Is *Hanif* dead?

An assessment of recoverable medical damages in tort cases following Howell v. Hamilton Meats

BY MARC S. HURD

Almost all lawyers who have litigated personal injury cases (either through trial or at least through settlement) over the last 20 years have dealt with the so-called "*Hanif*" issues (referring to *Hanif v. Housing Authority* (1988) 200 Cal.App.3rd 635 [246 Cal.Rptr. 192]. The "*Hanif* rule" essentially provides that when an injured plaintiff receives medical treatment, whose cost is covered by either private insurance or some other source, and the bills are reduced by the carrier to some lesser amount, only the amount actually paid is the proper measure of damages. But two recent cases out of the 4th District Court of Appeal, *Olsen v. Reid* (2008) 164 Cal.App.4th 200, 204 [79 Cal.Rptr.3d 255] (*Olsen*) and *Howell v. Hamilton Meats & Provisions, Inc.* (2009) 179 Cal.App.4th 686 [101 Cal.Rptr.3d 805] (decided November 23, 2009), gives hope to consumer lawyers who have felt the sting of this rule at trial or in settlement negotiations.

The position long advanced by the defense bar in personal-injury cases is this: That pursuant to *Hanif, supra,* and *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298 [112 Cal.Rptr.2d 861], in order to prevent an unfair "windfall" for plaintiffs, they may only recover what was *actually paid* by health insurance, and that the full value bills is both irrelevant and inadmissible. Thus, regardless of what a doctor or hospital charged or billed for medical services, if the injured plaintiff was covered by health insurance, and the bills reduced in accordance with the contractual relationship between the medical provider and the plaintiff's health insurer, the only amount "recoverable" by an injured plaintiff was the amount that the health insurer actually paid. The facts of *Hanif* provide a good illustration of that process.

The facts of the case

Hanif involved a personal-injury action brought on behalf of a minor (a Medi-Cal beneficiary), who was struck by an automobile. The trial court awarded $31,618 in special damages to the minor, which the jury found to be the reasonable value of the past medical services he received, even though that award exceeded the amount Medi-Cal actually paid for those services. (*Hanif, supra*, 200 Cal.App.3d at pp. 639, 643-644.) The defense appealed, arguing the trial court should have limited the minor's recovery for past medical services to the amount Medi-Cal "actually paid" ($19,317).

The *Hanif* court held that "when evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most that the plaintiff may recover for that care…" (*Hanif, supra*, 200 Cal.App.3d at p. 641.) Thus, it concluded, "a plaintiff is entitled to recover up to, and no more than, the actual amount expended or incurred for past medical services so long as that amount is reasonable." (*Id.*, at p. 643.) Applying this measure of damages, the plaintiff was not entitled to the full amount of the bills (over $31,000), but rather was only entitled to recover what Medi-Care paid for those services ($19,317). The apparent prevailing rationale was that tort law has a "bar against double recovery" and that an injured plaintiff should not get a "windfall" because insurance paid parts of his/her medical bills.

Similar results were reached in *Nishihama, supra*. There, the court found that the hospital which provided the medical care had no right to "balance bill" the plaintiff for amounts above and beyond those amounts paid by the health insurer (Blue Cross) under California's Hospital Lien Act (HLA), Civ. Code, §§ 3045.1-3045.6.) Further, since the plaintiff faced no reimbursement liability to repay the hospital, it felt that allowing plaintiff to recover the "full meds" would amount to the type of "double recovery" that *Hanif* rejected.

Thus, under *Hanif* and its progeny, the "rule" was that when a plaintiff had medical insurance, damages were limited to the amount actually paid or incurred, not any greater amount a medical provider billed, even if that greater amount was actually reasonable. It followed that the *Hanif* and *Nishihama* lines of cases were used successfully for years to try to limit the evidence as to the amount of plaintiffs' medical specials that would be admitted and presented to the jury.

Greer & Katiuzhinsky

The Draconian evidentiary limitation espoused by *Hanif* was relaxed slightly with the more recent holdings of *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150 [46 Cal.Rptr. 780] and *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288 [62 Cal.Rptr.3d 309].

Greer held that a personal-injury plaintiff's ultimate recovery was rightly limited to the amounts actually paid, but

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that the plaintiff should be permitted to present to the jury the actual medical expenses charged, subject to post-trial reduction of the award or verdict based on the actual "recoverable" amounts addressed in *Hanif* and *Nishihama*. That position was essentially confirmed in *Katiuzhinsky*. There, the court held that plaintiffs should be allowed to present the "full" medical bills, subject to reduction to the actual amounts paid, but it then added that the party seeking to reduce the award (to the amounts of the medical bills actually paid) bears the burden of producing evidence regarding the reductions, and suggested that such should only be done by post-trial motion.

Helfend

For most of the last 20 years since *Hanif* was first published, the plaintiffs' bar has regularly argued that these types of reductions in plaintiffs' verdicts violated the "collateral source rule" articulated in *Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1 [84 Cal.Rptr. 173] and, later, in *Lund v. San Joaquin Valley Railroad* (2003) 31 Cal.4th 1 [1 Cal.Rptr.3d 412].

In *Helfend*, the California Supreme Court explained the "collateral source rule" as follows: "[I]f an 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, supra*, 2 Cal.3d at page 6, (emphasis added).) The *Helfend* court also explained that the collateral source rule "embodies the venerable concept that person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift," and "the tortfeasor should not garner the benefits of his victim's providence." (*Id.,* 2 Cal.3d at pp. 9-10.)

Using *Helfend*, our brethren representing the injured argued that plaintiffs should be permitted to recover the full amount of the reasonable "cost" or "value" of the past medical expenses paid or incurred as a result of his/her injuries regardless of what his/her private health care insurer paid to the medical providers; *and* that courts should exclude evidence of the benefits the insurer "paid" to plaintiff's health care providers.

Notwithstanding this "venerable concept" embodied by the collateral source rule, the defense bar was often successful in using *Hanif* and its progeny to deny injured plaintiffs their full measure of damages. However, that tactic has been dealt some serious blows from two separate divisions of the 4th District in *Howell* and *Olsen*, with the more striking of the two cases being *Howell*.

Olsen

Turning first to *Olsen v. Reid* (2008) 164 Cal.App.4th 200, 204 [79 Cal.Rptr.3d 255]; there an injured pedestrian submitted records reflecting that she was billed nearly $62,500 for her care. The defense argued in motions in limine that the proper evidence of amount of the plaintiff's specials was the amount actually paid by the plaintiff's health insurer, an amount just over $8,000. The trial court denied the motion in limine (consistent with *Greer* and *Katiuzhinsky*), and allowed the plaintiff to present the full medical bills. However, following the jury's verdict in favor of the plaintiff, the trial court reduced the judgment by $57,000, the difference between what was billed by the providers versus what was actually paid by insurance (consistent with *Hanif* and *Nishihama*). Both sides appealed.

In *Olsen*, Division 3 of the 4th District Court of Appeal overturned the reduction in the verdict amount, concluding that the record was "far from clear as to what was paid, what, if anything, was 'written off,' and to what extent [plaintiff] remained liable for any further charges." (*Olsen*, *supra,* 164, Cal.App.4th 200, 203.) More importantly, Justice Eileen Moore wrote a concurring opinion that rejected the *Hanif* approach as inconsistent with the collateral-source rule. She explained:

> I write separately to sound the bell of alarm. By virtue of the *Hanif/Nishihama* procedure . . . permitting the post-trial reduction of medical expenses, the collateral source rule has been buried without dignity of any services or parting words. Without statutory authority or the Supreme Court's blessing, the *Hanif/Nishihama* line of cases divorced the collateral source rule from the complicated area of medical insurance. Absent such approval, *Hanif/Nishihama* simply goes too far. (*Ibid.*)

Howell

Apparently taking Justice Moore's lead, the court in *Howell v. Hamilton Meats & Provisions, Inc.* (2009) 179 Cal.App.4th 686 [101 Cal.Rptr.3d 805], went one step further. Of particular note is *Howell's* express rejection of the *Nishihama* decision. ("We disagree with this holding in *Nishihama* and the reasoning upon which it is based." The Court in *Howell* discussing *Nishihama*, found that the issue of whether the plaintiff was entitled to recover damages for past medical expenses based on the provider's usual and customary rates, or based on the negotiated rates the provider agreed to accept from her private health care insurer *should have been resolved based on the collateral source rule*. Further, the fact that the provider had no lien rights was "not pertinent to the issue of whether [plaintiff] was entitled under the collateral source rule to recover [full] economic damages based on the provider's usual and customary rates." It concluded that resolution of that issue required an analysis under the collateral-source rule of whether the plaintiff, before receiving medical care, entered into a financial responsibility agreement with that medical provider, and thus whether she incurred pecuniary detriment or loss in the form

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of personal liability for the medical expenses she would later incur at the normal rates. (*Howell, supra,* 101 Cal.Rptr.3d at p. 818.)

The Court in *Howell* continued that it agreed with Justice Moore's concurring opinion in *Olsen* that, "Hanif/Nishihama simply goes too far." *Howell* was equally disapproving of *Greer,* as evidenced by the following passage:

> We disagree with *Greer* to the extent it holds that a trial court in a personal injury action is authorized to hear and grant a defendant's post-trial motion to reduce under *Hanif* and *Nishihama* a privately insured plaintiff's recovery of economic damages for past medical expenses. As discussed, ante, we have concluded that the negotiated rate differential is a collateral source benefit within the meaning of the collateral source rule, and thus the trial court erred in granting [defendant's] motion for an order reducing the jury's award for [plaintiff's] past medical expenses in the amount of that differential…

(*Howell, supra,* 101 Cal.Rptr.3d at p. 818.)

Rather than rely on "*Hanif* and its progeny," the court in *Howell* instead relied on the collateral-source rule analysis. First, it rejected the defense argument that the plaintiff incurred no liability for the higher medical costs and thus incurred no "detriment" for the "waived portion" of the medical bills. While the court in *Howell* recognized that the reduction was in fact a "benefit" to her (since she was no longer personally liable for the "waived" amounts), it also concluded that this "benefit" was a collateral- source benefit within the meaning of the rule. Thus, the *Howell* Court relied on the collateral-source rule analysis, reversed the trial court's ruling reducing the plaintiff's recovery, and reinstated the jury's verdict to include the full amount of the medical charges that were originally billed.

So, is the rule from *Hanif* and its progeny dead? Given the apparently conflicting rulings from the various appellate districts, it is probable that these issues will eventually need to be addressed by the California Supreme Court. Up until the time of this article, the time to file a petition for review in *Howell* had not yet run, but it is all but certain that one will be filed. Given the split of authority and the importance of the issue, it seems likely that the Supreme Court will accept the case and resolve the controversy.

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