

**CONTENTS:**

- Page 1-2* Giving Credit Where Credit is Due: The Nebraska Supreme Court adopts *Pro Rata* approach to determining credit to afford non-settling joint tortfeasors.
- Page 2-3* Legislative Update
- Page 3-4* “Do We Have to Pay for This?” Employers’ obligation to pay for medical treatment and testing to rule in or rule out a condition.
- Page 4* Notes from the Firm

## GIVING CREDIT WHERE CREDIT IS DUE:

The Nebraska Supreme Court adopts *Pro Rata* approach to determining credit to afford non-settling joint tortfeasors.

BY STEPHANIE F. STACY

It’s a common scenario: One of two defendants settles and the case proceeds to trial against the remaining defendant. The jury is instructed they may consider the negligence of the settling defendant, and they allocate a percentage of negligence to both the settling defendant and the remaining defendant, and enter an award of damages in favor of the plaintiff. How much of those damages can the plaintiff collect from the remaining defendant? Does the remaining defendant get a credit for the entire amount of the settlement (often referred to as a *pro tanto* credit)? Does the amount of any credit depend at all on how the jury allocated negligence? Is the math any different for economic damages (for which defendants have joint and several liability) and noneconomic damages (for which liability is several only)?

economic damage award by 20 percent (for the plaintiff’s contributory negligence) but made no reduction related to the settling driver noting that under Neb. Rev. Stat. §25-21,185.10 the liability of each defendant for economic damages is joint and several. With respect to noneconomic damages (where the liability of each defendant is several only), the trial court determined the City of Omaha was responsible for 50 percent of the plaintiff’s noneconomic damages, in accordance with the court’s allocation of negligence. After adding together the portion of economic and noneconomic damages for which the City of Omaha was responsible, the trial court then deducted \$35,000, reflecting a *pro tanto* credit for the prior settlement with the driver.

In the past, calculating the credit to be afforded as a result of a pretrial settlement has been complicated and uncertain, but in the recent case of *Tadros v. City of Omaha* the Nebraska Supreme Court simplified the math, at least in cases where only one defendant remains by the time the fact finder gets the case.

The City of Omaha appealed, arguing the trial court erred in allowing only a \$35,000 *pro tanto* credit, and suggesting the proper approach would have been to reduce, *pro rata*, both economic and noneconomic damages by 50 percent (20 percent for the negligence attributed to the plaintiff and 30 percent for the negligence attributed to the settling driver). The swing in the two approaches was significant, as the *pro rata* approach reduced the City’s overall liability by \$377,699.94, while the *pro tanto* approach reduced the City’s liability for economic damages by only \$35,000.

In *Tadros*, the plaintiff was struck by a driver while crossing the street. Though she began crossing the street when the “walk” signal was displayed, the pedestrian signal turned to red before the plaintiff had finished crossing the street. The plaintiff sued the driver for negligence, and sued the City of Omaha claiming it failed to program the pedestrian signal to allow adequate time for crossing the street. Before trial the plaintiff settled with the driver for \$35,000 and the driver was dismissed from the litigation.

The Supreme Court began by explaining it was unnecessary for the trial court to distinguish between economic and noneconomic damages when determining the City’s liability for the judgment because §25-21,185.10, by its own terms, is limited to “action[s] involving more than one defendant.” Because only one defendant remained when the case was submitted to the trier of fact, the Court noted the action did not involve multiple “defendants” and consequently §25-21,185.10 was inapplicable to the analysis.

At trial, the court allocated 20 percent of the negligence to the plaintiff, 30 percent of the negligence to the settling driver, and 50 percent of the negligence to the City of Omaha. The trial court awarded economic damages of \$1,258,999.81 and noneconomic damages of \$300,000. In determining how much of the judgment the plaintiff could collect from the City of Omaha, the trial court reduced the

The Supreme Court went on to hold that when the Legislature enacted §25-21,185.11 (the portion of

*(Continued on page 2)*



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(Continued from page 1)

the Comparative Negligence Act which specifically addresses the rights of the parties when a settlement is reached between the claimant and a person liable to the claimant), it effectively abrogated the common law *pro tanto* reduction rule in favor of a *pro rata* approach to determining the non-settling defendant's share of a judgment. As such, the Court explained a non-settling defendant's share of a judgment is to be reduced **not** by the amount of the settlement(s) reached with others, but instead should be calculated in accordance with the degree of negligence allocated to the non-settling defendant by the finder of fact. Applying the *pro rata* rule, the Supreme Court calculated the City's share of the judgment by reducing **both the economic and the noneconomic damages** by 50 percent (20 percent for the plaintiff's contributory negligence and 30 percent for the settling driver's negligence).

In announcing the adoption of the *pro rata* approach, the Court suggested the new rule would eliminate contribution actions between joint tortfeasors when one of two tortfeasors settles with a claimant, because while a joint tortfeasor has a right to contribution against other joint tortfeasors when they discharge more than their "proportionate share of the judgment," the *pro rata* approach would effectively prevent non-settling joint tortfeasors from discharging more than their proportionate share.

Since the April 2007 Legislative Update in Baylor Evnen's Quarterly Newsletter, three bills passed which will impact the insurance industry.

**LB 588:** Driven in large part by the business group, Nebraskans for Workers' Compensation Equity and Fairness, under the leadership of the chair of the group, Baylor Evnen partner Dallas Jones, LB 588 was approved by the Governor on May 24, 2007. A workers' compensation bill aimed at reducing the cost of hospital expenses in Nebraska, LB 588 provides for reimbursement to large hospitals at the rate of 150 percent of Medicare. Its goal is to revise the fee schedule for at least 90 percent of all workers' compensation related hospital charges. This revised hospital fee schedule is expected to result in significant savings for employers and insurers.

In order to insure that the goal of the bill is met, it obligates hospitals and payors to report by October 15 of each year the total number of claims submitted for each Diagnostic Related Group and the number of times billed charges exceeded the Stop-Loss Threshold amount for each Diagnostic Related Group. The Workers' Compensation Court very recently decided that no reporting is due October 15, 2007. The first report shall be due October 15, 2008, and shall include payment data for the period of January 1, 2008, through September 30, 2008. On or about August 3, 2008, the Court will unveil

While the *Tadros* decision simplified the math considerably for those cases where plaintiffs settle with one of two defendants before trial, the *pro rata* rule is not applicable in all multiple tortfeasor cases. Dicta in the *Tadros* opinion suggests the *pro rata* rule has no application in cases where two or more defendants remain in the case after a settlement, and would not be proper in cases where tortfeasors act in concert or as part of a common enterprise or plan.

Although the Court in *Tadros* expressed its belief that the *pro rata* approach encouraged settlement, early speculation among members of the plaintiff's bar is that the new rule could have just the opposite effect. In the past, non-negligent plaintiffs who settled with one of two defendants could proceed to trial confident that, so long as the remaining defendant was allocated at least 1 percent of the total negligence, the plaintiffs would recover 100 percent of their economic damages by virtue of the joint and several liability imposed by §25-21,185.10. Since the *Tadros* opinion made clear that §25-21,185.10 has no application in cases where only one defendant remains, plaintiffs may choose to keep even nominally liable defendants in the case rather than settle, to avoid waiving the protection of joint and several liability for economic damages under §25-21,185.10.

## LEGISLATIVE UPDATE

for public comment its proposal as to how payors shall electronically submit payment data. We encourage our clients to regularly check the Court's website for further developments in this arena at <http://www.wcc.ne.gov>.

LB 588 also creates a prompt payment requirement for "compensable claims." Payors have 15 days to request additional information and 30 days from receipt of all required information to make payment. Failure to request additional information within 15 days is viewed as acknowledgment that the payor has all information necessary to pay the claim. Failure to pay within the specified time obligates the payor to pay the hospital its "normal billed charges."

LB 588 also has a provision changing compensation payable to employees who injure two or more members in one accident. In such cases, the employee may be entitled to compensation based upon a loss of earning power, rather than the schedule of benefits, if the payments per the schedule of benefits are, in the court's discretion, insufficient compensation and the employee shows he suffered at least a 30 percent loss of earning power.

It is anticipated that the savings derived from the revised hospital fee schedule will outweigh any additional cost that may result from the benefit increase portion of the bill.

(Continued on page 3)

*(Continued from page 2)*

The revised hospital fee schedule will become effective September 1, 2007, while the prompt payment and new compensation portions of the bill take effect January 1, 2008.

**LB 564** establishes some immunity for municipalities and other political subdivisions which provide public lands for recreational use. LB 564 is the Legislature's response to a recent Nebraska Supreme Court decision which held that the immunity provided landowners by the Recreational Liability Act did not apply to political subdivisions. The bill amends the State and Political Subdivision Tort Claims Acts to provide the state and political subdivisions with immunity from liability for claims resulting from recreational activities on public lands for which the political subdivision does not charge a fee or maintain control over the premises.

Specifically, LB 564 exempts the state or political subdivision for claims related to recreational activities for which no fee is charged where (1) the claim results from the inherent risk of the activity; (2) the claim arises out of a spot or localized defect of the premises, unless the defect is not corrected by the public entity within a reasonable time after receiving notice; or (3) the claim arises out of the design of a skate park or BMX park that was constructed according to generally recognized standards in existence at the time the facility was constructed. LB 564 took effect on May 16, 2007.

**LB 573:** The Minor Alcoholic Liquor Liability Act becomes operative on January 1, 2008. The Act establishes limited dram shop liability in the State of Nebraska and establishes a legal basis for compensation

to persons suffering damages caused by providing or serving alcohol to minors. Service of alcohol means any "sale, gift, or other manner of conveying alcohol."

LB 573 makes retailers, social hosts, and individuals who procure alcohol for minors jointly liable with the minor for injury, death, or damage to a third person, caused by the minor where the intoxication contributed to the negligent conduct. Neither the intoxicated person nor his or her estate has a cause of action under the law.

An agent or employee of a licensed retailer who serves or sells alcohol to a minor within the scope and course of his or her employment can also be held liable. Retailers maintain an absolute defense if, when providing the minor with alcohol, the retailer or its agent acted in good faith and relied on false identification that a reasonable and prudent person would believe is valid.

A social host is someone who knowingly allows a minor to consume alcohol "in his or her home or on property under his or her control." Parents are not included as social hosts if they only provide alcohol to their own minor children. Religious organizations who dispense alcohol as part of a bonafide religious ceremony, or individuals who procure alcohol in the company of and with the permission of the minor's parent or guardian, are also excluded from the definition of social host. The definition of social host appears broad enough to include employers who provide alcohol at office picnics, parties, or meetings where minors are in attendance.

## “DO WE HAVE TO PAY FOR THIS?”

### Employers' obligation to pay for medical treatment and testing to rule in or rule out a condition.

BY JENNY L. PANKO



Jenny L. Panko

The question, "Do we have to pay for this?" is often on the minds of employers and compensation carriers when it comes to making an accurate determination of their responsibility to pay for treatment and testing regarding alleged work related injuries. The answer to such a question becomes difficult in circumstances where the treatment or testing is recommended for the purpose of ruling in or ruling out a particular condition, or when the results of a procedure reveal that the condition was not work related after all.

Envision this scenario: An employee sustains an accident in which she injures her neck and both shoulders. Her workers' compensation claim for the injuries to her neck and shoulders is accepted and payments are made for the medical treatment associated

with these injuries. The employee continues to report pain and receive treatment for these conditions. Because of the continuing pain complaints, the treating doctor refers the employee to a neurologist and recommends an MRI of the brain because the treating doctor thinks the employee may have multiple sclerosis, which would be one reason why the employee continues to complain of pain. Does the employer or compensation carrier have to pay for the referral to the neurologist or the MRI?

Or, consider this scenario: The employee falls on ice while working at his job site, hitting the back of his head on the ground. After the accident, the employee complains of headaches and his treating doctor refers him for an MRI of the head. The results of the MRI

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(Continued from page 3)

reveal a cyst in the sinus and the employee is ultimately diagnosed with a sinus infection. Does the employer have to pay for the MRI?

It is often difficult to answer the “Do we have to pay for this?” question under circumstances such as these. While such a question is not clearly answered by the Nebraska Workers' Compensation Act or by the appellate courts in Nebraska, one unpublished case from the Nebraska Court of Appeals, *Castro v. IBP*, provides some guidance on the issue.

In *Castro*, the employee had a work accident, after which she experienced abdominal pain. Her doctors believed she had a hernia from the work accident. However, when surgery was performed to correct the hernia condition, a fatty tumor was found instead of a hernia. The employer claimed it was not responsible to pay for the surgery because the fatty tumor was not caused by the work accident.

The Nebraska Court of Appeals determined that the employer was required to pay for the surgery. The Court of Appeals reasoned that because the surgery was performed to eliminate and determine the cause of the employee's disability, the employer was responsible for payment. Specifically, the Court of Appeals stated, “The question is not whether the lipoma was caused by Castro's employment, but, rather, whether the surgery was an attempt to eliminate or determine the cause of Castro's disability.”

Does the Court's ruling in *Castro* mean that anytime treatment or testing is recommended by a doctor to rule in or rule out a condition as the cause of an employee's disability, the employer and its carrier are responsible for payment for that treatment and testing? Probably not. Such a determination is likely best made on a case by case basis. If the facts of the situation are similar to those in *Castro*, where the physicians believed that the employee sustained a work related injury, treatment was undertaken to correct the condition, and it is was discovered that the

cause of the condition was not work related after all, the more likely the rationale in *Castro* will apply. However, in situations where the condition for which the treatment or testing is not one which could be caused by the work accident in question, the employer/carrier likely has a basis to deny the treatment.

In the first scenario above, the employee would likely argue that the referral to the neurologist and the MRI are to eliminate and determine the causes of her disability and thus, the employer is responsible to pay for this treatment. However, the employer can argue that because a diagnosis of multiple sclerosis cannot be related to a work accident regardless, the employer is not responsible to pay for the testing to determine if she has that condition. While the treatment may be for purposes of ruling out a cause of the disability, the possibility that the doctors are attempting to rule in or rule out (multiple sclerosis) is not something that would have been caused by the work accident. On that basis, the employer and its carrier would likely have a reasonable basis to deny liability for the referral to the neurologist and the MRI.

The second scenario above likely presents a different outcome since it more closely resembles the facts in *Castro*. The MRI was ordered due to the employee's complaints of headaches following a work accident where he hit his head, in order to determine the cause of the headaches. Ultimately, similar to the *Castro* case, the MRI revealed a non-work related cause for the complaints. However, since the testing was necessitated by the work accident, even though the condition that was found was not work related, it is likely that the employer would need to pay for the MRI under the *Castro* decision.

While there is no blanket answer to the “Do we have to pay for this?” question, the *Castro* decision can be used as a guide to assist in assessing individual cases. The answer to this question in each case is one that is likely best based upon an analysis of the specific circumstances.



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## NOTES FROM THE FIRM

In April **Walt Zink** attended and presented at the American Law Firm Association Transportation Seminar in Austin, Texas. The seminar was titled “The Road to Resolution” and it focused on various approaches to effective alternative dispute resolution.

In June **Stephanie Stacy** moderated a panel discussion titled “Tort Trends Affecting the Property/Casualty Industry” during the American Law Firm Association Insurance Seminar in New York. **Cyndi Lamm** authored an article entitled “Ready to Run, No Place to Race: An Associate's Search for the Vanishing Trial” which was published at the seminar.

**Jill Gradwohl Schroeder** has been re-elected to a second term on the Board of Directors for Leadership Lincoln. Leadership Lincoln is an organization dedicated to developing and sustaining vital and diverse leadership in Lincoln and Lancaster County.

To find additional newsletter articles, go to our website at [www.bayloreven.com](http://www.bayloreven.com).