Trends Limiting Defendants

Contesting Medical Care in Litigation

By James H. Milstone and Beth A. Schenberg

Counsel must be prepared to make appropriate records and offers of proof at trial so that appellate courts can address unscrupulous personal injury-mill practitioners.

The growth of unconventional medical care and inflated billing has caused defendants great concern in personal injury tort litigation. Defendants have been asked to pay for many odd and unusual medical procedures, and frequently, it is reasonable to question decisions made by claimants and their doctors. Medical care is very expensive. It is not difficult for unscrupulous claimants to falsify and exaggerate their claims by presenting large medical bill claims. Defense counsel often is placed in the position of questioning not only the motivation of the claimants but also the honesty and integrity of the treating care providers.

In contrast, traditional tort principles severely limit a defendant's ability to contest medical care. These long-recognized principles had been intended to protect the rights of innocent claimants against tortfeasors, even if an innocent party received negligent medical care. The principle that public policy should bar tortfeasors from defending claims by questioning medical care, even if blatantly negligent, was recognized as far back as the Prosser Hornbook.

To complicate matters further, our society has come to accept a broader range of treatments as reasonable medical care. "Passive care" by chiropractors for prolonged periods, injections from pain specialists that can last for years, multiple and duplicative diagnostic tests, and other alternative treatments are now common. Claimants will often present claims for prolonged treatment when soft-tissue injury appears very minor.

Courts have now begun to reassess the traditional standards of medical care principles in tort litigation. What seemed familiar and straightforward for many years has now become subject to reinterpretation. This article will investigate this trend. First, we will present a brief review of the divergent authority on this subject. Next, we will evaluate *Sibbing v. Cave*, 922 N.E.2d 594 (Ind. 2010), a new authority from the Indiana Supreme Court. Finally, we will assess the ramifications of a limited review of medical decision-making and evaluate how to address the fair concerns of all interested parties.

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Divergent Authority

The familiar standard of "reasonable and necessary" still applies to recovery of medical expenses. Plaintiffs carry the burden of proof, aided by a presumption that medical bills, once admitted into evidence, are presumed reasonable in amount. *See*, *e.g.*, Fed. R. Evid. 414. However, courts have started to limit the defense's ability to contest medical care by limiting the scope of the fact finder's consideration of necessary care.

Across the United States, courts have differed widely in their treatment of the necessity of medical care. In some jurisdictions, courts have not limited at all the extent to which defendants can contest medical care by offering experts with different opinions. *Ponder v. Cartmell*, 784 S.W.2d 758 (Ark. 1990), is an example of that latitude.

In *Ponder*, the plaintiff was injured when the bus in which she was riding was involved in an accident. She claimed that she sustained injuries to various parts of her body, including her back, neck, and left breast. During the trial, her treating physician testified that she had a degenerative disc disease in her neck, which was aggravated by the accident. The physician performed two surgical procedures on the plaintiff and testified that the treatment was necessitated by the injury that she received due to the accident. The defendants presented an expert witness who disagreed with the plaintiff's treating physician's testimony. The defendants' expert testified that (1) the plaintiff had only suffered a neck sprain and lower back sprain during the accident, (2) the accident did not cause or aggravate the plaintiff's degenerative disc disease, and (3) the plaintiff's treating physician misdiagnosed her symptoms, which led to unnecessary surgery. The defendants' expert stated that he would not have performed either of the two surgical procedures. The plaintiff argued that the third portion of the expert's testimony should not have been admitted into evidence. *Id.* at 759–60.

The court stated, "[c]ertainly, a defendant's medical expert may testify that the physical injuries for which the plaintiff seeks compensation were not caused by the accident." *Id.* at 760. The court articulated, however, that the plaintiff's recovery should not be diminished due to her treating physician's misdiagnosis. *Id.* The court acknowledged that the jury might have determined that the plaintiff should have been treated more conservatively and that the surgery was an extreme or unnecessary measure. *Id.* at 760–61. Yet, the court noted, "so long as an individual has used reasonable care in selecting a physician, she is entitled to recover from the wrongdoer to the full extent of her injury, even though the physician fails to use the remedy or method most approved in similar cases or adopt the best means of cure." *Id.* at 761. Writing that its holding was consistent with the Restatement (Second) of Torts §457, the court articulated that "necessary" means "causally related to the tortfeasor's negligence." *Id.* Thus, the court concluded, if a plaintiff proves that his or her need to seek medical care was precipitated by the tortfeasor's negligence, then the expenses for the care that he or she received, whether or not the care was medically necessary, was recoverable. *Id.*

On the other hand, other jurisdictions place more limits on contesting medical care. Many jurisdictions have adopted the Restatement (Second) of Torts §457, which reads

> If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonable requires, irrespective of whether such acts are done in a proper or a negligent manner.

A good example of such a ruling is *Spangler v. Wal-Mart Stores, Inc.*, 673 So. 2d 676 (La. Ct. App. 1996). In *Spangler*, the plaintiff allegedly slipped on a wet substance in the bathroom and hit her back and head on the floor while shopping at Wal-Mart. Her family doctor treated her for a short period of time and then recommended that she see an orthopedic specialist. She was diagnosed with a fractured tailbone. She then saw a second orthopedist, who ordered an MRI, CAT scan, and thermogram. He also ordered physical therapy. When her pain did not decrease, he performed an anterior cervical fusion. When the plaintiff continued to complain of pain, the orthopedist performed a bilateral sacroiliac joint fusion. The plaintiff still complained of pain, and the orthopedic performed a posterior cervical fusion. When the plaintiff continued to complain of pain, he performed a lumbar fusion. The plaintiff then sought the treatment of a rehabilitation and pain management doctor, as well as a third orthopedic doctor. The third orthopedic doctor determined that the previous lumbar and posterior cervical fusions had not been successful, and he revised the lumbar fusion in her lower back and inserted a battery-operated, internal bone stimulator. *Id.* at 678–79.

An orthopedist hired by Wal-Mart was permitted to testify that, in his opinion, the surgeries were inappropriate and unnecessary. To form the basis for his opinion, he reviewed the plaintiff's medical records and examined her on two occasions. The expert testified extensively about the surgeries that the plaintiff underwent before the accident at issue. He opined that the plaintiff's pain was pain exhibited by an injured person to reap some benefit. *Id.* at 679. The jury awarded the plaintiff $64,000 for physical pain and suffering, $25,000 for past and future lost earnings, and $186,000 for past medical expenses. The plaintiff appealed. She argued that the trial court erred by allowing testimony from the defendants' expert that her doctors performed unnecessary or inappropriate treatment. *Id.* at 679. Prior to trial, the plaintiff had filed a motion in limine to prohibit Wal-Mart from introducing evidence that the surgeries she underwent were unnecessary or inappropriate. The motion had been denied. *Id.*

The plaintiff maintained that the erroneously admitted testimony was very prejudicial and affected the jury's award of damages. *Id.* Although the plaintiff argued it was prejudicial, the opinion does not cite to any evidentiary rules.

The Louisiana Court of Appeals stated that a tortfeasor is liable for unnecessary treatment or overtreatment unless the tortfeasor can show that the plaintiff underwent the treatment in bad faith. *Id.* The court noted that the jury awarded the full amount of medical expenses, making it clear that had the jury determined that the plaintiff had acted in bad faith in undergoing medical treatment, they would not have awarded the full amount of medical expenses. *Id.* The court did, however, find that the jury's award of $64,000 for physical pain and suffering was an abuse of discretion and awarded $250,000 in general damages. *Id.* at 680.

Wisconsin takes a different approach, as seen in *Hanson v. Am. Family Ins. Co.*, 716 N.W.2d 866 (Wis. 2006). In *Hanson*, the plaintiff was injured when her car was hit from behind by a truck. She developed lower back, neck, and rib pain, and her family physician treated her. She began undergoing physical therapy. She also was diagnosed with posttraumatic cervical dorsal strain. After several subsequent tests, the plaintiff was referred to a neurosurgeon who recommended surgery. The plaintiff had surgery to remove the C4, C5, and C6 discs, and they were replaced with bone graph material. The issues before the trial court were whether the plaintiff was injured in the accident and, if injuries existed, the extent of those injuries. *Id.* at 868–69.

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The defendants argued that the plaintiff's surgery had been unnecessary. To support this assertion, the defendants hired an expert to testify about the necessity of the plaintiff's surgery. When asked if the plaintiff's surgery had been caused by the accident, the defendants' expert responded, "No." He testified, "I do not feel the surgery was medically necessary." He also raised the possibility that the surgery was an act of malpractice during cross-examination. However, the defendants' expert conceded that the plaintiff initially went to the doctor as a direct consequence of the accident and that she had acted appropriately in following her doctor's recommendation to undergo surgery. The plaintiff's neurosurgeon testified that the surgery was "necessary," and the structural damage to her spine was caused by the accident. The plaintiff argued that the neurosurgeon's testimony, combined with the fact that she had acted appropriately in finding a doctor and following his instructions, prevented the jury from decreasing the damages to compensate for mistakes in the medical treatment. *Id.* at 869.

The jury awarded past medical expenses of $25,000, past lost earning capacity of $7,250, and future medical expenses of zero. The $25,000 awarded for past medical expenses was approximately the amount of the plaintiff's medical expenses after the accident but before the surgery. *Id.* at 869–70.

Following the verdict, the plaintiff filed a post-verdict motion requesting, among other things, an award of all past medical expenses or, alternatively, a new trial. The court denied the motions, and the plaintiff subsequently appealed. On appeal, the court granted the plaintiff all past medical expenses and a new trial on the issues of past and future pain and suffering and loss of earning capacity. *Id.* at 870.

The Wisconsin Supreme Court discussed the *Selleck* rule, which states that when a tortfeasor causes an injury to another person who then undergoes unnecessary medical treatment of those injuries, despite having exercised ordinary care in selecting a doctor, the tortfeasor is responsible for all of that person's damages arising from any mistaken or unnecessary surgery. *Id.* at 871 (citing *Selleck v. Janesville*, 75 N.W. 975 (Wis. 1898)). The court concluded that the *Selleck* rule applied to the case before it.

The defendants argued that unnecessary medical treatment differs from medical malpractice, which causes aggravation of injuries. The defendants contended that there was no causal relationship between the accident and the surgery. To support their argument, the defendants pointed to testimony of their expert, who had stated that he had found no spinal pathology causally related to the accident. The defendants also argued that the jury verdict, which awarded solely pre-surgery medical expenses, demonstrated that the jury had concluded that the surgery was not causally related to the accident. The court disagreed with the defendants' position, stating that the jury's award of pre-surgery medical expenses demonstrated that it had believed that the plaintiff had been injured in the accident and thus rejected the defendants' contention during the trial that she had not been injured in the accident. *Id.* at 873. Applying the *Selleck* rule to the jury's findings, the court declared that the plaintiff was entitled to all past medical expenses, if she had used ordinary care in selecting her physicians. *Id.* at 873–74.

The defendants also had argued during the trial that the plaintiff was a person who often exaggerated her injuries. The court stated, "For purposes of the *Selleck* rule, it does not matter if [the plaintiff] is a person who is very focused on her physical pain, as long as [she] used ordinary care in selecting [her physician]. In this case there was no dispute that [she] exercised ordinary care in selecting [her physician]." *Id.* at 873.

In her concurrence, Chief Justice Abrahamson recognized a distinction between necessary treatment necessary due to injuries and additional unnecessary treatment arising from the original injuries. *Id.* at 877 (Abrahamson, C.J., concurring). She noted that the problem with the case was that the defendants had tried to argue two different theories that they were not liable. *Id.* Under one theory, the defendants had argued that "the surgery was performed as treatment for injuries sustained in the collision, but the surgery was unnecessary." *Id.* Chief Justice Abrahamson acknowledged that *Selleck* foreclosed this defense. *Id.* Under the second theory, the defendants "may have" argued "that the surgery, necessary or not, was performed not to treat the injuries that Hanson, the plaintiff, sustained in the collision," but to treat an injury that she had "sustained at some other time." *Id.* at 878. Chief Justice Abrahamson stated, "This theory, however, was not well developed by the defendants and was blended with the argument that the surgery was simply unnecessary," leaving the court with a "muddled record." *Id.* Thus, she was satisfied that the majority opinion correctly concluded that the *Selleck* rule applied, and the plaintiff was entitled to a new trial on the issue of damages. *Id.*

Justice Prosser wrote a dissenting opinion in this case. He believed that while the *Selleck* rule remained good law, the issue was whether the *Selleck* rule was even applicable. *Id.* at 878 (Prosser, J., dissenting). He wrote that he believed that the *Selleck* rule did not apply until a plaintiff established a causal connection between the defendant's negligence and the injury or condition for which a physician rendered improper medical treatment. *Id.* Justice Prosser opined that the majority opin-

ion had failed to discuss whether the accident caused the plaintiff's injury for which she received surgery. *Id.* at 879. Contrasting his belief with the majority's view, he wrote, "The majority's opinion means that if a plaintiff can prove a coincidental correlation she can satisfy the causation element of a negligence claim." *Id.* at 879 n.6. Justice Prosser noted that the majority opinion concluded that because the plaintiff had experienced neck pain after the accident, the accident had caused the neck pain, but that conclusion either absolved the plaintiff from proving causation as an element of her negligence claim as a matter of law, or it completely undermined the sanctity of the jury verdict. *Id.* at 880.

Sibbing v. Cave

On March 4, 2010, the Indiana Supreme Court weighed in on causation and contesting damages for medical expenses in *Sibbing v. Cave*, 922 N.E.2d 594 (Ind. 2010), a motor vehicle accident claim. After the accident—a hard collision—the claimant's injuries appeared minor. She told officers she did not need an ambulance at the scene, claimed only a headache, went home, took a three-hour nap, and then she went to the hospital, with pain in the ribs and right hip. She had no fractures, nor did the hospital note complaints of back pain. She was sent home with pain reliever and instructions to follow up with another doctor. Two weeks later, though, she had symptoms of back pain and sought treatment from an internist. The internist ordered a nerve conduction study and an MRI, which showed a bulging disc at L5-S1, although it did not press on the nerve. She had physical therapy for several weeks and then unilaterally stopped treatment because she felt that she was no longer improving. More than a month after the accident, she underwent treatment with a chiropractor, whom she visited 40 times over the next six months. The only evidence that she offered during the trial to support her claim was the testimony of the chiropractor, who testified that the care that she received was reasonable and necessary as a result of trauma of motor vehicle accident.

During the trial, the defense did not contest liability. The claimant offered medical bills of over $16,000. The defense contested the medical care, offering a medical expert who had reviewed the medical records to contest the nerve conduction study as inappropriate and unnecessary. The defense expert also testified that the passive, chiropractic care received by the claimant more than four weeks after the accident was medically unnecessary. The trial court barred the defense expert's opinions on the nerve conduction study and the passive care. The matter was submitted to a jury, which awarded $71,675.

The defendant appealed, and the Indiana Court of Appeals affirmed the verdict. *Sibbing v. Cave*, 901 N.E.2d 1155 (Ind. App. 2009). In addition to arguing that the trial court had erroneously excluded the defendant's expert testimony, the defendant argued that the court had erroneously admitted statements made by the emergency room physician about the nature of the claimant's injuries and their permanence, mistakenly ruling that they did not constitute hearsay. The Indiana Court of Appeals ruled that the trial court had erred, but harmlessly, because other similar opinions were also admitted as evidence.

The Indiana Supreme Court granted transfer, and affirmed on March 4, 2010. *Sibbing v. Cave*, 922 N.E.2d 594 (Ind. 2010). In *Sibbing*, the Indiana Supreme Court redefined "reasonable and necessary." The plaintiff's burden to show that incurred medical expenses had been "reasonable" now specifically applied only to the amount of a bill. The court referred to its recent decision in *Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009), ruling that the defense could offer into evidence discounted amounts accepted by medical providers to show the reasonable value of medical charges, irrespective of the reason for a discount. In *Stanley*, the court stated that the actual charge was not the only measure of the reasonable value, which it said was "especially true given the current state of health care pricing." *Id.* at 856–57. The burden to prove that care was "necessary" now depended solely on whether the need for care was caused by a tortfeasor's negligence.

The *Sibbing* court next turned to the scope that it would allow a defendant in attacking a claimant's medical care. The court held that excluding the opinions of the defense expert, who believed that the claimant had unnecessary medical tests and unnecessary chiropractic care, had been proper. The court adopted Restatement (Second) of Torts §457, reasoning that, if a negligent actor is liable for another's bodily injury, he or she is also liable for any additional bodily harm resulting from the normal effort of third persons in rendering reasonably required aid to treat that injury, even if the assistive acts have been negligent. The court did not want to place innocent plaintiffs "in the unenviable position of second-guessing" their physicians to make sure doctors did not misdiagnose or performed only appropriate procedures. The court stated that a negligent actor should bear liability for those assistive efforts because it is reasonably foreseeable that medical care providers are human and capable of making mistakes. *Id.* at 621.

The *Sibbing* court did limit its holding. First, the court stated that "a plaintiff's recovery may be reduced if he fails to obey his physician's instructions and thereby exacerbates or aggravates his injury. *Id.* Second, the court did not want its decision to be read so broadly that it would allow a claimant to recover damages for medical treatment "wholly unrelated to a defendant's wrongful conduct." *Id.*

As to causation, the *Sibbing* court further clarified. The court distinguished what it meant from the "standard negligence doctrine," requiring proximate cause, which has two components: causation-in-fact and scope of liability. *Id.* at 603. The court defined the scope of liability as "whether the injury was the natural and probable consequence of the defendant's conduct, which in light of the circumstances should have been foreseeable or anticipated." *Id.* Then, the court opined that this scope of liability definition "was helpful in understanding the contours of this foreseeability aspect when a defendant seeks to challenge the nature and extent of medical treatment selected and provided by a plaintiff's medical care professionals." *Id.* at 603. The medical judgment of a claimant's medical care professional could not be contested even if it has been unsound or erroneous. *Id.*

The *Sibbing* court then asserted that future defendants could refute a plaintiff's claim that medical bills were reasonable and necessary by (1) contesting the amount as unreasonable, (2) showing that the defendant's actions were not

the cause-in-fact of the care, and (3) showing that the damages were not within the "scope of liability" as limited by the principle that the decisions of medical professionals would not be subject to contest. As to causation-in-fact, the court offered two examples of situations in which a plaintiff could not recover for care: (1) "damages for dental care received following a collision in which harm to the plaintiff's teeth was not implicated," and (2) damages for medical treatment that "was not at all necessitated by the alleged tortuous conduct but by non-aggravated, pre-existing conditions." *Id.* at 603.

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Writing a separate concurrence, Chief Justice Shepard of the Indiana Supreme Court voiced concerns over the scope of the holding. Justice Shepard wrote that "[g]iven the regularity with which this Court expresses its faith in the judgment of juries," he was surprised with the holding of his colleagues that allowed the claimant to provide expert opinions to the jury but prohibited the defense from doing the same. *Id.* at 604. While the burdens of proof placed on the parties was, in his opinion, "hornbook law," what was new in the rule of this case was that "the claimant may satisfy the burden of proof simply by tendering medical bills in accordance with Evidence Rule 413." *Id.* He felt that a plaintiff must offer expert testimony to demonstrate that the defendant's action caused the injury. *Id.* at 605. Justice Shepard was also concerned about the future impact of this rule:

> Most of the time, when medical treatment is provided by mainstream practitioners, there will be little tussle over whether the care was reasonable and necessary and the practical effect of prohibiting a party from tendering probative evidence to the jury will not likely lead to an unjust verdict. Because I am not persuaded that the prohibition worked an injustice in this instance, I join in affirming the outcome. But the breadth of today's ruling will lead future judges and juries to work injustices at the very moment when judgment is most needed to hold to account providers at the edge of reasonably necessary treatment, or beyond it. Today's "*Sibbing* rule" insulates sharp practices from scrutiny, which is why I decline to join in.

Id. at 605.

Ramifications

While the sympathy shown by the Indiana Supreme Court is commendable, the approach in *Sibbing* seems both naive and misguided. The "*Sibbing*" rule places unlimited faith in medical providers in not allowing defendants to in any way question their decisions. While we should recognize doctor's frailties in decision-making to some extent, this rule has no limits. The decision appears to eliminate any approach by a defendant to question the type of care, its duration, or the amount of testing received by claimants.

The national health care debate has produced much concern over unnecessary care. Opponents of recently enacted federal legislation claim that doctors practice defensive medicine to avoid malpractice claims, and often overuse diagnostic testing and unnecessarily treat patients. Also, while health insurance companies have tools to manage care, they confront strong limitations.

More importantly, cases involving abuse through inflated billing usually do not have any pricing tools to limit services. Most often, questionable medical providers agree with claimants' counsel to withhold collection on bills in return for protection of their right to recover from the proceeds of litigation. Compromises of fees are common, but only after resolution of tort claims.

Another concern raised in the national health care debate has been that our health care system divorces patients from the expense of care, which hinders control of health care cost inflation. Also, critics of our health care system fear that the system leads to demands by patients for more care, testing, and medication prescription than are necessary. For example, a doctor's note may read that he did not feel that an MRI was necessary to caring for a patient, but he ordered one anyway when a patient demanded it.

The *Sibbing* court failed to appreciate the amount of system abuse. If they do not have to affirmatively demonstrate the reasonableness of incurred medical expenses, unscrupulous care providers will have no limits on expenses or treatment. In some cases that we have already seen, patients have received numerous pain injections at the same site on the same day. General practioners, prescribing medication, have sent patients to chiropractors, then to neurologists, then anesthesiologists, then physical therapists, then back to chiropractors in quick succession. Imagine the abuse that would occur if defendants cannot contest all of these care providers' charges and care.

The court in *Sibbing* has also failed to appreciate our jury system. In trying a case, the argument that a tortfeasor should not be able to contest a decision of a health care provider is hard to contest, for the very reasons identified by the court: a patient should not have to second-guess his or her doctor. From the defense perspective, this is not an argument to take up unless it is clear that the warning signs had been clear and that a provider should have been second-guessed. When, for example, a claimant receives six months of chiropractic care three times a week but does not improve, most reasonable people would expect a responsible claimant to stop receiving the care or to seek a second opinion.

Indeed, the *Sibbing* court did not seem to consider situations involving disagreement among treating doctors about appropriate care. Often a claimant goes to many providers who all suggest conservative care before finding one who suggests aggressive care, or who wants to order medication. *Sibbing* seems to eliminate defendants' option to question care through testimony of independent medical experts. It is unclear if it eliminates introducing opinions from treating doctors questioning other treating doctors' care.

Sibbing's immediate ramifications in Indiana will prevent a tortfeasor in a case involving an injury that requires medical care arising from an accident from introducing evidence from an independent witness that questions the claimant's medical care, unless the tortfeasor can demonstrate that the choice of doctor was unreasonable. Mitigation seems to encompass all the interests at stake because it would allow a tortfeasor to question the care while allowing the claimant to plead that he or she should have to second-guess his or her doctor and place the burden of proof on the defense. The *Sibbing* court identified this defense in its opinion as appropriate, but only if a patient failed to obey his or her physician's orders and thereby exacerbated his or her injury.

Further, the *Sibbing* rule appears to treat all care equally, irrespective of the skill and training of the medical provider, or whether the care was generally accepted by the medical community. This seems to have concerned Justice Shepard, as noted in his distinction between "mainstream" practices and "sharp practices," when he wrote that "when medical treatment is provided by mainstream practitioners, there will be little tussle over whether the care was reasonable and necessary," but that the "*Sibbing* rule insulates sharp practices from scrutiny." *Sibbing*, 922 N.E.2d at 605. The ruling leaves no leeway to question holistic medicine, or other treatments that are fairly questioned as long as they are related to injured parts of the bodies of claimants.

The decision will lead to some interesting positions for defendants. Medical opinions will need to focus more on "but-for" causation and test the validity of a claimant's assertion that he or she suffered actual injury. It appears that defendants will have more difficulty attacking past medical care than before, which may lead defendants to push to begin trials quickly, before claimants complete care, to preserve defendant's rights to offer medical opinions. Also, insurance carriers can still attack unnecessary care through criminal prosecution avenues, or through fraud investigations.

In summary, the trend to limit a defense from contesting medical treatment is troubling. Defense counsel must prepare so that during trial they can make appropriate records and offers of proof so that appellate courts can address unscrupulous personal injury-mill practitioners. Courts should still allow jurors to use their common sense in reviewing medical care that seems excessive or exaggerated. Courts should not shield claimants from taking responsibility for their own medical care, particularly when they can profit from it. FD