

Damages: Obtaining prejudgment interest on economic damages in a PI case

Civil Code Section 3288: "…interest may be given in the discretion of the jury"

By Russell S. Kohn

In many clear-liability PI cases, the defendant's insurance company will admit fault but contest the extent of the injury and the reasonableness of the medical bills. They will admit to liability and that some injury was caused resulting in some medical expenses: For example, $30,000 worth of ambulance and hospital bills, and the $15,000 life-flight helicopter charge. But they will not timely pay these bills as incurred or advance any money to cover them until the plaintiff agrees to sign a release in full settlement of the injury claim. The insurance companies use the financial strain these bills place on the victim as leverage to secure a quick, cheap settlement. It is basic stonewalling.

Clients who don't have full medical insurance coverage for their medical bills are shocked to learn that the responsible party's liability insurer refuses to promptly pay these bills. Thus, we have to help clients find other ways to keep the health care providers at bay until the full extent of the injuries and damages is known and we are in a position to negotiate a full settlement of the claim.

Sometimes the client can set up a payment plan with the providers. Sometimes the health care provider will agree to take a lien against the case and await payment until the case settles. And sometimes, the client must borrow money at very high interest rates to pay providers who won't wait.

One of my pet peeves has always been that there is no penalty put upon a defendant's insurer who refuses to promptly pay medical bills or lost earnings that are clearly owed. Instead, the insurance company keeps earning interest on these funds until the case settles. In one such recent case, I set out to find the law that balances the scales of justice.

The case arose from a rear-end motor vehicle collision that caused neck and back injuries to a young woman, Ms. Hurtsalot. Predictably, the defendant admitted liability for the crash, but disputed the extent of injury and the reasonableness of the bills. (In retrospect, this was probably not the best test case because my client did not have any lost earnings to claim and she did have medical insurance that paid her bills in full. Regardless, I still believed it was wrong for the defendant's insurer to refuse to promptly tender the amount of these medical bills, particularly in view of the collateral source rule.)

At trial in San Diego County, because there's nothing in the standard CACI jury instructions that addresses this situation, I proposed the following special jury instruction, entitled "Interest on Economic Damages," to read, "Interest on items of economic damage incurred may be given in the discretion of the jury." On the special verdict form I added the following final question for the jury to answer, yes or no: "Should the Court include interest on the economic damages?"

As you might expect, this set off a firestorm of objections from the defense counsel. Interestingly, the civil court judge had never before received such a request despite over ten years of hearing civil trials, and it was not immediately well received.

In the discretion of the jury

My position was that prejudgment interest is allowable as compensatory damages in the jury's discretion pursuant to California Civil Code section 3288, which provides: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury."

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The applicability of this code section to PI cases was anything but clear. This is because case law makes very clear that such interest can only be given on liquidated damages and not on non-liquidated damages such as non-economic damages for pain and suffering. In a PI case there are arguably both liquidated damages and non-liquidated damages. Thus, defense counsel argued that Civil Code 3288 was not to be applied in a PI case and cited as authority Civil Code Section 3291 as being the exclusive manner in which interest is allowed in a PI case (plaintiff judgment exceeds CCP section 998 offer in a PI case). Defendant also cited Canavin vs. Pacific Southwest Airlines (1983) 148 Cal.App.3d 512 [196 Cal.Rptr. 82] as somehow suggesting that only when one is personally out-of-pocket can they claim interest on that amount.

It was also my position the jury should merely decide if interest should be awarded. If they decided in the affirmative, then the judge should set the interest rate and time period. The interest rate should be the same as provided for prejudgment interest under Civil Code section 3291, which is 10%. The interest should run from the date of the plaintiff's formal demand for payment assuming defendant has been provided proof of the non-economic damages incurred.

What facts can the jury weigh?

The judge quickly became hung up on what facts the jury would need to weigh to be able to exercise its discretion under Civil Code 3288. The judge believed that in order for the jury to exercise discretion, the jury would need to be informed that my client had medical insurance to pay her medical bills rather than having to pay them herself.

Thus, the Court ruled that I could include my special jury instruction and verdict question on prejudgment interest, but only if I also informed the jury that my client's bills were paid by her own insurance and not by herself. I believe that the judge's ruling requiring disclosure of collateral source payments to the jury violated the well-established collateral source doctrine, which precludes evidence of payments by a plaintiff's own insurance from being presented to the trier of fact. (See the discussion below as to the law on the collateral source doctrine.)

The court's concern that there must be something for the jury to weigh in order to exercise discretion on the issue should have been alleviated by the jury's need to weigh whether the defendant had a good faith dispute about either the injury sustained or the reasonableness of the medical treatment and billings. If it found such a dispute, then a reasonable jury should exercise their discretion to disallow interest.

After lively argument (see the actual transcript below), the court ultimately upheld the right of a PI plaintiff to seek pre-judgment interest on certain items of economic damages.

Despite this victory, I knew the instant matter would be more complicated and less appealing to jurors if we had to explain the collateral source rule. And so, given that the pre-judgment interest amount would have been rather small, I elected in this instance to remove the jury instruction that we had fought so hard to get, but I look forward to arguing it again when the plaintiff has no medical insurance.

Presented below is a transcript of the argument presented in court on the issue of whether it is appropriate to allow the jury to consider prejudgment interest on the medical expenses incurred by the plaintiff and paid by her insurer.

Trial transcript

Mr. Kohn: With reference to the issue of prejudgment interest on economic damages, I pulled the case that the court had referred us to, *Canavin vs. Pacific Southwest Airlines*. Canavin states that an individual who must litigate to recover damages should be placed in the same position as he was on the day he suffered an injury; otherwise the tort-feasor benefits from denying liability and continuing to litigate while he retains the use of the money to which the plaintiff is entitled, and the plaintiff is deprived of the benefit he should have derived from an immediate recovery.

As the California Supreme Court explained, "the award of such interest represents the accretion of wealth which money or particular property could have produced during a period of loss." And then it goes on and states, "such an award is all the more necessary in a group of cases such as the instant ones where the complexity of the proceedings and the positions of the parties has so long kept the plaintiff's rightful recovery in the defendant's bank account."

It seems to me that what the court is saying there is that money has a value, and an economic opportunity value, and that if this money was rightfully due to Mrs. Hurtsalot and had been paid earlier, she would have had the money and been able to invest it, or do with it as she pleases. And that this case language is stating that her opportunity loss needs to be compensated for if the jury finds that she is entitled to their verdict.

In another brief that I provided to the court, there was language discussing the collateral source rule. The defendant does not get the benefit of the collateral source. In particular the language from that case was very appropriate to the issue that we're dealing with here on prejudgment interest.

In the *Smaulee vs. Batey* case, it's the last paragraph of that brief that I submitted. It states, "at oral argument defendant argued that the jury might be prejudiced by evidence of the plaintiff's personal payment of medical expenses because they might be unduly sympathetic to one who does not have medical insurance. There are several problems with this argument. This ground of prejudice was not tendered in the trial court by defendant, nor relied upon by the trial court in its ruling under section 352. But

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more fundamentally, the sympathy for one who does not have medical insurance is the mindset that is the very aim of the collateral source rule. We want the jurors to assume a plaintiff does not have medical insurance. Evidence that tends to reinforce this mindset set cannot be prejudicial within the meaning of section 352."

So I think that goes to show that in a case before a jury, we want the jury to assume that the plaintiff does not have insurance to pay her medical bills. And that her bills are paid. The jury is to understand that she paid them.

And I think as far as prejudgment interest is concerned, if the jury rules in her favor, that she was correct and she should have been paid this money earlier, she's lost the opportunity cost of this money; she couldn't invest it, and instead the money sat in Farmer's bank account and earned interest. And that's just not right to let the windfall fall to the tortfeasor.

Defense counsel: Frankly, I had underlined and looked at that same passage that counsel read, and from the Canavin case. It's actually on page 526, for the record, 148 Cal.App.3d 512 at page 526. And I think that clearly goes to the point that if the individual pays themselves, then they are the ones suffering the benefit. An individual who must litigate to recover damages should be placed in the same position.

Well, here we don't have an individual who paid out money, then has had to wait a year-and-a-half, to get it back. Instead it's an individual who went and sought medical treatment and was paid for along the way. And for her to be able to claim that she should have been able to invest that money, it's money that would have never come to her in the first place. That's 'cause this is – it says the plaintiff is deprived of the benefit that he or she should have had from an immediate recovery.

The court: But wouldn't she have? Let's assume that the plaintiff had made the claim for her med pay, if that was the source, and the med pay kicked in and paid it, and then she files a complaint. And I think the language that Mr. Kohn reads suggests that then if the tort-feasor had paid up immediately upon being served with the complaint, or being made aware of the claim, then the plaintiff would have those funds available to her to which she has ultimately become entitled. And for that reason the court should consider prejudgment interest.

To let someone delay by denying liability, and/or going through the process, is to give them a benefit to which they are not entitled. That's what Mr. Kohn reads into the language, which followed the language, interestingly enough, that I read, which really caught my eye enough that I was convinced beyond doubt that I was right. And now I listen to Mr. Kohn and look at that language, it's not so clear to me.

It says specifically, the result can be achieved only if the plaintiff is placed in the position he would have been in had he been compensated for his injuries at the time the injuries were incurred. An individual who must litigate to recover those damages should be placed back – I'm adding that word – in the same position when he recovers as the individual who recovered the day he suffered the injury. Otherwise, the tort-feasor benefits from denying liability and continuing to litigate while he retains the use of the money to which the plaintiff is entitled.

Defense counsel: But again, it goes back to the individual being deprived of the benefit. She didn't give up anything. It was paid by Progressive's med pay. She didn't pay for that.

The court: Yes, but let's suppose she showed up at the door of your client and said, "Look, you caused this accident, caused me these injuries, and if I have to go to court, I'm gonna recover x. One of the things I'm gonna recover for sure are my medical expenses. And they total this much. Do you want to pay them to me right now?"

Answer: No. File your complaint. We'll litigate. A year-and-a-half later a jury comes in and says you get them, the medical expenses. She has been without that seven grand, or five grand, or whatever it becomes, for that period of time. And that's what that language seems to me to say. Not a good thing to do, judge. So I think he's turned me around. I'll let you think about it a little bit more while it's just a matter of shuffling some instructions.

Defense counsel: Right. Well, I think it would be unprecedented for a personal injury case of this nature to get prejudgment interest.

The court: Never heard of it myself. The *Canavin* case clearly contemplates it can happen.

Defense counsel: Certainly. And you're dealing with an airlines situation where you've got these horrendous injuries and people putting out-of-pocket to get themselves through that difficult time period. Whereas in this situation, you're not dealing with that. You're dealing with –

The court: Well, does it say that? Does it say what the expenses are specifically that they are talking about? Is it medical expenses? Is it lost income? I know it's not general damages. Okay. If Mr. Kohn succeeds, it is for the jury to decide whether or not to award interest. Then I decide what the amount of interest is, and what have you. So one of the questions, if I'm confronted with that, would be from what point in time.

Mr. Kohn: I would suggest to the court the time would be not when they are incurred, but when the settlement demand was made.

The court: Is that after the complaint was filed?

Mr. Kohn: No. Before.

The court: The complaint was filed is a date used in another case that I've read. But I'll listen to anything. But the first question is – is it appropriate, be-

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cause my knee-jerk reaction, as I told you, was it had to have been an out-of-pocket expense. But now that that language has been presented to me that I just read, and I won't reread, I promise, leads me to wonder.

I have now read all the briefs, and read all the cases I could find, and reached the same conclusion I started out with. Even though the analysis by Mr. Kohn is a good one, it overlooks the magic word that the code section provides, which is *discretion*. Jury is to exercise their discretion in determining whether interest should be awarded on economic damages.

In order for them to exercise their discretion, it seems clear to me that they must have all the information, which means they have to know the extent to which the plaintiff in fact paid for the medical expenses. I'm assuming that you don't want to go into that area, Mr. Kohn.

Mr. Kohn: Well, we're not to – the jury is not to know that she had insurance.

The court: You are not hearing me. On the issue of recovering interest, the jury is invited to make that determination, according to the section in question. And they are to exercise their discretion. I read that to mean they must know all of the necessary information in order to exercise their discretion, which would include whether or not the plaintiff paid the expenses.

Mr. Kohn: As opposed to her insurance?

The court: Yes. And then you're into the issue of the insurance paid. And if I were in your shoes I wouldn't want that to come in 'cause it doesn't come in under the collateral source rule.

Mr. Kohn: Can we also inform the jury that her insurance then has reimbursement rights?

The court: Reimbursement rights against this recovery?

Mr. Kohn: Yes.

The court: I don't know that that's true. If it's true, we could tell them. And you know I accept your word if you're telling me that's the case. Defense counsel will have to agree as well.

Defense counsel: My concern with that, I think, is misleading the jury, number one. Number two, now they are taking insurance into account, where they're gonna be specifically told not to take any insurance into account.

The court: Yes, but is that her insurance. Would you rather I not, then, permit the jury to know? I mean, the section is clear that the jury has the discretion to make a determination shown that there were economic damages, and that's a medical expense, that they could elect to add interest onto. Now, the reason why they are given discretion – there has to be a reason for it.

Unlike if you establish you have economic damages, you recover them, if you can prove that the defendant's conduct was a substantial factor. There isn't any discretion in that. Here there is discretion. That tells me something, that the legislature intended to permit the jury to make a decision, but they have to have all the information.

Now, if the defense is saying we don't want them to know that, then we'll just simply leave it the way it is and let them decide. I don't know why you'd want to do that, but that's up to you.

Defense counsel: No. Well, certainly my preference was to keep the interest issue away from the jury 'cause, again, I don't think that's appropriate. But at the same time I also don't want counsel going into an issue with the jury as far as med pay reimbursement, because we all know then that situation's going to be compromise issues. The jury may not know that. The jury may think, oh, she's got to pay this whole amount back. I certainly don't want that going in. That's a bigger concern for me. I would prefer there not be any evidence, and I would object to any evidence concerning insurance.

The court: How would you propose we do it? Because the law requires that I consider the issue of interest and permit the jury to exercise their discretion. And my only thought on that was they therefore should have all the information to exercise that discretion.

Defense counsel: I just think that that just is opening up a can of worms for confusion with the jury.

The court: I don't disagree with you, but the law – I didn't write it. 3288, and it says what I said it says. And I read all of it yesterday, and the cases that look at it. And it isn't a flat-out yes, you recover. As we know, it's discretionary. What does that mean? The jury has a right to say, "Sure, give her interest on the economic expenses." And I say they should know whether she paid for those expenses. And Mr. Kohn says then if the insurance paid for it, then don't they also have to know that the insurance has a right to recover, if that's true.

Defense counsel: Well, I think going into that entire issue of whether the med pay insurer, or any other insurer for that matter, has a right to recover is misleading, confusing, and its probative value is outweighed by the substantial prejudicial effect. Particularly because I believe we are dealing with both med pay and, I believe, health net.

The court: Well, I don't know any of that. That's one of my problems, and I'm not going to have a mini-trial on that issue, you can bet on that.

The law on prejudgment interest

As background, there are three controlling provisions in California on prejudgment interest: Civil Code sections 3287, 3288 and 3291. California Courts have clearly held that by these statutes, a plaintiff *may* be entitled to prejudgment interest as part of his or her compensatory damages. [See *Bodell Const. Co. v. Trustees of Calif. State Univ.* (1998) 62 Cal.App.4th 1508 [1525 73 Cal.Rptr.2d 450, 461] (citing text); *North Oakland*

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Med. Clinic v. Rodgers (1998) 65 Cal.App.4th 824, 830 [76 Cal.Rptr.2d 743, 747 & fn. 4 – "prejudgment interest…is an element of damages"].

The Rutter Group California Practice Guide, Personal Injury (2005) provides the following discussion of these statutes:

(a) CC 3291 creates an *absolute* right to 10 percent prejudgment interest on the *compensatory* damages portion of a *personal injury* (or *wrongful death)* award when a rejected CCP 998 settlement demand is exceeded by the judgment. [CC 3291; *Lakin v. Watkins Associated Industries*(1993) 6 Cal.4th 644, 656-661 [25 Cal.Rptr.2d 109, 116-119]; see *McKinney v. California Portland Cement Co.* (2002) 96 Cal.App.4th 1214, 1229-1232 [117 Cal.Rptr.2d 849, 860-862].]

(b) CC 3287 also provides for an "absolute" right to prejudgment interest as part of plaintiff's compensatory damages award; but this is limited to contract cases and actions where recoverable damages are "certain or capable of being made certain by calculation" (i.e., where the basis for computing recoverable damages is conceded and the only issue involves liability giving rise to damage). [CC 3287; *Stein v. Southern Calif. Edison Co.* (1992) 7 Cal.App.4th 565, 571-572 [8 Cal.Rptr.2d 907, 911]; see *Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 961-962 [57 Cal.Rptr.2d 141, 149] – no prejudgment interest in embezzlement case where P's comparative negligence made D's fault percentage incalculable until completion of trial]

(1) In most personal injury cases, both the liability *and* damages issues are contested; hence, 3287 does not apply. [See, e.g. *In re Pago Pago Aircrash of January 30, 1974* (CD CA 1981) 525 F.Supp. 1007, 1011-1012]

(c) In contrast, the jury has a "discretionary" right under CC 3288 to award prejudgment interest in all non-contract cases "and in every case of oppression, fraud or malice"…hence in all unliquidated tort actions. This has been characterized as a "necessary element of compensatory damages to insure a plaintiff is made whole" and hence part of plaintiff's "actual damages"; it represents the accretion of wealth which money or particular property could have produced during a period of loss (between the time of the injury and verdict). [See *Greater Westchester Homeowners Ass'n v. City of Los Angeles* (1979) 26 Cal.3d 86 [102-103, 160 Cal.Rptr. 733, 741]; *West Virginia v. United States* (1987) 479 US 305, 310-311 [107 S.Ct. 702, 706 & fn. 2]; *In re Pago Pago Aircrash of January 30, 1974*, *supra*, 525 F.Supp. at 1012-1019]

(1) However, 3288 prejudgment interest is only awardable on plaintiff's established "special" or "economic" damages – such as medical bills, lost earnings to date, loss of household services to date, loss of the use of property to date, and all other damages attributable to an ascertainable economic value. [See *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 815 [148 Cal.Rptr. 22, 29-30]; *Harsany v. Cessna Aircraft Co.* (1983) 148 Cal.App.3d 1139, 1143 [196 Cal.Rptr. 374, 376]… Pre-judgment interest cannot be awarded on plaintiff's "general damages" (pain and suffering, mental and emotional injury). [*Greater Westchester Homeowners Ass'n v. City of Los Angeles*, *supra*, 26 Cal.3d at 102-103 [160 Cal.Rptr. at 741]

a) The distinction is based, at least in part, on the increased danger of speculation and uncertainty were interest to accrue on general damages. Further, it is reasoned that the trier of fact already has authority to consider the duration of "pain and suffering"…so that disallowance of interest thereon does not deprive claimant of compensation for this element of damage. [See *Harsany v. Cessna Aircraft Co., supra*; *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, *supra,* 26 Cal.3d at 103 [160 Cal.Rptr. at 741]; *In re Pago Pago Aircrash of January 30, 1974, supra*]

(Flahaven, Rea and Kelly, CAL.PRAC. GUIDE: PERSONAL INJURY (The Rutter Group 2005) at pp3-13 to 3-15.)

The law on the collateral source doctrine

As further legal background, the collateral source doctrine is well-established in California and precludes reduction of liability for damages by virtue of collateral source arrangements. (*See, Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1 [84 Cal.Rptr. 173]; *Arambula v. Wells* (1999) 72 Cal.App.4th 1006 [85 Cal.Rptr.2d 584]; *McKinney v. California Portland Cement Co.* (2002) 96 Cal.4th 1214.) The rule "operates both as a substantive rule of damages and as a rule of evidence." (*Arambula v. Wells, supra* at 1015.) Simply stated, the rule is that "if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." (*Helfend*, *supra* at p. 6.) In perhaps its purest form, the rule "embodies the venerable concept that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift. The tortfeasor should not garner the benefits of his victim's providence." (*Helfend*, *supra* at pp. 9-10, fn. omitted.) Thus, in *Helfend,* the plaintiff claimed medical expenses, and the court held that the collateral source rule barred defendant from introducing evidence that the expenses had in fact been covered by plaintiff's insurer." (*Rotolo Chevrolet v. Superior Court* (2003) 105 Cal.App.4th 242, 264 [129 Cal.Rptr.2d 283].) Thus, assuming that the billing rates charged are reasonable and appropriate within the community for those services, the only measure of damages that should be presented to a jury is the amount of the bills generated by the medical providers.

Further, pursuant to court rules in many California jurisdictions including San Diego Superior Court's Rule 2.18,

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the Court automatically grants all motions in limine regarding collateral source payments. The Collateral Source Doctrine in California has long served to preclude a tortfeasor from diminishing their liability due to compensation or indemnity received by an injured party from a source independent of the wrongdoer and to which the tortfeasor has not contributed. (*See, Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1; *Arambula v. Wells* (1999) 72 Cal.App.4th 1006; *McKinney v. California Portland Cement Co.* (2002) 96 Cal.4th 1214.) Under the collateral source rule, plaintiffs in personal injury actions are entitled to recover full damages even though they already have received compensation for their injuries from such "collateral sources" as medical insurance. (*Arambula v. Wells* (1999) 72 Cal.App.4th 1006 [85 Cal.Rptr.2d 584]; *Pacific Gas & Electric Co. v. Superior Court* (1994) 28 Cal.App.4th 174 [176, 33 Cal.Rptr.2d 522].)


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