California's Sanchez Decision and the End of Expert Reliance on Hearsay Who Should Offer Expert Testimony on Medical Expenses in Personal Injury Cases

by

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Life Care Planning

Since the term "Life Care Plan" was first introduced to the legal community by Paul Deutsch in *Damages in Tort Actions*[1] *and A Guide to Rehabilitation,*[2] the practice and scope of the life care planning profession have developed and grown.[3] As initially conceived, the life care planner's (Planner) role is to outline the "future care needs and costs for individuals with catastrophic injuries, disabilities, or chronic medical needs."[4] The Planner satisfies this condition by asking and answering three fundamental questions:

1. What is the medical condition of the injured or disabled party?
2. What is required to address the medical condition of the injured or disabled party?
3. How much will it cost to address the medical condition of the injured or disabled party over time?[5]

As the profession has evolved, it's thought leaders have recognized the need to clearly define its methods and establish industry practice standards.[6] The life care planning (LCP) community quickly agreed to the idea that:

> [t]he life care plan [functions as] … a dynamic document based upon published

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1 Deutsch, Paul M, and Frederick A. Raffa. *Damages in Tort Actions*. New York, N.Y. (235 E. 45th St., New York 10017: M. Bender, 1982. Print.

2 Deutsch, Paul M, and Horace W. Sawyer. *Guide to Rehabilitation*. New York, N.Y. (235 E. 45th St., New York 10017: M. Bender, 1985. Print.

3 Neulicht, A. T., Riddick-Grisham, S., & Goodrich, W. R. (2010). Life Care Plan Survey 2009: Process, Methods and Protocols. *Journal of Life Care Planning*, *9*(4), 131–200. Retrieved from https://cdn.ymaws.com/rehabpro.site-ym.com/resource/resmgr/files/JLCP_Publications/JLCP_Vol_9_No_4.pdf

4 Id.

5 Gonzales, J. G., & Zotovas, A. (2014). Life Care Planning: A Natural Domain of Physiatry. *Pm&r*, *6*(2), 184–187. doi: 10.1016/j.pmrj.2014.01.011

6 Id.

> standards of practice, comprehensive assessment, data analysis, and research,[7] which provides an organized, concise plan for current and future needs with associated costs for individuals who have experienced catastrophic injury or have chronic health care needs.[8]

This definition encapsulates the principle that the practice of life care planning must be aligned with objective standards that establish a baseline for patient evaluation. On that account, the LCP community recognized specific criteria for plan development and analysis. The requirements are divided into three parts:

- Criteria 1: The collection of facts (such as medical records and information from personal interviews).
- Criteria 2: The formulation of an opinion or diagnostic conclusion about the patient's future medical care.
- Criteria 3: The determination of the cost of care for the patient based on available cost data.[9]

Despite these criteriums' codification, life care planners who provide testimony to the Court find it more difficult to withstand legal scrutiny. Courts have raised concerns about testifying Planners and the methodology applied to determine the cost of care.

Paul Deutsch, considered one of the founders of life care planning, foreshadowed some of the challenges we discuss in this article. He maintained that "the use of clinical practice guidelines and research literature [, while useful, is not enough] to meet the standards that have become necessary for a properly developed life care plan."[10]

A sound plan requires a strong foundation, which means that life care planners must:

1. Establish a strong connection between the data provided and the plan's recommendations,
2. Get information by asking questions of the medical professionals involved in treatment, and not just from the records,
3. Utilize consulting specialists,
4. Rely on clinical practice guidelines, and
5. Consider the research literature, where possible.[11]

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[7] The term “research” is loosely defined. A cursory review of the literature suggest that it is used to arbitrarily refer to a range of possible investigate techniques that may lead the life care planner to discover the future care needs and costs of an injured person.

8 Neulicht, , A. T., Riddick-Grisham, S., & Goodrich, W. R. (2010). Life Care Plan Survey 2009: Process, Methods and Protocols. *Journal of Life Care Planning*, *9*(4), 131–200. Retrieved from https://cdn.ymaws.com/rehabpro.site-ym.com/resource/resmgr/files/JLCP_Publications/JLCP_Vol_9_No_4.pdf

9 Gonzales, J. G., & Zotovas, A. (2014). Life Care Planning: A Natural Domain of Physiatry. *Pm&r*, *6*(2), 184–187. doi: 10.1016/j.pmrj.2014.01.011

10 Deming, L., & Riddick-Grisham, S. (2011). *Pediatric life care planning and case management*. Boca Raton: CRC Press., 847.

11 *Id.*

Planners who fail to provide this foundation undermine the validity of their work. Moreover, where "planners . . . [do] not consider [ ] the same issues or the same rules and regulations [when] . . . they make . . . a decision[,] [t]he result is … an exercise in professional judgment based on opinion without the proper foundation, [and] [d]ecisions made based on misinformation and limited or poor judgment."[12]

A New Opportunity for Forensic Economist: *People v. Sanchez*

In *People v Sanchez*,[13] the California Supreme Court overruled long-standing authority, allowing experts to rely on case-specific hearsay.[14] The decision fundamentally limits an expert's ability to rely on hearsay and asks the jury to consider the expert conclusion's underpinnings.

"When an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth."[15] "If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception."[16]

While the *Sanchez* ruling is a gang-related criminal prosecution case, the Court did not intend to be limited to that context.[17] The Court saw itself as resolving Sixth Amendment concerns about "the proper application of Evidence Code sections 801 and 802, relating to the scope of expert testimony."[18] *People v. Stamps* [19] echoes the *Sanchez* Court's sentiment. It reiterates that an expert cannot testify about case-specific facts, which he treats as correct unless the expert has personal knowledge of the facts or a hearsay exception applies.

> After *Sanchez,* reliability is no longer the sole touchstone of admissibility where expert testimony to hearsay is at issue. Admissibility—at least where "case-specific hearsay" is concerned—is now more cut-and-dried: If it is a case-specific fact and the witness has no personal knowledge of it if no hearsay exception applies, and if the expert treats the fact as true, the expert simply may not testify about it. (*Sanchez,* supra, 63 Cal.4th at pp. 684–686, 204 Cal.Rptr.3d 102, 374 P.3d 320.) The underlying fact also may not be included in a hypothetical question posed to the expert unless it has been proven by independently admissible evidence. (Id. at pp. 684, 686, 204 Cal.Rptr.3d 102, 374 P.3d 320.) If the hearsay relied upon by the expert is not case-specific, as we read *Sanchez*,

[12] *Id*.
[13] *People v. Sanchez*, 63 Cal.4th 665 (2016).
[14] See *Sanchez*, 63 Cal.4th 665, 671.
[15] *Id.* at 683.
[16] *Id.* at 685.
[17] See *Bennett v. Superior Court*, B292368, at 17 (Cal. Ct. App. Sep. 11, 2019). Bennet involves the admissibility of hearsay evidence sexual assault cases. The Court affirms Sanchez maintaining that an expert may not "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception."
[18] *Sanchez* at 671.
[19] *People v. Stamps*, 3 Cal. App. 5th 988, 986, (2016).

> the evidence still is admitted for its truth (id. at pp. 685–686, 204 Cal.Rptr.3d 102, 374 P.3d 320), and is therefore hearsay, but we tolerate its admission due to the latitude we accord experts, as a matter of practicality, in explaining the basis for their opinions (id . at p. 676, 204 Cal.Rptr.3d 102, 374 P.3d 320). Where general background hearsay is concerned, the expert may testify about it so long as it is reliable and of a type generally relied upon by experts in the field….. (*Sanchez*, supra, at pp. 676–679, 685, 204 Cal.Rptr.3d 102, 374 P.3d 320; Evid. Code, §§ 801, 802.) [20]

Pricing Medical Expenses Post- *Sanchez*

The decisions in *Sanchez* and *Stamps* have had a chilling effect on the testimony of experts. The rulings push experts to be accountable for the evidence they present to the Court. It limits their testimony to matters on which they have personal knowledge and begs the jury to seek testimony from experts who have personal knowledge about the facts in question.

Litigators and legal scholars alike have become increasingly aware of the paradigm shift created by *Sanchez*.

> [Now, judges] may no longer overrule a hearsay objection on the grounds that the hearsay is being considered solely for explaining the basis of the expert's opinion, and experts may no longer be asked to assume case-specific facts and opine on the significance of such case-specific facts, if such facts have not been, or will not be, independently admitted into evidence. Since the paradigm of allowing a limiting instruction to justify the admittance of expert basis testimony is no longer tenable under *Sanchez*, trial counsel [is] forced to shift their focus to ensur[e] they have established a proper evidentiary basis for admission of case-specific facts forming the basis of expert opinion testimony. [Doing so] may include calling more witnesses to properly authenticate and introduce evidence that trial counsel wishes the expert [to] relate to the jury. [I]f that [is] not possible, [then] trial counsel may be unable to present such evidence altogether.[21]

Nowhere is Sanchez's effect more evident than in cases involving the testimony of life care planners asked to opine on health insurance costs, billed, or charged amounts related to medical expenses.

Today, a growing number of Planners offering testimony are being challenged by opposing counsel. Issues arise when they testify about the source of their cost data. For example, a Planner may describe their method of analysis by relaying to counsel the following process: 1) Planner inputs the relevant cost data for the plaintiff's future care into a selected database, 2)

[20] *Id*.
[21] Marissa N. Hamilton, The End of Smuggling Hearsay: How People v. Sanchez Redefined the Scope of Expert Basis Testimony in California and Beyond, 21 CHAP. L. REV. 509, (2018).

Planner inputs unique identifiers to refine the data, and 3) the database produces outputs generally considered reliable by members of the life care planning profession. On its face, the methodology appears appropriate. But, opposing counsels move quickly for evidentiary hearings attacking the expert testimony's admissibility.[22]

The legal challenges faced by experts are not always successful. However, they create hurdles for Planners attempting to have their evidence about medical costs heard. Experts must explain why the cost data supporting their claims is "general background information" rather than "case-specific hearsay" modeled by third-party econometric sources used to value the goods and services identified in the life care plan.

Pricing and Reasonableness

Procurement professionals and policy analysts have long regarded cost and pricing analysis as the appropriate vehicle for evaluating medical expenses.[23] This point is born out in *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266.[24] *Pebley* involved an injured plaintiff who maintained health insurance but chose to be treated by healthcare providers that did not accept his insurance plan. The plaintiff received a very high bill for his care, which was higher than the amount paid by his insurance plan or other individuals using the same facilities. Despite objections raised by opposing counsel, the plaintiff was permitted to enter into evidence the full amount of his unpaid bills.

The *Pebley* Court reasoned that the insured and uninsured should not be dealt with differently under the law. Suppose an insured plaintiff seeks and receives uninsured medical care without applying for her insurance. In that case, the Court ought to treat her the same as an uninsured plaintiff. Therefore, the insured plaintiff who has sought and received uninsured healthcare should introduce evidence of the full amount billed. But the Court also reasoned that the plaintiff must be prepared to offer testimony that the billed amounts are "reasonable." The point made by the *Pebley* Court is that the "insured" and "uninsured" should be treated on par in the marketplace. Each is subject to the "billed amount" at the moment medical care is rendered. And while this experience is an essential feature of medical care, being insured is accidental.

Pebley reminds us that the "insured" and "uninsured" operate in one market (and not two). By stripping away the veneer of insurance status, we treat them equally under the law. Stated differently, all persons rendered medical care are subject to the billed amount.

Long before the Court's decision in *Pebley*, policy professionals acknowledged the "uninsured" as equal stakeholders in the healthcare market. When we account for the uninsured, coupled

[22] Cal. Evid. Code § 402.
[23] See Federal Acquisition Regulation, 48 C.F.R. §15.404-1 (2019). See also Contract Cost and Price, 2 C.F.R. § 200.323 (January 1, 2014).
[24] *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266.

with employment-based,[25] direct purchase,[26] Medicare, Medicaid, and Military-based[27] insureds, we have a complete picture of the market and a reliable basis for the identification of price "reasonableness."[28] In other words, the uninsured, as suggested by *Pebley*, are necessary stakeholders in the market, and reasonableness or reasonable value cannot be calculated without their experience of price.

Medical Damages as a Function of Price Reasonableness

California Courts see the calculation of medical damages as a function of price "reasonableness" – i.e., "reasonable value." The California Court of Appeals in *Cuevas v. Contra Costa County*,[29] for instance, ruled that while injured plaintiffs are entitled to receive the reasonable value of future medical expenses,[30] evidence of the full billed amount is not the basis for that value.[31] Reflecting on the *Markow v. Rosner* decision,[32] the *Cuevas* Court went on to say that the reasonable cost of medical expenses can be based on the negotiated amount paid by the insurance company.[33] Persuasive on this question is the United States District Court of South Carolina Charleston Division's findings in *United States v. Berkeley Heartlab, Inc.*[34]

The *Berkley* matter involves allegations that the defendants overbilled the government for laboratory tests in violation of the Fair Claims Act. Responsive to the question of "reasonable value" is the Court's rejection of the expert's use of a charge-based methodology as determinative of "reasonableness." The Court reasoned that because "physicians set their charges higher than the actual payment they expect to receive . . ."[35] the billed rate is not the amount required. Therefore, any methodology to determine the "reasonableness" of physician services based almost exclusively on charges is unreliable and is not a reasonable representation of fair market value.[36]

Sedgewick on Measuring Damages

California's shift in its evidentiary approach to expert testimony has forced the legal community to reconsider: (1) Who can testify, (2) What information can be offered, and (3) Whether the evidence (for purposes of the Court) is reasonable. These questions have become the cornerstone of the conversation about personal injury and the calculation of future medical damages. While California has led the discussion, more states are finding it necessary to look

[25] Employment-based health insurance includes coverage provided through an employer or union.
[26] Health insurance coverage purchased directly by an individual from an insurance company or coverage purchased through someone outside the household.
[27] Military-based payment includes TRICARE and CHAMPVA (Civilian Health and Medical Program of the Department of Veterans Affairs), as well as care provided by the Department of Veterans Affairs and the military.
[28] See *Cuevas* at 178-180.
[29] *Cuevas v. Contra Costa County*, 11 Cal. App. 5th 163 (2017).
[30] These expenses must be reasonably certain to be necessary.
[31] *Cuevas* at 182.
[32] *Markow v. Rosner,* 3 Cal. App.5th 1027 (2016).
[33] *Id*. at 179.
[34] *United States v. Berkeley HeartLab, Inc.,* Civil Action No. 9:14-cv-00230-RMG (D.S.C. Aug. 9, 2017), 2017 U.S. Dist. LEXIS 107481 (D.S.C. July 12, 2017).
[35] *Id.*
[36] *Id.*

into these questions.

> In almost all cases in which damages are recoverable, the measure of compensation involves an inquiry into the question of value. …. [W]hen the recovery is based on personal injury, a part of the damages at least must be made up of [economic] … elements, such as the … value of the medicine administered, etc.[37]

The value of an object (i.e., property, time, labor, or services), which is the subject matter of a tort, is what that object is bought or sold for in the market, and "the market price [of the object] shows what it would cost the plaintiff to be put in as good a position as if the tort ha[d] not been committed …."[38]

> "[T]he measure of recovery, where such property can be procured in the market, is the value of it in the market and not the cost; (*) for the owner of the property is fully compensated for it by a sum of money which will enable him to replace it. The market value must be ascertained by a money standard based on evidence. It cannot be assessed on conjecture. (*) It is the actual cash market value, not what the property would sell for under special or extraordinary circumstances. (*) Proof of a single sale is not enough to establish a market value. (*) The "market value" of an article requires the investigation of the actual condition of the market, and does not warrant the consideration of the conjectural consequences of a state of things which did not exist(.)"[39]

Theodore Sedgewick, a preeminent scholar and thought leader of the 19th century, led American legal discourse on the question of damages. He established that "market value" cannot be calculated based on a cursory investigation. Instead, it hinges on knowledge of "actual" market conditions. For instance, a life care Planner offering proof of one, two, or even three N95 facemask purchases falls short of providing a reliable picture of the reasonable value for the N95 facemask. Market value can only be adequately ascertained through an investigation of actual market conditions.

Given the complexity of today's marketplace, we are unlikely to see a credible pricing analysis based on a cursory market examination. An investigation is appropriately done by those who study the market. Forensic economists, for example, sit in this preferred position. And courts are telling us that investigating the market and calculating reasonable value requires more than a cursory investigation.

[37] Sedgwick, Theodore, et al. *A Treatise on the Measure of Damages: Or an Inquiry Into the Principles Which Govern the Amount of Pecuniary Compensation Awarded by Courts of Justice*. N.p., Beard Books, Incorporated, 2000.
[38] Id.
[39] *Id.*

Determining Reasonable Value

The purchase of items in the market, including unique goods, requires cost or pricing analysis to determine reasonableness. Forensic economists, procurement professionals, and policy analysts commonly use comparative pricing strategies to assess market reasonableness. And it is the approach applied by the federal government and others to evaluate the reasonable value of future medical expenses.

Within healthcare, three principles are essential to determining price reasonableness:

- Principle I: Calculations should be independent of any individual's experience of price, mode of payment, and medical condition or diagnosis.
- Principle II: Calculations should use objective and independently verifiable pricing and costs data fixed by type of payment -- i.e., employment-based,[40] direct-purchase,[41] Medicare, Medicaid, Military-based,[42] and uninsured.[43]
- Principle III: Calculations should couple payment type with population data to adjust for its influence on value.

As mentioned previously, the billed and (advertised) charge rate does not reflect reasonable value. It is not the payment providers expect to receive (all things being equal)[44] when an individual pays for medical services. In *Berkeley Heartlab, Inc.*[45], the Court highlights that "physicians set their charges higher than the actual payment they expect to receive..."[46] While I have discussed this matter previously, it bears repeating.

The *Berkley* Court acknowledged that physicians knowingly set their rates 200% to 500% higher than the Medicare Fee Schedule because the Medicare Physician Fee Schedule (MPFS) rates change annually.[47] The Court also recognized that physicians are keenly aware that Medicare is not permitted to pay above the MPFS when paying fees.[48] Based on its findings, the federal district court rejected the argument that a physician's charged rate reflects the amount required for payment. More importantly, the Court decided that an analysis relying on medical bills does not reflect the reasonable value of medical expenses. Instead, fair and reasonable value is kin to the average payment providers in the marketplace expect to receive, and the charged or billed amount is not the expected payment. By employing comparative pricing as a means for assessing reasonable value, we accept the *Berkeley* Court's reasoning that the average payment providers expect to receive in the marketplace is valued.

[40] Employment-based health insurance includes coverage provided through an employer or union.
[41] coverage purchased directly by an individual from an insurance company, or coverage through someone outside the household.
[42] Military-based payment includes TRICARE and CHAMPVA (Civilian Health and Medical Program of the Department of Veterans Affairs), as well as care provided by the Department of Veterans Affairs and the military.
[43] Individuals are considered uninsured or self-insured if they do not have health insurance coverage for the entire calendar year.
[44] When an individual walk into a provider's office, her insurance status is unknown. Similarly, the individual doesn't know what the providers expectations are in terms of payment. Operating on equal knowledge, both the purchaser of care and the seller of care enter the transaction with equal knowledge about the other and one another's expectations in terms of price.
[45] *United States v. Berkeley HeartLab, Inc.,* Civil Action No. 9:14-cv-00230-RMG (D.S.C. Aug. 22, 2017).
[46] *Id.*
[47] *Id.* at 14.
[48] *Id.*

Conclusion

Life care planning was introduced to the legal community as a tool for identifying and pricing the future care needs of individuals with catastrophic injuries, disabilities, and chronic medical conditions. It evolved with the understanding that precise methods and practice standards were needed to objectively evaluate patients.

Regrettably, the life care planning community has been unable to fully align itself with this goal. This weakness is evidenced in legal settings where Planners are called to testify on the price of future medical expenses. Calculating the value of future medical expenses requires an understanding of investigative and econometric techniques tempered by case law. Testifying experts without personal knowledge of this type fall short of being able to provide reliable data.

The kind of expertise required to offer credible claims about pricing is a function of economists, policy analysts, procurement professionals, and others intimately familiar with pricing data and the methodologies used to draw the proper conclusion. For example, the successful pricing of medical expenses in personal injury matters recognizes the importance of price as experienced by all payors, particularly that of the injured party. Following the *Sanchez* ruling, more courts have affirmed the common-sense idea that testimony about pricing should be left to experts who understand proper econometric investigation and analysis.