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Howell, Hanif & Beyond –

The current climate for assessment of medical "specials"

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The Collateral Source Rule

- As a matter of common law, California has adopted the collateral source rule, which includes the closely related principle that, “jurors should not be told that the plaintiff can recover compensation from a collateral source”

Collateral Source Rule Components

- The collateral source rule has two components:
  - an evidentiary rule that limits what the jury is told about plaintiff's receipt of collateral source compensation, and
  - a substantive rule that prohibits reduction of the damages plaintiff would otherwise receive for plaintiff's receipt of collateral source compensation.

TORT LAW 101

- The purpose of tort law is to compensate a plaintiff and restore him or her back to the place that they were prior to the alleged injury.
- The purpose is not to overcompensate a plaintiff.
- Defense bar vs. Plaintiffs bar begin long battle over collateral source rule

Hanif v. Housing Authority of Yolo County

- Finally, two decades ago, Third Appellate District held, "an award of damages for past medical expenses in excess of what the medical care and services actually cost constitutes overcompensation."
- A plaintiff is entitled to recover up to and ***no more than*** the actual amount expended or incurred for their past medical so long as the amount is reasonable.
- Only problem, *Hanif* was easily distinguished in cases where Medi-Cal was not the third party pocket book, such as private insurer cases.

Nishihama v. City and County of San Francisco

- A decade-plus years after *Hanif*, the First Appellate District held *Hanif's* ruling goes beyond Medi-Cal and applies to private **insurance** cases.
- Medical specials awards should confirm to the amount "actually paid" by the plaintiff's private medical insurer to satisfy the bills.
  - Even Criminal defendants who are convicted and must pay a victim restitution payment, are not required to reimburse a victim for anything beyond an amount sufficient to fully reimburse the victim's economic losses and without regard to potential reimbursement from a third party insurer.

"*Hanif/Nishihama*" Motions

- In order to implement *Hanif / Nishihama* rulings, defendants began to file "motions in *limine*" and "Post-Verdict Reduction Motions"
  - Motion in *Limine* = pre-trial motion to exclude evidence that is not relevant or overly prejudicial at trial
  - Post-Verdict Reduction Motion = after trial, defendant seeks to reduce jury's special damages award to reflect the collateral source payments

Problems with *Hanif / Nishihama* Motions

- Inconsistency among Districts and Judges
  - You never knew what you were going to get.
  - Some Judges held that compensatory damages were limited to the amount "actually paid" by the plaintiff or on the plaintiff's behalf regardless of the source.
  - Other Judges held that compensatory damages were limited to the "reasonable value" of services even if a plaintiff pays more.
- Trial court rulings often turned on technicalities
  - *See Greer v. Buzgheia*, 141 Cal. App. 4th 1150 (2006) (denying post-verdict reduction motion because defendant failed to preserve *Hanif* issue through pre-trial motion in *limine*).

Fixing the Problem: *Rebecca Howell v. Hamilton Meats & Provisions, Inc.*

- Plaintiff injured by Hamilton Meats employee & covered by private insurance
- Plaintiff awarded $689,978.63 in compensatory damages
  - $189,978.63 for "past economic loss, including medical expenses."
  - $150,000 for future economical loss including medical expenses,
  - $200,000 for past non-economic loss (including physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation and emotional distress), and
  - $150,000 for "future non-economic loss."
- Trial court granted defense post-verdict "*Hanif/Nishihama*" reduction motion – reduced Plaintiff's economic loss award from full amount of medical bills to amount insurance company actually paid (difference of $130,286.00).

A Roadblock: *Rebecca Howell v. Hamilton Meats & Provisions, Inc.*

- Fourth Appellate District Court reversed trial court Order and held:
  - Any order reducing a jury-related medical expense award violates the collateral source rule.
  - Post-trial *Hanif/Nishihama* motions are not mentioned and therefore not permitted under California's Code of Civil Procedure.
  - Rationale:
    - Simply because plaintiff had the foresight to purchase health insurance, defendant should not get the benefit of such foresight by having special damages jury award reduced by negotiated amount insurance company paid for medical bills.

The Law: *Rebecca Howell v. Hamilton Meats & Provisions, Inc.*

- California Supreme Court reversed Fourth Appellate Court opinion
  - "[t]he collateral source rule … does not serve to expand the scope of economic damages to include expenses a plaintiff never incurred."
- Rationale:
  - "We agree with the *Hanif* court that a plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less."

Howell Hypotheticals

- Plaintiff is a fifty year old woman. She slips and falls and suffers a hip fracture. She has surgery and fully recovers. The total amount of her hospital bill for her hip surgery is **$150,000**.
- The hospital has a pre-negotiated rate with Plaintiff's insurance company Blue Shield. As a result, her company is only charged **$50,000**.
- At trial, Plaintiff can only seek economic loss for the hip fracture that was reasonable and/or "actually paid" at the time of trial.
- If the hospital bills show Blue Cross "actually paid" **$50,000** at the time of trial, that is all that may be shown and "black-boarded" to the dury at trial.

Only Caveat – Future medical expenses!!!

- Plaintiff, a thirty year old woman, slips and falls and suffers a hip fracture. She has surgery and fully recovers. The total amount of her hospital bill is **$150,000**.
- Because Plaintiff is young it is possible she may need future surgery on her hip. If relevant, she may introduce expert testimony advising the jury to award her costs for her future anticipated surgery.
- The hospital has a pre-negotiated rate with Plaintiff's insurance company Blue Shield. As a result, her company is only charged **$50,000** for the hip surgery.
- Since it is unclear if Plaintiff will have private insurance at the time of her second hip surgery, her expert may refer to and her attorney may introduce the full amount of the bills paid for Plaintiff's first hip surgery - **$150,000**.
- On the other hand if Plaintiff is elderly an may not survive a second operation, then future medicals may not be admissible on relevance grounds even if her expert tries to state otherwise.

Relevance Statutes

- § 200 provides "Relevant evidence" means evidence, … having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.
- § 350 provides that "no evidence is admissible except relevant evidence.
- § 352 provides "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" applies herein.

New "Howell" Motion in Limine –

Evidence of Over-Inflated Bills is Irrelevant, Highly Prejudicial and Cannot be Admitted at Trial

- "Evidence of the full billed amount is not itself relevant on the issue of past medical expenses." *Howell* at 567.
- Any reference to or admission of medical bills displaying larger amounts that Plaintiff was never in any danger of being held responsible, is irrelevant under Evidence Code § 351 and overly prejudicial under Evidence Code § 352.
- There is no probative value of admitting or referring to over-inflated medical bills during trial when it is already clear to everyone that Plaintiff will not be entitled to recover the full amount for the bills at any time.

Howell Opinion Never Mentions Post-Trial Reduction Motions!

- Proper application of *Howell* does not provide for post-verdict "*Hanif / Nishihama*" reduction motions because *absent a "future medical damages" scenario*, a jury will not be presented with inflated bills
  - A Jury will not have any reason to award an over-inflated verdict for economic loss if it does not know about over-inflated bills in the first place!
- *Howell* forecloses any plaintiff from holding him/herself out to the jury as sustaining an economic loss that was *never* incurred, *never* in any danger of being incurred and, of course, was *never* lost. *Howell*, 52 Cal. 4th at 54

Howell & Bargaining Tool for Pre-trial and/or Pre-litigation *Negotiations*!

- Sometimes Plaintiffs will try to bargain their way out of *Howell* or enter into stipulations as to what amount both sides can agree is a reasonable figure to black-board to the jury.
- Key is to not bargain for more than what has (or may be) actually been paid "at the time of trial." *Howell*, 52 Cal. 4th at 566.
- In the absence of post-trial reduction motion, defendant should not be in danger or subject him/herself inadvertently by way of settlement negotiations of being responsible for over-inflated values.

Application & Extension of *Howell*

- Sanchez v. Brooke – 204 Cal. App. 4th 126 (Mar. 2012)
- Second Appellate District extended *Howell* to apply to workers compensation cases. When an injured employee's medical provider accepts a discounted amount as payment in full from the employer under workers' compensation law, the injured person/employee is not liable for the undiscounted sum stated in the provider's bill. As such, the unpaid balance does not represent an economic loss to the plaintiff and is not recoverable as damages.
- Sanchez v. Strickland, 200 Cal. App. 4th 758 (Nov. 2012)
- Fifth Appellate District held that pursuant to *Howell*, the trial court correctly reduced the damages awarded to reflect the amounts paid under Medicare to satisfy the medical bills.

"The Howell Bill" – SB 1528

- New Bill proposed by Plaintiff's bar specifically designed to legislatively overturn Supreme Court's holding in *Howell v. Hamilton*
- As originally proposed, the Bill would have provided that an injured party would be entitled to recover the reasonable value of medical services without regard to the amount actually paid for those services.
- The Bill was recently amended due to Defense bar's strong opposition to the original Bill
- Awaiting new language and Bill.

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