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WHITE PAPER ALERT

Compensatory Damages
Recovery of Medical Expenses
Howell rule

CONFIDENTIAL COMMUNICATION NOT FOR DISSEMINATION

Corenbaum v Lampkin
April 30, 2013

Summary

It was reversible error to admit evidence of the full amount billed for medical care rather than the lesser amount accepted by medical providers as full payment.

Analysis

Plaintiffs were passengers in a taxi struck by the defendant after driving through a red light. The defendant was legally intoxicated at the time of the accident and fled the scene. Defendant was convicted of a felony and served three years in prison.

In the civil action against the defendant plaintiffs filed a motion in limine to exclude evidence of payment of their medical bills by a collateral source. Defendant filed a request for a post-verdict hearing to reduce the medical expenses to the amount incurred. The trial court granted both motions.

The case proceeded to trial and a verdict was rendered on June 3, 2011. The jury heard evidence of the full amounts billed for plaintiffs' past medical care and heard no evidence of lesser amounts accepted by their medical providers as full payment pursuant to prior agreements with private insurers. Corenbaum was awarded $1,834,602 and Carter was awarded $1,392,141.

A second phase of the trial resulted in a punitive damage award against Lampkin, as well. On June 24, 2011, Lampkin filed a *Hanif/Nishihama* motion to reduce the awards by the difference between the medical expense amounts billed and the amounts paid. The Supreme Court issued the *Howell* decision on August 18, 2011.

On September 6, 2011, the trial court denied Lampkin's motion, indicating it had no jurisdiction, stating jurisdiction rested with the Court of Appeal. Both sides appealed.

The Court of Appeal noted the holding of *Howell v Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, that the plaintiff's pecuniary loss is limited to the amount paid, or incurred, for past medical services. *Howell* approved the general rule from *Hanif* and *Nishihama*. *Howell* also held that limiting a plaintiff's recovery in this manner does not contravene the collateral source rule. The term "negotiated rate differential" refers to the difference between the full amount billed and the amount the provider agreed to accept from the injury victim's health insurer as full payment. Since the insured plaintiff incurs no liability for the negotiated rate differential and suffers no pecuniary loss in that amount, it is not recoverable. (*Howell* at p. 555)

Plaintiff's medical expenses must be incurred and reasonable to be recoverable. Where a medical provider agrees to accept a certain amount for its services, that becomes the provider's price and there is no need to determine another/different reasonable value for those services. (*Howell* at p. 559)

As *Howell* noted, the full amount billed by medical providers is not an accurate measure of the value of medical services. The Supreme Court stated it is not possible to say generally that providers' full bills represent the real value of their services, nor that the discounted payments they accept from private insurers are mere arbitrary reductions. (*Howell* at p. 562) The negotiated rate is likely the best indication of the reasonable value of the services provided and it is unclear how any other market value could be determined.

Howell held the negotiated rate differential is not a collateral source payment and therefore is not subject to the collateral source rule. The CSR does not apply to losses or liabilities the plaintiff never incurred and is not entitled to recover. The Rule precludes evidence that an insurer, or other source independent of the tortfeasor, paid for the medical care, but does not preclude evidence of the amount a medical provider, pursuant to prior agreement, accepted as a full payment. (*Howell* at p. 563) Evidence of the amount a medical provider accepted as full payment, pursuant to prior agreement, is relevant to the amount of damages for past medical expenses and is admissible for that purpose, assuming it satisfies other rules of evidence.

Evidence of the full amount billed, in contrast, is not relevant to the amount of damages for past medical expenses if the plaintiff never incurred liability for that amount. (*Howell* at p. 567) But *Howell* expressly declined to decide whether evidence of the full amount billed is relevant or admissible on other issues, such as noneconomic damages or future medical expenses.

Plaintiffs argued an injury victim seeking damages for past medical expenses should be able to present evidence of not only the amount accepted as full payment for past medical services provided, but also the reasonable value of those services. The Justices stated that because an injured plaintiff can recover as damages for past medical expenses no more than the amount incurred for those past medical services, evidence that the reasonable value of such services exceeded the amount paid is irrelevant and inadmissible on the issue of the amount of damages for past medical services.

For the jury to consider both evidence of the amount accepted by medical providers as full payment and evidence of a potentially greater reasonable value would very likely cause jury confusion and suggest the existence of a collateral source payment, contrary to the evidentiary aspect of the CSR.

Plaintiffs next argued the full amount billed for past medical services is relevant to the reasonable value of future medical services the plaintiff is reasonably certain to require. *Howell* states that the full amount billed is not an accurate measure of the value of medical services. The Justices concluded the full amount billed by medical providers is not relevant to the value of future medical services.

Plaintiffs also asserted that evidence of the full amount billed for past medical services provided to injury victims is relevant to expert opinion testimony on the reasonable value of future medical services. Evidence Code section 801(b) provides an expert opinion must be based on matter that provides a reasonable basis for the opinion offered, and may otherwise be excluded. (*Sargon Enterprises, Inc. v University of Southern California* (2012) 55 Cal.4th 747)

The trial court may inquire into the reasons for an expert opinion and exclude expert opinion testimony if it is based on reasons unsupported by the material on which the expert relies. Evidence Code section 802 allows the courts to develop case law restrictions on an expert's "reasons."(*Sargon* at p. 771) If the material relied on does not support the expert's reasoning, the expert's opinion is properly excluded. Moreover, for an expert to base an opinion as to the reasonable value of future medical services on the full amount billed for past medical services provided to a plaintiff would lead to the introduction of evidence concerning the circumstances by which a lower price was negotiated with that plaintiff's health insurer, thus violating the evidentiary aspect of the collateral source rule. ***The court concluded an expert testifying with respect to the reasonable value of future medical services may not rely on the full amounts billed for plaintiffs' past medical expenses.***

Finally, plaintiffs argued that proof of the amounts billed for medical services provides evidence of noneconomic damages, including pain and suffering. The determination of the amount of damages by the trier of fact is subjective. (*Capelouto v Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889) There is no fixed standard to determine the amount of noneconomic damages. Instead, the determination is committed to the discretion of the trier of fact.

The California Supreme Court has stated, "One of the most difficult tasks imposed upon a jury in deciding a case involving personal injuries is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. No method is available to the jury by which it can objectively evaluate such damages, and no witness may express his subjective opinion on the matter. Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can, in his instruction, give the jury no standard to go by; he can only tell them to allow such amount as in their discretion they may consider reasonable …" The chief reliance for reaching reasonable results in attempting to value suffering in terms of money must be the restraint and common sense of the jury. (*Beagle v Vasold* (1966) 65 Cal.2d 166)

Lawyers use the amount of economic damages as a point of reference in their argument to a jury, or in settlement discussions, as a means to determine the amount of noneconomic damages. The Justices declined to comment on this practice except to state that it can provide no justification for the admission of evidence that is otherwise inadmissible and that is not relevant to the amount of economic damages. Since evidence of the full amount charged for past medical services is not relevant to a determination of damages for past or future medical services where the provider agreed to accept a lesser amount, it is likewise inadmissible for purposes of providing plaintiff's counsel an argumentative construct to assist a jury in its difficult task of determining the amount of noneconomic damages.

Concluding that it was error to admit evidence of the full amounts billed, the Court of Appeal also noted the error was prejudicial because the amounts awarded as damages were based on the full amounts billed rather than the lesser amounts accepted by medical providers as full payment. The judgments in favor of both plaintiffs were reversed as to the compensatory damages and a new trial ordered with directions to determine the amount of compensatory damages, liability having been established.

Conclusion

This is a further extension of Howell and follows our in limine practice. If you have any questions concerning this issue, or any other, please contact us at any time.

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