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ACTUARIAL TESTIMONY

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- The role of the actuary in providing expert witness testimony in the courts
- Practices in Canada and the United States
- Bases used to calculate actuarial values
- Professional standards and guidelines

MR. PATRICK LANDRY: We will discuss actuarial testimony and the actuary's role, practices in the United States and Canada, and professional standards and guidelines. In particular actuaries have been providing expert testimony in courts for years. We have provided expert advice in the areas of personal injury, fatal accidents, marriage breakdown, and pension plan issues. Each of the panelists that we have here is an expert in one of these areas. They'll be sharing some of their experiences with you.

Our panel includes Ian Karp, an actuary with Karp Actuarial Services in Vancouver. Ian has had considerable experience in actuarial work in these areas, and in particular, he has been practicing actuarial evidence work in British Columbia (BC) for ten years. He has provided actuarial evidence on numerous occasions to the Supreme Court of BC. In addition, he is currently a member of the Canadian Institute of Actuaries Task Force on the Division of Pension Benefits upon marriage breakdown.

We also have Mr. Bill Smith, who is head of the Pension Section of the Society. He spends about 10% of his time working in pensions and has been practicing in this area for the last 30 years.

Finally, there's Mr. Bill Flahavan, a Los Angeles lawyer, who has spent the last 17 years in personal injury litigation. Bill has authored the California Personal Injury Practice which provides the rules on evidence in the California courts. Bill will be giving us his impression of the role of the actuary in court.

For those of you who are not familiar with the laws in Canada, each province has its own laws on civil litigation and personal injury and family laws on marriage breakdown. The laws in BC are slightly different than those of the other provinces which is similar to the way the laws vary by state in the United States.

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The Canadian Institute of Actuaries (CIA) has implemented recommendations on the standards for actuaries in practicing actuarial testimony. These recommendations are actually quite general. However, the CIA is currently preparing recommendations on the standards of the division of pension benefits upon marriage breakdown. These recommendations will actually include what interest rates and which mortality tables might be appropriate in valuing pension benefits on marriage breakdown. The recommendations are only draft at this point and are being reviewed by all actuaries in Canada.

We'll start off with Ian. In his practice, he spends about 40% of his time on personal injury cases, about 30% on fatal accident cases, about 20% on matrimonial matters, and another 10% on other items.

MR. IAN KARP: I'm going to be talking about three types of cases: personal injury, fatal accident, and the pension/matrimonial area.

PERSONAL INJURY CASES

There are four principal headings under which future compensation is generally claimed:

1. nonpecuniary loss (pain and suffering)
2. loss of earnings
3. future expenses (cost of care)
4. investment management expenses

NONPECUNIARY DAMAGES

Across Canada there is a ceiling, currently about $200,000, on nonpecuniary damages. This arises from a trilogy of January, 1978 Supreme Court of Canada judgments, (therefore binding on all courts across Canada), involving young persons catastrophically injured.

The Court set $100,000 as the upper limit for an award for nonpecuniary damages, to be adjusted in line with inflation after January 1978. The Canadian CPI has roughly doubled since, hence the current $200,000 level.

The essential principle here is that money cannot conceivably compensate for tragic injuries; all that money can do is provide "solace" and "...physical arrangements which can make life more endurable."

In effect, $100,000 in January 1978, was found to suffice to provide such solace.

FUTURE LOSS OF EARNINGS

This is calculated as the injured plaintiff's earning capacity, had the accident not occurred, less the plaintiff's residual earning power in view of the accident.

Earnings Projection

The first step in this process is to develop a projection of what the injured plaintiff would have earned, had the accident not occurred. For older plaintiffs who had an established career, a record of what similar employees have done since the accident is a good starting point. For a younger person who has not established any track record, population averages offer the best guide. Based on B.C. population data, the earning capacity of a 25-year-old male who has finished high school is about $750,000, including an allowance for pensions and other employee benefits.

I'll now discuss briefly the actuarial assumptions applied to convert year-by-year projection of loss of earnings into present value.

Net Discount Rate
The net discount rate is the average annual excess of the rate of investment return over the rate of across-the-board salary increase. (Merit and promotion increases, if any, are built into the earnings projection itself.) Obviously, this assumption is important. Pension actuaries will recognize the analogy to a final-pay pension plan in the preretirement period.

When I first began doing this work in 1978, and continuing until 1981, each case required that an economist or actuary develop a projected net discount rate. Significant amounts of professional fees and court time were consumed in debating general economic considerations in each case. This led, in August 1981, to the Supreme Court of BC (pursuant to legislation giving it the necessary power) closing off debate by mandating 2.5% per annum as the difference between the annual rate of investment return and the annual rate of salary increase. Per annum of 3.5% was similarly mandated as the annual real rate of return; thus 1% was implicitly mandated as the real rate of across the board salary increase.

At the time, these assumptions seemed somewhat high. But that was before real interest rates went up and stayed up. In the light of recent years' experience, the mandated rates have been on the low side.

Contingencies
As to the mortality contingency, population tables are always applied. As to the disability contingency, Canada Pension Plan statistics on disability incidence are appropriate.

Income Tax Effects
The law provides that future loss of earnings be calculated ignoring income tax effects. Why is this? It is because the law views the plaintiff's earning capacity as an asset. The role of damages is to replace the asset's fair market value, almost as if it were a physical asset:

> "...it is earning capacity and not lost earnings which is the subject of compensation."

Under this view, it is irrelevant that, to benefit from the earning capacity asset, an individual must first pay income tax. It is also irrelevant that the investment income from an award for future loss of earnings will cause an income tax liability, thereby exhausting the plaintiff's fund before all projected losses have been met.

FUTURE EXPENSES (COST OF CARE)
These are generally projected by a rehabilitation expert, and the actuary converts them to present value. The necessary actuarial assumptions are the net discount rate (prescribed by the court in BC) and the remaining life expectancy (which in turn determines the mortality rates to be applied.) Doctors will often supply specific estimates of remaining life expectancy.

FUTURE COST OF CARE; AUGMENTATION FOR INCOME TAX (GROSS-UP)
As discussed, income tax effects are to be ignored in calculating future loss of earnings. In its January 1978 decisions, the Supreme Court of Canada found

that no allowance for income tax be made in respect of cost of care. In BC, the courts have viewed the Supreme Court of Canada's decisions as binding, and no gross-up is awarded. However, the courts have arrived at a different interpretation in Ontario.

Thus, in Ontario, the courts have decided that the initial fund created to provide for future expenses must be grossed up so that it also pays the income tax on the investment income before exhausting itself. In the McErlan versus City of Brampton case decided in Ontario a few years ago, damages were assessed at $7 million of which $5 million was for future cost of care. Of the $5 million for future cost of care, only $2 million was for the cost of care itself, and $3 million was gross up. (The award was overturned on appeal.)

Courts' Call for Legislation Action
Even when disallowing a claim for gross-up, the Canadian courts have recognized the reality of the tax burden, and have called on the Federal Government to lift the burden by changing the tax laws; no such changes have been made to date.

INVESTMENT MANAGEMENT EXPENSES
The courts generally make an additional award to provide for the hiring of professional investment advice.

FATAL ACCIDENT CLAIMS
These are claims by survivors for loss of support. The counterpart of non-pecuniary damages in a personal injury case is a claim by surviving children for loss of care and guidance of the deceased parent. In BC, about $20,000 is awarded to each child in this regard provided a relatively close parent-child relationship existed. The award has been made to adult children in at least one case. The underlying legislation does not provide for any nonpecuniary award to a surviving spouse.

LOSS OF SUPPORT
Usually, the main heading for a fatal accident claim (analogous to loss of earnings in a personal injury claim) is loss of support.

Calculation of future loss of support involves the following steps:

1. Develop a projection of the deceased's earning power, including retirement pensions and an appropriate allowance for nonpension employee benefits.
2. Where one or more dependents are working -- almost always the surviving spouse -- develop the projected earning power of the dependent (i.e., the spouse.)
3. Calculate the take-home pay corresponding to 1 and 2 above, by deducting estimated income tax payable, as well as Canada Pension Plan contributions, unemployment insurance premiums, employment pension plan contributions (if applicable), and union dues (if applicable).
4. Develop an allocation of family take-home pay among family members (will vary as each child reaches the age at which dependency is assumed to cease, typically either 19 or 22), and thus, derive the amount of each dependent's annual loss.
5. Determine the present value of the amounts in 4 above;

For developing allocation of family take-home pay among family members (No. 4 above), for simplicity, let's ignore the spouse's income, and assume a husband-wife family (prior to the husband's death) i.e., no children. To get from the deceased's take-home pay to loss of support, you have to subtract the portion of

take-home pay the deceased husband would spend on himself. The law in BC now essentially holds, rightly I think, that a 50/50 split is unfair to the wife because it doesn't recognize that there are common family expenses which are reduced very little or not at all by the husband's death.

Calculations based on general population statistics, and taking common family expenses as those involved in maintaining the family home, indicate about one-third of expenses to be common family, one-third the husband's personal expenses, and one-third the wife's personal expenses. The wife's year-by-year loss of support would then be two-thirds of the husband's take-home pay (her own personal expenses plus the common expenses.)

In determining the present value of amounts of lost support, the applicable net discount rates and mortality assumptions would be similar to those in a personal injury case. Of course, allowance must be made for the possible death of both husband (had the fatal accident not occurred) and wife. In the case of the husband, risk of death should apply from date of death; i.e., the probability of survival from date of death to valuation date should be factored in.

Also, court decisions in BC increasingly make reference to the contingencies of remarriage and divorce. Population statistics are available on which to base assumptions. The court uses the actuary's population numbers as a guideline.

Housekeeping Services (Female Deceased)
The law recognizes that the survivors of a wife and mother are entitled to compensation for the housekeeping services she provided. Such compensation is in addition to the claim for loss of support if the wife was working. In a recent BC case, such services were valued at $15,000 per annum for a deceased working mother with a husband, children, and an elderly mother-in-law to look after. The judge called the deceased: "... as a wife and mother ... a truly remarkable person," then gave a voluminous list of the household duties she performed which supports his comment solidly.

Handyman Services (Male Deceased)
Handyman services is the male counterpart of housekeeping services. As the name suggests, it covers work done around the house, car repairs, etc., that now is paid for or done without. A 1986 BC case, involving a longshoreman foreman, set the value of such services at $1,488 per annum.

Investment Management Services
The considerations are virtually the same as in a personal injury case. The surviving spouse's financial acumen may be considered. Thus in a recent case where the surviving husband had considerable business experience and a university degree, no award was made on the basis he should be expected to manage his own funds.

Tax Add-Back (Gross-Up)
As noted, in Ontario personal injury cases, gross-up applies to future costs of care only. In a fatal accident case, however, there is agreement across provinces that tax is to be deducted in the course of calculating year-by-year loss of support and that gross-up is also to apply. The Supreme Court of Canada made this clear in its January 1978 Andrews decision:

> "In contrast with the situation in personal injury cases, awards [in fatal accident claims] should reflect tax considerations, since they are to

compensate dependants for the loss of support payments made by the deceased. These support payments could only be received net of taxes...."

PENSION PLAN ANALYSIS IN MATRIMONIAL ACTIONS

Pursuant to the BC Family Relations Act specifically naming pensions as a family asset, the actuary's work in this area in BC dates from about 1980. BC is the senior province in Canada in this regard. A lump sum division (the husband buys out the wife's interest based on an actuary's valuation) will generally be in order only if the husband has substantial funds. Alternatively, if there is significant equity in a house, the husband can pay out the wife by taking less than one half of the house's value.

There are many difficult and complex issues which arise in this area, but there is one that is most important, at least in the case of a relatively young spouse covered by a final-pay plan. That issue is: should future pay increases be reflected?

The Stokes case, decided by the BC Supreme Court and upheld by the BC Court of Appeal, involved a husband 43 years old who was a member of a noncontributory final-pay defined-benefit plan. The court ruled that assumed retirement age be 60. The actuaries called by each side agreed that, if salary increases were to be allowed for, 6% per annum was an appropriate assumption. The resulting present value of the wife's interest was: $5,052, if salary increases were not allowed for and $22,273, if salary increases were allowed for.

My interpretation of the Court of Appeal's rationale is as follows:

1. In a division at retirement, the wife gets her prorata share of the pension based on all years of service getting equal weight. The wife's counsel argued that, in effect, the wife's share was determined with allowance for salary increases, setting a precedent. But the Court of Appeal determined that, even if this principle was established in the case of division at retirement, it did not necessarily carry over into a lump sum situation, and not this case in particular.

2. The Court then referred to the uncertainty of future events versus the certainty of a lump sum.

3. The Court then commented on the lack of evidence presented regarding various factors which could be relevant, and the lack of material furnished by the actuaries to justify their (mutual) 6% annual rate of assumed salary increase.

   (Note that the mandated net discount rates applicable to personal injury and fatal accident claims have no application here, as a matter of law.)

4. The Court concluded that:

   "When the [wife] elected to take an immediate payment ... she elected to rely on the facts as they existed at the valuation date ... To now take into account future increases in the [husband's] income, with virtually no evidence before us as to future contingencies, would be to assume very large risk of making an inequitable division of the pension."

I respectfully disagree with the Court's decision. I think it resolves all the uncertainty against the wife, with one apparent reason being that it is the wife who wishes a lump sum division. Leaving employment before retirement is certainly a legitimate contingency to consider, and this may have the effect of reducing the allowance for salary increase. Otherwise, if the calculation is based on remaining to pension age, I think salary increase must be factored in by virtue of fundamental actuarial principles.

Other Issues

As I said, there are other important issues in this area; some of them are as follow:

1. Valuation date; years of credit for valuation purposes
2. Mortality assumption; population table or "actively at work" table
3. What allowance should be made for future indexing, in a plan with a history of ad hoc increases?
4. Should the wife's possible death be factored in, or just the husband's?
5. What about the survivor benefits?
6. How should an adjustment for income tax be made?

MAINTAINING OBJECTIVITY IN AN ADVERSARY SYSTEM

Almost every assignment involves being retained by one side in a litigation case. I think an actuary's services should have two aspects:

1. The actuary helps the lawyer do the lawyer's job by:
   a. Helping the lawyer to understand the relevant issues.
   b. Drawing the lawyer's attention to relevant precedent cases.
   c. Advising the lawyer on what other experts' reports are required (e.g., medical report on life expectancy, vocational experts' report on future employability, etc.)
   d. Based on a. through c. above, helping the lawyer to arrive at reasonable instructions to the actuary on the legal aspects of the case.

   Obviously, a lawyer who is an experienced specialist in these cases will require less assistance than an inexperienced lawyer who is involved in few such cases.

2. Once step 1 above has been completed, the actuary must carry out calculations and report findings in an unbiased manner, fully disclosing all factors necessary for a complete understanding and informed interpretation of the report.

   When called to give evidence in court, the actuary should respond to all questions fully and frankly, whether posed by the lawyer that retained him or the cross-examining lawyer.

Examples of Situations that Might Arise

A. Suppose you are the actuary retained by plaintiff's counsel in a fatal accident case. He requests that your calculations not allow for the contingencies of remarriage or divorce.

   I think that it is perfectly in order to carry out such calculations, provided your report specifically mentions the contingencies of remarriage and divorce and their omission.

B. Same as A, but the lawyer requests that you delete any reference in your report to remarriage or divorce. I think that you must refuse, resigning from the assignment if the lawyer persists.

C. You are retained by the plaintiff's counsel in a personal injury case. The lawyer instructs you to calculate present value of future cost of care on the basis that the plaintiff has a normal remaining life expectancy. In response to your request for copies of medical reports, he replies that you need not see the medical reports as the assumption of normal remaining life expectancy is an instruction from him, to be disclosed as such, and is therefore not your concern or responsibility as the actuary.

I think that you cannot do the calculation requested because you must satisfy yourself as to the reasonableness of the assumptions you apply, even if they are instructions from counsel. Where an assumption is within the purview of another category of expert, I think the instruction can be accepted as reasonable if it reflects such expert opinion.

The Canadian Institute of Actuaries' Recommendations in this area (6.01) state:

> "The actuary should recognize that while the expert acts in an adversarial system and is usually retained by one of the opposing parties, the role as an expert witness is to assist the court in its quest for truth and justice. The expert should particularly be aware of the impact that his or her opinion can have on the actions of the various parties. Accordingly, the actuary should present a balanced view of the factors surrounding the actuarial aspects of the questions put to the actuary."

The Recommendations specifically allow actuaries to make assumptions based on counsel's instruction, so long as this is disclosed.

Concerns Raised by the BC Courts

In written comments prepared for the Vancouver Actuaries Club in November 1985, the Chief Justice of the Supreme Court of BC stated:

> "In the last 20-30 years ... we have experienced a new phenomenon -- the expert advocate in many disciplines who is clearly not a disinterested professional. This breed of expert is easy to identify and he has little credibility. Fortunately, this is not often seen with actuaries but it is not uncommon with economic experts, physicians, psychologists and social workers. I think it is essential, if the high regard we all have for actuaries is not to be diluted, for expert witnesses to be models of objectivity and reasonableness."

The Chief Justice's clear view was that disclosing which assumptions represented instructions from counsel did not go far enough:

> "I suspect many of you have been asked to express opinions based on specious assumptions ... It is all very well to say that you are only applying your skills objectively to a set of preselected assumptions, and you can include all the appropriate disclaimers in your report. But your reputation is at stake whenever you give such as opinion ... I suggest that you give careful thought to whether you should associate yourself with such a process."

Two decisions by the Chief Justice in 1987 reflected these concerns, and in particular questioned the relevance of a vocational rehabilitation consultant's report in a case where the injured plaintiff was established in a job before the accident.

A related concern of the courts is that actuaries provide sufficient detail to allow the court to carry out alternative calculations. Thus, in a 1986 fatal accident judgement, the BC Court of Appeal had the following comments regarding the plaintiff's economist's report and the defense's actuarial report:

> "Each report shows what the result should be if the whole of the report is accepted, an unlikely possibility, but omits the formulae needed to apply more reasonable views."

It is extremely difficult, perhaps impossible, to fully answer this criticism in a fatal accident case, because of the nonlinearity introduced by tax considerations. The best you can do is to show your work. By spelling out the calculations which can be easily spelled out, you allow the judge to see how the answer changes if an assumption is changed. In a personal injury case, where tax effects are ignored, it's relatively easy to spell out all calculations fully.

MR. WILLIAM DAVID SMITH: My practice as Patrick indicated has been less than 10% testimonial work. Over the years I remember some cases involving divorce, a lot of personal injury and death cases, and a couple of wrongful dismissals from a job. A couple of times I valued commissions of life insurance agents because I do some work in the life insurance field and understood the background of that. There was a suit that I would like to discuss later regarding the legality of changing future accruals for pension plan benefits for public plans. I've testified in an employer withdrawal liability situations, some sex discrimination issues, and finally at a telephone company rate hearing.

My testimony has been about evenly divided between representing plaintiffs and defendants. I haven't taken any positive steps to cause that, that's just the way that it's happened, but I do like that. I say to the attorneys who are hiring me if asked that I've represented both sides. I want it that way because I view my position in court as being sort of a friend of the court with some special information that the court needs to do its job. Taking both sides at different times implies some balance. I also strive for balance and think we all should.

About two-thirds of the time that I have been hired by an attorney, I have ended up being identified to the other side or testifying in court. Our court system is an adversary system and if we're to be of any help to the one who employs us, we must help him to be an adversary. However, we must be sure that we are not an overt identified party to the use of misinformation or the misuse of information.

I distinguish between two situations: one where we are only providing information to the attorney hiring us and we are not identified to the other side. The second is where we are either identified or we actually give testimony. If I'm only hired to provide information, I will provide everything the attorney hiring me wants. All the possible misunderstandings, the misinformation, the wrong ways of doing it, the mistakes the other side could make, and the mistakes he could make. I will give him everything I can think of.

I'll provide results for any set of assumptions he wants me to use however wild, but I'll always explain to him how it should be done and what is the reasonable range of assumptions. How that information is used or misused by him is not, in my opinion, anything that we have a right to concern ourselves with because we would therefore be interfering with the adversary process. If he can find some way to get the other side to make a mistake, it's certainly not up to us to correct that. I've thought of this many times and I think that this is the correct stance for us to take and perhaps Bill Flahavan will discuss that.

The next step is if we are identified or actually give testimony. At that point, I tell my client how I think the situation should be valued and the reasonable range of assumptions that could be applied and make sure that he understands what my answers to his questions will be. He should also think through the questions that the other side might ask and what my answers to those might be. Then he has to make the decision to use my testimony or not, but he has to live with my opinion and my answers. If he chooses to do that, fine. On the stand I will only suggest those assumptions that I am qualified to make. Any special medical, legal or accounting information I refuse to take the responsibility, of course. When my employer, the attorney, pushes me toward assumptions or methods that I think are unbalanced, I use the following defensive mechanism: I point out to him that the testimony must stand up under cross examination and that he's far better off strategically to have my testimony appear to the judge and the jury to have been conservative. I have found attorneys very sensitive to that fact.

One problem that an actuary in California and perhaps throughout the United States, and I'm not sure whether this happens in Canada, has to contend with is a court tendency, almost a direction, to use for the value of an annuity, the annuity certain for the expectation of life. That method has the advantage of ease of understanding, but it has the disadvantage that it gives the wrong answer. Anytime there's a positive interest rate it's too high an answer. I make sure that my employer (the attorney) knows of the problem and how much of an overestimate it is. For those situations in which you use an effective interest or an effective discount rate of 2% or 3% the error tends to be not so great, maybe less than 10%. At that stage, I don't fight, reasoning that there are so many other factors that affect the value that are uncertain that 10% isn't all that bad an error. When the error reaches 25%, then I think that we do need to fight. It's an uphill battle; if any of you have ever faced it.

I think we should also fight the lack of logic in any value where economic assumptions are illogical, such as negative effective discount rate when the salary increase assumptions are greater than the interest rate.

I've written out ten commandments of appearing on the witness stand. They aren't really commandments but suggestions that you might consider if you're going to be up there.

1. Be prepared. Try to avoid any situation where the client (the attorney) will not allow you to spend the time to be thorough and understand everything that's going to happen on the stand.

2. Make sure your client is prepared. He should never be surprised at an answer you give him, or that you give in cross examination. Your insistence on taking his time in advance is for the reason that he can't afford to be surprised in court and he will be very sensitive to that.

3. Dress neatly and conservatively. Don't wear anything that appears unusual. The image that you are trying to project is honesty and hardworking competence. You're used as an expert; make sure that you are and that you appear to be. My present dress I would say would be questionable. I would wear a somber tie and this suit is very dark with a little pinstripe in it. I'd be inclined to pick something a little less imposing. I think it's okay to appear dull in court; you're going to appear to be dull no matter what you do, so you might as well recognize that.

4. When you're sworn in listen to it. It's "do you promise to tell the truth, the whole truth and nothing but the truth, so help you God?" My reaction to that is for God's sake do just exactly that. Listen carefully to the questions and give calm, thoughtful and complete answers. They will allow you to talk until you think you've answered fully the question that was asked. Don't let either side put unwanted shades of meaning on your testimony by how they phrase the question to you. A good defense to that is to repeat the question the way you want the question to be. For instance, the attorney cross examining me trying to establish that I do a lot of work for this attorney and that my testimony is therefore shaded: "Mr. Smith, is it true that you are Mr. Rosenthal's actuary?" "Well sir, if you mean by that do I do all the actuarial work that Mr. Rosenthal has done, I don't know the answer to that question, you'll have to ask him. If you mean by that question, do I just do work for Mr. Rosenthal? No I do work for many attorneys." You've turned it around and once that he sees that you are adept at not falling into traps like that generally they'll stop doing it.

5. Try not to ramble. If you think that you haven't answered a question fully, you can say to the judge, "Your Honor, I don't think that I fully answered that question." They will let you answer it fully. On the other hand, if you're a rambler and you've been talking all morning to answer reasonable questions and the judge looks at you and rolls his eyes towards heaven when you say you haven't answered the question completely, pay attention, you're probably rambling. It's better to stop and think carefully of the answer and try to put it into a few words.

6. Try never to show anger. Remain cool.

7. Adopt the attitude that you're trying to be a help to the judge and the jury by providing them with information that they need to do their job. That attitude will help your testimony to be more useful to the court.

8. The courtroom situation is likely to make you feel a little intimidated. Don't accept that. You're an expert, if you're prepared, so think it, look it and act it.

9. Don't be arrogant or pompous. Be polite, competent and helpful. If necessary, study your act in front of a mirror. Or if you have a real problem, video tape yourself and see how you come across.

10. Be honest. Feel that you're being honest. In other words, the truth, the whole truth and nothing but the truth and you'll probably stay out of trouble.

Let's discuss for just a moment some assumptions. There's nothing in California law that I know of that mandates any assumptions or methods. Each case seems to be approached a little differently. Assumptions these days I think are someplace around 8% for an investment yield and someplace around 6% plus or minus for salary scales. It's important that you be consistent. You must be prepared to defend any assumptions that you make yourself. You may well be asked why your assumptions for this particular testimony are different than some previous case that the opposing attorney has discovered, or perhaps some assumptions you used in a pension plan situation. For one of my large public pension plans, the legislature was concerned at a time when mortgage rates were up around 12 to 14% that we were using only about 8% interest assumptions, so we used an assumption of 12% scaling down to 8% over a four-year period which had very little affect on the valuation. It was just an appearance, and if I had been asked in court why I was using 12% for this particular public pension plan and only 8% for this valuation, I would have been prepared to explain why.

I think it's important that the actuary give an answer. He is the expert and if you give a range which is 2 to 1, you are not being very helpful to the court. I have at times given a range and said, "And because I think that is a reasonable range, I think that the proper number to use in this situation is the average between those two. I also think the actuary does no one a service to come out with an answer of $29,134.16. It's ridiculous for us to take a stance with all the uncertainties in the assumptions that we make, that we can be anywhere near as precise as that."

In divorces, in the value of a final salary pension plan, I've always felt it inappropriate not to use future salary increases. I think the other spouse is being cheated if that happens; you're not always allowed to do that.

Finally, I think that I would like to point out that I try very carefully to avoid positions on such things as the portion of take home pay that is appropriate for a wrongful death case or wrongful injury, because I have not become an expert at that. Now there is no reason that an actuary couldn't become an expert and if you want to study it and become expert, obviously, you can take a position. I like to ask my client (the attorney) to give me those assumptions. On cross examination, I just say they're not my assumptions. Let somebody else argue about it. The best way to stay away from having your testimony be looked at as useless is not to make assumptions that you're not capable of making.

One final subject concerns some testimony I gave for the city of Los Angeles about a year ago concerning their pension plan. It involved the right of the city of Los Angeles to make changes in future accruals of the benefits in the city's Police Fire Pension Plan. It has been a sort of dogma in California that once a public employee is hired and given a set of benefits, those benefits must be provided him through his lifetime and his spouses lifetime, if necessary, with no changes except perhaps upward. I have never fully understood the law behind that. It's claimed that it is a constitutional issue involving the constitution's ability to give the state and junior subdivisions of the state the right to make contracts with its employees. No such right is claimed for the federal government, only the state government. The city of Los Angeles did get the voters to pass a law which changed the cost of living adjustment (COLA) on future accruals. It was taken to court and they lost. It's at some stage of appeal; I don't think it's gone to the Supreme Court yet and I'm not sure if they are going to go. Most actuaries are dumbfounded to hear that, but it seems to be a fact of life at least in California and I believe in New York where

there is something in the New York constitution that requires this for public employees.

MR. WILLIAM F. FLAHAVAN: As Patrick indicated, I am not an ambulance chaser, the reason being that I do defense work for the most part, so there is no need to. We get the referrals indirectly when the suit comes in.

I was fascinated to hear what Patrick had to say about Canada and its laws changing by way of province. In the United States, the laws are all different with respect to each state, so if you are from out of state what I'm about to tell you may or may not be applicable, and if you are working with an attorney you better check with that attorney as to what he expects you to do and what you have a right to do. In California, the laws seem to change by the day, so even though I am telling you this is the case today, our Supreme Court might come down with some decision tomorrow that might limit the uses of an expert.

I get the impression, based on what Ian said, that in Canada there is a formula. For instance, he indicates a $100,000 cap with respect to catastrophic injuries on nonmonetary damages. In California, there is no such cap and it's up to the jury to follow an instruction that basically says there is no formula and figure out what's right. It is very difficult and gives rise to runaway verdicts that you see in the papers where $20,000,000 is given to an individual because the jury feels sorry for him. So the use of a monetary expert is necessary in order to provide some reality to the type of injury that occurred and provide some monetary definition as to what would justly compensate an injured party or the heirs of a deceased party. For instance, with respect to a deceased party, the instruction is that the heirs are to receive all monetary sums that they would have received had the deceased not died as a result of the subject accident and in addition to that, all reimbursement for all care, comfort, society, protection, love and affection that was lost as a result of the early demise of the decedent. Again nobody can place a figure on what that sum might be and the only way, really to get a grip, from a defense standpoint, on those figures is to call a monetary expert to provide some definition to those items that you can put monetary boundaries on, i.e., what is it that these heirs lost monetarily as a result of the demise of the decedent. Once those figures come in, then usually you can provide some form of concept of the pain and suffering in the case of personal injury or care comfort, society protection with respect to the wrongful death action. Those sums should certainly not be more than 50% of the monetary loss.

As Ian indicated, Canada has put limits on it. In California, its a subject of advocacy and it's simply a matter of trying to put some real dollars and make the jury understand what real dollars mean. That's the use of the monetary expert. I am using the phrase monetary expert, because normally in California you have people with background in the area of economics who will testify at the time of trial, but it has been held in California that not only an economist, but an accountant or an actuary can qualify to provide the information. Indeed, as Bill pointed out, the function of any expert is to educate those people in the court room be it the jury or the judge. I believe as an expert you should take that approach once you take the stand. It's not proper to be arrogant or pompous.

On the other hand, it is important to project an ego when you are on the stand, and an understanding, to both the judge and the jury, that you are well prepared and you are comfortable with your testimony. You will gain their

attention and what's important to us is you'll also gain their respect and their trust and you'll be believed when you testify.

Let me tell you the manner in which an expert in California comes about, and then the nature of the testimony that would be called from that expert. First of all, there's a procedure in California (the California Code of Civil Procedure) which basically lays out what occurs with respect to expert testimony. First of all, if I employ an actuary as an expert, I initially employ you as an expert consultant. I would like to do that early on in the litigation process so that I can get a clear determination as to what the case is about monetarily and make a determination then as to what kind of offer to make in settlement of the case so that we avoid lengthy litigation.

There comes a time, however, shortly before trial, that is 50 days before trial, where basically all the attorneys have to provide a document identifying an individual as an expert, identifying the area in which he is going to testify, and making him available for a deposition if the other party so desires.

Whether or not I am going to designate a person as an expert depends upon a number of things. First of all, I'm not going to designate an individual as an expert if he's got testimony that is more harmful than it is valuable. In that respect, one of my functions is never to require, or even request, that any expert that I employ provide to me a report regarding his findings. The reason for that is that as the years go on, and in California it takes five years in many places to get to trial, things change. The economy changes, the assumptions change, and if there is a five-year-old report, in many respects it might be antiquated, and once you're designated as an expert witness at the deposition, the expert is required to produce his entire file.

Now, before this session we had an interesting conversation wherein Ian indicated that sometimes in Canada when an expert provides a report, the attorney says, I want a report with respect to this other issue, I don't like this issue. Now in California all the reports would be discoverable, now it would be unethical for me and improper, I believe, for the monetary expert to simply rip out of his file that report and trash it. I am not suggesting that it has not happened in the history of California jurisprudence. But I am suggesting to you that it has not occurred with respect to the firm with which I am associated and I think it would be improper. If there is a bad report in there it will have to be lived with by the attorney and the expert. The solution to that, of course, is not to request a report until at least it's getting very close to the trial when you know the report at the time of trial will be a current report. So most of the reports early on will be verbal. When the time for designation comes, if the information that the expert consultant has is valuable to my position in litigation, I will then designate him. He will then convert from an expert consultant to an expert witness. His deposition will likely be taken and at that time, the other side will inquire into all the basis for the opinions that have been rendered, what opinions have been requested of him. One would assume that any failure that might exist would be pointed out at the deposition.

Bill is locally right when he indicates that the most embarrassing position of all is one in which the expert is subject to being impeached because of improper assumptions that don't exist or improper assumptions being made by the monetary expert. So it is much better to have testimony that will be believed in total than testimony that will be thrown out in total because some of the testimony is clearly false. If the assumptions are false, the conclusions are false.

So what you want to do is provide to the expert fair assumptions and have him make a fair conclusion based on the area of expertise he is being called upon.

With respect to the areas of enquiry of a monetary expert in California, the first thing you would ask him to do would be to measure the past medical expenses which is simply a matter of redoing past medical bills. Estimating the loss of past income would basically involve procuring a history of at least four years of the wage and salary patterns with respect to the area in which the plaintiff was employed.

You would also be asked to project into the future the income the plaintiff might have earned subsequent to the accident. This involves such things as projecting inflation, real growth in the economy and relative demand for different types of skills in the economic future.

The next requirement is estimating what the probabilities are that the plaintiff would have been alive in each future year to earn the projected income. Now this is a little bit tricky. If you look at most reports that are prepared, an assumption that is often made, and perhaps to which Bill alluded, is that say, the plaintiff is 41 years old; the assumption is that his normal life expectancy is, for example, 80 years old. What we are talking about is a human being that has never existed and is guaranteed to live until he is 80 years old. That might seem fair, but it's not because that means that no plaintiff will be precluded from obtaining his whole work life expectancy. In other words, if the work life expectancy is 68, he is always going to make it. And we all know that there is no guarantee that the individual will live, so the monetary expert that I employ will refute that by obtaining the statistics pointing out the likelihood that he will die of some cause other than the accident, or the potential of that fact and then a discount for that fact.

When you have a situation of a death of a spouse, for instance, it is necessary to measure the potential life of the plaintiff's spouse as well as what the deceased would have lived to be and the one who dies first would be the measure of the loss of damage over that period of time. The other issue is estimating what age the plaintiff would in fact normally stop working. This draws on data from labor economics. I'm sure you are all aware of that.

Finally I will call upon the monetary expert to discount the future estimated flow of income to the present value, and as Bill had mentioned, that involves choosing the correct discount rate.

So those are the areas that the monetary expert in California will be called upon to render opinions. It basically is not difficult to qualify an individual as an expert. As I indicated, he is in the nature of an educator. The court looks forward to being educated and once it realizes that this individual has the ability to cause the court to learn something, that's enough to qualify that expert.

FROM THE FLOOR: What mortality table do you usually employ in these cases and do you vary it by race and sex? First the US, then the Canadian?

MR. SMITH: I tend to use any reasonable mortality table such as GA 71 or even a population table. I'd use sex, age, and race if its appropriate. We use a population table where that's available. I've rarely had the choice of mortality table questioned. Sometime if there is an actuary on both sides you might have to get together and decide which table is going to be used. I've always felt

that's really not very important compared to the choice of interest rates and salary scale sometimes which are something brutal in their effect compared to mortality and the courts generally accept any reasonable table.

MR. KARP: In regard to personal injury and fatal accidents, I use the Canadian Life Tables. The most recent tables are 1980-1982. The 1985-1987 tables should be out shortly, so that varies it by sex. I would not vary it by race. In the matrimonial area I use the same table but other actuaries do use an actively at work or pension table and I think there is a lot of argument on both sides of that issue.

FROM THE FLOOR: I asked the question primarily because I have heard the opinion stated that the census tables are the least controversial if you are talking to a jury. You can just say this is based on the most recent census table on American lives.

MR. SMITH: Ian, have you ever had the choice of mortality tables really questioned or seriously discussed?

MR. KARP: In matrimonial cases it has come up, but in personal injury or fatal accidents, never. The population table is accepted subject, of course, to a particular person's health situation, specific impairments, medical opinion regarding life expectancy. The law, in Canada at any rate, is that in a personal injury case, future loss of earnings is to be assessed on the basis of what the person's life expectancy was prior to the accident. So if he is rendered a quadriplegic and has a 15-year life expectancy but he is 25 years old, so before the accident, his life expectancy was 50 years. You do the future earnings loss of earnings on the basis of normal 25-year-old mortality. But when you are looking at what is needed to care for that person for the rest of his lifetime, in that context you would use the 15-year life expectancy and then you would use either a multiple of the mortality rates or a rating up on the age to give you a set of mortality rates that were consistent with that particular man's life expectancy.

MR. SMITH: Bob, I have always felt that population tables really aren't appropriate in most of these situations. Population tables would include people sitting in death row in San Quentin, for instance. If you are valuing somebody's work life expectancy, that person was a member of the work force in GA 71, which has a little lower QX attached to it which seems a little more reasonable in that situation. But again, I just have never had the choice of a mortality table questioned seriously.

FROM THE FLOOR: Depending on the audience, if you are talking to the actuary for the other side you can get together on a table. But if you are educating a jury, that's another story as to what looks reasonable to them.

MR. SMITH: I hate to get into arguments like that with the jury, because that's such a complex technical subject and the jury is almost instantly lost.

MR. FLAHAVAN: There is bench approved jury instructions that are given to the jury and I apologize that I don't know the source of the information, but in an appendix to the jury instructions is a mortality table based on sex, race and age. The court will instruct a jury that they can come to a different determination based upon the evidence but based upon whatever census, this is the

normal life expectancy of a human being in good health under these circumstances is X, whatever it indicates on the table in the Appendix.

MR. SMITH: And I believe that is a population table.

FROM THE FLOOR: Now that makes it easy for us in California then?

MR. WILLIAM J. SHEFFLER: Mr. Flahavan, I didn't understand something about your attachment to the importance of having your expert give a written report versus giving verbal reports during the course of developing his valuations. It seems to me that if I was giving a verbal report to an attorney, I would have to keep a transcript of what I told him and that transcript ought to be discoverable just like a written report was discoverable. Is that right?

MR. FLAHAVAN: That's correct Bill. Anything in your file is discoverable and I would caution my expert consultants to keep everything verbalized until I request that they provide to me a report. You are right that scrap of paper would be discoverable. I'll give you an example. I contacted a reconstruction outfit that I will not use anymore. It was in a brake accident case and I indicated that I wanted to employ an expert for the purpose of examining the brakes and I represented the interests of the defendant. The person that took that verbalized report down made notes that were subsequently produced to the other side. It said "Mr. Flahavan needs testimony that the brakes weren't bad." You see those types of notes could be catastrophic to the defense of a case. That's why and maybe because of bitter experiences like that I am insistent that there be no reports or if there is going to be one, it would be one that I would want to discuss with the expert before pen went to page.

MR. SHEFFLER: It seems to me like that's still putting your expert in a difficult situation having to keep basically in his head everything that he's told the attorney up to the point that he makes his written report.

MR. FLAHAVAN: It would depend upon, for example, what information I was seeking. But the court will never get into my file, that's attorney/client privileged information. I can take down and have notes as to what occurred and what information my experts provided to me.

MR. SHEFFLER: So the actuary has to depend upon your notes as being the correct transcript of the verbal conversations.

MR. FLAHAVAN: If, for any reason, I wanted to get those preliminary opinions to the actuary, that would be the way to do it. I don't know why, or if I'd want to refresh his recollection in that respect until such time as he became an expert witness on behalf of my client.

MR. SMITH: Bill, let me comment a bit on that. Actuaries tend to want to document everything they say, which I think is behind your concern in this situation. If you're called by an attorney, and I am often called by an attorney who has a problem that he doesn't fully understand and he wants to discuss it. I will use the annuity certain for the expectation of life; and I have a little calculator that can quickly spin out that kind of thing. Just talk in generalities; "I'm going to give you some numbers and these are just rough examples of what might happen if we really go to work on this thing." That's to help him understand the size of the case he has. If I write anything down in that situation, I just throw it away and say to him, "If you really want to use this,

you're going to have to call me back some time. I'll no longer have this information, but I can reproduce it for you if you tell me exactly what assumptions I gave you." I think that resolves the case for both sides. I don't see any need for keeping documentation of a telephone conversation like that. When he reaches the point where he really wants to hire you and wants a written report, then the rules change.

MR. MARK JOSEPH GOLDMAN: Do actuaries have any type of malpractice liability for expert testimony, or is this something that doesn't exist? Also, for someone who has never done an expert testimony, but would like to enter the field, how would one go about presenting oneself as a possible expert witness?

MR. SMITH: Well, obviously, we have malpractice exposure for anything that we do, but I've never felt threatened by that. I have to do my job and do it properly, and if I don't do it properly, I deserve to be sued for malpractice. I've never heard of anyone being taken to court for malpractice over something like this. And I think it a little unlikely. There are so many checks and balances built into the jurisprudence system. You know, it's an adversary system and the other side isn't going to take anything so ridiculous that you could be sued for malpractice is my guess.

MR. KARP: I don't know of any such lawsuit in Canada against an actuary. I think it's important though to avoid being sued as well as for other reasons as I said. Make sure that the lawyer is educated about the case law in the area. And that will vary by how experienced a lawyer he is. For example, as I said in the matrimonial area there's a case called Stokes, which I don't happen to agree with, but given that it is a BC court of appeal, which is a higher court, it's very important. I feel that it is my duty as an expert who is retained by lawyers, to make sure that each lawyer who retains me is aware of that case, notwithstanding the fact that I don't agree with the reasoning. And I think if I failed to do that, and the outcome of the case was affected adversely, I think, conceivably, the lawyer would have cause to sue me.

MR. FLAHAVAN: I do a lot of professional errors and omissions type work representing professionals that are sued -- a lot of lawyers, accountants, doctors, and I have as yet seen a situation where somebody has been sued because of negligent testimony, or negligent advice to an attorney. There is a privilege in California, Civil Code Section 47 A and B, which basically provides an absolute privilege from suit to any representations made in the judicial setting. And I think that that might provide protection. I could also point out that there are a few doctors who are not truthfully testifying on behalf of plaintiffs in certain cases. And they seem to have never been exposed to litigation adverse to them as a result of the fact that they are deliberately misrepresenting the facts. So, I don't think that anybody making a legitimate effort to provide helpful testimony to the court would run a significant risk.

With respect to the second question, normally when I look for an expert, I look in a few different areas. There might be an area of special expertise called for and there's a service that I use on occasion. I do use an economist on occasion at UCLA when I need information. In addition to that, when I'm looking for an expert, I'll go through what's called the jury sheets which basically are reports on cases that have been tried. As an index to that report, there is a list of every expert that has testified and the area in which he has testified. It doesn't help anybody that is a virgin, but somebody that has testified will often be contacted by attorneys that have similar matters where they are seeking

advice. Those are a couple of areas. There is also, for instance, Structured Settlements Inc., an outfit in Los Angeles that basically puts together annuities for when there's settlements, but they also have people who will testify as experts at the time of trial. I don't know if that's much help for you, but those are the places that I look.

MR. SMITH: Let me give you one other thing you could do. I don't really seek testimony work. I'm very busy with my other clients. I tend to have a very small number of very large clients and it's sometimes inconvenient to say to a large client that I can't serve him that day because I have to go to court. On the other hand, I feel that the actuary has a piece of information that I think that the courts ought to be allowed to have and I think that it would be very unfair of all of us to take that position, so my stance has been to not seek that, but to help when I could. Because of that, if you were practicing in in my city and wanted to get into this, if you gave me your name I'd be very happy to revert cases to you if it wasn't convenient for me to handle. So, the first thing you might do is just contact all of the actuaries in your locale and tell them that you would like to take on some testimony work. Maybe that's so easy to do that you should just do that immediately. I suppose you could advertise, but that's kind of a touchy point with professionals, but obviously you can advertise. Lawyers are advertising these days, so we can certainly do it. If you are going to do it, I'd make sure that you do it in good taste. Unfortunately, I suspect that lawyers wouldn't be looking in places where you would be advertising.

MR. KARP: In my own experience and the experience of most actuaries in Vancouver who have come into the work since I have, they'll have assisted another actuary in this work prior to attaining fellowship and then upon attaining fellowship, they'll take on a number of their own cases. You can run into problems if you are starting fresh with no experience, and possibly you should work up to it by assisting or cosigning with another actuary. The first time I went to court I had trepidation about it because I knew I had never testified, but the point just didn't come up. I guess that's a credit to the FSA and FCIA designation that that was good enough to qualify me as an expert and the lawyer on the other side didn't bring up the fact even though he knew it: that I hadn't testified. To the best of my knowledge, no actuary has encountered any problems in getting himself qualified as an expert.

MR. LANDRY: In Canada there is a lawyer's handbook with a listing of all lawyers in Canada or Ontario, and actuaries advertise there. And there are also lawyers' quarterly newsletters and actuaries advertise there. There are different ways to get your name across. But it is helpful when starting the practice to work with somebody else to find out what some of the rules are. In Canada we have the calculation of present value of future lost earnings, we use a 2.5% net discount rate and if you didn't know that and you produced a report and got into court, it would be fairly embarrassing.

MR. AILEY BAILIN: Just an observation which stems from some parochialism. I think that the issue of the different jurisdictions is extremely important here in that we do have different laws from province to province and from state to state. For example, Patrick, you just mentioned the 2.5% net discount factor which is also applicable in BC as well as Ontario, but in other jurisdictions, it happens to be 3% or 3.5% even. The issue that both Mr. Smith and Mr. Karp raised with respect to marriage breakdown and the projection of salaries is specifically legislated in the province of Manitoba where the determination is included in the Pension Benefits Act and you have to make a determination as

though the employee terminated employment at that point in time. I guess there's a question behind my comment in that if you are in a position of practicing across state boundaries, or provincial boundaries, are you in danger, or what should you do so that you don't make the mistake of assuming that your home turf applies in the other jurisdiction?

MR. SMITH: Let me just make another observation. It's an interesting fact that in Great Britain something like a hundred years ago, some actuarial testimony was presented to a judge who threw it out of court claiming that the actuarial estimate was so uncertain that it was not useful to the court. I believe to this day actuaries are not used in courts in Great Britain for anything.

MR. FLAHAVAN: Your observations are totally correct. In the practice of law it is even more difficult because there are things called local rules. So, if I go to San Diego, I am subject to a different set of rules than I am in Los Angeles and the same thing is true with respect to San Francisco. There is a different set of rules for federal court than there is for state court. And there is a different set of rules for municipal court than there is for the other two courts. All I could suggest is that you either practice in only one area, or make sure that you know the rules of the area in which you are going to testify.

MR. SMITH: Not only that, but the results seem to vary markedly in California. A court in Weed, California is not likely to give the kind of high awards that you see in downtown Los Angeles. You can look at the awards, and the situations are similar, but the numbers are quite different.

MR. FLAHAVAN: Any case that gets to Modesto, the defense loves. For a case in downtown Los Angeles or San Francisco or Alameda County, normally there's going to be high awards. Again, if you're going to practice throughout the state, you have to be familiar with that. If you are going to go over state boundaries or province boundaries, that's a very challenging situation to try to get up to speed when there might be somebody testifying on the other side who has years of experience in that area.

MR. KARP: One point you have to check is that the case is indeed a BC case, because it is possible to get a case where the lawyer is in BC, the plaintiff is a resident of BC, but the accident occurred somewhere else -- in Alberta or Saskatchewan, and, therefore, the jurisdiction of that province applies. So, you have to check that. Aside from that, I very seldom get involved in other provinces and if I was under the jurisdiction of another province I'd basically have to educate myself from square one as to the law in that province.

MR. DAVID S. DUNCAN: I've been involved in three or four cases this past year myself, for the first time. Mr. Smith used the term his employer, I wonder who is really your employer. Is it the attorney, or is it the attorney's client indirectly. Second, along with compensation, I have a couple of small questions. How do you charge and how much do you charge for actuarial testimony. And along with that, you mentioned that many cases can go on for several years; do you frequently ask for retainers or advances in those kind of cases?

MR. SMITH: I guess ultimately, the attorney's client is the employer. That has never been a problem to me; the attorney is a representative of that employer and he's the one that I generally have to deal with and I have paid no attention to that problem. Is that the correct stance Bill?

MR. FLAHAVAN: What I tell my experts to indicate, because there are certain attorneys at time of trial who will say things like: "How much did Mr. Flahavan pay for your testimony?" I didn't pay for his testimony. The proper response I think, is that I retained an expert for the purpose of providing an opinion, so it's me retaining the expert, and it's my promise to pay the expert a reasonable fee for his services. I can't speak to what a reasonable fee is, it would normally be on an hourly basis, and I would expect billings for services rendered shortly after they were rendered. So you are right that if the matter is going on for five years, I would expect that after significant services were provided that I would receive a bill for it.

MR. LANDRY: Bill, do you ever look upon the court as being your employer?

MR. SMITH: Well, as I tried to say, I like to adopt the attitude that I am there as a friend of the court because I have special information. But at the same time, Bill's never done it, but Mr. Flahavan would be my actual employer, and, as I said, I'll give him any information he wants until he decides to actually make public the fact that he's using me. Once he does that, he's got to live with my opinions. And I've never found an attorney who wasn't willing to do that. His choice is to not hire me if he doesn't like the opinion. That's why you have to be honest first with him and then with the court.

On the subject of fees -- I'm a consulting actuary, so I have an hourly billing rate established by my firm for my services and I just charge that. I've known of those who want to discourage that kind of work and they use a higher rate than their regular billing rate for this kind of work. And, of course, if you wanted to encourage it, you could use a lower billing rate.

It always seemed to me that the regular hourly billing rate plus out-of-pocket expenses for all the time spent, is the appropriate way to do it.

MR. KARP: Occasionally, when the outcome of a case is adverse, a lawyer may try to avoid payment of your account by saying that the client is ultimately the injured party and that they, unfortunately, have no funds because the case was lost. I'm told there is some law to that affect in BC I think it's important when a new lawyer calls you to make sure that he understands clearly that he's the client and that he will be responsible for paying your account regardless of the outcome of the case and any other factor.

MR. SMITH: When the lawyer hires you he understands that he's hiring you, taking your time, there's going to be some charges and you expect to be paid for them. I have been burned a number of times, and I'm sure Ian has too, it's just part of the problem of taking on this kind of work: that you will actually collect a little lower percentage of the work you do than in most other kinds of work.

MR. FLAHAVAN: From a pragmatic standpoint, if you are hired by a defendant, and normally we are hired by insurance companies to represent defendants, the insurance companies will universally honor your billing. If you are hired by a plaintiff, you do run into the problem that Ian ran into, and for that reason, a retention, or some sort of guaranty of payment, might be appropriate. What Ian refers to is the concept of champerty. You cannot fund litigation as an attorney. On the other hand, you can advance money on behalf of a client. And if the client does not repay the attorney, that is not an ethical violation the fact

that the client never paid the money back because the client didn't have it. Ian is referring to a situation apparently where the attorney is trying to faust off that advancement basically in the form of labor by Ian and he properly can advance those funds and simply not get it back. That is not unethical, and he should be made to do that.