

TRIAL PRACTICE IN ACCIDENT LITIGATION

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Of the many criticisms which the lay world aims at the legal profession, the most justifiable is that great uncertainty exists both in the law which we apply and in the results which attend our procedure. None may deny that charge; we can differ only as to how much of the uncertainty is inherent and unavoidable and how much we contribute by our philosophy and practice.

All men take increased interest in the law of negligence since society gained motorized momentum, ceased rubbing elbows, and began to crash fenders. Litigations over wills, contracts, bailments, or domestic relations are for the relatively few. They result from relations voluntarily, if not always deliberately, assumed and are largely against adversaries with whom one elected to deal. Their solution in the courts, if not highly satisfactory, is not scandalous. Likewise many of the tort actions, such as slander, malicious prosecution, criminal conversation, and the like are so relatively few in number and affect so few persons that they can not become a source of widespread complaint. But under modern conditions we can neither escape nor prepare for accidents. They involve us with all types of men, and drive us to court to seek reparation or to assert immunity from liability. The predominant contact between our judicial system and society is through the negligence cases which congest our calendars, produce ambulance chasers, prosper insurance companies, make promises to plaintiff's ears often to be broken to the hope, bring vexation or disaster to defendants, and cause most of the criticism of the courts, the law, and the bar.

Abuses in the personal injury practice have reached such magnitude that highly influential and responsible sources within the profession propose to remove the whole matter from the courts, to make automobile liability insurance compulsory, and to condition all insurance to provide for settlements by award of an administrative tribunal such as the workmen's compensation boards. This would largely dispense with the lawyer, and while it would seriously impair the sources of income of great numbers of attorneys, it seems likely to come about in some form if present abuses and uncertainties can not otherwise be overcome. The wide range of possible legal results from each simple accident exerts a most corrupting influence upon

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the legal profession. Its temptation must be met by greater resistance from the lawyers, or society will act to remove the temptation. We being forced to such a choice, is it too idealistic to urge starvation rather than prostitution?

Assurance has become a passion of the business world. Certain or predictable burdens are translated into terms of overhead or living costs. Unforeseen burdens spell disaster. Hence assurance against hazard has become one of the thriving enterprises of the modern economic order, and it is not surprising that the business world, ever ready to pay a premium for certainty, looks with disapproval upon the profession in whose hands and by whose processes all events are doubtful. What lawyer, after careful study of available information, can today honestly advise a client that he is or is not to be held liable, or can say what the extent of that liability will be? Liability strikes like lightning, unwarned, unpredictable, and its damage immeasurable. Yet since the Ten Commandments or the Twelve Tables, it has been an accepted axiom that the law one must obey shall be ascertainable. How may one learn what conduct will be "reasonably prudent" when weighed in a negligence trial? Uncertainty as to law and result is not confined to the personal injury case, but is present in a serious, if not equal, degree in a claimed violation of the Sherman Anti-Trust Act, or in a public utility rate case.

Much irregularity in legal process is inherent. Where it is necessary to resolve disputed facts there is great range in keenness of observation, clarity of expression, and even veracity of witnesses, as well as great scope for error in conflicting inferences to be drawn from the testimony. But there is a persistent, insidious, and plausible tendency toward uncertainty in everything that legal reasoning touches. It could, at a price of course, be avoided. The tendency is easier to illustrate than to describe.

The legislature after careful consideration of the interests of society declares, for example, that: "Every driver of a vehicle approaching the intersection of a street or public road shall grant the right of way at such intersection to any vehicle approaching from his right, except where otherwise directed by a traffic officer or by a lawful traffic regulation device or signal".¹ This rule is as arbitrary as it is clear and simple. On its face it imposes upon the driver approaching from the left the obligation of avoiding a collision. He must avoid interference at his peril. Liability for collision would be settled by one inquiry, who came from the left? The rule of law

¹N. Y. CONS. LAWS, c. 70 (GEN. HIGHWAY TRAFFIC LAW) § 12 (4).

to be applied is intelligible. Whatever its faults, want of simplicity is not one of them.

Yet this simple rule ran the gauntlet of the courts and emerged a different thing. Said the Court of Appeals, "[T]he application of this statute must depend upon all the surrounding circumstances, the distance of the cars from the intersecting point, the speed and the relative duties placed upon each".²

If two cars collided it would seem conclusive that no matter what the distance it was not enough, no matter what the speed it was too great, no matter what the relative duties the absolute duty upon the left car to yield the right of way until safe passage could be made was violated. But the court even says, "[T]he questions which arise over collisions at intersections of highways are always more or less perplexing. . . Much of the uncertainty is due, no doubt, to subdivision 4, Section 12 of the General Highway Traffic Law."³

The criticism of the court is not that they did not think as good lawyers; as legal philosophy their decision was probably sound. The court chose between two lines of public policy. It could not think in the simple terms of the statutory command; it reverted to the complex legal reasoning involving a combination of principles and depending upon multiplied conditions which the statute tried to supersede.

The literal rule of the statute is arbitrary but clear. It might impose an unreasonable liability, but, if so, it is one that can be ascertained without a lawsuit. Any man may know whether he is entering or did enter an intersection from the left or the right and may govern his conduct both in driving and in litigating accordingly. The rule of the court is reasonable and flexible and vague. Instead of a simple inquiry as to whence the defendant approached, we have the compound problem of relative speeds, distances, signals, lookouts, elapsed time, upon all of which witnesses are so glib and inaccurate, even when honest. The court's rule introduces such complexities and contradictions and finesse of reasoning as are certain to result in litigation.

It is not clear to me whether this inclination of judge and lawyer is disinterested philosophy or a "defense mechanism". Why such abhorrence of an arbitrary rule of liability fixed by the legislature in advance, and such devotion to an arbitrary determination of liability by a jury after the fact? Are we biased by an unconscious regard for the welfare of our craft or moved by a pure philosophy of

²Schuman v. Hall, 246 N. Y. 51, 54, 158 N. E. 16, 17 (1927).

³*Ibid.*

reasonableness? If the only controversy in a lawsuit were as to which car entered upon the right, there would be little field for the exercise of the talents of the lawyer; perhaps there would even be no lawsuit. It is in the field of uncertainty that the lawyer wins fame as a cross-examiner, a persuasive reasoner, a skillful tactician, an artist at enlarging verdicts in doubtful cases. Hence while laymen crave certainty we abhor a proceeding where two and two must always make four—we want a chance by forensic skill to build two and two up to six or hold them down to three, and now and then to get two and two returned by a jury as a cipher. Hence we approach the interpretation of a statute firmly convinced that it would be arbitrary to have liability follow a single simple fact but quite reasonable to have it follow a complicated *ex post facto* blending by a jury of many facts in unknown proportions. The fact that our philosophy and our interests coincide probably does not impair our faith in the philosophy.

Society may not have a rule at once arbitrary and flexible, at once certain and yet yielding to circumstance. It must choose between clarity and sweet reasonableness. Did it not through the legislature make its choice? It prefers certainty. It chafes under our effort at weighing collateral acts; it seeks the rule of *res ipsa loquitur*. It regards our philosophy as confounding and unjust—and takes out an insurance policy against the uncertainty of the courts as it would against the caprice of weather or fire or other element.

A favorite "alibi" of our profession, when charged with maladministration of justice, and a favorite point of attack on our legal system, in which many lawyers are joining, is the jury system. Newspapers carry dramatic stories of apparent miscarriages of justice; the jury room is pictured as a sanctuary in which, once he reaches it, the criminal is safe. Utility enterprises, insurance companies, and men of property claim they are penalized by its prejudice; higher courts reverse its errors; lawyers make play upon its inconsistencies.

Well-considered opinion will distinguish, however, the faults of the jury itself from the faults of our method of conducting causes before it. Since our whole society joins in creating the jury as our tribunal, we lawyers are not responsible for its existence. Those methods, however, which tend to confuse it, to obscure its view of the facts, to inflame its passions or play upon its prejudices, we as a profession are responsible for. It is difficult to escape the conviction that the bar is to blame for a large share of the criticism aimed at the jury. Why blame an untrained jury for yielding to passion or prejudice and excuse an educated lawyer for fanning it?

Since the jury of laymen, with modifications in procedure and methods, perhaps, seems destined to survive for many generations as the dominant tribunal for determining questions of fact, it behooves the bar to work out a trial technique that will accord with its peculiar characteristics.

This conviction of jury permanence is less due to merits of the jury than to defects of any substitute system. Judges are reversed for error as often as juries, and almost every instance of prejudice, ignorance, or corruption of juries can be paralleled by an example from the judiciary. The trial of ordinary causes before good trial judges is slower, more costly, and usually less satisfactory than jury trial. Juries at least commit their errors within a few hours and leave one to his remedy. In equity, however, consideration of the case, even on the facts, is usually postponed until all of the witnesses and most of the testimony are forgotten; then the transcribed record is briefed and requests submitted and decision dragged until the client suspects the zeal of counsel and the integrity of the judge. Equity is a lawyer's court; it has never had the confidence of the laymen that has been the lot of the law court.

Moreover, I am convinced that the jury, for reasons of statecraft, is destined to survive. This too is based upon the absence of a better method of deciding controverted questions of fact. It is doubtful if any other system could survive from generation to generation the shock of deciding questions of fact. One street railroad with a heavy litigation calendar was able for a considerable period to win from juries no cause verdicts in nearly one-third of its trials, and about half of the remaining verdicts were in amounts disappointing to the plaintiffs. Of course the large and spectacular verdicts reached the newspapers; those disappointing to plaintiffs did not. No judge could have maintained himself upon that bench who decided one-third of the cases before him in favor of an unpopular public utility and disappointed the plaintiff as to amount in another third of the cases. He would have been subjected to public attacks which, if they would not have driven him from the bench, would have made his return to the bench an impossibility. Judicial tribunals which have attempted to settle questions of fact, such as utility commissions, are notoriously short-lived and succumb to an accumulation of grievances, but a judicial system must live from generation to generation.

The jury system possesses peculiar characteristics which gives the public confidence that its errors are but a manifestation of weakness inherent in the average man and are not due to that peculiar type of

cussedness which is believed to inhere in educated specialists. The average man beaten by a jury damns it for its dullness and curses its prejudice or stubbornness or ignorance, and goes back to his work resigned to the act of a jury as to an act of God. But if beaten by a judge, he suspects foul play or overinfluence of an adversary, doubts the integrity of the judiciary in general, and waits for an election. A jury trial leaves the citizen feeling that he has had his day in court, even if it is a sad one; and the nature of the jury is such that it cannot be campaigned against.

The jury is a paradox. It is permanent but it is always changing, ready to decide all cases and yet never deciding but one. It is called into being on the morning of the trial, does unwillingly, and perhaps poorly, its duty, and after the verdict melts away into the elements from which it came. It may be cursed but it is gone. It had no ambition to live again and probably could not again be assembled. It may have all other vices but it has not the vice of ambition. It cannot be identified in advance and is not subject to the social and other influences that are sometimes alleged to weigh with judges. It returns its verdict without fear that it will be turned out of office. These peculiarities go a long way to offset the inability of jurors to comprehend the fourth dimensional reasoning of which our courts are so fond, and which, however admirable in the field of pure philosophy, is not very helpful in solving the problems of our rough life.

In all of the literature attacking the jury system, I have seen no suggestion of a substitute tribunal that could gain and keep public confidence as the jury system has done. While a particular lawyer engaged in a particular litigation may not care how his tribunal stands in the estimation of the public so long as it has legal power to give him a decision, from the point of view of society, it is tremendously important that the deciders of fact have the confidence of all classes of people; that the judgment seat be shared to some degree by humble citizens; that men in all walks of life may know that they may meet their peers in judgment. If business men complain that they seldom meet their peers upon the jury, it is largely because they are suffering from a superiority complex which makes them disdain jury duty; the fault is the psychology of the business clan and is not inherent in the jury system. Given a jury drawn from all classes of people and without exemption of the ever-complaining business man, presided over by a judge of character, courage, and a fair measure of legal intelligence, attended by lawyers intent upon trying their cases upon the merits, the jury system provides a tribunal as satisfactory as any that has ever been devised.

Assuming, then, continuance of the jury system, the duty devolves upon the bar to develop a trial technique which will reconcile the weaknesses of the ancient system with the modern demands upon it. To that end, the legal philosophy we expect jurors to apply must be simple and direct, the issues clear cut and the controversy limited to as few elements as possible, the machinery of presentation free of false motions and confusions.

This does not mean that all of the adaptation must be on the part of the bar. It is not certain but modifications of the jury system could adapt it somewhat to the growing complexity of its problems. Requirement of a unanimous verdict may in time be superseded by a two-thirds or even a majority rule. The unanimous verdict may not only load, but overload, the dice in favor of a defendant. If a majority vote is deemed sufficient to impose a rule of conduct or liability upon a whole state perhaps a majority is enough to apply it to an individual. Probably too, the general verdict enables the jury to reach results satisfactory to it without due consideration of the several elements that go to make up liability. More careful and impersonal consideration would result from requiring it to answer specific questions which the court would assemble and embody in a judgment according to the legal effect of the answers.

Among major adjustments of the law to the jury may be suggested a restriction of the permissible latitude in personal injury cases. No lawyer can give a client more than a sort of well-informed guess at the worth of a negligence case. Juries return and courts sustain verdicts from almost nothing to almost anything for identical injuries. No small part of the stubborn resistance to liability, the feverish speculation in personal injury litigations, and the sordid atmosphere that attends their disposition is due to the fact that an injury that will net one plaintiff five hundred dollars for "pain and suffering", will net another five thousand through the art of counsel, tact of witnesses, sex of the plaintiff, or financial condition of the defendant.

The better reason would suggest that damages be fixed by legislation by schedules of indemnity, either in a fixed proportion of lost earning power or in a fixed schedule of disability plus expense of treatment. If liability were found, the schedule should be applied as it is applied in workmen's compensation. If we remove from negligence litigation the speculative feature as to the amount of recovery, half of the cases now litigated would be settled. The illusive hope of making a fortune out of a misfortune leads plaintiffs to reject reasonable offers of settlement. The hope of a compromise

verdict leads defendants to chance trial rather than to make just and voluntary compensation. To the insurance company or utility with whom litigation is a matter of averages, this wide range may not be so serious, for if it loses one it ought to win, it compensates by winning one that it ought to lose. But to a plaintiff who is but one day in court and who has no series of hazards to average and equalize, the result is, as Chief Judge Cardozo said, "catastrophic". Society could well deny plaintiffs the right to struggle for extravagant compensation and extend to them the greater certainty of fair compensation.

A far reaching step in the better ordering of our procedure would be to educate a specialized bar for the trial of cases.⁴ The separation of function between counselor and advocate is not an arbitrary division but a natural one. Trial work would be greatly simplified if it were pursued by a relatively few lawyers as a career, instead of being incidental and often secondary work to the whole mass of lawyers. Such a bar would specialize in procedure and evidence and would acquire the practical art of proof as well as learn the abstract science of evidence.

Separation of solicitor from barrister and special training and restriction of the latter to trial work would result in a smaller trial bar, closer acquaintance, and more accurate knowledge. Conduct of litigation would be a career and not a mere interruption of more profitable office work. It could not fail to result in better qualified judges, for the bench reflects the qualifications of the profession from which it is selected. Employment would come to the trial bar largely from counselors in touch with the sources of litigation. The advocate who looks to such sources for retainers is likely to maintain higher professional standards than one who appeals to the public, for he knows that his standards will be better appreciated and more accurately judged. Maneuvers to please bitter clients or attract attention from reporters would be less frequent if the chief channel of employment of the trial lawyer were through counselors who discountenanced such tactics.

Trial work would be more expeditious and results less unsatisfactory if required legal education included the art of trial as well as the science of procedure. To conduct court work with dispatch and effect, one must know much more than the law governing his case. He must have skill as well as learning.

It is a weakness of our educational system that one may master the theory of evidence and still be unable quickly and simply to

⁴The author has expanded upon this matter in an article, *Advocacy as a Specialized Career* (1929) 7 N. Y. L. REV. 77.

prove the signature on a promissory note. Evidence is taught largely in the negative. The young lawyer receives little help from textbooks and decisions as to how he should prove his case, but the suggestions as to how he should not are many. It is the lawyer's errors rather than his good work that are immortalized in the decisions. Courts of review write to point out the errors below, and the good objections that were taken; but seldom does a judicial opinion record the good work of a trial lawyer or point out the way that a particular problem should be met. The study of most sciences is a study of the successful work of one's seniors. Study of the law of evidence is a research in blunders.

The course in evidence arms the young lawyer with a head full of objections with no restraint on the use of them. Objection being the thing the lawyer is qualified in, the American trial is composed of a vast number of objections that are never seriously pressed but which take time and lend it an atmosphere of confusion and contest. The number of objections in the average record on appeal impeaches the training and good faith of one or both lawyers, for while there will always be some difference of opinion as to admissibility, a well-trained profession should not in every trial make hundreds of unfounded objections nor permit its practice to be subject to any such number of good ones.

The art of trying lawsuits quickly and fairly requires a constructive mind and an affirmative program of proof. The negative equipment of a young lawyer, his education in obstruction rather than construction, perhaps explains why so many men can object to a leading question who cannot frame one that is not leading.

Many lawyers fully trained in the theory of evidence and the rules by which testimony is excluded cannot in a workmanlike manner qualify an expert or ask a hypothetical question, or prove a disputed signature or document, or establish an account stated. Yet after trying with obvious blundering and embarrassment to put in an affirmative case, the young counselor rises to the far more treacherous work of cross-examination, care free and self-confident. Here he feels at home. It is destructive work and fits his training, or it is more lawless and fits his lack of it.

Another important step would be taken if litigations were conducted not only in the names of the real parties in interest, but also in the names of all parties in interest whether contingent or absolute. Too often the names of the litigants are but the dummies behind which a lawyer who has become part owner of a claim and an insurance company which is resisting it fight their battles. Seeking

for an honest result we start the case by an only half successful deception of the jury as to whose controversy they are deciding. The general resort to liability insurance protection from the hazards of the law has crowded the court with professional litigants to whom a lawsuit is not an event but a routine. The defendant's lawyer is but a hired man, while the claimant's lawyer is all too frequently a partner in the claim. It is not consistent with our theory of the position of the advocate and his relation to the court that a lawyer should either be a partner litigant or a hired man for a corporate professional litigant. His position as an officer of the court necessarily assumes that his relation to his client shall be such that he shall be in charge of the litigation he is conducting and not a mere dependency of a claim department and that he shall value his standing as a lawyer more than the patronage of any client. It is difficult to say whether the partnership status of claimant's lawyers or the hired man status of many defendants' lawyers is more injurious to the legal profession; but neither represents the true dignity and independence that should pertain to an officer of the court.

Some other steps could be taken which would simplify jury trials. The exception should of course be abolished. It has been so universally abused that it no longer has any meaning whatever when taken, but often has disastrous consequences when omitted. It would seem that the court by rule and without legislation could provide that each litigant should be deemed to have an exception to every adverse ruling. Then the barking of an exception would cease. That the meaningless exception still has disastrous significance in this twentieth century, shows that the legal profession adheres to its mysterious incantations with the devotion of an oriental priesthood.

We should surely arrive at some limitation of the number of experts to be called on a side on any given point. If each side were limited to one expert who should state his conclusion and the reasoning by which he supported them and leave his testimony to be weighed by his reasoning rather than by the number who can be found to join in his conclusion, it would save time and expense and be more conducive to just results.

It would seem, too, that the profession might with reasonable regard to the interests of its clients adopt more modern methods of proof in many matters. For instance, why is it that a lawyer who would invest his money unhesitatingly upon the stock quotations contained in a newspaper would object strenuously to the receipt of that same paper in evidence in a small lawsuit to establish the

value at a given time of stocks in litigation? The same evidence that is sufficient to guide his investments is not sufficient in his litigations. Many examples might be given of similar inconsistencies, where the court seeks proof from sources less reliable and disinterested than those which guide the business world.

Lawyers may attain great eminence in the field of business, may head industrial corporations and devise the plans and corporate structures by which business should be conducted, but the lawyer's one exclusive and distinctive field is litigation. He shares it with no other. His right to pursue his vocation follows from admission to the courts. Yet it is this primary function of the bar which is most neglected and in which its conduct is most criticized. It would seem that in maintaining its primary and most distinguishing field of effort it should devote itself to developing a trial technique which would meet the criticisms so often repeated and so justly deserved. If the bar shall fail in court, where then shall it succeed?