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Sanchez v. Strickland and the Measure of Damages in California for Past Medical Expenses

Sanchez v. Strickland

In *Sanchez v. Strickland*, 2011 WL 5301773 (Nov. 4, 2011), the California Court of Appeal confronted the issue of whether a plaintiff can recover damages for the cost of gratuitous medical care—an issue left undecided by the California Supreme Court's landmark damages decision earlier this year, *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal. 4th 541 (2011). But in doing so, the Court of Appeal expanded the gratuitous care exception so far it could devour the *Howell* rule.

Howell v. Hamilton Meats & Provisions: the California Supreme Court Limits Recovery for Past Medical Expenses to Amounts Paid

Medical providers' "usual and customary" rates are often several times higher than the discounted rates they accept as payment in full from health insurers and others. In *Howell v. Hamilton Meats & Provisions, Inc.*, the California Supreme Court decided a recurring issue concerning such damages in personal injury cases: whether the plaintiff can recover as damages the *undiscounted* amounts billed for the plaintiff's medical care, or only the *discounted* amounts accepted as full payment for that care. The Supreme Court held the plaintiff may recover only the discounted amount: the plaintiff "may recover as economic damages no more than the amounts *paid* by the plaintiff or his or her insurer for the medical services received." *Id.* at 566 (emphasis added).

Howell is one of this year's most significant damages cases. One amicus brief in the case estimated that the difference between the undiscounted and discounted amounts could aggregate in California to almost *$3 billion* per year. Brief for Allstate Ins. Co. as Amicus Curiae Supporting Defendant/Respondent, Howell v. Hamilton Meats & Provisions, Inc., 52 Cal. 4th 541 (2011), 2010 WL 3777417 at *19-20.

The Sanchez Gratuitous Care Exception: Why It Conflicts with and Could Devour the Howell Rule

The *Howell* court observed a view widely held in other states that the collateral source rule applied to gratuitous services and allowed a plaintiff to recover the value of donated medical care. *Howell*, 52 Cal. 4th 557-58. However, the *Howell* court also observed that California law on this point was unclear. More than forty years ago, in *Helfend v. Southern California Rapid Transit District*, 2 Cal 3d 1 (1970), the California Supreme Court suggested the collateral source rule applied to unpaid services only when rendered "with the expectation of repayment out of any tort recovery." *Id.* at 7, n.5. But in *Arambula v. Wells*, 72 Cal. App. 4th 1006 (1999), the Court of Appeal declined to follow the *Helfend* dictum. *Id.* at 1010. The *Arambula* court instead held the collateral source rule allowed recovery of "gratuitous payments (including moneys to cover lost wages) by family or friends to assist tort victims through difficult times." *Id.* at 1008. The *Arambula* court reasoned that any other rule would conflict with the policy of encouraging charity. *Id.* at 1013.

In *Howell*, the Supreme Court recognized the conflict between *Helfend* and *Arambula*, but left it to be resolved another day. The *Howell* court explained that the rationale for allowing recovery for gratuitous care—an incentive to charity—did not apply to the facts before it involving commercially negotiated price agreements between medical providers and health insurers. *Howell*, 52 Cal 4th at 559.

In November, the *Sanchez* Court of Appeal filed its decision reaching this issue. The case involved personal injuries from an automobile accident. The medical provider billed $113,988.58, Medicare paid $66,704, and Medicare declined to pay $40,264.58. *Sanchez*, 2011 WL 5301773 at *7. This left a balance of $7,020. The opinion did not fully explain the handling of this balance, but quoted a declaration from a medical provider that the provider "billed the remaining $7,020.00 to Medi-Cal, but wrote off that amount, as [the provider was] not contracted with Medi-Cal." *Id.*

The *Sanchez* Court of Appeal discussed *Howell* and *Arambula*. Oddly, it ignored the contrary dictum in *Helfend*. The *Sanchez* court held a plaintiff may recover damages for past medical expenses that have been written off so long as the medical provider has "(1) rendered medical services to a plaintiff, (2) issued a bill for those services, and (3) subsequently written off a portion of the bill gratuitously." *Id.* at *8. Applying this rule, the court held the plaintiff could recover the $7,020 balance that had been "gratuitously" written off by the medical provider. *Id.*

Recovery for Gratuitous Care without Proof of Donative Intent?

Sanchez conflicts with *Howell* for at least two reasons. First, *Howell* held the gratuitous care exception (where recognized) reflects the policy of encouraging charity. *Howell*, 52 Cal 4th at 559. Yet the *Sanchez* court discussed no facts showing that, in writing-off the $7,020 balance, the medical provider acted with a donative intent.

Not every write-off is charitable. Indeed, *Howell* emphasized the distinction between a write-off made for commercial versus charitable purposes. *See Howell*, 52 Cal. 4th at 558-59. In *Sanchez*, the provider purportedly wrote-off the $7,020 balance only because the provider lacked a Medi-Cal contract. *Sanchez*, 2011 WL 5301773 at *7. This strikes us as a singularly commercial reason for writing-off a medical bill. If donative intent were shown by the absence of a contract guaranteeing payment (as *Sanchez* suggests), then every write-off would reflect a donative intent. Such an exception would consume the *Howell* rule.

Recovery for Gratuitous Care without Proof of Reasonable Value?

The *Sanchez* court also ignored *Howell's* commandment that a plaintiff may recover as damages "*no more* than the reasonable value of the medical services received." *Howell*, 52 Cal. 4th at 555 (original emphasis). There should be no recovery for *unreasonable* medical expenses. *Howell* explained that "reasonable value is a term of limitation, not of aggrandizement." *Id.* at 553.

As many consumers of medical care can attest, a medical provider's "usual and customary" rates as shown on its invoices are often several times higher than the discounted rates the provider actually agrees to accept as full payment for a patient's care. As a result, medical bills do not show the reasonable value of that care and they are not admissible for that purpose. "Where the provider has accepted less than a billed amount as full payment, *evidence of the full billed amount is not itself relevant on the issue of past medical expenses*." *Howell*, 52 Cal. 4th at 567 (emphasis added).

Yet the *Sanchez* court did not address the plaintiff's burden of proving reasonable value. And the court did not discuss any evidence showing the reasonable value of the "donated" medical care (other than the medical bills that are not admissible for that purpose). Instead, the court stated a rule that would seem to allow recovery of gratuitously written-off medical bills without regard to the value of the underlying services. *See Sanchez*, 2011 WL 5301773 at *8 ("[T]he amount written off constitutes a benefit that may be recovered by the plaintiff under the collateral source rule."). Such a broad rule would make no sense. Even in jurisdictions where a plaintiff can recover for gratuitous medical care, the plaintiff must prove "the *reasonable value* of the services even though he or she did not incur liability in that amount." *Howell*, 52 Cal. 4th at 559 (emphasis added).

The *Sanchez* decision is not final. The Court of Appeal has until December 5 to grant rehearing (a date that had not passed at the time this article was submitted for publication). If the Court of Appeal declines to grant rehearing, the California Supreme Court could grant review. But regardless of what happens in *Sanchez*, it is clear the gratuitous care exception will be the focus of attention as plaintiffs seek ways to bypass *Howell's* limitation on windfall damages recoveries.

Howell's Other Undecided Issues: the Gratuitous Care Exception Is Just the First

The gratuitous care exception was not the only issue *Howell* left unresolved. Although the Supreme Court held evidence of the billed amount was not relevant on the issue of past medical expenses, the Supreme Court declined to decide whether evidence of the billed amount might be relevant "on other issues, such as noneconomic damages or future medical expenses." *Howell*, 52 Cal. 4th at 567. Like the gratuitous care exception, this open issue is also destined for the appellate courts.

The issue should be decided in favor of defendants. Evidence of the undiscounted amount should be irrelevant to prove future medical expenses or noneconomic damages for the same reason it is irrelevant to prove past medical expenses—the plaintiff has not incurred a detriment based on the full billed amount. *See Howell,* 52 Cal. 4th at 555. This is especially true as the increasing availability of health insurance further reduces the relevance of the undiscounted amount charged for health care services. *See* 42 U.S.C. § 300gg (health insurance available to everyone regardless of preexisting conditions). Since the full billed amount is irrelevant because it can't be recovered for past medical damages (as *Howell* held), it should be equally irrelevant as a basis for seeking any other kind of damages.

We encourage trial counsel to raise appropriate objections to the admission of medical bills, particularly in cases that might be suitable for raising these issues in the appellate courts.

New Trials in Cases Tried before Howell

In the near term, *Howell* may lead to a flurry of new trials in personal injury cases that were decided under pre-*Howell* authority. Prior to *Howell*, trial courts were arguably *required* to admit evidence of the amounts billed for past medical expenses. *See Olsen v. Reid*, 164 Cal App. 4th 200, 204 (2008) ("Even the cases holding that a plaintiff is entitled to the lesser amount of damages. have approved of the jury's hearing evidence as to the full amount of plaintiff's damages."); *Greer v. Buzgheia*, 141 Cal. App. 4th 1150, 1157 (2006) (Evidence of the amounts billed for plaintiff's medical care "gives the jury a more complete picture of the extent of a plaintiff's injuries."). As discussed above, *Howell* has flipped this rule on its head.

Error in admitting such evidence cannot be excused on the ground that *Howell* changed the law. *Howell* is controlling even though it may have been decided after trial in any given case and even though it may have taken the trial judge by surprise. "The general rule that judicial decisions are given retroactive effect is basic in our legal tradition." *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 978 (1989).

New trials in personal injury cases because of *Howell* will not necessarily be limited to the issue of past medical expenses. Error in admitting evidence of the billed amount can inflate the jury's award of the amounts likely to be paid for similar expenses in the future. *See* 2 Jerome Nates et al., Damages in Tort Actions § 9.06[5][d], at p. 9-37 (2010) ("The cost and frequency of past medical treatment may be used as a 'yardstick for future expenses' if it can be inferred that the plaintiff will continue to seek the same form of treatment in the future").

Such error can also inflate the jury's awards for *noneconomic* loss. Some courts have recognized a logical and intuitive relationship between economic and noneconomic damages, which juries can be expected to understand as well. *See, e.g., Helfend v. S. Cal. Rapid Transit Dist.*, 2 Cal. 3d 1, 11 (1970) ("[T]he cost of medical care often provides both attorneys and juries in tort cases with an important measure for assessing the plaintiff's general damages"); *Major v. W. Home Ins. Co.*, 169 Cal. App. 4th 1197, 1216 (2009) ("In determining whether the noneconomic damages award is excessive, we compare the amount of that award to the economic damages award, to see if there is a reasonable relationship between the two.").

Indeed, practice guides confirm the logical relationship between economic and noneconomic damages. *See, e.g.*, 2 Dan Woods et al., California Trial Practice: Civil Procedure During Trial § 19.44, at 1206 (3d ed. 2011) (proposing that, during closing arguments, counsel "instead of specifying a dollar range for pain and suffering, suggest that the jury multiply the plaintiff's economic damages total by some multiple"); Zerne P. Haning et al., California Practice Guide: Personal Injury ¶ 3:34.1b, at 3-62 (Rutter 2010) ("Plaintiff's counsel should submit the total bills even where less was actually paid. Doing so may make the jury more sympathetic to plaintiff's injuries and perhaps more generous in awarding pain and suffering damages.").

Rather than submit evidence of the billed amount, it is now clear the parties should instead submit evidence of the paid amount. "[W]hen a medical care provider has accepted as full payment for the plaintiff's care an amount less than the provider's full bill, evidence of that amount is relevant to prove the plaintiff's damages for past medical expenses and, assuming it satisfies other rules of evidence, is admissible at trial." *Howell,* 52 Cal. 4th at 567. Yet anecdotal evidence suggests that, prior to *Howell*, many trial judges viewed the collateral source rule as precluding the admission of such evidence. For all of these reasons, evidentiary error on the issue of past medical damages may in many cases require a new trial on all or most damages issues.

***Sanchez* Begins the Next Chapter**

Howell is one of this year's most significant damages cases. Not only does the decision reject windfall damages claims, but it may necessitate new trials in pending cases that were decided under pre-*Howell* authority,and could reduce potential medical damages in California by as much as almost $3 billion a year. But as the *Sanchez* decision also shows, *Howell* leaves unanswered numerous questions that plaintiffs may seek to exploit in a quest for windfall damages.

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Editor's Note: For a discussion of the Howell Decision, see Legal Insights, Fall 2011.

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CA Court of Appeal Requires Treating Physicians Be Designated as Experts When Testifying to Subjects Outside the Scope of a Treating Physician

Dozier v. Shapiro, et al.

In *Dozier v. Shapiro, et al.*, Case No. B224316 (CA Dist. 2 Ct. App., Div. 1, September 27, 2011), the California Court of Appeal recently ruled that a plaintiff's treating physician, who was converted to an expert witness, must have been disclosed as an expert witness per California Code of Civil Procedure, section 2034.210 (CCP § 2034.210). The court held that because plaintiff's treating physician, Dr. Zeegen, was given additional materials from counsel after his deposition to enable him to testify about the required standard of care, he was transformed into an expert witness. Accordingly, the plaintiff should have disclosed the treating physician as an expert pursuant to CCP § 2034.210.

Background

The plaintiff sued an orthopedic surgeon for malpractice stemming from knee surgery. Through the testimony of the plaintiff's treating physician, Dr. Zeegen, the plaintiff sought to prove defendant's treatment fell below the applicable standard of care. Dr. Zeegen was deposed earlier in the action, at which time plaintiff's counsel stated on the record that the doctor would not be used as an expert. The plaintiff responded to the defendant's demand for expert witness information, but did not list Dr. Zeegen as an expert. Following the deposition, plaintiff's counsel provided Dr. Zeegen with additional materials. Due to the treating physician's reliance on additional materials acquired post-deposition, the trial court ruled that