SBBA South Bay Bar Association

Recent Developments in the Award of Medical Damages in the Aftermath of *Howell*—Best Practices for Civil Litigators from the Bench, Plaintiffs' and Defense Bars

FOCUS

In 2011, the California Supreme Court issued the *Howell* decision marking a turning point in California law relating to how medical damages are calculated and proven in civil litigation. But *Howell* left open critical questions—some of which were answered by the California Court of Appeal in the *Cornebaum* decision in 2013. Despite the bright line rules laid out in *Howell* and *Cornebaum*, thorny questions remain concerning calculation and proof of medical damages—such as the nature of evidence which expert witnesses can reasonably rely upon to forecast future medical costs. The implications of the Affordable Care Act, as well as the evidentiary issues arising at trial, suggest that rulings on motions *in limine* may remain unpredictable in many instances where future medical damages and expert testimony are at issue.◆

AGENDA

12:00 pm – 12:15 pm	**Check In**
12:15 pm – 12:20 pm	**Welcome & Introduction**
12:20 pm – 12:30 pm	**General Overview**
12:30 am – 01:10 pm	**Hypotheticals**
01:10 pm – 01:15 pm	**Questions & Conclusion**

HIGHLIGHTS

- Learn the latest case law applying *Howell* and *Cornebaum* and how the rules govern the calculation of medical damages and the introduction of evidence
- Identify the gray areas and unsettled issues arising from the *Howell* and *Cornebaum* decisions
- Participate in interactive question and answer session with panelists using TurningPoint® audience response technology
- Learn about recent published and unpublished case law applying *Howell* and *Cornebaum* in unexpected ways
- 1.0 Hour of general Continuing Legal Education Credit

MODERATOR & PANELISTS

- Hon. Stuart M. Rice, Judge of the Los Angeles Superior Court
- Bruce M. Brusavich, Esq. of AgnewBrusavich APC
- Richard L. Stuhlbarg, Esq. of Bowman and Brooke LLP

OTHER SBBA EVENTS

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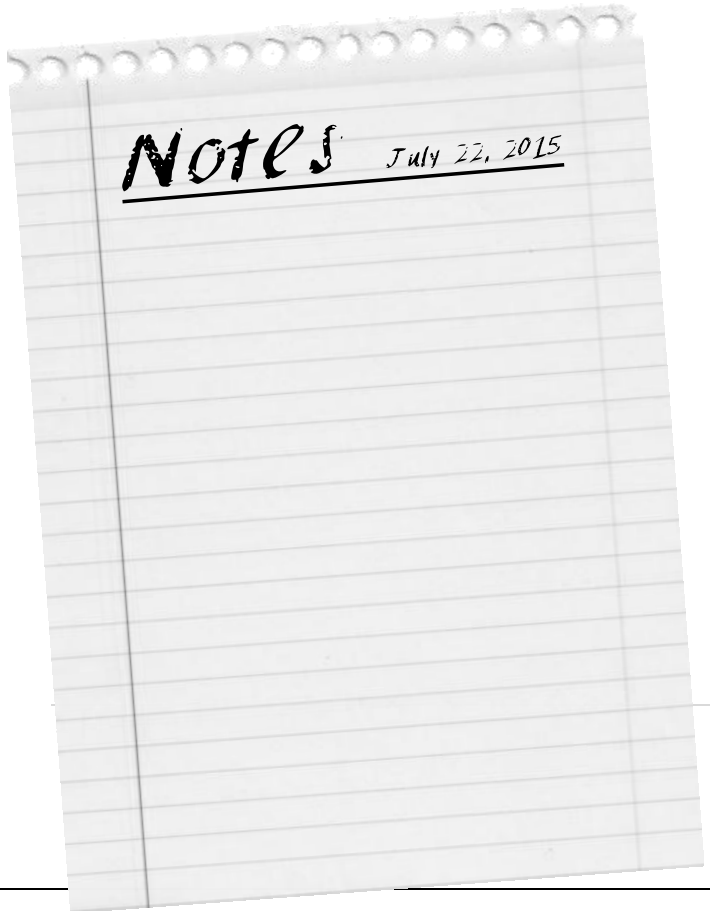
- Scan this QR Code to view SBBA events:

HYPOTHETICALS

Hypo 1

Jesse sustained personal injuries when Hiesenberg negligently Review and analysis a red light while driving his RV and crashed into a Monte Carlo driven by Jesse. Jesse's healthcare insurance coverage is a preferred provider organization (PPO). Under preexisting contractual agreements with his medical providers, the PPO paid $200,000 to settle all of Jesse's medical bills. Jesse sued Hiesenberg who filed a motion *in limine*, which the trial court denied, to exclude evidence at trial of each medical provider's customary charges (i.e., the standard, undiscounted rates charged to uninsured medical patients). After the jury awarded Jesse $300,000 in damages for past medical expenses, the trial court granted a post-trial motion to reduce that award to $200,000.



QUESTION

Did the trial court correctly rule on the motions (select the best answer)?

A. Yes, as to the motion *in limine*

B. Yes, as to the post-trial motion

C. Both A. and B.

D. None of the above

Hypo 2

Assume the same facts as ***Hypo 1***, except that Jesse's healthcare insurance coverage is solely through Medicare. Jesse contends that *Howell* does not apply to Medicare payments because Medicare is a federally funded entitlement program exempt from state law.

TRUE or FALSE?

Expenses for medical care afforded through most federally funded insurance and entitlement programs, including Medicare, are not subject to the holding in *Howell*.

Hypo 3

Assume the same facts as ***Hypo 1***, except that during trial Hiesenberg introduced persuasive, compelling, and uncontroverted evidence that the reasonable value of Jesse's medical care was $300,000. Based upon the evidence, the jury awarded Jesse $300,000 for past medical expenses.

QUESTION

If the trial court does not reduce the award and Hiesenberg appeals, what will be the likely result under California law?

A. Affirmed, Jesse is entitled to the reasonable value

B. Affirmed, it's the jury's call

C. Reversed, $300,000 is unreasonable

D. Reversed, the providers accepted $200,000

Hypo 4

Assume the same facts as ***Hypo 1***, except that Jesse's healthcare insurance coverage is a health maintenance organization (HMO) that pays an independent physicians group (IPA) a set amount annually for each enrolled person regardless of the amount of services provided by the IPA. Further assume that Jesse's HMO possesses lien rights under California Civil code sec. 3040 against Hank's tort recovery for the reasonable value of his past medical services. Jesse argues that, unlike the medical providers in *Howell*, IPA's do not "write off" a "negotiated rate differential" because no such differential exists under a capitated plan.

TRUE or FALSE?

***Howell* applies to capitated plans, such as HMO's, because the IPA accepts less than its customary rates charged to medical patients who are not HMO enrollees.**

Hypo 5

Assume the same facts as ***Hypo 1***, except that Jesse was in the course and scope of his employment when the accident occurred. Further assume that his employer, Fring, who was not a party to the lawsuit, was found 50 percent at fault at trial for reasons related to the negligent maintenance of the Monte Carlo (Jesse's company car). Hiesenberg filed a post-trial motion to reduce the award of $300,000 for past medical expenses.

Notes July 22, 2015

QUESTION

If the trial court rules correctly, what will be the amount of the ultimate award to Jesse?

A. $100,000

B. $150,000

C. $200,000

D. $300,000

Hypo 6

Assume the same facts as ***Hypo 1***, except that Jesse's only medical provider is a charitable organization, and that after he completed his medical treatment, that provider elected to gratuitously waive its right to collect payment from Jesse or his PPO for his past medical expenses. The trial court allowed Jesse to introduce evidence that the customary charges would have been $300,000, including supporting expert testimony. The trial court denied a post-trial motion to reduce the award from $300,000 to the amount that Jesse's PPO would have paid.

QUESTION

Was the trial court correct (select the best answer)?

A. Yes, the customary charges are relevant

B. Yes, the customary charges are reasonable

C. No, the customary charges are irrelevant

D. No, *Howell* requires a reduction to $200,000

Hypo 7

Assume the same facts as ***Hypo 1***, except that Jesse elected to seek only damages for future medical expenses as well as damages for pain and suffering. The trial court denied Hiesenberg's motion *in limine*, thereby allowing Jesse to admit evidence of each medical provider's customary charges. At trial, Jesse's expert witness relied in part upon such evidence in testifying about the reasonable value of future medical expenses. The trial court denied a post-trial motion to reduce the jury's award, rejecting Hiesenberg's argument that customary charges are irrelevant to future medical expenses or pain and suffering under settled law.

TRUE or FALSE?

If appealed, the reviewing court will likely reverse because the *Corenbaum* decision holds that customary charges are not relevant to past or future economic and noneconomic damages.

Hypo 8

Assume the same facts as ***Hypo 1***, except that Jesse does not have any healthcare insurance coverage. Jesse received treatment from medical care providers who agreed to care for Jesse subject to a lien on his tort recovery. The trial court allowed Jesse to admit evidence of the full amount of those liens, including related expert testimony from those providers as to the reasonableness of the underlying charges. Hiesenberg offered rebuttal expert witness testimony that the charges were not reasonable.

QUESTION

If the jury awards Jesse the full amount charged by the lienholders, what is the most likely ruling if Hiesenberg files a post-trial motion to reduce the award (select the best answer)?

A. Yes, the customary charges are relevant

B. Yes, the customary charges are reasonable

C. No, the customary charges are irrelevant

D. No, Howell requires a reduction to $200,000

CASE SUMMARIES

Howell v. Hamilton Meats and Provisions, Inc. (2011) 52 Cal.4th 541

Howell presented the situation where plaintiff's health care providers had a pre-service contractual agreement with plaintiff's health insurance carrier to accept reduced payments as payment in full.

California Supreme Court

The California Supreme Court found that the Collateral Source Rule was inapplicable to the "written-off" amounts. Since the plaintiff was never going to be responsible for the written-off charges, they simply are not recoverable tort damages.

The *Howell* court drew a distinction between pre-injury negotiated rates for medical care and the situation where after the medical services are provided, the medical provider writes off or discounts the amount of the bill, or where the plaintiff receives charitable care. *Id*. at 559. Therefore, Howell should have no application where the plaintiff initially incurs the provider's customary medical charges but later obtains the benefit of a reduction, write-off or waiver. See *Smock v. State of California* (2006) 136 Cal.App.4th 883; *Arambula v. Wells* (1999) 62 Cal.App.4th 1006; *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635; Rest. 2d, Torts, Section 920(a), comment, pg. 515.

Where the medical provider has sold or factored the medical bill to someone else like a collection agency and has zeroed out the balance, the plaintiff remains responsible for the entire bill as assumed by the assignee and is entitled to seek the full medical charge, assuming she can establish it is a reasonable and necessary charge. *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288 at 1296.

Workers' Compensation, Medi-Cal or Medicare

The holding of *Howell* was quickly extended to apply when the plaintiff's medical care was covered under the Workers' Compensation system. *Sanchez v. Brooke* (2012) 204 Cal.App.4th 126. The Court also held that the same principles applied where the medical provider was paid in full by accepting Medi-Cal or Medicare. *Luttrell v. Island Pacific Supermarkets, Inc.* (2013) 215 Cal.App.4th 19.

Corenbaum v. Lampkin (2013) 215 Cal.App.4th 1308

Corenbaum applied *Howell* and held that since the total amount of medical charges not paid or owed is inadmissible as to past medical expenses, that amount is also inadmissible with respect to general damages or establishing the value of future medical care.

State Farm Mutual Ins. Co. v. Huff (2013) 216 Cal.App.4th 1463

In this case, the hospital sought to recover its medical lien which the plaintiff ignored in settling a personal injury case in a direct action pursuant to *Civil Code* § 3045.1. On appeal, the Court reversed the award for the hospital finding that it did not offer any evidence that the amount of its medical charges subject to the lien were reasonable.

Bermudez v. Ciolek (2015) 237 Cal.App.4th 1311

On June 22, 2015, Division 3 of the Fourth Appellate District filed this Opinion certified for publication. In Bermudez, plaintiff was uninsured and incurred over $400,000 in medical bills on a lien. Plaintiff called two doctors who testified that most of the charges were "fair and reasonable." Plaintiff's neurosurgeon, who had performed his second back surgery on a lien, testified that his bills were "fair and reasonable and within community standards" for the surgery he performed. He also rendered opinions as to the cost of future medical care the plaintiff would require. Plaintiff then called an economist who rendered opinions as to the present value of the future medical expenses.

The defense called their own doctor to render opinions as to the reasonableness of medical expenses based upon his own practice, his knowledge of rates in his area of practice and the amounts he actually gets paid in his practice from insurance companies and cash patients. The jury awarded plaintiff $3,751,969 in damages, which included all of the medical care plaintiff received, including the $46,175.41 in damages which plaintiff's own experts said was excessive and not reasonable.

On appeal, relying upon *Howell* and *Corenbaum*, Ciolek argued that a new trial on damages was necessary because plaintiff failed to meet his burden of proving that his claim for past and future medical damages were "reasonable, as measured by an exchange or market value." The Court of Appeal held that the "actually paid" prong of *Howell* was inapplicable for the plaintiff was uninsured and that the determination of recoverable medical damages would turn on the "reasonable value prong of Howell." *Howell*, *supra*, 52 Cal.App.4th at pg. 555-556. The Court then held that plaintiff admitted his burden of proof with expert witnesses as to the reasonable value of his past and future medical expenses, the Court affirmed the judgment as modified subtracting the $46,175.41 which plaintiff's expert said were unreasonable charges.

Varela v. Birdi, 2015 WL 877793

On February 27, 2015, Division One of the Fourth Appellate District issued this unpublished decision.

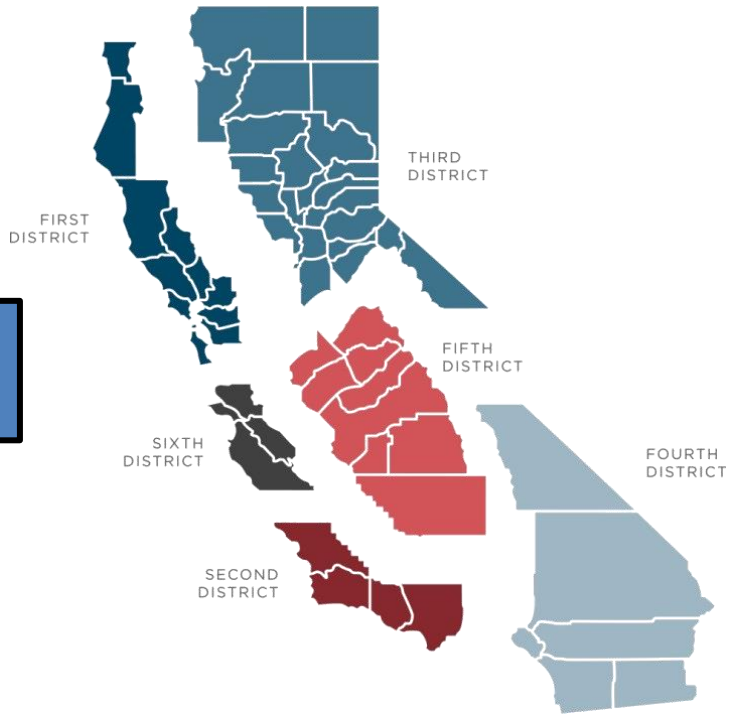
Gabriel Varela had spent 26 years in the Navy and had just been selected to serve as a commander of a Navy missile destroyer ship. He was riding his bicycle home from work at the Naval Base when the defendant drove through an intersection directly into Varela's path of travel. The jury awarded Varela $4,761,399 in damages, including $1,355,598 in future medical expenses. Varela waived any claim for past medical expenses. Throughout trial, Birdi's counsel persistently sought to introduce evidence that Varela could receive all his medical care through the Navy at no cost. The trial court consistently sustained the objections to such evidence,

ruling that it would be a violation of the Collateral Source Rule. On appeal, Birdi sought a remittitur awarding Varela one-third of the future medical care awarded by comparing the amounts billed and paid for past similar services.

The Court of Appeal reviewed California's long adherence to the Collateral Source Rule and that the *Howell* court explained that it was not abrogating or modifying the Collateral Source Rule in its decision. The Court held that where medical experts testified as to future medical care costs based upon what providers typically charge rather than amounts typically received through insurance or other payments was appropriate and not made inadmissible with respect to evaluating future medical expenses pursuant to *Howell* or *Corenbaum*.

The California Supreme Court denied review of the Varela decision in June 2015, but this unpublished opinion addresses *Howell* related issues that are being litigated in California's trial courts.

California's Appellate Districts



JUDGE STUART RICE

STUART M. RICE is a Judge of the Superior Court assigned to a civil independent calendar court in the Torrance Courthouse. He was appointed by former governor Arnold Schwarzenegger on July 27, 2005 after having served as a court commissioner from March 1, 2003 until his appointment. He received a bachelor's degree manga cum laude from Tufts University and a J.D. from Northeastern University School of Law. Prior to becoming a judge, Judge Rice was an associate at Gottlieb, Gottlieb and Stein from 1978-1983 and then a senior partner at Rice and Rothenberg thereafter until his appointment to the bench. Judge Rice focused his practice on civil, tort and probate litigation as well as juvenile defense. Judge Rice is the chair of the LASC Temporary Judge Committee and a former member of the Court's Executive Committee. Judge Rice is a frequent speaker and educator and served as president of the Benjamin Aranda III chapter of the American Inns of Court in 2013-2014.

BRUCE M. BRUSAVICH

BRUCE BRUSAVICH Bruce Brusavich co-founded **AGNEWBRUSAVICH APC** when he was 28 years old. Since the firm's inception, he has represented thousands of individuals and businesses in a variety of areas, including personal injury, insurance bad faith, business litigation, elder abuse, professional malpractice, product liability and wrongful death. With more than 100 jury trials, clients rely on Mr. Brusavich for sound legal counsel and to protect their rights through every phase of litigation. Due to his extensive knowledge of the law and litigation, he often teaches other attorneys at Continuing Legal Education programs, testifies before the state legislature, and serves as an expert witness in legal malpractice cases. Mr. Brusavich is the Past President of the

Consumer Attorneys Association of Los Angeles and Consumer Attorneys of California, where he led efforts to reform the summary judgment statute, create a two-year statute of limitations, improve the administration of justice, and maintain trial court funding, among other initiatives.

RICHARD L. STUHLBARG

Rick Stuhlbarg, is a partner at Bowman and Brooke LLP which just celebrated its 30th anniversary with nearly 200 attorneys in 10 offices across the United States defending products and manufacturers. Rick concentrates his practice representing corporate clients in product liability claims and commercial disputes. He has tried cases and obtained jury verdicts in state and federal courts for diverse clients such as AM General (Hummer), Ferrari, Ford, Jaguar, Maserati, Polaris, Toyota, and Yamaha. As Chair of the South Bay Bar Association Civil Litigation Section where he also serves on the Board of Directors, Rick has lectured on statutory offers and overseen several continuing legal education courses. He has also lectured at various products liability and warranty conferences including the Orange County Bar Association Product Liability Section and Southern California Manufacturers' Annual Lemon Law Seminar. Rick received his undergraduate degree from Bowdoin College and his J.D. from Loyola Law School in Los Angeles. He taught English in Japan after college and speaks Japanese as well as Spanish. ◆