

Fulfilling The Legislative Intent of Code of Civil Procedure Section 667.7

By John F. Denove

In 1975 the California Legislature passed and the governor signed, as an emergency measure, the Medical Injury Compensation Reform Act (MICRA). One portion of MICRA, Code of Civil Procedure section 667.7, provides that in any medical malpractice action the court shall, at the request of either party, enter a judgment ordering that future damages of \$50,000 or more shall be paid by periodic payments rather than a lump sum payment:

By authorizing periodic payment judgments, it is the further intent of the Legislature that the courts will utilize such judgments to provide compensation sufficient to meet the needs of an injured plaintiff. . . for whatever period is necessary while eliminating the potential windfall from a lump sum recovery, which was intended to provide for the care of an injured plaintiff over an extended period who then dies shortly after the judgment is paid, leaving the balance of the judgment award to persons and purposes for which it was not intended.

(Code Civ. Proc § 667.7, subd. (f).)

This intent is met, in part, by a subdivision that terminates all payments for future healthcare costs upon the death of the plaintiff, Code of Civil Procedure section 667, subdivision (b)(l).

In cases involving Code of Civil Procedure section 667 issues, some trial courts have been admitting evidence of life expectancies and instructing juries to make their awards accordingly. However, it is clear that the legislative intent is to provide compensation sufficient to meet the needs of an injured plaintiff, and that this approach can and will cause results which are contrary to the intent. As pointed out by George McDonald in his treatise, *California Medical Malpractice, Law and Practice*, Revised Edition, Vol. 3, page 384:

The "windfall" argument usually focuses on premature death. Few consider the reverse scenario: that the subject will out-live the actuarial date the trier has assumed and in so doing will also outlive the last cent the judgment has awarded.

This article will examine how to fulfill the legislative intent of Code of Civil Procedure section 667.7.

As an example, take the case of Sally Smith who, at the time of trial, was five years old. She sustained brain damage at birth due to an obstetrician's negligent failure to recognize fetal distress. As a result of this negligence Sally suffers from spastic quadriplegia. She requires 24-hour care and monitoring at an annual cost of \$200,000. At trial the defense offered expert testimony that Sally will die before she reaches her 20th birthday. Plaintiff's expert testified that with appropriate care Sally should reach the age of 60.

The jury found negligence and causation and awarded future care costs in the amount of \$3 million. The jury based its damage award on the defense expert's testimony that Sally will live no longer than another 15 years.

After the verdict the defense moved the court to order that future damages be periodicized and paid at the annual amount of \$200,000 over the next 15 years. The motion was granted.

It is now 16 years later and Sally celebrates her 21st birthday. She is relatively healthy due to the medical care that she has received. Unfortunately, at age 20 she received her last \$300,000 annual pay-

ment. She now has no funds to pay for the cost of care that has kept her healthy and alive.

This result is in clear contradiction of the explicit legislative intent of Code of Civil Procedure section 667.7 "to provide compensation sufficient to meet the needs of an injured plaintiff. . . for whatever period is necessary while eliminating the potential windfall from a lump/sum recovery which was intended to provide for the care of an injured plaintiff over an extended period"

Periodic payments prevent the windfall by terminating payments upon the death of the plaintiff. The legislative intent, however, is to provide compensation sufficient to meet the needs of an injured and surviving plaintiff. To secure this result, the jury should be told that damages for future healthcare costs of \$50,000 or above are, at the option of either party, periodicized over the life expectancy of the plaintiff and that upon the plaintiff's death no further payments shall be made. With this knowledge, the jury would not be placed in the position of speculating as to how long the plaintiff will survive.

The only concern in determining the amount of future medical care costs is what care is needed and the annual cost of such care. If the jury is forced to determine how long the plaintiff will live, and the plaintiff lives longer than they estimated, the plaintiff would be without funds to provide for the continuing healthcare expenses. The statute does not require a determination of the plaintiff's life expectancy because periodic payments terminate upon the plaintiff's death.

The jury does not have to be concerned with life expectancy in determining future loss of earnings. Code of Civil Procedure section 667.7, subdivision (c), specifically provides that "Money damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment debtor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to his death."

The jury will, however, need to determine life expectancy in determining future non-economic damages. This is true even though the plaintiff is limited to \$250,000. *Schiernbeck v. Haight* (1992) 7 Cal.App. 4th 869 [9 Cal.Rptr. 2d 716], suggests that in order to make a fairer determination as to the amount and timing of annual payments for non-economic damages, the jury should not be told of the \$250,000 cap. The court needs to instruct the jury that its finding of life expectancy is limited to the issue of future non-economic damage and not to future healthcare cost damage.

The defense may argue that it would be inappropriate to advise the jury of either the right of the parties to choose periodic payments or the fact that periodic payments for future health care costs terminate upon the plaintiff's death. The defense may point out that many trial courts do not permit the jury to know of the \$250,000 cap on non-economic damages, and therefore the jury should not know of periodic payments or the effect death has on such future payments. Many judges do not allow the jury to know of the \$250,000 cap because of a fear that juries will overcompensate a plaintiff for economic damages if \$250,000 is all the plaintiff can receive for non-economic damages.

The plaintiff's attorney must be aware that by allowing the jury to be told about periodic payments and that death terminates the payments, the jury will probably award future medical care costs for the normal life expectancy of the plaintiff. Unless one of the parties has chosen periodic payments, the jury must also determine the present cash value of future medical care costs. The present value will necessarily take into account the predicted life expectancy of the plaintiff because if periodic payments are not chosen, the present value will be paid to the plaintiff in a lump sum. Thus, if the plaintiff wishes to have the payments continue for

the actual life of the plaintiff rather than the jury's prediction of life expectancy, the plaintiff may have to choose periodic payments before trial.

Periodic payments present other non-jury problems. In determining the amount of attorney fees, some courts have calculated the contingent fee on future medical care costs based upon the cost of an annuity to secure the annual payments. *Schneider v. Kaiser Foundation Hospitals* (1989) 215 Cal.App.3d 1311 [264 Cal.Rptr. 227.]

However, the court in *Hrimnak v. Watkins* (1995) 38 CalApp. 4th 964 [45 Cal. Rptr.2d 514], rejected the argument that the attorney fees must be a percentage of the cost of the annuity purchased to fund the payments. The jury's determination of the present value provides a proper basis for calculating attorney fees.

If, however, the court instructs the jury on the effect of periodic payments, the court will not have the jury finding on present value to guide it in calculating attorney fees. The plaintiff's attorney will be left with the choice of having its attorney fees for the future medical care costs periodicized, or accepting attorney's fees based on the cost of the annuity. Many plaintiff attorneys may decide that neither approach is desirable.

In medical malpractice actions where there is a claim for significant damages for future healthcare costs and there is a legitimate concern that the jury will accept the defense argument of a greatly reduced life expectancy, it is suggested that plaintiff bring a motion in limine requesting the following: (1) an instruction to the jury that all future health cost damages in excess of \$50,000 will be paid over time, and that upon plaintiff's death all such payments for future health care costs terminate; and/or (2) an order that the attorneys may make that argument to the jury. Such a ruling is requested unless both parties stipulate that they waive the right to request periodic payments and, therefore, it will be necessary for the jury to consider life expectancy when determining the present and future value of healthcare costs.



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