Calculating the Judgment on Jury Verdict: Where Art Meets the Math Nightmare

By Robert Arns

INTRODUCTION

Accurately evaluating economic and non-economic damages before verdict is an art form mastered by only the most experienced lawyer. However, such predictions are becoming less difficult than determining what the ultimate net judgment will be to the client following a trial. Said another way, determining the nature and extent of damages is only half of the story. The other half is determining the amount the defendant will actually have to pay. The verdict is crucial but the judgment is the bottom line.

Many of us who have chosen a career in law are not known for our mathematical ability. Calculating a judgment on jury verdict may not use higher math but it does require numerous interrelated calculations. A "net judgment" worksheet can greatly aid in making those calculations.1 The best way to accomplish this task is to create a template with a database program. This is much easier than it sounds, but if you are not comfortable with computers it can always be done the old fashioned way.

This article will first discuss multiple uses of such worksheets, then address some fundamental concepts, including the legal difference between a verdict and a judgment. After that, it will set forth the legal principles of calculating a judgment based upon the jury verdict, and finally, how to plug in both the legal doctrines and the math to create a judgment worksheet.

A. THE THREE USES OF NET JUDGMENT WORKSHEETS

Even if one has never used a computer spreadsheet before and is turned off by the idea of injecting the use of a computer in this context, the use of a spread sheet saves valuable time by instantly and graphically illustrating concepts to a client, opponent or mediator. Thus, this high tech analysis tool really only infuses more craftsmanship into our profession.

However, there is nothing wrong with creating such a worksheet without a spread sheet program with blanks where the information is to be placed.

1. To Illustrate Probable Net Judgment Scenarios to a Client Before Trial

The first and most important use of a net judgment worksheet is as a graphic illustrative tool to demonstrate to clients what the probable scenarios will be after verdict and how the judgment on jury verdict and net recovery will be calculated. One can easily input different hypothetical percentages of fault and damages (both economic and non-economic). Thus, the client actually sees this graphic illustration, which helps the client understand the consequences of comparative fault, Code of Civil Procedure § 998 cost enhancements or deductions, the effect of workers compensation liens, the effect of settlements with co-defendants, how costs come into play, requests for trial de novo, and numerous other competing concepts. At the very least, the net judgment/net recovery worksheet is a checklist for the client to see the competing legal issues that come into play when calculating a net judgment.

This spreadsheet analysis should not stop with the net judgment, as medical liens, costs, settlements with other defendants, and other items including attorney's fees have to be deducted from or added to the net judgment. The client obviously wants to know what he or she is going to net and the risk analysis involved in getting there. There is no better way to illustrate these concepts than the net judgment worksheet.

2. To Help Convince the Defense of the Value of the Case

A second reason to utilize the net judgment worksheet is for the lawyer to easily calculate different scenarios and present them during settlement conferences or mediations. Too often, the defense attorneys, defendants and mediators do not understand concepts that inure to the plaintiffs' benefit. Being able to input different numbers during a mediation and obtain a calculation of the net judgment can be very persuasive to a defendant which claims that it is only 5% responsible in a catastrophic injury case with huge economic damages.

3. To Calculate the Net Judgment on Jury Verdict

The third reason to have a judgment worksheet is to input the numbers after trial as awarded by the jury and promptly prepare a judgment with the confidence it is correct. The judgment worksheet serves as a checklist of all items that must be taken into consideration. It is imperative that the judgment be prepared swiftly so

that the court can enter the judgment and the notice of entry of judgment can be served without delay.

B. VERDICT AND JUDGMENT FUNDAMENTALS

A jury will return either a general verdict, a general verdict with special interrogatories, or a special verdict. With the advent of California's pure comparative negligence scheme in Li v. Yellow Cab Co. (1975) 13 Cal.3d 804, and the enactment of Proposition 51 in 1986 (codified as Civ. Code § 1431.1) making the liability of each defendant for non-economic damages several and not joint, the general verdict form is all but obsolete in personal injury cases.

A general verdict is "that by which they [jurors] pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant …." (Code Civ. Proc. § 624.) Such verdict would read:

We the jury in the above entitled action find in favor of plaintiff and against defendant and award damages in favor of plaintiff in the amount of $_____.

Obviously a general verdict would not need to be calculated with a spreadsheet.

A special verdict is one "by which the jury finds the facts only, leaving the judgment to the court" (Code Civ. Proc. § 624) and sets forth the percentages of fault as well as the total amount of economic and non-economic damages. A general verdict on special interrogatories is similar to a special verdict and will also set forth percentages of fault and economic and non-economic damages.

The verdict is received by the court and, if proper, is read to the jury and the parties. (Code Civ. Proc. § 618.) The entry of the verdict consists of the complete verdict being set out at length in the court minutes.

With respect to the calculation and entry of judgment, Code of Civil Procedure § 664 states that:

When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict within 24 hours after the rendition of the verdict, whether or not a motion for judgment notwithstanding the verdict be pending, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings.

Because of the complexities of calculating a judgment in a complex case the court usually sets a hearing for presentation of the judgment with the hope that the parties can agree on the final form. It is at this time that the one desperately needs

to be sure about the law in calculating a judgment and have a judgment spreadsheet formatted so that the judgment can be confidently prepared without delay.

This timing is crucial because no entry of judgment2 can be accomplished unless the judgment is calculated. For that matter, until the judgment is "entered," it is not effective for any purpose. (Code Civ. Proc. § 664.) The prevailing party must prepare the judgment as soon as possible so it can be entered and so the notice of entry of judgment3 can be served which starts the time running for post-judgment motions and the notice of appeal.

C. LEGAL PRINCIPALS FOR CALCULATING NET JUDGMENT ON JURY VERDICT

One needs to go through the following 13 steps in order to calculate a net judgment on jury verdict. The law dictating these 13 steps is discussed below. The following hypothetical sets forth the assumptions which will be used in this analysis:

Non-Economic Damages $ 300,000
Economic Damages $ 700,000

Comparative Fault 10%

Employer Fault 40%

Defendant A Fault 50%

Settlement with Defendant B $ 250,000

Workers' Comp Lien $ 100,000

Step 1: Enter the Economic and Non-Economic Damages Awarded by the Jury

Civil Code § 1431.2(a) (Prop. 51) states:

In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

Each defendant's liability for non-economic damages must be separately calculated in the judgment. Thus, the first step in calculating the judgment is to enter the amount of economic and non-economic damages4 as awarded by the jury (or presented in the pre-trial hypothetical) in Step 1 of the calculation. According to the given hypothetical the following should be entered.

Non-economic Damages $ 300,000
Economic Damages $ 700,000

Step 2: Determine Percentage of Economic and Non-economic Damages (Economic Damages/Total Damages)

The first calculation that is required is the determination of the ratio of economic damages to the verdict as a whole. The percentage of economic vs. non-economic damages will be important in determining the amount deducted for pre-trial settlements (Step 5); and the workers' compensation lien (Step 6). To calculate this result, the economic damages are divided by the total damages awarded. In the hypothetical, economic damages are 70% of the total damage award.

Step 3: Set Forth the Percentage of Fault for Each Party or Other Entity

The percentages of fault of each party, plaintiff's employer or other entity will have already been calculated by the jury. The hypothetical numbers are:

Comparative Fault 10%
Employer Fault 40%

Defendant A Fault 50%

TOTAL 100%

Step 4: Determine Plaintiff's Net Economic Damages Recovery After Deduction for Comparative Fault

Under Torres v. Xomox Corp. (1996) 49 Cal.App.4th 1, 42, a plaintiff's comparative fault is subtracted from his economic recovery off the top. Therefore this calculation requires multiplying the total economic damages by plaintiff's comparative fault percentage and subtracting that result from the verdict. Thus, with a verdict of $1,000,000 with $700,000 in economic damages and 10% comparative fault, $70,000 is subtracted from the economic damages leaving $630,000.

Economic Award $ 700,000

10% Comparative Deduction $ (-70,000)

Result $ 630,000

Step 5: Subtract Pre-Trial Settlements from Economic Damages (Settlement x Economic Ratio)

In Espinoza v. Machonga (1992) 9 Cal.App.4th 268, the court ruled per Civil Code § 1431.2 that one must deduct the only the percent of a pretrial settlement which is economic. This calculation has been previously determined in Step 2 (and is 30% in the given hypothetical.) The Espinoza court stated that:

[Civil Code] Section 1431.2 provides that the responsibility for the non-economic portion of the damages allocated to each defendant shall be several and not joint. Therefore, each defendant is solely responsible for his or her share of the non-economic damages. Thus, that portion of the settlement attributable to non-economic damages is not subject to setoff. To do otherwise would, in effect, cause money paid in settlement to be treated as if it was paid as a joint liability. This could not properly be done on a verdict and we see no basis why it should be done on a settlement. Therefore, viewing the undifferentiated settlement figure as a whole, under these circumstances it is appropriate to calculate the percentage of the award attributable to economic damages in relationship to the entire award. (Id. at 276-77.)

Thus a pre-trial settlement of $250,000 is reduced 30% to make a $175,000 deduction from the economic damages. This affects the hypothetical as follows:

Economic Award $ 700,000
10% Comparative Deduction $ (-70,000)

Pre-Trial Settlement Deduct $ (-175,000)

Result $ 455,000

Step 6: Determine Workers' Compensation Lien Set Off (Torres; Scalice)

In Torres v. Xomox Corp., supra, at p. 7, the court stated:

We conclude that the proper method of allocating workers' compensation benefits under Proposition 51 is the same one that has been adopted for pre-verdict settlements in a line of cases beginning with Espinoza v. Machonga (1992) 9 Cal.App.4th 268. Under this "Espinoza" approach, workers' compensation benefits are to be allocated between economic and non-economic damages in the

same proportions as those damages are awarded by the trier of fact." (See also Scalice v. Performance Cleaning Systems (1996) 50 Cal.App.4th 221.)

Therefore, to calculate this result, the same procedure as used in Step 5 is applied to the workers' compensation lien. In the hypothetical the $100,000 W.C. lien would be multiplied by 70% and would equal a $70,000 deduction.

Economic Award $ 700,000
10% Comparative Deduction $ (-70,000)

Pre-Trial Settlement Deduct $ (-175,000)

W.C. Lien Set-Off $ (-70,000)

Result $ 385,000

Step 7: Determine Plaintiff's Net Share of Non-Economic Damages (DaFonte)

Each defendant can only be responsible for their non-economic damages directly attributable to its percentage of fault. The California Supreme Court confirmed this in DaFonte v. Up-Right, Inc. (1992) 2 Cal.4th 593, 601, where it stated:

Section 1431.2 declares plainly and clearly that in tort suits for personal harm or property damage, no "defendant" shall have "joint" liability for "non-economic" damages, and "[e]ach defendant" shall be liable "only" for those "non-economic" damages directly attributable to his or her own "percentage of fault."

Therefore, one must multiply the total non-economic damages by Defendant A's fault. In the given hypothetical Defendant A's fault was 50% and the total non-economic damages were $300,000. Therefore, the total non-economic award allowed is $150,000.

Step 8: Add Net Amount of Non-Economic and Economic Damages After Deductions

The total economic damages remaining following the deductions are then added to the total non-economic damages for each particular defendant.

Net Economic Damages $ 385,000
Net Non-Economic Damages $ 150,000

Net Judgment against

Defendant A $ 535,000

Step 9: Determine the W.C. Threshold Level (Associated Construction)

When a workers' compensation lien exists, one not only calculates set-off (see Step 5) but also the amount of repayment that the workers' compensation carrier gets back, if any. The formula to determine the "threshold level" is set forth in Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 829, 843 as follows:

When the issue of an employer's concurrent negligence arises in a judicial forum, application of comparative negligence principles is relatively straightforward. The third party tortfeasor should be allowed to plead the employer's negligence as a partial defense, in the manner of Witt. Once this issue is injected into the trial, the trier of fact should determine the employer's degree of fault according to the principles of American Motorcycle. The court should then deduct the employer's percentage share of the employee's total recovery from the third party's liabilityup to the amount of the workers' compensation benefits assessed against the employer…. Correspondingly, the employer should be denied any claim of reimbursementor any lien under section 3856, subdivision (b)to the extent that his contribution would then fall short of his percentage share of responsibility for the employee's total recovery.

Thus, the formula for determining the "threshold number" is calculated by multiplying the employer's negligence by the total damage award. To determine the threshold level, $1,000,000 (the total award to plaintiff) is multiplied by the 40% employer fault, which equals $400,000. This is the threshold number below which the employer is not entitled to any recovery from the third party defendant. The workers' compensation carrier is entitled recovery from the defendants for any lien monies paid above the threshold number. In the given hypothetical, the employer is entitled to no repayment of the lien since they paid less ($100,000) than their threshold level of fault ($400,000).5

Step 10: Add Costs Of Suit

The "prevailing party" is entitled as a matter of right to recover costs of suit in any action or proceeding. (Code Civ. Proc. § 1032.) Allowable costs are set out in Code of Civil Procedure § 1033(c)(1). In the hypothetical, allowable costs were $20,000, so the net verdict is:

Net Judgment
against Defendant A $ 535,000

Allowable costs $ 20,000

Net Judgment with costs $ 555,000

Step 11: Add or Subtract Costs Penalties

After calculating the above judgment, one has to determine if other legal doctrines could preclude the recovery of costs or actuate penalty provisions.

a. Judicial Arbitration Award Costs Penalties for Trial De Novo

Where a party has demanded a trial de novo after a judicial arbitration and the judgment obtained at trial is less favorable to that party then costs cannot be recovered by that party. Such party must pay opponent's costs, and may be responsible for opponent's reasonable expert witness fees "in preparation for trial of the case." (Code Civ. Proc. § 1141.21(a).) Thus, if there were a trial de novo after arbitration, one would have to calculate whether any of the costs penalties should be added the cost bill.

b. Costs Penalties for Rejection of CCP § 998 Offer

If a statutory section 998 offer of compromise was rejected before trial and the offeree fails to obtain a "more favorable" judgment, then the unsuccessful offeree would be required to pay the opponent's costs incurred from time of cost bill and may be responsible for opponent's reasonable expert witness fees in preparation for trial of the case. (Code Civ. Proc. § 998(c)(e).)

The difference between getting a higher or lower judgment with respect to a Code of Civil Procedure § 998 is obviously extreme especially in a multi-million dollar case with expert fees in the hundreds of thousands of dollars. This is a subject the client must be informed about in detail. In order to determine a prevailing party under a section 998 offer, there are numerous factors which come into play including how to calculate who the "prevailing party" is for purposes of section 998. Those factors are not discussed in this article.

Step 12: Add Prejudgment Interest

In personal injury actions, plaintiff is also entitled to recover 10% interest on the judgment from the date of the section 998 offer on the award if defendant rejected plaintiff's section 998 offer and failed to obtain a "more favorable judgment." (Civ. Code § 3291.)

Step 13: Calculate Attorneys' Fees If Allowed

There are numerous statutes which make fee awards discretionary and thus make such fees allowable "costs." (Code Civ. Proc. § 1033.5(a).) Probably the most common application of awarding attorneys' fees in a personal injury or wrongful death case is where a party refused to admit Requests for Admissions that are proved true at trial per Code of Civil Procedure § 2033(o).6

Thus, if plaintiff prevails and the "denied" requests for admission are proven to be true, one needs to set this forth in an affidavit accompanying the costs memorandum. In cases where defendants are hiding facts and making discovery difficult the plaintiff can obtain attorney's fees on almost all important evidentiary issues.

One needs to calculate the amount of attorneys' fees awarded and enter it in this step of the worksheet.

D. NET RECOVERY TO CLIENT

In addition to the steps above for calculating the judgment, there are several more steps needed to calculate the client's net recovery. These items obviously have no relevance to calculating the judgment but are of course key to determining the clients net recovery, and include other subrogation liens (private health care providers, MediCal, Medicare, etc.), the actual costs of plaintiff's attorney in prosecuting the case and attorneys' fees.

CONCLUSION

Calculating a final judgment on jury verdict includes difficult legal principals which are made even more complex because of the mathematical formulas required. A judgment spreadsheet allows one to quickly input the relevant numbers to obtain an instantaneous calculation. The judgment worksheet is a graphic aid for evaluation of the probable scenarios of a jury verdict with a client, as a settlement tool with the defense and mediators and for quickly calculating a judgment so that the entry of judgment can be accomplished and the notice of the same can be served at the earliest possible time.

If anyone is interested in a pre-formatted template for Microsoft Excel, that will automatically calculate each of the forgoing calculations with an explanation of the steps taken, The Arns Law Firm will send a disk with hard copy instructions. Send a large, self-addressed, stamped (75¢) envelope to: The Arns Law Firm, Judgment Spreadsheet Request, 101 Spear Street, San Francisco, CA 94105.

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1 A computerized spreadsheet (such as Microsoft Excel, Corel Quattro Pro, or Lotus 1-2-3) has columns and rows which intersect at cells. The cell address is the row number and column number of this intersection. Such spreadsheet templates can be easily pre-programmed with formulas to perform all necessary calculations automatically without having to laboriously redo the math with each step. Thus, once the spreadsheet is programmed with formulas, one need only enter the jury's findings or hypothetical numbers to calculate the net judgment instantaneously. This net judgment spreadsheet works particularly well when showing a client multiple variable scenarios where the attorney can illustrate how the variable can drastically change net verdict.

This article will use the term "spreadsheet" to mean a formatted program as described in this footnote and "worksheet" to mean a non-computerized method.

2 The "entry of judgment" is a clerical act. In most courts, judgments are "entered" by the clerk's filing of the judgment, i.e., file-stamping the original judgment signed by the court and placing it in the court file without regard to the time the judgment is recorded. (Code Civ. Proc. § 658; County of Los Angeles v. Ranger Ins. Co. (1994) 26 Cal.App.4th 61, 65.)

3 Per Code of Civil Procedure § 664.5 the party submitting the judgment for entry is required to (1) Serve notice of entry of judgment on all parties who have appeared in the action; (2) File the original notice with the court; (3) File the proof of service.

4 Civil Code § 1431.2(b) defines economic and non-economic damages as follows:

i. For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

ii. For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

5 The calculation of the workers' compensation "threshold number" is not to be confused with the set-off of the lien as calculated in Step 6 above which occurs

regardless of the right of the employer to receive funds or not. Set-off prevents plaintiff from being paid twice for the same damages. The threshold number prevents a negligent employer from benefitting from their own negligence.

6 CCP §2033(o) states:

If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this section, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.