any liens

(e) Identify any charitable care (i.e., daughter assisting with care)

(2) Disability and permanence

(a) Analyze medical records for treater account of disability

(i) Tactical decision whether to depose treaters

1. Preserve negative vs. positive evidence
2. Avoid surprise at trial

(ii) Evaluate evidence plaintiff did not follow reasonable care instructions.

(b) Confirm continuing disability

(i) Conduct investigation and discovery

(ii) Consider surveillance if evidence of behavior inconsistent with disability

1. Suggestion in medical record
2. Pain management records
   a. Did plaintiff sign a patient contract?
   b. Regular blood testing for signs of abuse or diversion?
3. Other evidence (neighbors, co-employees)

(3) Lost wages

(a) Confirm wage history

(b) Confirm dates of employment
(c) Confirm plaintiffs is actually not working
(i) Consider surveillance if independent evidence shows plaintiff is working
1. Mention in record
2. Third party report
3. Other

ii) Future economic damages
(1) Future medical damages
(a) Compare to current medical care
(i) Are any treating health care providers
(ii) Offering opinion on permanency, future care, causation
(iii) Working with or paid by plaintiff's counsel
(b) Identify retained experts?
(i) Life care planners
(ii) Rehabilitation physicians
(iii) Psychiatrists or psychologists
(iv) Neuroscience? Neuropsychologists? Other?
(c) Admissibility (*Daubert*) issues?
(i) FMRI testimony?

iii) Lost future income
(1) Identify plaintiff's theory of recovery
(a) Lost income vs. lost income capacity. See, Stephen M. Homer and Frank Slesnick, The Valuation of Earning Capacity: Definition, Measurement and Evidence, 12 Journal Of Forensic Economics 13 (1992). See also, *Liston v. University of West Virginia*, 190 W.Va. 410, 438 S.E.2d 590 (1993)(Future "loss of earning capacity can be proved in two ways. The first step in either approach is that the plaintiff must establish that there exists a permanent injury which can be reasonably found to diminish earning capacity. The plaintiff may then rely on lay or the plaintiff's own testimony to acquaint the jury with the injury's impact on his or her job skills. When this is done, the jury may assess a general amount of damages for diminished earning capacity….Where a plaintiff wishes to quantify the loss of earning capacity by placing a monetary value on it, there must be established through expert testimony the existence of a permanent injury, its vocational effect on the plaintiff's work capacity, and an economic calculation of its monetary loss over the plaintiff's work-life expectancy reduced to a present day value….").
(2) Comparable historical wages and benefits to projection.
(a) Courts allow "lost earning capacity," meaning that a plaintiff might very well recover more in tort damages than could actually be earned. Homer and Slesnick, supra, at 14.
(b) But, contrast what is claimed with past actual earnings on cross examination of the plaintiff and economic experts effectively attacks the credibility of the claim.
(3) Identify and verify other claimed lost income (retirement, Social Security)
(4) Tactical decision whether to depose

(a) Employer representatives
(b) Other

(5) Identify and retain expert consultants
(a) Vocational
(b) Economist
(c) Physicians
(d) Other

iv) Analyze household services claim
(1) Plaintiff and other fact testimony
(2) Other bases for assumption
(a) Literature on work done
(b) Literature on work value
(3) Consider expert witnesses
(a) Tactical decision: credible to challenge?

b) Economic projections
i) Identification of accurate costs to be projected
(1) Lost wages
(2) Fringe benefits. See, Ralph R. Frasca (1992) The Inclusion of Fringe Benefits in Estimates of Earnings Loss: A Comparative Analysis, 5 Journal of Forensic Economics, 127 (Spring/Summer 1992).
(3) Other: lost retirement or social security benefits

ii) Time frame
(1) Starting point of projections
(2) Future projection/life expectancy

iii) Calculation of inflation rate

iv) Calculation of reasonable investment rate

v) Reduction to present value
(1) Determine applicable law. *Chesapeake & Ohio Railway v. Kelly*, 241 U.S. 485 (1916)("[I]n computing the damages recoverable for the deprivation of future benefits, the principle of limiting the recovery to compensation requires that adequate allowance be made, according to [the] circumstances, for the future earning power of money; in short, that when [future] payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only."); *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S. Ct. 2541, 76 L. Ed. 2d 768 (1983)(In action brought under the Longshoremen's and Harbor Workers' Compensation Act, district court erred in applying a total offset rule under which future inflation was presumed to equal future interest rates with those factors offsetting in determining present value of a future stream of income) with *Kaczkowski v. Bolubasz*, 421 A.2d 1027, 491 Pa. 561 (1980)(Under "total offset" approach, reduction to present value not required under Pennsylvania law) and
(2) Analyze methodology. William F. Landsea, Inflation and the Present Value of Future Economic Damages, 37 University of Miami Law Review 93 (1982); Stephen M. Homer and Frank Slesnick, Definition, Measurement and Evidence, Thomas J. Hurney, Jr., Tort Damages: The Adjustment of Awards for Lost Future Earning

Capacity to Compensate for Inflation and Increased Productivity, 7 University of Dayton Law Review 139 (1981-1982).

(3) Analyze

(a) Discount rate used by plaintiff. See, Thomas O. Depperschmidt, The Problem Of Inflation And The Offset 'Solution' In Tort Damage Awards, 18 Mem. St. U. L. Rev. 51 (1987).

(b) Inflation and productivity offsets.

(c) Use of LPE to reduce damages. Michael L. Brookshire, Frank Slesnick, John O. Ward, Plaintiff and Defense Attorney's Guide to Understanding Economic Damages §§3.1-3.9 (2007).

(d) Use of annuitist to counter

B. Reduction Strategies

a) Statutory

i) "Amount paid" limitation on medical bills.

ii) Affordable Care Act. Eileen L. Moss, Ann M. Songer, and Paul H. Mose, Reducing Past and Future Medical Damages Through the Affordable Care Act, For the Defense 45 (DRI July 2016).

iii) Statutory restrictions on joint and several liability.

b) Factual

i) Did your client or carrier pay any of the plaintiff's expenses?

(1) Workers' compensation

(2) Med pay

c) Third party complaints

d) Other litigation

i) Other suits arising from same incident.

ii) Class or mass tort litigation that benefits plaintiff.

(1) Asbestos claim settlements and separate premises litigation.

(2) New England Compounding Pharmacy litigation class settlement; plaintiffs seeking further recovery in separate litigation against physicians who used contaminated steroids.

(3) Transvaginal mesh – federal MDL against manufacturers and separate state litigation against implanting physicians and hospitals.

C. Strategies for Jury communication

a) Discovery strategies: In cases involving large, future economic loss claims, deposing and cross-examining an opposing economic loss expert can have great benefit. 53 No. 9 DRI For Def. 36.

i) Obtain key concessions: In her article, "Cross-Examining an Expert Economist at Trial," Lisa C. Wood describes key pre-trial tactics to dismantling the testimony of an economic expert. Lisa C. Wood, Cross-Examining an Expert Economist at Trial, Antitrust, Fall 2005, at 80, 80–81.

(1) Woods opines in her paper that a defense attorney should identify all sources of information on which the expert relied in formulating her opinions, all witnesses interviewed, and every document reviewed or considered by the expert or her staff. Id. During a deposition, generally, a defense attorney should seek to gather the necessary information to pursue the lines of cross-examination without asking

questions that will reveal your trial strategy. Id. More specifically, the attorney should examine the expert in detail about her prior work experience and educational background, as well as any demonstrative materials that the attorney has prepared to aid her presentation or what materials the expert intends to use at trial. Id. If appropriate, one should request production of all drafts and subsequently identify any person who reviewed, commented upon, edited, or otherwise assisted in the preparation of the report. Many times the economist will have his or her staff "run the numbers" and place the numbers from the records into a spreadsheet. This can, on occasion, be an opportunity to truly determine whether or not the economist knows the case.

Woods recommends that a defense attorney obtain through discovery and otherwise "all of the expert's prior writings, depositions, and trial testimony" from various defense organizations, confer with counsels who have opposed the expert in the past, and review the data featured on forensic economic websites. Id. at 83. Defense attorneys should use this information to obtain admissions on issues on which the expert has not opined such as affirmative defenses or counterclaims that can be used at trial. Id. Further, a defense attorney should review the information submitted to the expert by the Plaintiff's counsel, and question the witness regarding prior injuries and other information relevant to the calculation of damages. Id.

Overall, counsel for the defense has to know the low hanging fruit that is available with the Plaintiff's economist. The numbers that an economist can put on the blackboard are staggering if they go unchallenged. The Plaintiff's economist often uses the life care plan or the numbers associated with the expert. These experts are well versed on getting the "big numbers" in front of the jury on multiple occasions during the course of a trial.

(2) During the deposition of the Plaintiff's expert, it is important to determine the assumptions that the expert has relied upon. In particular, the types of government surveys or numbers from the Department of Labor. Often, the Plaintiff's expert will try and overextend if left unchallenged. Another pointer offered by Woods in her article is that she explains the importance of pinning the expert down on all opinions, as well as those facts and assumptions underlying each opinion without tipping off the opponent of your best cross-examination. Id. She recommends that the defense attorney, "lock the expert into an approach, understand why she did not use different methodologies to analyze the issue, and confirm that the work reflects the expert's best effort and analysis of the issues. If applicable, then, point out contradictory approaches and theories and have the expert concede those approaches are scientifically respected and would have a different result." Id. at 80.

(3) During the deposition, a defense attorney should also inquire about any unfinished work and request for the disclosure of the results well before trial. Id.

(4) Identify speculation: A defense attorney should seek to identify elements of the underlying case of which the expert lacks knowledge to make the expert appear unreliable. Some of the matters in which you can obtain concessions allow the defense to show the unreliability of some of the assumptions by the Plaintiff's expert.

It is almost without exception that the expert will not have talked with the plaintiff or any of the medical providers in the case. The expert makes some very broad assumptions usually based on the simple reading of a deposition that may or may not paint the entire story. Speculation usually is found in the areas of work life expectancy, work that is available to the plaintiff and the overall lack of use of "free benefits that will consistently be available for the plaintiff.

ii) Consider pretrial challenge

(1) Depending on the expert's underlying theory or approach, a defense attorney should make a preliminary *Daubert* challenge or a relevancy challenge. 31 Am. Jur. Trials 287 (Originally published in 1984).

(2) The Economist often lends herself to challenging under the *Daubert* standard many of her opinions. At worst, you have framed the issues that are concerning and that the Court should be mindful of as the trial progresses. If the Court is aware of the weaknesses of the expert, it can be re-addressed when the expert is actually put on the stand.

b) Trial strategies:

i) Use of defense experts: When considering hiring a defense expert, a defense attorney has a couple of choices to counter the plaintiff's expert. First, an authoritative forensic economist with a national reputation can clearly be effective in certain jurisdictions and cases. Many defense counsel decide to retain an expert that is from the local college or business community that has a good reputation. This approach has its benefits in that you can go and spend time with the expert as needed to truly help you understand the weaknesses of the Plaintiff's economic theories. As the defendant's forensic economist, it will then be his task to examine the report and deposition of the plaintiff's economist and its strengths and weaknesses. This assessment is imperative to making pre-trial challenges to an expert report and may be used in identifying weaknesses to be discussed during a deposition. It is not uncommon to use the economist solely for the purpose of providing a challenging affidavit in a *Daubert* motion. It is truly a judgement call on whether to actually call an expert in your case in chief. A good Plaintiff's attorney will get major concessions from your expert (once again putting big numbers in front of the jury). Therefore, the damages in a case have to be so severe and profound that you really have no choice to call a countering economist.

(1) Pretrial *Daubert* challenge or motion in limine

(a) Everyone that has a substantial trial practice will be aware of The United States Supreme Court case of *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579 (1993), wherein the Court imposed on the trial judge the "gatekeeping" responsibility of assessing proffered expert testimony to "determine at the outset, pursuant to Rule 104(a)2 whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." 509 U.S. at 592, 113 S.Ct. 2786. Thus, *Daubert* requires a trial judge to conduct the "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 592–93, 113 S.Ct. 2786. It is not uncommon for a trial judge to simply "pass" on dealing with these issues until such time as evidence has been developed and the case is well into the trial.

(b) Since *Daubert*, trial judges have in many jurisdictions used a flexible reliability test. *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)* under which trial judges preclude expert testimony when "the process or theory underlying a scientific expert's opinion lacks reliability." *Lanigan*, 419 Mass. at 25-26; see also, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

(i) A reliable methodology upon which an expert opinion is based must be one that is "generally accepted" as reliable in the relevant scientific community. *Frye v. United States*, 54 App.D.C. 46, 47 (1923).

(ii) When drafting a Daubert challenge, it is important that a defense attorney review the sources upon which the plaintiff's expert relied. 53 No. 9 DRI For Def. 36. If an expert disagrees with quoted sources or key principles from cited sources, the testimony will be considered unreliable, and can thereby be thrown out under *Daubert* challenge or even excluded under Federal Rules of Civil Procedure 26 and 37. 53 No. 9 DRI For Def. 36.

(c) Motion in Limine

(i) In order to testify as an expert, Rule 702 requires the testimony of the proposed witness to satisfy three requirements: (1) the witness must be qualified as an expert "by knowledge, skill, experience, training or education," (2) the subject matter of the testimony must be "scientific, technical, or other specialized knowledge," and (3) the expert's knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702. *Davis v. ROCOR Int'l*, 226 F. Supp. 2d 839, 841 (S.D. Miss. 2002). The analysis under a motion in limine largely mirrors that which is applied in the *Daubert* challenge.

(2) Debate: creating a "floor" versus rebutting plaintiffs - John L. Jeffers, How to Present Complex Economic Evidence to Jury, The Litigation Manual: Trial 200 (ABA 1999)(discussing putting focus on damages and the need to make a record). There are numerous great papers out in the defense world related to "anchoring the damages" with help from an economist.

(a) The use of a defense economist is only advisable if the plaintiff's economist has utilized an improper approach to help create an appealable record. At that point, your economist may be subject to a deposition or a challenge of his or her affidavit. These are all decisions that are made in conjunction with the client, the economist and many times a jury consultant.

(3) "Critique" experts who don't express ultimate opinions. The economist that is a worthy adversary has usually been deposed in the hundreds of times. Many defense experts that "have the book" on an expert will pass on taking the deposition of the expert if they have faced them in the past. It is often the strategy of the defense to simply know the concessions that are available and then proceed to trial.

ii) Use of cross examination

(1) When preparing to depose or cross-examine an opposing economic loss expert, a defense attorney should consider the expert's qualifications as well as the expert's general methodology, calculations and assumptions. 53 No. 9 DRI For Def. 36. The economist expert often will have limited expertise in a certain area that truly does open the expert up for stiff cross examination.

(a) Qualifications:
   (i) If has previously declined to admit any of the expert's opinions in any prior proceeding or a decision was made not to offer the individual as an expert at trial, ask questions regarding these cases and the opinions in question. Wood, Cross-Examining an Expert Economist at Trial, Antitrust, Fall 2005, at 80, 82. It is also will serve you well to find any *Daubert* motions and orders from other defense counsel that have gone against the specific economist. The economist for the Plaintiff should be challenged at every turn in the case. Once an expert has been stricken or had certain opinions challenged and confirmed by Court, the defense has a solid basis for challenging the expert.
   (ii) Identifying areas of inconsistency between the expert's current opinion and her prior writings and testimony will make the expert seem less credible to a jury. Lisa C. Wood, Cross-Examining an Expert Economist at Trial, Antitrust, at 82. Similarly, scrutinize all the supporting expert opinions and narrowly define the limits of an economic loss expert's qualifications to make a *Daubert* challenge or contest a future economic loss projection in front of a fact-finder. 53 No. 9 DRI For Def. 36. This strategy will also work well when an economist states that he or she has testified for both the defense and the plaintiff. The "shading of the expert's opinions" will be evident on most occasions by reviewing the trial or deposition testimony. The expert will often state that they have worked for the defense but when challenged they will admit that they have not been "deposed" or given sworn trial testimony for the defense.
   (iii) An attorney may question the qualifications of an expert witness by challenging their knowledge about the underlying type of work that is involved in the case. By painting an expert as a professional witness by identifying the party for which the expert has repeatedly testified, and asking questions about the expert's hourly rate and how much legal consulting and witnesses comprises of her total income, a defense attorney can effectively discredit an expert. Lisa C. Wood, at 81. Although these types of questions are basic ways to attack an expert, it is amazing how the ties to the Plaintiff's counsel are often not exploited by the defense.

(b) Facts or data: By probing factual questions, a defense attorney can discredit a witness without challenging his academic excellence. Simply asking the expert about obscure facts about the plaintiff's work history or the maybe even things that might restrict the work issues. In the right case, you can discredit the plaintiff through questions to the economist expert.
   (i) Review the data upon which the plaintiff's expert relies and distinguish that data from the facts of the particular case. Wood, at 81. The questions that economic experts find most difficult to answer on cross-examination are those regarding how an expert's conclusion would change if the facts were different than how the expert had viewed them. Wood, at 81.

(c) Calculations and assumptions:
   (i) The underlying calculations and assumptions, as well as those methodologies used to generate them, should be examined by the defense attorney for "loose

threads" to unravel during cross-examination. 53 No. 9 DRI For Def. 36. If you find a simple math mistake in the expert's work papers, obtain an admission by the expert that she is relying on the spreadsheets for her opinions, and then expose the mistake to the jury. Wood, at 82–83.

(ii) Unlike forensic economists, general economists deal with large problems of the economic system that deal with groups, and therefore tend to analyze these problems in a highly aggregated fashion. 31 Am. Jur. Trials 287 (Originally published in 1984). A defense attorney should discredit the expert's opinions as based on incorrect or implausible assumptions in consideration to the facts of the case. Wood, at 81–82.

(iii) Wood describes how a defense attorney should go about discrediting an expert in this way: "…use the deposition transcript to have the expert list for the jury every assumption in her model. Box her in, again, by asking, "Are there any other assumptions that you used or relied on?" and, "Is that all?" Wood, at 82. Wood recommends that the defense attorney write the assumptions down on a screen or board for the jury to read, and ask the expert to agree that, if any one of these assumptions is "not right" then the whole model fails. An alternative approach suggested by Wood is to "ask the expert: 'If your assumptions were mistaken, then you would not have the same opinion, correct?' If she refuses to concede the point, ask her if her assumptions matter. Then attack her assumptions, preferably through other witnesses who will not understand the relevance of your questions." Wood, 82. In theory, invalidating the assumption will invalidate the conclusion. Id.

(iv) A defense attorney can also use a plaintiff's expert to bolster his own expert's argument by seeking validations from a plaintiff's expert regarding assumptions, economic theories, and factual matters that the defense attorney's own expert intends to rely upon. Wood, at 82.

iii) Use examples and story telling. Benjamin Reid, The Trial Lawyer as Story Teller: Reviving an Ancient Art, The Litigation Manual 157 (ABA 2008). An effective trial method that is often used is to provide analysis that challenges the reliability of the expert's model or opinion by showing that "correcting or changing only a single factor" of the analysis eliminates a portion of the claimed damages. This can be a tactic that is used to chip away at an effective economist expert. Under this method, the defense attorney will accept the entire model of the opposing expert, but then show the effect of changing a single assumption can cause a wide swing to the damages that are being claimed. Wood's paper is instructive of this theory: "Have the expert explain what her model would predict under a different set of facts. For instance, 'If there were only one pharmacy in town, would your model still predict that there would be lost profits?' If you are able to introduce evidence of a scenario that unfolded differently than the expert predicted using her model, you will have demonstrated effectively that the expert's all-important model is flawed." Id.

(1) An alternative form of questioning would be to directly seek an admission by the expert regarding what additional facts would change her opinion. Wood, at 82.

iv) General Advice

(1) Defense attorneys should keep the cross-examination of an expert short by only focusing on the "facts" that are understandable to the jury. It goes without saying that any time you cross examine an expert, the use of graphs, tables, excellent power point slides or every day examples to provide the jury with some basis for understanding specific criticism of the expert witness are always ways to challenge the testimony.