THE ROLE OF THE BAR AND THE JUDICIARY

IN CONTROLLING DISABILITY

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With growing recognition of the inadequacy, inequity and waste in the handling of serious personal injury cases, fortunately new thinking is being given to the subject.

Until recently all thought and treatment have rested on the assumption that a monetary award was the only means of compensating for an injury. Hence the injured person and the insurer have been cast as adversaries with the opposing aims of collecting as much and paying as little as possible. The result has been costly litigation and long delay in reaching court determinations or settlements, prejudicial alike to plaintiffs and defendants. Frequently plaintiffs have not had the means of getting proper medical attention when needed, have had worry over the outcome of litigation added to worry over injury, have been encouraged even to neglect proper treatment in the interest of inflating a monetary recovery, only to be deprived in the end of the advantage of a large verdict or settlement by the cost of getting it. Insurance companies, on the other hand, find themselves incurring large litigating expenses and ending up with excessively costly payments.

It seems clear that there is a basic fallacy in such an alignment of forces and the contest between them, and that in truth there is an identity of interest between the injured party and the insurance company, which should be recognized and served in a different approach and method of handling cases.

The faults in the present procedure are (1) the error in the underlying assumption that a monetary award is the only means or best means of compensation for an injury; (2) the addiction to the adversary approach; (3) the failure to do all that can be done to correct injuries and control disability, and the aggravation of injuries in the litigating process and psychology; (4) the excessive cost to both parties of the litigating course.

The sound approach is in almost the opposite direction, (1) adoption of the premise that a monetary award is a secondary and not the primary means of rectification, that first and foremost everything possible should be done to restore and rehabilitate, and that monetary compensation is the last item to make up for the residual injury which cannot be avoided or corrected and for economic loss, pain and suffering; (2) taking every measure at the outset and thereafter to procure for the injured person the best medical attention and care to achieve the maximum

in cure and rehabilitation and reduce to a minimum the residual injury; (3) removing as far as possible the risks, uncertainties and worries of litigation; (4) reducing the uneconomic costs of litigation.

That these aims and ends represent the true interest of the injured person cannot be doubted. It would seem equally clear that they represent the interest of the insurance company. The basic difficulty in cooperation is in the company's reservation about liability -- the extent to which it is not willing to assume the total cost of total compensation.

There are other difficulties, of course. I would place second the difficulty of compensating the plaintiff's attorney and persuading him that his economic interest will be appropriately protected in the cooperative procedure. It is significant that in the reports I have read of rehabilitative procedures, there has been no mention of the part played or even of the presence of a plaintiff's attorney.

Time is of the essence in many or most cases in which effective rehabilitation is to be undertaken. It is important or vital that proper care start from the beginning of the injury. There is, therefore, the obvious problem of the insurance company being on the spot and being able and willing to do the necessary to provide the best immediate medical attention. If it is so prepared and can act so quickly, perhaps a satisfactory course of conduct and relationship between the injured party and the insurance company can be established before a lawyer is consulted and without his ever coming into the case.

But I do not believe that the efforts and hopes of rehabilitation can or should be related to the absence of a lawyer in the picture. While the necessary immediate procedures can appropriately be undertaken without waiting for a lawyer to be consulted, I do not think that firm arrangements or final settlements should be negotiated without the injured person being represented by counsel. I think that the companies should insist upon it.

I have no illusions about the problems and difficulties in establishing at the same time the most effective rehabilitation procedures and satisfactory arrangements between the insurance company, the injured person and his attorney. But I am quite sure that any measure of success in the significant or full development of rehabilitation attitudes and actions is dependent upon mutual acceptance of the program by the carriers, legal profession and public.

Frankly, I am dubious about effecting an accommodation of the various interests. But it is certainly worth the effort and I have been persuaded to take part in this challenging discussion with the hope that a serious effort will be made.

The impetus must come from the insurance industry. First, therefore, there must be some soul searching in those quarters. What is the industry willing to do? What will its activation be?

Undoubtedly the initial prompting is economic considerations -- a concern about present and prospective costs and losses and a hope of effecting savings. But such considerations alone will never carry conviction or enlist necessary support from other interests. There must be a genuine new and different concept of the role of insurance, a dominant third dimension, of serving the public through doing the best that can be done for the injured person, in addition to providing protection for the insured and a profit for the insurer.

Certainly a much better service can be rendered the injured party. If he is so fortunate as to have at hand the most competent and knowledgeable medical men and the financial means to follow their directions, he will fare well without outside aid. But if he is not so fortunate, it is important that he be placed in proper medical hands as soon as possible and be assured of proper treatment. The insurance companies can provide the requisite knowledge of the best available medical hands and the wherewithal to bring them to bear when needed.

Can the insurance companies be persuaded to recognize a responsibility toward the injured person which will make their prime objective his restoration? Can they so consistently and effectively discharge that responsibility as to gain public confidence and acceptance?

How far will appraisal of liability -- not too accurate at any time -- influence attitude and action? It has always been a dominant factor in insurance thinking about a case, but is it wholly irrelevant to the care which an injured person should receive? What arrangements can appropriately be made to assure the proper care without prejudice to liability claims and positions?

This is not the occasion to descend to details. But there are numerous important and difficult details. And it is the difficulty of details which break down good plans and purposes.

Obviously, success in this new vision is dependent upon the good will and cooperation of many parties -- the injured person, his doctor and lawyer, the insurance companies and the courts. I do not visualize at the moment just how the courts would come into the matter, because the time at which most cases would have to be submitted to rehabilitative treatment would be before they could get to court. But the courts have a real concern in the matter and I suspect that their good offices will be needed in fashioning proper professional attitudes and forming necessary professional action.

I would think, therefore, that we have here a subject which calls for the joint thinking and planning of the medical profession, legal profession, courts and insurance companies. I would suggest, if an earnest effort is to be made to regularize and promote rehabilitative procedures in personal injury cases, the AMA, ABA and its section on judicial administration, and the insurance industry should jointly work on the program and procedures. Or if the national approach seems too unwieldy in the beginning, the same kind of cooperation on a selected local level would provide a good pilot project.