APPLYING PRE-TRIAL SET-OFFS TO A SINGLE DEFENDANT PLAINTIFF'S VERDICT

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Many times a case proceeds to trial with prior settlements between the plaintiff and other parties without requesting that the jury apportion fault among the other parties on the Special Verdict form. In such a situation, the party that elects to try the case is entitled to apportionment of the damages and set-offs of the prior settlement amounts in the event of a plaintiff verdict. This includes both economic and non-economic damage awards. This article addresses the steps necessary to ensure the appropriate set-offs are applied to the verdict.

Assume there is a plaintiff verdict of $450,000, allocated $150,000 in economic damages and $300,000 in non-economic damages. Assume further that the co-defendant settled before trial for $50,000. Different formulas are used as set-offs to discount the verdict, depending on whether this is a non-medical malpractice case or a medical malpractice case.

In a non-medical malpractice case, the general rule is that only economic damages are off-set by the amount of the prior settlement – the non-economic damages are not affected. The $150,000 in economic damages would be reduced by half of the $50,000 settlement because economic damages are jointly divisible. Thus, $25,000 would be credited to the settling co-defendant for the plaintiff's economic damage claim. The other $25,000 would be credited to the co-defendant who tried the case, as an off-set to the plaintiff's total economic damage claim.

The $150,000 in total economic damages awarded to the co-defendant who tried the case would therefore be reduced to $125,000. The $300,000 in non-economic damages would be unaffected by any off-sets. Combined, the total adjusted verdict would be $425,000 ($125,000 in economic damages plus $300,000 in non-economic damages) instead of $450,000. In a non-medical malpractice case, this would be the end of the set-off calculation.

Different rules apply when calculating the effect of off-sets to a medical malpractice verdict. The total value of the verdict is reduced by off-sets which are calculated as the ratio of the prior settlement applied separately to both the economic and non-economic damages. *Mayes v. Bryan*, 139 Cal.App.4th 1075, 1099-1103 (2006).

The first step in adjusting the plaintiff verdict is to reduce the $300,000 non-economic damages to the maximum $250,000 cap permitted under MICRA. The second step is to calculate the ratio between the noneconomic and economic damages in light of the prior settlement amount. If the plaintiff did not seek economic damages and the total verdict was $300,000 only for pain and suffering, then the entire $50,000 settlement amount would be deducted as an off-set to the entire verdict after the $250,000 MICRA cap is imposed. *Gilman v. Beverly California Corporation*, 231 Cal.App.3d 121 (1991). In such a case, the adjusted result would be a $200,000 total verdict.

Otherwise, if the plaintiff recovered economic damages ($150,000) and non-economic damages (adjusted to $250,000 under the statutory MICRA cap), the total $50,000 settlement sum represents 20% of the $250,000 economic damage claim. That 20% (or $10,000) would be applied as an off-set to the non-economic damage claim, thereby reducing it to $240,000. The remaining 80% of the settlement (or $40,000) would then be applied as an off-set to the economic claim, thereby reducing it to $110,000. Combining the adjusted amounts leads to an adjusted result of a $350,000 total verdict.

This calculation, due to off-sets from the prior settlement, represents a $100,000 overall reduction in value from the original $450,000 verdict. It is apparent to see that this is a significantly lower adjusted sum than would otherwise be the case in a non-medical malpractice verdict.

It is our goal to not have to undertake such post-trial calculations, but in the unlikely event of a plaintiff's verdict, the calculations are good to know. In a medical malpractice setting, it is good to keep in mind that it is not necessary to seek an apportionment of fault against the various settling defendants so as to avoid a verdict with even a small percentage of fault assigned to the healthcare provider. In other words, make the jury decide it is all or nothing.