

## RECOVERING ECONOMIC DAMAGES AND THE COLLATERAL SOURCE RULE

### PERSPECTIVE

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The state Supreme Court recently granted review of *Howell v. Hamilton Meats & Provisions Inc.*, which raised key questions about a plaintiff's ability to recover, as economic damages, amounts that have been paid by the injured plaintiff's insurer. (2010) 101 Cal.Rptr.3d 805. Depending on its outcome, the case could reduce recoveries for personal injury plaintiffs. A favorable finding for the defendant would in essence allow at-fault defendants to benefit from an injured plaintiff's foresight in purchasing insurance and from having the plaintiff's medical expenses paid by this collateral source.

Under private insurance policies, insurers often pay health care providers a negotiated rate for medical services provided to their insureds. The negotiated rate is generally lower than what the "reasonable and customary rate" is for medical services provided. Where the insurance company pays the negotiated rate to a personal injury plaintiff, is the plaintiff entitled to recover as economic damages the "reasonable and customary rate" for the medical services received?

From the injured plaintiff's perspective, the full "reasonable and customary rate" for medical services received *is recoverable* under the collateral source rule. The state Supreme Court has defined the collateral source rule as follows: "[i]f any injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6. From the at-fault defendant's perspective, where the cost of medical services is based on a "negotiated rate differential," the injured plaintiff *should not* recover the "reasonable and customary rate" for services where a lesser amount is *actually* paid. This "negotiated rate differential" refers to the difference between the *full amount* of the medical service providers' bills and the *lesser amount* paid by the health care insurer to the medical services provider. In situations where a negotiated rate differential exists, this lesser amount is accepted by the medical provider as payment in full. This agreement is based on an independent contract between the private health care insurance company and the medical services provider. Under the collateral source rule, those payments should not be deducted from damages that the injured plaintiff would otherwise collect from the at-fault defendant.

The 4th District held in *Howell* that the negotiated rate differential *is* a collateral source benefit within the meaning of the collateral source rule. Consequently, a personal injury plaintiff may recover that amount as part of her recovery for past medical care for her injuries. That the at-fault defendant should not benefit from the insured's foresight in investing in insurance premiums is precisely the reasoning behind *Howell*.

In its petition for review, the defendant in *Howell* argues that plaintiff's economic damages recovery should be limited to those amounts *actually paid* by the health care insurer, or those amounts that *will be paid* on behalf of the injured plaintiff. Any recovery above the negotiated rate would, according to the *Howell* defendant, constitute a "windfall."

Yet conversely, the 4th District reasoned that the injured plaintiff in fact incurred a "detriment in the form of personal financial liability when she executed written agreements in which she agreed to be financially responsible for all charges for the medical services they provided to her." Under these circumstances, the plaintiff is not receiving a windfall. Rather, plaintiff is receiving a benefit within the meaning of the collateral source rule - receiving economic damages that are "wholly independent" of the "tortfeasor."

The court made it clear that the correct measure of damages in a personal injury action is the "reasonable amount that was paid or incurred, whether by the plaintiff or a collateral source (such as the plaintiff's health care insurer)." It reasoned that the amount incurred by the plaintiff is not necessarily defined by the *actual* amount paid by the insurer to the provider. Rather, the court's calculation of detriment to the plaintiff considered the personal financial liability assumed by the plaintiff when she entered into financial responsibility agreements with both the insurer and the medical provider. Further, the court held that the plaintiff's contract with both entities made it clear that she was obligated to pay the hospital's "usual and customary charges for such services" and would owe "any... balance not paid for by [her] insurance." The defendant relied primarily on *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, and *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, to argue that the proper award of damages was a calculation of the actual amount paid by the insurer on behalf of the insured. The court, however, distinguished *Hanif* and *Nishihama* from *Howell*, holding that the correct standard of review was the state Supreme Court's decision in *Parnell v. Adventist Health System/West*, (2005) 35 Cal.4th 595, 609.

*Hanif* was a personal injury action involving a minor receiving Medi-Cal. Here, the 3rd District reversed the trial court's decision that the reasonable value of medical services received was the amount that was billed by the medical providers to Medi-Cal, an award that exceeded the amount that Medi-Cal actually paid for the services rendered by the providers. Instead, the Court held that the correct measure of damages should be "the actual amount *expended* or *incurred* for past medical services so long as that amount is reasonable."

However, the *Howell* court illuminated a critical distinction from *Hanif*. In *Hanif*, the plaintiff did not incur any personal liability for the medical charges billed to Medi-Cal because he "lacked the capacity to enter into financial responsibility agreements with his medical providers." The *Howell* court's reliance on *Hanif* undermines the court's rationale that the negotiated rate differential was a benefit to the insured because the insured had incurred personal liability for the medical services rendered and the extinguishment of this differential was interpreted as a release of a portion of the insured's debt to the medical providers.

The *Howell* court also found that *Nishihama* did not apply. Although *Nishihama* did involve a private insurance company, the crux of that decision rested on the fact that the medical provider had placed a lien against the plaintiff's recovery under California's Hospital Lien Act.

That act provides for third-party liability to a lien-holding health care provider "for the amount of its lien claimed in the notice which the hospital was *entitled to receive* as payment for the medical care and services rendered to the injured person." The court found that the medical provider had no lien rights under the act and could not collect in excess of the amount for services actually rendered. In fact, the *Howell* court disagreed with *Nishihama* altogether and argued that the analysis in *Nishihama* should have been the same as in *Howell*: whether the injured plaintiff had, under the collateral source rule, incurred detriment or loss as a result of

the personal liability she accepted when entering into a financial responsibility agreement with the medical provider.

In *Parnell*, the state Supreme Court held that "a lien under the *Hospital Lien Act* requires the existence of an underlying debt owed by the patient to the hospital and that, absent such a debt, no lien may attach." Using the same reasoning as *Howell*, the court ruled that the negotiated rate differential was being discharged for the insured's debt to the medical provider for the provider's "usual and customary charges," and not the negotiated rate. Through the insurer's payment to the medical provider, the injured plaintiff would no longer be personally liable for that portion of the debt that she had personally incurred. The court in *Howell* consistently cites *Helfend* as the defining case for the application of the collateral source rule. Not only did *Helfend* stand for the adoption of the principle that the benefit of the insured's thrift and foresight in procuring health insurance should go to none other than the insured, it characterized collateral benefits as money that "has [already] come out of the pockets of California's citizens and employers" and not out of the pockets of California taxpayers and their insurers.

The courts in *Hanif*, *Howell*, *Helfend* and *Parnell*, all agreed that the proper analysis in determining the benefit of the negotiated rate differential was to look at the personal liability incurred by the insured as a result of the financial responsibility agreements between the insured and the medical provider. Yet, the defendant in *Howell* argues that the plaintiff is barred from complete recovery of the financial burden that she undertook at the time medical services were provided to her because she had already bought health insurance. Thus, *the only* measurement of detriment to the plaintiff is the negotiated rate.

The issue now before the state Supreme Court is whether a plaintiff may recover as economic damages an amount exceeding what his or her private health insurance has paid and the medical services provider has accepted as payment in full. If the court agrees with the defendant, evidence of recovery by an independent third party insurer would be admissible and would serve to reduce plaintiff's recovery. If the court disagrees, evidence of a negotiated rate differential may not be considered when calculating a plaintiff's economic damages. Accordingly, a plaintiff may maintain the benefit of having had the "foresight in investing in insurance premiums," and that benefit would not extend to the at-fault defendant.