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Case Study

Wrongful Death Claims Against Public Entities: Recoverable Damages Increased

— by Jeffrey D. Eberhard

Claims Pointer: In a wrongful death claim, each beneficiary's claim seeking damages against the public body is independently subject to the non-economic damage-limit under the Oregon Tort Claims Act. Thus, if an estate has one beneficiary, then damages are limited to \$200,000, but if the estate has two beneficiaries, then damages are limited to \$400,000. As a result, the potential exposure of public bodies has significantly increased.

Prior to 1967, the state and local public entities enjoyed immunity from tort claims—such as wrongful death claims—through sovereign immunity. However, in 1967, the Oregon legislature passed the Oregon Tort Claims Act, which partially waived sovereign immunity by allowing tort claims to be filed against state and local public bodies, but monetary limitations on potential damages were enacted to limit the overall liability exposure. A recent Oregon Court of Appeals case, Miller v. Tri-County Metropolitan District, dba Tri-Met, a governmental agency, expanded local public bodies' total liability exposure for wrongful death claims. No: A142393, The Court of Appeals of the State of Oregon (February 23, 2011).

Austin Miller was killed after being struck by a bus operated by Tri-met, a governmental agency. Austin Miller was survived by his parents, his only statutory-beneficiaries. A personal representative for Austin Miller's estate (hereinafter "Plaintiff") filed a wrongful death action against Tri-met. The parties disagreed about whether or not Plaintiff brought two claims—one for each beneficiary—or one claim on behalf of the decedent. The trial court determined Plaintiff brought two claims, one claim for each beneficiary and awarded \$375,000, \$187,500 for each beneficiary.

On appeal, Tri-met argued the Oregon Tort Claims Act limited recoverable damages against public bodies to \$200,000¹, regardless of how many beneficiaries were seeking claims. Plaintiff contended that as the personal representative it was only a "nominal party," but it brought multiple "claims on behalf of each beneficiary that are independently subject to the [Oregon Tort Claims Act] limitations."

The Oregon Court of Appeals agreed with Plaintiff and held, relying upon prior case law, that in wrongful death claims against a public entity, a personal representative sues on behalf of the beneficiaries, not the estate. Thus, when there are multiple beneficiaries, there are multiple claimants, and the damages-limitation applies separately to each beneficiary. Therefore, the court of appeals found the trial court did not err by awarding each beneficiary \$187,500, for a total of \$375,000.

At first glance, it appears that this case could provide plaintiffs' counsels a basis to seek non-economic damages that exceed the \$500,000 statutory limit for wrongful death lawsuits against individuals. We expect plaintiffs' counsels to make this argument, but this is not supported by prior case law.

The Miller Court relied upon Oregon case law that analyzed the Oregon Tort Claims Act, which reformed wrongful death lawsuits raised against public bodies and their officers, employees, and agents. See Christensen v. Epley, 287 Or 539, 601 P2d 1216 (1979); see also Neher v. Chartier, 142 Or App 534, 923 P2d 653 (1996). However, the Oregon Tort Claims Act did not affect wrongful death actions brought against individuals. Instead, the Oregon Legislature enacted ORS 31.710 to govern the amount of non-economic damages recoverable in "any civil action," including wrongful death actions, brought against individuals.

Interpreting "civil action" under ORS 31.710, the Oregon Court of Appeals explained a "civil action" is the "aggregate of operative facts giving rise to a right or rights...." Tenold v. Weyerhaeuser Co., 127 Or App 511, 519-20, 873 P2d 413 (1994). In a wrongful death action, even though there may be multiple claimants seeking damages, the claims all arose from a single injury-producing event. See id. Therefore, claimants' non-economic damages are

(Continued on next page)

Independent Opinions Call for Independent Information

By Lisa Kouzes

My role in the med-legal community as a chiropractic consultant is to seek the truth and make solid opinions, ones that are reasonable, logical and defensible. I review cases in which the primary treatment has been provided by chiropractors or physical therapists and occasionally by naturopaths and acupuncturists. Usually injuries are limited to the soft tissues, but that is not always the case. I have

Case Study... *(Continued from page 1)*

limited to \$500,000 for that single injury-producing event. See id.

Limiting wrongful death actions to \$500,000 per occurrence, rather than per beneficiary, is also supported by the legislative purpose behind enacting ORS 31.710, which was to provide predictability in the reinsurance markets, reduce insurance premiums, and reduce litigation costs in civil actions. See id. at 519-20; see also Greist v. Phillips, 322 Or 281, 298-99, 906 P2d 789 (1995).

Therefore, any arguments made by plaintiffs' counsels seeking to expand exposure liability for multiple beneficiaries beyond the \$500,000 cap under ORS 31.710 should be fought. ❖

¹See ORS 30.270 (which was recently repealed). The Oregon Legislature subsequently enacted ORS 30.272, which increased the cap against local public bodies. Under the new law, exposure is capped at:

- \$500,000 per claimant and \$1 million per occurrence for causes of action arising between 7/1/09 and 7/1/10;
- \$533,300 per claimant and \$1,066,700 per occurrence for causes of action arising between 7/1/10 and 7/1/11
- \$566,700 per claimant and \$1,133,300 per occurrence for causes of action arising between 7/1/11 and 7/1/12.

ORS 30.272 provides subsequent increases between 7/1/12-7/1/15.

Full case available at:

<http://www.publications.ojd.state.or.us/A142393.htm>

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been involved in panel evaluations and record reviews with neurologists, orthopedists and physiatrists, to name a few, when injuries have been more severe or when the claimant has been seen by a variety of specialists.

I take a systematic approach, first investigating the cause of the injury. In the case of motor vehicle accidents, knowing the type and magnitude of the collision is paramount. Photographs of the vehicles, repair estimates and police reports are excellent sources of independent information. Not only do they give me an unbiased view, but I am also able to compare them to what the claimant tells me and/or to what I find in the medical records to establish credibility.

The initial pain diagram and subjective complaints found on the Application for Benefits and/or in the medical records are fundamentally important as they provide the first insight to possible related injuries. Medical records contemporaneous to the accident may identify objective findings through physical examination, diagnostic testing and imaging. The subjective and objective findings need to be consistent with each other and with the greater picture to establish valid diagnoses and relatedness to the mechanism of injury.

Importance of Proper Coding

In the chiropractic realm, special tests may be used that show contradictory or confusing results. I give the same scrutiny to diagnostic procedures as I give to the rest of the evaluation. The documentation must support the necessity of those tests and the information gained must contribute to the clinical decision-making process. If not, the test was not in the best interest of the patient. I have attended many seminars hosted by manufacturers of such specialized diagnostic equipment and have become versed in their rhetoric and have found stark inconsistencies. A common focus has been “winning bigger settlements.”

With diagnoses established, I then move onto the course of care. For treatment billed to be reasonable and necessary, it first must meet the definition of the CPT codes used.

- For example, a chiropractor may bill for manual therapy (CPT code 97140) performed to the same

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Medical Notes... *(Continued from previous page)*

area as the chiropractic manipulation, when in fact the code for manipulation is inclusive of the manual therapy. Therefore, billing for manual therapy and adjustment to the same area would be a form of double billing. The treatment must also be consistent with the established diagnoses.

- For example, neuromuscular reeducation (CPT code 97112) would be inappropriate to bill if the diagnosis was only sprain/strain, given that this treatment is reserved for those cases with significant neurological deficit, as in stroke victims. Some treatments on the chiropractic horizon are not identified specifically by a CPT code and chiropractors may use creative billing instead of using the proper codes to identify the unlisted service. These examples illustrate the importance of including the bills for review.
- For example, in soft tissue injuries, passive modalities may only be reasonable and necessary during the acute phase with little clinical value when continued beyond this point. Treatment consistent with CPT codes and diagnoses rendered may still be unreasonable if provided within an inappropriate time period. I also take into consideration the frequency and duration of treatment relative to the severity of the established injury.

Chiropractors employ a variety of treatment techniques and as a profession it may be on the cutting edge of new ideas, either for better or for worse. Regardless of treatment, the claimant should show some form of improvement both subjectively and objectively for complaints to be reasonably correlated to an injury. If there is no appreciable improvement over a reasonable time period, then the treatment should be discontinued. Continued pain does not necessitate continued treatment.

Medical Necessity

This leads into another topic often unidentified by the treating provider: pain behavior; symptom magnification; and other inconsistencies. The records may show no objective findings to support ongoing complaints, or pain levels may remain consistently high. To the trained eye, even the pain diagram can be used as a telltale sign if complaints show a non-anatomical or an exaggerated pattern.

In some cases, the medical records, bills, PIP application and independent information such as the accident report, repair estimate, and photographs are sufficient for me to provide a solid independent opinion. A medical file review would be reasonable. This would also be appropriate if the claimant were unavailable for evaluation or if significant time had passed since the date of injury.

Sometimes the records provided are so vague or minimal that no clinically relevant information can be obtained therefore, scheduling an independent medical evaluation would be more beneficial. This gives me the opportunity to interview the claimant and perform an examination. I can then identify if current complaints are supported by objective findings and consistent with established injuries and if treatment has been reasonable, necessary and related to the incident under review.

Asking the Right Questions

If there are inconsistencies in the claim, the independent medical evaluation may be able to shed light on the situation, and conversely, it may lead to the discovery of such inconsistencies. Occasionally, talking with the claimant will reveal he/she treated with his/her provider just prior to the auto accident, contrary to the “new patient evaluation” submitted in the bills. This is common enough that I make a habit of asking each time. I may also ask the claimant to describe the type and duration of treatment provided in an attempt to correlate this with services identified in the records. Billing for services not rendered and other inappropriate practices are not uncommon.

By doing a systematic and thorough review and evaluation, I can “stand my ground” in contested cases as I have truly analyzed the information for accuracy and consistency. I am able to counter the treating chiropractor when treatment and diagnostic procedures utilized are unique to the chiropractic field, as it has been suggested these would be unfamiliar to other health professionals making them unsuitable as experts.

I give the benefit of the doubt to the claimant whenever possible. I go out of my way to make them comfortable and I treat them with the same respect and in the same manner as I would any of my patients. My goal is to provide accurate, fair and independent opinions. I have no vested interest and I

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take pride in seeking out the truth.

I understand the importance of an accurate and defensible opinion, and my opinions are reinforced with the amount of independent information and facts provided. ❖

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