Plaintiff's Personal Injury Case - A Practical Study

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THE PLAINTIFF'S PERSONAL INJURY CASE— A PRACTICAL STUDY

by
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THIS Article will emphasize the practical day-to-day problems occurring in the handling of the plaintiff's personal injury case. The attempt will be to isolate, discuss, and recommend the practice and procedure which should be followed by the plaintiff's attorney in properly representing his client.

The principal categories for discussion are (1) the original interview, (2) the investigation, (3) the evaluation of the case, (4) the settlement negotiations, (5) the filing of suit and movement of the case toward trial, (6) the preparation for trial, and (7) the trial of the case.

I. The Original Interview

The personal injury case begins for the lawyer with the original interview. This first meeting between lawyer and client is probably the most important part of the entire case. This interview has three main objectives: (1) Instilling in the client a feeling of confidence that the selected attorney is capable, interested in the problem, and able and willing to devote every effort to the client's case; (2) Obtaining a fair fee contract which will compensate the lawyer for the efforts he is to render; and (3) Gathering the facts which form the foundation of the case.

If properly conducted, this interview can save many hours and days of work, substantially affect the ultimate result of the case, and materially increase the compensation to be received. Facts are all-important, and the lawyer must learn and understand the significance of every available fact to be able to evaluate and present the case properly.

From the original interview should come the framework of the entire case. The lawyer should learn what facts he has and where he must go to gather the remaining information. At this time his course for subsequent investigation is charted, and the basis is laid for future settlement negotiations and final presentation of the case to a jury. Because of the overriding importance of this original interview, it will be given extensive attention.

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A. *Opening The Interview*

The average personal injury client has had little, if any, prior experience with lawyers. He is a member of the general public, and, unfortunately, is somewhat apprehensive about dealing with lawyers. He should be put at ease. When the client arrives, the lawyer should greet him personally and show him into the lawyer's office. If the lawyer cannot see the client immediately, the apprehensive and nervous client should not be left waiting for a long period of time while a busy lawyer finishes other matters. This only adds to the apprehension and nervousness of the client, and can easily be avoided if the lawyer will take a few seconds to meet the client and assure him that his business will receive prompt attention.

The prospective client is usually disorganized in his thoughts and wants to volunteer a great deal of unrelated, immaterial information having no ultimate bearing on the problem. The client, however, is not in the office for the purpose of being cross-examined and confined only to the essential details. The best practice is to let the client make his original statement first. A few general questions along the way will guide the client and probably shorten the original statement. It is not good practice to pick up a legal pad and start scribbling notes furiously when the client first walks into the office. Let him tell his story in his own way. Listen to him.

B. *Getting The Facts*

Once the original statement is completed, the lawyer can proceed to question the client thoroughly in a friendly manner in order to get all the information which will be essential to the proper handling of the case.

A check-list is a useful device. An even better practice is to have a mimeographed information form containing a list of the questions that need to be asked, as well as blanks in which the particulars of the case may be written. The form is extremely helpful from several standpoints: (1) it insures the obtaining of the necessary original information; (2) it provides an outline for an orderly exploration of the facts; and (3) it assembles in one place at one time the necessary information with which the lawyer will be working for weeks, months, or perhaps years to come. For clarity and convenience, let us assume we are dealing with a personal injury case arising from an automobile accident. The information to be obtained is as follows:

1. *Vital Statistics on Client*

Under this category the lawyer should obtain the client's full name,

residence and business addresses, phone numbers, age, marital status, and number of dependents.

2. *Vital Statistics on Defendant*

First, we want to ascertain the number and identity of potential defendants. Who was driving the car? Who was the owner of the car or employer of the driver? Assuming one defendant, we should ascertain the following: name, business and residence addresses, and phone numbers.

3. *Date, Time, and Location of the Accident*

It is essential to know the date and time of the accident, name of the city, state, and county in which it occurred, and the street or streets on which the collision happened. If an intersection is involved, the description is relatively simple. If not, the lawyer should obtain, as nearly as possible, a precise estimate as to the number of feet or miles from a certain intersection that the collision occurred. Caveat: Clients are notoriously poor in their ability to estimate distances and speed. Therefore, it is advisable to ask where the accident occurred with reference to some particular landmark, *e.g.*, the third house from the corner, at the bend of a road, or in front of an old oak tree about four car lengths from the corner.

4. *Direction and Position of Vehicles*

The lawyer should ascertain the general direction of each street, the direction of the client's car, and the street on which it was moving. Also, locate the lane or approximate position on the street in which the client's car was traveling. The same information is obtained about the street, direction, and lane in which the defendant's car was traveling. It is very helpful here to draw a rough diagram of the accident to use in understanding the case.

5. *Description of the Actions Taken by Each Driver Involved in the Automobile Accident*

Now is the time to get specific as to what was done by each driver. This information will furnish the basis for later specific allegations. The questions to be asked about the actions of each driver are as follows: speed before there was any attempt to slow down, whether speed was reduced before the accident, speed at the time of the accident, whether brakes were applied, and whether there were any skidmarks and the length of those skidmarks. The lawyer should also inquire whether there was an attempt to turn right or left to avoid the collision, and, if so, which direction and how far back from impact the turning action started. It is necessary to determine whether there was

any signal of an intention to stop or turn, and, if so, what signal was given and about how far from impact the signal was first given; and whether there was a horn sounded by either car, and, if so, how long before or how far back from impact the horn was sounded. Also, the question of proper lookout should be explored carefully. The lawyer should ask the location of the other car when the driver first saw it, and what action was taken immediately upon seeing the other car.

Of course, a client cannot always give all of the above information. In many instances he has no knowledge of what the other driver did. A word of extreme caution must be given: Do not rely too heavily in the subsequent handling of the case upon what the client had to say in the interview about specific actions, especially insofar as they relate to speeds, times, and distances. People are often hopelessly inaccurate in estimating these factors. Even the most blameless driver can be made to look negligent if he starts conjecturing as to times, speeds, and distances.

After the specific questions mentioned, the lawyer should obtain a description of any other action taken by either driver, as well as any general comments that the client may have in explaining the actions taken by any of the drivers.

6. Description of Accident Scene

The physical description of the scene of the accident is most important, and many times it is overlooked. Often the particular physical conditions existing at the scene of any accident were, as much as any other factor, responsible for the accident which occurred. The particular questions should include the following: Was it daylight or dark? If dark, was the area lighted? What were the weather conditions and did the weather affect either visibility or other abilities of the driver to avoid the collision? (The most obvious examples of this would be wet or icy streets.) Were there any other road conditions, such as a humpback street or loose gravel which could have contributed to the accident?

The lawyer should learn the width of the street in feet or lanes, the type of traffic control signals, and the location of any hedges, billboards, parked cars, or other objects which would block the vision of approaching traffic. Additionally, any other physical condition which may have contributed to the collision should be carefully noted.

Also, it is necessary to obtain a physical description of the accident scene after the accident occurred. Here the lawyer should find out about any glass or other material on the street showing the point of

impact after the collision, and the nature of any damage done to poles, trees, or other items at the accident scene.

7. *Sketch the Movements and Position of the Vehicles*

A freehand sketch of the accident scene should be used to portray the position and movement of each car at three times. First, show the location of the cars before any danger was apparent. Second, show the location of each car at the time of impact. (Indicate by arrows each car's movement. Also indicate, if possible, the number of feet each car had penetrated the intersection.) Last, show the location of each car after it came to a rest (indicating the number of feet and direction each car traveled after impact).

8. *Description of Property Damage*

There should be a detailed itemization of the parts of each car which were damaged along with an indication of the cost of the damage.

9. *Summary of Police Action*

Determine if the police were called and who called them. It is important to know if they actually investigated the physical facts, or based their findings and report solely on conversations. Also, the lawyer should know if the cars were moved or if the scene was otherwise disturbed before the investigation took place. Of course, the lawyer should ask which party received a ticket from the investigating officer, and for what, as well as the disposition of the ticket.

10. *Conversations After the Accident*

All conversations taking place after the accident should be noted. Statements made at the scene about what caused the accident are common-place. The lawyer is looking for admissions either by the client or the adverse party with respect to such statements as, "I just did not see you." Since these statements are often denied later, it is essential not only to find out what was said, but the identities of all persons to whom the statement was made and who may have overheard it.

11. *Witnesses*

Many times clients erroneously report that there were no witnesses to an accident. The question of witnesses should be explored specifically. First, determine how many people were in the client's car, the address and phone number of each person, and the position where each was seated in the car at the time of the collision. Second, obtain the same information with respect to the other car.

Third, ascertain the total number of investigating officers who were at the scene. Often the attorney will find that a patrol car was the first to arrive, and that an accident investigator who actually signed the report of the accident was later called. Many times these original patrol officers have information which will be helpful; therefore, the client should be asked how many police cars were there, what law enforcement agency they represented, and the number of officers involved.

Fourth, obtain the names, addresses, and phone numbers of all other people who either saw the accident or were there later. Although a person may not have been an actual witness, he may have overheard conversations. Even if the client does not know the name, address, and phone number of these people, he can give certain general descriptions, such as, "the man at the Gulf service station across the street who came over and talked to us about the wreck."

12. *Insurance Information*

Obtain not only the full insurance information with respect to the other party, but also with respect to the client, including the name of the public liability and the collision insurance carriers. (They are often different.) This is needed to obtain the benefit of the investigation conducted by the client's carrier. If the client has not made any report of the accident to his own insurance company, the lawyer should see that this is done.

Next, obtain information about the defendant's insurance coverage, including the name and address of the insurance company, the adjuster handling the claim, the amount of liability insurance coverage, whether the client has been contacted by the defendant's insurance company, and whether the client signed a statement prepared by the person who contacted him.

13. *Description of Property Damage*

Determine whether the car has been repaired, or if a repair estimate has been made, the name and address of the garage and the particular repairman who repaired the car or gave the estimate, and the amount of the repair bill or estimate. Similar information should be obtained about the damage to the other vehicle.

14. *Description of Injuries*

The lawyer should thoroughly explore the matter of injuries. Often the client will have received injuries or had certain symptoms which he no longer has. These must be documented. A good procedure to assure a complete picture of injuries is as follows: Start with the

time of the accident and come forward to the present. Ask the client what injury was first received, and continue from that point. Specifically mention each major part of the body, such as the head, arms, shoulders, hands, back, hips, and legs to make absolutely sure of a full description of all of the injuries the client received.

15. *Medical Care of Injuries*

Make sure all medical care is noted. Again, chronological questioning is a good procedure. Ask the name of the first doctor visited, the person who recommended that doctor, what the doctor did for the client, the number of times the doctor has been seen, what the doctor originally said about the injuries, and what the doctor has since said. Follow this procedure day-by-day and doctor-by-doctor to make sure of having the name of each doctor and a description of all treatment. Also, ascertain if the client has been hospitalized, the name of the hospital, the date of admission, and the date of discharge.

Obtain the amount of the doctor and hospital bills. Itemize all medical expenses, including hospital bills, doctor bills, drug bills, nursing expenses, and charges for X-rays. Also, determine if the bills have been paid and secure all bills and receipts.

16. *Prior Medical History*

One of the most important matters to explore is medical history. Ask if the client has had any other injury or illness affecting the part of his body listed as being affected in this injury. Obtain full information with respect to such previous injury, such as when it occurred, its duration, and the doctors and hospitals involved. Separate and apart from the question of similar injuries, the lawyer should find out the previous times the client has been hospitalized, the name of the hospital, the doctor treating him, the approximate date of treatment, and the reason for hospitalization. It is surprising how often the lawyer finds other injuries or illnesses which might be claimed to have been similar in nature.

17. *Employment Information*

The matter of employment information is extremely important. A major portion of the damages in personal injury cases consist of lost wages and earning capacity in the past and in the future. Starting again at the time of the accident, determine the client's employer, wages, and method of payment (*e.g.*, straight salary, hourly rate, or commission). Also, secure a detailed description of the client's job, including any detail made more difficult to perform because of the injury. List the actual days lost from work, and note the actual

loss of dollars caused by absence from work or inability to work properly. Often employment has been intermittent, and such periods should be noted. Also, determine if the client has the same job that he had at the time of the accident, and if he is able to do his job as well as before. If not, the differences should be carefully described. If the client was a commission salesman or an independent businessman whose loss of earnings is hard to pinpoint, the lawyer should arrive at a realistic formula based on average income per day and the number of days lost.

18. *Prior Employment History*

Prior employment history should be explored for two purposes: (1) to ascertain the client's average past earnings in order to predict future earnings, and (2) to see if the client is a steady, substantial citizen who has traditionally held jobs for long periods of time. The lawyer should know if he can demonstrate, from a comparison of prior and subsequent employment records, the drastic effects upon the client of the accident. Also, he needs to know if the client has an intermittent record of employment, which drastically differs from the client's post accident record.

Obtain the name and address of each employer, the dates of employment, the job held, the reason for leaving, and the wage earned on the job. Likewise, determine if the client has copies of his federal income tax returns filed for the past several years.

19. *Prior Claims History*

Prior claims history is necessary for obvious reasons. Obtain the approximate dates of the previous claim, the nature of the claim, the amount received as a result of it, and the name of the other party or insurance company that was involved.

C. *The Fee Contract*

Assuming that the case is one which the lawyer feels justified in taking, the interview with the client has reached the point where there should be a frank discussion concerning the fee to be charged.

Explain to the client that there are two ways in which the case can be handled from a fee standpoint. The first way is to charge for the time spent. Explain that the client is obligated to pay this charge regardless of the result that is obtained in the handling of the case. The second method, of course, is the contingency contract, which is used in the vast majority of personal injury cases.

The best way to explain the contingent fee in layman terms is to say something like the following: "I can handle your case on a

percentage of the amount that I recover for you. If I make a recovery for you, then I get a certain part of the money. On the other hand, if I do not get anything for you, I do not get anything for myself. Of course, the more money I am able to recover for you, the more money I earn as a fee."

The client should then be advised that he may choose between the two types of fee. Almost invariably he chooses the contingent fee.

The amount of the contingent fee deserves comment. A good system is what may be called the "stair-step contingency." For example, the fee contract might call for a contingent fee of 25 per cent if the case was settled through negotiations before suit was filed; 33⅓ per cent if the case was settled through negotiations after the filing of suit but before the commencement of trial; and 40 per cent if a recovery was obtained either by settlement during trial or by a successful judgment. Some lawyers favor a fourth step in such a contingent fee arrangement to provide for an additional contingency in the event of an appeal.

The actual percentages should depend upon the facts of the particular case with which the lawyer is confronted. There is entirely too much standardization of contingent fees in personal injury cases. The unqualified one-third fee is unrealistic. For example, cases of aggravated liability, severe damages, and high insurance limits differ substantially from cases of questionable liability and slight injuries; and the lawyer's contingent percentage should likewise differ.

D. *Concluding The Interview*

In concluding the original interview, the lawyer should do the following:

(1) Obtain signed authorizations to empower the attorney to secure medical records and information from the doctors and hospitals;

(2) Obtain all pertinent papers in the client's possession;

(3) Secure the signed fee contract;

(4) Make arrangements for the client to furnish whatever additional papers he did not have with him;

(5) Instruct the client not to talk with or give any information to any person without the lawyer's knowledge and permission;

(6) Advise the client to commence a record or diary in which he notes days lost from work, expenses, visits to the doctor, and occurrences of pain and disability; and

(7) Assure the client that the case will receive the lawyer's prompt attention and that he will be kept advised of the progress made.

II. The Investigation

The lawyer's object in a personal injury suit is to make satisfactory recovery of money for his client. There are two ways to do it—settlement or trial. To do either properly, the lawyer must know the case. There are three ingredients in a personal injury case: liability, injuries, and defendant's ability to pay damages through insurance coverage or individual solvency. In the investigation phase of the lawsuit, the lawyer's purpose is to find out as much as possible about all three of these important factors.

Following the original interview, the lawyer's first step is to study and analyze the facts in order to develop a tentative theory of the case from a liability standpoint. Assume that the lawyer is faced with the following case:

> The client was involved in an intersectional automobile collision. His car was faced with a stop sign. There were no traffic controls for the defendant's vehicle. The right of way statute commanded that the client yield the right of way to other vehicles approaching the intersection sufficiently close to constitute an immediate hazard. The client states that he stopped at the stop sign, observed the other car a considerable distance away, and proceeded into the intersection thinking that he had sufficient time to cross it before a collision would occur. The client cannot estimate the speed of defendant's car but thinks that it must have been going at a high rate of speed. Otherwise, the client thinks that he would have cleared the intersection without a collision.

The theory of this case would be that defendant's unreasonable rate of speed caused the defendant to close the distance much faster than an ordinarily prudent person would have anticipated. In effect, the lawyer would be contending that defendant's speed was the sole proximate cause of the collision. Proof of such a contention would be necessary, in order to avoid a jury finding of contributory negligence by the plaintiff. The lawyer's investigation should be conducted with a view to showing that the other car was traveling at a high and dangerous rate of speed and was not sufficiently close to the intersection to constitute a hazard at the time the client entered the intersection. The point is that the lawyer should develop a tentative *theory* of the case from the facts at hand and be constantly aware of that theory in conducting subsequent investigations. The words "tentative" and "theory" are both important. If the theorized facts do not appear favorable, the lawyer should quickly scrap the original theory and study the case again in light of the facts that do actually develop.

Space does not permit a discussion of the techniques of investiga-

tion. The investigation phase of the case is extremely important and the investigation should be done thoroughly. The result should be the obtaining of the maximum possible information about liability, damages, and ability to pay. The lawyer is not equipped to discuss settlement or begin his lawsuit until he possesses at least the following information:

(1) A thorough knowledge of all of the facts of the accident, including an understanding of the strength and weakness of the case;

(2) A complete list of all special damages and expenses, including medical expenses, automobile damages, and lost wages; and,

(3) Full medical reports and records setting forth the injuries received, treatment given, progress made, present condition, and the doctor's prognosis as to the future pain, disability, and medical expense.

It is a good practice to commence the investigation phase of the case by the preparation of a check list such as the following:

(1) Items client is to furnish, *e.g.*, receipts for medical and drug expenses, a copy of previous income tax returns, the name of the adjuster whose card he has, the name of the garage which repaired the client's automobile, and the exact dates the client missed work because of injuries;

(2) Items the attorney must obtain, *e.g.*, police reports, the repair estimate held by the collision insurance carrier, narrative medical reports from treating doctors, and hospital records;

(3) Witnesses to contact for statements (including the defendant, who should be immediately contacted in order to obtain a statement and information about insurance coverage); and,

(4) Other action to be taken, *e.g.*, personally visiting the scene of the accident, obtaining photographs of the accident scene, and finding the address of a missing witness.

III. Evaluation of the Case

Before seriously discussing settlement, the lawyer should evaluate the case. There is no mechanical evaluation procedure. Proper evaluation comes from experience. Through experience a lawyer learns to estimate with reasonable intelligence what may be called the "reasonable settlement range." Personal injury cases do not have precise values because there are too many intangibles. They do possess a value within a range of figures and the precise settlement is arrived at by negotiation. The size of the "reasonable settlement range" is influenced by many factors. The following factors are important.

1. Determine the permanency of the injuries and their incapacitating effect. This is the most important factor in a personal injury case. Substantial settlements or verdicts are seldom produced unless the injury will result in pain, suffering, medical expenses, and lost earnings over a period of years.

2. Determine the demonstrable nature of the injuries. In cases where a jury can see the visible effects of an injury, settlement values are considerably greater than in those cases where a jury cannot see the injury or its effect.

3. Ascertain the liability facts.

4. Evaluate the defendant's ability to pay the judgment from an insurance policy or personal assets.

5. Evaluate the strength of the medical testimony. A jury awards substantial damages only if convinced of the serious nature of the injuries.

6. Evaluate the quality of the plaintiff as a witness. This involves many things such as appearance, past history of employment and injuries, and ability to be sincere and forthright with the jury rather than vague and confused or blustering and arrogant.

7. Determine the special damages. These are the "out-of-pocket" expenses of the client.

8. Be aware of the value of the skill and reputation of the plaintiff's attorney as a man who knows how to properly present the case and receive a substantial jury verdict.

9. Be familiar with the attitude taken by the insurance company or its lawyers. Sometimes the defendant will be afraid of a case without real reason. Also, the defendant will sometimes deviate from reasonable analysis and refuse to face the facts of a serious case. In the first instance, the plaintiff's lawyer should pursue the advantage and strike for a quick settlement before serious thought is given to the matter. In the latter instance, the plaintiff's lawyer should forget about an early settlement and move the case toward trial as quickly as possible, anticipating that a good second look at the case may later produce a different attitude by the defendant.

10. Ascertain the "trial tendency" of the defendant. There are some companies and likewise some lawyers who have no hesitancy about trying a lawsuit. There are others who will avoid the courthouse at almost all risks for a variety of reasons. One of the most powerful reasons is found in what may properly be described as the deadly art of second guessing. These companies or lawyers know that once a settlement is authorized, agreed to and paid, both parties are usually satisfied. They also know that if a settlement is not made

and the plaintiff receives a substantial award, their opinions and actions may be seriously questioned.

IV. Settlement Negotiations

The first settlement negotiations should never take place until the case has been investigated and evaluated. The attorney then arranges a conference with the insurance claims man. The lawyer must remember that the company does not make a settlement without being convinced that it should do so. Thus, the lawyer must convince the proper parties.

The claims man or his superiors are the ones to be convinced because they make the recommendations that result in compensation for the client and the lawyer. There are several basic things about claims men that are generally true and should be kept in mind.

First, the claims man is usually underpaid, overworked, and believes that he is better able to evaluate and handle claims than the lawyers involved. Sometimes the claims man is highly qualified. Sometimes he is not. However, the claims man's position is very important since his reports and decisions are the basis upon which the company, and later the defense lawyers, form their evaluations of the case.

Secondly, the claims man's attitude toward the client's claim is essentially negative. The claims man is a partisan whose experiences have naturally developed attitudes and approaches designed to avoid or minimize payments. It is his job to find the loopholes in the client's claim. He approaches the case from that standpoint. Also, there is a subconscious tendency on his part to regard each injury as faked, every claimant as a malingerer, and all plaintiffs' lawyers as shysters.

Thirdly, the claims man is one part of a large organization where the opportunity for second guessing is extremely high. His opinions are formed and his decisions are reached with full knowledge that many people will be looking over his shoulder and participating in the devastating art of second guessing. He knows that if he speculates too much, the result may be disastrous.

Bearing the above factors in mind, we come to the subject of the first settlement conference. What is the task? It is to do a job of salesmanship. It is to convince this one man of the fairness of the claim and justness of the demand. What are the methods? Since the claims man does not appreciate lawyers, particularly plaintiffs' lawyers, the first thing to do is to portray honest warmth and sincerity. We should immediately let the claims man know that we want our business negotiations to be on a courteous and friendly basis.

Since the claims man is often overworked, why not make his job easier? He must have information to make up his mind and to support his recommendations. What does he need to have? Basically, he needs full information concerning the damages sustained by the client. When the claims man comes to the lawyer's office, the lawyer should have ready for the claims man a complete documentation of the damages in written form. This should ordinarily consist of an itemized list of lost wages, hospital bills, doctor bills, nursing charges, drug expenses, repair bills, expenses for crutches or braces, X-ray expenses, and additional household expenses. There should also be available to the claims man for his inspection the receipts and cancelled checks which support the documentation. Sometimes photostatic copies will be desired, and these should be furnished. Likewise, there should be attached to this summary of damages, a copy of narrative medical reports.

There are few companies who will make a settlement without obtaining full information about the claim. Sooner or later, by deposition or otherwise, all of the above information will be brought out. Why not take the initiative and supply it in an affirmative way in the first instance? The insurance company then knows the facts from the very beginning concerning the monetary expense and the medical picture. In this manner you have furnished full information and based your settlement demand upon facts, figures, and medical opinion, rather than on mere conversation.

Damages have been covered; what about liability? It is better practice to face the liability question immediately and try to persuade the claims man to do the same. For example, in a rear-end collision case, it is usually best to seize the initiative at the very beginning by saying, "I do not expect you to admit liability officially, but for settlement purposes would not we be better off to assume a case of liability and approach the case from the standpoint of the injuries and expenses and see what is a reasonable settlement?" Usually, the claims man will agree to approach the case on this basis. If he has anything in the way of a defense that the plaintiff's attorney does not know about, this appeal to reasonableness will ordinarily reveal it. Thus, the lawyer may discover early what potential defense exists.

It is also best to recognize a case of questionable liability. In this kind of case, do some listening first. Draw out the claims man on how he sees the case from a liability standpoint. Probably he will take the obvious position that the client was negligent in several ways. If the lawyer has done a proper job of investigating and analyzing the case, he already has the answers to these questions. After learn-

ing the view being taken by the other side, it is proper to set forth the various reasons why the lawyer believes a jury would find for the plaintiff by convicting the defendant of negligence and exonerating the plaintiff. After the lawyer has done so, he should still realize that he does not have a clear-cut case of liability by saying something like this: "I recognize that this is not a perfect case. A jury could go either way. I think I have the better side of it, but I am ready to consider all these factors in a settlement. The case calls for a compromise by discounting the value from that which would be received in a case of absolute liability." No one can argue with this approach, and negotiations can begin on the basis of trying to find a solution to the case, rather than on the basis of arguing about liability.

Aside from damages and liability, the other factor in these cases is coverage. It is highly important. Exposure to big judgments is a powerful settlement factor. If the lawyer receives the case soon enough and investigates it thoroughly, he can ordinarily find out from the defendant the amount of the policy limits before the lawyer has any contact with the insurance company. If those policy limits are more than the minimum policy, the lawyer should inform the claims man that he has this information. If the company has only a minimum policy, it is much more inclined to fight a case of doubtful liability and serious injuries. If the lawyer has not found out the liability limits, he should never assume that they are the minimum. The case should be evaluated on its own merits. If the lawyer has a case worth more than $5,000.00, and there is only a $5,000.00 policy involved, the company will eventually admit this or indicate such to be the fact when confronted with a demand for settlement in excess of $5,000.00. When the company takes that position, the lawyer should require proof of the fact, investigate the solvency of the defendant, and then seriously reconsider his case from a settlement standpoint.

What kind of offer should be made? Should the lawyer's first settlement demand be very extravagant? The practice of excessive first demands stifles the opportunity for negotiation. Defendants faced with a ridiculous figure usually make no offer or respond with an offer that is excessively low. Thus, neither party achieves anything.

If this is true, should the lawyer make his best offer and thereafter refuse to compromise? There are two things wrong with this approach. First, the lawyer can easily be wrong in his original evaluation. Second, no one ever believes that the first figure is the best figure. Also, an uncompromising attitude begets a like attitude. The

defendant's representatives become just as determined not to pay the lawyer's particular price as the lawyer is determined to obtain it.

What is the best practice? It is to make a settlement offer, within the range of reason and fairness, which still leaves room for negotiation and compromise.

After the case has been discussed, the information furnished, and the offer made, what comes next? Generally, the claims man does not have authority to settle the case at that time. He will return to his office, write up a report, send it to his superior, obtain settlement authority, and then contact the lawyer.

Should the lawyer put the file away and forget it until he hears from the claims man? No! The biggest pitfall in a personal injury case is inactivity on the part of the plaintiff's attorney. The case must be kept moving by the plaintiff's attorney; the defendant certainly will not move the case forward.

The lawyer cannot afford to allow initial settlement negotiations with the company to last interminably before suit is filed. On the other hand, a recovery must be obtained without any undue delay if that is possible. Once suit is filed, the case ordinarily will be in the courts for a long period of time. An investment of about thirty days often produces a reasonable settlement without a lawsuit being filed. Allowing initial settlement negotiations to run beyond thirty days is not ordinarily justified.

At the time of the initial settlement conversation, the lawyer should ask the claims man how long it will be before the lawyer may expect an answer to the demand of settlement. The claims man will ordinarily indicate a time ranging from one to two weeks. Allow the claims man to set the time as long as it is reasonable. Make a point of noting the time so the claims man will know that he is expected to respond by the time he promised.

Assume the claims man has said ten days. When the time is up, the lawyer should contact him. If his home office has not acted on the settlement offer, or some other legitimate reason is given, the lawyer should be reasonable and agree to an additional specified length of time. The lawyer must always assume the responsibility for contacting the claims man at the end of the specified time or the case will fall into a state of inactivity.

The lawyer will be able to recognize an impasse where the lawyer's lowest offer and the company's highest counter-offer are separated by a substantial difference. Likewise, the lawyer will recognize a situation where the company is either stalling or being dilatory in

its attention to the case. When this happens, what is the most effective way of moving the case?

An effective practice is to prepare and file Plaintiff's Original Petition. Then send a copy of it along with a letter to the insurance company stating that suit has been filed, but that service of citation will be delayed for a few days pending a last attempt to arrive at a reasonable and fair settlement. This will either produce a settlement or demonstrate that a settlement at this time is not possible.

V. Filing of Suit and Movement of Case Toward Trial

There is a wide difference of practice among lawyers concerning the content of Plaintiff's Original Petition. Some file an extensive pleading stating the smallest details. Others file only the briefest type of original pleading. Some are specific, and some are general. The best practice is to consider the purpose of the original petition and draft it accordingly.

If the object is to produce an immediate settlement, the lawyer should carefully draw his pleading with a view to having it impress the insurance company and its representatives with the seriousness of the case, the correctness of the plaintiff's position, and the danger of a substantial verdict.

If the purpose of the pleading is merely to get a case started that is not ready for settlement, and further information is needed before final pleadings can be prepared, there is little point in consuming a great deal of time and effort in the careful preparation of a pleading which is to be superseded. A short "shotgun" pleading will accomplish the purpose of initiating the suit.

As a general rule, the practice of pleading too specifically is very dangerous. When a lawyer pleads down to the finest points of evidence, he may later find himself in a very disadvantageous position. Very rarely does evidence come from the witness stand in exactly the same form as it was envisioned by the lawyer months before when the pleadings were prepared.

Concerning the amount of the prayed-for damages, a policy of suing for much more than the lawyer expects to receive is the wisest course. This is true for the following reasons: (1) The lawyer cannot predict what the future will reveal, and it may well be that the injuries are much more substantial than the lawyer had originally believed; (2) The lawyer may be completely mistaken in the evaluation of the case and should never run the risk of a verdict for more than the prayer would entitle the client to receive; and (3) The

defendant has no reason to settle a case unless there is exposure to a potential judgment for greater than the amount for which the case can be settled. However, the lawyer should not pray for such a greatly-exaggerated sum that no legitimate argument can possibly be made to sustain it. The obviously overstated and exaggerated claim runs a substantial risk of an adverse jury reaction.

A lawyer should never file his case and wait until the court or the opposing lawyer brings it to trial. After suit is filed, he should check with the sheriff to make sure that citation has been served. Many times the lawyer will find the sheriff has not been able to locate the defendant because of an incorrect address or other reason. This could delay the case considerably unless the lawyer is aware of the situation and is certain that service is perfected. When the defendant has been served, the lawyer should note the time that the answer is due.

A fundamental rule that has proved itself true over and over again is that "activity produces money" no matter how good or poor the case. The action of the plaintiff's lawyer in remaining fully familiar with the case, moving it along, and maintaining the initiative will produce good results over the long run.

After the defendant's answer has been filed, the plaintiff's lawyer should immediately take the initiative in moving the case toward settlement or trial. Most defense lawyers have a heavy docket and are forced to work with the case that is closest to them at the time. A new case that is obviously months away from a trial setting will seldom generate much excitement or attention in the defense lawyer's office.

Plaintiff's lawyer should acknowledge receipt of the defendant's answer and immediately send a list of all the special damages and medical reports to the defendant's attorney. This is ordinarily a simple matter because the work of assembling the information has already been done during the negotiations with the claims man. The information should be brought up to date if there have been any further expenses or if subsequent medical reports have been received. In the same letter, the defense lawyer should be offered the deposition of the plaintiff if the defense lawyer desires it. Likewise, the defense lawyer should be informed of the settlement negotiations which have previously taken place, and be asked to contact the plaintiff's lawyer about settlement as soon as the case has been reviewed and evaluated.

Allow the defense lawyer a few days to become familiar with the case, and then contact him to discuss settlement. Indicate that it is necessary to move the case forward, take the depositions that need

to be taken, and get the case set for trial as quickly as possible unless it can be settled. New negotiations often get started through this procedure, and the case is sometimes settled quickly. Usually, the defense lawyer will request further information or an independent medical examination.

Should the plaintiff's lawyer supply the additional information? Should he agree to a medical examination by a doctor of the defendant's choosing?

The best general practice is to be as cooperative as possible in all dealings with the defense lawyer and to honor all reasonable and legitimate requests for further information. Such matters as furnishing a list of prior employers, giving information about income in previous years, furnishing copies of repair estimates and receipts for expenses, should be honored promptly.

What about a medical examination by a doctor of defendant's choosing? It is here that many lawyers for plaintiff err. The purpose of a separate medical examination usually is not to furnish the defendant with evidence to use against the plaintiff upon the trial of the case. If that is the purpose, the request should be denied. The doctor suggested to make the examination should be carefully studied. It is easy to find out which doctors are "testifying doctors" whose opinions are too often tailored to satisfy the person paying the bill. This applies to doctors on both sides of the docket.

Submitting a client to medical examination by one of these doctors for the defense is a dangerous practice. The doctor's report will not be objective and will most likely entirely deny or greatly minimize the injuries of the client. Once such a report has been written, following what was supposed to be an independent objective examination, the defense is greatly strengthened.

In all fairness, the defendant is entitled to determine the genuineness of the alleged injuries, but is not entitled to be equipped with prejudiced and slanted testimony. The plaintiff's lawyer can learn the identity of qualified physicians who do not form a habit of testifying either for the plaintiff or the defendant and who will make an independent objective evaluation of the client's injuries. If the defendant is genuinely interested in having an objective examination conducted, there should be no real trouble in agreeing upon a truly independent doctor.

While an early settlement of the case with the defendant's attorney should be explored, the plaintiff's lawyer should not allow his case to remain idle on the docket of the court. If the original settlement negotiations have been properly conducted in order to

furnish the defendant with all of the information necessary to form an intelligent evaluation of the case and no settlement has been reached, it is unlikely that the case will be settled until the defendant faces the choice of settling or going to trial. A vast number of cases remain for months and even years on the docket of the court and are settled just before trial. The plaintiff's lawyer must remember that the defendant is not required to pay anything until a judgment becomes final. Many defendants consciously delay as long as possible in the belief that time is on the side of the defense, and that the plaintiff, tired of waiting or needing money, will settle the case cheaply.

The lawyer should pay his jury fee and procure a setting of the case. Depending upon the local practice, he may have to obtain a pre-trial setting first. Regardless of the mechanical steps necessary in the particular district where the case is pending, the lawyer should pursue diligently the necessary steps and obtain the earliest possible trial setting for the case.

VI. Preparation for Trial

Most of the emphasis heretofore has been placed upon the methods of moving the case toward a settlement. Since the number of cases actually tried is infinitesimal when compared to the number that are settled, there has been a great emphasis upon the settlement aspects of the case. Although the possibility of settlement should be explored at all stages of a case, the alternative course must be considered. Either the plaintiff or the defendant has the perfect right to choose to resolve the matters in dispute by jury trial. What are the actions plaintiff's lawyer should take in anticipation of trial?

There are many stories about lawyers who have a great ability to try a case with a minimum amount of preparation. The usual result is that they harm themselves and their client. The trial of a lawsuit is the final act in a long production. The measure of its success will be directly proportionate to the amount of thought, time, and effort that has gone into the case from the very beginning. Thorough preparation by hard work is the most important ingredient in a courtroom victory.

Facts win lawsuits. Therefore, the first step is to complete a thorough investigation, examining all matters that have not previously been fully explored. All potential witnesses must be located. Written statements should be obtained. Police reports alone should not be relied upon; the investigating officer should be interviewed

and the notes from which his report was written should be examined. Careful attention should be given to the basis of the statements each witness makes. Is the witness relying on hearsay, or did he observe and understand that about which he is testifying? The lawyer's case must not be based upon a theory of what he can prove, but upon admissible testimony.

Once the investigation has been completed, the lawyer is ready to ascertain as much as possible about the defendant's case.

Plaintiff's case is never properly prepared for trial without the deposition of the defendant and the depositions of adverse witnesses whose statements could not be obtained. Too often the plaintiff's lawyer submits his client for a deposition and gives the defendant the decided advantage of knowing the plaintiff's version of the facts without securing for the plaintiff the same advantage by taking the defendant's deposition. This is a case of being "penny wise and pound foolish." The cost of a deposition is minor when compared with the advantage it can furnish.

The advantages of taking the defendant's deposition are as follows:

1. It allows the plaintiff's lawyer to study the witness and evaluate the probable impression the witness will make on the jury;

2. It confines the defendant to a story from which he cannot deviate at the time of trial unless he wants to be exposed as either an unreliable or untruthful witness;

3. It gives the lawyer an opportunity to secure damaging admissions from the defendant which may either win the case before a jury or provide the basis for more settlement negotiations with the plaintiff's position being considerably strengthened.

In the matter of depositions, the following practices should be observed.

1. Be courteous and friendly to the witness. There is no one present to be impressed by any dramatic tactics. Likewise, better results are obtained if the lawyer can create a conversational atmosphere with an adverse witness. This is true because the witness will be less defensive and more likely to reveal what actually happened.

2. Be persistent in obtaining direct answers to the questions. Even though an answer may be obvious because of the manner in which the witness has conducted himself, that fact cannot be reflected on the printed page by the court reporter.

3. Be thorough in the examination and cover all of the necessary points. Limiting the inquiry because the deposition may run a few pages longer and cost more defeats the entire purpose of the deposition and is the height of foolishness.

4. Do not be afraid of covering the same ground twice after receiving an answer that is particularly damaging to the defendant. A lawyer has the privilege of offering whatever portion of the deposition he desires and that portion which the witness has already answered may be selected and read. If the witness repeats the same answer, he will have a difficult time changing the story later. If it is changed, the witness is telling inconsistent stories.

The matter of preparing the plaintiff for depositions to be taken by the defendant's lawyer is very important. Seldom is a client skilled in the art of precisely stating his views. The lawyer should have the client come to his office a sufficient time before the scheduled deposition to allow a thorough review of the questions that are likely to be asked. The client should be given certain instructions. The facts should be gone over in light of those instructions, to make sure that the client fully understands them.

Among the more important instructions to be given the plaintiff are the following:

1. Listen carefully to the precise question asked and answer that question only. Do not volunteer any information not asked since the purpose of the deposition is to answer the questions the lawyer asks.

2. Do not guess. Confine the answers to the things that are known of the plaintiff's own knowledge. If the plaintiff does not remember, he should frankly say so.

3. Be absolutely truthful at all times without worrying about the effect that it may have upon the case.

4. Do not try to outguess the lawyer or anticipate his point. Simply answer the questions as they are asked.

5. Be especially careful about agreeing to the correctness of the statements that the lawyer makes. When the lawyer asks about something, give him the information. When the lawyer then attempts to state something and asks if he is right, be very certain that each part of the lawyer's statement is correct before agreeing that it is.

6. If the question is not understood, do not attempt to answer it. The court reporter may be asked to read back a question before it is answered. Also, the lawyer may be requested to ask it again to make the exact meaning clear.

7. Do not either exaggerate or minimize the injuries received, the pain caused or the disability that has resulted. No one wants to appear to be a chronic complainer; yet, the deposition is no place to try to be a martyr or a long-suffering hero. If there is pain, this should

be stated; if not, this should also be stated. The same is true about the ability to work as well now as before the accident.

8. Be especially careful about estimating speeds and distances. If the plaintiff knows how fast a car was going or how far a distance was this should be stated. If the plaintiff can sit down and figure it out, then he should do so. However, do not guess without any real basis.

After the plaintiff's deposition is taken, the plaintiff's lawyer should ask no questions. He can prove his case at the courthouse. The deposition is not the place for it. If necessary, a question to straighten out an incorrect answer or impression may be asked. Seldom is it justified. Other than depositions, the lawyer will find additional pre-trial procedures, such as requests for admissions, to be useful and necessary in some cases. In the ordinary personal injury case, depositions will be the only necessary or desirable procedural tool. Thorough and complete trial preparation is the test; if other means are necessary to be truly "ready" for trial, they should be employed.

The depositions may develop new avenues for investigation. If so, that investigation should be completed promptly. After the depositions have been taken and the investigation has been completed, it is time to file amended pleadings setting forth the full basis of the claim and the important allegations upon which the case will rest.

It is best to have the amended pleadings on file before the pre-trial conference is conducted. This allows the defendant to file all of his exceptions, which can be ruled upon at pre-trial. This will give the plaintiff's lawyer ample opportunity to make sure that the pleadings are in proper form before the case is called for trial, thus depriving the defendant of an opportunity to seek a postponement on this basis.

In the preparation of amended pleadings, the plaintiff's lawyer should remember the jury that will hear the case. The pleadings can be prepared in such a way and in such language that they will take on meaning to a jury, instead of being just a legalistic, boring ritual. The plaintiff's attorney should make as many points for his side as early in the jury trial as possible. One of the first opportunities comes with the reading of the pleading. A little thought and attention to the preparation of the pleadings in an understandable and sensible way will pay dividends.

One of the biggest questions involved in preparing for trial is when to begin. In the typical situation, the case is far down on the court's docket, and the defendant's lawyer indicates he is going to be busy in another court. As a practical matter, the plaintiff's

lawyer can not get each of his cases completely ready for trial every time they come up on the court's docket. There is no ready answer as to when the lawyer should make the most serious effort toward preparing the case for trial. Let us assume, therefore, that the case has a number 1 setting, the court has assured the plaintiff's attorney that it will go to trial, the defendant's attorney has agreed to try it, and possibilities of settlement have been exhausted.

The following steps in preparing for trial should be followed: (1) A current medical examination of the client should be arranged and the lawyer should be furnished with an up-to-date medical report; (2) The post accident employment record of the client should be thoroughly reviewed; (3) The special damages should be made current; (4) All depositions should be digested and absorbed in complete detail in the lawyer's mind and a synopsis of the depositions with appropriate page references should be made for use at the trial; (5) All exhibits such as photographs and receipts should be collected and indexed in a convenient form; (6) The names of lay witnesses such as relatives, neighbors, and fellow employees who can corroborate the injuries and disability of the client should be collected; (7) All witnesses who are to be used should be contacted so that their presence at the trial will be assured; (8) A schedule of conferences with the witnesses as close to trial date as possible should be set up so that their prospective testimony can be reviewed; (9) The medical questions in the case should be thoroughly studied by the plaintiff's lawyer and an extensive conference with the medical witness should be arranged and held; (10) Subpoenas should be issued for the witnesses and the documents whose presence in court might otherwise be doubtful; and (11) The overall strategy of the case and its presentation to the jury should be carefully outlined in a trial memorandum.

In planning for trial, the best procedure is to commence by listing on paper each and every fact expected to be proved on the trial of the case. Opposite that fact should be the name or names of the witnesses or exhibits by which such fact is to be proved. The same procedure should then be followed with reference to the defendant's case. Every known fact or circumstance the defense is anticipated to use and the witness or witnesses by which the defense is expected to prove such facts should be listed.

The lawyer should also anticipate and reduce to writing any difficulties that may arise with regard to evidence and any questions of law that he feels will be forthcoming. By properly looking ahead

and anticipating these points, the lawyer will not be taken by surprise and be unable to prove important points.

With this work done, the lawyer is ready to prepare his final strategy and place it in a trial memorandum. The memorandum should be in outline form and divided into three parts: (1) Jury selection; (2) Plaintiff's direct evidence; (3) Suggested cross-examination. The questions for jury selection should be listed. The direct case should be outlined by listing the witnesses in the order in which the lawyer plans to put them on the stand, with a listing of each fact to be proved by that witness. For cross-examination, the points to be brought out should likewise be listed along with a reference to a page in the defendant's deposition which will be essential in establishing the point.

VII. Trial of the Case

Many volumes have been written about the jury trial. Here we will be limited to a concise discussion of four of the many facets involved in the proper preparation of the jury case: jury selection, plaintiff's direct evidence, cross-examination, and jury argument.

A. *Jury Selection*

The importance of jury selection cannot be over-emphasized. It is important for two reasons. First, it is the lawyer's opportunity to favorably introduce himself and his case to a jury which is attentive and eager to hear the matter they have been called upon to try. Since the plaintiff's lawyer has the opportunity to create a first impression that may be a lasting impression, he has an important advantage and should use it. Second, it gives the lawyer an opportunity to strike from the panel those jurors least likely to be receptive to plaintiff's case as explained by the lawyer.

Too often lawyers approach the examination of a jury panel with almost no advance thought or preparation. Plaintiff's lawyer has the opportunity to start the case with a good impression. He should do so by completely planning the approach to the jury panel with as much thought and attention as is given to the other important parts of the case.

Some of the more important questions and methods involved in selecting the jury in the plaintiff's personal injury case are as follows.

1. Plaintiff's lawyer should remember that sincerity, directness, and fairness are the tools of a successful trial lawyer. Falsity and lack of sincerity will be seen and resented by the jury.

2. Jury selection is no place for a harangue of oratory, but, rather,

it is the time and place to be pleasant and conversational in a manner designed to make friends with the jury.

3. The lawyer should neither lecture nor harass a prospective juror. If he finds a sarcastic juror, he should not respond in kind because the remainder of the jury might be alienated.

4. By general questioning of the panel, the lawyer can develop communication with the jury. Once that communication is firmly established, he should then begin the task of persuading the jury of the correctness of the case.

5. The lawyer should tell the jury in a short and concise manner that the case is one where the plaintiff contends that an automobile accident occurred because of the defendant's negligent driving, and that the plaintiff received serious and permanent injuries.

6. Throughout the examination of the jury panel, the lawyer should be concentrating upon those parts of the case which would justify a large verdict. The biggest factor will be the permanent nature of the injuries. Repetition is a valuable tool. The idea that the injuries are permanent should be constantly before the jury from the very beginning of the case. Large verdicts are not awarded for temporary injuries, but damages for a lifetime of pain and disability may be substantial.

7. Plaintiff's lawyer should explain that the law allows compensation in money for the pain and suffering that the plaintiff has suffered and will suffer permanently. Each juror should be committed to make an award in money to compensate for pain and suffering.

8. The jurors should likewise be committed to the fact that they will award the full amount of money for which the plaintiff is suing if they are satisfied under the law and the evidence that such an award will fairly compensate the plaintiff for his injuries. Extract a promise that there is no juror who would not bring in an award in the full amount of the prayer if satisfied under the law and evidence that it is fair and just and reasonable.

9. The examination of the panel should be conducted with a consideration of the final jury argument. When the jurors commit themselves to do a certain thing if the law and evidence shows that it should be done, then, in jury argument, they should be reminded of their promise. They should be shown where the evidence proves the verdict they agreed to render if proved, at the start of the trial.

The foregoing points are some of the important items to be covered during the questioning of the jury panel. We now come to the question of actually eliminating some of the prospective jurors. The successful trial lawyer acquires an awareness of the kind of juror

with which he can communicate. He can also sense an antagonistic reaction. Aside from the intangible elements, there are some general rules for the plaintiff's lawyer to follow in selecting jurors.

A plaintiff's juror is a plaintiff's juror. By this strange-sounding sentence, the point is made that the plaintiff wants people from the low income groups on the jury. The plaintiff does not want the banker, the insurance man, the strong company man, the club-woman, and the society set. No matter how many arguments are made about the low income people not understanding large money claims, the fact is that the bigger verdicts come from lower income group juries and the smaller verdicts come from the "blue ribbon" juries.

B. *Plaintiff's Direct Evidence*

The first step in the successful presentation of the plaintiff's case is the planning of the order of proof. Who shall be the first witness? Who shall be the last?

The case should begin well, but do not put on the best witness first. It is usually preferable to save the best witness until the last. At all costs, however, the plaintiff must avoid getting off to a bad start. The best practice is to start with a witness who will make a good impression, present the lesser witnesses, and close with the strongest possible witness.

In a case where the injuries are quite severe, but the liability is questionable, a good procedure is to begin the trial of the case by reversing the chronological order and beginning with testimony about the injuries. In other words, build up a strong sympathy factor for the plaintiff before allowing the jury an opportunity to get a negative attitude about the merits of the cause of action.

Assuming that the order of proof has been properly planned and the witnesses have been properly interviewed, the direct examination should be conducted most carefully. It is the direct examination that ordinarily makes or breaks the plaintiff's case. Although cross-examination may present a greater challenge and may allow the lawyer a greater opportunity to exhibit his talent, the direct testimony is the determinative factor in the plaintiff's case.

The lawyer has the advantage on direct examination of knowing what he wants to prove and how he is going to prove it. He should let the witness relate the facts, and then remove the witness from the stand as quickly as possible. The lawyer should not delve into matters on direct examination that have not been covered in advance with the witness and to which the lawyer does not know the answer. A

rambling witness, giving answers to questions not fundamental to the plaintiff's case and not reviewed in advance presents one of the greatest dangers in a lawsuit.

The questions should be short and understandable. Direct examination is not a place for the lawyer to display his histrionic talents. The witness is testifying, not the lawyer. The personality of the witness and the directness and honesty of the witness should be dominant and should not be submerged by any theatrical examination by the lawyer.

The questions should be in plain and simple language, designed to prove the essentials of the case. When the point has been effectively made, do not cover it again because the great odds are that the witness will not do as well in repetition. Make sure that the jury has the point, but do not belabor it.

A jury always dislikes the delays that make the trial drag. The brief, concise, courteous lawyer obtains great favor in the eyes of the jury.

Many lawyers call the defendant as their first witness. Except in an unusual situation, this practice should be avoided. After all, the plaintiff has been given the opportunity to get his story across first. He should capitalize upon that opportunity and not allow the defendant to get an initial advantage. Even if the lawyer is faced with a defendant that he knows will displease the jury, this advantage may be reserved for a later time. Although the defendant should not be called as the first witness, plaintiff's lawyer should ordinarily plan some strategic place in the order of proof to call the defendant. A good place comes just after the essential parts of plaintiff's case from the liability standpoint have been placed in evidence. Plaintiff's lawyer obtains the advantage of being able to guide the first testimony to come from the defendant rather than having it done by the defendant's lawyer. Ordinarily, the defendant's testimony is rendered less effective when done in this manner. Before placing the defendant on the stand, however, the plaintiff's lawyer must have thoroughly reviewed and digested the defendant's deposition in order to be in the best possible position to demonstrate the unsoundness of the defense which was unfolded to the plaintiff's lawyer in the deposition.

The lawyer should save his strongest witness on the damage issue for the close of his testimony. It may well be that the strongest witness is the medical doctor who treated the injuries. On the other hand, it might be the husband or wife of the injured party, who could testify in detail about the great changes that were wrought in

their lives as a result of the injury. It might be someone entirely different. That is a matter that the trial lawyer should determine in advance. The person who can make the strongest case from the standpoint of injuries and damages should be the witness upon which the plaintiff's case is rested.

C. *Cross-examination*

The first lesson about cross-examination is that it should not always be used. There is a story about a young lawyer trying his first case. Sitting beside him to observe and give advice was an experienced attorney. The opposing lawyer's client had just testified in full on direct examination. The young lawyer was busily consulting his notes and envisioning a devastating cross-examination when a hand fell upon his shoulder, and the older lawyer said, "Tell the judge you have no questions to ask of the witness." The young lawyer blinked, but followed the advice given. What the young lawyer had failed to realize was that there had been absolutely no damaging testimony whatsoever coming from the adverse witness, and that cross-examination could not improve upon the testimony that had been given. The young lawyer had the pleasant satisfaction of winning his first case without cross-examining a witness.

Cross-examination should not be conducted without a definite purpose. Its chief purpose is to attack testimony or impressions which have damaged the lawyer's case. If there has been no such testimony or impression, there should be no cross-examination.

The lawyer must learn to remain calm and impassive even when the witness has damaged his case. If the witness has testified in a damaging manner, do not allow the jury to realize that the plaintiff's case has been hurt. Above all, do not directly attack this damaging testimony at the very start of cross-examination.

Be courteous, be nice, and be friendly. Be fair with the witness and refrain from sarcasm. Begin slowly and easily. Although the witness may be an unmitigated liar, the jury may not yet know it, and the lawyer must not excite sympathy for the witness in the minds of the jury. If the witness is giving prejudiced testimony or being untruthful, give the witness every opportunity to display inconsistencies. Without alienating the jury by over-aggressive cross-examination, a lawyer can expose prejudiced and slanted testimony. The lawyer can lead the witness into demonstrating the unfairness of the testimony. Only when the witness has demonstrated unfairness or untruthfulness may a lawyer completely devastate the adverse testimony. These comments are made because a jury is naturally

more inclined to put itself in the position of the witness than it is to put itself in the position of a cross-examining lawyer. The lawyer should be certain the jury is inclined in his favor with respect to the exchange between the lawyer and the witness before the lawyer subjects the witness to intensive cross-examination. Otherwise, the points made by such cross-examination may not influence a jury sympathetic to the witness.

Before attempting cross-examination, the lawyer must study the witness. If the man is intelligent, has support for his position, and is unlikely to alter his viewpoint, a frontal assault on the damaging testimony would be disastrous because it would only serve to strengthen and confirm the testimony in the eyes of the jury. On the other hand, reason and logic employed in a courteous manner may be used to weaken the testimony and slowly develop the obvious conclusion that the witness is mistaken. If the witness cannot be weakened, it is far better to avoid any questions on the damaging point of his testimony. Instead, proceed to collateral matters where the witness is vulnerable and, therefore, subject to having his entire testimony, including the damaging part, discredited to some extent.

Sometimes defendant puts on a witness who sincerely attempts to be completely fair. If this is the case, the lawyer should strongly consider waiving cross-examination. Such a witness should never be confronted with an antagonistic, quarrelsome lawyer on cross-examination. Such tactics will cause the witness to lose his previous fairness and objectivity and become a partisan who might do real damage to the cross-examining lawyer's case. If handled properly, this witness will often give testimony in behalf of the case of the cross-examiner that far outweighs the full testimony given on direct examination.

In summary, the following points about cross-examination should be kept in mind.

1. Do not cross-examine unless the testimony has harmed the plaintiff's case.

2. Do not indicate that adverse testimony has damaged the plaintiff's case.

3. Begin cross-examination in a courteous way, having an attitude of fairness.

4. Attack damaging testimony slowly so that it is not re-emphasized, unless there is a substantial possibility of changing or minimizing the testimony. This is particularly true in cross-examining an adverse medical witness.

5. Attack collateral points which are vulnerable, to discredit the

witness' testimony where the damaging evidence cannot be weakened.

6. Allow an adverse witness to antagonize the jury before making a direct attack upon his testimony or his credibility.

7. Do not ever make the jury sympathetic toward the witness and antagonistic toward the cross-examiner.

8. Be alert to the possibility of favorable testimony from one of the witnesses put on the stand by the defendant.

D. *Jury Argument*

In a personal injury case there are two major points. First, the jury must find for the plaintiff on the liability aspects of the case. Second, the jury must bring in a satisfactory verdict on the damage issue. Many a plaintiff's lawyer has walked out of the courthouse with a hollow victory because he proved the accident was the defendant's fault, but received damages which hardly make the effort worthwhile. Also, many defendants have escaped a substantial verdict because of a seemingly innocuous finding that plaintiff failed to keep a proper lookout. Both liability and damages require careful treatment in the jury argument.

The liability questions should be presented from the overall perspective rather than from any mechanical method such as arguing each question in the order listed in the court's charge, or reciting what each witness said in the order the witness took the stand. The automobile accident was a living, dramatic incident. It did not occur in the same sequence that the trial was conducted.

In argument, the jury should be taken back to the day the accident happened. The minds of the jury should see plaintiff's car driven down the road in a manner showing that plaintiff could not have reasonably avoided this accident which was caused entirely by defendant's negligence.

In many cases plaintiff will be trying to avoid a finding of contributory negligence, feeling reasonably assured of securing a verdict that defendant was negligent. In those cases, the jury should be read what the court said in the charge about an ordinarily prudent person in the exercise of ordinary care. The jury should be reminded that the test is not whether a defense lawyer can determine months later that there was a mechanical way in which the accident might have been avoided. They should be told that the question is whether an ordinary man using ordinary care would have avoided the collision. The lawyer should proceed to show how no ordinary person exercising ordinary care would have done any more, and probably

not as much, as was done by the plaintiff to avoid being injured and disabled.

Any particular questions in the court's charge that present a hazard to plaintiff's case should be specially discussed. These would include such matters as "unavoidable accident." The court's special definitions on such matters should be read to show that this is not a case of an unavoidable accident as the law defines that term.

Once the case has been covered in argument from this perspective, then and only then should plaintiff's lawyer, time permitting, argue the liability aspects of the case question by question as set forth in the court's charge. However, plaintiff's lawyer should group the questions to inform the jury how the questions should be answered. An illustration is as follows:

> Questions 1 through 18 ask about defendant's driving conduct. On several different points these questions basically ask if the defendant was guilty of negligence proximately causing the collision. Under the evidence your answers to Questions 1 through 18 should be "Yes." Questions 19 through 28 ask if the plaintiff was negligent. Under the evidence Questions 19 through 28 should be answered "No." Issue Number 29 asks if the collision was the result of an unavoidable accident. The evidence compels the answer to be, "It was not the result of an unavoidable accident." (Plaintiff's lawyer should put on the blackboard these questions, to impress on the jury that numbers 1 through 18 should be answered "Yes," numbers 19 through 28 should be answered "No," and number 29 should be answered, "It was not the result of an unavoidable accident.") The remaining questions inquire about the amount of money necessary to compensate Mr. Jones (the plaintiff) for his injuries.

The plaintiff's lawyer has then led directly into his argument on damages.

In the argument on damages, plaintiff's lawyer should list (on a blackboard, if possible) each element of damages included in the court's charge. The elements would be as follows: medical expenses to date, medical expenses in the future, lost wages to date, loss of earnings in the future, physical pain and suffering in the past, physical pain and suffering in the future, mental anguish in the past, and mental anguish in the future. The separate and distinct nature and the importance of each of these elements of damages should be explained. Emphasis should be placed on the fact that the court asks about compensation for each of the items, and that no item of the damages may be overlooked or slighted.

The lawyer should then ask each juror, in the interest of fairness,

to write down in the jury room each of the separate items of damages when discussing the amount of the verdict.

Remembering that larger verdicts come in cases of permanent injury, the plaintiff's lawyer should ask the jury to take a vote on whether the injuries are permanent before voting on the money to be awarded. He then should indicate that the vote will have to be that plaintiff's injuries are permanent, because reputable doctors treating the plaintiff have said so, the X-rays show a permanent displacement of bone, and other evidence supports this conclusion.

A separate argument on each of the damage elements, and a reminder to the jury of their promise to award money damages for pain, suffering, and anguish should be made.

The scope of this Article does not allow a detailed description of the trial tactics involved in the medical aspects of a personal injury case. The following suggestions for jury argument would apply equally to all phases of the trial.

1. Avoid medical descriptions, and speak of a fracture as a broken bone and a contusion as a bruise.

2. Dramatize the injury in terms of every-day living. Do not frequently refer to a 25 percent limitation of function; rather emphasize the plaintiff's difficulty in walking up and down stairs, his inability to bend over and tie his shoes, and the fact that he cannot sit in one place for over an hour at a time.

3. Show the anatomical importance of the injured part and how it is connected to the surrounding nerves, tendons, bones, and tissues that depend on its strength and stability. The use of X-rays, charts, skeletons, and the like are very helpful.

4. Comment on the visible signs of the injury, such as scars or deformities, pointing out that the jury can see the injury today, and that plaintiff will see it and have to live with it for the remainder of his life.

5. Point out exactly how the injury has prevented the plaintiff from working at his chosen trade, and how it will continue to cause him to lose earnings in the years to come. A simple example is that a postman cannot deliver the mail if a foot injury prevents him from walking long distances. Whatever the injury, be sure to relate it in specific terms to plaintiff's employment in order to show a lifetime loss of earning power.

After the argument about each item of damage, the jury should be reminded that this is the only day in plaintiff's life when he can be compensated for the injuries he received through no fault of his own. They should be told that plaintiff may not return later

and be compensated for pain, suffering, lost wages, and medical expenses occurring in the future, but that it must be done now on the basis of reasonable probability. The medical testimony about what will happen to plaintiff in terms of reasonable probability should again be mentioned.

Thus far, the lawyer has emphasized eight separate items of damage for an injury which will remain with the plaintiff for as long as he lives. The lawyer should then multiply the elements of future damage by the number of years in plaintiff's life expectancy to show that the amount prayed for as money damages is reasonable and just. The jury is asked if $1.00 an hour (or whatever other figure is used) is too much to compensate for pain and suffering. The defense lawyer may be asked to say in his argument if he would endure what the plaintiff will suffer for as little as $1.00 an hour. There are many hours left in most lifetimes. The mathematics should be worked out in advance so that the money per hour or day is very small. The truth is that a permanent injury is a serious matter and deserves adequate compensation. The only way to obtain it is to graphically show how long a lifetime is and to demonstrate the lifetime nature of the injuries.

In making the argument that the sum asked for is fair, reasonable, and even conservative, it can be pointed out that nothing is allowed for depreciation of the dollar by inflation or other means. Also, the plaintiff's lawyer should show that money is a relative concept. One illustration is as follows:

> One dollar is not much money by itself. It is far too much money to pay for an apple. Likewise, $100,000.00 is a lot of money standing by itself. But it is a very realistic and conservative sum to receive for injuries which rob a man of life's most precious possession—his health. If a million dollar airplane or a $200,000.00 building had been destroyed by negligence, you would not hesitate a minute in compensating the owner in full. The plaintiff in this case is entitled to be compensated with the same fairness and justice. The court tells you what items are to be compensated. Those items are the ones that we put upon the blackboard. Each one is separate and distinct and should be weighed carefully in your judgment. When measured by his loss of health and a lifetime of being disabled, the sum of $100,000.00 is a fair and reasonable, if not a modest, sum to be awarded. Each of you will remember promising to bring in a verdict for the full amount of these damages if the evidence showed you that the amount was fair and reasonable. That is all the plaintiff asks, and he is entitled to receive it.

The foregoing contains a brief description of some of the specific methods of organizing and presenting the jury argument. What of

the manner of delivery? Should the rafters ring and the tears flow? Should the lawyer speak so as to soar like an eagle and coo like a dove?

Sincerity is a far greater weapon than silver-tongued oratory. Frank, honest expression wins more juries than contrived emotionalism. It is true that plaintiff's lawyers try to reach the heart, and the defense attorneys appeal to the head. By the same token, an obvious play for sympathy will hurt a plaintiff's case. Likewise, overstating or magnifying the injuries will often result in a nominal verdict or no verdict at all. The lawyer should speak as he feels, being careful not to let his feelings run away with him.

In conclusion, the best courtroom tactic is to be frank, sincere, and natural in the presentation of the evidence and argument to the jury.

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