

Outside Counsel

Expert Analysis

2011 PJI Poses Problem for Reducing Damages to 'Present Value'

Considered essentially a “bible” for trial, the Pattern Jury Instructions (PJI) provides critical guidance on various issues of law from which judges and attorneys rarely deviate. It is, therefore, of paramount importance that the content of the PJI reflect the current, and certainly, accurate state of the law. The 2011 PJI contains a new section, 2:320A, titled “Damages—Action for Wrongful Death and Conscious Pain Based on Medical, Dental or Podiatric Malpractice Commenced on or after July 26, 2003.”¹ Significantly, this new section omits the language present in earlier editions instructing the jury to reduce damages to their present value.²

Notably, the 2009 and 2010 editions of the PJI (Section 2:320, titled “Damages—Action for Wrongful Death and Conscious Pain—Actions Commenced on or after July 26, 2003”) instruct the jury that, “In determining the economic loss sustained...you must reduce the amount...to its present cash value in order to make allowance for the earning power of the money.”³ The former PJI 2:320 was followed by a further instruction concerning how to make the actual calculations.⁴

Given this unexplained change in the 2011 PJI, a brief review of the common law and legislative history of the calculation of future damages is warranted. Our discussion will demonstrate the flaw in the 2011 PJI section 2:320A. Specifically, before 1985, there was



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no statutory scheme for the computation of damages. Rather, the information was presented to the jury through the testimony of an expert economist. The expert would explain the undiscounted value of future damages as well as the concept of the present value of those future damages, meaning, what the money the plaintiff would have expected to receive in the future was actually worth at the present time. The jury would then make its award based on the information presented by the expert economist.

Amendments and Cases

In an effort to achieve so-called “tort reform,” in 1985, the New York Legislature enacted CPLR 4111 and CPLR 5031, which resulted in essentially a bifurcation for the calculation of economic damages. In order to fulfill the statutory mandates, an expert economist would calculate the future damages and, in accordance with CPLR 4111, the jury was instructed to award an undiscounted amount of damages along with the number of years for which the plaintiff was to be compensated. Then, pursuant to CPLR 5031(e), it was incumbent upon the trial judge, through a series of mathematical equations, to calculate

the present value of the jury’s award and to enter judgment based on that amount.

However, this process led to unintended windfall awards for plaintiffs, with none so clearly demonstrative of the flaws in the statutory scheme as occurred in the case of *Desiderio v. Ochs*.⁵ The *Desiderio* jury awarded the plaintiff \$50 million in damages and as a direct result of the statutorily required calculations and annuity payments, the plaintiff ended up with an award of \$140 million.⁶ At the Court of Appeals’ urging based on this untenable result, the Legislature revised CPLR 4111 and CPLR 5031.

Since those amendments were enacted, in wrongful death actions predicated on medical, dental or podiatric malpractice, the jury has been instructed to return an award for the “total amount” of wrongful death damages. Moreover, under the revised CPLR 5031(b), the payment of wrongful death damages is to be awarded in a lump sum, the statute having eliminated annuity payments for these cases. As a direct result of the statutory amendments, a plaintiff receiving damages for wrongful death based on medical, dental or podiatric malpractice receives all of the money that he would have otherwise received in the future all at one time, in the present, thus necessitating a reduction of those damages to their present value.

Significantly, because the trial judge no longer reduces the award to present value, if the jury is not instructed to do so, the explicit purpose of the statutory amendments is undermined and indeed, defeated. Any other interpretation necessarily results in unintended windfall awards, the very out-

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come the Legislature sought to prevent by amending CPLR 4111 and CPLR 5031.

Consider the scenario where the plaintiff's expert economist proposes to testify that had the decedent lived, he would have worked for an additional 10 years and would have earned \$900,000 over that time. Failing to instruct the jury to reduce those 10 years worth of earnings to their present value would result in the plaintiff receiving the full \$900,000 10 years ahead of time which creates a windfall award because the plaintiff is now in the position of being able to invest \$900,000 that he would not have otherwise had to invest for another decade. Toward that end, because the jury found that the plaintiff was entitled to \$900,000 in damages, the former PJI 2:320 instructed the jury that properly invested, by the end of the 10 years, the amount of the jury award in its present value should yield the same \$900,000 that the decedent would have earned over that period of time had he lived.

Despite the Legislature's clear purpose in amending the statutes in 2003 to prevent windfall awards, the PJI did not include an instruction to the jury to reduce damages to present value until 2009. Because there are no published notes or transcripts of the PJI committee meetings, we are at a loss to understand why, in 2011, the authors appear to have abandoned that crucial language. Even though the new section 2:320A purports to address itself exclusively to wrongful death actions predicated on medical, dental and podiatric malpractice, the authors have removed the critical language instructing the jury to reduce its award to present value (which is the only way to give meaning and effect to CPLR 4111 and CPLR 5031).⁷

The new charge further complicates matters with its commentary suggesting that a reduction to present value may be inappropriate.⁸ To confuse the issue even more, 2:320A contains the following paragraph:

[*In actions subject to CPLR 4111[e], state:*] The amount you decide as the amount of economic loss sustained by [list the distributees by name] must represent the full amount of such losses without reduction to present value. You must also decide the period of years

for which that amount is intended to provide compensation.⁹

Notwithstanding the commentary to PJI 2:320A which suggests the possibility of a contrary interpretation, CPLR 4111(e) is inapplicable to medical, dental and/or podiatric malpractice actions, and therefore has no place in this jury instruction. Thus, overlooking that critical italicized phrase could easily culminate in a charge to the jury in a wrongful death action based on medical, dental or podiatric malpractice NOT to reduce the damages to their present cash value, a result completely at odds with the legislative intent in amending CPLR 4111(d) and 5031(b).

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As clearly and unambiguously reflected in its title, "Itemized verdict in medical, dental, or podiatric malpractice actions," CPLR 4111(d) is the exclusive statutory provision for such causes of action. Given the fact that there have been no changes to the relevant statutes since 2003, nor any case law suggesting that damages should NOT be reduced to present value, we are also at a loss to understand what could have prompted this departure from the charge established in 2009 that finally instructed the jury to make that necessary reduction.

Two Cautions

In our view, the 2011 PJI section 2:320A turns the clock back to the untenable situation that medical, dental and podiatric defendants faced before the statutory amendments. Failing to instruct the jury to reduce awards to present value in these cases will necessarily result in the windfalls that the amendments were purposefully designed to prevent.

Thus, our cautions are twofold: First, be wary of the paragraph in this charge which instructs the jury to return an award *without reduction to present value*; that charge should be given only in cases governed by CPLR 4111(e),

which does not include actions based on medical, dental or podiatric malpractice. Second, assuming avoidance of that pitfall, request the court to charge 2011 PJI section 2:320A.1 so that the jury is instructed as the Legislature intended. While the PJI represents the best thinking of the judiciary, ultimately, it need not in every instance be considered the final word.

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1. NY PJI 2:320A (2011).
2. NY PJI 2:320A (2011).
3. NY PJI 2:320 (2009); NY PJI 2:320 (2010).
4. NY PJI 2:320 (2009); NY PJI 2:320 (2010).
5. *Desiderio v. Ochs*, 100 N.Y.2d 159, 761 N.Y.S.2d 576 (2003).
6. *Desiderio*, 100 N.Y.2d 159, 761 N.Y.S.2d 576 (2003).
7. NY PJI 2:320A (2011).
8. NY PJI 2:320A, at 1707-1708 (2011).
9. NY PJI 2:320A (2011).