

## Calculating economic damages

*In multiparty litigation, questions of who owes what and to whom aren't always straightforward*



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### Litigation

For more than 30 years, California has been a pure comparative fault state when it comes to damages for bodily injury. That is, even a defendant found to be only 1 percent responsible for a plaintiff's injuries still will be held responsible for a portion of plaintiff's damages if other defendants, or other parties, or even the plaintiff is found to be 99 percent at fault. This should be simple to calculate. However, California has chosen to increase dramatically the complexity of the task by differing the approach to calculating economic damages and non-economic damages.

The reasoning began simply and fairly, with the passage in 1986 of Proposition 51, a voter-approved initiative to differ the approach to the two kinds of damages (Cal. Civ. Code §§1431-1431.5). This arose conceptually from the following situation. A driver with minimum \$15,000/\$30,000 automobile policy limits acted negligently and caused seri-

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ous and permanent injury to a plaintiff. Plaintiff's attorney sued both the driver and the local city for a design defect relating to an adjacent light pole. The design defect was a factor contributing to the injury, but the contribution was tiny compared to that of the automobile driver. The thinking then and now was to hold the city jointly and severally liable for all of plaintiff's out of pocket costs, but to hold it only severally liable for the more inchoate and sometimes dramatically larger economic damages such as pain and suffering, humiliation and the like.

This approach is at odds with most other states. The neighboring state of Oregon, for example, treats economic and non-economic damages equally and in most cases allows only several liability for both (Oregon Revised Statute §31.610(1)). The state of Ohio does allow for the imposition of joint and several liability for economic damages, but only when the negligent tortfeasor is found to be 50 percent responsible for the loss (2006 Ohio Code 2307.22).

Economic damages include past medical expenses, past wage loss and loss of earning capacity. There is current appellate activity on the calculation of past medical expenses, but that is beyond the scope of this article, and past medical expenses are by and large fairly easy to calculate and are often the subject of stipulation. Similarly, past wage loss is often easy to calculate.

Future medical expenses occasionally present more difficulty, though that varies from case to case. The area fraught with more complicated and more controversial calculations relates to future wage loss and especially future loss of earning capacity. This is especially evident in a wrongful death case, or in the situation where the plaintiff is expected

to have a shortened life expectancy as a result of the acts of the defendant. In this situation, the trier of fact is allowed to itemize and calculate losses for "lost years," including not only future wage loss, but also loss of future pension benefits and social security earnings which the plaintiff would have received had he been able to live out his normal life expectancy.

The elements of economic damages have been litigated extensively during the past 25 years, since Prop 51, because economic damages have become the more important damages for settlement purposes and often drive settlement negotiations with marginal defendants. Plaintiff attorneys have made efforts to add categories to the type of damages called "economic" and defense attorneys have tried to restrict the category. For instance, it is commonplace for the plaintiff's economist to provide a number, sometimes a large number, for the category of loss of household services. Household services include such tasks as repairing the roof, tending the outside fences and lawn, cooking meals, but also includes washing dishes, vacuuming the home, making the bed, none of which were ever jobs where money in fact changed hands. Putting a monetary value on these tasks sets them as economic damages, subjecting a defendant to joint and several liability should liability be found.

For illustration, let us assume that at trial damages are found to be the following:

Economic damages: \$1 million

Non-economic damages: \$3 million

Let us assume further that one defendant is found liable to the plaintiff, but that the defendant's liability is found to be only 5 percent of the total. The judge or jury can assess liability of other de-

fendants who were previously parties to the lawsuit or anyone else, including employers, who might in other circumstances be found contributing to the injuries of plaintiff, but who were not sued for one reason or another.

The calculation of non-economic damages is simple. The number is 5 percent of \$3 million, or \$150,000. There will never be a set-off from non-economic damages for pretrial settlements. Pretrial settlements, or a portion of them as explained below, will be deducted from the economic damage award only.

This same defendant, found only severally liable for the larger \$3 million award, is jointly and severally liable for the smaller \$1 million economic damage award. This defendant potentially pays the entire \$1 million award, less some portion of pretrial settlements.

If the only other potentially responsible party was someone with a minimal \$15,000 liability policy, then that defendant found liable pays at least \$985,000 due to economic damage loss, but pays only \$150,000 of the much larger non-economic damage award. Here economic damages drove the judgment numbers.

Even if there are deep-pocket co-defendants, calculation of the set-off from their pretrial settlements is elusively complicated and usually turns out to be

a much lower number than expected. Let us assume that pretrial settlements in this case totaled \$1.2 million. At first glance, it might be expected that the settlements wipe out the economic damage award. Not so. When calculating the amount of the set-off for judgment purposes, the presiding judge first applies the "Greathouse ratio." This is a calculation derived from *Greathouse v. Amcord*, 35 Cal.App.4th 831 (1995). Looking at this model of \$1 million in economic damages and \$3 million in non-economic damages, the ratio (*Greathouse* ratio) is 1:3. Stated another way, the economic damages were only 25 percent of the total verdict. The reasoning is that the non-economic damage award is that defendant's contribution alone, and no other defendant's payment, or potential payment, should dilute it. But the economic damage award is joint and several, and so one should assume that pretrial settlements were allocated economic to non-economic in the same ratio as found by the trier of fact. Therefore, in calculating the amount of the pretrial settlement to deduct from the economic damages award, one applies only 25 percent of that settlement money to set off the award.

In this model, 25 percent of \$1.2 million is \$300,000. Therefore, the calculation is the following. For non-economic dam-

ages, the liable defendant pays \$150,000. For economic damages, the liable defendant pays \$700,000 (\$1 million less the \$300,000 setoff). The total judgment will be \$850,000. Again, the economic damages drove the amount of the judgment, and the threat of economic damages would have been the driving force during settlement negotiations.

There are other wrinkles to the analysis. If loss of consortium is found in favor of the spouse, these damages are all non-economic damages and are treated as such. Some types of litigation, like toxic tort litigation, allow the pretrial settlement to include an allocation for future wrongful death cases, which adds another level of complication. (See *Jones v. John Crane, Inc.*, 132 Cal.App.4th 990 (2005) (discussing these concepts in more detail)). There are also variations in product liability cases where the manufacturer and distributor, or other company in the same chain of distribution, are defendants in the same lawsuit. Usually, but not always, those defendants share the same amount of responsibility. Contributory negligence or contributory fault by plaintiff will go to lessen both economic and non-economic damages, so in a case where there is potentially heavy plaintiff involvement, the economic damage driving force may be diluted substantially.

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