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A MOLOTOV COCKTAIL: PROPOSITION 51 AND WORKERS' COMPENSATION

I. INTRODUCTION

Damage awards in California have adversely affected taxpayers, businesses, and government entities.¹ Damage awards have such far reaching effect because of subjective symptoms such as pain and suffering or other variations of mental distress.² In 1975, the California Supreme Court recognized the problems inherent in the then existing system and began the slow process of tort reform.³

Prior to 1975, California tort law subscribed to the common law system of “all-or-nothing.”⁴ That is, a plaintiff’s lawsuit was barred if he or she contributed in any measure to his or her injury;⁵ on the other hand, if a defendant was liable to any degree, each defendant was jointly and severally liable for the entire damage award.⁶ Because the all-or-nothing system resulted in injustice and inequity,⁷ the doctrines that composed the system, in particular contributory negligence and joint and several liability, have gradually been eliminated or modified.⁸

The first significant change to the tort system came in

¹ See CAL. CIV. CODE § 1431.1(c) (West Supp. 1998).
² See, e.g., CAL. CIV. CODE § 1431.1 (West Supp. 1998). This section states that “the deep pocket rule” threatens “financial bankruptcy of local governments, other public agencies, private individuals, and business and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayer.” Id. To remedy this problem the section attempts to contain non-economic damages. Id.
³ See Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975).
⁴ See, e.g., Id.
⁵ See Li, 532 P.2d at 1229-30.
⁷ See Li, 532 P.2d at 1230. The all or nothing doctrine resulted in injustice and inequity because it failed “to distribute responsibility in proportion to fault.” Id.
⁸ See infra Part II.A.1.
1975, when the California Supreme Court adopted the doctrine of "pure" comparative fault. By opting for comparative fault, the court rejected the common law rule doctrine of contributory negligence. There were two related consequences of this change. First, a negligent plaintiff is no longer barred from recovery when he or she is at fault. Second, the harshness of the all-or-nothing system is eliminated for plaintiffs; however, defendants' hardship remained because they bore the burden of joint and several liability. The California Supreme Court refused to completely reject joint and several liability, but the doctrine was modified. Proposition 51 is the latest example of the effort to reduce the harshness caused by joint and several liability.

Proposition 51 was approved by the California voters in 1986 and affects defendants' liability for damage awards. Proposition 51 applies in "any action for personal injury, property damage, or wrongful death, based on principles of comparative fault." The Proposition treats economic and non-economic damages differently because it "free[s] defendants from joint liability for non-economic damages: such damages are to be allocated to each defendant 'in direct proportion to the defendant's percentage of fault.'" However,
defendants remain jointly liable for economic damages.\textsuperscript{17}

Because a defendant pays only his or her share of non-economic damages, a defendant's portion of non-economic damages is not reduced by any pre-trial or post-trial payments.\textsuperscript{18} At the same time, economic damages are reduced if there is an independent justification because defendants are jointly liable for economic damages.\textsuperscript{19} For example, if the plaintiff will receive a double recovery,\textsuperscript{20} the plaintiff's economic damages will be reduced in proportion to the amount they received from the third party source.\textsuperscript{21} Proposition 51 did not change the "basic concept that a workers' civil damages are reduced by the amount of benefits paid by the employer."\textsuperscript{22} Since economic and non-economic damages are treated differently, the determination of whether set-off payments, such as settlements and workers' compensation payments, are completely economic or part economic and part non-economic has a tremendous impact on the plaintiff's award and the defendant's obligation.\textsuperscript{23}

While settlement payments clearly contain both an economic and a non-economic component, California courts of appeal have reached opposite conclusions on the issue of whether workers' compensation payments are economic or part economic and part non-economic.\textsuperscript{24} The California Book

\textsuperscript{17} CAL. CIV. CODE § 1431.2(a) (West Supp. 1998).
\textsuperscript{18} "An obligation imposed upon several persons...is presumed to be joint, and not several, except as provided in § 1431.2, ..." CAL. CIV. CODE § 1431 (West Supp. 1998).
\textsuperscript{21} See, e.g., Witt v. Jackson, 366 P.2d 641 (Cal. 1961) (holding that an employee could recover damages from a third party only in excess of workers' compensation benefits). See also, Erreca's v. Superior Court, 24 Cal. Rptr. 2d 156 (Ct. App. 1993) (holding that settlement proceeds should be credited against non-settling defendant's judgment).
\textsuperscript{22} See, e.g., Hoch v. Allied-Signal, Inc., 29 Cal. Rptr. 2d 615, 625 (Ct. App. 1994) (stating that "when multiple defendants are responsible for the same compensatory damages, a setoff is not only mandated under section 877(a), but is required by the fundamental principle that 'a plaintiff may not recover in excess of the amount of damages which will fully compensate him for his injury.'").
\textsuperscript{24} See infra Part II.
of Approved Jury Instructions (BAJI) 16.75 Use Note 25 treats workers' compensation payments as purely economic and subtracts those payments from the economic award to prevent a double recovery. 26 In contrast, Scalice v. Performance Cleaning Systems, 27 treats such payments as part economic and part non-economic and therefore reduces the economic damages by the economic-to-non-economic ratio determined by the factfinder. 28 These two methods produce varying results—sometimes to the extent of hundreds of thousands of dollars. 29 In addition to the Scalice and BAJI method, several alternative methods have been espoused. 30 Paul Peyrat has offered one such alternative which has not yet been accepted by a California court. 31

This comment examines the appropriate method for reducing damage awards where the plaintiff received workers' compensation benefits and then sued a third party for compensation for the same injury. The Background section discusses the evolution of the all-or-nothing system 32 and familiarizes the reader with Proposition 51. 33 This section then looks at the method adopted by the courts to calculate plaintiffs' damage awards under Proposition 51 where there is a settlement reduction. 34 Finally, this section discusses the na-

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27. 57 Cal. Rptr. 2d 711 (Ct. App. 1996).


29. See infra Part II.

30. See, e.g., Romero v. Dermendzhayan, 12 Cal. Rptr. 2d 819 (Ct. App. 1992), review denied and ordered not to be officially published.


32. See infra Part II.A.

33. See infra Part II.B.

34. See infra Part II.C.
ture of workers’ compensation payments\(^3\) and the various methods applied by the courts to reduce a plaintiff’s damage awards under Proposition 51 where the plaintiff received workers’ compensation payments.\(^3\) The Problem section of this comment uses damages from cases to illustrate the divergent results that arise under each.\(^3\) The comment then analyzes the statutory language of Proposition 51. It continues with an analysis of various California appellate courts’ treatment of workers’ compensation benefits, and concludes that workers’ compensation is compensating for monetary losses which are “objectively verifiable.” Finally, this comment proposes to adopt the BAJI method of calculating damages under Proposition 51 because workers’ compensation benefits compensate for economic losses.\(^4\)

II. BACKGROUND

A. All-or-Nothing: Pre-Proposition 51

Prior to any modifications in the system, the two doctrines responsible for the inequities of the all-or-nothing system were contributory negligence and joint and several liability.\(^4\) Under this system, a plaintiff that shared any fault was barred from recovery because the courts refused to allow the law to “aid a wrongdoer.”\(^4\) At the same time, a defendant who was marginally at fault bore the liability of a large damage award.\(^4\) For obvious reasons, this system led to inequity and therefore injustice.\(^4\) In 1975, the California Supreme Court eliminated the “all-or-nothing doctrine of contributory negligence” and opted for a system of comparative

35. See infra Part II.D.
36. See infra Part II.E.1-3.
37. See infra Part III.
38. See infra Part IV.A.
39. See infra Part IV.B.1-3.
40. See infra Part V.
42. Id.
43. American Motorcycle Ass’n v. Superior Court, 578 P.2d 899, 907 (Cal. 1978); see also Dow v. Sunset Tel. & Tel. Co., 121 P. 379 (Cal. 1912).
44. See DaFonte, 828 P.2d at 143.
45. See, e.g., Li v. Yellow Cab Co., 532 P.2d 1226, 1230 (Cal. 1975) (stating that contributory negligence is inequitable in its operation because it fails to distribute responsibility in proportion to fault).
Three years later, the California Supreme Court rejected the argument that "adoption of comparative negligence logically compels the abolition of joint and several liability of concurrent tortfeasors."\textsuperscript{47}

Despite the court's refusal to abolish the joint and several doctrine, it nonetheless modified the harshness of the doctrine.\textsuperscript{48} The California Supreme Court announced the first changes to the joint and several liability doctrine in \textit{American Motorcycle Ass'n v. Superior Court}.\textsuperscript{49} In \textit{American Motorcycle}, the court accepted the concept of comparative indemnity between tortfeasors.\textsuperscript{50} Prior to this decision, when multiple defendants were liable, they split the damage award regardless of fault.\textsuperscript{51} For example, if two defendants, Y and Z, were held liable to plaintiff A, Y and Z would each pay half of the damage award.\textsuperscript{52} The court recognized the "obvious lack of sense and justice" in this common law rule.\textsuperscript{53} Therefore, the court concluded "that the equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis."\textsuperscript{54}

After the foregoing changes to the system, the proper method for computing plaintiff's recovery in a workers' compensation case was to "first subtract from the total award the proportionate amount attributable to the plaintiff's negligence . . . and then to subtract the proportionate amount attributable to the employer's negligence up to the amount of the workers' compensation benefits paid."\textsuperscript{55} Under the com-

\begin{itemize}
  \item \textsuperscript{46} Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975).
  \item \textsuperscript{47} \textit{American Motorcycle Ass'n}, 578 P.2d at 906.
  \item \textsuperscript{48} \textit{See, e.g.}, \textit{American Motorcycle Ass'n v. Superior Court}, 578 P.2d 899 (Cal. 1978).
  \item \textsuperscript{49} 578 P.2d 899 (Cal. 1978).
  \item \textsuperscript{50} \textit{American Motorcycle}, 578 P.2d at 917-18.
  \item \textsuperscript{51} \textit{Id.} at 185 (stating that "liability among multiple tortfeasors may be apportioned on a comparative negligence basis").
  \item \textsuperscript{52} \textit{See, e.g.}, \textit{JOHN L. DIAMOND ET. AL., UNDERSTANDING TORTS § 1303}, at 225 (1996).
  \item \textsuperscript{53} \textit{American Motorcycle Ass'n}, 578 P.2d at 918 (quoting PROSSER, LAW OF TORTS § 50, at 307 (4th ed. 1971)).
  \item \textsuperscript{54} American Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 912 (Cal. 1978) (adoption of comparative indemnity). In \textit{American Motorcycle}, the defendant motorcycle company was permitted to sue the plaintiff's parents because of their possible role in neglecting to exercise their supervisory power over their minor child.
  \item \textsuperscript{55} Torres v. Xomox Corp., 56 Cal. Rptr. 2d 455, 470-71 (Ct. App. 1996)
\end{itemize}
proportional indemnity doctrine, the trier of fact proportions liability among all of the joint tortfeasors. Since the joint and several doctrine remained intact, deep pocket defendants were still liable “for all damages attributable to the employer’s fault which were not covered by workers’ compensation.”

This modified system still produced injustice and inequitable results. For example, a deep pocket defendant marginally responsible for an injury was still liable for the entire damage award if a co-defendant was insolvent. As a result of certain defendants bearing total responsibility, “[t]he People—taxpayers and consumers alike—ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.” Thus, comparative indemnity did little to fix the injustices and inequities present in the system.

B. Proposition 51

The modified joint and several doctrine created “catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.” California’s solution to these problems was the passage of Proposition 51, which holds “defendants in tort actions ... financially liable in closer proportion to their degree of fault.” Under Proposition 51, actions for “personal injury, property damage, or wrongful death, based upon the principles of comparative fault,” a defendant is joint and severally liable for the economic damages, but non-economic damages are allocated in direct proportion to the defendant’s liability. In short, the Proposition imposes “strict proportionate liability” for non-economic damages. The principle effect of the Proposition is to alter the “preexisting balance among the

(quotating Aceves v. Regal Pale Brewing Co., 156 Cal. Rptr. 41 (1979)).

56. See American Motorcycle Ass’n, 578 P.2d at 918.
59. See e.g., JOHN L. DIAMOND ET. AL., UNDERSTANDING TORTS § 1303, at 225 (1996).
60. CAL. CIV. CODE § 1431.1(b) (West Supp. 1998).
63. Id.
64. CAL. CIV. CODE § 1431.2(a) (West Supp. 1998).
rights of employee, employer, and third party tortfeasor so that the employee 'like any other tort victim,' bears the risk of loss from non-economic damages assessed against a defendant who is insolvent or immune. 66

In its simplest form, Proposition 51 requires the judge to take two steps. 67 First, the judge renders "a joint and several judgment against all defendants for the economic damages amount found by the trier of fact." 68 Second, the judge renders "a separate several judgment against each liable defendant for that defendant's proportional share of non-economic damages." 69

This scheme is complicated when the plaintiff is at fault and/or the plaintiff has received monies either from a settlement or from workers' compensation. 70 If there is an independent justification for reducing economic damages, those damages must be reduced to avoid a double recovery. 71 Non-economic damages are not set-off by settlement payments or workers' compensation because "each defendant is solely responsible for his or her share of the non-economic damages. 72 "To do otherwise would, in effect, cause money paid in settlement to be treated as if it was paid as a joint liability." 73

Since economic damages are reduced by economic payments, the classification of setoffs as economic or part economic and part non-economic is critical. 74 Under Civil Code section 1431.2(b)(1), economic damages are "objectively verifiable monetary losses including medical expenses, loss of


67. The simplest form occurs when there are multiple defendants, the plaintiff is not at fault, and there are no setoffs such as settlement money or workers' compensation benefits. PEYRAT, supra note 16.

68. Id.

69. Id.


71. See CAL. CIV. PROC. CODE. § 877 (West 1980 & Supp. 1998) (reduces the claims against non-settling joint tortfeasors by the amount stipulated in the settling joint tortfeasor's release); see also Witt v. Jackson, 17 Cal. Rptr. 369, 378 (1961) (stating that since "the injured employee may not be allowed double recovery, his damages must be reduced by the amount of workmen's compensation he received").


73. Id.

74. See supra Part II.
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. Section 1431.2(b)(2) defines non-economic damages as "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." Despite these definitions, it is not clear whether workers' compensation is purely economic or part economic and part non-economic because it is not a system that easily fits into common law tort categories.

C. Proposition 51 and Settlements: The Espinoza method

Espinoza v. Machonga set the standard for apportioning settlement proceeds under Proposition 51. In Espinoza, the plaintiff sustained injuries to his eye when a glass door shattered. All parties involved participated in arbitration. The arbitrator concluded that plaintiff Espinoza was 10% at fault and defendants Machonga and the Housing Authority were each 45% at fault. The Housing Authority settled with Espinoza for $5,000. The arbitrator awarded Espinoza $6,242.94 for medical expenses, $15,000 for general damages and costs of the suit. However, an appeal ensued when the parties could not agree on the division of the settlement proceeds. The appellate court held that pretrial settlements contained both economic and non-economic components and therefore ought to be divided accordingly.

The following calculations will illustrate the significant impact Proposition 51 had in Espinoza. Prior to the passage

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76. CAL. CIV. CODE § 1431.2(b)(2) (West Supp. 1998).
78. Id.
79. Id.
81. Id.
82. Id.
83. Id.
84. Id. at 498.
of Proposition 51, Machonga would have been liable for $14,128.65 compared to $10,900.88 after Proposition 51.\textsuperscript{85}

\textit{Pre-Proposition 51}

\begin{tabular}{lrl}
\$21,242.94 & Total damages (economic and non-economic) \\
\- 2,124.29 & Reduction due to Espinoza's fault: 10\% of 21,242.94 \\
\$19,128.65 & Subtotal \\
\- 5,000.00 & Housing Authority's settlement payment \\
\$14,128.65 & Machonga's total damages \\
\end{tabular}

However, after Proposition 51, courts must take a more active role in calculating damages. First, economic and non-economic damages were separated—total damages were $21,242.94 of which $6,242.94 or 29.388\% were economic while $15,000 or 70.612\% were non-economic.\textsuperscript{86} The settlement figures must be viewed "in relationship to the ultimate award, 29.388\% of the settlement figure is allocable to economic damages."\textsuperscript{87} Accordingly, the court's calculation was as follows:

\begin{tabular}{lrl}
\$6,242.94 & Total economic damages \\
\- 624.29 & Reduction due to Espinoza's fault: 10\% of 6,242.94 \\
\- 1,467.77 & Reduction of the Housing Authorities settlement: 29.388\% of 5,000. \\
\$4,150.88 & Machonga's share of the remaining economic damages \\
\+6,750.00 & Machonga's 45\% share of non-economic damages: 45\% of 15,000 \\
\$10,900.88 & Plaintiff's total damage award. \\
\end{tabular}

Proposition 51 in this case made a difference of $3,217.77.\textsuperscript{88} The \textit{Espinoza} court reached the conclusion that "viewing the undifferentiated figure as a whole" was the appropriate method.\textsuperscript{89} In coming to this conclusion, the court

\begin{tabular}{l}
85. \textit{Id.} at 501. \\
87. \textit{Id.} at 504. \\
88. See \textit{id.} at 501. \\
89. \textit{Id.} at 504. \\
\end{tabular}
rejected alternative approaches, such as an express allocation, by settling parties of the economic-to-non-economic ratio because such allocations were unlikely to hold up against nonsettling defendants. This same method of calculation was applied in cases involving setoffs from workers' compensation and post verdict settlements.

D. Nature of Workers' Compensation

Workers' compensation is a statutory scheme to provide employees benefits "irrespective of fault." Workers' compensation involves a quid pro quo: the employer will provide for employees who are injured on the job; in return, employees "must treat workers' compensation benefits as their exclusive remedy against the employer and give up any common law tort claims against their employers." This system is, in effect, a compromise.

Workers' compensation statutes have scales with floors and ceilings to determine benefits for situations such as partial injury, permanent injury or death. For example, Labor Code section 4658 provides for a sliding scale to calculate payments for a workers' permanent disability. The payment is calculated by taking "the range of percentage of permanent disability." The employee receives "two-thirds of the average weekly earnings [allowed] for four weeks for each [one] percent of disability." Furthermore, section 4658(a) provides a schedule for more severe injuries. Under this section, it is possible for an employee to receive permanent disability and remain on the job.

As a result of this unique structure of computing payments, "identification and labeling of benefits is indeed un-

90. Id. at 503.
93. CAL. CONST. art. XIV, § 4.
95. See Scalise, 57 Cal. Rptr. at 232.
100. Id.
clear.”\textsuperscript{102} The “fundamental problem with attempting to categorize workers' compensation benefits as any particular form of damages is that such benefits are not damages.”\textsuperscript{103} In addition, an employee is not entitled to compensation from a third party defendant where the employee has received workers' compensation benefits for the same work related injury.\textsuperscript{104} However, workers' compensation does not compensate for pain and suffering or provide for punitive damages.\textsuperscript{105} Thus, in an appropriate case a third party who was in part responsible for an employee's injury may be liable for an employee's pain and suffering damages because workers' compensation does not compensate the injured employee for those damages.\textsuperscript{106}

Prior to the passage of Proposition 51, the proportionate amount attributable to the workers' compensation benefits up to the amount of the employer's negligence was deducted from plaintiff's damage award.\textsuperscript{107} This changed with the introduction of Proposition 51, but it remains unsettled whether workers' compensation benefits are economic or part economic and part non-economic.\textsuperscript{108}

\textsuperscript{102} Torres v. Xomox Corp., 56 Cal. Rptr. 2d 455, 475 (Ct. App. 1996) (quoting Moore Shipbuilding Corp. v. Industrial Acc. Comm'n., 196 P. 257 (Cal. 1921)).

\textsuperscript{103} Id.

\textsuperscript{104} See CAL. LAB. CODE §§ 3850-3863 (West 1989 & Supp. 1998). These sections "should not be construed to permit the employee a double recovery against the employer and the third party for the same damage." CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKERS' COMPENSATION § 11.24(1)(b) (Warren Hanna ed., 2nd ed. 1997).

\textsuperscript{105} See Solari v. Atlas-Universal Service, Inc., 30 Cal. Rptr. 407, 414 (Ct. App. 1963) (holding that an employee who suffered a head injury could not receive workmen's compensation unless the injury affected the employee's ability to work, but could recover pain and suffering damages related to the head injury from a liable third party); see generally Johns-Manville Prod. Corp. v. Superior Court, 165 Cal. Rptr. 858 (1980) (allowing an action for punitive damages only in an action at law).

\textsuperscript{106} See Solari, 30 Cal. Rptr. at 414 (holding that an employee who suffered a head injury could not receive workmen's compensation unless the injury affected the employee's ability to work, but could recover pain and suffering damages related to the head injury from a liable third party).

\textsuperscript{107} See Torres, 56 Cal. Rptr. 2d at 470-71 (quoting Aceves v. Regal Pale Brewing Co., 156 Cal. Rptr. 41 (1979)).

E. Proposition 51 and Workers' Compensation

Proposition 51 went into effect in June of 1986 and a "full decade after [it] became effective, the proper treatment of workers' compensation benefits under that law is apparently still an open question." 109 Although the California Supreme Court in *DaFonte v. Up-Right, Inc.* 110 recognized the importance and significance of the appropriate method for deducting workers' compensation benefits from damage awards, the court declined to address the issue. 111

1. The BAJI 16.75 Use Note Method

The BAJI 16.75 Use Note provides a method for calculating damages where the employee received workers' compensation and also sued a third party for the same injury. 112 It treats workers' compensation benefits as economic and therefore the proper method for calculating damage awards is to subtract any such payment from the economic damage award. 113 To date, only "two cases have touched upon the appropriate allocation of the workers' compensation benefit and have indicated that a deduction from economic damages would be appropriate." 114

In both cases, an appellate court affirmed the trial court's deduction of workers' compensation benefits from economic damages without discussion. 115 In *Poire v. C.L. Peck/Jones Brothers Construction Corp.*, 116 the Second District Court of Appeal stated that benefits paid under workers' compensation to a construction worker injured on the job were properly deducted from the plaintiffs' total economic damages after deducting the plaintiffs' comparative fault. 117

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111. *Id.* at 245.
113. *See id.*
116. 46 Cal. Rptr. 2d 631 (Ct. App. 1995).
Similarly, in *Hernandez v. Badger Construction Equipment Co.*, the Fourth District Court of Appeal stated that the economic damages were "properly reduced" by the benefits the plaintiff received under the Federal Longshore and Harbor Workers’ Compensation Act.

Since there was no discussion of this issue and since no alternative was presented or addressed, neither *Hernandez* nor *Poire* are binding. Therefore, the door was left open for other courts to agree or disagree with the BAJI method.

2. The Scalice/Espinoza Method

In *Scalice v. Performance Cleaning Systems*, the court characterized workers’ compensation benefits as having both economic and non-economic attributes and therefore apportioned the benefits in the same manner settlement proceeds are apportioned. Under this rationale, workers’ compensation benefits are apportioned according to the economic-to-non-economic ratio that the fact finder determines. Then, only the economic portion of workers’ compensation is subtracted from the economic damages; the defendants’ portion of the non-economic damages remains untouched.

The *Scalice* Court concluded that workers’ compensation benefits are both economic and non-economic because they are a "product of a rough statutory approximation of what the average injury of a particular type should yield, rather than a precise computation of actual monetary losses." The *Scalice* court pointed to several labor codes to support its argument that workers’ compensation benefits "encompass consideration of intangible, subjective items such as pain, and in some instances they impose penalties." The *Scalice* court argued that Labor Code sections 4453 and 4454 were not

118. 34 Cal. Rptr. 2d 732 (Ct. App. 1994).
119. *Hernandez*, 34 Cal. Rptr. at 743.
120. *See* Ginns v. Savage, 39 Cal. Rptr. 377 (1964) (stating opinions are not authority for propositions they do not consider).
121. *Id.*
122. 57 Cal. Rptr. 2d 711 (Ct. App. 1996).
124. *Id.* at 718-20.
125. *Id.* at 720.
126. *Id.* at 717.
127. *Id.* at 716.
"equivalent to the tort concept of lost earnings" which is listed as an economic damage. For example, Labor Code section 4454 specifies that "average weekly earnings within the limits of section 4453" include overtime, advantages received by the employee, but not sums paid by the employer for special employment expenses or cost of savings plans or other benefits. Since Labor Code section 4453 provides "a formula for calculation of benefits based on some, but not all items of lost earnings," it is more akin to non-economic damages. To be sure, "computation of annual earnings for temporary and permanent disability does not set out a method for determining actual wages lost to the employee, but consists of a series of statutory formulas that establish floors and ceilings for calculations of earnings."

Additionally, the Scalise court argued that Labor Code section 4658 provides a scale to calculate compensation for permanent disability but the employee may still work. Because "[a]n employee may receive permanent disability even if he or she is not off work, and may receive benefits while working at the identical job held prior to the injury[,] [s]ubjective symptoms such as pain, may be the basis of permanent disability payments."

Finally, the Scalise court argued that since several labor code sections impose penalties for late payments, these payments are "designed to penalize intentional misconduct of an employer" and are therefore similar to tort concepts, such as willful and wanton behavior. Thus, "although not technically punitive damages, these provisions have little in common with the items referenced as economic damages in Proposition 51."

The thrust of the Scalise argument is that although the

130. Id. at 716.
131. Id.
132. Id.
133. Id. at 717.
134. Id. (quoting Ferguson v. Workers' Comp. Appeals Bd., 39 Cal. Rptr. 2d 806 (Ct. App. 1995)).
136. Id. at 718.
amount an employee receives under workers' compensation is objectively verifiable, "these benefits are not identical to compensation for monetary losses, nor are they direct reimbursement for... medical expenses or lost earnings."  

Hence, such benefits are not wholly economic. Because the Scalice court characterized workers' compensation payments as having both an economic and non-economic component, it viewed such benefits as "the proceeds of a settlement imposed by the Legislature for claims arising out of and occurring in the course of employment." Thus, the court applied the Espinoza method to reduce the plaintiff's economic damage award by the percentage of workers' compensation which was allocated as economic.

The Scalice court recognized the possibility of a double recovery under the Scalice/Espinoza method. However, the court rationalized this potential by reasoning that since "plaintiffs bear the risk of poor settlements[,] logic and equity dictate that the benefit of good settlements should also be theirs." Furthermore, there is "no rigid rule against over-compensation."

Under the Scalice/Espinoza method, economic and non-economic damage reduction factors are calculated separately. First, the judge computes the dollar amount of each reduction and then divides this amount into economic and non-economic based on the trier of fact's determination of economic-to-non-economic damages. The judge then subtracts the economic workers' compensation dollars from the economic damage award.

3. The Peyrat Method

In addition to the BAJI and Scalice/Espinoza methods, several other methods of calculation have been suggested.
One such alternative offered by Paul Peyrat and the Continuing Education for the Bar is the “preferred” or “conservative” method. This method entails a four-step process that, according to Peyrat, harmonizes the social policies underlying tort law. Under Peyrat’s method, workers’ compensation benefits “should diminish non-economic damages first and economic damages only if the benefits paid (together with plaintiff’s fault percentage and the amount of settlements) more than exhausts non-economic damages.” The justification for this approach is based on the “potential inequity in a rule which would require an injured plaintiff who may have sustained considerable medical expenses and other damages as a result of an accident to bear the full brunt of the loss...”

Peyrat’s method harmonizes four policies underlying comparative fault and indemnity. First, his method maximizes the amount of money the injured party receives for his/her injuries to the extent that others caused the injuries. Second, it encourages settlements. Third, the Peyrat method ensures “equitable apportionment of liability among tortfeasors.” Finally, in accordance with Proposition 51, the Peyrat method insures a defendant will not pay more “than his or her percentage share of non-economic damages.”

Peyrat’s four-step process requires a trial judge to do the following:

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146. Id. at 98.
147. Id. at 97.
149. Peyrat, supra note 145, at 91.
150. Peyrat, supra note 145, at 91.
151. Peyrat, supra note 145, at 91 (quoting Sears, Roebuck & Co. v. International Harvester Co. 147 Cal. Rptr. 262, 264 (1978)).
152. Peyrat, supra note 145, at 92.
153. Only the first two steps are listed because the other two do not bear any direct relationship to this comment. Steps three and four address comparative indemnity. Peyrat, supra note 145, at 99.
154. For the purposes of Peyrat’s method the following definitions apply: “Defendant” is a party defendant to whom the trier of fact has assigned a fault percentage other than zero. “Judgment” is the judgment before the addition of costs or interest.
Step 1: "Render a joint and several judgment for the plaintiff against all defendants." This is "the amount of the economic damages finding unless step 1A requires entry of a lesser amount."

Step 1A: Subtract the combined reduction amount from total damages. If the remainder is less than the economic damages finding, enter this lesser amount as the judgment in Step 1 and omit Steps 3 and 4.

Step 2: "[R]ender a separate several judgment... against each defendant." The amount of each such judgment is that defendant's fault percentage multiplied by the non-economic damages amount unless Step 2A requires entry of a lesser amount.

Step 2A: Subtract the "combined reduction amount from the amount of the non-economic damages finding. The remainder is the highest dollar amount that can be entered in, Step 2, as a several judgment against any individual defendant."

Another variation to calculating judgments under Proposition 51 was offered by an appellate court panel in Romero v. Dermendzhayan. The California Supreme Court, however, ordered this opinion de-published. One commentator noted that "[a] reader with a masochistic bent might find enjoyment in trying to decipher and understand the thirteen computational steps applied by the trial judge in Romero..."

As evidenced by the forgoing discussion, there is no consensus on the appropriate method for deducting workers' com-

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"Total damages" is the sum of the trier of fact's economic damages finding and non-economic damages finding.

"Combined reduction amount" is the sum of the reductions, if any, for (a) plaintiff's fault (determined by multiplying plaintiff's fault percentage times total damages), (b) pre judgment settlements (dollar amount or value), and (c) workers' compensation (dollar amount).

Peyrat, supra note 140, at 99.
155. Peyrat, supra note 140, at 99.
156. Peyrat, supra note 140, at 99.
158. Peyrat, supra note 140, at 99.
159. Peyrat, supra note 140, at 99.
160. Peyrat, supra note 140, at 99.
161. Peyrat, supra note 140, at 99.
162. 12 Cal. Rptr. 2d 819 (Ct. App. 1992), review denied and ordered not to be officially published.
163. Id.
164. Peyrat, supra note 140, at 95.
pensation from a damage award.

III. IDENTIFICATION OF THE PROBLEM

If workers' compensation is wholly economic, then the amount paid to the plaintiff is subtracted from the plaintiff's economic award; however, if workers' compensation is both economic and non-economic, then only the portion that is economic is subtracted from the economic damages. An illustration using the numbers in *Scalice* illustrates the divergent outcomes created by the various methods of calculation—BAJI, *Scalice/Espinoza* and Peyrat.

In *Scalice*, the fact finder concluded that the plaintiff was not at fault, employer was 30% at fault and the defendant was 70% at fault. The jury awarded $677,000 in damages, of which $274,000 or 40.473% was economic and $403,000 or 59.527% was non-economic. The plaintiff received $162,008.53 in workers' compensation benefits. Because of Proposition 51, under both methods non-economic damages are the same, i.e., the defendant is liable for $282,100: 70% of $403,000.

**Pre-Proposition 51**

<table>
<thead>
<tr>
<th>Total damages</th>
<th>Reduction of workers' compensation benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td>$677,000.00</td>
<td>- 162,008.53</td>
</tr>
<tr>
<td></td>
<td><strong>$514,991.47 Plaintiff's total damages</strong></td>
</tr>
</tbody>
</table>

**Scalice/Espinoza Method**

<table>
<thead>
<tr>
<th>Total economic damages</th>
<th>Reduction of workers' compensation benefits: 40.473% of $162,008.53</th>
</tr>
</thead>
<tbody>
<tr>
<td>$274,000.00</td>
<td>- 65,569.71</td>
</tr>
<tr>
<td></td>
<td><strong>$208,430.29 Total economic damages</strong></td>
</tr>
<tr>
<td></td>
<td>+282,100.00 Defendant's 70% of non-economic damages</td>
</tr>
<tr>
<td></td>
<td><strong>$490,530.29 Plaintiff's total damage award</strong></td>
</tr>
</tbody>
</table>

---


**BAJI Method**

- $274,000.00: Total economic damages awarded
- $162,008.53: Reduction of workers' compensation benefits
- $111,991.47: Total economic damages
- $282,100.00: Defendants 70% of non-economic damages
- $394,091.47: Plaintiff's total damage award

**Peyrat Method**

- $274,000.00: Step 1: economic damages
- $240,991.47: Step 2A: highest amount that can be entered against any one defendant for non-economic damages
- $514,991.47: Plaintiff's total damage award

Under the Peyrat method, Step 1A was not applicable because subtracting the workers' compensation benefits from the total damages leaves $514,991.47, which is higher than the economic damages. Since Step 1A is used only if it is lower than Step 1, this step was omitted. Step 2 was not applicable because Step 2A requires the "combined reduction amount" to be deducted from the non-economic damages. This number, $240,991.47, represents the highest dollar amount that can be entered in step 2. Since $282,100—defendant's 70 percent of $403,000—was higher than $240,991.47, the lower number must be entered.

Between the BAJI and Scalice/Espinoza methods there is a difference of $96,438.82. Peyrat's method, on the other hand, is identical to the pre-Proposition 51 outcome.

The issue becomes whether workers' compensation benefits are economic or part economic and part non-economic for the purposes of calculating tort damages. The California Supreme Court, in DaFonte v. Upright, Inc., recognized that this issue is "a matter of some difficulty and importance", however the court has yet to address this issue. Meanwhile,
appellate and trial courts choose between either the BAJI Use Note or the Scalise/Espinoza method.\textsuperscript{172}

IV. ANALYSIS

The common factor among all the changes of the tort system is a desire to create equity and justice for both the plaintiff and defendant.\textsuperscript{173} The goal of reimbursing the plaintiff for injuries suffered is the primary concern of the courts,\textsuperscript{174} but in attaining this goal, people, businesses or governments cannot be made liable for all sums incurred in a single action.\textsuperscript{175} Because of these opposing concerns, the tort system has gradually developed protectors to ensure that plaintiffs will be reimbursed for their injuries even if they contributed to the injury.\textsuperscript{176} At the same time, defendants will bear other defendants’ liability to a minimum degree and even then, just to ensure the plaintiff is covered for “objectively verifiable monetary losses.”\textsuperscript{177} One such protector is Proposition 51.

A. Statutory Language

Section 1431.1 of the California Civil Code states that “[i]n any action for personal injury, property damage, or wrongful death, . . . the liability of each defendant for non-economic damages shall be several only and shall not be joint.”\textsuperscript{178} The section proceeds to define economic and non-economic damages.\textsuperscript{179} However, “[t]he Act itself says nothing about how the trial judge should calculate judgments if one or more . . . ‘reduction factors’ are present.”\textsuperscript{180} For example, the act does not provide any guidance where the trier of fact finds that the plaintiff shared in fault.\textsuperscript{181} Similarly there is no guidance for reducing damages where the plaintiff settled

\textsuperscript{172} The one notable exception is Romero v. Dermendzhayan, 12 Cal. Rptr. 2d 819 (Ct. App. 1992), review denied and ordered not to be officially published.
\textsuperscript{173} See, e.g., American Motorcycle Ass’n v. Superior Court, 578 P.2d 899 (Cal. 1978).
\textsuperscript{174} See Peyrat, supra note 140 at 91 (quoting Sears, Roebuck & Co. v. International Harvester Co., 147 Cal. Rptr. 262, 264 (Ct. App. 1978)).
\textsuperscript{175} See CAL. CIV. CODE § 1431.1(a)-(c) (West Supp. 1998).
\textsuperscript{176} See, e.g., American Motorcycle Ass’n, 578 P.2d at 917.
\textsuperscript{177} CAL. CIV. CODE § 1431.2(a) (West Supp. 1998).
\textsuperscript{178} CAL. CIV. CODE § 1431.2(a) (West Supp. 1998).
\textsuperscript{179} CAL. CIV. CODE § 1431.2(b)(1), (2) (West Supp. 1998).
\textsuperscript{180} Peyrat, supra note 140, at 89.
\textsuperscript{181} Peyrat, supra note 140, at 89.
with a defendant. Finally, Proposition 51 does not direct parties in calculating plaintiff's damage awards where he or she received workers' compensation payments for the injury on which he or she sued.

Since the Proposition is silent with respect to reduction factors, there must be some other statute or judicial principle that authorizes such a deduction. For example, California Code of Civil Procedure section 877 prohibits a plaintiff from receiving a double recovery. Section 877 provides that:

[w]here a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort...it shall have the following effect: (a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is greater.

To be sure, Proposition 51 did not abrogate the concept of double recovery. In most settlements, the parties take into consideration economic and non-economic factors in reaching the appropriate figure. Unlike settlements, workers' compensation payments are difficult to label as economic or non-economic because it is not a traditional tort concept.

B. Interpretation

The California Second and Fourth District Courts of Appeal, accepted the trial court's determination that workers' compensation was wholly economic without discussion.

182. Peyrat, supra note 140, at 89.
183. Peyrat, supra note 140, at 89.
184. CAL. CIV. CODE. § 1431.2 (West Supp. 1998) only address proportionality of non-economic damages.
187. See id. (stating that both economic and non-economic factors are considered by defendants in settlement negotiations).
189. See supra Part II.E.1.
However, since no justification was given for the acceptance of the BAJI method, the First District Court of Appeal was not bound by these decisions. The First District then interpreted workers' compensation statutes as having both economic and non-economic attributes and therefore treated workers' compensation benefits like settlement payments. To illustrate the varied outcomes and flesh-out the proper method of calculation, the various methods of calculating damages will be applied to the cases referred to in the background.

In Hernandez, a shipyard employee was injured when he was involved in a crane accident. The jury assigned fault as follows: employee plaintiff 5%, employer 55%, defendant Carde 20% and defendant Badger 20%. Plaintiff was awarded $850,000 of which $350,000 or 41.176% was economic and $500,000 or 58.824% was non-economic.

### Pre-Proposition 51

\[
\begin{align*}
\text{Total damages} & : \$850,000.00 \\
\text{Reduction of plaintiff's fault: 5% of } \$850,000 & : \$42,500.00 \\
\text{Reduction of workers' compensation benefits} & : \$148,943.94 \\
\text{Total damage award} & : \$658,556.06
\end{align*}
\]

### Peyrat Method

\[
\begin{align*}
\text{Total Economic damages} & : \$350,000.00 \\
\text{Step 2A: Several judgment against Carde} & : \$100,000.00 \\
\text{Step 2A: Several judgment against Badger} & : \$100,000.00 \\
\text{Total damage award} & : \$550,000.00
\end{align*}
\]

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190. *See* Ginns v. Savage, 393 P.2d 689 (Cal. 1964) (holding that opinions are not authority for propositions they do not consider).
192. *See supra* Part II.
194. *Id.* at 738.
195. *Id.*
BAJI Method

$350,000.00  Total economic damages before reductions
- 17,500.00  Reduction of plaintiff's fault: 5% of $350,000
- 148,943.94 Reduction of workers' compensation benefits
$183,556.06  Total economic damages
+100,000.00  Several non-economic judgment against Carde
+100,000.00  Several non-economic judgment against Badger
$383,556.06  Total damage award

Scalice/Espinoza Method

$350,000.00  Total economic damages before reductions
- 61,329.16  Reduction for workers' compensation benefits: 41.176 percent of $148,943.94
$288,670.84  Total economic damages
+100,000.00  Several judgment against Carde
+100,000.00  Several judgment against Badger
$488,670.84  Total damage award

In Poire, plaintiff employee slipped and fell off a plank ramp, which ran from the window to the ground. The jury returned a verdict for the plaintiff and assigned fault as follows: plaintiff 20%, employer 40%, settling defendants 0% and non-settling defendants 40%. The plaintiff settled with two of the three defendants for a total of $45,000 and received $82,424.48 in workers' compensation payments. The jury awarded the plaintiff $285,000 of which $202,000 or 70.877% was economic while $83,000 or 29.123% was non-economic.

197. Id.
198. Id.
199. Id.
Pre-Proposition 51 Method

$285,000.00 Total damages
- $57,000.00 Reduction for plaintiff’s fault: 20% of $285,000
- $45,000.00 Reduction for settlement
- $82,424.48 Reduction for workers’ compensation payments

$100,575.52 Total damage award

Peyrat Method

$100,575.52 Step 1A: Total economic damages
+ $0.00 Step 2A: Non-economic damages

$100,575.52 Total damage award

BAJI Method

$202,000.00 Total economic damages
- $40,400.00 Reduction for plaintiff’s fault: 20% of $202,000
- $31,894.65 Reduction for settlement: 70.877% of $45,000
- $82,424.48 Reduction for workers’ compensation

$47,280.87 Total economic damages
+ $33,200.00 Defendants portion of non-economic damages

$80,480.87 Total damage award

Scalice/Espinoza Method

$202,000.00 Total economic damages
- $40,400.00 Reduction for plaintiff’s fault: 20% of $202,000
- $31,894.65 Reduction for settlement: 70.877% of $45,000
- $58,420.00 Reduction for plaintiff’s workers’ compensation: 10.877% of $82,424.48

$71,285.35 Total economic damages
+ $33,200.00 Defendants’ portion of non-economic damages

$104,485.35 Total damage award

Suppose that an employee was injured while on the job
and sued a third party. Assume further the jury assigned fault as follows: the plaintiff 50%, the employer 25% and the third party 25%. Also assume that the jury awarded $500,000 of which $350,000 or 70% was economic and $150,000 or 30% was non-economic. Suppose the employee received $280,000 in workers compensation benefits. The results of such a scenario are as follows:

Pre-Proposition 51

| Total damages | 500,000.00 |
| Reduction for plaintiff's percentage of fault: 50% of $500,000 | 250,000.00 |
| Reduction for workers' compensation | 280,000.00 |
| Total Damage award | (-30,000.00) |

**Peyrat Method**

| Step 1A: economic damages | $-30,000.00 |
| Step 2A: no non-economic damages | +(-380,000.00) |
| Total damage award | ($-410,000.00) |

**BAJI Method**

| Total economic damages | $350,000.00 |
| Reduction for plaintiff's percentage of fault: 50% of $350,000 | -175,000.00 |
| Reduction for workers' compensation | -280,000.00 |
| Total economic damages | (-105,000.00) |
| Defendant's portion of non-economic damages | + 50,000.00 |
| Total damage award | $50,000.00 |

**Scalice/Espinoza Method**

| Total economic damages | $350,000.00 |
| Reduction for plaintiff's percentage of fault: 50% of $350,000 | -175,000.00 |
| Reduction for workers' compensation | -196,000.00 |
| Total economic damages | (-21,000.00) |
| Defendant's portion of non-economic damages | + 50,000.00 |
| Total damage award | $50,000.00 |

As the above numbers illustrate, the usual effect under the **BAJI** use note is that the plaintiff's damages are lower. However, where the plaintiff's fault is higher, the difference between the **BAJI** method and **Scalice/Espinoza** method is
lower. This last hypothetical also illustrates the possibility of the plaintiff recovering money under the BAJI or Scalice/Espinoza methods even though there is a negative balance of economic damages. Since only economic damages are reduced, the defendant is still liable for his or her portion of non-economic damages. The numbers further illustrate that the Peyrat method mirrors the pre-Proposition 51 outcome, with the Hernandez case being the one notable exception.

1. The BAJI Method

Since Hernandez and Poire each accepted the trial court's determination that workers' compensation benefits were economic without discussion, there is not a great deal of consolidated legal authority to support this conclusion. However, this method is supported by the nature of workers' compensation, policies underlying tort law and the purpose of Proposition 51.

Although, "analogies to common law cannot be applied too closely to [the workers' compensation] scheme," for the purposes of Proposition 51, such benefits must be classified as either economic or part economic and part non-economic. Various labor codes illustrate that the nature of workers' compensation is to compensate for "objectively verifiable monetary losses including medical expenses, loss of earnings, ... loss of employment and loss of business or employment opportunities." To be sure, "it does not require extended analysis to see that medical, surgical, and hospital treatment provided as a compensation benefit is the equivalent of medical expenses" under Proposition 51's definition of economic damages.

Under the Workers' Compensation Act, "compensable injuries may be physical, emotional or both, so long as they are disabling." Therefore, disability benefits "are a sub-

201. Torres v. Xomox Corp., 56 Cal. Rptr. 2d 455, 474 (Ct. App. 1996) (emphasis added) (quoting Western Metal Supply Co. v. Pillsbury, 156 P. 491 (Cal. 1916)).
204. See Torres, 56 Cal. Rptr. 2d at 471.
stitute for loss of earnings." Factors to determine disability benefits include the employee's earnings, the nature and extent of the injury, and the injury's effect on the employee's ability to hold employment. These are the same factors against which a loss of earnings claim is made in a tort case. Since these factors are objectively verifiable, they are more akin to economic damages according to Proposition 51's definition than they are non-economic. Similar analogies can be made with death benefits.

In addition to looking much more like economic damages, the BAJI method supports the underlying tort concerns. The plaintiff still receives economic damages over what workers' compensation has paid. Similarly, settlements are still encouraged because any established rule "can be factored into any settlement negotiation[ ]." Thus, workers' compensation, "strictly limits the amount recoverable, but does not allow compensation at all for certain elements of damage which may be asserted in a tort action." Since the employee receives economic payments for some, but maybe not all, economic damages and does not receive non-economic damages, the employee may sue a third party defendant to recover damages in excess of the workers' compensation benefits.

2. The Scalise/Espinoza Method

The Scalise court argued that although some workers' compensation benefits resemble economic damages, if you look closely enough you will find some labor code provision that may take into account non-economic factors. Therefore, the Scalise court allocated such benefits along the same lines as settlement proceeds. To support this conclusion, the Scalise court argued that since the permanent disability la-

209. See supra note 104, §§ 14.01, 14.11, 14.12.
213. 2 WITKIN, SUMMARY OF CAL. LAW, Work Comp. § 249 (9th ed. 1987).
bhor code provides a scale with "maximum and minimum amounts payable" and allows employees to continue working with only a partially permanent disability, the amount the employee receives may take into account subjective symptoms such as pain and suffering. However, this provision makes perfect sense; it fulfills the purpose of the Workers' Compensations Act, which is to compensate the employee for his or her "diminished ability to compete in the open labor market." For example, an employee may have lost a finger on his left hand while at work, but he or she is still able to operate his or her machine with his or her right hand. At the same time the workers' ability to compete for better jobs is diminished because those jobs may require two good hands. Thus, this provision is not based on pain, but rather workplace injury. Money received under this provision more closely resembles economic damages since section 1431.2 specifically includes loss of employment opportunities.

This conclusion, unlike the Scalise court's, is consistent with the California Supreme Court's determination that workers' compensation did not compensate for pain and suffering. Workers' compensation payments are "not to make the employee whole for the loss which he has suffered but to prevent him and his dependents from becoming public charges during the period of his disability." "Complete protection is not afforded the employee" under workers' compensation.

Similarly, Scalise argued that some labor codes have a punitive quality because they impose penalties for an employer's willful failure to pay benefits or unreasonable delay in payment. However, workers' compensation authorizes payments for work-related injuries, not punitive damages.

Thus, the Scalise court's rationale is flawed because it

216. Id.
219. See Jacobsen v. State Indust. Accident Comm'n, 299 P. 66, 68 (Cal. 1931) (holding that there is no compensation for pain unless it raises a presumption of incapacity to earn).
221. Id. at 979.
tried to analogize workers' compensation benefits too closely to common law tort damages. After several analogies between workers' compensation benefits and common law tort damages, the Scalice court concluded that "rather than attempt to fit the different components of workers' compensation benefits into specified items of out-of-pocket or more subjective losses," they viewed such payments as they would view settlement proceeds.

Clearly, when parties are in settlement negotiations, non-economic damages are taken into consideration when calculating appropriate settlement figures. Parties also consider how much money a jury would award both for specific injuries and for pain and suffering. This subjective thought process does not occur in calculating workers' compensation benefits; rather, the parties refer to the appropriate labor code and calculate the payments accordingly. Therefore, this process is not subjective.

3. The Peyrat Method

The Peyrat method is desirable because it, arguably, best harmonizes the policies underlying the tort system. Furthermore, the Peyrat method strictly interprets the language of Proposition 51 as not expressly authorizing a reduction from economic damages unless necessary to prevent a double recovery. In this last respect, Peyrat's method "insures that the total amount of any settlements, plus the dollar amount of the judgment, will not exceed the total damages awarded."

However, the effect of the Peyrat method, as aforementioned, would effectively invalidate Proposition 51. As in Espinoza, the plaintiff would have received $514,991.47 under both pre-Proposition 51 and Peyrat's method. Similarly, in Poire, both the pre-Proposition 51 and Peyrat method result in the plaintiff receiving $100,575.52 in total damages. Furthermore, in the last hypothetical, the Peyrat method, like the pre-Proposition 51 calculation, resulted in the plaintiff receiving no compensation despite the defendant's 25% li-

224. Torres v. Xomox Corp., 56 Cal. Rptr. 2d 455, 474-75 (Ct. App. 1996) (quoting Western Metal Supply Co. v. Pillsbury, 156 P. 491 (Cal. 1916)).
226. Peyrat, supra note 140, at 89-90.
227. Torres, 56 Cal. Rptr. 2d at 477.
ability. Thus, in three of the four cases compared, the Peyrat method results in the same outcome as pre-Proposition 51. Furthermore, accepting the Peyrat method would require a court to call into question all cases that addressed credits, including pre-trial settlements. Espinoza has been widely accepted by various courts for computing settlement payments. Even the Second District Court of Appeal which decided Poire and subtracted workers' compensation benefits from economic damages accepted Espinoza for settlement proceeds.

V. PROPOSAL

The California Supreme Court should recognize workers' compensation payments as wholly economic and therefore subtract any such payments from a plaintiff's economic damages. The citizens of California adopted Proposition 51 because the previous system "threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses, and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers." The BAJI Method, as represented in Hernandez and Poire, ensures that the plaintiff receives compensation for his or her injuries. At the same time, BAJI method ensures that the plaintiff does not receive a double recovery. This approach then meets the primary concern of tort law while meeting the more recent concern of double payments and overburdening deep-pocket defendants.

The BAJI Method recognizes the difficulty of classifying workers' compensation benefits as wholly economic or part economic and part non-economic, but also recognizes that this classification must be made in order to calculate payments under Proposition 51. Since workers' compensation benefits compensate employees for on the job injuries and not for pain and suffering or punitive damages, such payments

228. See id.
230. Poire, 46 Cal. Rptr. 2d at 637.
233. See supra Part IV.B.1.
are more akin to economic damages.\textsuperscript{234}

The \textit{Scalice} opinion represents an unjustified shift away from calculating workers' compensation payments under the \textit{BAJI} method to characterizing workers' compensation benefits as proceeds from a settlement.\textsuperscript{236} This shift is unjustified because it looks too closely at workers' compensation rather than looking at the \textit{nature} of workers' compensation. The nature of workers' compensation is to reimburse an employee for economic losses he or she has suffered.\textsuperscript{236} Furthermore, the California Supreme Court held that workers' compensation does not include pain and suffering\textsuperscript{237} or punitive damages.

\section*{VI. CONCLUSION}

Because of workers' compensation's unique characteristics, it is not easily categorized into economic or non-economic damages; however, Proposition 51 requires just such a classification. Thus, since workers' compensation is objectively verifiable it is roughly equivalent to economic losses and should be classified as such for the purposes of Proposition 51.

Workers' compensation compensates for partial injury, permanent injury or death, but does not compensate for subjective symptoms such as pain and suffering.\textsuperscript{239} Rather, the systems' sliding scale\textsuperscript{240} is an efficient way to provide more money for more severe injuries and less money for less severe injuries. The system is not perfect and some workers may receive more money for less severe injuries, but this is an imperfection in the workers' compensation system. Such money should not be termed pain and suffering thereby effecting classification for the purposes of Proposition 51.

\textit{Laura Buhl

\begin{itemize}
\item \textsuperscript{234} See supra Part IV.B.1.
\item \textsuperscript{235} See supra Part IV.B.1.
\item \textsuperscript{236} See supra Part IV.B.1-2.
\item \textsuperscript{237} See Jacobsen v. State Indust. Accident Comm'n., 299 P. 66, 68 (Cal. 1931) (recognizing that there is no compensation for pain unless it raises a presumption of incapacity to earn).
\item \textsuperscript{238} See Johns-Manville Prod. Corp. v. Superior Court, 165 Cal. Rptr. 858 (1980) (allowing an action for punitive damages only in an action at law).
\item \textsuperscript{239} Jacobsen v. State Indust. Accident Comm'n., 299 P. 66, 68 (Cal. 1931).
\item \textsuperscript{240} See supra note 95.
\end{itemize}