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Balancing Act: Civility in the Legal Profession

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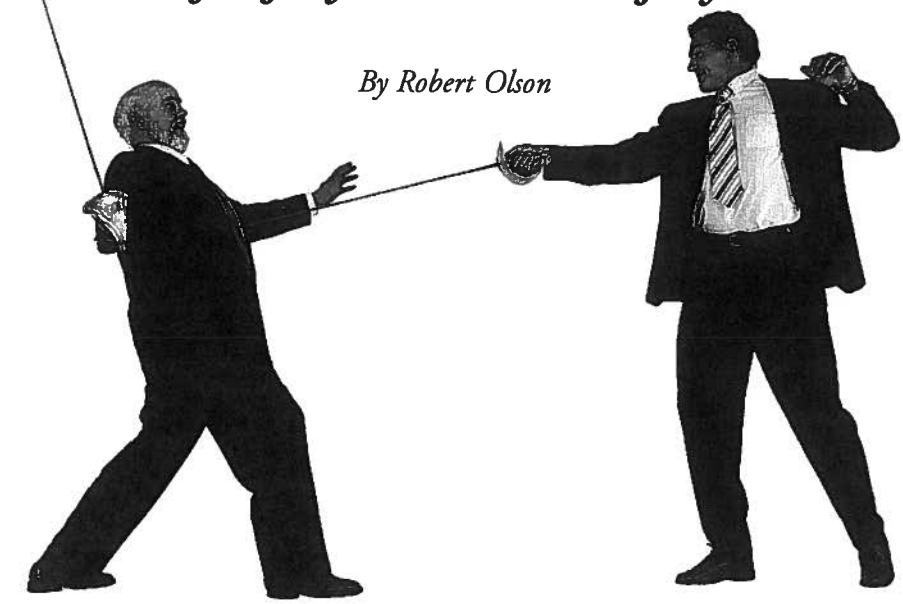
Taking the Offense

Parrying Claims that "Usual and Customary" Medical Charges are Indicative of the Extent of Injury in Personal Injury Actions



By Robert Olson

A plaintiff may recover only the actual cost of past and future medical care resulting from a tortfeasor's conduct. But to inflate their damages some plaintiffs have attempted to introduce evidence of retail or so-called "usual and customary" medical care charges above what has been paid on their behalf, typically by the plaintiff's insurer under negotiated discounted rates. (See generally *Parnell v. Adventist Health System/West* (2005) 35 Cal.4th 595 [hospital could not enforce lien against tortfeasor for "usual and customary" charges exceeding discounted rates actually paid by insurers].) In *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, the Third District Court of Appeal in Sacramento held that a plaintiff could introduce evidence not only of what the plaintiff (or others on the plaintiff's behalf) actually incurred for medical services, but also the higher "usual and customary" charges. In a world of substantial insurance or Medicare discounts such retail list-price "usual and customary" charges often greatly exceed what was actually paid for the services as well as the average charge for such services.

A plaintiff cannot recover as economic loss more than what was actually paid for medical services. That remains the law. But *Greer* theorized that the "usual and customary" charge amount is relevant evidence of the extent of the plaintiff's injury for purposes of determining noneconomic general damages. It further held that if the defense fails to obtain a special verdict form separately enumerating the amount of medical expenses being recovered, the defense cannot complain that the jury may have mistakenly awarded the excessive "usual and customary" medical charges as part of economic loss.

Plaintiffs have taken *Greer* as a carte blanche to introduce the "usual and customary" medical charges in virtually any kind of personal injury case. *Greer* may well be wrongly decided and subject to further appellate scrutiny, especially outside of the Third Appellate District in California. The purpose of this article, however, is to provide an approach to handling plaintiffs' attempts to introduce evidence of "usual and customary" charges within the framework of *Greer* as it currently exists as precedent. In particular, this article advocates that defense counsel take the offensive to exclude such "*Greer* evidence" or to so blunt or reverse its impact as to make it not worth plaintiffs' while.

Greer's *Rationale*

An injured party is certainly entitled to recompense from a legally responsible defendant for that party's economic loss. But it should be a truism that an injured party is not entitled to recover *more* than that party in fact has to pay to others. (*Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 639-644; *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 308.) Where the collateral source rule applies, the defendant may not reduce its liability by claiming the plaintiff's damages were paid by or will be recouped from others (such as healthcare insurers), but even under that rule,

the defendant's liability for economic loss is tied to the amount of harm actually incurred by *someone* (i.e., the plaintiff or the plaintiff's collateral source).

Greer does not purport to depart from this fundamental proposition. "Usual and customary" charges are *not* a recoverable measure of economic damages if those are not the charges actually paid by (or on behalf of) the plaintiff. (See *Greer, supra,* 141 Cal.App.4th at p. 1157.) Rather, *Greer* holds that the trial court has "broad authority" to admit evidence of the often inflated "usual and customary" value of medical care as relevant to the extent of the plaintiff's *noneconomic* injuries (e.g., pain and suffering), relying on *Nishihama, supra,* for that proposition. (*Id.* at pp. 1156-1157.)

In fact, *Greer* is a radical expansion of *Nishihama. Nishihama* addressed only a limited issue – whether the possibly improper admission of the "normal" cost of the medical care required reversal of the *noneconomic* award where any prejudicial effect on the economic award (or lack thereof) in that particular case could be precisely identified. (*Nishihama, supra,* 93 Cal.App.4th at pp. 305-307.) *Nishihama* could deduce no *prejudice* that would require recalculating the noneconomic damages. What *Nishihama* said is that "[t]here is no reason to assume that the usual rates provided a less accurate indicator of the extent of plaintiff's [noneconomic] injuries than did the specially negotiated rates obtained by Blue Cross." (*Id.* at p. 309.) *Nishihama's* no-prejudice finding was not the equivalent of holding such evidence was properly admitted for that purpose, but *Greer* read it as approving introduction of "usual and customary" charges as a yardstick for evaluating pain and suffering damages. (*Greer, supra,* 141 Cal.App.4th at pp. 1156-1157.)

Greer recognized the inevitable potential confusion between the amount of actual medical charges (recoverable economic loss to the extent reasonable and caused by tortious conduct) and "usual and customary" charges, in fact not paid (and therefore not recoverable). Its solution was to foist upon defense counsel the responsibility to obtain a special verdict form that separately shows the amount of medical expenses awarded as economic loss so that the trial court post-verdict or an appellate court can determine if that amount exceeds what the evidence supports for *actual* medical expenses. (*Id.* at pp. 1157-1159.)

Approaches to Dealing with Greer

Plaintiffs have taken *Greer* as freely approving the admission of evidence of "usual and customary" charges. That should not be the case. There are a number of steps that defense counsel can take to exert control over the issue in a fashion that may ultimately restore balance.

Assert an Evidence Code section 352 objection

Greer recognizes that trial court's have "broad authority" to admit or not tangentially relevant evidence. (141 Cal. Ap'p.4th at p. 1156.) Evidence Code section 352, of course, allows the trial court to exclude evidence that it views as more time consuming, misleading, confusing or otherwise prejudicial than probative. Nothing in *Greer* limits the ability of a trial court to exclude "usual and customary" charges evidence on that basis. The potential prejudice presented by such evidence includes the strong possibility of jury confusion as to what the proper measure of medical expense damages is – actual charges or "usual and customary" charges. In addition, as discussed below, the introduction of such "usual and customary" charge evidence opens up a potential for collateral issues (e.g., the true usual cost of medical care, whether medical costs correlate with the severity of injury) to take up an inordinate amount of time.

The counterbalancing probative value of "usual and customary" medical expenses for the sole reason they are proffered – extent of the plaintiff's injury – is exceedingly low. There is no consistent correlation between the supposedly "customary" price of medical bills and the extent of injury. More expensive medical treatment does not necessarily correlate with greater injury and vice versa. For example, the medical bills to amputate a limb or to pronounce a victim deceased may be much less than those to successfully treat a less injurious bacterial infection with expensive drugs or to monitor a relatively minor ailment over the course of several days in the hospital.

Having an expert prepare rough estimates of the "customary" costs of procedures associated with varying injuries may be helpful in presenting to a court the lack of correlation between expense and injury. The customary costs of care simply does not provide much help to a jury that is trying to evaluate the severity of harm and the corresponding compensation for non-economic injuries.

Equally, the cost of treatment may well vary between different locales. The fact that it costs more to treat a particular injury in, say, Los Angeles, than, for example, Bakersfield, does not mean that the plaintiff in Los Angeles has suffered greater non-economic injury than the plaintiff in Bakersfield. Again, such an example can illustrate to a trial court the lack of correlation – that is, the lack of probative logical connection – between medical bills and general damages.

Trial courts have broad discretion to exclude evidence under section 352.

A trial court convinced of the tenuousness of any logical inference to be drawn between "usual and customary" charges and the extent of physical injuries would be well justified in excluding evidence of such charges on Evidence Code section 352 grounds. Given the trial court's broad discretion, such a ruling would be exceedingly difficult to challenge on appeal.

Proffer countervailing evidence

Plaintiffs often simply proffer the "usual and customary" medical charges based on a column from a health care provider's rate sheet and hold out that standard as if it is set in stone. Of course, it is not. In most cases, amounts reflected on such lists are an illusion – rarely, if ever, collected. The defense should be prepared to proffer evidence of that fact. The plaintiff is proffering "usual and customary" charges on the theory that such charges more closely reflect the real value of medical services (and supposedly, therefore, the real extent of the plaintiff's injury) than the actual amounts paid. The defense should be entitled to present evidence that the real "usual and customary" charges are those that medical providers typically collect for their services. A useful analogy may be found in other consumer contexts: a computer, software, or even a car may have a "list" or 'MSRP" price that is far above its "street price." If the plaintiff seeks to present "list price" evidence, the defense should be entitled to present evidence of the "street price."

The plaintiff, or the trial court, may complain that such evidence is going to be time-consuming or tangential. But it is the natural partner to plaintiff's evidence regarding "usual and customary" charges. Having opened the door on the subject, the plaintiff should not be the only party allowed to present evidence as to the reasonable value of medical services as a standard by which to judge the extent of physical injury. That the inquiry is time-consuming and tangential simply highlights why Evidence Code section 352 should preclude inquiry into the whole area.

Ask for a special instruction

Given the significant potential for jury confusion between charges actually paid and "usual and customary" charges, defense counsel should request an instruction directing the jury that it cannot award as economic damages any amount exceeding the amounts actually and reasonably paid, and that additional "usual and customary" charges cannot be awarded as noneconomic damages but can only be used (if at all) to help gauge the extent of injury in determining noneconomic damages. (Note that CACI No. 3903A references only the "reasonable cost of reasonably necessary medical care" standard, a standard that a jury could easily confuse with "usual and customary" charges. The use notes cite to *Hanif's* limitation to amounts actually expended. Defense counsel should not propose or acquiesce in giving CACI 3093A without asking for a complementary instruction on that limitation. It may be effective to ask plaintiff's counsel to stipulate to such an instruction and, if counsel refuses, to suggest to the court that counsel has two choices: to stipulate or not to present "usual and customary" medical expense evidence.

In addition, defense counsel may wish to request a limiting instruction when any "usual and customary" medical charges evidence is first introduced to the effect that it can be used, if at all, only for a limited purpose – i.e., as possibly reflecting the extent of injury for general damages purposes, but that they are *not* a measure of general damages and are not recoverable as a component of general damages in their own right. (E.g., Evid. Code, § 355; CACI No. 206.)

Request a special verdict form segregating the amount of medical expenses awarded as economic damages

Greer directs that the *defense* has to request a separate verdict form detailing the amount of medical expenses awarded as economic damage to preserve any challenge that the verdict improperly includes damages inflated beyond the true amount needed for compensation. (*Greer, supra*, 141 Cal.App.4th at pp. 1157-1159.) If this is defense counsel's duty under *Greer*, it is also the defense's *right*. Counsel should insist on such a special verdict form.

One problem, however, is that parties often dispute the amount or type of treatment reasonably required by the injury. There is no way to tell whether a special verdict that awards an amount greater than the defendant's estimate reflects an agreement with plaintiff regarding the scope of needed treatment and is based on the actual, reasonable costs of that treatment (consistent with proper compensatory principles), or reflects an agreement with defendant as to the scope of treatment but is based on inflated "customary" charges for such treatment (contrary to basic compensation principles). In an appropriate case, counsel can also request a breakdown between various medical services so that it can be ascertained whether the jury awarded an excessive amount of medical expenses as to any services where additional "usual and customary" evidence was presented.

If plaintiff's counsel balks at such a verdict form, the defense can argue that plaintiff had the choice of not presenting "usual and customary" charge evidence. But, if plaintiff does so, the separate jury interrogatories are a matter of right.

Reserve objection to *Greer's* holding

As the holding of a Court of Appeal, *Greer* is binding on all trial courts in California until disagreed with by another Court of Appeal or disapproved by the Third District or the Supreme Court. *Greer*, however, is not binding on other appellate courts in California. (E.g., 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 934, pp. 971-973.) For that reason, in the trial court careful defense counsel will want to note that the defense disagrees with *Greer* and intends to pursue the issue on appeal. It is entirely appropriate – and solidifies preservation of the issue on appeal – for the defense to provide notice that it intends to challenge existing law on appeal.

Argue the issue

In arguing to the jury, defense counsel may wish to make clear that actual medical expenses are the *maximum* that the jury may award as economic damages. Further, counsel may wish to argue that plaintiff's introduction of demonstrably inflated "usual and customary" charges shows an attempt by plaintiff to be overreaching given that those charges are not reflective of real healthcare expense and are *not* a proper independent measure of recovery. Defense counsel can also suggest that if plaintiff is overreaching in one regard – e.g., medical bills – plaintiff may be overreaching in others.

Conclusion

With some of these steps the initiative on the *Greer* medical expense damages issue can be taken from the plaintiff. The result may be that the plaintiff decides that introduction of "usual and customary" charges may not be worth the effort. If not, these steps may enhance the record for any appeal on the *Greer* issue.

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