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How to double your future economic damages in medical-malpractice cases

PERIODIC PAYMENTS CAN BE YOUR FRIEND, AS CAN WAGE GROWTH AND MEDICAL COST INFLATION

In medical-malpractice cases, MICRA (specifically Civil Code section 3333.2) greatly limits the upside potential for medical-malpractice jury verdicts. For this reason, it is important to maximize the amount of damages that are unlimited – namely, the client’s economic damages. In this article, we explain how it is possible in many cases to greatly increase your client’s economic damages award, resulting in an award of future economic damages that is more than double the original amount.

The key to this strategy is section 667.7, of the Code of Civil Procedure, another MICRA provision, which allows the defendant to pay economic damages periodically over time instead of immediately.

How “present value” works in most types of personal-injury cases

In the typical personal-injury case, the damages for both past and future economic damages are awarded to the plaintiff *immediately* in one large lump sum. Defendants argue that awarding the plaintiff the full amount of future economic damages today in one large lump sum results in an unfair windfall to the plaintiff because the plaintiff can take that lump sum and invest the money over time, thereby eventually receiving more than the amount necessary to compensate the economic losses. To remedy this perceived “unfairness,” defendants use economists and CPAs to introduce evidence of the “present value” of future economic damages. The “present value” of a gross award of future economic damages is that sum of money prudently invested at the time of judgment which will return, over the period in which the future economic damages are incurred, the gross amount of the award. (*Holt v. The Regents of the University of California* (1999) 73 Cal. App.4th 871, 878; *Salgado v. County of Los*

Angeles (1998) 19 Cal. 4th 629, 635.)

“The concept of present value recognizes that money received after a given period is worth less than the same amount received today. This is the case in part because money received today can be used to generate additional value in the interim.” (*Holt, supra*, 73 Cal.App.4th at p. 878).

For this reason, in a typical personal-injury case, when the plaintiff wants to present evidence of economic damages that she will sustain in the future – like future loss of earning capacity, or the cost of future medical care – the parties present competing experts’ testimony on how present value should be calculated. This conflicting evidence typically focuses, in part, on what investment rate each expert believes that the plaintiff might be able to conservatively obtain when investing her lump sum of future economic damages awarded by the jury. Regardless of which expert the jury believes, this present value analysis will usually involve a *reduction* in the amount of future lost wages or the cost of future medical care.

The “pay-over-time” provision in CCP Sec. 667.7

Medical-malpractice cases, however, are different from ordinary personal-injury cases in one significant respect. There is a specific statute that is applicable only to medical-malpractice cases, which allows the defendant, after being hit with a judgment, to obtain a court order allowing the defendant to make the payment of future damages (both economic and non-economic) *in periodic installments over time*. Section 667.7 of the Code of Civil Procedure states:

(a) In any action for injury or damages against a provider of health care services, a superior court *shall*, at the request of either party, enter a judgment

ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds two hundred fifty thousand dollars (\$250,000) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages....

(b)(1) The judgment ordering the payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Such payments shall only be subject to modification in the event of the death of the judgment creditor.

Therefore, if the award of future damages is \$250,000 or more, the defendant has the right to obtain an order directing that these future economic damages be paid over time in periodic installments. That right is mandatory. In other words, as long as the \$250,000 threshold is reached, the trial court has no discretion and must grant such a request if sought by the defendant. If you inspect the answer of the medical-malpractice defendant, in nearly every case, the defendant will invoke section 667.7 as an affirmative defense.

How long does the defendant have to make these periodic payments? For loss of future earning capacity, the periodic

payments will typically take place over the remainder of the plaintiff's work-life expectancy (somewhere between age 62 and 67, typically). For the cost of future medical care, the periodic payments will typically take place over the remainder of plaintiff's life expectancy (typically when the plaintiff is in her 80s). In other words, in the typical scenario, the defendant is making payments to the plaintiff over decades. One can see why the defendants and their insurers love this statutory provision.

Pre-trial strategies to exclude evidence as to present value

If the medical-malpractice defendant, however, has full license to pay a damage award for future economic damages in periodic payments over decades, one must query why the defendant then is allowed to introduce evidence before the jury as to "present value?" If the defendant is paying the award over decades in periodic installments, there is no "immediate lump sum" for the plaintiff to invest. There is no plaintiff "windfall." To the contrary, the *defendant* keeps all the money and is allowed to invest the money as the *defendant* pleases. This results in a huge windfall to the *defendant*.

If the defendant introduces evidence of present value, and at the same time gets to pay over time, the defendant, in essence, reduces the plaintiff's future economic award *twice*. Accordingly, the medical-malpractice plaintiff must prevent evidence of "present value" from being admitted before the jury. Only evidence as to the *gross* amount of the future economic damages should be admitted.

In all medical-malpractice cases where the defendant has asserted section 667.7 in its answer, the plaintiff should file a motion in limine seeking to exclude all expert testimony on the subject of present value and should seek to prevent the submission of CACI 3904A and 3904B on the subject of present value.

The best way to argue this motion is simultaneously to give the opportunity to the defendant to withdraw its section 667.7 affirmative defense. In nine times out of 10, the defendant will not withdraw this defense. Why? First, insurance companies love the ability to pay a judgment over time. However, more importantly,

subdivisions (c) and (f) of section 667.7 seem to suggest that, if the trial court structures an award for future medical care over a number of years, and then the plaintiff suddenly dies a short time into the payment schedule, the defendant may be able to cease future payments altogether and get off paying nothing further! What defendant would not love that miscarriage of justice?

In addition to the motion in limine, when depositing the defendant's economist expert, it is important to ask questions to the expert about section 667.7. Plaintiff's counsel should ask the experts what they know about this statute. They should question the expert hypothetically about what would happen if there was no lump sum immediate award but if payments of the verdict were made in installments over time. They should ask the expert to calculate future lost earning capacity and future medical costs by assuming a 0% discount rate.

The *Salgado* case

Support for the argument that present value should be excluded in all medical-malpractice cases where section 667.7 is invoked by the defense is found in the California Supreme Court's decision in *Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 639. In *Salgado*, a minor plaintiff brought a medical-malpractice action to recover injuries he sustained during his birth at a county hospital. The jury awarded economic and non-economic damages, including \$125,000 for future medical costs.

On the topic of future economic damages, the jury heard expert testimony evidence from both parties regarding the amount by which the gross number of future economic damages should be reduced to "present value." Following this evidence, the jury determined that the "present value" of the future medical costs should be reduced from \$125,000 to \$50,000. The trial court then ordered that the award for future medical costs be paid on a periodic basis over 66.8 years, funded by a \$32,179 annuity purchased by the defendant.

The Supreme Court reversed, holding that the trial court erred in reducing the sum used to fund the stream of future periodic payments. The Court made clear

that allowing the defendant to obtain a reduced verdict based on present value and then simultaneously obtain a discount by paying their damages over time would result in an *unfair double-discount*: "This is because if a present value award is periodized, a plaintiff might not be fully compensated for his or her future losses; the judgment, in effect, would be discounted twice: first by reducing the gross amount to present value and second by deferring payment." (*Id.* at p. 639.)

Of interest here, the Supreme Court gave guidance on how to handle future cases in which medical-malpractice defendants assert their right to make a post-judgment request for periodic payments under section 667.7. "The proper approach ...is for the *jury* to determine the *gross* amount of future damages and for the *court* to structure a periodic payment schedule based on *that amount*." (*Salgado, supra*, 19 Cal.4th at p.639, emphasis added.) In making this ruling, the Court reaffirmed its decision in *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, finding that trial courts in MICRA cases may "submit *only the issue of the gross amount* of future economic damages to the jury, with the timing of periodic payments – *and hence their present value* – *to be set by the court* in the exercise of its sound discretion." (*Salgado, supra*, 19 Cal.4th at p. 649; *Holt, supra*, 73 Cal.App.4th at 879 ["[T]he present value cannot be used as the figure to be periodized; periodic payments are based on the *gross* amount of the future damages"].) Based upon *Salgado*, the proper approach is to exclude present value and to have the jury award the gross amount of future economic damages.

How the economic damages get doubled

Salgado teaches that the jury must only determine the gross amount of future economic damages, not the present value amount. Therefore, all evidence as to the interest rate to be used to grow a lump sum award must be excluded. But how does that result in economic damages getting increased or even doubled? The answer is: wage growth and medical inflation.

In a typical personal-injury case, when determining the appropriate amount to modify the gross amount of *future wage loss*, economic experts examine

two primary factors: (1) the interest rate that a prudent investor could obtain on a lump sum of money (called the “discount rate”); and (2) the rate at which wages generally grow over time (called “rate of wage growth”). This second factor must be included, because if the plaintiff has lost her job due to the defendant’s negligence, she likely would have received increases in wages over time.

The first factor – the discount rate – makes the gross amount of future damages go down. The second factor – the rate of wage growth – makes the gross amount of future damages go up. If the discount rate is greater than the rate of wage growth (for example, 4% discount rate versus 3% wage growth rate), then the net effect is that the gross amount of future damages will go down. If, on the other hand, the discount rate is less than the rate of wage growth, then the net effect is that the gross amount of future damages will go up. If the discount rate and the wage growth rate are the same, then the net effect is that the gross amount remains the same.

The same is true for *future medical bills*. Again, two factors are compared: (1) the interest rate that a prudent investor could obtain on a lump sum of money (“the discount rate”) and (2) the rate at which medical costs will increase due to inflation (“the medical inflation rate”). The second factor must be included, because the cost of a wheelchair today will be considerably less than the cost of a wheelchair when plaintiff needs it in the future. If medical inflation is not factored in, the plaintiff will be undercompensated. If the discount rate is greater than the medical inflation rate (for example, 4% discount rate versus 3% medical inflation rate), then the net effect is that the gross amount of future damages for medical bills will go down. Conversely, if the discount rate is less than the medical inflation rate, then the net effect is that the gross amount of future damages for medical bills will go up. If the discount rate and the medical inflation rate are identical, then the gross amount will remain the same.

In a medical-malpractice case where the defendants preserve their rights to invoke section 667.7, the jury is not allowed to consider the first factor – the discount rate – because there is no lump sum for plaintiff to invest. In such a scenario, then, the discount rate will be zero. However, note that the second factor still applies. For future lost wages, the second

factor is the wage-growth rate, and for future medical bills, the second factor is the medical-inflation rate. These “second factors” are not affected in any way by the election to pay over time under section 667.7.

Therefore, because the jury has a constitutional role as the ultimate arbiter of the facts and of damages, (see, e.g., *Salgado*, 19 Cal.4th at 649 [the jury’s established constitutional role and prerogative as the sole judge of the facts” must not be usurped]), the plaintiff should still be allowed to present expert testimony on the effects of wage-growth increases and medical inflation. In other words, the factor making the numbers go down is excluded, while the factors making the numbers go up are still present. Plaintiff’s expert should be allowed to opine that, assuming a discount rate of zero, and further positive wage-growth rates and inflation rates, the gross amount of future economic damages should actually be increased.

We took this approach in a recent medical-malpractice case. All three defendants had asserted section 667.7 in their answers. We filed the motion in limine, giving the defendant the opportunity to withdraw their section 667.7 defenses. When they refused, we argued to the trial court that the defendant’s expert CPA’s testimony on present value should be excluded. The trial court granted our motion and excluded the present-value testimony.

The trial court also denied the defendant’s request to submit CACI 3904A. The trial court, however, allowed our expert to explain how the gross numbers of economic future damages should be increased due to wage growth and medical inflation. We started with \$744,000 in lost future earning capacity and \$8.2M in our life-care plan for future medical costs. After applying a 0% discount rate (i.e., no reduction to present value), and applying the wage growth and medical-inflation percentages, the gross numbers went up to \$1.18M and \$19.7M respectively – an increase of 59% for future lost-earning capacity and an increase of 240% for future medical costs. Importantly, the defendants could see that our approach was correct, and they instructed their CPA to provide opinions using merely wage growth and medical inflation, and assuming a 0% discount rate. This resulted in the *defendant’s* expert testifying that, with those assumptions, damages were in the millions of dollars.

After the verdict

Of course, once the jury returns a verdict, that is not the end of the story. If, for example, the jury returns a verdict for plaintiff, and the award for future damages exceeds \$250,000, the defendant must choose whether to invoke section 667.7. If the defendant chooses *not* to invoke it, then both parties would submit post-verdict expert declarations to the trial judge on the subject of present value. Then, the trial court, after weighing the declarations, would reduce the award of future damages based upon present value, and according to whichever expert’s testimony he or she believed contained the more persuasive testimony on the subject of the discount rate. (See *Holt*, *supra*, 73 Cal. App.4th at 880 [“The court then structures the periodic payment schedule, using the gross amount as the ‘pivotal figure’ in its determination”]; *Salgado*, *supra*, 19 Cal.4th at 639 [same]; *Hrimnak v. Watkins* (1995) 38 Cal.App.4th 973, 979 [same].)

If, however, the defendant invoked section 667.7 and chose to pay over time, the award of future damages would be periodized, but the gross amount awarded would stay the same. Given the fact that the defendant could escape many of its obligations if the plaintiff dies prematurely, this author believes that in most cases, the defendant will choose to invoke section 667.7.

Conclusion

Medical-malpractice cases are difficult due to their inordinate cost, complexity, and the damage limitations imposed by MICRA. But one affirmative defense intended to help defendants, section 667.7, may actually benefit the plaintiff if the correct motions are filed and pre-trial strategies followed. By increasing the amount of economic damages, the plaintiff’s attorney can attempt to even the playing field in medical-malpractice cases. 

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