

## PRETRIAL'S PART IN EVALUATING DAMAGES IN PERSONAL INJURY CASES

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(ED. NOTE— *Judge Thomas, serving his 10th year as a Common Pleas Judge after 15 years practice as a trial lawyer in Cleveland, has had the unique experience of being a judge in Geauga County (1950-1953) and Cuyahoga County (1953-to date). In both courts he has advocated and developed pretrial procedure in civil cases. Mr. Sindell is a trial lawyer of long practice, largely on behalf of plaintiffs in personal injury cases. Mr. McNeal's firm represents many insurance companies among its clients and he is defense counsel in many personal injury actions involving these companies.*

*Much of what should be known about the subject cannot be found in case reports or learned treatises but must be gleaned from personal experience. The authors have therefore chosen a unique format; that of the panel discussion. The result is, we think, a highly informative and extremely readable discussion of the role of the pretrial conference in evaluating damages.)*

*W.K.T:* Pretrial, as we will be using the word, refers to a court-conducted hearing held after the issues are composed, at which hearing there is consideration of the material issues of the case, the likely evidence, and the applicable law; at such hearing stipulations of undisputed matters are sought; the case is otherwise readied for trial; and finally, the possibility of settlement is thoroughly explored.

*J.S:* It is worth mentioning that the title, "Pretrial Procedure," appears in the Revised Code of Ohio. But as used there it refers to something quite different.

Chapter 2311 of the Revised Code, entitled "Pretrial Procedure," deals with the definition of a trial, the order of hearing cases, revivor, change of venue and other procedures which happen before trial. This is a confusing heading which detracts from the real meaning of pretrial.

*McN:* The emergence of pretrial as a definite process for improving and facilitating civil justice suggests a related comment. In the legal literature we are beginning to see the word spelled without a hyphen. I think this is significant. Pretrial has become well enough established, though regrettably it is not universally utilized in all of the country's trial courts, to be treated as a permanent word.

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*W.K.T.*: Using pretrial in the unhyphenated form conforms to the rule that

“. . . the conversion of a hyphenated word into an unhyphenated single one is desirable as soon as the novelty of the combination has worn off, if there are no obstacles in the way of awkward spelling, obscurity, or the like.”<sup>1</sup>

Now in approaching the part that pretrial can play in evaluating a personal injury case, it must be remembered that when parties reach agreement on the value of a personal injury case, settlement often will result.

Perhaps then, we should first face up to the question of whether the settlement of cases is the primary purpose of pretrial, a question upon which judges and lawyers apparently still differ. At least a recent book states, “Whether pre-trial should be primarily a vehicle for settlement is the subject of genuine controversy.”<sup>2</sup>

Do you think that the court should attempt to secure settlement at pretrial?

*J.S.*: Whether settlement should be an objective or a by-product of pretrial, the fact is that many cases are settled at pretrial.

*W.K.T.*: Last year, in our court, pretrial accounted for 2,467 terminations, out of the grand total of 8,262 civil case terminations (divorce and alimony not included).<sup>3</sup> But for purposes of determining the actual percentage the total must be reduced by those cases which by nature can never reach pretrial.

From the total of 8,262 must be deducted 2,031 cases summarily disposed of in Room 1 (1,085 driver’s license-point 12 cases, and 946 cognovit judgments and foreclosures). Also 502 Uniform Dependents Act cases tried by the chief justice must be subtracted from the grand total.

<sup>1</sup> Fowler, Dictionary of Modern English Usage 244.

<sup>2</sup> Zeisel, Kalven & Bucholz, *Delay in the Court* (1959).

<sup>3</sup> In 1959 in the Common Pleas Court of Cuyahoga County the civil branch terminated 8,252 cases, the domestic relations branch terminated 6,016 cases and the criminal branch of the court terminated 2,033 cases.

The court has unlimited civil jurisdiction, complete divorce and alimony jurisdiction (as of January 1961 two domestic relations judges, to be elected in November of 1960, will be added), and complete felony and misdemeanor jurisdiction.

The time of the nineteen judges of the court, assigned by the chief justice to the various branches of the court, was allocated as follows:

7.29 judges devoted their time to the civil trial rooms, while 3.69 judges conducted pretrials. The remaining 8.2 judges included the criminal court judges (five most of the year), Room 1 judge (interlocutory matters), domestic relations judges (one one term, two two terms and all civil judges assigned to periodic Saturday morning domestic relations dockets), and the chief justice (docket assignment; advancement and continuance of civil cases where the court rules do not permit same by consent of parties; Land Court; Uniform Dependents Act; and general non-jury cases assignments, principally domestic relations).

Using the adjusted total of 5,729, these are the percentages:

Pretrial settlements equalled 2,467 cases, or 43.05 per cent.

Settlements reached by the parties without court intercession before the cases reached pretrial amounted to 2,129 cases, or 37.28 per cent.

Disposition in the trial rooms included 590 settlements (10.3 per cent) and 543 trials (9.48 per cent).

Nevertheless, the significant proportion of settlements resulting from pretrial in our court does not justify the possible conclusion that a pretrial should be devoted solely, or even primarily, to settlement discussions. On the contrary, a pretrial devoted to settlement talk from the very beginning is less likely to result in settlement than a pretrial which does not explore the possibility of settlement until the first and formal part of the pretrial is concluded.<sup>4</sup>

*McN*: Nothing more surely gets a pretrial off on the wrong foot than to have the judge open with the question, "Can this case be settled?" That approach turns the pretrial into a bargaining session, pure and simple. It shuts off orderly consideration of the essential elements of the case so necessary to a measurement of the value of the case.

In fact, it is most distressing to come into a pretrial discussion and hear the pretrial judge summarily state for the lawyers, the insurance representative and the client that he is interested in knowing what has been offered in settlement and what figure the insurance representative is prepared to pay in settlement of the case.

On the way to the courthouse the insurance company representative may have pre-judged the pretrial by stating to me, "I suppose this is another sandbagging proposition and that we will be asked what we will pay in settlement before discussing the issues of liability and injury." His prejudgment, confirmed by such statements of the pretrial judge at the outset of the pretrial, makes it most difficult for a defense counsel to properly discuss the reasonable and sound value of the case with the insurance company representative.

*J.S*: There is another thing that can get a pretrial off to a bad start. Counsel for the plaintiff has prepared his client for an appearance at a court hearing. To bring him down to the courtroom only to suddenly have the lawyers disappear into the judge's chambers and leave the clients sitting in the courtroom creates a mystery. Considerable doubt and wonderment arises in the mind of the client as to what is going on in the judge's chambers.

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<sup>4</sup> Thorough-going pretrial, first established in our court in July of 1953, produced similar conclusions when examined in 1956. See "The Story of Pre-Trial in the Common Pleas Court of Cuyahoga County," 7 W. Res. L. Rev. 368 (1956).

Thorough preparation for the pretrial by counsel for the plaintiff—with the plaintiff and those interested in the case (parents or a spouse)—should be accomplished prior to going to the pretrial hearing. Counsel should prepare his client for the pretrial since the client in most cases has never been inside a courtroom or met a judge and would misunderstand the entire judicial procedure of pretrial. Among other things, a formal pretrial should be dignified, orderly and meaningful to the litigants. The same pretrial pattern should be followed by all the judges in the courthouse in order to avoid confusion.

*W.K.T.*: I take it that you gentlemen firmly believe that a personal injury pretrial hearing should take up the issues and questions in a regular order in the presence of both counsel, the plaintiff, and the defendant's insurance company representative.<sup>5</sup>

*McN.*: After participating in all versions of pretrials as conducted by the several judges, I am satisfied that it is imperative that the pretrial should follow a regular order and cover certain indispensable points.

By direct questioning, based on the court's previous study of the pleadings and the prior proceedings in the case, the court should develop the issue of liability, first from the view of the plaintiff and then from the view of the defendant. Plaintiff's counsel should be asked to state the main contentions of negligence and the likely evidence which will support those contentions. Defendant's counsel should be quizzed as to his answering contentions, the substance of any affirmative defenses, and as to the likely evidence which defendant will offer.

In connection with the liability questions to be propounded of respective counsel in the presence of the plaintiff and in the presence of the insurance company representative, I feel that it is of utmost importance that particular attention be directed to the use of deposi-

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<sup>5</sup> Cuyahoga County Common Pleas Court Rule 21 (Pre-trial Procedure) provides in part:

"(b) The parties and their respective counsel shall appear at each pre-trial session. . . . A party who is insured in connection with the claim constituting the subject of the action may appear by a claim agent of his insurance company. If the pre-trial Judge finds that the presence of an insured party is essential to the conduct of the pre-trial, he may direct such party to appear."

The defendant's public liability claims man cannot be compelled to attend the pre-trial. However, public liability insurers with claims men stationed in Ohio have almost universally taken advantage of the right given by Rule 21 to have a claims man attend the pretrial. The rule deliberately encourages the attendance of the claims man. He is more essential than the defendant. He usually has personal knowledge of the fact investigation. He has authority—sometimes complete authority—to make a settlement. On the other hand, the defendant has no authority to prevent the settlement but may often oppose any settlement since, as a matter of principle, it appears to concede his fault.

tions which certainly should have been obtained by both sides prior to any pretrial conference. I have found it to be a great leveler and useful tool when a deposition can be quoted from and used in support of arguments concerning liability on the part of the defendant when such arguments can be heard by plaintiff and his counsel. It seems to me that this feature of liability discussions has been overlooked and considered unimportant in some pretrial discussions.

*J.S.*: Depositions work both ways. The plaintiff at pretrial stands to benefit from them too. Not only does plaintiff's counsel thereby know defendant's story, but plaintiff's counsel also knows what his own plaintiff has said under cross examination on the vital points. The presence of the plaintiff at the pretrial table, listening to his own testimony being read by defense counsel from a deposition, may make the plaintiff amenable to defendant's offers to settle, although these offers may not necessarily be consistent with what the plaintiff originally had in mind. The *quid pro quo*, reading admissions made by defendant from a deposition, makes the plaintiff's settlement figures sound more reasonable to the claims man.

*McN.*: As the pretrial progresses, the court should take up the possibility of stipulating the identification and authenticity of photographs, hospital records, death certificates, municipal ordinances, contracts, insurance policies and other relevant documents or pieces of physical evidence. The opportunity to object to the introduction of any such exhibit on grounds other than identification or authentication ordinarily would be reserved.

In my opinion, each side should be interrogated as to whether any amendments to the pleadings are sought. In the event of such request, if the matter cannot be corrected on the spot (e.g. the substitution of easterly for westerly, or a change of date), leave may be granted to file the amended pleading by date certain, with additional time granted the other side to move or plead.

*W.K.T.*: When the question of liability is concluded, the court then proceeds to the question of injuries and damages.

*J.S.*: I might suggest, Judge, that one approach to the question of injuries is for the judge to inquire of plaintiff's counsel concerning the plaintiff's present claims of disability (i.e. at the time of the pretrial). This helps to ascertain the seriousness of the claims of injury that are being made and whether there is any diminution or enlargement of the claims stated in the petition. I feel that the court should then ask to examine medical and hospital records. There should be no secrets at the pretrial table. The facts pertaining to the medical and hospital records should be available to both sides and to the court to permit a realistic evaluation of the injuries.

*McN*: This should always be consistent with the liability question involved.

*W.K.T*: At this point in the pretrial I find that it is timely to inquire whether either side desires to avail itself of Cuyahoga County Common Pleas Court Rule 12 to obtain photostatic copies of hospital records, if not already obtained. As you know, this rule permits, by consent or after motion and hearing, the issuance of an order to a hospital directing the reproduction of designated portions of the hospital records, at the expense of the requesting party.<sup>6</sup>

*J.S*: Judge, I would like to call to your attention a very practical advantage of the formal part of the pretrial being held in the courtroom with the judge sitting at the head of the table and each side present, plaintiff on his side of the table and defendant on its side of the table. To have each side give its version of the accident, in the presence of the plaintiff and the defendant's claim man; to discuss questions of liability and questions of law; to have the plaintiff detail his injuries; to have an exchange of medical information; and to have other pertinent points revealed: all of these disclosures have a very salutary effect on what will follow when we finally do get to the discussion of the value of the case.

*W.K.T*: Gentlemen, I know that each of you is a strong advocate of thorough preparation. I think we all agree that a case cannot be adequately pretried unless sufficient preparation has been accomplished to be sure that the case is ready for pretrial. It is this thinking which produced on March 1, 1958 our new "Certificate of Readiness for Pretrial Rules." Under that rule a case will not be set down for pretrial until there is a certification that the listed steps have been completed.<sup>7</sup>

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<sup>6</sup> Rule 12 also provides:

"Objections to the admissibility of such reproduced hospital records on the grounds of materiality or competency shall be deemed reserved for ruling at the time of trial without specific reservation in the order to reproduce. Reproductions made pursuant to this procedure may be admitted in evidence without further identification or authentication but subject to rulings on objections impliedly or specifically reserved, unless the order otherwise expressly provides."

Recently, in *Arter v. Zettelmayer*, Case No. 718,724, Cuyahoga County Common Pleas Court, Judge John V. Corrigan thus summarized the purpose and operation of Rule 12:

"The *raison d'être* of discovery is to permit either side in a lawsuit to become acquainted with the salient facts known to the other parties prior to the trial. In the past the rule has been utilized with great satisfaction by all parties in furtherance of this end. It results in a tremendous saving of time by hospital employees and it is convenient for all concerned. It is now accepted usage in this County. Since it comports with the general theory of discovery, does not transcend the Court's powers, and affords the patient protection in the matter of privileged communication, it is valid."

<sup>7</sup> In part the Certificate of Readiness for Pretrial reads:

What depositions do each of you feel are necessary in order to permit an accurate evaluation of the case at pretrial?

*McN*: I feel that the answer to that question depends upon the particular kind of case which is being considered from the defendant's standpoint. However, I might say that it is of utmost importance that we on the defense side obtain the deposition of the plaintiff. If the case involves a technical or scientific problem, then it may be necessary to obtain the depositions of experts within the particular field. Also, in some instances it may be necessary to obtain depositions of physicians and surgeons who may not reside within the county, or perhaps will be out of the county or state at the time the case comes on for trial.

*W.K.T*: Are you, Mr. McNeal, suggesting that each side has the right to depose the other side's experts?

*McN*: I was thinking primarily of the depositions which would be taken of the experts whom I would expect to call, but we might envision a case where defense counsel might well want to call the experts who would be expected to testify for the plaintiff. I realize that this is a somewhat touchy point from a legal standpoint, but it is at least something that every defense counsel must consider in a given case.

*W.K.T*: Mr. Sindell, you have already pointed out earlier the importance of depositions from the plaintiff's standpoint. Is that a standard procedure in your office?

*J.S*: It would depend on the nature of the case. For example, if the defendant was killed in the collision and the question of *respondeat superior* was an issue, then perhaps the best method would be to use interrogatories. If the answers to the interrogatories are not

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"With reference to said case it is certified:

- (1) That the issues have actually been joined;
- (2) That each party has deposed the opposite party and any other witness necessary before pre-trial; or that there has been reasonable opportunity to take such depositions;
- (3) That in personal injury cases the defendant has had a physical examination of the plaintiff within the past 90 days, or has had a reasonable opportunity to have had such an examination, and the defendant, subject to R.C. [Ohio Rev. Code] 2317.02, other applicable statutes and Rule 12, has obtained or been furnished with copies of any hospital records of the plaintiff, or that the defendant has had reasonable opportunity to obtain hospital records of the plaintiff.
- (4) That any other discovery or interrogatory proceedings, necessary before pre-trial, have been completed or a reasonable opportunity has been given the parties to complete same.
- (5) That any party claiming special damages has furnished opposing party an itemization of such claimed special damages.
- (6) That the case is in all respects ready for pre-trial.
- (7) That within 30 days of the filing of the certificate the parties have unsuccessfully attempted to settle or dispose of said case."

conclusive, then one can resort to depositions to obtain records. Generally the plaintiff gets the answers he needs, and the time, effort and cost of deposing can be avoided.

In cases where defendant is available, his deposition should be taken as soon as practicable after the filing of the petition. The facts and circumstances are fresher and more easily recalled on cross examination. The handling of an injury case consists in great part of a "time-binding" of past events. Therefore, the sooner the deposition is taken, the clearer will be the fact situation.

Depositions of aged witnesses or witnesses who may be out of the jurisdiction at the time of trial are imperative and should be taken when counsel first suspects the witness may not be available. The plaintiff's ability to carry the burden of proof becomes heavier in direct proportion to the length of time that elapses from filing to trial. Depositions can lighten the burden of proof and, in some cases, preserve the case until trial time.

*W.K.T.*: All of which has its part in evaluating the case, I take it?

*J.S.*: Yes, that is right. Depositions, particularly of the plaintiff and defendant, serve another very important function in evaluating an injury case. The home office of the insurance carrier is often so many miles away from the local atmosphere that it is unable to grasp the full meaning of the lawsuit. Copies of the depositions, sent by defense counsel to the home office with his appraisal of the testimony, simplifies and expedites the task of evaluation and the granting of authority to settle.

*W.K.T.*: Gentlemen, another one of the requirements of the certificate of readiness is that, "In personal injury cases the defendant has had a physical examination of the plaintiff within the past 90 days, or has had a reasonable opportunity to have had such an examination, and the defendant, subject to R.C. 2317.02, other applicable statutes and Rule 12, has obtained or been furnished with copies of any hospital records of the plaintiff, or that the defendant has had reasonable opportunity to obtain hospital records of the plaintiff."

You both will recall, I think, that one of the reasons that particular requirement was included was because we had some pretrials which were dry runs. The parties came down and it turned out that neither side had obtained this information. As a result the pretrials had to be postponed until the information was secured. Do you feel that getting this data is indispensable to the pretrial?

*McN.*: From the defendant's standpoint, I feel that no pretrial should be undertaken unless and until the plaintiff has been examined by competent medical men who will provide the defendant with com-



plete and informative reports concerning the complaints of the plaintiff and the condition of the plaintiff from a physical standpoint, as well as indicating the prognosis which necessarily must be considered when any pretrial discussion is had.

*J.S.*: Ordinarily, plaintiffs and their counsel consent to all requests for physical examinations by doctors chosen by defendants, including a follow-up examination. Of course, plaintiffs are aware of the non-statutory inherent power which the trial court has "to require the plaintiff in actions to recover damages for personal injuries to submit his or her person to a reasonable private physical examination by competent physicians and surgeons when necessary to ascertain the nature, extent, and permanency of the alleged injury."<sup>8</sup>

However, under this inherent power the court must exercise discretion as to the nature and number of examinations ordered. The court might authorize a defendant to have an orthopedic examination if bone and joint injuries are claimed, a neurological or psychiatric examination if injuries in the field of these specialties are claimed, and likewise in other specialties in the field of which injuries are claimed. Surely the defendant should not be permitted to have an examination by more than one specialist in a particular field, and then only if the plaintiff intends to press that claim of injury.

In making requests for physical examinations, defendants should realize that too many examinations may have a tendency to give the plaintiff the impression that he must be very ill or the other side wouldn't be examining him so much.

*W.K.T.*: Any unresolved question or objection as to nature or number of medical examinations or the qualifications of the proposed examiner should be ruled on at the pretrial.

One other requirement of the certificate of readiness on which I would like to get your thinking, gentlemen, is the fifth requirement, "That any party claiming special damages has furnished opposing party an itemization of such claimed special damages."

*J.S.*: I am reminded that one of the judges in our common pleas court told me about a young lawyer who came to a pretrial, and when they got to the question of "what are your specials?" the young lawyer asked the judge, "What is a special?" I think he felt that a "special" was something like a special charge to the jury or some such thing. What is a special, may after all, be a fair question. There are over 50 types of damages from "actual damages to vindictive damages."<sup>9</sup> A good, general definition of specials can be found in the

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<sup>8</sup> *Kresge Co. v. Trester*, 123 Ohio St. 383, 175 N.E. 611 (1931).

<sup>9</sup> *Ballentine, Law Dictionary* 325 (1930).

medical pay clause of most standard automobile liability insurance policies:

“. . . To pay all reasonable expenses incurred . . . from date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for . . . person who sustains bodily injury, sickness or disease, caused by accident . . .”

Other items of damage to be listed are property damage (auto, clothing and other personalty), transportation to and from doctors for treatment, help at home, loss of income, medicines, drugs and appliances. Today the lawyer handling injury cases does his best to list and itemize all of the damages incurred by his client, because he realizes that this is the very heart of his case. Every item of damage should be verified in some manner to save time at the pretrial and also to save time possibly at trial so that they can be checked out by both sides before trial. The fact that an item of damage has not been paid by the plaintiff is not the test as to its validity. For example, a relative rendering nursing care to the injured plaintiff, although not paid, still entitles the plaintiff to recover the reasonable value of such nursing care. An early Ohio decision held that it was error to charge that there could be recovery for the loss of a mother's earnings because of her inability to perform outside employment while nursing her son, but the reasonable value of the mother's nursing services are recoverable.<sup>10</sup>

*McN*: Of course, insurance companies insist, and properly so, on knowing exactly what the specials are. Undoubtedly there is some relation between the size of the specials and the worth of the case. However, I do not think that the time-honored formula of three times specials offers any inflexible guide to valuation.

*W.K.T*: Gentlemen, in connection with this matter of special damages, it is probably pertinent to refer to the pretrial order, issued by this judge, which directed a plaintiff, upon motion for disclosure duly made in a personal injury action:

“to produce for inspection and copying his retained copies, if complete and correct duplicates of his original returns, otherwise . . . to secure certified copies of the original returns at defendant's expense.”

It was further provided that the plaintiff was permitted to block out or delete those portions of his returns, in accordance with the pretrial order which limited the order of disclosure:

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<sup>10</sup> Cincinnati Omnibus Co. v. Kuhnell, 9 Ohio Dec. Reprint 197 (1884). Also see Klein v. Thompson, 19 Ohio St. 569 (1869) (surgeon's bill recoverable by indigent plaintiff even though paid by township trustees). See also 63 Harv. L. Rev. 330, 331 (1956).

"to reports of earnings, wages, salaries for personal services, and/or profits in connection with the operation of any business."

The pretrial order was further delimited by the specific disclaimer of the defendant to:

"any right or desire to examine income tax returns with reference to plaintiff's personal contributions to charitable or philanthropic causes; likewise, any other information relating to exemptions or deductions or earnings from securities or bank accounts or other sources of income, other than the ones previously listed."<sup>11</sup>

We have now reviewed essential pretrial methods and have considered worthwhile steps in preparing a case for pretrial. All of these matters have point, in part, because of the assistance thereby rendered in evaluating the case at pretrial. I would like to learn what criteria you use in evaluating a clear liability case.

*J.S.*: With liability being clear and thereby eliminating a great bulk of the problems in the lawsuit, you can then look to the injuries suffered by the plaintiff and analyze the medical reports to determine future disability, pain and suffering.<sup>12</sup> In addition, if you have clear liability, a plaintiff's lawyer would look for what I would refer to as aggravated liability, those things which may give the case a greater value if tried (i.e. intoxicated defendant, punitive damages, knowledge of defective brakes).

*McN.*: From my standpoint, it is important to know as much as I can about the plaintiff's personality and ability to gain the confidence of the jury as to the nature and extent of the injuries, as well as considering the question of permanency. I would also want to know, if possible, the identity of the experts who would testify for the plaintiff because some experts, whether they be medical experts or trained in other fields, may or may not be good witnesses. This would materi-

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<sup>11</sup> See *Mandell v. Yellow Cab Co.*, case No. 676,640, Cuyahoga County Common Pleas Court. In the supporting memorandum it was stated among other things:

"In Federal Regulation 458.204, there is no mention of privilege and perforce there is no mention of how the privilege may be waived. The present situation is not comparable to one arising under the privileged communications section of the Ohio Statutes. Section 2317.02, Revised Code. Privileged communications are only creatures of statute. Under Section 2317.02, if the client or patient voluntarily testifies, the attorney or doctor may be compelled to testify.

Here in the absence of any statutory guides, simple justice requires that since the plaintiff in his petition voluntarily makes an issue of his earnings during 1954 and ensuing years, he is deemed, by operation of law, to have waived any privilege which he may conceivably have under Federal Regulations 458.204."

<sup>12</sup> *Spaak v. Chicago & N. Ry.*, 231 F.2d 279 (1956); 19 *NACCA L.J.* 164 (1957). Also see *Drlik v. Imperial Oil*, Cause No. 3548, United States Dist. Court (N.D. Ohio, Eastern Div. 1955). Judge James Connell's opinion allowing per day, month and year compensation for pain and suffering.

ally affect my notion as to a reasonable settlement value of such a case. I would like to have information concerning the plaintiff's work habits and whether the plaintiff has been involved in any difficulties which might cut down on any verdict which might be expected by counsel for the plaintiff.

Those factors, I think, are of paramount importance and ones which I would want to consider first before going into the other considerations which every defense counsel would consider at a pretrial conference.

*W.K.T.*: Mr. McNeal, can you visualize a case in which you would be willing to share some of this information that you have gleaned about the plaintiff and plaintiff's habits and the plaintiff's past in order to effect a more realistic evaluation on the part of plaintiff's counsel than perhaps you think he has so far taken?

*McN.*: I think I can honestly state to you that in probably nine out of ten such cases I have divulged such information to counsel for the plaintiff, either in advance of pretrial or at pretrial. I must say that I have never been prejudiced by my willingness to divulge such information. I do not recall any case which had to be tried after the information was given to counsel for the plaintiff in the presence of the plaintiff and the pretrial judge.

*W.K.T.*: Do you attach significance, Mr. Sindell, to the identity of the parties?

*J.S.*: The identity of the parties and the type of plaintiff or defendant in any given lawsuit is of primary importance in evaluating a clear liability case. The worst part of the defendant's case is the defendant, and likewise the worst part of the plaintiff's case could well be the plaintiff. These are either weak or strong points in evaluation.<sup>13</sup>

*W.K.T.*: Of course, I think this emphasizes the absolute indispensability of the plaintiff at the pretrial so that both sides can fully appraise the impact that the plaintiff will make on the jury. After all, isn't the real question we are considering: how will the jury react to all of these facts that are being disclosed?

*J.S.*: I might point out, Judge, that very often it is not until the pretrial that the defendant's counsel will say that his investigation has disclosed prior injuries. I sometimes wonder why this is not conveyed to the plaintiff's counsel earlier. Such information in the hands of a conscientious plaintiff's lawyer is helpful in that he can discuss it with the plaintiff and re-appraise the situation in the light of what he has been told with respect to prior injuries.

*McN.*: I want to re-emphasize what you stated, Judge Thomas,

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<sup>13</sup> "What Price Personal Injury," *Prac. Law.*, Feb., 1957. See also 1 Belli, *Modern Trials* 756-764 (1954).

concerning our trying to put ourselves in the position of a jury in reaching what is considered a reasonable figure as to settlement. After we have explored all of the facets of the case, I quite agree that counsel on both sides must then view the case at pretrial from the standpoint of a jury. We must put ourselves in the jury box in considering the case in order to realistically appraise the case as one for settlement or trial as the pretrial conference unfolds.

*W.K.T.*: The reverse of the coin is the no-liability case, and this may very well not be revealed until pretrial. Do you have any special comment about the approach that should be made in evaluating a so-called "no-liability case?"

*J.S.*: Judge, it is always the hope of the plaintiff's lawyer that he has made no mistake in selecting the particular case for filing and perhaps for trial. Although it sometimes comes as a shock to the plaintiff's lawyer at pretrial that his case is not as strong as he would like it to be, he had best keep his eyes and ears wide open when it gets to the discussion of liability. If he is convinced by what the defendant is willing to disclose at the pretrial affecting liability, he should be courageous enough to dismiss his case and frankly tell the client at that time that to go forward would result in failure. The lawyer who refuses to do so is simply fooling himself.

*McN.*: From a defense standpoint, I think there are two kinds of no-liability cases which have to be considered by defense counsel. The one case could be said to be the case where the defense must consider extensive, serious and perhaps sickening personal injuries involving an elderly person or a youngster, where the testimony from the plaintiff's side is sufficient to persuade the trial judge to submit the case to a jury despite the overwhelming and preponderating evidence in possession of defense negating liability. In such a case, defense counsel must accurately appraise the sympathetic factors which are involved in considering whether to make some offer of settlement to counsel for the plaintiff, despite the feeling of confidence on the part of defense counsel concerning liability.

The other case which is considered a no-liability case is the one where counsel for the defense has in his possession a signed and accurate statement given by the plaintiff completely eliminating the question of liability insofar as the defendant is concerned. In such a case, I would not be willing to make any offer of settlement and would much prefer taking such a case to trial and defending it, despite the question of seriousness of injury.

*W.K.T.*: So far, gentlemen, we have been discussing the formal part of the pretrial. Before this first part of the pretrial is concluded, the pretrial judge should be sure that every step necessary to ready

the case for trial has been taken. Now any mention of settlement has been carefully and purposely excluded from the formal part of the pretrial. The second part of the pretrial, on the other hand, goes directly to the question of settlement. You are both thoroughly familiar with our procedure of conducting separate settlement discussions. Do you go along with that procedure?

*J.S:* Judge, this is the best way, of course. It gives each of the parties an opportunity to think about what has happened at the formal pretrial. While the one side is discussing the matter with the judge in chambers, the other side can be discussing it with his client. Another and perhaps the most important part of the separate settlement discussions is for the judge to be willing to discuss settlement figures with plaintiff's counsel and the plaintiff. After the judge has heard the formal part of the pretrial, he is in an ideal position to evaluate the case for both sides. The judge's offices should always be open to discussing money with the plaintiff and with counsel for the plaintiff in the judge's chambers—and for that matter with defendant's counsel and the claims man too. Without the judge's help in discussing this figure with the client, plaintiff's lawyer sometimes is unable to bring to a close by settlement a case which plaintiff's counsel knows should be settled at the figure which has been offered.

*McN:* I would like to make two points here. One is that I feel that the pretrial judge should always first discuss a figure of settlement with counsel for the plaintiff and not first discuss a figure of settlement with counsel for the defendant, as some judges have done. I feel that it is axiomatic that the figure which has to be discussed by counsel for the defendant should first come from the plaintiff. I do not agree that defense counsel should be asked first to venture a figure which would be offered in settlement provided the plaintiff would accept such a figure. It seems to me that such an approach to a pretrial discussion on the settlement issue is one which places a great burden upon the defendant and counsel for the defendant.

Secondly, I feel that it is a necessary function of the pretrial judge to actively and impartially conduct the settlement discussions to the end that there is an honest and sincere negotiation between the demand and the offer for the ultimate settlement of the case in fairness to both parties. The pretrial judge should not remain aloof when there is any chance whatsoever of bringing the case to a conclusion by reason of a settlement. In order to achieve the ultimate settlement of the case, it seems to me that the pretrial judge must by his actions gain the confidence of both sides. He must impress upon both sides that he is a disinterested arbiter and that he is viewing the case as perhaps a jurymen would view the case. By his com-

ments and contributions in settlement discussions he acts as the catalyst. Thus, he brings the two opposing parties into complete agreement and brings about the successful culmination of litigation, which is the very purpose of the whole pretrial procedure.

*J.S.*: The pretrial judge should inform the parties of the problems and expenses of trial, the general rules of law applicable to the case, and the function of the jury and the trial judge. The pretrial judge would not be remiss in using gentle persuasion with both plaintiff and defendant to accept an offer which he himself feels to be reasonable under the given circumstances. If the pretrial judge feels that there would be an advantage in holding a second or third pretrial, he should so order, rather than simply dropping all settlement conversation, if the offer and demand figures are reasonably close. A little urging by the pretrial judge might be just the thing to turn a lengthy piece of litigation into a closed file.

*W.K.T.*: There is a great deal to what both of you have said. One particular subject warrants special comment in connection with these settlement discussions.

The question continually arises at pretrial whether defendant legally can be required to disclose public liability policy limits, and whether as a practical matter the company should disclose policy limits in any event.

To date, there is no report of any Ohio court having ruled that disclosure of policy limits can be forced. Of course, after judgment, it's a different story.<sup>14</sup>

But in the process of evaluating a personal injury case, the size of the public liability policy may become very pertinent. Undoubtedly, plaintiff's evaluation of his case should first be made without reference to policy limits. But everyone knows that the collectibility of the defendant is a significant fact to be considered in reaching a final evaluation of the worth of any action for money damages. It is at this stage that a casualty insurer is well advised to disclose its policy limits and to be willing to verify the size of the policy. Many cases can be cited by pretrial judges and trial counsel where such disclosure brought to settlement a case which otherwise would have unnecessarily gone to trial. Nothing would be gained by recording a verdict in excess of the policy limits, an excess which never could be collected.

Now we may summarize the role of the pretrial judge in the settlement discussions. As I see it, the pretrial judge is a mediator who fulfills several functions.

His acquaintance with the case freshly gleaned from the first part of the pretrial and from any additional relevant information

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<sup>14</sup> See Ohio Rev. Code § 3929.06 (1953).

imparted in the separate conferences, combined with his disinterestedness, enable him to fairly assess the strengths and weaknesses of each side of the case. Taking the long view, he is in a good position to even anticipate the probable outcome. What are the chances of a plaintiff's or defendant's verdict? If it is a verdict for the plaintiff, what is the likely range of money damages? Answering these questions, he can arrive at a settlement evaluation which is fair to both sides.

Secondly, by talking separately with each side, he can find out what the plaintiff actually regards the worth of his case to be, and how much money, if any, the defendant is willing to pay. In the separate discussions he can give each party the benefit of his own appraisal. Especially, he should reveal his own evaluation to the party whose figure seems not in keeping with a realistic evaluation. By undertaking back-and-forth negotiations with each side separately, a pretrial judge may often achieve an evaluation of the personal injury case which is satisfactory to both sides. In arriving at such a figure, the parties can properly feel that the settlement represents the logical result of a judicial hearing.

If, on the other hand, separate negotiations reach an evaluation unacceptable to either or both sides, the pretrial has nevertheless served a useful purpose. The pretrial judge has assisted each side in readying the case for trial. So too, the gap between opposing evaluations has often been so narrowed by pretrial that a settlement may result before the case is actually called to the trial room, with the accompanying savings of time and expense for each side.