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## *Fair Dealing in Personal Injury Cases*

*Philip J. Hermann\**

**M**OST OF US ARE WELL AWARE that an expanding population living in a mechanized world and driving high-speed motor cars is producing a rapidly increasing number of personal injury claims. For lawyer and insurance company this has produced a boom. But what is not recognized generally is that this boom has created serious problems threatening the very economic existence of the lawyer and the insurance company. It can be said that personal injury has been battered by its own boom!

For the lawyer, personal injury has become the largest single source of income. Judge Aaron Steuer of the Supreme Court of New York speaking before the 1960 National Conference of State Trial Judges said that, "Representing one or two personal injury claimants a year is the difference between existing and not existing for most lawyers." But ironically, notwithstanding larger verdicts and settlements, the average lawyer's income is actually shrinking in relation to the products and services he buys. The American Bar Association in its pamphlet, "The 1958 Lawyer and His 1938 Dollar," refers to it as "the dwindling dollar."

This is in direct contrast to the average American who though working fewer hours per week has a continually rising income. The United States Department of Commerce estimates that the gross national product is increasing at approximately 3% per year. The question may be asked why the lawyer does not share in this increase. A study of the facts should cast light upon this problem and its solution. Upon entering the lawyer's office, we can immediately recognize part of the problem. Like so many other persons and businesses that maintain offices, the lawyer has been faced with spiraling overhead consisting of increased rentals, services and supplies. However, unlike successful business operations, he has been unable to absorb this increase through increased production. Actually, the reverse is true. Instead of turning out more legal work in the course of each day, most lawyers today turn out less. Part of this is due to the trend toward devoting a larger part of the day toward leisure pursuits. The people with whom the lawyer associates spend an increasing proportion of their time in play and enjoyment of life. Naturally,

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this influence spills over so that today's lawyer works fewer hours and fewer days each week than lawyers of yesterday. Nowadays, not many law offices are open on Saturdays. With fewer hours devoted to the work of clients in the course of a year and the increase of overhead, it is understandable that the overhead attributable to each chargeable hour has increased quite substantially.

A further adverse influence is also noticeable. This is particularly evident in personal injury claim and lawsuit handling. The amount of time necessary today to bring a personal injury lawsuit through verdict has increased substantially. As knowledge concerning injury, liability, and the effective development of a personal injury lawsuit have increased, so have the number of hours that are required for the preparation and trial of today's personal injury lawsuit.<sup>1</sup>

In addition, the out-of-pocket expense necessary to handle a claim and lawsuit because of refined trial techniques have also increased. Today, we see the widespread use of blown-up photographs, draftsman-prepared diagrams of the accident scene, professional exhibits, models of the accident vehicles and the human body, the greater use of depositions, and specialists (medical as well as non-medical).

Suffice it to say that there is ample evidence that verdicts of \$2,700 are necessary just to cover overhead and out-of-pocket expense. Larger ones are needed to yield the attorney compensation for his time. Smaller verdicts usually represent an out-of-pocket loss to the plaintiff attorney.

A study of over 8,000 verdicts from the various sections of the United States showed that 38% were for the defendants; 10% were under \$1,000; and 9% between \$1,000 to \$2,000, and 6% between \$2,000 and \$3,000. It is quite probable that in over 50% of the verdicts rendered by juries in the United States, the plaintiff attorney received nothing for the time spent in preparation and trial of the lawsuit. And in a substantial portion of these, he most likely sustained an out-of-pocket loss as well! It can be conservatively stated that in a profession known for its wasteful procedure, no phase of the law is more replete with waste of time

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<sup>1</sup> For a study of the amount of time that it takes a plaintiff's attorney to handle a personal injury case through its various states and the effect upon net income, see "Invitation to Litigation" by Philip J. Hermann, *Insurance Law Journal*, November, 1959, Commerce Clearing House, and "How to Increase Your Income From the Handling of Personal Injury Claims and Lawsuits," published by Statewide Jury Verdicts Publishing Co., 1961.

and money than that of handling personal injuries. Professor John C. Payne in the April, 1960, issue of the American Bar Association Journal, puts his finger on the problem when he says, "Lawyers are piece workers," and that, "In most cases, the compensation is based on the economic interest at stake, rather than on the time expended in completing a particular piece of business." He notes that, as a profession, they are losing ground economically because of inefficiency; that to increase their income, they must make use of means for conserving time.

Thus, notwithstanding, larger settlements and larger verdicts, the average lawyer's income as reflected by purchasing power has been declining while that of his neighbor has been increasing. If the lawyer does not note this, certainly, his wife and children eyeing the new acquisitions of the neighbor, when they request similar privileges, will promptly bring him to a realization that he is falling behind his friends.

Faced with shrinking income, the lawyer does everything possible to make each personal injury claim yield the largest possible settlement or verdict. He buys books on how to secure larger verdicts and spends time attempting to develop new legal concepts of liability. He attends seminars and trial demonstrations in his quest for the larger verdict.

The insurance company faced with increased demands upon its reserves struggles to keep claims' payment and legal and claims expenses within the portion of the premium dollar allocated for claims. The result is a substantial increase in litigation. Judge Steuer pointed out that New York City's population decreased in the past ten years, yet the filings and undisposed cases have continued to rise. He also noted that personal injury cases now account for 80% of the cases filed in New York. The court battles have also become more intense and prolonged. The result: Hard-working judges just can't keep up with the accelerating docket and fall further behind.

In the Courts of Common Pleas, Cuyahoga County, new cases filed in 1959 jumped to 8,877 from 7,892 in 1958, an increase of 12½% in one year. Of the 1959 filings, 47.7% were tort cases, but they constituted only 44.7% of all disposals. In Nassau County, New York, Supreme Court jury cases pending increased in 1959 by 1,104 to 4,179. This increased the delay by an estimated additional 12 months to a total estimate of 56 months. Westchester County, New York, pending cases increased by 628 to 2,874 and delayed by eight months, to a total of 39 months. Over

70% of the cases filed in New York Supreme Courts were tort lawsuits. Similar increases in filing and delay are being reported throughout the country.

Premiums earned on liability policies sold by over 700 casualty insurance companies last year reached a total of more than 3.7 billion, about 4 times what they were in 1945. However, despite the phenomenal rise in premium income, companies in the automobile insurance business have been losing money on their liability policies. In the past four years, the casualty stock companies were 700 million in the red on bodily injury and property damage auto insurance. Obviously, for casualty insurance companies despite the boom in insurance, these are not prosperous times.

As the pressures on the part of insurance companies to stem the losses increase and the pressures on the part of lawyers to boost their income become more intense, it is apparent that the amount of time and money necessary to handle personal injury claims and lawsuits will continue to increase.

The net result is obvious. Insurance companies may lose more money on casualty insurance; lawyers may have less net income.

In an effort to stem losses, insurance premiums in recent years have been substantially increased. However, so often the increases are so slow in being authorized that they sometimes do not keep pace with the increased cost of doing business. In addition, there is growing evidence that the public are resentful of the rate increases, and are bringing increased pressure for compensation plans some of which are minus insurance companies and with limitations upon the participation of attorneys as well as fees.

### **Solving the Mutual Problem**

There is a possible solution to the problems within the existing framework which bears careful thought on the part of both lawyers and insurance companies. The large amount of labor and expense that presently goes into handling a claim is a substantial factor that prevents casualty insurance from being profitable to some insurance companies and from personal injury claims and lawsuits from being as profitable as they should to many attorneys. If most claims could be settled at an early date on a fair basis and without resorting to litigation, the substantial

savings to attorneys and insurance companies may do a great deal to solve the financial problem to both.

What are the underlying causes of this excessive, expensive litigation? There appear to be five important causes:

1. The belief on the part of some plaintiff's attorneys that reasonable settlements can only be achieved through litigation.
2. Poor evaluation on the part of plaintiff's attorneys and insurance companies.
3. Poor negotiation techniques on the part of attorneys and insurance companies.
4. The acceptance by attorneys of injury claims which have no merit.
5. The acceptance by attorneys of personal injury claims in which maximum offers have been made direct to the injured party.

### **Is Litigation Necessary to Obtain Reasonable Settlements?**

Concerning the belief that reasonable settlements cannot be obtained without resort to litigation, the reader is referred to "Accidents, Money and the Law," a study of the economics of personal injury litigation made by Columbia University project for effective justice which was released in 1961. In that report, on page 19, it states, "We have concluded on the basis of extensive, earlier research that the value of a case will not be substantially increased solely by the act of suing or going to trial." The report also noted, "Recovery in cases that went to verdict average 16% less than in cases settled during trial."

A study of 2,957 back and neck injury verdicts revealed<sup>2</sup> that 36.8% of the offers in those lawsuits which resulted in verdicts for the plaintiff were larger than the actual verdict. More than one out of six offers (17.6%) was two to six times greater than the actual verdict and one out of ten (9.5%) was 26 to 99% greater than the actual verdict. Further, in considering that approximately 38% of verdicts rendered throughout the country are defense verdicts<sup>3</sup> and that a recent study showed that in 68% of the defense verdicts, offers in excess of \$1,000 were made. The

<sup>2</sup> Valuation Handbook Service, Statewide Jury Verdicts Publishing Co., Cleveland, Ohio, p. 2, 1960.

<sup>3</sup> Jury Verdict Expectancies Service, June Release, 1961.

greater percentage of these were over \$2,000 with many between \$5,000 and \$20,000.<sup>4</sup> Certainly, there is abundant evidence that litigation and/or the trial of a lawsuit does not in itself result in increasing the size of the settlement or of the recovery.

### Poor Evaluation

Poor evaluation is undoubtedly the prime cause of litigation. There is a tendency for each side to blame the other as being guilty of poor evaluation. So often, insurance companies blame plaintiff's attorneys for making excessive demands; plaintiff's lawyers on their part, blame insurance companies for making unrealistic offers. What are the facts?

A study of the last offer and demand in 443 back and neck injury verdicts,<sup>5</sup> revealed that three out of every four demands (73.2%) exceeded the verdict size and nearly two out of three offers (63.2%) were less than the verdict size. Only one out of every six demands and offers fell within 25% of the verdict size (17.9% and 16.7%, respectively). To fall within this range for a \$10,000 verdict, the demand and/or offer would have to be between \$7,500 and \$12,500.

Of the offers, one out of every two offers (56.2%) was only seven to 74% of the actual verdict. One out of every six (17.6%) was two to six times greater than the actual verdict and nearly one out of every ten offers (9.5%) was 26.99% greater than the actual verdict.

Of the demands, one out of five (19.6%) was 5 to 11 times greater than the actual verdict. One out of every four (23.5%) was two to four times greater than the actual verdict. One out of five (22.6%) was 26 to 99% greater than the actual verdict. And one out of six demands (16.4%) was only seven to 74% of the actual verdict.<sup>5</sup>

In actual money, the demands totaled \$4,441,398, the offers \$1,921,216, and the actual verdicts, \$3,439,058. It is thus apparent that the demands were approximately \$1,000,000 more than the verdicts and the offers were approximately one and one-half million less than the actual verdicts. It is apparent that the guessing is quite wild on the part of both attorneys and insurance companies.

<sup>4</sup> Jury Verdict Expectancies Service, p. 1, 1960.

<sup>5</sup> Valuation Handbook Service, p. 1. (See footnote 2, above.)

In a study of 881 verdicts *for the plaintiff*, in 161—no offers were made. In this group for which no offers were made, some of the verdicts were over \$100,000.<sup>6</sup>

It is particularly significant when one considers that the study of 2,957 verdicts referred to above involve neck and back injuries—the injuries most frequently encountered by attorneys and insurance companies!

Considering that today we know a great deal more about jury reaction to liability facts and injuries and have available tools which will produce evaluations which should average within 10% of the actual verdicts, there is no excuse for the wild guessing of yesterday.<sup>7</sup>

### Faulty Negotiation Techniques

It is not unusual upon receiving the jury verdict to discover that both the plaintiff attorney and the insurance company had basically the same evaluation. Had this been realized prior to trial, no lawsuit would have been tried. Why then did this unnecessary trial occur? The answer is obvious—poor negotiation technique.

Many plaintiff's attorneys believe that they must as their opening demand, ask a sum several times the value of the claim. On their part, many insurance companies faced with such a demand may either retaliate by making a token offer or none at all. The net result may be that negotiation gets stalled on dead center and may so continue through the trial itself. Not infrequently, insurance companies by their conduct actually invite litigation.<sup>8</sup>

### Acceptance of Claims Having No Merit

Some attorneys knowingly accept cases which have no merit in the hopes that they can force nuisance settlements. Probably an even larger group of no-merit cases are accepted by attorneys with the expectation that they have merit, only to later find that they do not. Not infrequently, the plaintiff's attorney believes that he has a case of some merit, little realizing that the

<sup>6</sup> Jury Verdict Expectancies Service, p. 1.

<sup>7</sup> For a discussion by the same author of "The Partially Educated Guess and Claim Evaluation," see the February, 1960, issue of *The Insurance Law Journal*.

<sup>8</sup> "Invitation to Litigation" also discusses how insurance companies unwittingly invite litigation, by Philip J. Hermann, *Insurance Law Journal*, April, 1960 issue.



insurance company's investigation being far more complete, discloses a different position. In such situation, communication of these facts to the lawyer may result in withdrawal of the claim.

Sometimes, litigation is resorted to for the sole purpose of trying to force a settlement of a claim without merit. Not infrequently, the attorney discovers that by so doing, he has a tiger by the tail and must see the case through litigation with the resultant loss of time and out-of-pocket expense. Sometimes, he is goaded to do so because he must save face to an insurance company or to a client who by the litigation is falsely led to believe his case is worthy of prosecution. Non-meritorious claims rarely yield a profit to the plaintiff's attorney and are costly to the insurance company. In addition, the attorney who handles such claims causes ill will between him and the insurance company which may spill over into other claims causing further costly unnecessary litigation.

#### **Maximum Offers Made Direct to Injured Party**

A far more common situation than generally realized is where prior to the entrance of an attorney in the case, the representative of the insurance company made a maximum offer directly to the injured party. The injured party consults the lawyer to determine whether the offer should be accepted. The lawyer sometimes because of faulty evaluation honestly believes the claim is worth more than the offer and is retained to secure a larger settlement. Other times, he realizes the offer is fair but believes that the insurance company can be nevertheless induced to pay a larger sum. Such cases are troublesome for all concerned. The insurance company may refuse to pay more than the reasonable value. The injured party may be reluctant to accept the previously offered amount less an attorney's fee. The attorney on his part is reluctant to forego his fee especially as he has by now expended time and out-of-pocket expense. Litigation is then entered into, but without real hope of securing a verdict larger than the offer and it may because of the embarrassing situation have to be resolved by a jury. The result so often is a disappointment to attorney and client. The client may secure, after several years wait, less than he had been originally offered. The attorney may after deducting overhead and expenses, have nothing to show for his time and effort.

### Fair Dealing for Mutual Profit

What is the solution to the problems causing needless expensive litigation? The answer is apparent. *Fair dealing on the part of the plaintiff's attorney and fair dealing on the part of the insurance company and its representatives, properly deployed, should inhere to mutual profit.* Once plaintiff's attorneys fully understand that excessive demands do nothing but cut their income in the handling of claims, they will tend to avoid excessive demands. And once insurance companies understand that inadequate offers to today's attorneys will generally result in additional handling, investigation and legal expenses, they, too, will understand the value of fair dealing. Even as this is being written many attorneys and insurance companies recognize the importance of fair dealing to themselves and practice it in the handling of their claims.

Just how is this translated into reality, for those who don't? As promptly as possible, the plaintiff's attorney should marshal his facts and law and promptly translate these into a sound demand.

Barring mistake or later developments, the original demand should be so sound that the attorney should be prepared to stand on or substantially close to it. If his demand is met with either no offer on the ground that it is excessive or by an offer which is clearly not within radius of the demand, the attorney should seek to determine the reason for this. If the insurance company fails to give adequate reason to indicate that the plaintiff's attorney's demand is unsound, he is entitled to assume that they have no valid basis. However, to avoid cutting his own income, he should carefully re-examine his own position to be certain that his facts and law interpretation are correct, and the valuation based upon these, sound. If the validity of the previous position is confirmed, he has no alternative other than to communicate the situation to his client and with his client's permission, to enter litigation.

The insurance company through its representatives should on its part make an independent appraisal of the claim preferably without knowledge of the demand. The reason why it is best for the company to arrive at an evaluation prior to receiving the demand is that so often it is influenced by the demand in arriving at its evaluation. This may result in an unduly low or unduly high evaluation. For example, if the demand is reasonable, there may be a reluctance to arrive at an evaluation similar

to it for fear that a supervising official may get the erroneous impression that the evaluator is permitting the plaintiff's attorney to do his evaluation for him or may feel that because of the size of the demand, the claim must be worth less than the demand for reasons not yet apparent. Likewise, a very high demand can influence an evaluator to place a higher price on the claim than he would have otherwise, perhaps feeling that his own investigation did not reveal some facts which would give it greater value.

If the independent evaluation shows that the demand is sound and worthy of prompt acceptance, this should be promptly done. It is submitted that with today's knowledge of jury verdicts to aid in evaluation of personal injury claims, most claims should settle as a result of the first conference between the plaintiff's attorney and the insurance company representative.

Where the demand is higher than the evaluation, then, inquiry should be made of the plaintiff's attorney to determine the reason. If none is given, the insurance company has a right to assume that its evaluation is sound. However, again to minimize expense, it should re-check to be certain that its position is sound. It should then counter with a fair offer even if the demand is many times the value of the claim. It is preferable that the offer be made in writing and may express the request that it be communicated to the client. Even though the attorney may not agree with its size, he has a duty to promptly inform the client for his acceptance, refusal or counter offer.

Some insurance companies, though their staff is capable and does arrive at sound evaluations, refuse to make offers where the demand is completely out of line. This is a questionable procedure. Failure to make an offer or in making a grossly inadequate offer, really serves no purpose other than to virtually guarantee that the claim will enter litigation and perhaps pass through it.

If the offer is not accepted and the claim enters litigation, the insurance company should request its defense counsel to make an appraisal of its value. If it differs substantially from that made by the insurance company, the offer should be carefully reconsidered. If recommendation of defense counsel results in a new evaluation, either lower or higher, outstanding offers should be adjusted accordingly.

If the new evaluation indicates that the offer made is clearly too high, it should be withdrawn and the adjusted, smaller offer

should be substituted. Although there is a reluctance to do this, sound claim and lawsuit handling dictates that it be done. Some plaintiff's lawyers though they recognize the offer made as being sound, will sometimes enter and continue litigation with the thought that as it pends, the company may be willing to add a premium to get rid of it. And, if it doesn't, the last highest offer can always be cashed in even if later events indicate the offer is much higher than justified. There is no more rhyme nor reason for such policy than there is to insisting that a demand made must be adhered to, even though subsequently, it is discovered that the injuries have become worse or that the case was under-valued. The party who wishes to gamble or who wishes to indulge in the luxury of unsound demands or offers should take without complaining the risk that later events may call for an adjustment of offer or demand.

Where the defense attorney has re-examined the case, and either the previous offer is adhered to or a new one made and does not result in prompt acceptance, communication should be had with the plaintiff's attorney to determine whether any mistake was made at arriving at the evaluation or lack of complete knowledge of injury, specials, liability facts or law which would make a material difference in value. If the mis-evaluation is on the part of the plaintiff's attorney, effort should be made to correct his position so that prompt settlement can be arrived at. If on the part of the insurance company, it should be communicated to it for revision of the offer.

Where the lawsuit has no settlement value and will be resisted, this too should be communicated to the plaintiff's lawyer. If the plaintiff's attorney's thinking is sound and he knows that it will be tried and he cannot prevail, he should, like the poker player who realizes that his chance of winning is gone, fold his hand. This is sound poker playing and is sound claim handling economics for the lawyer.

Prior to extensive legal processes, attorneys for both the plaintiff and the defendant should through negotiation, investigation, of fact and law as well as through the use of evaluation tools, endeavor to lead the erring side to as early a settlement as possible.

When a fair offer or demand has been made, not only should it be adhered to so as to encourage sound early offers or demands, but it is unfair for a company, attorney or even a judge to suggest

or insist that a fair demand should be reduced or a fair offer increased, merely because the case has pended for so long, or is in the pre-trial or trial room. To insist upon such procedure will only penalize sound evaluation, sound offers, and sound demands, and encourage needless litigation.

It is submitted that where there is fair dealing on the part of plaintiff's attorney and insurance company, a great deal of needless expense to both will have been eliminated enabling insurance companies to handle their claims and lawsuits with fewer personnel and smaller defense fees. And plaintiff's attorneys on their part, will be able to bring to conclusion more work during the course of a year; and where a staff is required, they will be able to operate with fewer personnel. The result to the plaintiff's attorney will be an increase in net income and perhaps more time for leisure pursuits. For the insurance company, the savings may mean the difference between a profit or a loss. For all, it may mean the retention of our negligence system.