

CHAPTER THIRTEEN

AVIATION LAW

DAMAGES

DAMAGES 1

- General Damages 2
- Special damages 2
- Several liability for noneconomic damages (CC§1431) 2
- Pain and suffering 3
- Aggravation of preexisting condition 3
- Medical expenses 3
- Loss of enjoyment of life 3
- Prospective damages [CC §3283] 3
- Loss of earnings 3
- Personal Property 4
 - Partially destroyed 4
 - Totally destroyed 4
 - Damage to real property 4
 - Reduction to present cash value and effect of inflation 5
 - Taxability of tort damages [Rev & Tax C §17131] 5
 - Prejudgment interest as damages 5
- Survival of Actions 6
 - Right to institute or continue cause of action after death of party 6
- The Collateral Source Rule 6
- Injured Party's Duty to Mitigate Damages 7
 - Duty to mitigate as limited by reasonableness 7
- Mitigation in personal injury cases 7
- Punitive damages [CC §3294] 7
- Case #1 Fortman v. Hemco, Inc. 8
- Jury Instructions on Damages 16

DAMAGES

Understanding the law of damages will provide greater insight on the liability theories discussed in this course.

Every person who suffers loss or harm in person or property from the unlawful act or omission of another may recover monetary compensation, called damages, for that detriment from the person at fault. [CC §§3281, 3282] Any party injured by the breach of an obligation not arising from contract is entitled to an amount in compensation for all the detriment proximately caused by the injury, whether it could have been anticipated or not. [CC §3333 (applicable except where otherwise expressly prohibited by statute); Mozzetti v Brisbane (1977, 1st Dist) 67 CA3d 565, 136 CR 751. Damages may be awarded for loss or harm arising after a judicial proceeding has commenced, and for loss or harm certain to result in the future. [CC §3283]

In tort actions, compensatory damages are awarded to restore the plaintiff as closely as possible to his or her position prior to the injury. The amount of compensatory damages should be commensurate with the degree of injury suffered. People v Southern California Edison Co. (1976, 5th Dist) 56 CA3d 593, 128 CR 697.

In general, the rules of legal cause that determine liability also determine the defendant's liability for damages. State Farm Mut. Auto. Ins. Co. v Allstate Ins. Co. (1970, 3rd Dist) 9 CA3d 508, 88 CR 246. In addition to proving causation, the injured party must establish the extent of the harm and an adequate amount of compensation with as much certainty as the nature of the tort and the circumstances permit. Clemente v State of California (1985) 40 C3d 202, 219 CR 445, 707 P2d 818.

Nominal damages and statutory, or penal, damages differ from compensatory damages. Nominal damages are awarded in a trivial amount where a cause of action is proved but no substantial damage or injury has occurred. Avina v Spurlock (1972, 5th Dist) 28 CA3d 1086, 105 CR 198. Statutory damages impose a penalty in an arbitrary sum, and are awarded regardless of actual damages, and in addition to the award of compensatory damages. For example, CC §3343, provides for the amount of damages recoverable for fraud in the purchase, sale, or exchange of property.

General Damages

Compensatory damages are pleaded differently depending on their classification as either general or special damages. Colvig v RKO General, Inc. (1965, 1st Dist) 232 CA2d 56, 42 CR 473. General damages are noneconomic or intangible losses that necessarily or usually flow from the wrongful act. They are sometimes characterized as being subjective or not directly quantifiable. Beeman v Burling (1990, 1st Dist) 216 CA3d 1586, 265 CR 719.

In most cases, general damages consist of compensation for harm or loss such as pain, suffering, and emotional distress. In addition, claims for loss of future earning capacity and future lost earnings are usually considered part of the general damage award. Although these losses have not yet been incurred at the time of trial, they are nonetheless general damages because they are considered a natural and proximate result of the wrongful act.

Special damages

Special damages are defined as damages that do not arise from the wrongful act itself, but depend on the circumstances peculiar to the infliction of each respective injury. Thus, special damages must be specifically pleaded in order to provide defendant's notice of the compensation the plaintiff is seeking. Myers v Stephens (1965, 1st Dist) 233 Cal App 2d 104, 43 Cal Rptr 420. Special damages include any items of actual, objectively verifiable, monetary losses or out_of_pocket expenses caused by the injury that can be documented by bills, receipts, canceled checks, and other records. They usually include medical and related expenses, burial costs, loss or cost of services, loss of use of property, costs of repair or replacement, and costs of obtaining substitute domestic services. Special damages may also include the loss of actual earnings and the loss of business or employment opportunities, including lost business profits from the date of injury to trial (as distinguished from loss of earning capacity which is generally classified as general damages).

Several liability for noneconomic damages (CC§1431)

In any action for personal injury, property damage, or wrongful death, based on principles of comparative fault, the liability of each defendant for noneconomic (general) damages is considered several only and not joint. [CC §§1431.1_1431.5] This means that each defendant is liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment will be rendered against that defendant for that amount. [CC §1431.2(a)] The rule effectively abolishes the presumption that an obligation imposed on several persons, or a right created in favor of several persons, is joint, and not several, with respect to noneconomic damages, while retaining

joint and several liability for economic damages. For purposes of establishing joint and several liability, noneconomic damages are defined as subjective, nonmonetary losses including, but not limited to, pain and suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation. [CC §1431.2(b)(2)] The statute defines economic damages as 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.

Pain and suffering

Damages may be recovered for physical pain and mental suffering that result from physical injury. Hilliard v A. H. Robins Co. (1983, 2nd Dist) 148 CA3d 374, 196 CR 117 Pain and suffering are considered a unitary concept. Pain and suffering are an aspect of general damages and need not be specifically pleaded. Damages for pain and suffering include recovery for terror, ordeal, fright or shock at the time of the injury, physical pain, grief, worry, apprehension, nervousness, anxiety (including anxiety regarding development of a future disease or condition), and any indignity, humiliation or embarrassment at the time of the injury or resulting from scars, disfigurement or disability, as well as any pain and suffering reasonably certain to occur in the future.

Aggravation of preexisting condition

A plaintiff who suffered from a physical or emotional condition prior to the defendant's wrongful act is entitled to compensation for the extent to which the preexisting condition was exacerbated by the defendant's wrongful act. Fox v San Francisco (1975, 1st Dist) 47 CA3d 164, 120 CR 779. An injured plaintiff may also recover damages if he or she becomes susceptible to, and suffers, a subsequent disease or injury as a result of a weakened condition caused by the injury. Ensign v Southern Pacific Co. (1924) 193 C 311, 223 P 953.

Medical expenses

The plaintiff injured by the wrongful act of another is entitled to recover as special damages the reasonable value of necessary medical expenses incurred prior to trial, as well as the reasonable value of any necessary medical expenses which are reasonably certain to be incurred in the future, reduced to their present cash value. Rodriguez v McDonnell Douglas Corp. (1978, 2nd Dist) 87 CA 3d 626, 151 CR 399.

Loss of enjoyment of life

Another compensable element of general damages in tort actions is recovery for loss of enjoyment of life, defined as the impairment of a person's capacity to engage in recreational or other pleasurable activities of a normal person. Loss of enjoyment of life is factor in determining extent of injuries and damages in general or for pain and suffering.

Prospective damages [CC §3283]

Once a defendant's liability for a tort has been established, the plaintiff is entitled to recover for any loss

reasonably likely to occur in the future, as well as any loss incurred prior to the trial. [CC §3283] In personal injury actions, prospective damages may be awarded for future disability, future pain and suffering, and future medical expenses for physical or psychological injuries, or any related services to be provided in the course of treatment.

Loss of earnings

Any person who suffers a disability is entitled to recover the value of his or her earnings lost up to the date of trial, including lost wages, tips, overtime pay, bonuses, commissions, pension rights and other benefits lost because of the inability to work. Recovery may include future lost earnings as well. In addition to damages for lost wages, recovery may be permitted for loss of earning capacity. This aspect of recovery is the amount that an injured plaintiff could have earned, as distinguished from what he or she would have earned, in the future. Damages based on loss of future earning capacity may be claimed without proof of actual earnings either before or after the injury. Thus, even a plaintiff who was unemployed at the time of the injury is entitled to recover for loss of future earning capacity since the purpose of recovery is to provide compensation for loss of the ability to work. Lost earnings or income are usually treated as special damages because they can be proved with reasonable certainty. On the other hand, when a plaintiff claims loss of earning capacity it is treated as general damages. This distinction may have significant consequences for recovery of damages where there are multiple defendants, since CC §1431.2 creates joint liability for economic damages among all defendants, and several liability for noneconomic damages.

The injured plaintiff may also recover an amount for prospective lost business profits upon showing with reasonable certainty both their occurrence and extent. Sanchez-Corea v Bank of America (1985) 38 C3d 892, 215 CR 679, 701 P2d 826. These damages must be specifically pleaded and alleged in tort actions because they are considered special damages. However, a plaintiff may not recover for both lost earnings and lost profits if the award would result in double recovery.

Personal Property

-Partially destroyed -

The general rule for damage to property is that the owner may recover all of the detriment proximately caused by the injury. [CC §3333; Frustuck v Fairfax (1963, 1st Dist) 212 CA2d 345, 28 CR 357. If personal property is wrongfully damaged, but not completely destroyed, the owner may recover for the decrease in value of the item, reduced to its present cash value, and measured by the difference between the value of the item immediately prior to and following the damage. If the owner chooses to have the property repaired, he or she should seek the reasonable cost of repairing the item. If repairing the item

does not restore its original value, the plaintiff is entitled to recover the difference between the value before the injury and the value after the repairs have been made, plus the reasonable cost of making the repairs. But if the repairs restore the item to its original value, the plaintiff must elect between recovery of the repair costs and the diminution in value. In addition, if the cost of repair is more money than the extent of decrease in value, recovery will be limited to the amount of the decrease. In these cases, the defendant must prove that the plaintiff's measure would result in excess recovery. Conversely, if the amount awarded for the decrease in value would be greater than the cost of repairs, the damages will be limited to the reasonable cost of repairs. The owner may also recover for loss of use of the property, usually for the amount of time reasonably required for making repairs. In addition, lost profits resulting from the property damage may be recovered. However, recovery for both lost profits and loss of use of the property is generally not permitted because of the prohibition against double recovery.

Totally destroyed

If personal property is entirely destroyed by the wrongful act of another, the property owner is entitled to the market value of the property at the time it was destroyed, rather than the amount required to replace the item or the cost of the property. However, if the property has a peculiar value to the owner, the particular value of the item may be recovered, if the plaintiff can prove that the defendant acted willfully, or that the defendant was aware of the peculiar value before causing the damage to it. CC §3355.

Damage to real property

Usually the value of damaged land is measured by the diminution in value of the property, according to the difference between the market value of the land before and after the injury. In some situations, damages may be awarded for the cost of repairing damaged lands. However, if the cost of repair is greater than the extent to which the property's value has been diminished, then the amount of diminution is the proper measure. An exception may be recognized if the property owner demonstrates a personal reason for restoring the property, or if there is reason to believe that the plaintiff will make the repairs, even though the cost of repair is greater than the decrease in the value of the land. In trespass actions, loss of the use of the property is also a compensable element, established by the reasonable rental value of the property. If commercial property is damaged, the plaintiff may be entitled to recover the value of lost profits, prospective lost profits, and increased operating expenses incurred while repairs were being made. However, the rental value measure of the property may be applied if the lost profits are not clearly caused by the tort. In addition, if the damage to the property is only temporary, the measure is the

difference in rental or usable value before and after the injury. If a fixture, such as a building, is damaged or destroyed, the plaintiff may recover for the diminution in its value, or its entire value if it is destroyed. The measure of damages is generally the value of the fixture as part of the real property, rather than the usually lesser value it would have if it were to be sold separately from the land. However, if a fixture has a substantial value independent from the land on which it sits, the plaintiff may recover for the value of the destroyed fixture, or for the cost of repairing the fixture. Givens v Markall (1942) 51 CA2d 374, 124 P2d 839 (permitting recovery for the cost of repairing mining machinery taken and later returned, as well as the cost of reinstalling machinery in mine).

Reduction to present cash value and effect of inflation

In determining an award of future damages, the amount must be discounted to its present value. Fox v Pacific Southwest Airlines (1982, 4th Dist) 133 CA3d 565, 184 CR 87. Present cash value means the amount which, if invested at the highest reasonably secure rate of return, will cover the award. Wilson v Gilbert (1972, 1st Dist) 25 CA3d 607, 102 CR 31]

Some courts permit expert evidence of estimated inflationary or deflationary changes in the purchasing power of the dollar, as long as the estimate is based on sound and substantial economic evidence, and is postulated with some reliability. Rodriguez v McDonnell Douglas Corp. (1978, 2nd Dist) 87 CA3d 626, 151 CR 399. Other courts apply what is known as the total offset theory, which assumes that the discount rate and the inflation rate will cancel each other out. The total offset theory views the effect of inflation as equal to the reduction to present cash value rate that is applicable to all damage awards.

Taxability of tort damages [Rev & Tax C §17131]

Although compensatory damages are generally considered part of a plaintiff's gross income for purposes of determining taxable income, there is an exception for damages in personal injury actions. Gross income does not include the amount of damages a person receives either by judgment or settlement, regardless of whether the money was awarded in a lump sum or a periodic payment, arising out of personal injuries or sickness. 26 USC §104(a)(2); Rev & Tax C §17131 (providing that items not included in gross income are to be determined according to Internal Revenue Code unless otherwise provided by Rev & Tax C §§17131 et seq.) Thus, taxable gross income excludes money received as compensation for pain and suffering, loss of consortium, medical expenses, and loss of earning capacity.

Prejudgment interest as damages

Interest may be recovered as part of a damage award. Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is given on a particular day, is entitled also to recover

interest on that amount. CC §3287(a) In addition, CC § 3288 provides that 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 awarded at the jury's discretion.

Under CC §3291 in any personal injury action arising from tort, whether by negligence or willful intent, the plaintiff may claim interest on the damages alleged as provided in that section. If the plaintiff makes an offer to compromise pursuant to CCP §998 which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment will bear interest at the legal rate calculated from the date of the plaintiff's first offer pursuant to CCP §998 which is exceeded by the judgment. Interest will accrue until satisfaction of the judgment. A public entity or a public employee acting within the scope of employment is not liable for interest under CC § 3291.

Survival of Actions

Right to institute or continue cause of action after death of party

A cause of action survives the death of the plaintiff or defendant and all damages may be awarded that could have been recovered had the decedent lived, except:

(1) Punitive damages cannot be recovered against a decedent's estate. CCP §377.42; and

(2) A decedent's estate cannot obtain damages for pain, suffering, or disfigurement CCP §377.34.

Thus, except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period. CCP §377.20(a). If a prospective plaintiff or defendant dies prior to the institution of a law suit, the action may be commenced by or against the person's personal representative or successor in interest. If an actual plaintiff or defendant dies after an action or proceeding was commenced, the pending action or proceeding, on motion, may be continued by or against the person's personal representative or successor in interest. A cause of action survives even though the loss or damage occurs simultaneously with or after the death of a person who would have been liable if the person's death had not preceded or occurred simultaneously with the loss or damage.

A survival action is distinguishable from an action for the wrongful death of the decedent. Grimshaw v Ford Motor Co. (1981, 4th Dist) 119 CA3d 757, 174 CR 348. A survival action is maintained by the decedent's personal representative or successor in interest to enforce a cause of action belonging to the decedent, while a wrongful death action is maintained by the decedent's heirs or by the decedent's personal representative on behalf of the heirs (CCP §377.60).

A pending action or proceeding does not abate by the death of a

party if the cause of action survives. An action by the parents or guardian of an unmarried minor child for injury to the child caused by the wrongful act or neglect of another person is not abated by the child's subsequent death. The parents are entitled to any damages to the child accruing before the child's death. CCP §376(f). A complete cause of action need not exist at the time of the injured party's death for rights to survive that can later mature into an actionable claim. Thus, if the decedent's cause of action ripens at or after his or her death, the decedent's personal representative or successor in interest may still institute a law suit. An exception to the general rule of survivability exists in actions for invasion of privacy. The right of privacy is purely a personal one and it cannot be asserted by anyone other than the person whose privacy has been invaded. Accordingly, the right does not survive but dies with the person.

In an action brought against the decedent's personal representative or successor in interest, all damages, other than punitive damages, may be awarded which might have been recovered against the decedent had the decedent lived. [CCP §377.42] In an action brought by the decedent's personal representative or successor in interest, the compensatory damages recoverable are limited to the loss or damage the decedent sustained or incurred before death, but not including any damages for pain, suffering, or disfigurement. [CCP§§377.34] The right to recover damages for pain and suffering dies with the decedent. Bartling v Glendale Adventist Medical Center (1986, 2nd Dist) 184 CA3d 961, 229 CR 360.

The Collateral Source Rule

California courts adhere to the collateral source rule, which provides that any compensation that an injured party receives for his or her injuries from a source wholly independent of the tortfeasor is not deducted from the damages to be collected from the tortfeasor. This rule is based on the concept that a person who has invested years of insurance premiums to assure medical care should receive the benefits of that investment, and that the tortfeasor should not receive those benefits. Helfend v Southern California Rapid Transit Dist. (1970) 2 C3d 1, 84 CR 173, 465 P2d 61, 77 ALR3d 398.

Injured Party's Duty to Mitigate Damages

An injured party has the duty to act reasonably to minimize his or her injuries or loss. Damages cannot be recovered for increased or aggravated harm that could have been avoided through reasonable efforts or expenditures by the plaintiff. For example, an injured person who does not obtain necessary medical treatment cannot recover for any additional harm resulting from the lack of medical treatment. The doctrine of mitigation of damages applies in cases of intentional tort as well as

negligence.

Duty to mitigate as limited by reasonableness

The duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable. For example, there is no duty to mitigate where the expenditure required would be disproportionate to the loss sought to be avoided, or where the injured person is financially unable to accomplish mitigation Valencia v Shell Oil Co. (1944) 23 C2d 840, 147 P2d 558.

Whether an injured party has acted reasonably in mitigating damages is a question of fact. Moreover, the reasonableness of an injured party's efforts to mitigate damages must be judged in the light of the situation confronting him or her at the time the loss was threatened and not by the judgment of hindsight. The fact that reasonable measures other than the one taken would have avoided the damage is not, in and of itself, proof that the action taken, though unsuccessful, was unreasonable. Additionally, the standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of the law; it is sufficient if the injured party acts reasonably and with due diligence, in good faith.

Mitigation in personal injury cases

In personal injury cases, the plaintiff is obligated to accept medical treatment that appears to be reasonably necessary. However, a plaintiff may properly refuse to undergo a serious operation with attendant risk of failure, even if there is evidence that the surgery would have resulted in a permanent cure. Where an injured party has taken reasonable steps to mitigate damages, his or her right to recover damages will not be diminished on the basis that better treatment was available. For example, a plaintiff who treated a slight abrasion with mercurochrome for 4 days, then went to a doctor as soon as he developed a fever, would not be precluded from recovering damages for blood poisoning resulting from an infection of the wound. Garrison v Booth (1935) 10 CA2d 738, 52 P2d 535.

Punitive damages [CC §3294]

Punitive damages, sometimes called exemplary damages, may be recovered in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. The provisions of CC §3294 apply only to actions in which the initial trial did not commence prior to January 1, 1988. The purpose of awarding punitive damages is for the sake of example, and by way of punishing the defendant. When a defendant's conduct is outrageous, punitive damages may be awarded in addition to compensatory damages to punish the defendant and to deter such conduct in the future. In contrast,

compensatory damages are awarded to compensate a party for personal injuries or property damage. Punitive damages also differ from statutory damages, sometimes referred to as penal damages. Statutory damages, like punitive damages, are awarded in addition to compensatory damages to punish the defendant and set an example. However, statutory damages are distinguishable in that their recovery is authorized by particular statutes imposing a penalty in an arbitrary sum, regardless of actual damages suffered. In some instances, statutes provide for multiplication of the amount of compensatory damages. In general, a plaintiff is not entitled to recover both punitive damages and the statutory civil penalty, since an award of both would result in punishing a defendant twice for the same conduct. However, if the trier of fact were to conclude, based on the evidence, that the statutory amount was not sufficient to punish the defendant, additional punitive damages might be warranted. In general, punitive damages are only recoverable in tort actions.

There are statutorily prescribed limitations on recovery by plaintiffs in actions for wrongful death and survival actions maintained by personal representatives on behalf of a decedent. Punitive damages are generally not recoverable in wrongful death actions. The United States Supreme Court has held that punitive damages awards in actions between private parties are not subject to the Eighth Amendment prohibition against excessive fines. Browning Ferris Industries, Inc. v Kelco Disposal, Inc. (1989) 492 US 257, 106 L Ed 2d 219, 109 S Ct 2909] The court in Browning Ferris also found that the award of punitive damages did not constitute a criminal penalty that would merit special scrutiny for vagueness under the due process clause of the Fourteenth Amendment. The question of whether the due process clause might limit a jury's discretion in determining the amount of punitive damages where there is no statutory provision for punitive damages remains unsettled. The United States Supreme Court recently held that under the particular circumstances of one insurance fraud case, where all of the state's procedural protections had been provided to the party against whom the damages were assessed, a punitive damage award of nearly \$1,000,000 did not violate due process. Pacific Mut. Life Ins. Co. v Haslip (1991) US , 113 L Ed 2d 1, 111 S Ct 1032.

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CASE #1

Fortman v. Hemco, Inc.

(1989) 211 Cal.App.3d 241, 259 Cal.Rptr. 311

OPINION

Nichole Fortman, a minor, sustained permanent and extensive injuries when she was ejected from her parents' jeep after inadvertently unlatching the passenger door while the car was in operation. The door, which was rear_hinged and front opening, caught the wind and flew open ejecting Nichole, who had snagged her sleeve on the door handle. She fell to the street and was run over by another vehicle.

In her lawsuit Nichole alleged that the jeep door was defective by reason of being rear hinged and front opening and because of its use of exposed door handles. The door was part of a fiberglass jeep top sold to jeep owners as an after_market product.¹

The idea of the fiberglass jeep top was conceived by John Redford. Because he lacked the training to turn his idea into a product, Redford sought advice from Jim Greene, owner of Wild Child Custom Shop, an auto body shop, and Ronald Hill, a trained engineer and president of Hemco, Inc., a company that made fiberglass molds and cast products. Redford received advice from Greene and Hill while working out the feasibility of the design for the jeep top. Greene made the prototype from which the mold was made. Hemco made the mold and actually cast two tops, one for Redford's use. Redford rejected Hemco's bid for the right to produce the tops.

Hemco was one of several defendants named in Nichole's action and she only defendant who refused to settle. A jury awarded Nichole \$23,742,620 and found Hemco to be 25 percent responsible for her injuries. Hemco appeals. We affirm.

The facts are that John Redford wanted a fiberglass top for his jeep and decided that the only way he could afford one was to produce them commercially. He first talked to Ronald Hill in the fall of 1975. He was looking for someone "in the business of making fiberglass components, finished products in the automotive business." Hill's company, Hemco, was in the business. One of their clients was the Kenworth Truck Company for whom Hemco made truck cabs.

At their initial meeting, Redford showed Hill a sketch of his jeep top concept and asked Hill whether Hemco would be interested in building it. At a second meeting, Redford showed Hill more refined drawings and asked him specific questions as, for example, whether Hemco had sources for hardware and windows. Hill took Redford through Hemco's plant and showed him examples of prototypes being built by Hemco including that of a Kenworth

cab. Hill showed an active interest in the jeep top and a willingness to cooperate with Redford and Greene.

Jim Greene set out to build a wooden prototype of the jeep top from which Hemco could make a fiberglass mold. The mold in turn would be used to cast the actual parts of the jeep top.² While the prototype was being built, there were meetings at both Wild Child and Hemco "to obtain a consensus of opinion about how the wood should be built so that [it] would [be] something that Hemco could make a mold of." Hill and Greene assisted Redford in "all aspects of the design" of the jeep top.

The design incorporated rear_hinged, forward_opening doors that used nonrecessed "hook" handles. Redford consulted Hill about various issues related to the door. Hill, for example, felt the lock Redford wanted to use was unnecessarily expensive. Hill was not consulted on the placement of the door hinge. Hill did say that he saw the market appeal of a rear_hinged door and thought the design outstanding.

Hemco made a mold from Greene's prototype which Hill had revised and edited. In addition to making the mold, Hemco actually cast two jeep tops from the mold, one of which Redford used for his own jeep. Hill also gave Redford an estimate for the cost of producing the tops from the mold. Redford, however, was dissatisfied with both the quality of the tops Hemco produced and Hemco's cost estimate and went to a company called Rigid Forms, Inc., to have the tops produced. Hemco was paid about \$2,500 for making the mold.

Initially, Rigid Forms used the Hemco mold to produce the jeep tops. Later, the number of pieces for the mold was reduced from 12 to 8. However, there were no changes made by Rigid Forms on the Hemco mold for the doors. Unchanged, the door mold was used for the entire period the jeep tops were produced by Rigid Forms. Every door produced by the mold was identical to the mold.

One of the jeep tops cast from the Hemco mold was attached to the jeep eventually purchased by Richard Fortman. On November 13, 1981, Debra Fortman used the jeep to drive to and from the bank. With her was her three_year_old daughter, Nichole. At the bank, one of the tellers gave Nichole a booklet to play with. During the drive home from the bank, Nichole dropped the booklet and asked her mother for permission to pick it up. Nichole was not wearing a seatbelt. Her mother told her to get the booklet and then to sit back down. Mrs. Fortman saw Nichole standing in the area of the front door. She then saw Nichole's arm next to the door and heard Nichole yell " 'Mommie.' " The door blew open

and she saw Nichole hanging on the door as if she was holding on or hooked. Nichole fell to the street below, and was run over by a car in the next lane which was a few feet behind the jeep.³

As the accident was later reconstructed, Nichole apparently pulled herself forward from her seat to a standing position on the floor by grasping the door handle. As she stood, she pressed the handle down, releasing the door latch. The door caught the wind and began to open. Nichole snagged her shirtsleeve on the handle and was thrown out of the car.

Nichole brought an action against numerous defendants. Nichole alleged causes of action in strict liability and negligence against Hemco. By the time the action went to trial, settlements had reduced the defendants to Hemco and Austin Hardware & Supply, Inc. Nichole dismissed her negligence cause of action against Hemco. Mrs. Fortman dismissed her cause of action for negligent infliction of emotional distress, removing her as a plaintiff from the case. Thus, as against Hemco, the trial proceeded solely on a strict liability theory.⁴

The only expert put on by either side regarding the defective door and Hemco's role in its production was Cory Gray, an engineer specializing in accident analysis.

On the issue of defect, Gray testified that rear_hinged, front_opening doors had been recognized as unsafe by the automobile industry for years. No American car had utilized this door design since the mid_1960's, because of the danger of inadvertent door openings.

Based on his own experiments, Gray concluded that at 30 to 35 miles per hour, the speed of the Fortman Jeep at the time of the accident, it would have taken no more than a second from the moment the door became unlatched to when it opened 180 degrees, slapping against the back of the jeep. He said that within a half second a child holding onto the handle when the door opened could be yanked from the car.

In addition to the danger of inadvertent door openings, Gray identified a second danger created by the use of exposed, nonrecessed interior door handles. The use of this kind of handle creates the possibility of a passenger or driver grabbing the handle in an emergency and unlatching the door. Gray concluded that the jeep door was defective for both these reasons.

Gray also testified to the role played by the mold_maker in the manufacturing process. Gray characterized the making of the

mold as "the first step" of that process. A fiberglass product, like the door, could not have been manufactured without a fiberglass mold. The mold imparted the exact shape which all subsequent doors would take.

Gray's testimony suggested that Hemco would have been aware of the defective configuration of the door from the outset of its involvement with the project. The Hemco mold was made from a prototype, a mockup giving the appearance of the final product. Gray testified that the prototype would have shown that the design of the jeep top incorporated front_latching doors when Hemco's president, Hill, inspected the prototype. Moreover, the mold itself would have revealed an indentation at the site of the door's lock showing the door to be front latching. Indeed, because of manufacturing considerations, the mold_maker would have to pay special attention to that area of the door. The mold_maker would realize, therefore, that doors cast from this mold would be front latching.

Hemco did not put on any expert testimony. Instead, its case consisted of reading into evidence portions of James Greene's deposition. Greene had no recollection of the role that Hemco had played in the production of the jeep top,⁵ supporting Hemco's position that its role was insignificant.

At the conclusion of the trial, the jury returned a verdict in which it found Hemco 25 percent liable for Nichole's injuries and her mother, Debra, 75 percent liable. Damages were awarded to Nichole in the amount of \$23,742,620 of which \$17,742,620 was for economic losses and \$6 million for noneconomic losses. Hemco moved for a new trial and judgment notwithstanding the verdict. These motions were denied.

Hemco makes a number of arguments regarding the propriety of the damages that were awarded to Nichole. Before reaching those arguments it is necessary to set forth the evidence relevant to the damages issue.⁹

The record reveals that the injuries that Nichole sustained from the accident are permanent and catastrophic.

Dr. William Kneeland, a board certified pediatric neurologist, testified to her injuries and future medical expenses. Immediately after the accident, she was rushed from the scene to a nearby hospital where she remained in a coma for four months. Dr. Kneeland began to treat Nichole five weeks later. Dr. Kneeland was brought in because of Nichole's continuing coma and because she was experiencing convulsions. At the time he first saw her she was being treated by a number of

doctors for her various injuries: an orthopedic doctor for broken bones, an oral surgeon for broken jaw and facial bones, a urologist for kidney damage, and a pulmonary specialist for lung damage. She required mechanical ventilation in order to breathe and had undergone a tracheotomy.

Dr. Kneeland's examination of Nichole revealed significant brain injury, specifically to the cerebral hemispheres of her brain and to her spinal cord. X-rays also showed atrophy, a shrinkage of the brain, which is an irreparable condition. Nichole underwent a craniotomy to relieve pressure from fluids that had collected in her brain.

At the time of her release, Nichole was still comatose. When she eventually regained consciousness, she was, and is, a paraplegic. She has no bowel or bladder function. She suffers from scoliosis, and must wear a body brace. To prevent seizures she takes phenobarbital, and macrodantin to prevent urinary tract infections. At some point she may require a colostomy.

As a result of the severe damage to her brain, Nichole will function at a five_year_old's intellectual level for the rest of her life. For a while she suffered cortical blindness, a condition in which the brain is unable to recognize an object that the eyes see. Even now she has perceptual problems and is sometimes unable to identify objects correctly.

Nonetheless, given appropriate care, Nichole will have a normal life expectancy which, at the time of trial, was estimated to be 70.9 years. She will never be self_sufficient, however, and will incur lifetime expenses for nursing and medical care and for therapy. Dr. Kneeland estimated that, in 1985 dollars, this care would cost \$180,895 per year.

The largest single component of this expense is 16_hour_a_day nursing care estimated by Dr. Kneeland to cost \$125,000 per year. Additionally, Dr. Kneeland testified that Nichole would require physician services for the rest of her life from a range of doctors, including a neurologist, a pediatrician, an orthopedic surgeon and an ophthalmologist. Extensive and varied laboratory services will also be required. Further expenses will also be incurred for educational and therapeutic services, including physical, occupational and speech therapy. Dr. Kneeland testified that Nichole would require a specially_equipped van, wheelchairs and other medical appliances over the course of her life. Finally, she will also require medicines.

Peter Formuzis, an economist, testified to the present cash value of Nichole's future expenses based, in part, upon Dr.

Kneeland's figures. Using an actuarial table showing Nichole's life expectancy to be 70.9 years he calculated the present cash value of her future medical expenses to be \$16 million. He also calculated her lifetime lost wages to be between \$884,078 and \$1,132,599.

Hemco did not put on evidence regarding damages.

The jury's subsequent award for economic losses was \$17,742,620. Noneconomic damages were assessed at \$6 million.

B.

Hemco argues that the trial judge failed to make an independent assessment of the evidence relating to damages before denying Hemco's new trial motion. This contention is utterly without substance.

Code of Civil Procedure section 657 provides in part: "A new trial shall not be granted ... upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury should have reached a different verdict or decision. "Accordingly, in deciding whether to grant a new trial "the trial court must independently weigh the evidence and assess whether it sufficiently supports the jury's verdict. [Citations.]" (People v. Capps (1984) As a corollary to this rule, the trial court's ruling "is entitled to great weight" on appeal. (Hilliard v. A. H. Robins Co. (1983)

Hemco relies on Lippold v. Hart (1969), a rare reversal of a trial court's denial of a new trial. The judge in Lippold denied the motion for new trial in a personal injury action even though he believed the verdict was unfair and questioned the defendant's credibility as a witness. His reason for denying the motion was his belief that he was bound by the jury's unanimous verdict. On appeal, his ruling was reversed. The appellate court stated that the trial court is not bound by the jury's verdict but must "reweigh the evidence, the inferences therefrom, and the credibility of the witnesses in determining whether the jury 'clearly should have reached a different verdict' [citations]."

Hemco would liken the actions of the judge in Lippold to that of the judge in the case before us, but there is no comparison.

Here, the trial judge conducted the trial in an informed, intelligent and scrupulously unbiased manner. On the specific issue of his handling of the new trial motion, it is quite clear

that he was well aware of his duty to independently assess the evidence. Indeed, in reference to the liability issue, the judge expressly stated that he had "reviewed the evidence" and made his "own independent assessment" of whether it supported imposition of liability. It is simply not plausible that the judge could have discharged his duty properly with reference to the liability issue but not damages. The fact that he did not make explicit reference to the independent assessment standard in passing upon damages is not determinative. On appeal, where the record is silent we presume that an official duty has been correctly performed. (People v. Mack (1986); Evid. Code, § 664.)

Equally unconvincing is Hemco's citation to a remark by the trial judge that he was "limited by the evidence at trial" in ruling on the new trial motion. This observation is absolutely correct. A trial judge is limited to a review of the evidence at trial and, as this judge recognized, cannot be guided by personal bias or belief. This remark in no way shows that he failed to independently assess the evidence. Rather, the remark reveals that he had performed his function fairly and impartially and determined there was no rational basis in the evidence to warrant a new trial on damages. We accord this determination great weight as we approach Hemco's remaining arguments.

C.

Hemco maintains that the award of damages was excessive. It is well settled that damages are excessive only where the recovery is so grossly disproportionate to the injury that the award may be presumed to have been the result of passion or prejudice. Then the reviewing court must act. (Bertero v. National General Corp. (1974); Fagerquist v. Western Sun Aviation, Inc. (1987) The reviewing court does not act de novo, however. As we have observed, the trial court's determination of whether damages were excessive "is entitled to great weight" because it is bound by the "more demanding test of weighing conflicting evidence than our standard of review under the substantial evidence rule" (Hilliard v. A. H. Robins Co., supra. All presumptions favor the trial court's determination (Fagerquist v. Western Sun Aviation, Inc., supra, and we review the record in the light most favorable to the judgment (Neal v. Farmers Ins. Exchange (1978).

In light of these rules we reject Hemco's attack on the substantiality of the evidence to support that portion of the jury's award of \$17,742,620 attributable to Nichole's economic losses.¹⁰ Hemco attacks the testimony of economist Formuzis, claiming that his reliance upon Dr. Kneeland's estimate of Nichole's medical expenses was improper because Dr. Kneeland had

no sufficient basis for estimating those costs. Hemco's argument is more rhetorical than real and amounts to a belated attack on the credibility of Nichole's witnesses. As we previously observed, however, it is not our function to weigh credibility. (Hilliard v. A. H. Robins Co., supra, 148 Cal.App.3d at p. 414, fn. 23.)

Nor is Hemco's reliance on Pacific Gas & Electric Co. v. Zuckerman (1987) persuasive insofar as it purports to support Hemco's argument that Formuzis's reliance on Dr. Kneeland's estimations was improper. The Pacific Gas decision involved expert testimony on the novel issue of the value of storage rights for underground reservoirs of gas. In that decision the record revealed that the plaintiff's expert disregarded pertinent information and fabricated information without a factual basis to arrive at a vastly overinflated valuation of those storage rights.

Nothing comparable occurred in the case before us. There was nothing novel in the medical or rehabilitative services which Dr. Kneeland testified (orally and by written statement) Nichole would require. Nor did Hemco challenge the veracity of Dr. Kneeland's cost estimation or the manner by which it was derived. Hemco put on no evidence of its own on this issue. Only now, on appeal, does Hemco find reason to quarrel with those assumptions. It does so in the wrong forum.

Addressing a similar contention, the court in Niles v. City of San Rafael (1974), said: "The expert testimony was substantial evidence supporting the portion of the award relating to the future cost of attendant care. The substantial evidence test is applied in view of the entire record; other than a vigorous cross_examination of plaintiffs' expert, appellants presented no evidence on the cost of attendant care. The elaborate economic arguments presented in the briefs of appellants ... might better have been presented to the jury in opposition to respondents' expert testimony." In our case, too, the testimony which we set forth in part III A is substantial evidence supporting the award for Nichole's future medical expenses.

D.

Hemco next maintains that damages are excessive because they are disproportionate to the aggregate sum of good faith pretrial settlements. The assertion is specious.

The issue of disproportionality with respect to damages awarded at trial refers to whether the award is disproportionate

"to any reasonable limit of compensation as shown by the evidence" (Roedder v. Lindsley (1946); Bertero v. National General Corp., supra,) By contrast, disproportionality with respect to good faith settlements under Code of Civil Procedure section 877.6 involves "whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries." (Tech Bilt, Inc. v. Woodward Clyde & Associates (1985))

In light of this distinction, Hemco's suggestion that the aggregate sum of good faith pretrial settlements sets the range by which posttrial damage awards are to be measured for excessiveness is a case of comparing apples to oranges. No authority supports this proposition nor do considerations of policy and logic, and for good reason; the two things are not comparable.

In the first place, proportionality for good faith purposes can only be determined on "information available at the time of settlement." (Tech Bilt, Inc. v. Woodward Clyde & Associates, supra.) A trial, by its very nature, yields a fuller record of the plaintiff's damages. This is precisely why the question of excessiveness should be made in light of the evidence at trial and not by comparisons with a settlement made months or even years earlier. Second, the comparison is unwarranted because settlements are discounted to give an incentive for defendants to settle. ["[A] settlor should pay less in settlement than he would if he were found liable after a trial."] Accordingly, settlements may not only be based on a less than accurate picture of the damages but the settlement amount is further discounted to promote settlements. These considerations make it particularly inappropriate to use settlement awards as a benchmark to determine whether damages awarded by a jury are excessive.

E.

Finally, Hemco spends considerable time arguing that the award is excessive because it is large, or, as Hemco puts it, "precedent shattering." Both the Supreme Court and this court long ago rejected this argument.

"The vast variety of and disparity between awards in other cases demonstrates that injuries can seldom be measured on the same scale. . . . For a reviewing court to upset a jury's factual determination [of damages] on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding." (Bertero v. National General Corp., supra, ; Rodriguez v. McDonnell Douglas Corp. (1978)

The question of excessiveness must be answered in light of the evidence of what is required to compensate this victim for her damages. Our review of the record persuades us that these damages are not disproportionate to the amount of damages shown by the evidence.

Finally, Hemco contends that the court failed to properly offset damages against two settlements, one for \$900,000 between Nichole and AMC/Jeep, and the other for \$2 million between Nichole and Austin Hardware. The arguments are without substance.

First, Hemco failed to seek an offset of the \$900,000 guaranty by AMC/Jeep, none of which was ever actually paid to Nichole. Since the issue of offsets "is a question of fact" (Syverson v. Heitmann (1985)), Hemco's failure to seek an offset in the trial court precludes it from doing so on appeal. Second, as to the Austin Hardware settlement, Hemco did seek an offset but, as no part of that settlement had been paid, the court declined to make the offset. Instead, it invited Hemco to make an ex parte application for postjudgment setoffs at such time as the settlement was actually paid. (Code Civ. Proc., § 877, subd. (a).) We believe the court acted within its discretion in making this order and decline to reverse.

The judgment is affirmed. Nichole to recover her costs on appeal.

McClosky, J., and George, J., concurred.

A petition for a rehearing was denied June 27, 1989.

FOOTNOTE 1. The Fortmans had purchased their jeep secondhand from a private party.

FOOTNOTE 2. At trial, Nichole's expert, Cory Gray, testified that no fiberglass product can be manufactured without a mold having been made.

Although the mold apparently consisted of a number of separate parts, the parties refer to it in the singular, as do we, for consistency.

FOOTNOTE 3. Evidence of Nichole's injuries is set forth under our discussion of damages.

FOOTNOTE 4. Austin Hardware reached a settlement with Nichole in the course of the trial and was dismissed. Hemco is the only appellant in this appeal.

FOOTNOTE 5. Hemco's president, Ron Hill, also testified though not on Hemco's behalf. He was called as an adverse party by Nichole. While he admitted making the mold from Greene's prototype, he denied knowing the design incorporated front_latched doors. Evidently, the jury disbelieved him.

FOOTNOTE 6. Hemco does not argue that the design of the doors was not defective.

FOOTNOTE 9. Hemco failed to set forth an account of the evidence to support its claim of excessive damages. Such failure can result in the argument being deemed waived. (Leming v. Oilfields Trucking Co. (1955) 44 Cal.2d 343, 356 [282 P.2d 23, 51 A.L.R.2d 107].) Nonetheless, we will consider Hemco's argument in the interests of justice.

FOOTNOTE 10. Actually, Hemco's challenge goes only to future medical expenses, leaving unchallenged that evidence which goes to lost future wages.

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PART 14. JURY INSTRUCTIONS ON DAMAGES

14.00 Compensatory Dam._Pers. Inj./Prop. Dam.-Intro.

14.01 Compensatory Damages...(Admitted Liability)

14.02 Compensatory Damages_Pers. Inj./Prop. Dam.

14.10 Measure of Damages_Pers. Inj._Expenses...

14.11 Measure of Dam._Pers. Inj._Loss of Earnings

14.12 Meas. of Damages...Loss of Earnings Capacity

14.13 Measure of Damages...Pain and Suffering

14.20 Measure of Damages_Pers. Prop._Prop. Damages

14.21 Measure of Damages_Pers. Prop._...Destroyed

14.22 Measure of Damages_Pers. Prop._Loss of Use

14.30 Damages_Injury to Minor_Minor's Damages

14.31 Meas. of Dam._Injury to Minor_Minor's Damages

14.32 Meas. of Dam._Injury to Minor_Parent's Damages

14.40 Measure of Damages_Loss of Consortium

14.00/1 If, under the court's instructions, you find that plaintiff is entitled to a verdict against defendant[s], you must then award plaintiff damages[, economic and non_economic,] in an amount that will reasonably compensate him for each of the following elements of claimed [injury] [damage] [loss] [or] [harm] [subject to being reduced, as you will be instructed, if you should find that the plaintiff was contributorily negligent], provided that you find that such harm or loss was [or will be] suffered by him and [legally] caused by the act or omission upon which you base your finding of liability.

[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.]

14.00/2 [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, humiliation and injury to reputation.]

The amount of such award [including economic and non_economic damages] shall

include:

14.01 The defendant[s] having admitted liability for plaintiff's [injuries] [damage] [loss] [or] [harm] [legally] resulting from the accident in question, you will award plaintiff damages[, economic and non_economic,] in an amount that will reasonably compensate him for each of the following elements of claimed loss or harm, provided that you find it was [or will be] suffered by him and [legally] caused by such accident.

[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.]

[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, humiliation and injury to reputation.]

The amount of such award [including economic and non_economic damages] shall include:

14.02 The total amount of plaintiff's damages[, economic and non_economic,] is the amount that will reasonably compensate him for each of the following elements of claimed loss or harm, provided that you find that such loss or harm was [or will be] suffered by him and was [legally] caused by the act or omission upon which you base your finding of negligence of the defendant[s], if you so find.

[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.]

[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, humiliation and injury to reputation.]

The amount of such award [including economic and non-economic damages] shall include:

14.10 The reasonable value of medical [hospital and nursing] care, services and supplies reasonably required and actually given in the treatment of the plaintiff to the present time [and the present cash value of the reasonable value of similar items reasonably certain to be required and given in the future].

[This is economic damage.]

14.11 The reasonable value of working time lost to date.

In determining this amount, you should consider evidence of plaintiff's earning capacity, his earnings, how he ordinarily occupied himself, and find what he was reasonably certain to have earned in the time lost if he had not been injured.

[A person's ability to work may have a monetary value even though he is not employed by another.]

[Also, the reasonable value of services performed by another in doing things for the plaintiff which, except for his injury, plaintiff would ordinarily do for himself.]

[This is economic damage.]

14.12 The present cash value of earning capacity reasonably certain to be lost in the future as a result of the injury in question.

[This is economic damage.]

14.13 Reasonable compensation for any pain, discomfort, fears, anxiety and other mental and emotional distress suffered by the plaintiff and of which his injury was a [legal] [proximate] cause [and for similar suffering reasonably certain to be experienced in the future from the same cause].

No definite standard [or method of calculation] is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. [Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation.] In making an award for pain and suffering you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence.

[This is non_economic damage.]

14.20 A

Compensation to plaintiff for damage to his property in the sum of \$ _____.

[This is economic damage.]

B

The reasonable cost of repairing the damage to plaintiff's vehicle not exceeding the sum of \$ _____.

[This is economic damage.]

C

The reasonable cost of repairing the damage to plaintiff's property.

[This is economic damage.]

D

Reasonable compensation to plaintiff for damage to his property.

That sum is equal to the difference in the fair market value of the property immediately before and immediately after the accident.

If the damages have been repaired, or are capable of repair, so as to restore the fair market value as it existed immediately before the accident, at a cost less than such difference in value, then the measure of damage is the cost of such repair rather than such difference in value.

[This is economic damage.]

E

Reasonable compensation to plaintiff for damage to his property.

If repairs have been made but the property cannot be completely repaired, the measure of damages is the difference in the fair market value of the property immediately before the accident and its fair market value after the repairs have been made plus the

reasonable cost of making the repairs.

[This is economic damage.]

14.21 Reasonable compensation for property lost or destroyed in, or because of, the accident. That amount is the fair market value of such property at the time of its loss or destruction.

[This is economic damage.]

14.22 Reasonable compensation to plaintiff for being deprived of the use of his [automobile] [property] during the time reasonably necessary for repairing the damage [legally] resulting from the accident. In determining that amount you may consider the reasonable rental value of the [automobile] [property] for the period of time just mentioned.

[This is economic damage.]

14.30 This lawsuit involves two separate claims: one, a claim by _____, a minor, for [economic and non_economic] damages for his injuries, and the other, a claim by his parent[s] for medical expenses incurred [and for loss of earnings and services of the minor during his minority] [which [are] [is] economic damage[s]].

If you find that said minor and his parent[s], or either of them, are entitled to recover from the defendant[s], you must award to the party or parties entitled to recover, damages[, economic and non_economic,] in an amount that will reasonably compensate such party or parties for each of the following elements of claimed loss or harm, [subject to being reduced, as you will be instructed, if you should find that the minor or the parents were contributorily negligent,] provided that you find it was [or will be] suffered by him or them and [legally] caused by the act or omission upon which you base your finding of liability.

14.31 The amount of such award to the minor shall include:

1. The present cash value of his earning capacity reasonably certain to be lost after he becomes 18 years of age as a result of the accident in question. [This is economic damage];

2. The present cash value of any medical care and attention reasonably certain to be required and given in the future treatment of said minor. [This is economic damage.]

The amount of the award to said parent[s] shall include [the following economic damages]:

1. The reasonable value of medical [hospital and nursing] care, services and supplies reasonably required and actually given in the treatment of said minor;

2. Such monetary loss, if any, as the parent[s] [has] [have] suffered and [is] [are] reasonably certain to suffer in the future by being deprived of the services, if any, which the minor would have performed during the period of his minority.]

3. Such loss of the child's earnings, if any, as said parent[s] may have suffered by reason of the fact, if it be a fact, that as a [proximate] [legal] result of the injury in question [their] [his] [her] child, _____, has been unable to pursue [his] [her] occupation or a gainful employment. In determining that amount, you must find what portion of such earnings would have accrued to the financial advantage of the

parent[s].]

[Also such sum as will compensate said parent[s] reasonably for whatever loss, if any, [they] [he] [she][are] [is] reasonably certain to suffer in the future, until the child reaches the age of 18, as a result of any loss of earning capacity caused said child by the injury in question.]

14.40/1 If you find that plaintiff _____ (husband) (wife) is entitled to a verdict against the defendant[s] and if you find that as a [legal] [proximate] result of the act or omission upon which you base your finding of liability that plaintiff _____ (wife) (husband) has suffered or is reasonably certain to suffer in the future any loss of [her husband's] [his wife's] love, companionship, comfort, affection, society, solace or moral support; any loss of enjoyment of sexual relations or ability to have children or any loss of [his] [her] physical assistance in the operation and maintenance of the home, you shall award [her] [him] reasonable compensation for any of such losses as may be established by the evidence. [This is non_economic damage.]

In the event that you find that plaintiff _____ (wife) (husband) is entitled to compensation for any of the losses that have been mentioned, you will not include in any such award any compensation for losses that the plaintiff _____ (husband) (wife) may be entitled to recover. That is, you will not award plaintiff _____ (wife) (husband) any compensation for loss of [her] [his] right to financial support from [her husband] [his wife] as that is included in [his] [her] right to recover for loss of earnings and loss of earning capacity. Neither will you include in any award to [her] [him] any compensation for [her] [his] personal services to [her husband] [his wife], such as nursing, as that too is included in [his] [her] right of recovery.

[Also, you will not include in any award to [her] [him] any loss of [her] [his] earnings if [she] [he] was employed and gave up [her] [his] employment to take care of [her husband] [his wife].]