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A PUBLICATION OF DELAWARE BAR FOUNDATION

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The Cover:

The fanciful vision of litigation in full swing is the handiwork of Mark Vavala of the Prothonotary's office in New Castle County. Mark's caricatures, including the accompanying self portrait, appear throughout this issue. E.D.

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EDITOR'S PAGE

The genesis of this issue of DELAWARE LAWYER was the storm cloud brewing over Dover last spring in expectation of what then appeared to be the legislative *tod-tentanz* on tort reform. As Gina Iorii notes in her article appearing on page 6, the legislative session ended with a silence, not a bang. This issue was thus transformed from a retrospective to a preview of the upcoming dance of lobbyists and legislators.

While this issue contains several first time contributors to the magazine, I should like to call special attention to Mark Vavala who has provided the caricatures and cartoons that grace this issue. Mark is a court clerk with the Prothonotary's office in New Castle County, Delaware, who we hope will be a steady contributor to this magazine. I must take issue, however, with Mark's depiction of me to the left of these words, I am emphatically *not* a cigarette smoker.

Footnote 22 of Judge Martin's article on Alternative Dispute Resolution requires some explanation. "Greenbaum, Josh Martin", is not Judge Martin's semitic alter ego. He is a student who participated in Judge Martin's Spring, 1988 course at Delaware Law School on Alternative Dispute Resolution. Judge Martin avers that the name is "mere coincidence".

Thanks go to all the authors who have contributed to this endeavor. The thoughtfulness and attention each provided in their article made editing this issue genuinely easy. Further, the authors proved Bill Wiggin wrong in his prediction that I would "never get this baby to bed on schedule". Finally, I should like to thank Bill Wiggin and Sylvia Johns of the Bar Association for their assistance, John Elzufon, Esquire, my secretary, Barb Blatchford, and last but certainly not least, my wife, Kim, for her patience and understanding.

Lawrence S. Drexler

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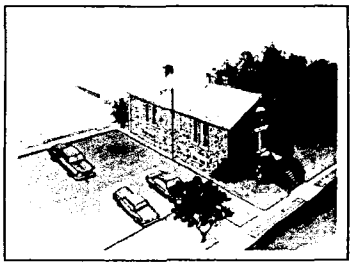

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MUCH ADO, BUT NOTHING:
TORT REFORM IN DELAWARE

Regina A. Iorii

June 30, 1986: The Delaware General Assembly closes its 1986 session. House Bills 437 and 438 and Senate Bill 364 disappear quietly.

June 30, 1987: The Delaware General Assembly closes its 1987 session. House Bills 194 and 281 die with nary a whimper.

June 30, 1988: The Delaware General Assembly closes its 1988 session. House Bill 418 crashes and burns without even having made it out of committee.

The demise of these bills is cause for celebration for the Delaware Trial Lawyers Association, which fought vigorously against their passage. Nevertheless, it is preparing for the anticipated resurrection of a similar bill in the 1989 session. For the insurance industry, however, the third time was not a charm; it will undoubtedly be returning to Legislative Hall next year more determined than ever to push a similar bill through the General Assembly.

These innocuously numbered bills have caused quite a furor in Delaware in the last three years. Indeed, their subject has stirred up controversy all over America. That subject is tort reform.

A (Very) Brief History of Tort Reform

Tort reform exploded to the forefront of American consciousness in the early part of this decade. It became impossible to pick up a newspaper or turn on the nightly news without reading or hearing about the "insurance crisis" that held both corporate and individual Americans in a vise-like grip. The culprit most often blamed was the increase in million-dollar jury verdicts in cases ranging from products liability to medical malpractice to directors and officers liability. These verdicts were forcing insurance companies to increase premiums to all but unaffordable levels or even simply to stop writing policies for occupations deemed too high risk. The frustration of insurance consumers reached a fever pitch, and these consumers began demanding action.

Tort reform began in what was perceived as one of the most besieged areas: medical malpractice. Several states, including Delaware, enacted statutes aimed at alleviating the crisis by placing caps on the amount of recovery of non-economic damages; abrogating the collateral source rule; requiring periodic rather than lump-sum payments of damages exceeding a certain amount; and instituting ceilings on attorneys' fees. Most of these statutes have survived equal protection challenges by application of the rational basis test.

The legislative response in the medical malpractice area did little to quell the clamor; if anything, it whetted the desire for even greater reform. The Delaware experience is evidence of this nationwide call to arms.

1986: Delaware Gets Into The Act

The first indications of the tort reform movement in Delaware appeared in January 1986, with the introduction of House Bills 437 and 438 and Senate Bill 364. H.B. 437 proposed the addition of a new section to the Insurance Code. It defined punitive damages as "awards over above general and special damages" and provided that punitive damages could only be awarded upon clear and convincing evidence that the tortfeasor either 1) "personally and intentionally acted out of malice directed towards the injured party," or 2) "knowingly and intentionally acted out in flagrant disregard of the injured party's legal rights." The legislation sought to eliminate gross negligence as a basis for awarding punitive damages, and forbid punitive damages for breach of contract. It also proposed to limit the amount of punitive damages that could be awarded against any party for a single incident to $100,000 per person or $500,000 in the aggregate, regardless of the number of plaintiffs or lawsuits. The synopsis stated only that it was "intended to help retard the escalating cost of insurance."

H.B. 438 proposed to amend the collateral source rule to allow the defendant to introduce evidence of benefits received by the plaintiff from health insurance, workmens' compensation and the like. However, the court was not required to decrease the damages awarded to the plaintiff. The purpose for the amendment was to allow the jury to consider the plaintiff's compensation from other sources.

Finally, S.B. 364 sought to alter the well-established principle of joint and several liability to hold a defendant li-

(Continued on page 8)

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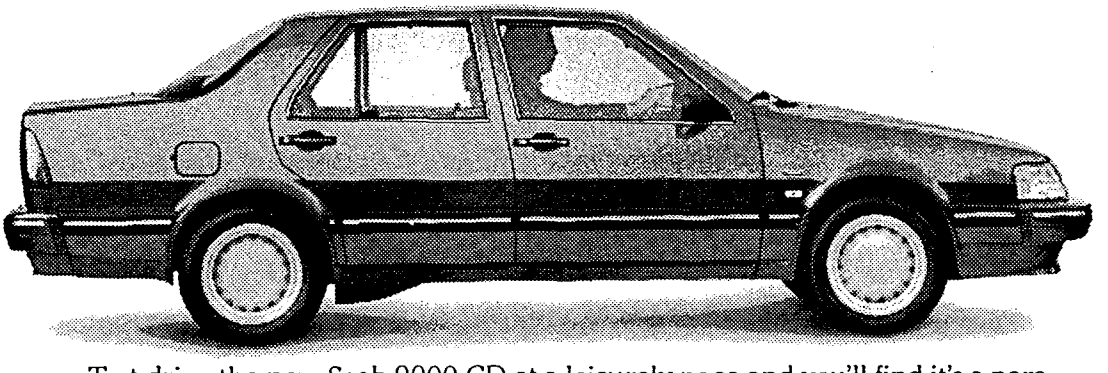

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(Much Ado continued)

able only for that portion of the damages for which his negligence was responsible. The amendment would have allowed defendants to point to a non-party "empty chair" and argue that the missing person bore some or all of the fault, and also eliminated contribution among defendants.

Predictably, the plaintiffs' bar was outraged by what it perceived as caving in to the insurance industry. Just as predictably, the insurance industry saw its opposition as seeking to preserve its windfall verdicts. In a February 1986 letter to the Executive Committee of the Delaware Bar Association, B. Wilson Redfearn, Esquire, summed up the defense position as follows:

> If it is one's philosophy that plaintiffs should be entitled to windfalls because their cost is distributed among the insurance-buying or product-buying population, then you should not support these Bills. If you reach the conclusion that the Bills and fair, and that adequate compensation will still be obtained, and that this legislation is an appropriate way to balance the liberal trend of the tort system, then you will vote in favor of the legislation.

All the ruckus was rendered moot, however, as the General Assembly closed session without having considered the bills.

1987: The Insurance Industry Tries Again

Tort reform began rather quietly in May 1987 with the introduction of H. B. 194. This bill proposed to amend the Insurance Code to require personal injury attorneys to submit annual reports to the Insurance Commissioner. The report would include information about the dollar amount received by a plaintiff; the parties to the action (including the insurer); collateral sources; estimated future compensation; and amounts paid as court costs and legal and other fees. The report encompassed settlements as well as jury and court verdicts. The bill gave the Insurance Commissioner authority to prescribe the form of report and to promulgate rules and regulations to administer this provision.

Shortly thereafter, the full frontal assault began in earnest when H. B. 281 was introduced. It continued to target punitive damages, collateral source recovery and joint and several liability as the primary villains.

A. *Punitive Damages*

H.B. 281 changed the definition of punitive damages from that proposed in 1986 and also expanded the situations in which they could be awarded. It defines punitive damages as "awards in excess of objectively verifiable monetary loss." It retained the requirement of proof by clear and convincing evidence, but proposed to allow them where the defendant acted recklessly 1) out of malice toward the particular plaintiff or 2) with "conscious indifference to the foreseeable effects of his conduct upon the rights of the [plaintiff] or of any class of persons similarly situated." The bill capped punitive damages at three times the amount of compensatory damages and provided that they could not be requested until liability had been established and compensatory damages ascertained. In a new provision, the bill authorized the governmental specifications defense as an exception to an award of punitive damages.

Interestingly, the DTLA's attack on this provision did not contest the definition, standard of proof, or the limited situations in whcih punitive damages could be awarded. Rather, it attacked the governmental specifica-

Ms. Iorii, an Associate with the firm of Ashby, McKelvie & Geddes of Wilmington, has been a member of the bar for little more than a year, but she brings impressive credentials to writing on legal topics. After graduating Magna Cum Laude from the University of Delaware where she majored in criminal justice, she attended the (then) Delaware Law School of Widener University, where she was the articles Editor of the Delaware Journal of Corporate Law. Once again she graduated Magna Cum Laude from that institution. This is her first contribution to DELAWARE LAWYER.

tions defense and the requirement of separate trials on liability and punitive damages. With respect to the latter, it wrote:

Ironically, this section benefits the victim in a way that the sponsors . . . surely did not intend. If a drunken driver of a speeding, unsafe truck maims someone, that person first can have a trial on negligence and compensation damages; any jury hearing that case will likely be on the generous side in awarding damages. Then, the injured person gets a second bite of the apple by presenting the case all over again to a second jury which will then be instructed not to award more than three times the first award as punitive damages. [T]his is a trial lawyer's dream and a self-insured's nightmare. . . .

The DTLA also noted that requiring separate trials imposed a greater burden on Delaware's already clogged court system (an interesting parry to its opponents' thrust that the explosion of tort actions taxes the courts' finite resources)

B. *Collateral Source Rule*

H.B. 281's proposal to abrogate the collateral source rule did not vary substantially from that introduced in 1986. It provided that the trier of fact could be told of the existence of other sources from which the plaintiff had been or would be compensated, and that the plaintiff could inform the fact finder of liens or money to be repaid. A further amendment permitted the plaintiff to introduce evidence that the defendant(s) had liability insurance to cover damages arising out of an action, thus negating part of the DTLA's argument. However, DTLA still contended that the vaguely worded bill permitted defendants to identify the *amounts* of benefits received by the plaintiffs as well as the sources of recovery, while the plaintiffs were restricted to demonstrating only the existence, and not the limits, of a liability insurance policy.

C. *Joint and Several Liability*

H.B. 281 as originally sponsored provided that each defendant shall pay only the damages caused by his fault. The bill permitted defendants to produce evidence of a non-party's fault and required the trier of fact to consider that evidence in apportioning fault.

Predictably, the plaintiffs' bar was outraged by what it perceived as caving in to the insurance industry. Just as predictably, the insurance industry saw its opposition as seeking to preserve its windfall verdicts. All the ruckus was rendered moot, however, as the General Assembly closed session without having considered the bills.

DTLA attacked this provision by claiming that it would discourage settlements, increase litigation, and encourage defendants to point the finger at insolvent or inadequately insured defendants. Another concern was the

(Continued on next page)

(Much Ado continued)

bill's preservation of joint and several liability for toxic torts only for the cost of clean-up or other remedial action. Subsequently, two amendments to this provision were sponsored. One amendment preserved joint and several liability for damages arising from wrongful contamination or pollution of the air, water or soil, and was designed to leave intact joint and several liability for all damages caused by toxic torts.

The other amendment divided damages into two categories: economic and non-economic. Economic damage included, among other things, loss of earnings and medical expenses -- in short, "objectively verifiable monetary losses." Non-economic damages encompassed recovery for pain and suffering, loss of consortium, emotional distress, and the like. Neither category included punitive damages. Defendants would continue to be jointly and severally liable for economic damages, but their liability for non-economic damages would be in proportion to their degree of fault. This amendment at least partly refuted the argument that abrogation of joint and several liability would deny plaintiffs full recovery for their injuries.

The final proposed amendment to H.B. 281 would have struck down all these provisions. It called for the creation of a Civil Justice Council having 15 members drawn from various professions. The Council was to study the cost and availability of insurance, recent legislation and its impact on cost and availability, the interaction of tort law with the judicial system, the contingency fee section, and alternative dispute resolution. It was directed to recommend legislation to "improve the civil justice system as it relates to damages in personal actions".

One again, however, the General Assembly took no action on H. B. 281 or any of the proposed amendments. Opponents and proponents of tort reform retreated to plan next year's maneuvers.

1988: Three Strikes, You're Out(?)

The 1988 session brought the most ambitious tort reform bill yet. Besides the expected onslaught on punitive damages, the collateral source rule and joint and several liability, H.B. 418 also proposed limitations on contingent fees in personal injury actions and repealed comparative negligence. What was also interesting was that, unlike previous years where such bills had not been sponsored until late in the session, H.B. 418 appeared in January -- an indication of the insurance industry's determination to accomplish its agenda.

Any perceived compromise in 1987 on the punitive damages provision was rescinded in the 1988 version. The requirement that the defendant exhibit personal malice toward the plaintiff, present in the 1986 bill, reappeared. The cap on punitive damages was reduced even further so that an award could not exceed the amount of compensatory damages, and the jury was not informed of a cap. Moreover, liability for awards of punitive damages as among multiple defendants was several only.

Once again, H.B. 418 permitted a defendant to introduce evidence of payments received from a collateral source. Interestingly, however, the bill provided an exception for benefits

provided under a collective bargaining agreement. A plaintiff was allowed to proffer evidence that the defendant who introduced collateral source payments had a liability insurance policy, but was again precluded from disclosing the limits of that policy.

Abolition of joint and several liability appeared too, in substantially the same form as in the previous bills. This bill included a new provision preserving joint and several liability for plaintiffs who the trier of fact found to be faultless.

By far, the biggest surprise (although given the proposed amendment to 1987's H.B. 281 it should have been expected) was the provision purporting to establish limits on contingent fees. Under this provision, contingent fees would be restricted to 30% of the first $100,000 of recovery, 20% of the next $100,000, and 10% of the balance. These limits would apply to both settlements and judgments. The proposed sections would allow a plaintiff to contract for an attorney's services on an hourly or per diem basis.

Despite the wailing and teeth gnashing that these provisions inspired, H. B. 418 never made it out of committee. Like the bills before it, the few months' worth of intense argument was academic.

Is Tort Reform Really Necessary in Delaware? A Middle-of-the-Road Proposal

The failure of these tort reform bills raises the question whether tort reform is much ado about nothing. Would the bills sponsored thus far really make any difference if enacted? According to Mr. Redfearn, the beneficial effect on availability of insurance would not be particularly dramatic, and the General Assembly could do little to affect national business cycles with respect to availability. If the insurance crisis was brought on by insurance industry practices, as tort reform opponents contend, *should* the General Assembly bail it out at the expense of those who pay for insurance? Isn't there some way to curb perceived inequities in the tort system without such drastic measures as those proposed in the last three years? If indeed some tort reform is necessary, however, the present system should not be emasculated. In the remainder of this article, I offer some suggestions for tort reform that neither side will embrace wholeheartedly, but with which both sides could live.

Joint and Several Liability

The time-honored rationale for joint and several liability is to ensure that a plaintiff is made whole for his injury. This rationale was appropriate when contributory negligence was the rule. With the advent of comparative negligence, however, the reason for joint and several liability loses much of its force. Everyone realizes the unfairness of requiring a defendant found to be 1% at fault to pay the entire award to a 49% negligent plaintiff. It is equally unfair for a plaintiff who is only 1% at fault to be denied recovery because one of the defendants is insolvent or underinsured. Of course, in real life most cases are not so clear cut, and so a value judgment must be made. Is it fairer for an injured plaintiff to be fully compensated for injuries not caused by his own negligence or for a defendant to be required to pay only for the damage he causes? Unfortunately, there is no right or wrong answer.

If some action must be taken, however, it seems that the fairest method is to retain joint and several liability and to adopt the Uniform Comparative Fault Act. Under the Act, all parties at fault, including the plaintiff, share the burden of a judgment against an uncollectible defendant in proportion to their amount of fault. This is a less drastic alternative to forcing the plaintiff alone to shoulder the uncollectible judgment, as the proposed Delaware bills would do. It also meets some of the reform proponents' claims of unfairness by requiring a negligent plaintiff to bear some of the risk.

The Collateral Source Rule

The justification most often advocated for the collateral source rule is that tortfeasors should not benefit from a plaintiff's foresight in securing insurance for himself. However, in many cases a plaintiff's economic losses are compensated through insurance for which he did not pay directly - for example, workmen's compensation or employer-paid medical benefit plans. Realizing this, insurance companies have begun inserting subrogation

(Continued on next page)

(Much Ado continued)

provisions in their policies to allow them to recover the benefits provided from the injured party's recovery. Given this trend, it does not appear that abrogation of the collateral source rule would accomplish any great reduction in the cost of coverage or result in increased availability. In fact, the insertion of subrogation rights without a corresponding requirement that a verdict or settlement be separated into general and special damages components may actually benefit insurers. A jury may award damages only for noneconomic losses, believing that the plaintiff has already been compensated for lost wages, medical expenses and other economic loss, and an insurer with a right of subrogation can tap that award to recover its payments, thus leaving the plaintiff less than whole.

The increasingly common subrogation right provides a balance to any perceived windfall. Abrogation of the collateral source rules therefore would seem to have at best a negligible impact on insurers under these circumstances. To the extent that it helps to make plaintiffs whole, it should be retained.

Punitive Damages

Part of the problem with punitive damages has been the schizophrenic recitation of the rationales for such damages, which are acceptable in the abstract but often clash with fundamental notions of fairness when applied to real-life situations. Punitive damages have traditionally been justified as both penal (punishing a particular defendant for his action) and as a deterrent to others. All would agree that it is fair to penalize Ford for marketing unsafe cars when the defect could have been remedied cheaply and easily, and that a large award of punitive damages will make other manufacturers think twice before taking similar action. But none would agree that it is fair to impose the full responsibility for punitive damages on a defendant who has been found to bear only some of the fault, even if such an award were intended as a deterrent. The General Assembly could eliminate this unfairness by requiring punitive damages to be assessed in proportion to the defendant's fault. The size of the entire award, if large enough, would have the requisite deterrent effect, and at the same time accomplish the penal purpose.

The class of defendants against whom punitive damages may be assessed, however, should not be as narrow as the 1986 and 1988 bills have proposed. Limiting the class only to defendants who knowingly and personally act with malicious intent toward the *particular* plaintiff would allow large corporate defendants to escape such awards, since they rarely, if ever, personally act towards a particular victim. Rather, punitive damages should be assessable against any defendant where the prerequisites for an award are present.

The failure of these tort reform bills raises the question whether tort reform is much ado about nothing. Would the bills sponsored thus far really make any difference if enacted?

Given that under Delaware law punitive damages must bear a reasonable relationship to the award of compensatory damages, placing a cap on the amount of punitive damages is unnecessary. The trial judge can order remittitur to a reasonable amount if he believes that the award is unreasonable, thus providing another safety net. Moreover, a cap on damages, especially one that limits an award *only* to the amount of compensatory damages, may fail to achieve either punishment or deterrence; it may be perceived as just another cost of doing business.

Requiring separate trials with separate juries for determining a punitive damages award would place a great burden on an already clogged court system. Much of the evidence on which a plaintiff will rely to prove entitlement to such damages will most likely be introduced during a liability trial, and it would be a waste of time and resources to repeat the process. The problem is easily resolved by barring any mention of punitive damages during the trial and instructing the jury at the end of the trial only that the plaintiff is requesting punitive damages and that it may award such damages.

Punitive damages should be awarded only where there is evidence of egregious intentional conduct by the defendant. These damages are designed to punish; that justification is defeated when they are awarded against a defendant who is merely negligent. This is not to say, however, that the defendant has to exhibit personal malice toward the victim. They may also be awarded where a defendant makes a conscious decision to put an entire class of persons at risk. The "preponderance of the evidence" standard should be retained because the requirement that there be some egregious action by the defendant will serve to weed out those defendants whose conduct does not warrant punitive damages. Establishing too high a standard, on the other hand, may permit defendants against whom such an award is justified to slip through the cracks.

Conclusion

No one is going to agree wholeheartedly with the compromise outlined above, but it is unlikely that anyone would fully support any tort reform bill that may ultimately be enacted. As in any proposal, there are flaws in my logic and much room for improvement in this proposal. Nevertheless, I hope that emphasizes what I believe is the most important consideration: each side is going to have to compromise to attain a tort reform bill with which we all can live, because in the end, any bill that passes will affect all of us, not just the presently warring factions.

It will be interesting to see what the 1989 session brings. ■

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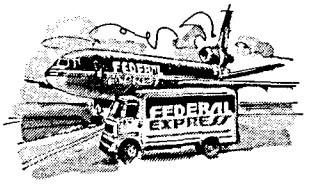

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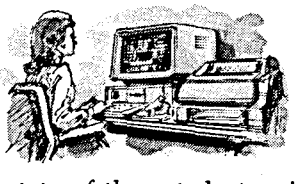

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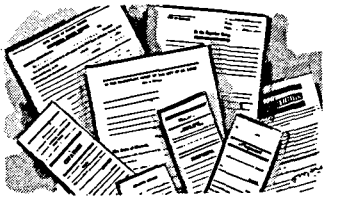

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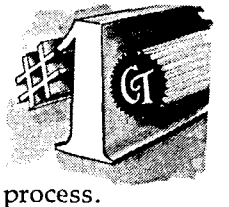

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WILL TORT REFORM AFFECT THE AFFORDABILITY AND AVAILABILITY OF LIABILITY INSURANCE IN DELAWARE

David N. Levinson

Commissioner Levinson, a native of Middletown, Delaware, is an honors graduate of Harvard College and Harvard Law School. As of this writing he is beginning his second four-year term as the Insurance Commissioner of the State of Delaware. He is the Chairman of the National Association of Insurance Commissioners, Northeast zone. He has chaired several of that Association's committees, dealing with such topics as the financial stability of insurers. He is a highly visible and highly articulate authority on insurance practice. This is his first appearance in this magazine.

In the mid-1980's, the availability and cost of certain lines of liability insurance became a major national problem. The so-called "insurance crisis" created tremendous demand from the insurance-buying public to "fix what's wrong". The problem was highlighted in Delaware in early 1985, when the company providing medical malpractice insurance to anesthesiologists practicing in the northern portion of our state elected not to renew the policy. I explained to the company that, although the courage of Delawareans was second to none, our pain threshold was not high enough to support the company's decision. With great effort, coverage was secured, but the problems were only beginning. We began to take action. The Delaware General Assembly passed legislation providing the Insurance Commissioner with short term emergency powers. The Delaware Insurance Department established a Market Assistance Plan (MAP) to secure liability insurance for Delawareans who had made a sincere but unsuccessful effort to secure coverage for themselves. In part because of Delaware's small size, MAP worked remarkably well. There were times when, I believe, an industry member of the MAP Committee would provide coverage just to avoid the train ride from New York to attend a meeting called to locate coverage. Virtually all legitimate requests for liability insurance were met. And Delaware fared better than much of the nation.

In addition various long-term solutions to the liability "insurance crisis" were advanced. The Delaware Liability Lake, a pooling of risk pools to allow for a form of self insurance proposed by the Delaware Insurance Department was eventually passed into law. And "tort reform" was advanced by some as a panacea, while others disputed its worth.

I note at the outset that this debate, often controversial and with neither side eager to compromise, is couched in terms of "reform", not "change". Clearly change in compensating victims of tortious conduct is a serious economic and social issue. And whether we are evaluating true "reform" or simple "change" is a matter of viewpoint. However, since the term "tort reform" is in widespread use, I will use it to refer to the current controversy.

Much of the debate has skirted the real issue. Are tort reform and the cost and availability of insurance interrelated? Can changes, if enacted, be monitored so as to determine whether they indeed alleviate the "insurance crisis"? Tort reform, especially in Delaware, is more a social than an insurance issue. Unfortunately the Delaware insurance-buying public faces the worst of all possible worlds. Delaware has a large number of automobiles to insure and, therefore, a high level of actuarial credibility in automobile insurance rates, where Delaware loss ratios are high. However, in governmental and commercial liability insurance lines, Delaware loss ratios are low, but Delaware has too few insured in these lines of insurance and low actuarial credibility.

Insurers measure the profitability of a line of insurance and assess their willingness to write that line and at what price by actuarially credible "loss ratios". Delaware loss ratios (the percentage of dollars paid in claims divided by premiums collected) compared to national loss ratios differ greatly by line of insurance. The latest statistics available[1] (1986) show that Delaware had the nation's seventh lowest loss ratio for general liability insurance (51.6%), yet the highest for automobile liability insurance (91.8%)[2]. *Actual* loss experience in Delaware for general liability insurance has had a minor impact on Delaware rates. For example, over a six year period (1980-1985) Delaware day care centers had an average loss ratio of 50.8%[3]. However, commercial insurers will not base Delaware insurance rates on our actual experience, because there are insufficient numbers of day care centers to make an actuarially credible rate. Thus, Delaware's day care centers are in-

cluded in the national loss experience, and Delaware in effect "subsidizes" the poorer experience of other states. Since the Delaware experience has been virtually irrelevant in setting Delaware rates, tort reform would not substantially affect Delaware rates.

While the number of day care centers and other commercial and governmental lines are numerically insufficient to make Delaware- based rates and thus take advantage of our low loss ratio in these lines of business, the number of motor vehicles registered in Delaware (543,000 in 1988)[4] makes possible a rate based on the unfavorably high loss ratio experience in Delaware. It is obvious from the 91.8% automobile loss ratio previously cited that the one area in which tort reform may help to reduce rate increases in Delaware is in auto insurance. To that end, the Insurance Department, with input from leading automobile insurers, is experimenting with creative responses, such as a "sticker bill" requiring proof of insurance to be displayed on each vehicle, mild tort reform (which we hope will reflect a consensus or compromise position), and various other technical adjustments.

During 1987, the Insurance Department had developed and introduced into the General Assembly a series of seven bills designed to reduce claims. Each bill included a future credit for consumers resulting from the reduction in claims costs that this legislation would produce. Included in the package was House Bill 348, which would have required a verbal threshold for litigation arising from motor vehicle accidents. (A "verbal threshold" sets minimum standards for the type of injury incurred to initiate litigation.) This proposal was prompted by studies finding that tort thresholds are effective in reducing litigation.[5] Modest tort thresholds may reduce the number of successful tort claims by half, and the strictest thresholds may exclude even more potential claimants. Our proposed legislation does not impose a fixed dollar threshold. Such thresholds may induce claimants in a no-fault state such as Delaware to inflate their medical expenses through needless treatment. Moreover our proposed legislation tempers the usual verbal threshold language and is designed as a compromise position.

Another of our proposals, designed to moderate future increases in automobile insurance rates, and dubbed "Rolling Thunder" by a respected Delaware plaintiff's attorney, represents a compromise on the limitation of joint and several liability. Under our proposal, if a jury were to find a "deep pocket" defendant's negligence responsible for 10% or less of the damages, the maximum recovery from that defendant could not exceed the actual percentage of negligence assessed. Further, if a jury were to find such a defendant between 11% and 20% negligent, the percentage of liability assessed above 10% would be multiplied by a factor of 1.5. Thus, if a "deep pocket" defendant were found 20% liable, the maximum recovery allowed against that defendant would be 25%. If such a defendant were found between 21% and 40% negligent, a multiplying factor on the incremental liability above 20% of 2.0 would be used. Thus, if such a defendant were found 40% negligent the maximum recovery would be 65% against that defendant. If such a defendant were found over 40% negligent, a multiplying factor on the incremental liability above 40% of 2.5 would be used, but the total allowable recovery would not exceed 100%.

Tort reform, especially in Delaware, is a social issue rather than an insurance issue

"Rolling Thunder"
Maximum Contribution
By A "Deep Pocket"

Liability Assessed	Defendant
10%	10%
20%	25%
30%	45%
40%	65%
50%	90%
54% and over	100%

(Continued on next page)

(Levinson continued)

The advantage of this compromise solution is that it protects the "deep pocket" from frivolous suits requiring large settlements resulting from the fear that a minimal percentage of fault finding by a jury will result in total payment, yet it permits injured parties to be fully compensated by "deep pockets" substantially at fault.

Until July, 1988, adoption of tort reform legislation could have had little or no impact on general liability insurance in Delaware. As previously noted, the Delaware experience in those lines of insurance has been of minimal consideration in establishing Delaware rates. However, as of that date, a Delaware Insurance Department proposal was signed into law, creating what I call the Delaware "liability lake", which would establish a "pooling of risk pools" arrangement for Delaware governmental and some commercial liability insurance lines. The lake's initial capital and surplus provided would be from the issuance of revenue bonds. The total exposure base could thereby be broadened, creating large enough numbers to produce high actuarial credibility for rating purposes and permitting rates to be based largely on Delaware experience. The creation of the "liability lake" could make tort reform relevant to the rates paid for governmental and commercial liability insurance.

A proposal to "cap" punitive damages is also pertinent to liability insurance rates. Some believe that the present system of awarding punitive damages to a single claimant is inherently unfair, since the claimant is often compensated for injuries the defendant has inflicted on society generally. To save a relatively small amount of money Ford marketed a vehicle, the "Pinto", with an inherent defect. A jury decided that Ford should be punished, with the result that of the "flaming Pinto" plaintiff received a punitive award, which did nothing to make amends to siciety as a whole.

An effective element in a compromise proposal might preserve the disincentive punitive damages impose upon those who would introduce harmful products into the market place while tempering the chilling effect the threat of punitive damages has, on the introduction of new products or on doctors who accept high-risk patients. Such a compromise might divide awards for punitive damages into two layers; primary and secondary. Primary punitive damages would be payable only to a plaintiff and his attorney and would be capped at a fixed dollar figure. The remainder of the award (secondary punitive damages) would be divided. The plaintiff and his counsel would receive a limited percentage and the balance would go to a fund to protect the health and safety of Delawareans. Since a jury could award substantial punitive damages, this proposal would continue to provide a disincentive for irresponsible behavior. However, it also would reduce the plaintiff's economic incentive to invest in the aggressive pursuit of an excessive and unreasonable award.

The key to assessing the effect of tort reform is data collection, but neither the insurance companies nor the insurance regulators have maintained the information necessary to illuminate the tort reform debate. In 1986, the Delaware legislature adopted a financial disclosure mandate, which requires insurers to submit a wide range of data for the prior ten year period. The legislation requires information on the amount of reserves and the number of claims closed with payment by line of insurance, and the amount of reserves and the number of claims closed without payment. Delaware is one of twenty-seven states that requires some type of detailed financial reporting.[6]

The initial data collection has been disappointing. The Department found numerous coding errors. (Insurers used the wrong codes to identify particular lines of insurance and the location of the risk.) But the primary problem has been that insurers have not kept records to produce useful information under the means of collating mandated by the legislation. The data collected have proved to be virtually useless. The solution is the adoption of nationwide financial disclosure guidelines instead of the varied laws now in effect. Standardized coding and reporting should generate data for all states, which are both reliable for assessing the economic impact of tort reforms and less costly for insurers to maintain.

As a final note, I suggest to the participants in the tort reform battle consider that the state would be better served by reasonable compromise. The need for tort reform of the kind proposed by legislation already introduced clearly lacks a consensus in the Delaware legislature. Several years of effort have failed to result in the enactment of even the simplest kind of reform. Moreover, even if such efforts had been successful, the passage of tort reform bills by one or two votes are subject to repeal by subsequent legislatures and governors, would create an unstable operating environment beneficial to none. Enormous amounts of legislative time have been spent during the last several years on the tort reform battle to the detriment of other pressing state concerns.

It is clear to me that both the proponents and opponents of tort reform in Delaware are people of good will, attentive to their vision of Delaware's best interests. I hope that they will soon resolve to compromise, at least temporarily, their differences and let enough time pass to determine the effect that their compromise may have on Delaware's social and insurance environment in Delaware. ■

1. *Bests Insurance Management Reports,* "General Liability and Medical Malpractice Insurance Marketing, 1986, dated September 7, 1987

2. Bests Insurance Management *Reports,* "Total Auto Insurance Premium Distribution and Leading Writers By State", dated August 10, 1987

3. Insurance Services Office Report - General Liability Insurance Day Nurseries Monoline and Package Business, dated July 21, 1988

4. Report from State of Delaware, Division of Motor Vehicles Audit Section, Registered Vehicles as of April 1, 1988

5. Institute for Civil Justice "Limiting Liability for Automobile Accidents: Are No Fault Tort Thresholds Effective?", #N-2418-1C5, October 1985

6. National Conference of State Legislatures, "State Legislatures and Tort Reform", 1986 and 1987, dated December 31, 1987.

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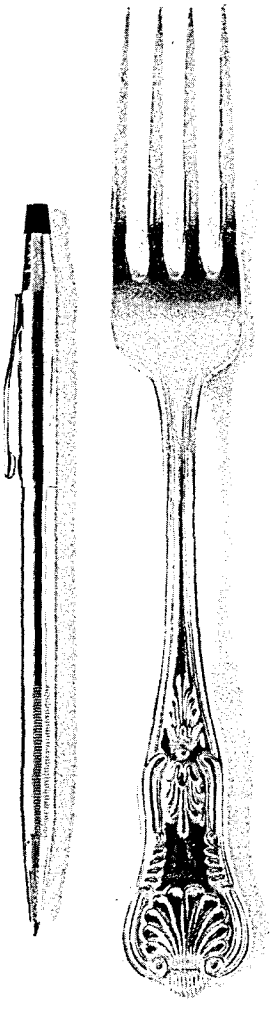

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FROM LITIGATION TO ARBITRATION: *HOW TO SIMPLIFY A LAW SUIT*

Victor F. Battaglia
and
Francis S. Babiarz

Ben Castle and Victor Battaglia have agreed to serve as legal advisors to a mythical patient, "I. M. Neurotic", who has just seen Dr. Harvey ("The undertaker is my best friend") Crippen regarding an operation. Crippen has cagily suggested the arbitration agreement reprinted at page 24 and discussed in this article. Mr. Neurotic has sought the opinion of these two respected lawyers to assist him in deciding whether to enter into this arbitration agreement.

"SIMPLIFY, SIMPLIFY" - HENRY DAVID THOREAU WALDEN

In September, 1977, a former mental patient deliberately ran his car into another vehicle and killed the driver. The mental patient had a long history of psychotic episodes, and in March of that year he had been admitted to the Delaware State Hospital. Fifteen days after his admission, he was released.

In 1979, the widow of the driver sued 3 psychiatrists on the hospital's staff for failure to exercise reasonable care in the treatment and discharge of the patient. In 1986, 7 years after suit, a Superior Court jury awarded the plaintiff damages in the amount of $1. 4 million against one of the psychiatrists and exonerated the other two. In April, 1988, almost 11 years after the incident, the Delaware Supreme Court affirmed that verdict.[1]

Unfortunately, such time periods will be common as long as litigants rely on a complicated and increasingly burdened court system to resolve their disputes. Injured patients with valid claims must endure years of waiting before being properly compensated, while blameless doctors must also wait to be vindicated.

Each side bears an enormous burden of emotional turmoil during a prolonged period of indecision, but even after the seeming climax of a jury verdict, the dispute may still languish during the appellate process.

The constantly lengthening docket in the Superior Court and the complexities inherent in traditional litigation combine to produce this result. The average time for disposition of a civil case following the filing of a complaint in New Castle County has increased from 901 days in 1981 to over 1227 days in 1987. During that same period, filings increased by 22%.[2] No figures are available for the average time between filing and disposition of medical liability cases.

In addition, court rules often encourage expensive, time consuming, and many times fruitless procedural maneuvers. A litigant with an unlimited opportunity to explore every factual nuance will be inclined to make maximum use of every discovery device available to insure that nothing has been overlooked. Motions for summary judgment consume further time and effort; the formalities of trial presentation lengthen courtroom time, and then comes the appeal.

Litigating through the court system today has perhaps become the rough equivalent of a death followed by an elaborate funeral ceremony with burial many years later.

The need for a better way is obvious, and the contractual relationship between doctor and patient offers a solution unavailable in many other types of cases. Because that relationship is grounded in a contract, the parties can use arbitration to simplify the procedure for resolving their dispute and thereby reduce the cost of the entire process.

The Delaware Uniform Arbitration Act,[3] provides that a written agreement to submit to arbitration any controversy arising after the effective date of the agreement is valid, enforceable, and irrevocable.[4] The statute specifies certain minimum procedures for the arbitration hearing and defines the relationship between the judicial system and the arbitration process.

In accord with this statute, Delaware courts have consistently favored arbitration. *Pettinaro Construction Company v. Harry C. Partridge Company,*[5] ruled that this statute reflected a policy designed to discourage court litigation, to permit parties to resolve their disputes in a specialized forum more likely conversant with their needs, and to provide for the speedy resolution of disputes. It is, therefore, public policy of the state to enforce arbitration agreements. Similarly, in *Falcon Steel Company v. Weber Engineering,*[6] the court held that any doubts were to be resolved in favor of arbitration, and a court could determine only whether a claim was arbitrable.

(Continued on page 22)

WHY YOU SHOULD NOT AGREE TO BINDING ARBITRATION

Ben T. Castle

Dear Mr. Neurotic:

For a number of reasons I strongly advise you not to sign the agreement and, if the surgeon insists on your entering into the agreement as a condition to submitting to the surgery, I advise you to look elsewhere for the necessary medical care.

First, you are giving up the valuable procedural rights and protections available to you (or your survivors) in the civil justice system if there should be a problem. The court system assures a methodical procedure to uncover facts and to gather them in an orderly and persistent way. If the information is not forthcoming, then it can be compelled by subpoena or court order. But why is this important if the medical records are prepared at the time of the surgery and they tell the "story"?

The operation will involve many participants, including the anesthesia team, resident physicians assisting the surgeon, or even physician assistants working with the surgeon, and nursing personnel in the operating room and the recovery room and during the post-operative recovery period. There will be lab studies, x-rays taken and read, and medications administered. In short, there will be many opportunities for many people to make mistakes that could have very serious consequences.

Throughout the entire operation and during some portion of the recovery time you will be totally unaware of what is going on, and will have no input whatsoever into what is entered on your medical records and charts. Health care providers, like the rest of us, are not famous for openly acknowledging their errors in documented records. If something does go wrong, which may or may not constitute negligence, it is unlikely to be advertised in the medical records.

Given that landscape, if there has been an unfortunate outcome, it is going to be necessary for you to probe in order to find out exactly what occurred. Sometimes this may be accomplished by discussing the matter directly with the surgeon but in my experience that does not usually prove to be very fruitful. Therefore, if there has been suspected negligence and the accounting for it is not apparent from the records or forthcoming in the course of voluntary conversations, the only avenue remaining would be to delve into this through formal discovery as part of a lawsuit. The support and enforcement power of the court would be available to compel witnesses to attend depositions and to compel the production of various documents and records, which may be important but which are not a part of the hospital chart itself. The arbitration agreement, on the other hand, would shut the door on these remedies and you would be stuck with the bare medical record prepared by the potential defendant. More often than not a victim of malpractice pressing a claim in arbitration would likely find himself in a situation in which the arbitrators might "suspect" that negligence had been committed but be faced with an inability on the part of the patient to prove it solely on the records and his expert's interpretation of those records. Why should a victim of substandard care give up the right to find out what happened to him, and thus forfeit a valid claim?

Despite its complexities, awkwardness and time-consuming pace, the jury nevertheless remains the most significant protector of individual rights and liberties anywhere in the world.

A second major and fundamental reason why I advise against arbitration is that the decision in the case will be made by a panel of three, one chosen by each side and the third by the first two. No matter how conscientious or how well trained (and there is no assurance arbitrators will be either), it is still submitting the patient's entire case to the unfettered discretion of a single panel, one member of which is the hand-picked candidate of the opposition. "'I'll be judge, I'll be jury', said cunning old Fury; 'I'll try the whole cause, and condemn you to death.'"

In cases of paralysis, other devastating permanent injury, or death it is extremely risky to leave the burden of a final decision to a select group. The jury system provides for the common assessment and judgment of either six or twelve men and women selected from diverse backgrounds with multiple points of view. Despite its complexities, awkwardness and time-consuming pace, the jury nevertheless remains the most significant protector of individual rights and liber-

(Continued on next page)

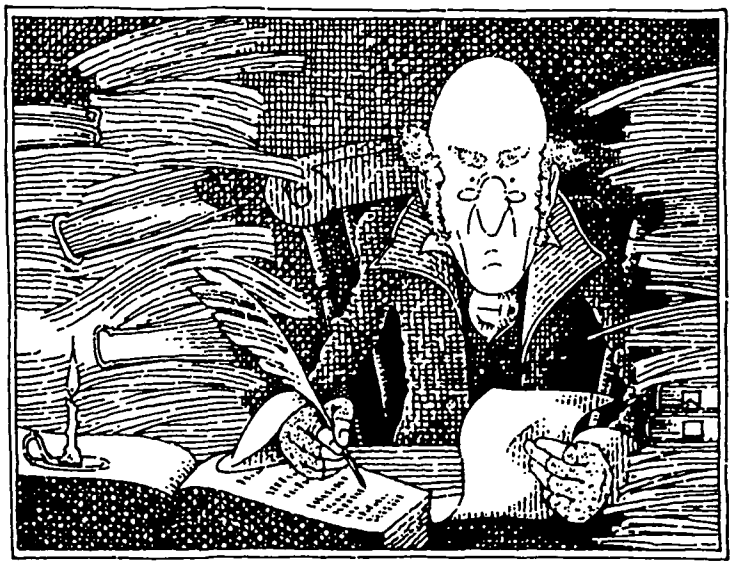
(Castle continued)

ties anywhere in the world. To give up the right to avail yourself of that kind of protection from the exercise of arbitrary power requires something extremely valuable in return. What is being offered?

Speedy determination, they say. It is probably true that an arbitration procedure is likely to be quicker, and while justice delayed is justice denied. a hasty and incomplete proceeding is usually injustice. The arbitration procedure would move rather quickly from the time the dispute or controversy first arises to the selection of an expert and to submission of the medical records and expert testimony to an arbitrator and the rendition of a decision. It would not be unrealistic to think that that could be accomplished within four to six months. There is no guarantee, however, that things would move that quickly, and many lawyers can describe arbitration procedures (usually in the construction industry) in which complex presentations, a number of different participants, and years of arbitrating prior to a final decision. It is true that, barring the unusual, the arbitration procedure should move more quickly. But that carrot is not so tempting that patients should relinquish basic rights to discover all of the pertinent facts and to have a jury determine their case.

In my experience when a medical negligence dispute has arisen and the matter has reached the law suit stage, no health care provider has suggested a voluntary non-binding arbitration in an effort to resolve the matter. Rather, the typical response by the defense team of physician, hospital, insurance company, and defense counsel, has been to resist the claim as long and vigorously as possible. As one defense lawyer says, "Make the plaintiff jump every hurdle and cross every ditch." It would be extremely naive to expect a different approach under the guise of "binding fair arbitration", and in that setting a negligently injured patient would only have lost some of the fundamental protections available to other victims of misconduct. ■

Mr. Castle, a member of the firm of Young, Conaway, Stargatt & Taylor, is a highly accomplished litigator with a distinguished practice in personal injury, medical malpractice, and other branches of tort law.



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(Battaglia-Babiarz continued)

Although arbitration has not generally been used in medical cases, the mechanism has a long history of use in other disputes. Perhaps every collective bargaining agreement has an arbitration clause, as do many building construction contracts. Arbitration provisions are also common in stockbroker agreements as well.[7]

Moreover, arbitration of medical claims has been used in other jurisdictions with generally favorable results. A study conducted in California in the 1970's, for example, suggests that arbitration produced faster resolution of claims and lower processing costs than comparable claims resolved in the court system.[8]

Delaware's experience with court annexed arbitration under Superior Court Civil Rule 16(c) has likewise been favorable. From the inception of the program in September 1984 through June 1987, 1,180 arbitration hearings produced only 14 court trials. The arbitration program has achieved an early disposition of civil cases with resulting savings in time and costs to both the litigants and the court.[9]

With this experience as a guide, an arbitration agreement was developed for use in the doctor/patient context.[10]

The agreement was specifically designed to dispose of disputes fairly, promptly, and more economically than currently occurs without affecting the substantive rights of either party. The goal was to devise a simplified procedure that would benefit both plaintiffs and defendants equally, giving no advantage to either, while maintaining all existing substantive rights of each.

The agreement is bilateral. At the inception of their relationship, doctor and patient agree that each will use the arbitration procedure delineated in the agreement rather than the courts to resolve any dispute between them.

The centerpiece of the procedure is an arbitrator selection process that allows the parties themselves to create the arbitration panel. The plaintiff selects an arbitrator; the defendant selects an arbitrator, and those two arbitrators then select the third. If the two arbitrators selected by the parties are unable to select the third, then the Chancery Court is empowered to do so under 10 **Del.C.** §5704.

Significantly, no limitation exists on the arbitrator that each party may select. In most cases, however, the parties will likely choose as "their" arbitrator a person knowledgeable about such cases. Thus, claimants would probably select lawyers with expertise in handling plaintiffs' claims; while, defendants should likewise select lawyers skilled in defending such cases. In effect, each party will have a sympathetic person in the "jury" room.

These party-selected arbitrators, in turn, will choose a third person whose judgment and integrity they both trust. In this way the selection process is equitable.

Indeed, to the extent that lawyers are picked as arbitrators, the system relies on a proud tradition of the Delaware Bar. Delaware lawyers have traditionally put the administration of justice above all other interests, and without question, they will carry out their duties with fidelity, honesty, and integrity.

Moreover, with lawyers as the arbitrators, advocates will not have to spend time on basic matters that require careful instruction of a jury. For example, experienced attorneys already understand how to evaluate circumstantial evidence and apply the burden of proof. Advocates and arbitrators can thus dispense with many of the complex formalities inherent in a traditional trial and focus their attention on the core issues of a case. This will reduce both preparation and presentation time.

Litigating through the court system today has perhaps become the rough equivalent of a death followed by an elaborate funeral ceremony with burial many years later.

In addition, the procedure has been deliberately simplified to produce a quick result at minimum cost and stress.

Each side has the same discovery rights, but these have been abbreviated. Each party consents to the other examining all relevant and unprivileged documents. If a party's physical or mental condition is an issue, that party consents to a medical examination by a physician selected by the other party. While the agreement does not provide for depositions, they are not precluded. The parties may take depositions by agreement, and they can informally interview anyone willing to talk to them.

The parties exchange a list of witnesses and evidence 50 days before the hearing, which is to be scheduled between 60 and 180 days from the appointment of the third, a neutral, arbitrator. Exceptions to the time limits are available by consent of both parties.

This means that parties will obtain a definite date for a hearing with knowledge that the case will not be rescheduled on the morning of trial because no judge or courtroom is available.

Since the attorneys must prepare for the arbitration hearing quickly, they will be forced to evaluate the strength and weaknesses of their case much more quickly and make determinations necessary for settlement negotiations.[11] Obviously, with the prospect of a final hearing occurring approximately six months after filing, realistic negotiations will take place in short order.

At the hearing the arbitrators consider all relevant evidence not subject to a privilege that possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. This, or course, is the same basic standard used in Superior Court Civil Rule 16(c). Experience under Rule 16 confirms that the time devoted to prehearing preparation and the hearing itself is much less. This benefits not only attorneys, but also clients who must sacrifice time for such matters.

Most significantly, the agreement states that the parties may assert at the hearing any claim or defense available to them in a court of law. Thus all substantive rights are explicitly preserved.

The agreement also contains an "escape" clause. The agreement continues until the patient delivers a written revocation to the doctor. All claims related to events occurring before revocation, however, remain subject to arbitration.

(Continued on page 24)

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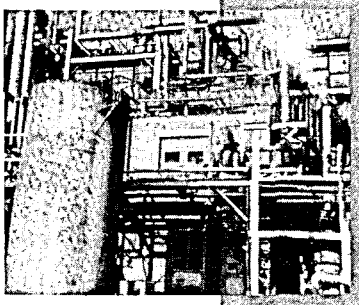

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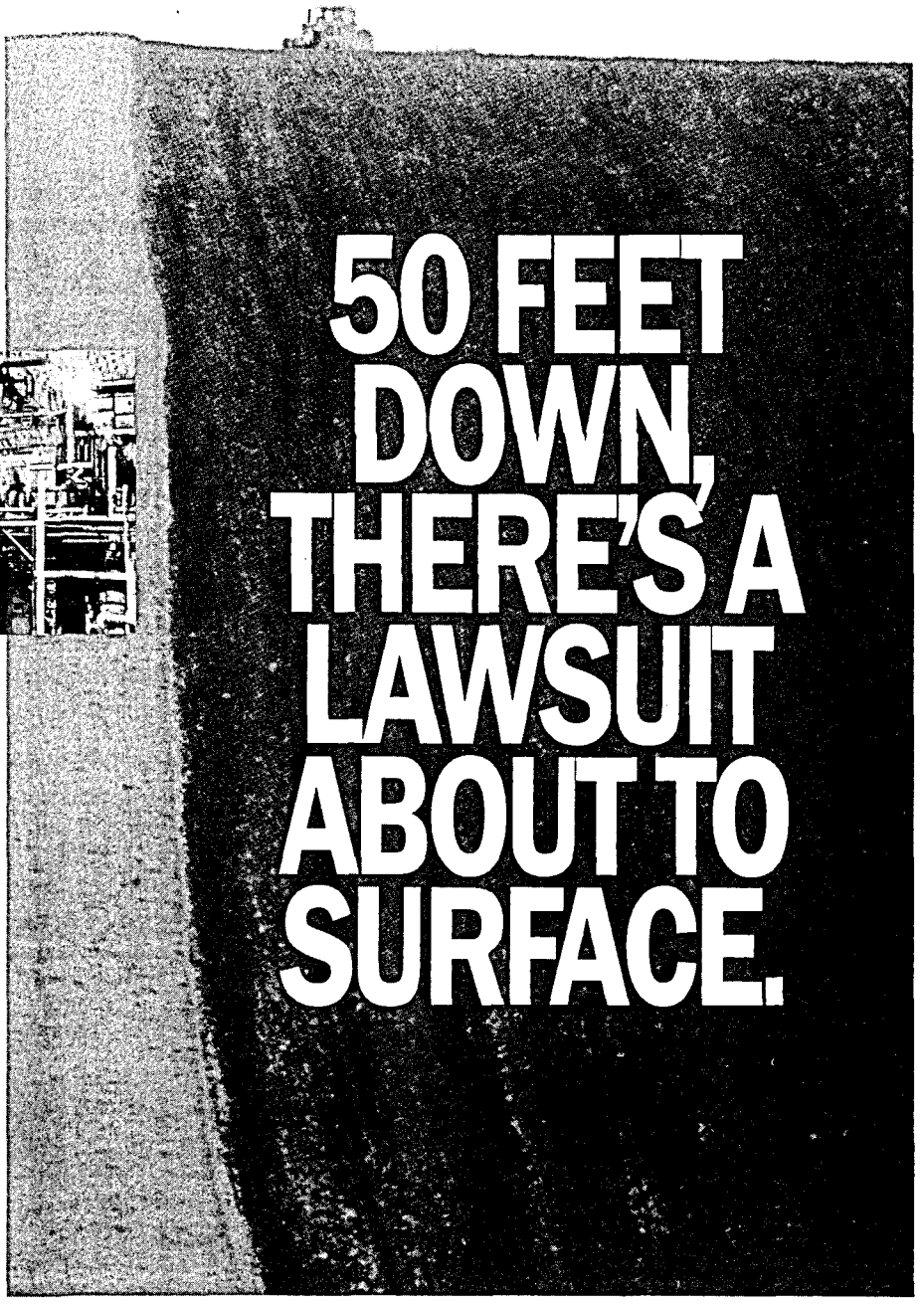

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(Battaglia-Babiarz continued)

Furthermore, these procedures compare favorably with actual experience under Superior Court Arbitration Program. In a report on attorneys' attitudes towards that program, one frequent comment was the need for some type of brief discovery. Specifically, attorneys in personal injury cases wanted to have the plaintiff's medical records before the arbitration hearing. Another criticism was that many arbitrators were not familiar with the value of personal injury cases. Accordingly, lawyers wanted arbitrators experienced in the type of matter at issue. On the other hand, attorneys viewed the expeditious disposition of a case as arbitration's most important benefit, and thought that the arbitration process worked only if both sides believed they should "take their best shot."[12].

The ultimate goal, of course, is to resolve a dispute on its merits with fairness, speed, and economy. A decision rendered by three experienced attorneys, or other arbitrators selected by the parties themselves, cannot be seen as either more suspect or less fair than a traditional jury verdict. At the same time, the procedure has been specifically designed to expedite the resolution of the dispute. This provides a distinct advantage currently unavailable to litigants.

Very simply, this arbitration procedure preserves every substantive right of every party, but cuts through the procedural maze of regular litigation. It requires that everyone in a dispute work quickly to resolve it on the merits. It provides the parties with the basic information they need to evaluate and present their case, but by simplifying the procedure, it eliminates the expense, frustration, and pains currently unavoidable in traditional litigation.

These benefits cannot be ignored, and anyone advising a client should recommend agreement to this procedure.

RE: *MEDICAL ARBITRATION AGREEMENT*

Dear Mr. Neurotic:

You have asked our opinion regarding whether you should enter the arbitration agreement that Dr. Crippen has given you. We are already familiar with this agreement, and in fact, are responsible for drafting it at the request of another client, the Medical Society of Delaware.

Arbitration is a mechanism for the resolution of disputes outside the court system. It is governed by a contract that specifies the procedure to be used for the resolution of a dispute. Such contracts are specifically authorized under Delaware law.

In drafting this agreement, we took great effort to insure that its procedure benefited both parties equally and gave neither side any advantage.

If you enter this agreement, both you and Dr. Crippen give up your rights to have any dispute between you determined by a jury. Instead, the case will be decided by a panel of three arbitrators. You will have the opportunity to select one of those arbitrators; Dr. Crippen will likewise select one, and those two arbitrators will then select a third.

If a dispute develops, we suggest that you select as "your" arbitrator an attorney who specializes in handling plaintiffs' claims. You may wish to consider appointing Ben T. Castle, Esquire, or one of the many other fine lawyers with experience in litigating for plaintiffs.

Significantly, the contract provides that both parties retain the right to present in the arbitration hearing all claims and defenses that could be raised in a regular law suit. This means that neither party is surrendering any substantive right. Under these circumstances, a decision rendered by this arbitration panel should be consistent with a jury verdict.

Moreover, unless you and Dr. Crippen agree to extend the time period, your case will be heard within six months from the appointment of the arbitrator.

Unfortunately, because of the current backlog in the Superior Court, any jury determination would likely occur years after suit was filed. Furthermore, the technicalities of such a trial require much greater effort, and hence expense, than is needed in an arbitration proceeding under the agreement. In this regard, our experience with non-binding arbitration in Superior Court confirms that the time and expense of an arbitration proceeding are much less. Indeed, this Superior Court program has worked very well in resolving cases to which it applies.

In sum, the benefits of the arbitration procedure that has been proposed to you are as follows:

1.You have a direct voice in the selection of one of the arbitrators, and an indirect voice in the selection of another.

2.The proceeding will resolve your case much more quickly. The therapeutic effect of a quick resolution of a case contrasts dramatically with the trauma inherent in waiting years for a final decision.

3 The scheduling of the hearing will be much easier. The time of the hearing will not depend on a busy court docket, but can even accommodate your own scheduling preference.

4.The case can be heard less expensively.

5.The case will be heard in private. This means that your personal medical problems will not be published in the newspapers or exposed to the morbid interest of court room spectators.

For these reasons, we recommend that you sign the agreement. We will be happy to discuss this matter with you in further detail at any time.

Very truly yours,

VICTOR F. BATTAGLIA

VFB/mlm

AGREEMENT TO RESOLVE ALL CLAIMS AND DISPUTES BY ARBITRATION

(Print Name Here) (hereafter "patient" and_____, M. D. on his own behalf and as agent for _____, P. A. (hereafter collectively "doctor") hereby agree to resolve by final and binding arbitration all claims and disputes in any way arising out of the doctor's medical treatment or diagnosis of the patient, including all disputes involving the doctor's fees and all claims alleging malpractice on the part of the doctor.

A person shall initiate arbitration by sending the other party to the claims or dispute a written demand for arbitration that identifies the issues to be arbitrated. A person must send the demand for arbitration within the time

specified by the applicable statute of limitations governing the claim or dispute.

Within 30 days after the demand is sent, each party shall appoint an arbitrator and give notice of that appointment to the other party. Within 30 days after the second arbitrator has been appointed, the two arbitrators shall select a neutral arbitrator and give notice of the selection to the parties. If a neutral arbitrator cannot be selected within that time period, the person initiating the arbitration shall apply to the Court of Chancery of the State of Delaware for an appointment of the neutral arbitrator pursuant to 10 **Del.C.** §5704.

Not less than 60 days nor more than 180 days from the appointment of the neutral arbitrator, a hearing shall be held on the claim or dispute on a date set by agreement of the parties. At least 50 days prior to the hearing, the parties shall exchange a list of witnesses and other evidence that each party will present at the hearing. Each party consents to the other party examining all documents and records not subject to a privilege relating to the issues to be arbitrated, and if a party's physical or mental condition is in issue, that party also consents to a medical examination by a physician selected by the other party.

At the hearing, the arbitrators shall consider all relevant evidence not subject to a privilege that possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. Upon the request of either party, the arbitrators shall decide by a majority vote any procedural issue related to the hearing. The parties may assert at the hearing any claim or defense available to them in a court of law. The hearing shall not be open to the public.

Within 30 days after the conclusion of the hearing, the arbitrators shall decide the claim or dispute by a majority vote. The decision of the arbitrators shall be final and binding.

The time periods specified in this agreement may be changed at any time by mutual agreement of the parties. This agreement and all resulting arbitration decisions may be specifically enforced and shall be governed by the laws of the State of Delaware, including the Delaware Uniform Arbitration Act, 10 **Del.C.** Chapter 57 and 18 **Del.C.** Ch. 68 except Sections 6802 through 6814.

This agreement and all resulting arbitration decisions shall be binding upon the patient, the doctor and all persons related to them with a claim or dispute described in this agreement, including spouses, children (whether born or unborn), personal representatives, estates, heirs, successors and assigns. As used in this agreement, "person" includes individuals, partnerships, corporations, proprietorships and professional association. If any term, provision or application of this agreement shall be invalid or unenforceable, all remaining terms, provisions and applications shall not be affected, but shall remain valid and enforceable.

This agreement shall continue in effect until the patient delivers a written revocation to the doctor. This agreement shall continue to apply, however, to all claims and disputes described in this agreement related to any event occurring prior to the revocation.

By signing this agreement, the patient and the doctor specifically recognize and agree that they each waive all their rights to have a court decide all claims and disputes in any way arising out of the doctor's medical treatment or diagnosis of the patient, including all disputes involving the doctor's fees and all claims alleging malpractice on the part of the doctor, and further that no person bound by this agreement shall have any right to a

(Continued on page 26)

Mr. Battaglia, a former President of Delaware State Bar Association and Chairman of the Board of Directors of Delaware Bar Foundation, is an occasional contributor to this magazine.

Mr. Battaglia's collaborator, Francis Babiarz is associated with him in the practice of law at the firm of Biggs & Battaglia where he specializes in commercial litigation. Mr. Babiarz is a Phi Beta Kappa graduate of the University of Delaware. In addition he holds a law degree from the University of Michigan and an LLM in taxation from Temple University. He is the third member of his family to be a contributor to this magazine. His father, former Wilmington Mayor John E. Babiarz, and his brother, The Honorable John E. Babiarz, Jr., have both written for DELAWARE LAWYER.

(Battaglia-Babiarz continued)

trial by jury with respect to the claims and disputes governed by this agreement.

THIS AGREEMENT GOVERNS IMPORTANT LEGAL RIGHTS. BOTH PATIENT AND DOCTOR AGREE THAT THEY FULLY UNDERSTAND THE TERMS CONTAINED IN THIS AGREEMENT AND VOLUNTARILY AGREE TO BE BOUND BY THOSE TERMS. THIS AGREEMENT IS EXECUTED IN DUPLICATE WITH PATIENT AND DOCTOR EACH RETAINING AN ORIGINAL COPY.

_____
Witness

_____
Date

_____
Patient (Seal)

_____
Witness

_____
Date

_____
Doctor (Seal)

(Name of Professional Assocociation)

_____
Witness

_____
Date

BY:_____
Doctor

(c)Biggs and Battaglia

1 See *Naidu v. Laird*, Del.Supr., 534, A.2d 1064 (1988), and *Laird v. Buckley*, Del.Supr., 534 A.2d 1076 (1988).

2 Draft Report to the 134th General Assembly on the Superior Court p.2.

3 10 **Del.C.** Ch. 57

4 10 **Del.C.** §5701

5 Del.Ch., 408 A.2d. 957 (1979)

6 Del.Ch., 517 A.2d, 281 (1986)

7 See *Shearson/American Express, Inc. v. McNulty*, 96 L.Ed.2d 185 (1987)

8 Heintz, *Medical Malpractice Arbitration: A Viable Alternative*; The Arbitration Journal vol. 34, no. 4, pps. 15-18.

9 Arbitration Program 1987 Annual Report, pp.8-9.

10 This task was undertaken at the request of the Medical Society of Delaware.

11 See Arbitration Program 1987 Annual Report p.1.

12 Favata, *Success or Failure: A Study of Attorney's Attitudes Towards Court Ordered Arbitration in Delaware*. pp.21-24; Appendix D to Arbitration Program 1987 Annual Report.

MALPRACTICE AND THE PRACTICING PHYSICIAN

Martin J. Cosgrove, M.D.

My responsibility as a physician is to do all that I can to return my patients to good health. Usually there is a cure or recovery. Unfortunately, despite the best medical care and treatment, restoration to good health does not always occur. When that happens, increasingly the patient, his family, or both become critical of my efforts.

The successfully treated patient gives thanks to God and to me. When the treatment is unsuccessful, only I get taken to court. No one is more concerned or saddened when a poor result occurs than the physician who has done all within his power to treat. More and more that disappointment is only the beginning of the grief and pain the physician must suffer.

I see many different patients each day. It is important that I be at my best in order to provide quality treatment or diagnosis. Imagine, if you will, the stress of quite literally life or death decisions, together with the difficulty of dealing with federal health regulations attempting to ration or even deny health care to my patients impose another great burden and further increase the already stressful situation of the practicing physician. There is the seemingly interminable malpractice litigation process and the accompanying challenge to the physician's competency.

In the medical profession we constantly search for new and better medications and more effective treatment modalities. Certain forms of malignancy and leukemia that were almost invariably fatal 25 years ago are often curable today. Two weeks in the hospital were once routine for gall bladder operations. Now patients are frequently discharged 48 hours following surgery. When most of us were born, a 10-day hospital stay for mother and infant was routine. Today the standard is less than 2 days of hospitalization.

The medical profession is not, however, able to improve the litigation process. This is a subject within the expertise of the legal profession. We know, however, that the cost of litigation has exploded. Time required to dispose of medical cases has lengthened. Demands upon the parties to litigation have become greater. Some doctors have been defendants in cases that pend for 10 or 11 years.

Controversy over tort reform is taken up by shrill voices on both sides of the issue. Proponents and opponents have locked horns so that little or no change appears in the law.

As President of the Medical Society of the State of Delaware, representing the physicians of our community, I call upon the legal profession to improve the procedures that keep us litigating for years and years -- to look at new methods that will allow me to spend more time in my office treating people and less time in court. Let us keep looking for an ultimate solution to the malpractice problem. We in the medical profession will do all we can to eliminate malpractice. But as we search for the practice of medicine without error, please help us by improving the legal procedures to which we are subject in malpractice liability determination. A case that drags on for 10 years adversely affects 20 years of life -- 10 each for the patient and the doctor. These cases should be compassionately and expeditiously processed with as little undue disruption in the lives of the patient and the physician as possible. Medical malpractice litigation should not be an eternal process destroying and poisoning not only the physician-patient relationship, but the association between our two ancient and honorable professions.

Dr. Martin J. Cosgrove is the Immediate Past President of the Medical Society of Delaware. During a distinguished tenure as President, he was instrumental in the organization of the Joint Professional Conference on AIDS, a landmark of creative collaboration between three professions in pursuit of a common good.

INSURANCE REFORM:
WILMINGTON'S RESPONSE TO RISING INSURANCE COSTS

The Honorable Daniel S. Frawley
and
David Randall

In the Spring of 1985, the latest in a seemingly never-ending wave of insurance pricing and availability crises appeared to be cresting. Headlines everywhere sounded the alarm. Coverages became unavailable and for those fortunate enough to find coverage at all, premium increases sometimes approached 100%. Furthermore, these premium increases were typically accompanied by reduced limits of liability, increased deductibles, and restricted coverages.

While no entity survived the crisis entirely unscathed, many groups, characterized by the underwriters as "very risky", seemed to take the worst beating during this insurance hard market. Few organizations took a worse thrashing than governmental entities, whose premiums rose an average of 491% during the hard market.[1]

The City of Wilmington could not navigate completely around these stormy seas and faced many of the same perils, including, skyrocketing premiums; however, Wilmington was more fortunate than most. The City has maintained it's primary insurances for a number of years with the same carrier and, although it may not have enjoyed the "bargain basement" premiums of the early 1980's when the 1985 renewal date arrived, coverage *was* available at a substantial premium increase. The 43% increase brought the City's total annual premium to over $1.5 million dollars.

Premiums for property and casualty coverages were approaching 3% of the City's total operating budget. With the continued prospect of substantial premium increases and loss of Federal revenue sources, targeted by the Reagan administration, insurance costs were destined to become an unacceptable financial burden adversely affecting the City's ability to deliver vital services.

Something had to be done. The City was not willing to reduce City services in order to pay insurance premiums. But at the same time the City couldn't jeopardize its fiscal responsibility to City taxpayers by neglecting to make some provision for liability protection. So during the summer of 1985, City management began to explore alternatives to the existing commercial insurance program

On January 1, 1986 the City canceled the last of its major insurance policies. A critical juncture had been reached, as the initial steps of a self-insurance program are vital to its long term survival.

The City formed a Risk Management Committee consisting of the Finance Director, the Budget Director, the Personnel Director, the City Solicitor and the Mayor's Administrative Assistant, to look at numerous alternatives, ranging from maintenance of the existing costly program to foregoing coverage altogether.

The first exercise was to take a thorough look at the City's exposures to loss. Wilmington is a full-service city typical of most its size, with one notable exception: the City's operation of a major port facility. While there was no noticeable problem area of catastrophic claims that would have "scared" a carrier away, the condition of the 1985 insurance market made finding a replacement insurance company virtually impossible to find.

Further review showed the City's claim experience to be surprisingly consistent. Annual claims incurred by the City averaged less than $300,000 with the majority of settlements at less than the City's deductible of $2,500. The worst general and auto liability loss year had claims totalling less than $450,000. We weren't without claims, but the $300,000 annual average claim experience clearly did not warrant the $1,500,000 in premiums and deductible costs.

The Risk Management Committee's claim analysis leads to an obvious conclusion: if claims were only $300,000 a year, the City would simply pay the claims and not even buy insurance ("go naked"). However, the decision was not that easy. Many questions needed to be answered. Who would ad-

Mr. Frawley, now embarked on his second term as Mayor of the City of Wilmington, is also a lawyer and a graduate of the Wharton School of the University of Pennsylvania. Until he became Mayor four years ago he worked as an attorney with the Dupont Company. His administration has been marked by aggressive and innovative accomplishments, not the least of which is the one that he and his co-author describe in the accompanying article

minister claims against the City? Who would provide legal defense? How much should we budget for claims, internal administration and so forth? What would happen if we don't budget enough? Was self-insurance practical?

It was evident that further analysis was required. The City sought the advice of consultants, agents, business leaders, and members of the administration and the City Council. This extremely valuable information, combined with countless hours of internal meetings and discussions, lead us to the conclusion that self-insurance was the alternative of choice, if the following conditions could be met:

1)Development of administrative parameters including legislative and budgetary proposals.

2)An effective system for claim administration.

3)Maintain or improved the City claim experience.

Self-insurance was not new to the City. For years, the City has maintained a self-insured, self-administered Workers' Compensation Program. But the differences between the two programs -- liability and workers' compensation -- necessitated a completely different administrative structure.

The initial effort was to establish a claim administration system since effective claim management can "make or break" a self-insurance program. This was easy because the City's private agency had been effectively handling the City's claim activity for a number of years with a staff well-versed in City business as well as municipal exposures and losses. The agency was eager to continue its claims adjustment service for the City, thus ensuring the continuity of claim handling at the commencement of the self-insured program.

To meet the other two conditions, we developed and put in place a Risk Management Plan. Major steps included:

1)Creation of the position of Risk Manager

2)Hiring an additional Assistant City Solicitor to handle additional claims defense.

3)Legislation of a funding mechanism for the Risk Management Program.

4)Establishing loss prevention

We also developed means to determine additional insurance and service needs, analyzing departmental risk exposures, and establishing a safety program.

Work progressed at a fever-pitch on the Risk Management Program, and the time came when the City was forced to mitigate its "losses", discontinuing premium payments. Some policies had already been cancelled on July 1, 1985. On January 1, 1986 the City cancelled the last of its major insurance policies.

A critical juncture had been reached, as the initial steps of a self-insurance program are vital to its long term survival.

A nationwide search had already begun for a self-insurance program administrator. We found an experienced governmental Risk Manager who agreed to accept the challenge of starting-up the Wilmington program.

Almost immediately, we realized that one of the foremost advantages to the self-insurer was the heightened awareness of loss exposures. Meetings were held with City department heads and operations personnel to explain the meaning of self-insurance and risk management. Whenever the City undertakes a new operation, it is studied for potential liability exposure to the City and an evaluation of the safeguards necessary to minimize catastrophic loss.

The net savings to City taxpayers has been in excess of $2,500,000 in two and a half years.

While enhanced awareness of loss exposure is an important benefit of self-insurance, it is difficult to quantify. The City soon began to realize, however, more substantial, quantifiable benefits.The most immediate was the cash-flow advantage. Instead of writing out the large premium check for $1.5 million and presenting it to the insurer, we could hold these monies and remit as claims were incurred. The pay out on substantial liability claims, as we know, can sometimes take years and, in the meantime, the investment earnings to the City on such funds can help offset the administrative expenses of the City's Risk Management Program.

Another obvious advantage of self-insurance program is the immediate saving of insurance company profit, commissions, and overhead, which may represent nearly 50% of the premium charge.

These cost avoidance and cash flow advantages are well and good, but no self-insurance program can succeed unless casualty losses are controlled. Although the City's losses had been considerably less than the premium paid, there is always room for improvement. This part of the job cannot be considered complete until we are a "loss-free" City, an undoubtedly utopian but useful program objective. Since the City began its self-insurance program, many changes have been made to improve loss experience. After an exhaustive evaluation of City operations and safety practices, our consultants developed a safety management program. It is administered through the Mayor's Safety

(Continued on next page)

Mr. Randall, Director of Risk Management and Employee Benefits for the City of Wilmington, joined the Frawley administration in February 1986. He has been responsible for the City's self-insurance program since its inception. He is a graduate of the Ohio State University, where he received a Baccalaureate degree in insurance and risk management. He serves as National Vice President for the Public Risk Management Association.

(Frawley-Randall continued)

and Health Committee, which sets city-wide safety policy, and the Operating Safety Committee, composed of managers who review routine City operations from a safety perspective and recommend necessary modifications in policies or practices to the Safety and Health Committee. For example, in the past year the City retained its first full-time Safety Officer to coordinate safety training of all City operational personnel.

In addition to the many safety functions aimed at controlling losses, the Risk Manager and the Risk Management Committee constantly review City operations and programs to find ways to further reduce the liability impact of such operations on our self-insurance program. For example, the Risk Management Committee has uncovered some potentially severe loss exposures; but, thus far has always managed to find a way to shift the risk, either through conventional insurance coverage or some other mechanism. So while some other governmental entities had to discontinue or limit recreation programs, development projects, and even some public safety programs, no City operation has been affected by the City's decision to self-insure.

Although one of the most frequently cited disadvantages to self-insurers is the wide swings in claim experience from one year to the next, Wilmington along with countless other governmental and business entities, learned that insurance costs can be even more unpredictable. However, to protect the taxpayers from these exposures, City Council passed legislation in October, 1986 formalizing the program and setting operational guidelines to ensure the solvency of the program. Highlights of the legislation include a provision that the risk management fund be permitted to accumulate monies at an actuarily determined level that do not revert to the City's general fund at year-end. This allows all claims to be fully funded when they are incurred with the monies to be available at such time as a claim to be fully funded when they are incurred with the monies to be available at such time as a claim is settled. The legislation calls for annual adjustments to the fund to maintain its solvency and an annual review of the fund by an independent actuary to verify the adequacy of the fund.

Results

No matter how much planning and effort has gone into this project and regardless of how many theories support the City's move to self-insurance, the program can only be judged on its results. Through the first two and one-half years of the self-insurance program the City has incurred the following costs:

Paid Claims	$ 141,860
Claim Reserves	$ 291,250
Administrative Expenses	$ 247,000
Insurance Premiums	$ 365,000
Total Incurred Costs	$ 1,045,110

If our premiums had remained constant at approximately $1.5 million per year, our insurance expenditures would have been $3.75 million over this same period. Therefore, the net savings to City taxpayers has been in excess of $2.5 million in 2 years. We are not, however, ready to declare the total success of the program on the strength of a couple of good years. Accordingly, we have established a contingency loss fund for claims that may have occurred but have not been formally reported, thus ensuring that a surprise hit on the fund can be met.

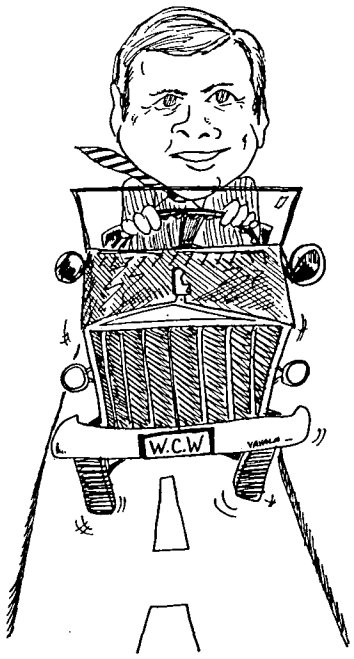
We feel this program has been both prudent and successful. We hope to be able to further reduce our annual appropriation for insurance and claim costs as our risk management efforts continue to bear fruit. As the program matures and our contingency fund grows, the City should enjoy a long-term stability in its liability costs and avoid future "wild swings" in the commercial insurance market. ■

1Risk and Insurance Management Society, "Insurance AvailabilitySurvey". 1986-1988

TORT REFORM:

THE SEARCH FOR FAIRNESS AND PREDICTABILITY

William C. Wyer



During his ten years as President of the Delaware State Chamber of Commerce, William Wyer has transformed that organization into a vigorous and highly visible institution. He has been extremely active in other organizations dedicated to the public safety, enlarged trade, and a wide variety of cultural interests, such as the Grand Opera House and the Wilmington Institute Library. The Editors are very pleased to welcome him to these pages.

The Delaware State Chamber of Commerce is the First State's oldest and largest business advocacy organization. We have been in Delaware since 1837 and we represent 3600 member companies.

For the past three years the State Chamber has advocated reform of Delaware tort law. Ninety five percent of our members operate small businesses. I stress this because opponents of tort reform repeatedly and falsely accuse the State Chamber of representing only big business on this issue.

Small businesses, municipalities, and non-profit organizations seek relief from the unfairness and unpredictability of our current system. The State Chamber has championed this cause for three years. Although we have not yet been successful, we presevere because our members want and need tort reform. It may take the business community repeated attempts to bring about tort reform but we are ready, willing, and able to make that effort.

Tort reform in Delaware is not an insurance issue, but one of fairness. Delaware's small businesses need the protective shelter of civil justice reform. They need to know that they won't be wiped out in the single sweep of a runaway jury award. This is not a new need. It's been out there in every corner of the state for the past three years.

The State Chamber first alerted Delawareans to the need for tort reform in the autumn of 1985. We worked diligently to bring about fairness and balance in our civil justice system. We held workshops with input from all elements in the community: small business, non-profit organizations, the medical profession, municipalities. All expressed their concerns to the General Assembly and to the State Chamber about the need for tort reform.

In March, 1986, hundreds of concerned Delawareans gathered for a day-long public hearing at the University of Delaware to examine the issue from both sides. In May of 1986, thirty seven witnesses appeared at a hearing held in the House of Representatives of the General Assembly. They came from every walk of life in Delaware. They sought relief from the General Assembly, but nothing happened. The legislators turned their backs on small business, municipalities, non-profits.

In 1987, the cry for civil justice reform continued. The General Assembly heard the same requests voiced a year earlier. At the last moment, when it was time to tally up, to stand up and be counted, the House voted to "study the issue".

On June 22, 1987, the *News Journal* in an editorial, "Three or four times a session legislators consider issues on which there are strong feelings and which, if enacted, would have wide repercussions."

The editorial continued,

"Let's look at how the legislature deals with it.It's hardly pretty.

"In the Senate, nothing happens. It won't budge from committee... .In the House, a bill was brought to the floor. Discussion ensued. Some important amendments were offered and adopted. Then an amendment to gut the bill and put off discussion and a vote until next year was presented. It passed.

"The killer amendment calls for a study of the issue. A study was called for last year but no one ever did it.

"Why?", asks the *News Journal.*

"Perhaps because this issue has been studied and studied. If any members of the legislature don't have sufficient information to vote now, they've been derelict in their duty."

In 1988, I joined the *News Journal* in asking the General Assembly to face up to this recurring issue – and have the courage to bring it to a vote. Nevertheless, no action was taken on tort reform in 1988. Once again, the citizens of Delaware were denied the progress other states have made. Thirty seven have adopted some form of civil justice reform, while Delaware hangs back timidly, refusing to face reality.

The failure to adopt civil justice reform will affect our economy. When businesses look for new sites these days, one of their first concerns is the status of tort reform.

(Continued on next page)

(Wyer continued)

For the last two years, the tort reform coalition led by the State Chamber has talked about the unpredictability of the courts and the risks of excessively high damage awards. Opponents of tort reform have replied, "Don't worry. It can't happen here." No one can say that any longer, because it has happened here. In November of 1987, a Delaware Superior Court jury awarded $75 million in punitive damages. In March 1988, another Superior Court jury awarded $22 in punitive damages.

I am sure that these extremely high awards will be vigorously contested, but if the judgments stand the plaintiffs' attorneys will receive more than a fair share of the awards. Under our current contingency fee scheme there are no controls to ensure that the injured parties receive their fair share of the damage dollars. Judgments like these are all too often "get-rich-quick" programs for plaintiffs' attorneys - the big winners in the law suit lottery. Unfortunately, many who oppose tort reform don't understand this. Organized labor fails to see that is is the union member who is hurt by contingency fees. Some labor leaders have been duped by plaintiffs' lawyers into believing that tort reform will rob them of basic rights. Just the opposite is true. Ironically, our present contingency fee system often hurts the people who need help the most. Union members are being short-changed, not by defendants, but by the plaintiffs' bar.

During this year's session of the General Assembly the coalition opposed to tort reform was composed of an unusual mixture, notably many who worked hard to defeat the Financial Center Development Act (FCDA), reductions in Delaware's personal income tax, and other progressive initiatives all of which have benefited the entire citizenry. It should come as a surprise to no one then the same "naysayers" oppose tort reform. They fail to understand that tort reform is important to economic growth, just as they failed to comprehend the value of the FCDA and the personal income tax cuts.

Our attitude toward tort reform is an important criterion for businesses considering a Delaware presence. At the State Chamber we have received inquiries about tort reform in Delaware from as far away as Hong Kong and as close as Maryland. Delaware attitudes toward tort reform were important to these companies in making their final site selection.

It appears that those who oppose tort reform fail to appreciate the relationship between tort reform and economic development.

The Costs of An Unpredictable System

Although Delaware has yet to adopt tort reform, thirty eight other states have taken action. I believe they have done so because they recognize that every American faces the impact of an inequitable civil lawsuit system. The lack of predictability in our courts places a financial burden on all of us. An explosion of liability suits and million dollar damage awards (such as we have seen in Delaware) has affected the costs of goods and services nationwide. Our current legal system isn't fair, balanced or predictable, and all of us pay the price. According to statistics compiled by American Tort Reform Association (ATRA) costs of goods effected by tort damages include:

- tetanus vaccines -- up $7.10 a shot
- motel rates - up $5.00 per night
- six-foot, wooden step ladders - up 20% per ladder
- National Boy Scout fees - up $25 per troop
- child care - up $4.00 per child, per day
- piston engine airplanes - liability costs now averaging one third the cost of the airplane
- hunting rifles - now 20% of the cost of each rifle

Companies are spending more on legal fees, staff time, and laboratory work, much of it unnecessary. As a result, the American consumer is suffering while critical services are curtailed or never developed because of the threat of law suits. Consider the unbelievable impact of the liability crisis on mothers seeking obstetrical care. Here in Delaware, consider the effect upon the Medical Center and the recent action by its anesthesiologists.

The System is Not Fair

America's legal system is not fair, and all Americans are paying the price. Why? Because as the A.T.R.A. notes,

- deserving victims receive less than 50% of any monies a jury awards with the remaining going to lawyers and court costs. Congressman John D. Dingell (D-MI) recently noted "how can we tolerate a product liability system under which two out of every three dollars spent never get to the victim?"
- because a defendant found only 1% at fault may end up paying 99% of any award if that defendant is the "deep pocket". This issue of joint and several liability is the single most significant defect in Delaware's tort system.
- because a few plaintiffs receive windfall settlements, many times the most deserving don't get their fair share because of the "lottery" element
- because a victim with a solid case but with little chance for a million dollar settlement may not have access to the most qualified attorneys.
- because innovations such as more effective pharmaceutical drugs, foolproof contraceptives, and safer sports equipment (to name only a few) are kept off the market entirely because of the threat of lawsuits.
- because a business, an engineer, an architect or other professional can adhere to all testing, safety standards and regulations set by a government agency and still be sued and found at fault should an injury occur.

Thus, we all pay the price of our unfair civil justice system through higher priced goods, reduced services, and a loss of faith in our courts.

The System is Not Balanced

A working liability system has an admirable purpose -- the compensation of people who have been injured. However, our system is now weighted toward plaintiffs, even those with unmeritorious claims.

- A defendant found totally innocent must pay all defense costs and, although exonerated legally, could be forced into bankruptcy.
- A kind of blackmail is occurring regularly, as a defendant who is not at fault settles out of court in order to avoid the time, costs, and publicity associated with a lengthy trial.
- A jury is not allowed to be informed if a plaintiff has other sources of compensation when determining the amount of the award to the victim.

The System is Not Predictable

A dramatic increase in lawsuits and widely varying awards have virtually eliminated predictability from our civil

justice system. The sky's the limit!

• Million dollar verdicts primarily for pain and suffering are on the increase despite little proof they are reasonable or justifiable.

• It is not uncommon for an injured party to have his case thrown out of court at the same time that an individual in an adjoining state, suffering the same injury due to the same defect in the same product, is awarded a substantial judgment.

• Our system has evolved into a scheme of compensation divorced from fault principles.

According to major national and state polls, confirmed by state referenda in California and Montana,

Thirty seven states have adopted some form of civil justice reform, while Delaware bangs timidly back, refusing to face reality.

Companies are spending more time and money on legal fees, staff time and laboratory work, much of it unnecessary. As a result, the American consumer is suffering as critical services are curtailed or never developed because of the threat of law suits.

Americans have expressed their loss of faith in our legal system, which is no longer seen as equitable. According to a recent Harris poll a majority support changes in the system, even when reminded these reforms might affect their own ability to recover damages.

• 68% of respondents believe that more people bring lawsuits than should;

• 71% believe that the actual cost of lawsuits is too high;

• 79% of these people see the chance to "make a lot of money" as propelling an increase in civil actions.

Americans are calling for immediate reforms. Delawareans join the rest of the country in seeking a return of the principle of fault based liability in order to hold a shoddy or illegal business responsible; to insure that a deserving victim is adequately compensated without a 50 percent lawyers fee; to move away from the overwhelming tendency "to sue" as a way to resolve all disputes; to educate the public on the proper use of the civil court system; and to impose penalties for frivolous or nuisance suits.

We need to expand the debate beyond "special interests" such as insurance, product liability or medical malpractice, and address tort rules broadly and comprehensively.

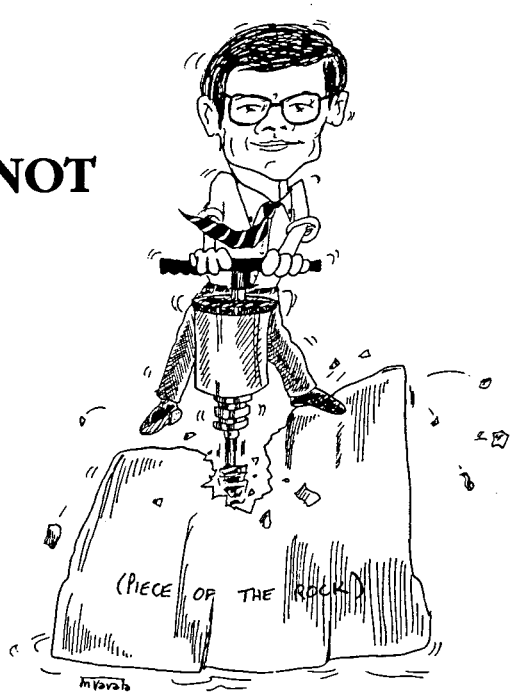
The answer is changes in the principle of joint and several liability, capping contingency fees, allowing juries to have full knowledge of all collateral sources of recompense, and a limit to punitive damages. To remain competitive, Delaware must undo the damage of the past twenty years. Tort reform calls for limitations on awards and contingent fees.

Opponents claim there is no evidence that tort reform works. This is simply not true: It will take time to demonstrate conclusive data reflecting the benefits of tort reform, but that time will come.

Our civil justice system has lost sight of its historic purpose and is out of touch with reality. Consumers spend millions of dollars each year paying for the system's inequity. We need tort reform now to bring *fairness, balance,* and *predictability* back to our legal system. ■

WE NEED INSURANCE REFORM, NOT TORT DEFORM

Bernard Van Ogtrop



In the mid-1980's, this country was swept by a liability insurance crisis that crippled many cities and towns, health care providers, small businesses, and schools. This crisis took the form of soaring premiums and widespread unavailability of some types of liability insurance. Businesses failed, school and municipal programs were cut, and some high-risk medical specialists considered curtailing their practices.

The insurance industry is nothing if not opportunistic. In the midst of the public outcry (which had been produced by the insurers' unwillingness to provide adequate levels of affordable insurance) the industry financed a multi-million dollar public relations crisis, which linked the problems in the insurance market with an allegedly "out-of-control" tort system. Simultaneously, insurers aggressively built large coalitions of dissatisfied commercial policy holders, public officials, and health care providers who naively took at face value their insurers' word on the root cause of their problems.

These newly formed coalitions marched into legislatures across the nation, demanding that the tort system be changed in order to "fix" the problem with insurance. Proposals ranging from limitations on damages to modifications in joint and several liability and the collateral source rule were proposed and, in a number of states, approved.

We saw many of the same pressures in Delaware, including sharply rising premiums, unavailability of some types of coverage, and an insurance/business coalition calling for so-called "tort reform". Fortunately our legislators showed a greater degree of skepticism about the connection between the disruptions in the insurance market and the tort system. Rather than blindly stripping away a variety of legal rights from the injured victims of corporate and individual carelessness, our legislators demanded first that insurers provide more information. The 1986 passage of the Delaware Insurance Disclosure Act was an exceptional display of legislative thoughtfulness, mandating a more complete disclosure of information about insurers' profits and losses.

Since 1986, the liability insurance crisis has abated, both in Delaware and across the nation. As Figure 1 shows, liability insurance premiums stabilized in 1987, after three years of startling increases. Interestingly, this resolution of the insurance crisis has occurred in every state in the union, whether or not "tort reform" limitations on the rights of accident victims were passed. Were legislators who voted for restrictions on legal rights misled?

In a word, yes. The more information we get about the insurance industry, the clearer it becomes that insurers were never in financial trouble, but that their price hikes of the mid-1980's were both unrelated to the tort system and entirely manufactured by insurers. The facts speak for themselves:

*From January 1, 1984 to December 31, 1986, supposedly the three worst years in the property/casualty insurance industry's history, *insurance company stock prices increased over 70 percent* even more than the rest of the bullish stock market.

*Since 1975, the net worth of the insurance industry has soared from $20 billion to over $100 billion. In 1986 and 1987 alone, the industry's net worth increased by over $20 billion (Figure 2).[1]

*The foolish practice of "cash-flow underwriting", in which insurers sell insurance policies for too little when investments are high, and for too much when investments are down, is the actual cause of the premium increases

Bernard Van Ogtrop, a very able trial lawyer, is a Director of the Wilmington firm of Cooch and Taylor. He recently concluded a year as President of the Delaware Trial Lawyers Association. A member of the Delaware bar for nearly twenty years, he served as a Special Agent of the Federal Bureau of Investigation from 1969 through 1972.

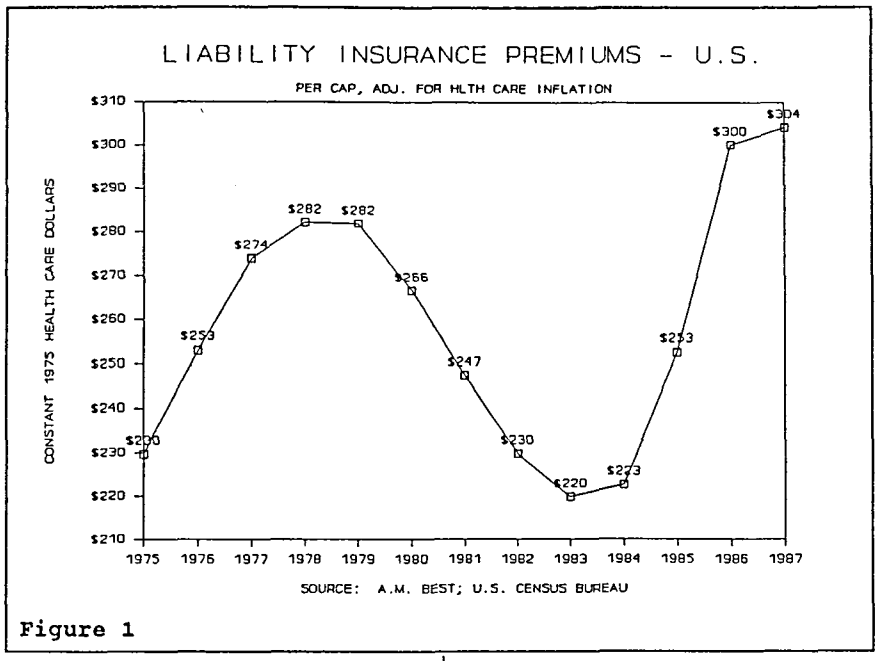


Figure 1

since 1983. It is no coincidence that premiums started to skyrocket at the same time interest rates dropped – in 1982 and 1983 (See Figure 1, *supra).*

*As Delaware Insurance Commissioner David Levinson explained, "In the early 1980's interest rates fell rapidly. The lower premium payments the insurance companies had collected no longer generated enough return on investment to satisfy claims, let alone return a profit. . . . When insurance companies finally saw the handwriting on the wall, they overreacted! . . . Rate increases of up to 1,000 percent were charged, sometimes even more."

*The National Center for State Courts, in a study released in April 1986, found that the number of civil lawsuits filed actually *declined* from 1981 through 1984.[2]

*Like their fellow Americans, Delawareans are not sue-crazy. In 1985, there were only 3.22 liability lawsuits for every 1,000 Delawareans, a decline from 1981.[3] (See Figure 3).

*This lack of litigiousness is evident in the Delaware Superior Court statistics for civil filings, including non-personal injury cases. From 1978 through 1987, serious civil suit frequency remained between 6.05 per 1,000 Delawareans (1985) and 7.41 per 1,000 (1980) (See Figure 4).[4]

*In Delaware, once the state's population growth and the increase in the cost of health care have been figured in, there has been virtually no growth whatsoever (less than one-half of one percent per year) in the property-casualty insurance losses paid in the last decade (Figure 5).[5]

The speciousness of the insurance industry's linkage between their own business practices and the tort system has not gone unnoticed. Anti-trust actions have been filed by 20 state attorneys general, alleging that the mid-1980's crisis was the product of an industry-wide conspiracy to blackmail legislators into restricting the legal rights of injured victims of carelessness and defective products.

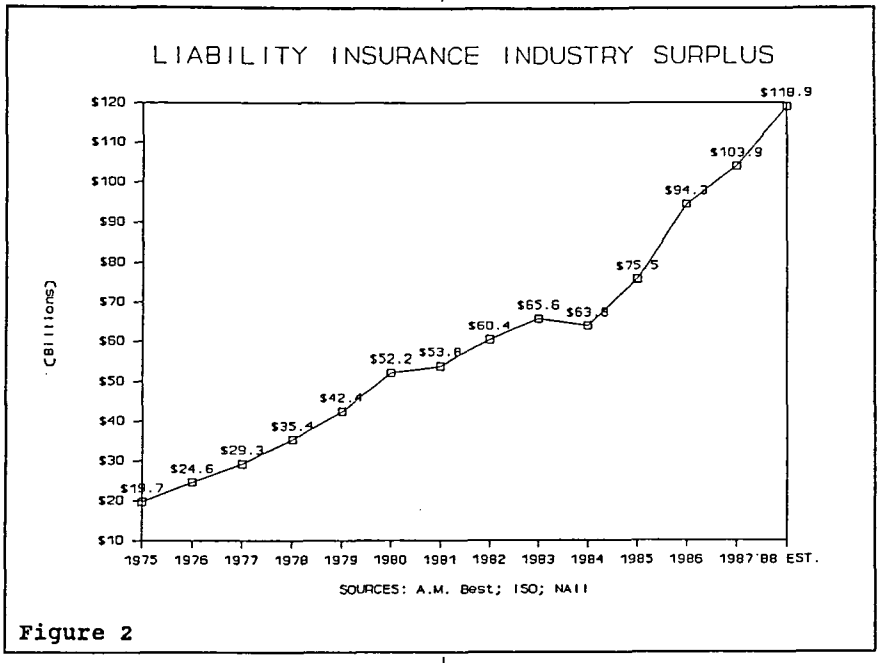


Figure 2

Despite the clear evidence that the problems have been with insurers, not juries, some special interests in Delaware nonetheless tried to bludgeon the Delaware General Assembly into making a wholesale raid on the Delaware jury system. Not surprisingly, the lack of a legitimate insurance crisis forced these opponents of the jury system to repackage their products as something other than a cure for the insurance "crisis" that has seemed to cure itself. The new cosmetic wrapping for the bill was the time honored American concept of "fairness". The insurance and corporate sponsors of HB 418 argued that the bill would make Delaware a fairer place.

The problem with the new gift wrapping was its transparency. Even the most cursory examination of the bill revealed it as anything but fair. It would have limited the accountability of wrongdoers by modifying joint and several liability, limited the ability of a jury to impose punitive damages, virtually abolished the collateral source rule, and placed severe limitations on what a victim could pay his attorney under the contingent fee system, thereby foreclosing to many *full* compensation for their injuries.

(Continued on page 38)

LIES, DAMN LIES, AND STATISTICS

Identify the Problem, Find the Solution

The articles by Mr. van Ogtrop and Mr. Wyer demonstrate that statistics can be (and have been) created to bolster the arguments of both camps in the tort reform wars. Interestingly, the RAND Corporation's Institute for Civil Justice (ICJ) has undertaken to sort out the conflicting statistics by a long term study of trends in tort litigation.

The ICJ, as reported in ***Litigation News*** (Volume 13, Number 6), identified three types of tort litigation characterized "'by a different litigation growth rate, jury verdict, trend, and cost profile.'" They are personal injury (automobile accidents), high stakes personal injury (malpractice and product liability), and mass latent injury (asbestos). ICJ described the trends in each category as follows:

"Routine personal injury torts such as auto cases are growing slowly in frequency and costs, and their outcomes - inflation-adjusted - have not changed much over the last 25 years. . .

"Higher-stakes torts such as malpractice and product liability are growing faster in frequency and costs, and their outcomes have increased dramatically over the past 25 years in their jurisdictions we have observed intensively, and substantially in the shorter five-year period for which we have national data. . .

"Mass latent injury torts, once identified, tend to explode in number, carry high trasaction costs, and have highly uncertain outcomes. . ." Vol. 13, Litigation News, Number 6, pg. 1 (1988).

The discovery of varying trends amongst the three different types of tort litigation mandates that reformers paint in fine strokes as opposed to the broad brush suggested by the most radical proponents and opponents of tort reform. Thus, as the ICJ notes, we must "diagnose the system's ills and prescribe effective remedies, .. disaggregate each system... ask what these data mean rather than rejecting them out of hand. And policy makers need to consider more seriously specialized solutions tailored to special problems that characterize some tort reform, but not others." **Id.** page 6.

On the other hand, we are relying on statistics, which will undoubtedly be cited by all sides to mean all things.

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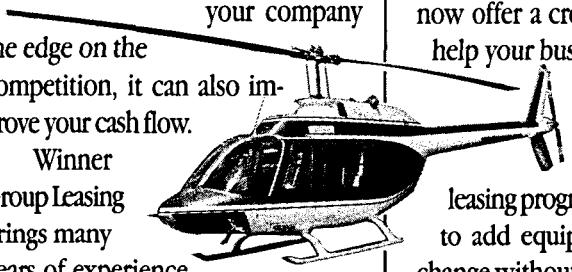

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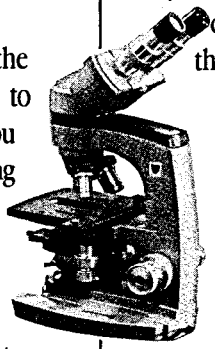

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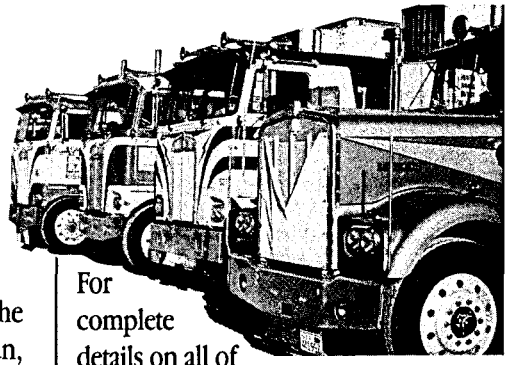

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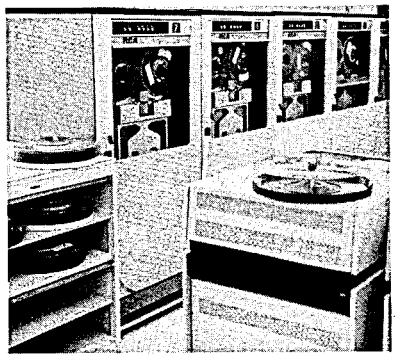

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(Van Ogtrop continued)

Naturally insurance companies and manufacturers of potentially lethal products don't want to be sued by the people they injure. Fortunately for the citizens of Delaware, our legislators once again had the wisdom to conclude that, before tampering with the jury system, we need solid proof that change would be in the best interests of all of us. Let us hope this wisdom carries forward to the next legislative session and the next attack on our jury system.

1.A.M. Best's Aggregates and Averages.

2."A Preliminary Examination of Available Civil and Criminal Trend Data in State Trial Courts for 19878, 1981, and 1984," Court Statistics and Information Management Project, National Center for State Courts (April 1986).

3.Delaware Superior Court Records.

4.Office of the Court Administrator (1987)

5.Population figures from Statistical Abstract, 1985, U. S. Bureau of the Census; insurance figures from A. M. Best's Executive Data Service, Report A2, Experience by State.

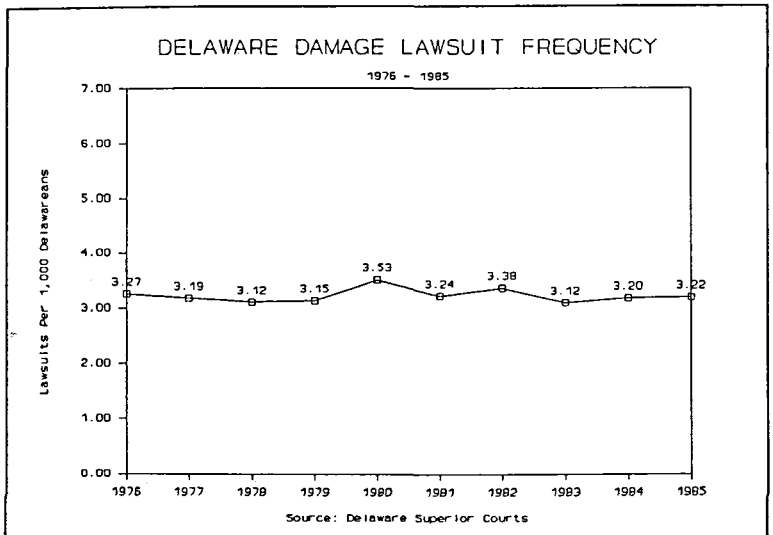

Figure 3

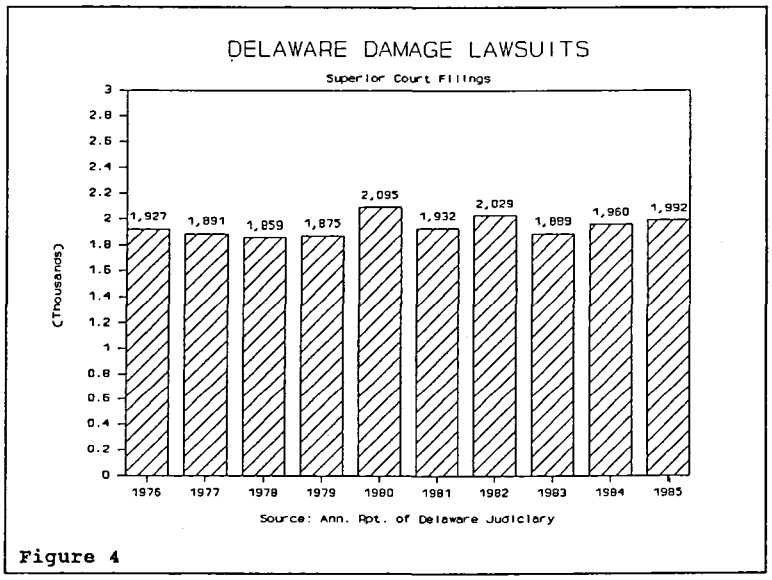

Figure 4

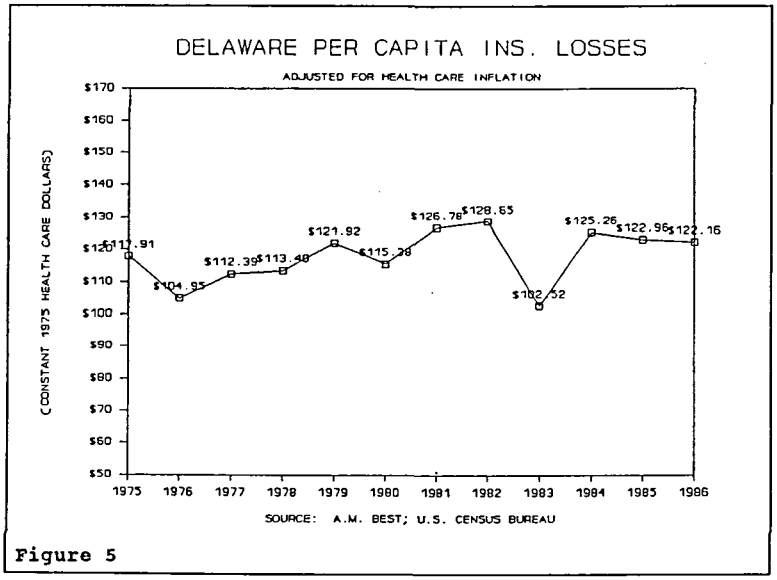

Figure 5

ROOM FOR COMPROMISE

B. Wilson Redfearn

The passage or rejection of a Tort Reform Act in Delaware will have a minimal effect on insurance companies, consumers, and lawyers. The adverse effect that the proceedings have already had between plaintiffs' lawyers and defense lawyers, and between lawyers and legislators is thus unfortunate. While some may believe that Delaware's lobbyists have demonstrated legislative advocacy at its best, with the "Trial Lawyers" standing up for the injured and oppressed, or the defense groups attempting "to bring sense to a liability system out of control", I was discouraged by it all.

It was disheartening then, and is now, to reflect on those public and private meetings in which vehemently irate people either could not or would not accept the fact that the side on which they argued was dictated by their position in life; intelligent advocates immersed in a self-interested, adversarial world, which they refused to recognize as such.

Just as disappointing was the realization that the merits of the legislation had only a peripheral effect on the motivation of most legislators. Not only was the betterment of a system for the administration of civil justice not controlling, but we were clearly in circumstances where efforts and arguments related more to friendships, deals, and contribution dollars than they did to the interests of society. To believe otherwise is blissful naivete.

Why then has such a tremendous effort gone into this project, which will undoubtedly continue into the next legislative session?Can we, with minimal compromises, improve the system and redirect our efforts to other productive pursuits? Are there remedial measures, other than legislation, which the members of the bar and judiciary might provide? If you are interested in a resolution of this conflict, then ponder these weighty issues:

Is there a problem that needs to be resolved? And if there is, what has caused it? How significant is it? How can you assist?

Does the insurance industry have an obligation to keep down the cost of premiums? If so, how should it do that?

Is the cost of litigation part of the problem? If so, are the Bar and the Judiciary doing all that they can to lessen that cost?

Why do the proponents of tort reform want to abrogate the contingent fee system?

Is it fair to allow damages in relation to a person's degree of fault, or, conversely, to charge a person for more than his share?Who will benefit or suffer if collateral source benefits are, or are not, known by a jury? Should they benefit?

Should damages intended to protect "society", enure to the benefit of a single litigant and his lawyer?

Should punitive damages be assessed more than once for the same conduct?

Is the world a better place because everyone who can afford it, pays a few hundred extra dollars a year for insurance and consumer goods so that injured litigants will not be disadvantaged by injuries caused by the negligence of others?

Mr. Redfearn is a partner in the law firm of Tybout, Redfearn, Casarino & Pell, which primarily represents corporations and insurance companies in civil litigation. The Delaware Chairman of the Defense Research Institute, he served on the Task Forces that wrote the Medical Malpractice Act and revised the No-Fault Act.

LEGISLATIVE CONCERNS: A simplified statement of the four legislative concerns:

The *collateral source rule* states that the benefits an injured plaintiff obtains from an outside source (e.g. Blue Cross, workmen's compensation) are not relevant evidence in a trial. Proponents of the collateral source rule argue that the wrong-doer should not benefit from these. Opponents argue that one should not receive a double recovery at the expense of the general consumer (i.e. the increased cost of insurance and consumer goods): and so, they urge, let the jury know about any payments already made to the plaintiff.

Proponents of the *punitive damage* system state that it is only by imposing substantial punishment that the. civil justice system can prevent the abuses that cause suffering to the innocent. Opponents of current punitive damage laws state that there is no reason why those damages should go to the individual; that the damages are often assessed against those (e. g. stockholders), who had had nothing to do with the problem, and that such damages should be limited to egregious behavior.

(Continued on next page)

(Redfearn continued)

Joint and Several Liability proponents argue that a party should be assessed only with the degree of damages (fault) for which he/she/it is responsible. Opponents state that responsibility should be paid, up to 100%, by those who participated in the fault and who can afford to pay, rather than letting the innocent suffer.

Proponents of the *contingent fee* system argue that it allows lawyers to represent people who cannot otherwise afford a good attorney and obtain fair reimbursement for injuries. Opponents argue that because of professional self-interest, the system is gouged by professional avarice. Thus, the costs of litigation and the depletion of the plaintiff's recovery is a burden on the tort system.

The arguments of both sides are so far apart and based on such diverse statistics that those who have attempted to mediate the issues can seemingly find no common ground. Industry experts would have you believe they are being driven to ruin. Plaintiffs cry unconscionable profits by industry.

INCREASE IN LITIGATION: Let us examine some facts. According to the Academic Task Force for the Review of the Insurance and Tort Systems, Final Fact Finding Report on Insurance and Tort Systems, March 1,1988, the most comprehensive analysis of tort litigation trends available can be found in the material published by the National Center for State Courts.[1] This analysis used the data from seventeen court systems in thirteen states that reported comparable tort data for the years from 1978 to 1984. The Center's findings showed that for the period of 1978 through 1984 there was a 9% increase in tort suits, while the populations of the subject states increased by 8%. Between 1981 and 1984, according to the National Center's report, the population grew 4% and tort filings increased by 7%.[2] The Center's report indicates that there had been significant increases in litigation during the later 1970's in a wide assortment of civil actions. However, the so called "litigation explosion" reached its apex in 1981. Succinctly put, the statistics show only a modest increase.[3]

INCREASED CAUSES OF ACTION: One should also review the argument that the right of recovery has been expanded within the court system. Examples often given are: there is an increased right of recovery for emotional distress in personal injury cases; loss of a chance in medical malpractice cases; loss of affection in death and family relations cases; loss of economic expectations in commercial tort cases; abolition of the contributory negligence defense in tort cases, availability of strict liability, etc. While exceptions certainly exist, it is difficult to identify any dramatic changes that have taken place over the past 50 years in the tort damage arena. Rather it appears that the increases in tort damage awards are largely attributable to inflation, technological changes that produce greater losses, and changes in social and economic factors that influence jury attitudes. The large awards can be ascribed more liberal application of traditional rules, rather than to changes in the rules themselves.[4]

The arguments of both sides of the liability insurance issue are so far apart and based on such diverse statistics that those who have attempted to mediate the issues can seemingly find no common ground. Industry experts would have you believe they are being driven to ruin. Plaintiffs cry unconscionable profits by industry.

INCREASE IN AMOUNT OF JURY AWARDS: While figures seem to vary depending on who is making the argument, in certain areas it is clear that there are major increases in awards. According to Jury Verdict research, the average verdict in medical malpractice suits increased 363% from 1975 to 1985. The average product liability verdict has climbed 370% in the same time period. The Tort Policy Working Group argues that the significant factor in these increases is the recent prevalence of extremely large verdicts. The number of million-dollar verdicts in medical malpractice shot up from

three in 1975 to 71 in 1984. Product liability million-dollar verdicts soared from nine to 86. If these numbers are excluded from the statistical analysis, medical malpractice verdicts exhibit only a 26% increase in the sample time period while verdicts in product liability suits increased only 87%. The escalation of jury verdicts appears more prevalent at the upper end of the damage scale, rather than across the board, and this is probably attributable to increases in awards for non-pecuniary losses and punitive damages.

PUNITIVE DAMAGES: These are damages beyond the actual injury to the plaintiff. They are hypothetically imposed for a public purpose, i.e. to punish those who have injured plaintiffs intentionally or whose conduct displayed a reckless disregard for the safety of the plaintiff and others. The imposition of punitive damages theoretically acts to deter others from following such a course of behavior by making an example of the defendant. Problematically, punitive damages are often awarded (1) against companies already penalized by other juries; (2) against defendants not actually responsible for the acts, (3) in amounts which are shockingly high, and; (4) only to the benefit of the litigants in the particular case. Consider the following alternatives.[5]

1.Punitive damages should not be included in the initial prayer for damages, but should be requested after an initial finding of liability.

2.A defendant's liability for punitive damages is a decision for the jury; however, the dollar amount of such punitive damages should be set by the judge.

3.The imposition of punitive damages should require a finding of actual malice or actual fraud by clear and convincing evidence.4. Where punitive damages have previously been awarded against the defendant, no additional claims for punitive damage should be allowed against that defendant based on the evidence produced in the proceedings in which punitive damages were previously awarded, unless it is established that new evidence has been discovered that would be admissible and would have a substantial effect on the award.

5.Absent proof that the defendant intentionally or fraudulently misrepresented information, punitive damages should not be awarded where a product materially complies with established standards.

Plaintiffs' lawyers have found these suggestions restrictive. Industry says that it is absolutely necessary to put a "cap" on such awards. I am hard pressed to see the burden of the above rules to either side.

COLLATERAL SOURCE: On the other hand, I see no reason why plaintiffs should "give up" their collateral source recovery. If a plaintiff has engineered his life in such a fashion that he has a collateral source benefit following an accident, why should the tortfeasor get this advantage? If one subscribes to the "insurance crisis" theory, he or she might find the way to an answer favorable to insurance companies claiming that the system must bend to accommodate a failing industry. I do not so subscribe.

In the greatest number of cases (e.g. workmen's compensation payouts and medical benefits) there is a lien that must be repaid to a blameless company. The plaintiff makes no double recovery. Unions want to see the "extra" money go to its members and have, in fact, "bargained" for that advantage. No-fault insurance has, to a great degree, removed double recovery from automobile tort cases. Pensions are a benefit of a planned employment system chosen by the plaintiff. Rules of evidence permit a defendant to make note of the collateral source benefits if the plaintiff claims to be disadvantaged because of an economic detriment which he has not actually suffered. The collateral source doctrine, as it has developed, is working in an acceptable fashion. Let it remain.

CONTINGENT FEES: To what extent then can it be demonstrated that the payouts in this system for the administration of civil justice are adversely or improperly affected by contingent fees? The argument that it is often starts (somewhat engimatically to my way of thinking) using data from asbestos cases, which apparently are the only cases that have been compiled and

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(Redfearn continued)

scrutinized. These data, so the argument goes, reveal that the major beneficiaries of the system are lawyers. Statistics show that only 37% of the total payout on closed claims reached the injured parties, i. e. 63% of the expenditure was consumed in legal expenses (both plaintiffs' and defendants' attorneys).[6] While this gives reason to question the efficiency of the process from the consumer/litigant standpoint, such statistics do not appear to prove that contingent fees have a major effect on tort liability payoffs. There is, however, some effect, and the legal community (both plaintiff and defense) would serve themselves well by dealing with it directly. May the good Lord (should you so believe) protect the man who suggests that lawyers ease the conflict and lead the way by passing efficiencies on to the litigants, for example, by lowering fees in alternative dispute arbitration procedures, when the quality of the service and the actual hours needed to resolve the dispute are not so high; or as is done in some states, by having supervised fee schedules in certain types of litigation.

While litigants would benefit from supervised fee schedules, or lower contingencies, juries will continue to pay the same amount for the injury, and that is what generally guides both plaintiffs and defendants in evaluating a case. The attempt to crush the contingent fee system was never a realistic attempt to lower the amount of payouts in tort cases. Assuming that you accept the argument that the opposition of the plaintiffs' bar to tort reform is motivated by the loss of the fees involved, the proposed legislation reducing contingent fees was, at best, an attempt by potential defendants to create a bargaining chip to play later in the game.

JUDICIARY: Litigation costs are also a factor. What have the courts done to meet their responsibility for reducing the cost of litigation? Requests continue for more judges and money to handle heavy case loads and adjudicate matters at a faster pace. Little is heard, however, of the need for judges with skills of managers who are willing to crack the judicial whip at their peers. Nothing is said of judges who are willing to take the time to understand and use modern equipment. Managers in all phases of private industry are using skills and knowledge that are available but unused by the judiciary. Civil disputes are not so complicated that they cannot be resolved in a timely fashion. The court's personnel, both judges and administrators, should be no less skilled than those in the private sector. The American Bar Association Action Commission to Reduce Court Costs and Delay indicates that management techniques and systems viewed as "innovations" in the civil justice system are "old hat" outside that system. Even law offices (so often behind in the technological race) used computer research, computerized time control and other technological devices, which are available to maximize efficiency and time.[7]

The *Judges Journal* in the winter of 1984 reported on the views of the Conference of State Court Administrators and the National Conference of State Trial Judges. For civil jury cases, COSCA suggested eithteen months as an appropriate time from case filing until disposition of a trial, while twelve months was considered appropriate for the completion of non-jury cases. Research done by Professor Wayne Brazil indicates that lawyers want judges to become more active in pushing civil cases towards disposition.[8] Of 1,900 lawyers surveyed, 85% looked for judges to become more involved in settling cases; 72% favored mandatory settlement conferences.[9] In a report from the Institute for Court Management of the National Center for State Courts, the conclusion was that the courts successful in rapid case disposition had strong leadership.

It would be nice if more changes, which would provide for the economic efficiency of the system, could start "at home", and not in the legislature, with lawyers and judges setting up task forces to expedite cases and reduce costs. But that is only one step. The quest for legislation will undoubtedly continue.

JOINT AND SEVERAL: Of the recurring bills, the subject most easily susceptible of compromise is that of joint and several liability. Courts initially (historically) held that joint and several liability applies to those tortfeasors who act in concert and with a common design to commit a wrongful act against another party. The conduct of one was considered to be the conduct of all. Fault was not to be apportioned among those tortfeasors be-

conduct of all. Fault was not to be apportioned among those tortfeasors because it was considered impossible to divide "an indivisible wrong". Today the notion has been greatly expanded. All defendants who have had any part in an action may be held severally liable for the entire amount. In determining what compromise is possible one should review the options:[10]

1.Retain joint and several liability where the defendants acted in concert.

2.Limit several liability to non-economic damages, while each defendant remains jointly liable for economic losses, (e.g. medical expenses, and wages).

3.The "Texas system". Defendants whose responsibility is exceeded by that of the plaintiff are liable only to the extent of their responsibility for the plaintiff's injuries. Those defendants whose responsibility is greater than that of the plaintiff are held jointly liable for the entire judgment, but do enjoy the right of contribution.

4.Reallocate uncollectable judgments. If after one year from the date of judgment a defendant's portion of the award is uncollectable that amount is reallocated to the remaining parties, including the plaintiff, utilizing the allocation of responsibility determined by the jury.

With the elimination of contributory negligence as a complete defense, and the installation of a comparative negligence rule these options deserve fair consideration. I have not heard the argument that persuades me that the options are inequitable. I have never heard an argument for several liability made by anyone other than a person in interest.

So I suggest you review the questions initially proposed. Will fair-minded men and women reach the same result? Parties in interest (lawyers, doctors, judges, manufacturers, insurers, governmental entities, litigants) can myopically find their way back to their old arguments. Our system is basically a good one. If everyone would bend, *just a little,* it could be better. Alas, we live in an imperfect world.

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ALTERNATIVE DISPUTE RESOLUTION

A REACTION TO THE ALLEGED NEED FOR "TORT REFORM"?

The Honorable Joshua W. Martin, III

Fairly stated, tort law reform represents a notion that there are numerous deficiencies in the current system and substantial reforms are required to correct them. Some examples of proposed reforms are placing caps on non-economic damages such as pain and suffering awards, limiting or abolishing punitive damages awards, providing for periodic rather than lump-sum payments of damages and reducing awards where plaintiffs could be compensated by collateral sources. Other proposals under consideration include limiting the amount of contingency fees for plaintiffs' lawyers or requiring Court approval for certain contingency fees. In addition, there are proposals to modify or abolish joint and several liability and to shift costs and attorneys fees for frivolous or bad faith lawsuits.[1]

It is beyond the scope of this article to explore tort law changes or to advocate a position for or against such modifications. Nevertheless, if it is our intent to promote the public interest through an improved system for the delivery of civil justice, we must ask if there are practical alternatives to traditional adjudication. Mediation, arbitration, negotiation, and variations on these methods are proven approaches short of litigation for resolving disputes.

I will explore several private approaches as well as courtrelated alternative dispute resolution ("ADR") techniques, with particular emphasis on court-annexed arbitration and its success in the Superior Court of the State of Delaware.

Initially, we must ask, even if *all* of the tort law reform proposals are not warranted, if this means that we have to accept the status quo or whether can we find other ways to improve the civil justice system and its effectiveness and fairness to all litigants and the public interest?[2] There is no guarantee that adjudication will always provide the best approach to the solution of a legal problem. A traditional court judgment may render the truth and it may achieve justice, but it in a significant number of cases it may lead to neither.[3] Any advocacy for alternatives should not ignore the premise that traditional adjudication must be reserved and preserved for a significant percentage of cases, including those with complex issues and matters of first impression. Furthermore, Courts must continue as the protectors of basic and fundamental human rights.[4]

Currently there is a full spectrum of ADR approaches, which have been attempted with some success across the country in response to the explosion of civil litigation in our court systems. Contributing to the growth of this movement have been dissatisfaction with litigation and criticism of lawyers, some of which has been voiced by lawyers themselves. "We may well be on our way to a society overrun by hoards of lawyers, hungry as locusts," stated former Chief Justice Warren E. Burger.[5] For many, litigation is too expensive and slow. Avoiding litigation can, in many instances, reduce costs and achieve fairer, more useful resolution of conflicts. Advocates have suggested that the use of means other than traditional litigation would reduce court overcrowding, provide satisfactory processes for settling disputes accessible to more people, and empower citizens to resolve their differences without automatic recourse to lawyers and Courts.[6]

Alternative dispute resolution has become very effective in making litigation only one means for resolving disputes. It has been described both as a

philosophy and as a set of simple tools designed to produce equitable settlements faster and at a lower cost than traditional litigation allows. Alternative dispute resolution is not tort reform. The value of ADR lies not in replacing litigation but in identifying litigation as only one means of resolving disputes. Its purpose is to reduce the time, cost, and uncertainty that have developed within our civil justice system.[7]

The following alternatives have the objective of bringing about speedier, less-expensive, fairer resolution of civil disputes. They include mediation and arbitration as well as mini-trials and summary advisory jury trials.

Mediation

Mediation is a process in which a neutral person skilled in identifying areas of agreement assists disputants in reaching a negotiated settlement of their differences. The distinguishing mark of mediation is that the parties to a dispute formulate an agreement on their own rather than letting outsiders impose a settlement. Usually voluntary, mediation typically results in a signed agreement that defines the parties' future behavior. As a court-related alternative, mediation may employee trained lawyer volunteers specializing in the subject matter of the case. The volunteer mediator meets with lawyers and parties to facilitate discussions and react to presentation of the facts and law in light of their expertise, giving the parties the benefit of their views. Mediators do not decide cases or determine awards; they help identify the strengths and weaknesses in each party's case. The object of such an approach is to settle disputes early, before costs escalate, tempers flair, and the climate for resolution deteriorates even further.

Arbitration

This procedure is traditionally used in labor-management disputes and in breach of contract and other commercial litigation. A dispute is submitted to a neutral third-party who, unlike a mediator, issues a decision after hearing arguments and reviewing evidence. An arbitrator may have technical expertise in the disputed subject thereby acting, in effect, as a private judge. Procedurally less complex than litigation, arbitration usually can be completed more quickly than a trial.

Summary Jury Trial

Here is an emerging technique that offers significant promise. It is a particularly useful complement to the adjudicatory process. In a summary jury trial the parties make presentations to a sample jury. There are opening statements, summations of evidence, and closing statements. There may or may not be live testimony, and normally the presiding judge will resolve any evidentiary questions before the presentations. After receiving an abbreviated charge, the jury deliberates and renders a non-binding verdict. Normally representatives of the parties, other than counsel, having settlement authority are present. They hear the non-binding jury's assessment of the case and are then in a position to settle the matter.

In the words of the originator of this ADR technique, Judge Thomas D. Lambros of the U.S. District Court for the Northern District of Ohio, although "litigation is the 'crown jewel of this process' and the foundation on which all other dispute resolution processes rest, . . . there are many disputes that don't need the 'intrusive, complex, expensive, and time-consuming procedures" of this process. Litigation should be used only for the "durable, hard-core cases" since other processes can complement it and keep it from becoming overburdened.[8] Judge Lambros recently suggested that "lawyers are not effective predictors of what juries will do." Therefore, a summary jury trial uses a non-binding jury "for purposes of testing the value of a case" and facilitates settlement.[9] There is always some risk associated with litigation. In asserting that lawyers do not always comprehend the psychological component, i.e., how a jury verdict is reached, Judge Lambros cited a study suggesting that 80% of jurors make up their minds after opening statements and don't change them thereafter. Jurors don't use inductive processes, drawing a conclusion after the presentation of evidence. Instead, they use a deductive method reaching an initial conclusion and then filtering the evidence so as to sustain that conclusion. Lawyers often "miscalculate" what juries will do --- and summary jury trials serve to overcome this obstacle. "[10] If one accepts this premise, then an alternative dispute resolution technique such as a summary jury trial is an available, albeit evolutionary, resource, appropriate in certain cases where a negotiated result might be preferable. It should be noted that in Judge Lambros's experience, since 1980 only six of the approximately 200 summary jury trials have gone to full trial. In 4 of these 6 cases, the verdicts after trial were consistent with those reached during the advisory summary jury trial. In one the lawyers subsequently agreed they had the case settled after the summary jury trial, there would have been a 40% savings in the total cost of the litigation.[11]

Litigation should be used only for the "durable, hard-core cases", since other processes can complement it and keep it from becoming overburdened.

ADR has the ability to get a case back on track where there is a breakdown of communication or unrealistic expectations on either side.

This is an emerging technique and it is not without its detractors. For example, in *Strandell v. Jackson County,* CA. 7, 87-1559, 1/21/88, the U. S. Court of Appeals for the 7th Circuit held that a Federal District Court lacked authority to order plaintiffs to participate in a summary jury trial. Although this opinion represents a balancing of judicial innovation with the individual rights of litigants, the summary jury trial would still be a means of promoting settlement in many cases where proceeding to a jury verdict may be risky.

Mini Trial

Another informal process is the mini-trial. This approach, which is amenable to many variations, may include a presentation before a privately hired judge or adjudicator and representatives of the parties, e.g., corporate executives. For example, after some limited discovery, a presentation lasting from a few hours to a few days is presented to the presiding judge. If the matter is not settled after the presenta-

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tion, the adjudicator then submits a non-binding opinion to the parties, reflecting the relative strengths and weaknesses of their presentations, including a prediction of the likely outcome of a trial. Normally neither the adjudicator nor his appraisal is available for use at any subsequent trial.[12] This too is an informal process, normally concluded in a single day. It presents a balanced view of a case to decision makers, who can then use it as a basis for settlement. Mini-trials are particularly useful where the amount of damages is the primary issue and where there is no disparity in bargaining power among the litigants.

Some of these emerging techniques are now being used across the country as a means of resolving crowded civil case dockets and effectively processing complex litigation. For example, in the Northern District of Ohio a case management plan has been designed for all "asbestos cases" to move toward trial or settlement within 365 days of the filing of the case.[13] This comprehensive plan employs a number of sophisticated case evaluation techniques but it also includes alternative methods of dispute resolution, i.e., opportunities for use of alternatives at various stages of a case.

Private Courts

Insurance companies are now exploring speedier and less expensive ways to settle disputes. For example, some companies are now using "private court systems" such as Judicate. Founded in 1983 in Philadelphia, Judicate represents, in part, a response to overwhelming civil case dockets, the skyrocketing costs of litigation, and the lengthening delays in getting matters to trial. Judicate operates primarily by hiring retired judges to hear cases in the privacy of the Company's courtrooms. Generally, two dispute resolution processes are employed at Judicate, judicial hearings and settlement conferencing. Since the parties are proceeding by agreement, decisions rendered through binding arbitration are enforceable in virtually all states under applicable arbitration statutes.[14]

In December 1986 a major insurance company directed each of its regions to begin using ADR methods in earnest.[15] This company, Allstate, issued a directive that its claims personnel were to consider alternatives when traditional negotiation reached an impasse. The initial success of this approach, albeit applied to only a small percentage of this insurer's cases, suggests that informal dispute resolution methods, including Judicate, are indeed effective.

Another major carrier. Cigna, concerned with the growing costs of litigation, as well as the dramatic increase in the size of verdicts and settlements, has embarked on a comprehensive restructuring of its management of cases using a number of ADR initiatives.[16] ADR is a key element in Cigna's attempt to reach early resolution of claims.

The Travelers Insurance Company has also been active in pursuing ADR techniques.

Travelers and the American Arbitration Association started an ADR referral program in the summer of 1983 and later expanded their activities to include work with Endispute, another private ADR firm.[17] Travelers is now in the fifth year of using ADR to resolve property-casualty insurance claims. At Travelers ADR has been used most often on two party personal injury claims of moderate to low value. Experience has shown, however, that ADR need not be so limited. Coverage disputes, significant property damage cases, first party property loses (both commercial and home owner), co-defendant disputes, and even worker's compensation disagreements have all proven amenable to the process. Neither dollar exposure nor complexity need be a limiting factor. ADR has been effective in settling million dollar losses as well as facilitating agreements among co-defendants in multi-party litigation.[18] In Travelers experience, ADR techniques enhance negotiations and provide more satisfactory results for all parties. ADR has the ability to get a case back on track where there is a breakdown of communication or unrealistic expectations on either side. ADR can respond to emotional and psychological needs by giving a litigant an opportunity to tell his story in a simulated courtroom atmosphere. The ADR procedures most often used by Travelers in resolving insurance claim disputes are mediation, arbitration, and sometimes the mini-trial. Mediation is favored 4 to 1 over other approaches. It offers the advantage of leaving the parties in control by employing a *facilitator* instead of a *decision maker*. It is directed toward interests rather than positions and it provides an opportunity to seek creative solutions for resolving conflicts. Stated differently, mediation offers the opportunity for win-win resolutions rather than win-lose outcomes.[19]

Although arbitration is not used as extensively by Travelers as mediation, arbitration programs have found broad support throughout the insurance industry.[20] Despite a growing number of jurisdictions with court-ordered arbitration programs, many courts have relatively restrictive jurisdictional limits, e.g., Philadelphia-$20,000, which have propelled the insurance industry toward private ADR providers. Mediation is also being pursued by insurance companies both before and after litigation has commenced. Companies actively using mediation include Travelers, Aetna, Allstate, Hartford, Nationwide, Royal, Maryland Casualty, Federated, Chubb, State Farm, St. Paul, Wausau, and Fireman's Fund.[21] Mediation is viewed as a useful alternative because of the client's participation in the process.[22] It has been very successful in settling claims as a voluntary, non-binding, and confidential process.[23]

Court-annexed arbitration is a mandatory, though non-binding, referral of disputes within a fixed monetary range for consideration by an arbitrator or an arbitration panel. Arbitrators render awards, which become judgments of court. Such programs usually include some disincentives for requests for trials *de novo*.

The Delaware Experience

In the Delaware Superior Court under Civil Rule 16(c), effective January 1, 1988, all matters not certified as claims in excess of $50,000 must go to arbitration. The Rule covers all civil cases in which monetary damages are sought and in which the non-monetary claims are insubstantial. Cases are diverted into the arbitration program immediately upon the filing of a responsive pleading and before any significant discovery. A single arbitrator can be stipulated by the parties or chosen from a list of members of the Delaware Bar who have been in practice for at least five years and who have expressed an interest in this type of adjudication of disputes. Once the case is assigned to a single arbitrator, the rules require that a hearing be held within 40

days. Arbitrators are encouraged to conduct telephone conferences with counsel to resolve any pre-hearing problems and to determine whether memoranda setting forth arguments and legal authorities should be presented to the arbitrator for decision.

The hearings are held at the convenience of the arbitrator and the parties. The Arbitration Unit of Superior Court encourages holding these hearings at times other than normal business hours, which may be more convenient for all concerned. The average arbitration hearing takes about an hour and a half. Written reports from both experts and fact witnesses are used and live testimony, other than the parties is discouraged. Although the Rules of Civil Procedure apply to any matter diverted into arbitration, the Delaware Uniform Rules of Evidence are only used as a guide as to the admissibility. A significant feature of Delaware Arbitration Program is the lack of any substantial discovery before the hearing.

Within five days of the hearing, the arbitrator should render an order, including the amount of any award. Any party can request a trial *de novo* within 20 days after filing of the arbitrator's order, in which case the matter will proceed on the Court's civil docket as though arbitration never occurred; however, financial sanctions are available against a party who requests a trial *de novo* and does not receive a betterIresult than attained in arbitration. This sanction serves as a disincentive to frivolous appeals. Where there is no request for a trial *de novo* within 20 days after filing of the arbitrator's order, the order becomes a judgment of Court and is enforceable like any other Superior Court judgment.

The arbitrator receives $250, charged equally among the parties, for resolving the matter. On average, arbitration matters are resolved within six months of the filing of a complaint, a substantial savings in time alone. The average Superior Court case that proceeds to trial takes between 36 and 40 months to be heard. As the following results will show, not only does the Arbitration Program in Superior Court remove a number of cases from the Court's docket, it resolves them much earlier. Early disposition reduces the cost of processing cases, the expense to the parties in maintaining the litigation, and the time required by attorneys in handling cases that could be resolved at a much earlier point. Like most other court-annexed programs across the country, the Program enables the Court to take control of its calendar and move matters to a prompt disposition.

Delaware statistics show that with the monetary limit at $50,000, 70 to 75% of all civil cases filed in Superior Court are now being diverted into the Court's Arbitration Program. The previous $30,000 level, in effect until January of this year, diverted only 50% of the cases into arbitration. In addition, we note that civil case filings are up, e.g., 1395 civil cases were filed during the first 5 months of 1988, compared to 1150 cases during the first 5 months of 1987 and 1015 cases for the comparable period in 1986.[24]

Estimates for the fiscal year just concluded, i.e., fiscal year '88, show that of 2350 cases referred to arbitration, approximately 70% were resolved and removed from the system before an ar-

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bitration hearing. These cases were removed through either default judgment, settlement, dismissal, consolidation with other cases, certification increasing the value of the case beyond the monetary ceiling, transfer to another forum or pursuant to some Court order. Of the remaining 30% of the cases that required a hearing, approximately half were disposed of pursuant to arbitrators' orders. The other half, 15% of the cases referred to arbitration, in which a trial *de novo* was initially requested, were or will be, for the most part, resolved before trial. Our tracking of these cases, after requests for trial *de novo* are filed, suggests that the overwhelming majority are not only resolved before trial but are dismissed after settlement and before any substantial discovery has taken place. The results to date, i.e., since inception of the program in September of 1984, *suggest* that less than 1% of the cases that require a hearing before an arbitrator ultimately result in a full trial.

Arbitration is having a profound effect on the processing of civil cases in Superior Court. Cases are being removed from the Court's civil dockets much earlier in their history, at substantial savings to taxpayers and litigants and savings in attorney time. This frees attorneys to concentrate on more complex matters and allows the Judges of this Court to devote their attention to those matters that require trials. In addition, for litigants, it decreases the period of anxiety associated with impending litigation by giving a result in a dispute much earlier than would have been the case if the litigant were required to wait for a full trial.

In an attempt to resolve a number of "old cases" that are now on the Court's civil docket, Judges are recommending the Arbitration Program. In particular, the Judges are suggesting that litigants use arbitrators drawn from a pool of attorneys and retired Judges who have made themselves available as arbitrators. This is another advantage of this form of alternative dispute resolution and its utility in the administration of justice. ■

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Judge Joshua Martin has served on the bench of the Superior Court since July 1982, and as Resident Associate Judge since June 1983. Before his appointment to the Superior Court he was Chairman of the Delaware Public Service Commission, and, before that, senior patent attorney at Hercules, Inc. He is a graduate of Case Institute of Technology - Case Western Reserve University and of the Rutgers School of Law. He was instrumental in establishing the highly successful Superior Court program for mandatory non-binding arbitration.

Wolfgang Amadeus Prickett

In which William Prickett, a regular contributor, gives us a welcome glimpse of the artistic quality of life in post World War II Wilmington.

When I tell my daughter Annie, age 9, to do something, there is always a little flicker in her eyes before she does as I say. I know full well that she is deciding each time whether she will or she won't do as I say. She mentally calculates each time whether she can defy me, get around me, or wear me down, or pull off a "trifecta", a combination of all three. It was far different, however, in the good old days when I was growing up in the 1930s. There was never any question whatsoever when my father told me to do something as to whether or not I was going to do it. In other words, when my father said "jump", no matter how gently, it was not a question of whether I would or would not jump: the question was "how high" and "how often". Times have changed: parental authority is not what it used to be.

However, when I came back after a stint in the U.S. Navy during World War II, my father quickly recognized that to prefer noise, both making it and listening to it to music, the louder the having marched to orders other than his, his orders to me probably were not going to be followed with alacrity any more. He knew that he had better not say "jump", expecting me to defy the laws of gravity again. However, as this little tale shows, my father had other weapons in his parental quiver to achieve any objective that he thought desirable if he could no longer attain such objective by a simple direct command.

Now this story starts with a fundamental premise—that is, that I am not and never was a musician. Indeed, the first report from the progressive education school where I spent my early years was discouraging about many things including my musical ability (or rather my total lack of musical ability to put it more accurately). Indeed, as to music, the report stated bluntly: "Your Bill is an enthusiastic and clumsy child. He seems better. He has no eye to hand coordination and no ear or rhythm. He likes to shout more than he likes to sing." (I am sure some of my colleagues will say this report is still true.) I must say that over the years, my ability to make music did not improve much, though living in my father's and mother's household, I was exposed to reams of classical music and came in time to not only enjoy it but enjoy it immensely.

On the other hand, my father was an amateur musician. For example, he had gotten into the Triangle Club at Princeton by playing the violin. My mother was a passable musician, as all young women of her era were—that is, she could play something on the piano and had studied the violin. She had played a reluctant viola when my father enthusiastically promoted a string quartet in the 20s. My sister had dutifully taken up the piano. However, when I was eight years old or so, it was universally decided that I was a

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musical lout and not trainable. Hence, I was able to avoid the tedium of endless piano lessons and enforced practice that were my sister's lot in life before she went off to boarding school and Smith College.

When I came back to Delaware after having served in the U.S. Navy during the closing days of World War II, it was assumed that after the summer, I would go back to Princeton again. (I had been accepted to Princeton before going off to serve in the fleet. Princeton recognized that it would have to make good on its wartime undertakings even though it was now overwhelmed with a rash of discharged veterans, many of whom had far better credentials and indeed higher aims than I did.) My father rejoiced in my undeserved good luck in being able to go back into a university far above my intellectual gifts or my propensity for intellectual work of any kind. I knew privately, however, that I was well-fitted for Princeton University, having trained extensively in the taverns and inns that cater to the Navy. But I was not at all sure that I really wanted to plunge back into the rarified intellectual atmosphere of a university such as Princeton.

One day after I came home from the Navy, I sat down at Mother's piano. I played around with the keys, not having much else to do. Eventually, I came up with a little six bar air that had a classical sound as opposed to jazz or rock (or as opposed to nothing, which is what it was). It was hard to say whether it was more like Bach or Brahms, Schumann or Schubert but it sounded classical all the same. People around the house said it was nice. Mother's bridge friends looked up from between stout drinks at their rubbers of bridge and remarked on what a really fine piece of music the six bars were. One lady said that it was perfect Chopin. Another, downing her third rye and soda, and before getting another, said that it sounded like early Tschaikovsky. The third lady who was non-musical, said that she didn't know what it was but she liked it all the same. Mother said nothing: she knew musical garbage when she heard it. However, the damage had been done. The seed had been planted in my brain that I was a musical genius. I went on playing my little air over and over again. Even the dogs got sick of it. They would whine to be let out of the house whenever I sat down at the piano. However, I knew that they were a non-musical group of mutts.

One day at breakfast when I was feeling a trifle surly from too many beers the night before, my father said brightly that he supposed that I would be going back to Princeton in the fall. To my father's utter surprise, I said flatly, "No, as a matter of fact, I am not going back to Princeton at all." I told my astonished father, mother, brother, and sister that in fact, I had decided that I would take up music and become a composer. My father looked dumbfounded. Then he began scratching the hair in back of his left ear, a gesture which he always unconsciously did when he was cross, annoyed, or very angry. That gesture reinforced my new found musical determination.

However, my father very quickly got himself under control. He said nothing more at the time.

The next day at breakfast, I expected to receive a paternal lecture on the value of a college education and what a fine college Princeton was, etc. However, I was determined that I wasn't going to jump just because my father said so. However, my father looked benignly around the table and then quietly announced: "I thought Bill was going back to Princeton but he has now decided to become a musician." My sister Elise giggled but my father shushed her up with a stern look. My father continued, "I was a musician in my youth. Indeed, it was my ability to play the violin that got me into the Princeton Triangle Club. I think that it is fine that one of my children has decided to become a musical composer." My mother's eyes opened slightly. A look of Gallic disbelief crossed her face but she said nothing: she knew that my father was going to take care of this little musical escapade all in his own way and time. She knew better than to interfere. I must say that I felt slightly incredulous but managed to look around and smile. My father went on: "Now my other son will graduate from Princeton if he keeps his nose to the grindstone. But Bill here will become a composer.

Now the first thing that I'm going to do for Bill is to get him the basic skills that he will need including the ability to play the piano." My father went on to spell it out.

My father's plan was simple and straightforward. It was all that I could possibly have demanded in my wildest artistic dreams (and dreams they were). We had a big, Victorian house at 1401 Delaware Avenue next to the Soldiers' and Sailors' Monument which my father had inherited from his father. The house was always closed up for the summer. We lived in a summer house in Centerville, Delaware. Dust covers were placed all over the furniture. The rugs were rolled up. The venetian blinds and curtains were drawn and tightly closed. It was as still as an Egyptian tomb in this musty old Victorian house. Each year it had to be aired out completely in early September when we moved back into town again just before school started. It is still there if you care to see it, shorn of its Victorian finery and now divided into several handsome apartments and doctors' offices. (It does as yet have a bronze plaque announcing that this was the first practice studio of Wolfgang Amadeus Prickett.) For reasons which should appear to the readers who have not already guessed, I was no gift to the musical world. However, let's press on and finish.

My father pointed out that there was a big Baldwin grand piano in the main living room. Indeed, its action was rather like that of a Baldwin steam locomotive. My father said that I could go in town with him to the house in the morning. I would have the house all to myself. I could practice to my heart's content without the annoyance of a younger brother, a nearby swimming pool and all the other distractions that might take an otherwise giddy young composer away from the business of learning music. After two hours of practice, I could then take the streetcar and go across the Brandywine out on Baynard Boulevard where Ms. Osborne, a retired teacher for the Wilmington Music School, gave private piano lessons to gifted students. She would give me an hour of instruction on the piano and an hour on musical theory. Then I would catch the streetcar back to the Victorian house to have a sandwich lunch from a brown paper bag. I was then free to spend the entire afternoon practicing the piano. My father would pick me up at 6:00 P.M. and bring me on home. After dinner, I could practice at home on the somewhat smaller piano in the country house or I could spend the time until bedtime listening to old classical records on the wind-up Victrola. Once I had gotten the basics down, then Juilliard, Nadia Boulanger, the Elizabeth Competition, and

(Continued on next page)

(Wolfgang continued)

on to Moscow!

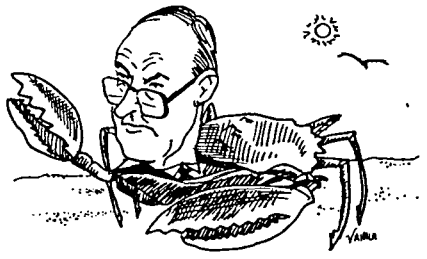
I was speechless. My stern old father had given way. I was to have my way. And it happened just the way my father said it would. I went on into town the first day and my father dropped me off at 1401 Delaware Avenue. The first day worked just fine. I spent the day at the house practicing my little air and experimenting with the piano. I had rather enjoyed taking the trolley across the Brandywine and up to Ms. Osborne's house. However, Ms. Osborne turned out to have a couple of nasty features. She was an older, prim sort of lady with steel rimmed glasses and a no-nonsense attitude towards music lessons. She had the nasty habit of wacking me smartly across the fingers with a rule when I goofed off or hit a wrong note. This happened quite often and it hurt. Furthermore, as we bent over scores learning theory, I discovered that she had really bad breath—ugh! However, in spite of the foregoing, I thought at first that it was great. I continued to have sort of Walter Mitty visions of conducting my own piano concerto at the Opera House in Vienna or sitting in a box as Toscanini bowed to me at the conclusion of a great artistic triumph of mine.

The second day was pretty much like the first day except that it began to get just a trifle boring in the big Victorian house at the end of the day. The third day I was really bored. I had come to share the dogs' view of my little air. I was tempted to duck Ms. Osborne's lessons on the fourth day.

Well there is no use stringing this out any longer. I lasted, I think, a week or maybe eight days. At the end of that time, I began begging off. By the end of two weeks, my father had reclosed the town house and had totally paid Ms. Osborne off. Actually, as I think back on it I am sure that she was in league with him from the start. She may well have applied the ruler a little bit more frequently and with more vigor than she would have done with any other clumsy young man. After all, she could tell a Mozart from a sow's ear. Clearly, the young man that she had under instruction was not a second Wolfgang Amadeus.

I returned to Princeton in the fall totally cured of my musical ambitions and dreams—they have never recurred.

My father had handled a difficult situation with skill and affection. ■



REFLECTIONS OF THE RESIDENT CRAB

Last Spring the time arrived for me to replace a lawnmower. My electric-start, self-propelling Lawn Boy had performed outstandingly for nearly a decade, but after hard use in a big yard it was showing its age. Since it had been one of the most satisfactory commercial products I have ever owned, there was no question about the replacement. Naturally another Lawn Boy. For roughly three times what I had paid for the old I acquired the new. It is a beautiful object, intelligently designed and well assembled from a stock of high quality parts. I hate it.

This well made object has been outfitted with an array of safety features that render it virtually inoperable. To start the machine is but the work of a moment: to keep it going is a full time career. Let me explain: the handlebar by which one propels the mower consists of two parts. They must be brought together before the engine will start. Let go of the handle long enough to pick up a rock in the cutting path, and the upper part of the bar springs forward and turns off the engine. Well, said Foxy Grandpa, there's a way around that! After binding the two parts of the handle together with a short piece of twine I was free to use my hands as I saw fit. This presented one small difficulty, however. I could no longer *stop* the damned thing without undoing all those knots. Yankee ingenuity once again to the rescue: I learned after a few tries how to strangle the engine (a deeply satisfying experience) by pushing the speed control lever to the "choke" position.

Like its predecessor the new Lawn Boy is "self-propelled" - well, sort of. It seems the machine can run away if left in the self-propelled mode. Accordingly, it has been cleverly rigged to require a continuous nudge from the operator. As a result it is for all intents and purposes operator-propelled.

And why has so much ingenuity and expense been lavished on this sulky juggernaut? Why, to prevent idiots from maiming themselves and bringing suit. In fairness to the Lawn Boy people I must concede that their Rube Goldberg triumph is almost certainly the result of one or more mischievous governmental regulations. And of course it comes with a thick book of warnings against self-inflicted injuries and behavior so foolish that it does little more than preach to the converted.

Designing for imbeciles and plotting to stay out of court have become large industries, consuming money and talent that would be better used in the national interest in creating world competitive products, valuable assets in confronting the trade deficit. Our international competitors enjoy a far less litigious atmosphere in which to design, improve, and *sell*. According to an article in the Journal of American Insurance, Fourth quarter, 1988, Dow Chemical does more than half of its business overseas. In 1987 it defended four product liability suits outside the United States and 456 here at home. Obviously, we are paying dearly for this national zeal for suing. Lawyer-engineer, Peter Huber, writing in the July 13, 1987 issue of Forbes, notes that Beech Aircraft now spends $105,000.00 in product liability costs for each of the planes it manufactures. Obviously the consumer pays for this. How long manufacturers will be willing to function in this daunting climate is anyone's guess. Is it not but a matter of time before we complete the expatriation of our marvelous national heritage of industrial design and production? I, for one, do not fancy the prospect of living the balance of my life in a banana republic overrun by plaintiffs' lawyers and greedy incompetents bent on making others pay for their self-inflicted injuries.

I don't have any proposed tort reform suggestions. It is obviously a complicated problem with no easy fixes. Nonetheless, whenever I have to wrestle with that infernal lawn mower I get very, very angry. I have a hunch that if enough people like me air their gripes we may begin to move to an accommodation between justice for the negligently injured and renewed incentive for those who design and manufacture all those good things we regard as essential to an enviable standard of living. W.E.W. ■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