



Damages in civil-rights cases

A REVIEW OF CALIFORNIA CIVIL DAMAGES, ESPECIALLY AS THEY PERTAIN TO CIVIL-RIGHTS CASES

The focus of this article is to address the damages recoverable in cases arising from civilian encounters with law-enforcement officers where there is use of excessive force, whether intentional or negligent.

There are two categories of damages sought in civil-rights cases where a person is injured or killed during a police encounter: economic and non-economic damages. Economic damages pertain to objective losses, such as costs incurred from a funeral or an emergency room visit. Non-economic damages, on the other hand, include more subjective losses, such as pain and suffering.

Damages for wrongful death

There are three main components in determining damages for wrongful death. Each is an essential part of the compensation you may recover.

Economic damages

Economic damages refer to the financial harms suffered, such as the decedent's expected lifetime earnings and potential inheritances; services and goods provided by the decedent; medical expenses; funeral expenses; lost benefits the decedent would have earned (e.g., pension, medical coverage). These damages have a specific monetary value that may be assigned to them, making them easier to prove in many circumstances.

Non-economic damages

Non-economic damages compensate for the non-financial losses suffered. These may include mental anguish, emotional distress, and grief; loss of advice, care, and support; loss of consortium; and pain and suffering.

Punitive damages

In some cases, punitive damages may also be appropriate. These types of

damages serve to punish defendants for particularly egregious conduct, such as extreme recklessness or intentional behavior. Punitive damages are awarded in addition to compensatory or nominal damages in both state and federal court. Proof of a highly culpable state of mind is necessary to support an award of punitive damages and the amount of the award is dependent upon the defendant's financial circumstances.

Punitive damages primarily serve penal and deterrent functions. In addition, when punitive damages are awarded in conjunction with general compensatory or nominal damages, they also perform a vindicatory function. Finally, insofar as punitive damages provide an incentive for an aggrieved citizen to act as a private attorney general, they perform a law enforcement or "bounty" function.

Pain and suffering damages

In California, pain and suffering damages are the compensation plaintiffs may receive due to the mental anguish and physical pain they suffer from an injury. Because of the complex and subjective nature of pain and suffering claims, calculating the value of those claims can be complicated. Plaintiffs may prove their pain and suffering by presenting evidence of their injuries. This evidence may include medical records, witness testimony, and social media posts. In addition, a therapist may provide beneficial expert testimony in the case to prove mental suffering. Notably, there is not an established set standard that a jury or judge can use to calculate a pain and suffering award. A plaintiff will usually present evidence of physical pain and emotional trauma, and a decision is made on a “reasonable” amount of money for the damages.

Until recently, pain, suffering, and disfigurement damages were only recoverable by the person who directly experienced the injury. If the victim died before the conclusion of the case, the defendant was not required to pay these damages; however, recent amendments to California law now allow for this recovery even if the victim dies before the conclusion of the case.

California lawmakers enacted significant changes to the law dictating lawsuits for pain and suffering after the injured party dies. In October 2021, the legislature amended California Code of Civil Procedure section 377.34, which permits recovery of damages for pain and suffering, or disfigurement in survival actions. In effect, the amendment to section 377.34 allows recovery of these damages by a decedent’s representative or successor in interest through a survival action after their death. Before January 1, 2022, damages for pain and suffering or disfigurement could not be recovered following the decedent’s death. Thus, many seriously injured plaintiffs sought preferential trial settings to ensure recovery of general damages before impending death.

Section 377.34, subdivision (b) is undergoing an experimental practice period. This amendment applies to actions filed between January 1, 2022, and January 1, 2026, and to all existing actions granted a trial preference. The amendment is scheduled to expire on January 1, 2026. That said, the amendment includes language that requires the Judicial Council to report judgments and court-approved settlements for further evaluation.

Some believe this amendment will be made permanent. Ultimately, section 377.34, subdivision (b) is the law, and so, if your client is seriously injured by a police officer during an encounter that was caused by conduct that is either negligent or intentional, and your client was alive for a period of time before your client died, your clients’ heirs may recover the decedent’s pre-death pain and suffering.

While the amendment increases insurance exposure, it makes this area of law more complex. For example, when deciding whether to pursue general damages through a survival action, a plaintiff’s attorney needs to consider the weight of the exposure of settlement to medical liens. Unlike a wrongful-death lawsuit, which is an action for the victim’s survivors, a survival action is derivative of the victim’s tort claim and subjected to liens for medical expenses. This amendment may also impact granting of preferential trial settings because the justification that a plaintiff would lose the right to pursue general damages will carry less weight.

Conversely, if you brought your action in federal court under a claim of excessive force in violation of the Fourth Amendment and your client died as a result of the police encounter, the heirs are entitled to recover pre-death pain and suffering and damages for the violation of the Fourth Amendment itself.

One of the most significant developments in the field of civil-rights litigation has been the emergence of damages as a remedy for the enforcement of constitutional guarantees. In 1871,

Congress created a cause of action, now codified in section 1983 of title 42 of the United States Code, to redress the violation of constitutional rights by persons acting under color of state law. The United States Supreme Court has recognized a comparable cause of action against federal officials implicit in the Constitution.

In cases where an officer uses excessive force, this is a violation of the Fourth Amendment. As such, unreasonable and excessive force is a violation of the constitutional right to be free from a governmental seizure. The fact that an illegal seizure has occurred entitles the victim to money damages for the violation itself. How much a person might recover for an illegal seizure depends on the severity of the harm done. The same is true with regard to a deprivation of the First Amendment. All people in the United States have the right to speak up and express their opinion, with some exceptions of course. The classic example of an exception is that you cannot falsely scream out fire in a crowded theater, as such conduct would subject you to arrest. However, protestors have a right to assemble and speak out publicly on matters of public concern. A government official cannot deny a person that right. The deprivation of that right is compensable.

Damages in federal court

In federal court when asserting a section 1983 claim concerning a wrongful death, two specific types of damages are available. Pre-death pain and suffering damages and “loss of life” damages are available pursuant to *Chaudhry v. City of Los Angeles* (9th Cir. 2014) 751 F.3d 1096, 1105 and *Valenzuela v. City of Anaheim* (9th Cir. 2021) 6 F.4th 1098, 1003.

Pre-death pain and suffering and loss-of-life damages are recognized given that they are consistent with the purpose of section 1983. (See *Chaudhry v. City of Los Angeles* (9th Cir. 2014) 751 F.3d 1096, 1105 [“California’s prohibition against pre-death pain and suffering damages limits recovery too severely to be

consistent with § 1983's deterrence policy. Section 377.34 therefore does not apply to § 1983 claims where the decedent's death was caused by the violation of federal law"]; *Valenzuela v. City of Anaheim* (9th Cir. 2021) 6 F.4th 1098, 1003 ["Prohibiting loss of life damages would run afoul of § 1983's remedial purpose as much as (or even more than) the ban on pre-death pain and suffering damages"].)

Nominal damages

Nominal damages typically consist of a one-dollar allocation awarded upon proof that the defendant has violated the plaintiff's legal rights. They are recoverable only in select actions, such as trespass to land, battery, assault, false imprisonment, defamation, and malicious prosecution. Since they are awarded for the purposes of declaring and vindicating legal rights, nominal damages do not require proof of harm.

Bane Act damages

California Civil Code section 52.1 is commonly referred to as the Bane Act. In California, this statute provides another form of recoverable damages for injuries occasioned by an interaction with a law enforcement officer.

Specifically, section 52.1 provides:

(a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the *actual damages*, and any

amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars (\$4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6. (b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for *exemplary damages*.

(2) A *civil penalty of twenty-five thousand dollars (\$25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney. An action for that penalty brought pursuant to Section 51.7 shall be commenced within three years of the alleged practice.*

(3) *Attorney's fees* as may be determined by the court.

Needless to say, if you represent a client who has a provable Bane Act claim, you should always plead it. However, because this is a state-based claim you must submit a government claim within six months of the harm.

Damages recoverable under a substantive due process claim

Parents have a liberty interest in the companionship of their adult children and have a cause of action under the Fourteenth Amendment when the police kill an adult child without legal justification. Legally married spouses also share this same right. There is a higher burden of proof required to prove a violation of the Fourteenth Amendment in a police interaction that caused the death of the family member. The damages recoverable for a parent or a spouse are only general damages, and not economic damages.

How wrongful-death settlements are disbursed to recipients

Family members may receive a wrongful-death settlement in several ways. Qualifying family members will receive appropriate portions of the verdict or settlement under California law. Generally, family members, such as a spouse, children, parents, or siblings, may be eligible under California wrongful death law. Who is entitled to a share of the settlement will depend on the factual situations of the case.

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