

Jury Trials v. ADR

Are we trying too few cases?

— by Jay D. Enloe

Over the 30 plus years that I have defend insurers and their insureds in personal injury litigation, there has been an unmistakable shift from trying cases to resolving cases through ADR. I have gone from handling maybe 1 or 2 jury trials a month in the early years, to perhaps 1 or 2 jury trials a year, with the slack being taken up with arbitration and mediation. For the most part, this is a good trend. Insurers and attorneys have gotten better at recognizing the fair value of cases and settling cases without the expense of a jury trial. Cases which can be resolved for their fair value should be.

I contend, however, that at times we are getting carried away, rushing to settle cases and “close claims”, even when doing so ends up costing far more than simply asking a jury to decide the case. We are also at times treating mediation as a substitute for our own a critical analysis of cases and our own effort to either settle cases or try them. ADR is not always necessary to reach either end, and it often increases the cost of defending cases unnecessarily.

Let me cite to a recent example of a case that did not need ADR. I just completed a jury trial, in which the plaintiff had been offered approximately \$25,000 (including PIP reimbursement) for a case involving two arthroscopic knee surgeries and roughly \$30,000 in total medical expenses and wage loss. This offer had been made pre-litigation, in a good faith effort to resolve a disputed claim. The rationale for the amount of this pre-litigation offer was that causation for the knee condition was disputed (this was a tap rear-ender). This offer reflected a fair compromise between possible jury verdicts of a zero dollar recovery and something close to the \$50,000 policy limit.

Once the case was filed, and I was retained to defend the insured, the facts improved considerably. Through discovery, we discovered a mechanism of injury that pointed to something other than the minor rear-end impact as the cause of the knee condition

which led to surgery. We also confirmed that the forces of this impact were more in the range of what a person might experience while parallel parking, than anything with serious injury potential. We also discovered a criminal history for the plaintiff, which we thought the jury would properly consider when judging his credibility.

The court scheduled a Judicial Settlement Conference, a few weeks before trial. By the time of the conference, the insurer had already spent considerable defense dollars in discovery and medical consultation, but told the settlement judge it would still pay the \$25,000 if the plaintiff wanted to settle on that basis. Up until that point, the plaintiff’s settlement demand had been the \$50,000 policy limit. Although the settlement judge worked hard and did persuade the plaintiff and his attorney to reduce their demand from \$50,000, the judge was unable to convince them to take the \$25,000. They insisted on \$27,500, because of an outstanding medical bill. The insurer did not want to increase the offer.

With this, the contest was set up. The parties chose to convene a jury, over a \$2,500 difference. This is pretty rare these days. There are considerable pressures that come to bear to close a claim, from insurers concerned about extra-contractual liability, to strong-armed judges, to concerns about the expense of trial, but I agreed with the insurer in this case. The previous \$25,000 offer seemed to over-state the risk of this case, as it had developed in discovery.

At the start of trial, the trial judge did his best to get the parties to close the gap. He started with the plaintiff and told the plaintiff’s attorney that he felt the \$25,000 offer seemed like a “bird in the hand” that should be accepted. He asked me if the insurer would still pay it, if the plaintiff wanted it. I had to admit that I was somewhat doubtful, because of the expenses incurred since the Settlement Conference, but I said I would inquire. After a brief consultation with the plaintiff, however, we were told he would only consider settlement if the offer were increased. The trial began.

Two days later, and after less than 30 minutes of deliberation, the jury decided the plaintiff had not met his burden of proving that the defendant was negligent or that he was injured in the accident. The jury returned a full defense verdict. The insurer saved \$25,000. Of course, they had incurred the cost of defending the case, but that was less costly than pay-

ing \$25,000. And, this result was far less expensive than it would have been to settle the case after already spending the money to defend it.

This type of story does not occur frequently enough these days. Far too often, once a claim gets into litigation, the focus becomes “closing the file”, at basically any cost. Settlement judges and mediators talk frequently of what they think the “settlement value” of the case should be, or what similar cases have “settled for”, instead of how similar cases have been decided by juries.

If we try fewer cases, we do not know as well as we once did what juries are awarding. This is one reason why we need to try more cases. We also need to ask juries to decide cases to keep our focus on what we are doing. The goal is to pay what a jury would award. Some plaintiff attorneys have not taken a case to trial in years. And, some plaintiff attorneys have essentially turned the job of evaluating and resolving their clients’ cases over to settlement judges or mediators. We do not need to do the same.

In my opinion, the true “settlement value” of a case should be what a jury would award for it, not whatever we can pay to get rid of it. Often, the true settlement value of a case is a fairly known quantity, at

least for standard cases without many wrinkles. To the extent there are unusual features, such as skinny liability but very serious injuries, there may be a need to increase the settlement range. Or, the risk may run both ways, as in the case I just tried, suggesting a settlement value somewhere in the middle.

We do not need to be afraid to try cases. Defense attorneys who have tried enough cases, or who are otherwise in tune with what juries are awarding, are usually able to fairly well forecast a likely jury value range. On occasion, that forecast can be wrong. The jury might award less. Or, it could award more. The important thing, however, is that once the jury is done with the case, we will know exactly what it is worth, and we will have that much more experience with which to evaluate the next case.

In summary, I believe we should strive to resolve cases for their fair value, as early in the process as possible, to keep defense costs to a minimum. If a fair settlement is not possible, we should not be reluctant to ask a jury to decide the case for us. We need to restore balance in the system and put us all back in touch with the true value of injury cases. ❖

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Case Study



Jury to Decide Whether Friend of Gunman was Negligent for Harm to Hostages

— by Jeffrey D. Eberhard

In yet another installment of the PIP claim attorney fee saga, the Oregon Supreme Court recently reconsidered and revised its August opinion *Grisby v. Progressive Preferred Ins. Co.*, 343 Or. 175, 166 P.3d 519 (August 9, 2007) that dealt with PIP claims and attorney fees. As most Oregon adjusters know, ORS 742.061 provides for the recovery of attorney fees if an insurer fails to settle a first party claim within six months. Subsection 2 of the statute provides an exception for personal injury protection (PIP) insurers in cases where the insurer has 1) “accepted coverage and the only issue is the amount of benefits due the insured,” and 2) consented to submit any question as to the amount of benefits

due to binding arbitration. Although the Court’s revision of *Grisby* clarified that a single letter accepting coverage within 6 months of proof of claim could qualify as “accepting coverage” for the purposes of avoiding attorney fees in PIP claims, exactly what “the only issue is the amount of benefits due the insured” means remains a bit unclear.

In the *Grisby* case, plaintiff Omar Grisby sustained injuries when his vehicle was rear-ended by another driver. He filed for PIP benefits with Progressive, his insurer. Progressive sent Grisby a letter accepting coverage and agreeing to pay for reasonable and necessary medical expenses related to the accident. Progressive’s letter also consented to submit any dispute regarding the amount of PIP benefits due to binding arbitration. Progressive then paid for some of Grisby’s medical expenses, but refused to pay \$4,042 worth of chiropractic treatment it deemed to be unrelated to the accident.

At trial, a jury found Grisby’s chiropractic treatments to be related to the accident and awarded him

Claims Pointer: According to ORS 742.061, PIP insurers who fail to settle first party PIP claims within 6 months of proof of loss are subject to attorney fees unless the insurer has 1) “accepted coverage and the only issue is the amount of benefits due” and 2) agrees to submit any dispute regarding the amount of benefits due to binding arbitration. A single letter that is sent within 6 months will be sufficient to “accept coverage.” However, a dispute on whether the accident caused the need for the medical expense is not a dispute regarding the “amount of benefits,” and therefore, the insured may recover attorney fees if a lawsuit is filed. In short, a denial of PIP benefits may be opening the door to an insured’s claim for attorney fees.

damages. The trial court, however, denied Grisby’s request for almost \$50,000 in attorney fees after finding that Progressive had complied with ORS 742.061(2). The Court of Appeals affirmed. The Oregon Supreme Court reversed, holding that Progressive had not “accepted coverage” within the meaning of the statute when it denied Grisby’s chiropractic treatments. In its opinion, the Court defined the statute’s phrase “accepted coverage” as not being limited to a one-time acceptance of coverage, but instead, an “ongoing series of decisions ‘accepting’ or ‘denying’ coverage of particular claims for services rendered by medical providers.” As a result, it became unclear whether an insurer could effectively cut off attorney fees under ORS 742.061 by sending just one letter “accepting coverage.”

In a somewhat unusual move, after accepting Progressive’s petition for reconsideration, the court revised its earlier decision as it related to its previous interpretation of what constitutes “acceptance” of “coverage.” In *Grisby v. Progressive Preferred Ins.*

Co., --- P.3d ---, WL 3293407 (November 8, 2007), the Court disavowed that portion of its previous opinion that suggested that “acceptance” of “coverage” was a “series of ongoing decisions.” Instead, the Court agreed with Progressive that, “acceptance” of “coverage” for the purposes of ORS 742.061(2), is a single event and can be accomplished by sending out a single letter.

Nevertheless, the Court’s modification did not change the outcome of this particular case because although Progressive may have “accepted coverage” under the exception to the attorney fee statute, the court held that the PIP dispute over chiropractic treatment Progressive was having with Grisby involved more than just the “dollar level” of those treatments. In short, a dispute over whether certain medical treatment was needed as a result of the accident is not a dispute over the amount of benefits. However, a dispute over whether a particular charge was excessive would appear to be a dispute over the “amount of benefits.” In the gray area is whether a dispute that the number of medical visits was excessive given the insured’s complaints. While we would like to give you better advice on the meaning of the *Grisby* case – as the Supreme Court itself has essentially admitted – the court’s opinion may result in more confusion than it anticipated. ❖

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Oregon’s Dog Bite Law Changing Effective January ‘08

— by Bruce M. White

MITCHELL, LANG & SMITH

The 2007 legislature enacted a law that somewhat modified Oregon’s common law rule on liability for an injury caused by a dog. House Bill 2345, effective January 1, 2008, provides that in a claim for economic damages, a plaintiff injured by a dog need not prove that the owner of the dog could

foresee that the dog would cause the injury. The act does not otherwise alter the common law defenses available to dog owners, and the injured plaintiff must still prove that the owner knew or should have known of the dog’s aggressive nature to recover non-economic damages.

Under the new law, persons injured by a dog, who are on the owner’s premises with express or implied permission, will be able to recover medical expenses and provable lost earnings, without having to establish the owner’s knowledge or notice of the dog’s dangerous propensities. Litigation for dog bite injuries will be more complicated with the change, as

different liability standards apply for economic damages and non-economic damages.

Although it has been some time since Oregon actually recognized the “one-bite rule,” this change brings Oregon closer in line with Washington and California as far as recovering economic damages

caused by dog bites. Investigation of dog incidents should still include determining whether there was any provocation, whether the dog has any prior history of aggression, and whether plaintiff knowingly encountered a dog that was properly restrained. ❖



Medical Notes

Acupuncture Treatment & Soft Tissue Injuries

Article provided by Health Cost Management

— by Steve Meeker, Dipl. Ac., L.Ac, FAAPM

Acupuncture and Oriental Medicine is one of the fastest growing health professions in the world that everybody is talking about, but nobody knows about. How it works, what it does, how it feels, what it doesn't do. Even the professionals don't know.

Wrapped in enigmatic words, puzzling concepts, strange diagnoses, and treatments that defy logic, the “otherness” of this medicine is a strange attraction. To the Western sensibility, it is foreign - but for many, those terrible needles are a way to manage pain and movement after an injury or trauma.

Can the incomprehensible be understood? Well, actually yes, the basics are simpler than you think.

Acupuncture Theory in 20 Seconds, Visualize this: There are pipes running lengthwise, up and down the body, head or upper body to foot, or to the arm. There is one that wraps around the waist, and can divide the upper and lower body. These pipes are carrying an energy that helps the blood and lymph flow, and keeps the body animated. Like a pipe, there are 2 major things that can go wrong, a blockage in the pipe (embolus) or a break in the pipe (thrombus). When there is a blockage, swollen, hot areas can occur, especially in back of, or around the areas that are blocked. A break acts like a hose running freely on the ground, and can feel swampy, mushy, and have pain in a larger area. The practitioner is the roto-rooter man, and tries to fix the problem.

This, of course, is highly simplistic, but is an easy way to explain diagnosis and treatment, especially of soft tissue problems. To correct the above problems, stimulation is performed by needle, laser, micro-current, massage, or other physical treatments of certain reactive points, which act as gates or controllers to return balance to the affected areas of the body.

The basic idea that underlies all of oriental life; food, architecture, medicine, is balance. Light/dark, hot/cold, male/female, are opposites that balance each other with a tension and flow at the same time. When this balance is not maintained, then disease/disorder arises.

Emotions and infectious diseases among other causes can tip this balance. In the current discussion, the cause would be trauma.

Diagnosis of soft tissue damage is usually straightforward. Bone and nerve damage would be referred out to the appropriate persons if not diagnosed already. By history, palpation, signs and symptoms, a pain picture emerges. Along with the customary diagnostic procedures, there are two techniques that will be new to Westerners: reading the pulse and the tongue.

The pulse is actually taken at the radial arteries of both wrists at 6 positions, 3 light and 3 deep on each wrist. Each of these positions is related to a pipe discussed earlier, and is a way of assessing the state of that particular pipe and its associated qualities.

The tongue diagnosis also shows the state of the body, but is excellent for revealing long-term problems, and deeper imbalances.

Both techniques may be of limited use in trauma, and may or may not be performed.

Treatment consists of stimulation as discussed above, usually with needles, and these may be fur-

ther stimulated by micro-current for a quicker, longer lasting treatment. At the same time, a special type of infrared heat may be applied, which increases circulation, and relaxes muscles further.

This electric heat replaces the use of Moxa, which is an herb that is burned to create a penetrating type heat. The drawbacks of this are a pervading smoke and smell, which is not appreciated in most professional settings. Moxa is still used for some techniques; the practitioner will explain this if they choose to apply it.

Other common physical techniques are massage, and cupping and gwa sa. Cupping is performed by placing special glass or plastic cups on areas of the body (usually back) in which a vacuum is created. This brings to the surface un-oxygenated blood, and increases the range of motion with tight muscles, Gwa Sa is a similar procedure, but treats a larger area. A smooth object with a lip, as a Chinese soup spoon, is lightly stroked along the skin, usually the upper back. A lubricant such as Vaseline is used to smooth and even out the strokes. This can immediately bring to the surface of the skin a redness, which can become very dark in areas of pain, or trigger points. Both of these techniques can be visually dramatic, but, do not hurt the patient, and can quickly resolve pain and restriction. Both of these are practiced as folk remedies around the world, and can be seen in the film “the Godfather” treating the child Fredo’s weak lungs.

Treatment may take 20 to 45 minutes per area, and 2 to 3 areas may be treated in one session. By the end of the treatment, pain should be reduced and range of motion will be increased. By how much depends on the extent of the injury, date of initial injury, and underlying patient condition. Usually it takes 24 to 36 hours for inflammation to resolve, many times the patient feels much better the next day. If physical or a mobilization therapy is running concurrently, usually the acupuncture should be given first to loosen the body for the other procedures.

Classically, treatment frequency initially should be about twice a week, then reduced to once a week,

and slowly taper off as the patient recovers. Traditional treatments are given in courses. Typically 10 treatments are in a course, after that a rest of a week or two, and then treatment is resumed. In practice, this pattern may not be followed, especially concerning soft tissue injuries, where patient response guides treatment.

Specialties in Chinese Medicine are classically by technique, not body area, but this is changing in the West. Techniques can vary greatly, but the underlying idea of balance is inherent in each one.

Specialties may include, country specific techniques like Japanese, Korean, or French, for example or Microsystems - a way of treating the whole body by using a part of it as a map, which can include hand, face, scalp and ear Acupuncture. Some other systems are Classical, Traditional, and 5 Element. The patient may know or not know or care what specific system is being used as long as the technique is effective.

There are only four CPT codes describing Acupuncture. These are only a few years old, but they are known throughout the industry.

There are other codes that cover the heat and massage, but there are no specific codes for other common techniques as described above, so these may be entered under a catchall NOS physical code. In the last few years, an effort has been made to codify all of these techniques, called the ABC codes, but support has been limited so far.

Historically insurance companies only pay for Acupuncture when related to pain. Again the last couple of years, new pain codes have been added to the ICD list, and many are taking advantage of these more specific codes, but generally the basic codes cover the types of pain seen in soft tissue trauma.

Acupuncture and Oriental Medicine techniques are useful in soft tissue injuries, even more so when applied early in treatment. Concurrent use with mobilization therapies reduces even further the length of time needed to return to pre injury status, and may reduce costs and pain for the patient. ❖



— by Russ Matheson, CPA, CFE

Last month's column focused on the key elements of Business Income loss calculations. Part II will provide further details related to those elements as they pertain to the period of restoration.

The period of restoration is a key element of the Business Income loss calculation, because it defines the start and end dates of the damage measurement period. As such it is imperative to keep your accountant apprised of any changes to the length of the period, as they could impact financial projections, and result in revisions to the loss calculation.

The period of restoration is evaluated and applied to the circumstances of the loss by the insurance company adjusters or its legal representatives. Typically, the period of restoration will begin on the date the property is physically damaged and ends on the date that the property should be repaired or replaced.

There are a variety of different factors that can impact the period of restoration. Paying close attention to these factors will reduce the likelihood of misunderstandings with the insured about periods of time that may not qualify for Business Income loss recovery.

1. **Clear Scope of Repairs** It is critical to develop a clear scope of repairs following the loss event and make sure every consultant (contractor, engineer, architect, etc.) involved in estimating the repair period has the exact same scope of work in mind. It is much easier to compare estimates when the information from which they are based is the same. This will assist you in establishing when the property should be repaired or replaced.
2. **Improvements** The insured will often choose to make improvements or expand its facilities while the business is closed for repairs. This can cause a delay in the resumption of operations that is typically excluded from the insured pe-

riod of restoration. Before plans for improvements are finalized, the insured should be made aware that the additional time to complete any expansion is excluded from the period of restoration. If the insured decides to move forward with improvements, it becomes critically important for the adjuster to frequently check in with the contractor and ascertain whether the project is progressing as originally planned. Any variances from the original time line estimates should be investigated and resolved as soon as possible to limit potential problems during the final settlement process.

3. **Planning** Often, the insured's Business Income loss can be mitigated and the suspension of operations minimized by careful planning. For example, certain situations may allow for replacement and installation of critical equipment well before the building is completely repaired or rebuilt. Even a partial resumption of operations can dramatically reduce the insured's Business Income loss -- especially if the period of restoration spans several months. In some situations, paying the contractor overtime to complete repairs can also reduce the period of restoration. However, careful consideration should be given to the premium cost of overtime and the extent to which it reduces the Business Income loss that would otherwise be payable.
4. **Extended Period of Indemnity** Many standard commercial insurance policies include an Extended Period of Indemnity beyond the period of restoration. Extended periods are typically limited to 30 days, but can be longer. Most of the time, the extended period begins immediately after the period of restoration ends. However, there may occasionally be a gap between the end of the period of restoration and the beginning of the extended period. The extended period of interruption may not begin until the date when the property was actually repaired or replaced and operations were resumed. The date repairs are completed and operations resumed could be weeks or even months after the period of restoration. As always, the proper period of restoration is determined by the insurer.

Paying close attention to these factors that can impact the period of restoration will result in a more accurate resolution of the business income loss recovery. It is important to have a clear scope of work, to communicate frequently with the insured, and be aware of factors that might increase the suspension

of operations. Careful planning can help minimize the suspension of operations and ultimately reduce the insured's Business Income loss. Finally, when considering the applicability of the Extended Period of Indemnity, it is important to differentiate between the period of restoration and the actual date repairs are completed. ❖

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