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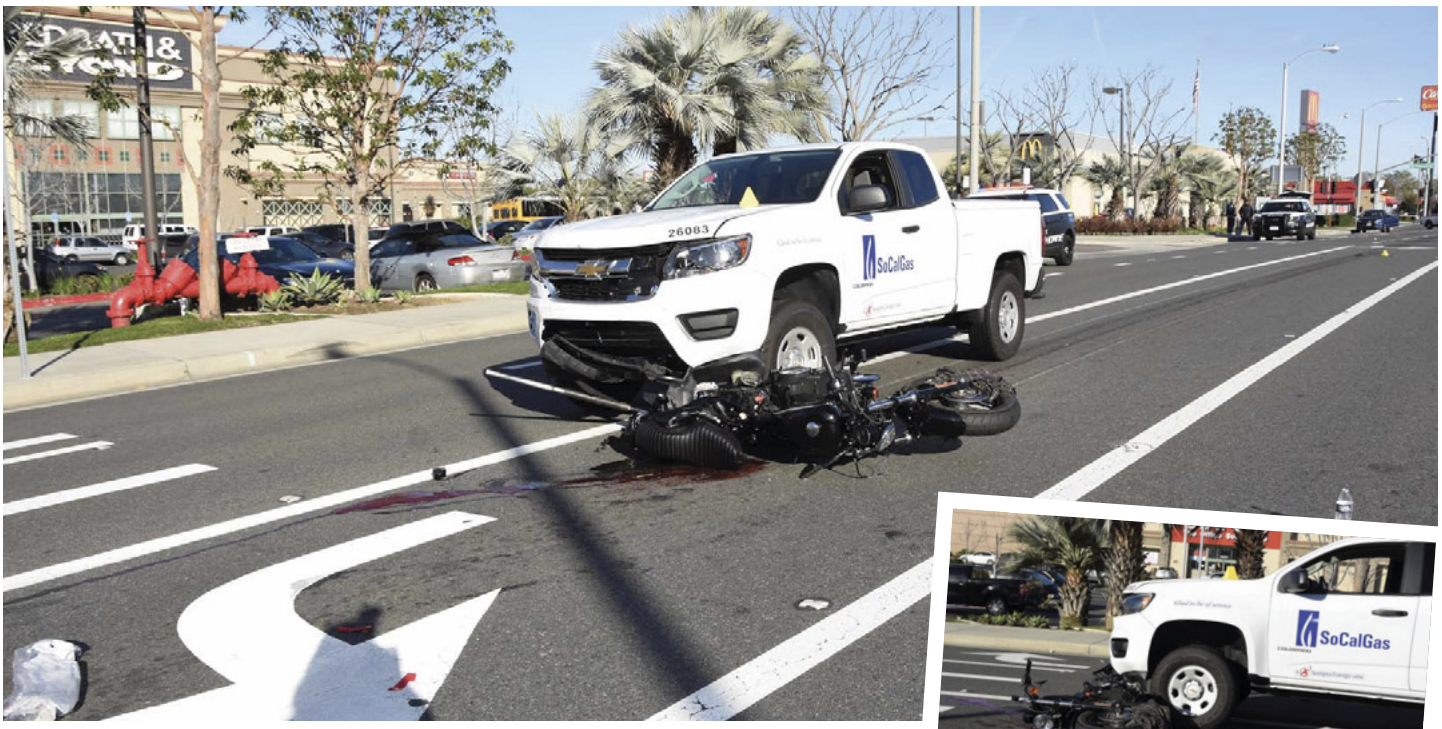

Maximize future-medical damages by beating the latest defense tactics

SARGON AND *SANCHEZ* OFFER DEFENDANT THE OPPORTUNITY TO EXCLUDE MUCH OF YOUR LIFE-CARE PLANNER'S TESTIMONY IF YOU'RE NOT CAREFUL ABOUT LAYING THE FOUNDATION

The facts were shocking. A SoCalGas truck driver with a known history of seizures was allowed to remain on the road, resulting in a hit-and-run collision within the course and scope of his employment, which nearly killed thirty-two-year-old Air Force Captain Jason Lo, who was stopped at a red light on his motorcycle, in Hawthorne, California.

Defense counsel knew if the jury heard the full story, it would be a landmark verdict. The actions were inexcusable. Instead of focusing on developing a substantive defense, the defense's primary tactic was obstruction. Simply put, keep the facts away from the jury.

This article will focus on two defense strategies that, if successful, would have resulted in a much less favorable outcome for deserving plaintiffs. Specifically, defense counsel attempted to exclude plaintiffs' entire life-care plan as well as all testimony concerning future medical care that could not be estimated by the plaintiff's expert to a reasonable degree of medical certainty.

Sargon Enterprises* and *People v. Sanchez

In making these arguments, defense relied heavily on expansive interpretations of *People v. Sanchez* (2016) 63 Cal.4th 665 and *Sargon Enters., Inc. v. Univ. of So. Cal.* (2012) 55 Cal.4th 747 (2012). These are cases the plaintiff's bar needs to know inside and out.

Over the course of a twenty-seven-day trial in downtown Los Angeles Superior Court, plaintiff's attorneys Brian Panish, Daniel Dunbar, Alex Behar, and Matt Stumpf were ultimately able to overcome these challenges. The jury heard the full story and justice was done.

Use this article as your playbook on how to beat these obstructive tactics and maximize your verdict.

The case

On the morning of February 13, 2017, Captain Lo was stopped at a red light, on his motorcycle when he was struck by a SoCalGas truck traveling at 27 mph, driven by employee Dominick Consolazio. Consolazio claimed he had suffered a seizure immediately before and during the incident.

After the initial impact, the truck came to a stop in the middle of the intersection, with Captain Lo pinned beneath the vehicle, still conscious.

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Captain Lo's right leg was forcefully pressed on the ground under the weight of his motorcycle.

Just as Captain Lo thought Consolazio would come out to assist him, Consolazio started to drive towards the I-405 onramp, dragging Captain Lo beneath the vehicle for a distance equal to a football-field-and-a-half. Consolazio was finally stopped by Good Samaritans. The entire incident was captured on traffic cameras. Consolazio later pled to felony hit and run. As a result of the collision, Captain Lo suffered massive, near-fatal injuries to his right leg and lost approximately 40 percent of his blood. He was hospitalized for nearly a month with orthopedic and vascular injuries to his leg that required multiple surgeries, including a latissimus dorsi free-flap reconstructive procedure and a saphenous-vein transplant, in an effort to avoid immediate amputation.

Despite prior knowledge of his epileptic condition, Consolazio continued to drive. Consolazio admitted he suffered from "breakthrough" seizures, meaning they were unresponsive to medication.

Liability and course and scope of employment were admitted by defense. At trial, the jurors were called upon to decide the amount of damages that Captain Lo and his wife, Nina, were entitled to receive and whether punitive damages against Consolazio were warranted.

Opening statements

Brian Panish described the injuries in vivid detail:

"You'll see the piece of bone at the scene. Multiple pieces…the femur bone is the strongest bone in the body, requires the most force to break. And that wasn't broken; that was crushed.";

"You'll see the scars, like a machete, across his back";

"All the muscle is ripped out. And he had a serious injury to his lymphatic system which results in chronic leg swelling.";

"It was like taking a glove off backwards and that glove is the skin off the body";

"He had such swelling, they have to do what is called a fasciotomy because your leg is swelling and the blood's not getting here…like a sausage, they slice it open, slice it open on both sides to relieve the pressure. And then you'll see the scars. They are brutal."

Panish finished his opening statement with an honest assessment about what the evidence would show: There was a real chance the leg would be amputated, but no one knew for sure. To this end, Panish said there would be two life-care plans: one for $1,800,000 with no amputation computation, and another for $3,500,000, which included the amputation figures. The decision was up to the jury.

Defense opens

The defense asked the jury to focus on the certain injuries, not emotions, and provide only for reasonable compensation. Defense counsel stated, "The evidence shows we owe it. We just can't reach an agreement between us on what is fair and reasonable in this case. That's…that's why we need your help." Jason's leg was deformed, but doctors had miraculously saved it, and its appearance could be surgically improved. Jason would face adversity, but his recovery was progressing. And finally, no doctor recommended amputation and, as such, plaintiffs' demands were unfounded.

The stage was set. If we could not admit evidence about the risk of amputation, or if our life-care plan figures were excluded, we would be unable to fulfill our promise to the jury.

The law

Sargon Enterprises, Inc. v. Univ. of S. California

In *Sargon*, a dental implant manufacturer brought a breach of contract action against USC, seeking lost profits for USC's alleged failure to complete a five-year clinical study of Sargon's new dental implant product. Sargon had developed a single-surgery implant, which its expert called the "holy grail of dental implantology." Sargon argued that, but for the breach, its product would have revolutionized the industry.

At issue was the testimony of plaintiff's accounting expert, James Skorheim, who opined that plaintiff's lost profits were between $200 million and $1 billion. At the evidentiary hearing, Skorheim testified that his valuation was based upon the "market share" approach, by which he determined what share of the worldwide market Sargon would have gained had USC completed a favorable clinical study.

At the time, Sargon was a three-person company with recent fiscal net profits of $101,000. But Skorheim compared Sargon's growth potential to that of six large multinational competitors (the "Big Six"), which collectively controlled 80 percent of the market. Although there were 90 other smaller companies that made implants, Skorheim testified that the Big Six were the only innovators and all others were "copycats" and "price cutters." Further, he stated that the key factor to success in the industry was innovation.

Skorheim acknowledged that Sargon currently had 0.5 percent of the market, with no meaningful marketing department, research and development department, or parent company to assist it. But he believed all of that was "incidental" to the key market driver, innovation. He opined that Sargon's potential should be compared to the Big Six and not to the other small companies. He then opined that, had the USC study been favorable, and had other potential favorable publicity followed, Sargon's profits could potentially increase by 534.4 percent in one year and by over 157,000 percent in ten years, leading Sargon to acquire 20 percent of the global market.

At issue on appeal was whether the trial court abused its discretion in excluding Skorheim's testimony as overly speculative. The Supreme Court found that it was. Skorheim's opinion, for example, assumed that a substantial portion of the growth he projected for Sargon would be created by products that it had not even invented yet.

As to the general issue of expert competency, the Supreme Court emphasized that expert-opinion

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testimony must not be speculative – but the Court was careful not to overstep its role as gatekeeper and insert itself as the trier of fact:

> The court must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. The court does not resolve scientific controversies.

(*Id*., at p. 772.)

People v. Sanchez

Before the 2016 *Sanchez* decision, the Evidence Code was interpreted to give expert witnesses more leeway concerning hearsay testimony. Evidence Code section 801 allowed an expert to testify to matters "whether or not admissible, that is of a type that reasonably may be relied upon by an expert." This went hand-in-hand with section 802, which permitted an expert to "state on direct examination the reasons for his opinion and the matter."

Experts were often permitted to testify to hearsay statements to explain the basis of their opinions. This testimony would be prefaced by a limiting instruction from the court, advising that the hearsay evidence offered by the expert should only be considered as the basis of the expert's opinion, and not for its truth.

Coined the "not-for-truth" analysis, this interpretation was premised on the jury's ability to evaluate opinion testimony without assuming the supporting hearsay evidence was accurate. It was a practical approach, forgoing the additional time and expense to lay the foundation for materials that experts agreed were industry standard. But conceptually, it was asking the jury to perform mental gymnastics.

In *Sanchez*, the California Supreme Court held that the "not-for-truth" analysis was a legal fiction and would no longer be permitted. Further, although the Court ultimately determined such evidence was a violation of the Sixth Amendment's Confrontation Clause, its discussion on hearsay was independent and without qualification. As a result, this criminal ruling has proven difficult to distinguish in the civil context.

By way of background, *Sanchez* was a criminal case where the defendant was charged with gang-related crimes. The key witness was the prosecution's gang expert, who opined the defendant was a gang member. To lay the foundation for his opinion, the expert testified to various hearsay statements found within the defendant's police records concerning his earlier contacts with a gang.

The Court determined that the expert's testimony was based on inadmissible "case-specific" hearsay. The court defined admissible "background" hearsay as "an expert's testimony regarding his general knowledge in his field of expertise." Inadmissible, case-specific hearsay was defined as "those [facts] relating to the particular events and participants alleged to have been involved in the case being tried" of which the expert has no independent knowledge. (*Id*., at p. 676.)

The *Sanchez* court held, "An expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Id.* at p. 685.) "What an expert *cannot* do is 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." (*Id.* at p. 686.)

The fight

***Sargon* challenge to amputation testimony**

Plaintiffs' expert vascular surgeon testified that given the devastating nature of Jason's injury and his age, he would "likely" need to undergo a second femoral popliteal bypass. Further, that each time you redo a bypass, the chances of a successful outcome "substantially reduce." Finally, if the second bypass failed, "more likely than not the outcome would ultimately be amputation."

Jason testified there were times when he felt it would have been better if his leg had been amputated because he would not have to deal with the pain. Further, that a prosthetic leg might allow him to run and be active again.

To this end, plaintiff's pain-management expert testified that Jason was a candidate for elective amputation if he chose not to undergo his treater's recommended 4 to 6 additional in-patient scar-revision procedures, which would take place over the next several years. As to a medically necessary amputation, plaintiff's expert also opined, "I don't think it's probable. I think it's possible. And I worry about that possibility."

The defense's orthopedic expert admitted that if the bypass or flap failed, or due to infection, amputation might be required.

On these facts, the defense moved in limine to exclude all testimony concerning amputation because no expert would testify that amputation was reasonably certain to occur. Citing *Sargon*, defense argued that, because the evidentiary burden for future damages is "reasonably certain," expert testimony short of that standard was wholly speculative, irrelevant, and prejudicial.

David v. Hernandez

In response, plaintiff's brief focused on the issue at hand: whether these doctors were competent to testify as to Jason's future care. *David v. Hernandez* (2017) 13 Cal.App.5th 692 was directly on point. In *David*, a minivan driver and passenger brought action against the driver of a tractor-trailer for negligence. The plaintiff driver suffered a significant shoulder injury requiring a partial replacement surgery. At trial, the jury found that it was reasonably certain the plaintiff would require four future shoulder surgeries. At issue on appeal was whether the evidence was sufficient to support a finding that these future surgeries were required.

Dr. Norris, the treating physician, testified that over time, the prosthetic metal ball surgically inserted in the plaintiff's shoulder would wear away the socket and would gradually shift into the shoulder blade. The testimony was, "At some point, [respondent] may need a cover for the socket or to replace this kind

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of prosthesis with what is called a 'reverse shoulder prosthesis.' That would depend upon infection, rotator cuff status, how much bone is worn away, whether or not he needs bone grafts." Further, that if this additional surgery were required, it could last for only "10 or 15 years and then would need to be redone."

Dr. Norris opined given plaintiff was only 19 years old, that there was 80 to 90 percent chance he would need the additional surgery. But, he did not say when this second surgery is likely to occur, nor did he say how many revision surgeries, if any, would be required.

The only other testimony to support the four additional surgeries was hearsay testimony of plaintiff's forensic economist, Nordstrand. Nordstrand testified that plaintiff's life-care plan called for four subsequent surgeries. The defendants failed to object to hearsay and thus waived that objection. The *Hernandez* court concluded that the evidence was sufficient to support the future-care finding.

Of particular relevance was the court's discussion, similar to *Sargon*, of the important distinction between plaintiff's evidentiary burden versus the competency of an expert witness to testimony. The court made clear**,** *experts do not have to testify to a reasonable degree of certainty that future care is necessary*:

> It is not required for a doctor to testify that he [is] reasonably certain that the plaintiff would [need to undergo surgeries] in the future. All that is required to establish future [surgeries] is that *from all the evidence, including the expert testimony*, ... it satisfactorily appears that such [future surgeries] will occur with reasonable certainty.

(*Id.,* at p. 220, emphasis added, internal quotation marks omitted.)

This same concept is echoed in *Ostertag v. Bethlehem Shipbuilding Corp*. (1944) 65 Cal.App.2d 795, 807: "The rule to be drawn from the foregoing cases is that from expert testimony as to the medical probabilities it is for the jury to determine whether future detriment is reasonably certain to occur in the particular case."

Based on *David* and *Ostertag*, we argued the issue was about the competency of the witnesses to testify, as opposed to a dispositive motion seeking to determine whether plaintiffs had met their evidentiary burden. There is no "reasonably certain" element listed in the Evidence Code. Further, that this "reasonably certain" argument is a defense tactic that incorrectly attempts to conflate the evidentiary burden with the competency of an expert to testify. We also argued that the expert testimony concerning amputation was not purely speculative, because three doctors testified there was real risk of required amputation, and further, Jason himself testified that he was considering elective amputation. This was distinguishable from the accountant in *Sargon*, who opined that a small company would revolutionize an entire global industry overnight.

The judge ruled in plaintiff's favor.

Sanchez v. Evidence Code section 1340: Challenge to plaintiffs' life-care plan

Plaintiff's expert was a Certified Life Care Planner who had worked in the field for twenty-five years. Forty percent of her work was clinical practice, 60 percent was composing life-care plans ("LCPs"). Seventy percent of her LCPs were composed in the med-legal context, with a 60/40 split between defense to plaintiff retention, including retention by defense counsel on a previous matter. She had testified as an expert at trial between 50 and 75 times. She had personally prepared one thousand LCPs in her career. In short, there were no red flags.

But the trap was deftly laid by the defense in her deposition. Plaintiffs' life-care planner testified that the vast majority of that cost in the plaintiffs' LCPs were derived from reference to a subscriber database called FAIR Health Benchmarks ("FHB"). She testified that FHB is an independent nonprofit that collects data for and manages the nation's largest database of privately billed health insurance claims as well as Medicare claims. Further, that the database was generally used and relied upon as accurate by LCPs.

She explained that life-care planners input the relevant CPT codes for the client's future care into the database, along with the geographic region where the treatment will be received. The database then produces cost information for the procedure, including the mean, mode, and percentile figures. Our life-care planner used the 75th percentile figure for the costs, which, based upon her experience, was a conservative figure and further was generally accepted. What's more, the defense planner relied on this same database to compose the defense LCP.

But before plaintiffs' life-care planner took the stand, the defense moved for a hearing under Evidence Code section 402 concerning the admissibility of the FHB evidence. The defense argued that, under *Sanchez*, the data from FHB was inadmissible, case-specific hearsay. Specifically, that the expert was simply copying these cost figures from a hearsay source and testifying that they were true and accurate, without any personal knowledge about how the data was compiled or verified. The defense also argued that this data was not general background information, but case-specific facts meant to value the plaintiff's particular healthcare costs.

We focused our brief on Evidence Code section 1340, the published-compilation hearsay exception. It allows evidence "of a statement, *other than an opinion*, contained in a tabulation, list, directory, register, or other published compilation" is admissible if "the compilation is generally used and relied upon as accurate in the course of a business." To this end, we argued our case was analogous to *People v. Mooring* (2017) 15 Cal.App.5th 928, a case decided after *Sanchez*.

In *Mooring,* defendants were charged with possession for sale of over 4,000 prescription pills. Some of the pills were in labeled bottles; others were not. To identify these pills, the prosecution's expert criminalist relied on a website called Ident-A-Drug. This was a

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subscription-based website that contained information about, and images of, pharmaceutical pills derived from information collected from the FDA and the pill manufacturers. The criminalist testified she used the website to cross-reference and identify the unmarked pills and that the website was generally accepted in the scientific community and that she had identified pills in this manner over 2,000 times previously. The criminalist admitted she did not conduct chemical testing on the pills, but made the identification based upon visual examination.

On appeal, the defense argued that pursuant to *Sanchez*, the criminalist's testimony regarding the website was inadmissible, case-specific hearsay. In response, the State argued that the website fell within the section 1430 exception. The Court agreed. It framed the hearsay exception this way:

(1) the proffered statement must be contained in a 'compilation';

(2) the compilation must be 'published';

(3) the compilation must be 'generally used ... in the course of a business';

(4) it must be 'generally ... relied upon as accurate' in the course of such business; and

(5) the statement must be one of fact rather than opinion."

In doing so, the Court focused on the indicia of reliability of the website as testified to by the criminalist. Its information was gathered from the FDA, a governmental agency, and pill manufacturers. And because it was accessible only by paid subscribers, the website had an incentive to provide accurate information, since its author knows the work will have no commercial value unless it is accurate. (*Id.,* at p. 938.) The ruling in *Mooring* was later endorsed in *People v. Espinoza* (2018) 23 Cal.App.5th 317.

After review of the briefs and the testimony of our LCP, which we made sure covered all five of the *Mooring* elements, the judge ruled in our favor. As a result, the FHB information on life-care costs was allowed in and plaintiff was able to provide the jury with figures for the future-care costs.

The verdict

Jason was awarded $4,864,102 in economic losses, including the LCP figures used in the amputation LCP. Jason was awarded $35,000,000 in non-economic damages.

Nina was awarded $2,000,000 in loss-of-consortium damages.

Further, the jury found the driver had engaged in conduct that warranted punitive damages.

The case ultimately settled for $46,000,000 just before the jury was ready to announce its punitive-damage verdict.

Lessons learned

To avoid *Sanchez* challenges to your LCP, you need someone with personal knowledge to lay the foundation for the cost figures. Here are my tips:

Hire an LCP with clinical experience who can testify that the figures in the plan are based on personal knowledge and experience, in addition to what other sources are cited;

Depose the treating physicians (providers) and ask about the cost they intend to charge for recommended future care. If a provider claims ignorance, think about deposing the person most knowledgeable on that topic at the provider facility;

Have your experts testify to the cost they charge for these procedures;

If your lifecare planner intends to use a database such as FHB, depose the person most knowledgeable from that service to lay the foundation concerning how the figures are compiled and why they are accurate and reliable;

Finally, ask if defense counsel will stipulate to the admission of the LCP's testimony. Stress to them that if they do not, it will require additional treater depositions and associated costs. Put it in writing so they have to inform their client.

Regarding *Sargon* challenges, it is important to do a thorough trial brief on this issue to fully educate the judge on the difference between the evidentiary burden versus an expert's competency to testify (contact the author if you would like to see the briefs).

Use these tools to make sure your jury hears all the facts so you, too, can maximize the verdict for your deserving clients.

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