

A NEW APPROACH TO PERSONAL INJURY LITIGATION

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Since I am about to propose a new approach to personal injury cases, it is reasonable that the reader's first question might be: "Does the present system really need changing?" I think it does. And I think that I can illustrate that need quite cogently before I proceed with an analysis of the problem. Here are some extracts from the press:

Dear Governor:

My five year old boy four weeks ago was struck by a driver who has no insurance and no money and Tommy is still in the hospital. He was walking across an empty lot away from the curb when a car crashed over the curb and struck my boy, breaking both his legs and bruising his head and face so that it took thirty stitches to patch him up.

Someone told me that where there is a wrong, the law gives a remedy. I am a poor woman, Governor, won't you please tell me what remedy is provided for me by the laws of this state?

and:

Consider the ethical virtue of the "sock the city" verdict, as it might be called. Six years ago a 39 year old barge worker toppled, dead drunk, onto the tracks of a New York subway station. An incoming train screeched to a halt, but failed to stop short of him, and killed him. His widow sued and won on the grounds that the city was at fault; it should have maintained such operating conditions that no train could run over a drunk who fell on the tracks. It was no contest: she was a real, tearful woman, and the city was a vast, cold abstraction. She collected \$101,649.86.¹

The purpose of this article is to point out the need for a fresh approach to personal injury litigation. I do not criticize the present system because there are problems connected with its administration, which are amply illustrated by the preceding articles in this symposium. I criticize it because it is not fair. It works with a tremendous inequality. It forces the personal injury claimant to assume risks that he never knew existed. He assumes the risk of uncertainty in the law, the difficulty of proving negligence, of the choice of proper counsel, of being coerced to settle because he cannot afford the long delay until he might get his case heard, and the risk that the defendant might not be able to pay any judgment he may eventually obtain. The defendant in the personal in-

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¹ Hunt, *Damage Suits—A Primrose Path to Immorality*, (Harper's, January, 1957).

jury case must also assume some of these same risks, and in addition, he must assume the risk that he may be called upon to pay many times the economic loss of the claimant, and the risk that the plaintiff's lawyer will be able to convince the jury that the pain and suffering of the plaintiff should have a remarkably high value. The defendant has no method, because of the wide variation in jury verdicts, by which he can standardize his exposure. Nor does the availability of insurance aid the defendant as much as would be first supposed. Insurance costs money and in these days of rising jury verdicts, it is not unusual to find that a defendant, who assumed that he was amply covered by insurance, is faced with a verdict far exceeding his policy coverage. Liability insurance is not, in any event, universal. No more than 75% of the automobiles on the road today are covered by liability insurance and the percentage is much smaller in those personal injury cases which do not involve automobiles.

Perhaps most of us can agree that the purpose of personal injury litigation must be the compensation of the victim. Punishment, if any is called for, is clearly a matter for the criminal law. It makes little sense to reward a victim of a personal injury accident with so-called punitive damages, for this permits him to turn an otherwise unfortunate occurrence into a personal bonanza. Nor does it make any sense to give the victim a very large reward if he has been injured by a rich defendant, and nothing or next to nothing, if he has been injured by a poor defendant. *From the standpoint of justice, we are concerned with the injuries that the victim has suffered, and his recovery of fair, but not excessive, compensation for those injuries.*

The defender of the present system will agree to this only if two conditions are added:

- 1) If the injury was clearly and wholly caused by the fault of an identifiable third person.
- 2) If that person is able to respond in damages either by way of his own assets or by way of liability insurance.

Again, I think we can all agree that these conditions operate to place the victim's right to recover on the completely unforeseeable item of the pocketbook of the person who injures him; and it places the defendant at the mercy of a system which says, in effect, that it will be the size of his pocketbook, as much as it will be the extent of the injuries suffered by the complainant, which will determine the amount to be paid. It is this subject which we shall examine first.

THE MEASURE OF DAMAGES: ABILITY TO PAY

Nowhere in the present symposium will the reader find ability to pay mentioned as a legally recognized item of damages in personal injury cases (except in the very rare instance where punitive damages are recoverable). The reader will find considerable discussion of pain and suffering, and there are instances on record where juries have valued pain and suffering at rather astronomical figures: \$40,000 for eleven

hours and \$5000 for thirty minutes.² In each of these cases, by the way, the jury also brought in a substantial verdict for the wrongful death which ended the pain and suffering.

Certainly, no reader of this article would accept five thousand dollars for the kind of agony that these dying persons endured. And that is precisely the point! The morality of a system which attempts to put a price tag on such an item is open to very severe questioning indeed, and if we do presume to put a value on it, we get exactly what we deserve: the widest possible variation in the verdicts of juries as to what one man's pain and suffering is worth as against another's, due partly to the differences in juries, and due more to the awesome ability of some skilled lawyers to recreate a gruesome spectacle of violent agony in every tiny detail to the point where the jury cannot abide it; this is known as "demonstrative evidence."

What has all this got to do with ability to pay? It has everything to do with it! A rich defendant makes it well worth the plaintiff's time to attempt to trail every bit of blood possible across the floor of the court room. If that rich defendant is an insurance company, the jury will know it, in spite of all the efforts of the defendant to keep that fact away from the jury's knowledge. At present, juries assume the existence of insurance, especially in automobile accident cases, and this assumption is generally a correct one. It is correct, not because all automobiles are insured, but rather because most men of any substance are insured. This brings us to look at the other side of the coin: ability to pay is the greatest single factor in determining which law suits are never filed. There is no point in litigation with an insolvent defendant, no matter how much of a liability case is present. When a law suit is filed, it is filed because there is some expectation of recovery and where the defendant has no insurance and no assets, the matter is usually forgotten. In this case, the victim's agony, worth perhaps \$50,000 under other circumstances, will never be described to any jury. Discussion of amounts of damages in negligence cases involves us in an assumption which is all too casual: there is often no point in determining an amount, because there is no ability to pay.

As we turn our attention to sky-rocketing verdicts then, let us remember that they represent only one view of what is wrong; the law suit which is never filed because of lack of ability to pay is certainly just as serious.

The battle of jury verdicts is raging loud and long. Less than a year ago a prominent national magazine carried an article called *Damage Suits—A Primrose Path to Immorality*.³ The theme of that article is that the law suit for personal injuries has become a national pastime; that the avariciousness of the plaintiff and the plaintiff's lawyer is degener-

² See note 1 *supra*, and see also, in general, BELLI, *READY FOR THE PLAINTIFF*, (1956).

³ Note 1, *supra*.

ating the entire moral fiber of American life, and raising insurance costs.

This, I suppose, is the defendant's position. Letters to the Editor, pointing out that the injured individual is usually without money, the delaying tactics of insurance company lawyers, and settlements forced on destitute victims, show that there is plenty of sentiment in favor of the plaintiff. One such letter states in part, "There is nothing on earth more piously moral than an insurance company. . . . Morally, insurance is exactly like roulette or craps with a much larger house percentage. . . ."

It is not the purpose of this article to take sides between the crap-shooter and the croupier. It is sufficient to note that today we have a joint association of plaintiff's lawyers dedicated to push the amounts of verdicts up to Heaven, and a joint association of insurance companies dedicated to holding the amount of the verdict as low or lower than Hades, all without much relation, if any, to the economic loss of the victim.⁴

These questions are now posed for us:

- 1) Does the wealth of the defendant constitute a reason for rewarding a victim whose economic loss is only a fraction of the award?
- 2) Does the poverty of the defendant constitute reason for depriving an otherwise deserving victim of the full measure of his economic loss?

Those who answer the above questions in the affirmative are in favor of the present system, for that is unquestionably the way it operates. Those who do not answer those questions in that way, we invite to join us in our search for something better. Our object is not to hold down verdicts or push them up. It is to find a more just method of determining damages, for if we remove the question of ability to respond in damages as both a qualitative and a quantitative test, something has got to be put in its place. What follows are some ideas which the writer wishes to put on the table for examination and discussion, not with the

⁴ On October 18, 1957, the Journal of Commerce carried an article in which the insurance industry assailed the National Association of Claimants Compensation Attorneys as an "unvarnished pressure group" whose campaign to increase the frequency and size of damage awards could bankrupt insurance companies.

In reviewing Mr. Belli's book (note 2 *supra*) Fleming James, Jr., writing in in the HARVARD LAW RECORD, November 7, 1957, states in part: "There are many areas in which I have for some time made common cause with the NACCA and the author. Together we deplore the plight of the uncompensated accident victim and the law's delays which unduly postpone his compensation. We join in condemning those who take undue advantage of his plight to make unconscionable settlements. We share approval of many rules which expand accident liability and cut down archaic defenses, as well as faith in the role of the jury in the process of expending liability.

"What then of demonstrative evidence and what Mr. Belli calls 'the adequate award'? Here my doubts and misgivings come in, but they go only to part of the area and need to be stated very carefully. . . . Mr. Belli tells of verdicts (many obtained by him) which range all the way up to \$420,000; and he thinks that for the future the trend is upward."

conviction that they represent the final uncompromising answer, but rather with a sense that the situation demands and deserves suggestions constructively offered.

THE PATH TO THE SOLUTION

Before these problems can be solved, two things must happen:

1) The amount of damages must more clearly be standardized with relation to the real economic loss of the victim.

2) We have got to know in advance that the victim will be compensated for that economic loss.

In the limited space available to me, I will not examine the fact of the widely differing awards in personal injury cases. Rather, I will refer the reader back to the articles in this symposium dealing with inadequate and excessive awards and related subjects, again cautioning him to remember that every excessive award has its counterpart in the case that was never filed because of the judgment-proof nature of the defendant.

Presently, it is the jury which determines damages. The court room is the scene of a test of ability, legal and forensic, between plaintiff's and defendant's counsel. The jury is in the middle, uneasily weighing the charges and counter-charges hurled about. Qualified authorities today question the role of the juries in personal injury cases. Judge David W. Peck, the former presiding justice of the Appellate Division of the New York Supreme Court, First Department, and Judge Samuel H. Hofstadter, Justice of the New York Supreme Court, First District, have each suggested that the jury be dispensed with in negligence cases. Judge Peck made his case primarily in terms of delay and when we realize that it took forty-four months to get a case to trial in New York, we can understand why he felt that something must be done. He believed that it is the jury trial process which causes the cases to move with "excruciating slowness." He further stated:

Indeed, there is no standard for a jury verdict. Nothing could be more of a guess and a gamble than what a jury's verdict will be in a closely contested case. There is no inherent virtue in that gamble.⁵

Judge Peck further commented:

If the argument against jury trials rested only upon a time-saving base, I would not be so confident of my ground in advocating a change. If the quality of justice can be assumed to be the same, however, the time element is a sufficient reason to change to a system of trial by judge without a jury. And we can be fairly well assured that there would be no sacrifice of justice in any way by the fact that the most traditional country in the world, England, the cradle of the jury system and the common law, quite some time ago abandoned the jury system in most civil cases without regrets.

⁵ PECK, REPORT ON JUSTICE (1953).

Judge Peck then recommended a different trial system, a trial by a judge, with a system of comparative negligence.

Let me state something at this point which should be too obvious to need saying. I think that we again have a point of almost unanimous agreement when I state that most of us will concur in G. K. Chesterton's famous remark, "I would trust twelve ordinary men but I cannot trust one ordinary man." The right to a jury trial is one of our fundamental freedoms, and both of the outstanding jurists mentioned above are fully cognizant of that fact.

The question which Judge Peck raised is whether that sentiment has any real relation to the trial of negligence cases, and it is a question to which we should address ourselves in a serious vein, and as objectively as possible.⁶

In addition to the problem already referred to in this article, the jury is continually faced with the conflicting views of experts with regard to the seriousness of the injuries, experts who talk a language which juries seldom understand. Juries are faced further with a doctrine of contributory negligence, the meaning of which has become quite obscure. In recent years there has been much literature written on the desirability, pro and con, of adopting a doctrine of comparative negligence. Obviously, this doctrine looks attractive to plaintiff's lawyers, but unattractive indeed to defendant's counsel. In the midst of the argument, a very interesting thing has happened. Mr. Louis C. Ryan writes in the *Virginia Law Weekly Dicta* that "the absence of the rule of comparative negligence in Virginia or elsewhere should cause no insomnia (to plaintiff's lawyers) because a jury will usually apply the rule anyway."⁷ And in the same periodical, Frederick S. Benson argues against the adoption of the comparative negligence doctrine as follows:

In negotiation towards settlement and in the deliberations of juries, and in the decisions of judges, we have substituted the use of common sense for the strict application of the contributory negligence rule so as to end up with substantial justice to all parties. I submit, moreover, that we have done that without adding to our troubles by complicating our deliberations and our judgment with mathematical calculations which to me are in the realm of the mystical. I feel that the doctrine of contributory negligence is a salutary check on the gambling instincts of the litigating public who, if they thought they could not lose, would certainly go in and gamble on getting the pot of gold at the end of the rainbow.⁸

⁶The courts of New Jersey have found that trial by the court without a jury in personal injury cases works exceedingly well. See REPORT AND RECOMMENDATIONS OF THE JOINT COMMITTEE OF THE NEW JERSEY LEGISLATURE, (January 28, 1952).

⁷7 VA. L. WEEKLY DICTA COMP. 75.

⁸*Id.* at 102.

It all depends on your point of view. Mr. Benson obviously feels that comparative negligence would mean a greater delay and crowding in the courts; plaintiff's lawyers argue that it would lessen court congestion by making defendants more willing to settle cases which they knew they could not defeat with the technical defense of contributory negligence.

In any event, this debate furnishes us with some amazing conclusions. All sides concede that juries today do not pay much attention to the technical doctrine of contributory negligence. So, the argument runs—"the law may be behind the times, but the jury is ahead of the law and somehow this double imperfection operates to produce a reasonable kind of justice. We cannot afford to bring the law up to the times because then we run the risk that the jury will be too generous in its verdicts." So there you have it! We admire the jury, but we do not trust it. We breed a contempt for the law and for lawyers alike; we nourish that contempt by loudly proclaiming on the one hand our love for the jury system, and on the other our mistrust and fear that it will not follow the law.

Our basic problem here is the calculation of damages in negligence cases. We have seen, through lack of standards and wide differences in the abilities of lawyers, that there is a great deal of unfairness in damage verdicts. This is not the fault of the jurymen; these are faults of the system in which the jurymen must operate. What the writer proposes, therefore, is that an attempt be made to standardize damages, based on factors which I shall mention later. And I propose to take the determination of the damage question from the care of its unwilling owners, the jurymen, and place it where there would be more competency to listen to the intricacies of expert testimony and apply that standard. Where it can be fairly and effectively done, I propose to make sure that the standard is adhered to, that is, that the victim actually receives that much compensation. The method by which this can be done is what follows. The reader will note that I must now divide my attention between two different classes of negligence cases. The first, and by far the largest class, deals with injuries growing out of motor vehicle accidents. They encompass at least 75% of all the negligence claims in our courts, so that by disposing of this classification, we will have solved the major part of the problem. We can handle the motor vehicle cases in a far better manner than we can the others because the motor vehicle cases are the product of a single social phenomenon: the tremendous use of highways which the American public has undertaken in the last few decades.

MOTOR VEHICLE ACCIDENT CASES

Many of the readers of this article will be familiar with some of the ideas which have been advanced for the handling of automobile accident cases. A great deal of literature has appeared recently on the subject, and it will be well worth the reader's time to examine some of

the material indicated in the footnote below.⁹ What this idea advances is a challenging new method for the disposition of automobile accident cases.

Summarizing it briefly, it means that every car driven in the State of Ohio must be covered by a policy of compensation insurance. Such compensation insurance will cover all death and personal injuries caused by the operation of the motor vehicle upon the roads of this state.

The amount paid by way of compensation to the personal injury claimant will be determined by fixed schedules. Our long experience with workmen's compensation insurance enables us to determine comprehensive and adequate schedules. This compensation will be paid without regard to fault. We would recognize the fact mentioned at the beginning of this article—the victim has suffered injuries and his economic loss should be compensated. He should not be permitted to turn his misfortune into a personal triumph, but at the same time he should be guaranteed that his recovery will not be eliminated because of a judgment-proof defendant.

The question of fault is dispensed with. Indeed, the advance of the automobile age has dispensed with that question for us. As most lawyers are aware, it is no longer possible, in an age of 350-horsepower automobiles, when accidents happen in a split second, to tell who is at fault. The law suit for personal injuries has therefore become the greatest gamble in the world, with neither side being able to define its possibilities of recovery or its risk exposure.

The compensation insurance program operates quite similarly to the workmen's compensation procedure. It is no longer a theory; it is a working fact. The province of Saskatchewan, Canada, has had a successful compensation insurance program for more than ten years. The economic loss of personal injury claimants is repaid promptly, according to schedule. The sky-high verdict is extinct.

In the past, much has been made out of the supposed difficulty of adapting payment schedules to automobile accident cases. Actually, no real problem exists in this area. To avoid a situation where everyone is paid the same amount, regardless of economic status and income, the payment schedules can be based on a percentage of average monthly income of the person injured. Maximum limits must be placed on these payments in order that the risk may be standardized, but this is of no real concern. If a man earning \$100,000 a year or more, is injured in an automobile accident today, he must take his turn in perhaps more than four years from the date of the accident at the court room gamble, assuming that he has been lucky enough to have been injured by a person

⁹ In this connection, the reader is referred to some of the prior articles by the author. E.g., *Motorism, Not Pedestrianism* 42 A.B.A.J. 421 (1956); *Compensation Insurance for Automobile Accident Victims*, 15 OHIO ST. L.J. 134 (1954); *Let's Compensate, Not Litigate*, FEDERATION OF INSURANCE JOURNAL QUARTERLY (1953); *Compulsory Compensation Insurance*, 25 COLUM. L. REV. 164 (1925).

carrying adequate liability insurance. Under the compensation program, he would be assured of a prompt recovery of a certain amount. If he desires to be protected in more than that amount, his economic status enables him to cover that desire by personal accident insurance.

The compensation program is to be administered by a Board similar to that used in Workmen's Compensation. It does *not* necessarily involve a state fund, for workmen's compensation is insured by private carriers in most states. In this manner prompt relief can be awarded to those injured in automobile accidents. The tremendous flood of cases which are at present engulfing the courts would be wiped away; the heavy losses of insurance carriers due to unknown exposure will be eliminated; more important, the victim of a motor vehicle accident would be fairly treated.

We are able to classify the automobile accident cases apart from the other types of negligence cases for several reasons. Injuries and death, most of us will admit, are an inevitable risk of automobile travel on the highways. Recent statistics have proved beyond doubt that it is human error, rather than mechanical failures, which account for most automobile accidents. As long as human beings are driving cars, their operation will be subject to human failures. For this reason, although we wish to do everything possible in the adoption of safety-measures and stricter licensing laws, we know that the automobile accident is a product of the times. It is only reasonable that the motorist who is a part of the social phenomenon represented by the millions of automobiles on our highways today should bear the cost of compensating the victims of that phenomenon.¹⁰ The premium rates for compensation insurance would be far lower than most persons have imagined; lower because the risk is known, the high verdict is dispensed with; and the expenses of administration are greatly reduced. For example, Saskatchewan gives its citizens broad compensation coverage of current model cars for \$30.00 a year. Of course, Saskatchewan is not nearly as urbanized as Ohio, but whatever difference this makes would at least be equated by the fact that the Saskatchewan protection is far broader than that which is under discussion here.

In the space allotted to me, I can only once again suggest that the reader refer to the material cited previously which examines this program in far greater detail. What I wish to emphasize here is that with regard to automobile accidents, we have met the objectives set forth at the beginning of this article; that is, we have assured each victim of a prompt and fair repayment of his economic loss, and we have done it in a way which will take a tremendous burden off the courts. We are at an advantage in

¹⁰ Furthermore, motor vehicle accidents relate directly to an activity which is licensed by the state: the operation of a motor vehicle is a privilege, not a right, and it is eminently proper that the state attach conditions to its exercise to insure that one man's privilege does not result in another man's disaster.

dealing with the automobile accident cases because it is a type of negligence case readily separable from other negligence actions and with regard to which we have clearly fulfilled our two standards: we know in advance that the victim will be compensated for his economic loss and we have standardized the damages with relation to that economic loss.¹¹

OTHER TYPES OF NEGLIGENCE CASES

We have now disposed of the majority of personal injury cases. In examining those that remain, we can first take note of some real differences: In the first place, fault is usually an item which is more clearly determinable. It is much more comprehensible to determine whether or not a landlord has exercised sufficient care in keeping his premises free from dangers than it is to determine which of two speeding drivers crossed the line of due care. In the second place, other types of negligence cases are not so related to any single phenomenon, or to any identifiable segment of the American public. For that reason, it would not be possible, or fair, to ask any segment of the public to bear the cost of any program similar to that set forth above for automobile accidents. Nevertheless, there is certainly great need for a new approach in the handling of those cases, for the evils that exist today in the handling of motor vehicle accident cases apply in many respects to all negligence actions. The standardization of verdicts is within our grasp, for the discussion which has gone before points to some conclusions which are worth considering: first, that the jury is not the ideal body for the determination of the amount of damages, and second, that some general standard is necessary. It is also our conclusion that the doctrine of contributory negligence has outlived its usefulness, if indeed, it ever had any.

The standardization of damages can be achieved through the use of the same schedules that will be used in motor vehicle cases with the qualification that they will have to provide for a lump sum payment. It is suggested that this standard can be applied best by the court, sitting without a jury so that while technically the adversary nature of the proceeding is retained, the court will be in a much better position to decide which award shall be given.

Since it is further our conclusion that fault in negligence cases, other than those growing out of automobile accidents, is not only more reliably ascertainable but that it is also a fairer guide on which to determine liability or non-liability, it is proposed not only that the principle of fault be retained, but that it be determined by the jury as is done

¹¹ In the book review referred to in note 4, *supra*, Professor James observes: "I do not think the existing system is the best solution for our current accident problem. I see a better alternative in a scheme of liability without fault for important segments of our accident law. But if the basis of liability is to be changed, I believe that the substitute system must also be one with reasonable checks and balances, and I should expect the new dispensation to limit somehow the amount of recovery to the minimum needed for adequate care, cure, and rehabilitation of the victim and his dependents from the effect of his accident."

today. "Fault" is by any standard a reflection of the way people feel about certain conduct at a certain time; and since a jury is generally much more identified with the current reaction of the public than is the court, it seems proper that the jury should continue to decide the question of fault. But this jury should be permitted, in accordance with the principle of comparative negligence, to say all that it wants to say about the fault involved; and if it feels that the defendant was 50% to blame for the accident, it should be permitted to say exactly that.

But here the legitimate function of the jury ends. The court can now continue to hear the evidence on the question of damages, from the experts employed by the parties and from court appointed experts. The opportunity that the use of court appointed experts gives to the administration of justice is tremendous; for this expert is not one in the pay of one of the adversaries, although he is subject to their cross-examination. Nor is this a novel practice; it has been employed in New York City for several years, and was initiated by the writer in the Superior Court of Cincinnati thirty years ago.¹² Having determined the amount of damages from the evidence, and based on the schedules referred to above, the court can now apply the comparative negligence verdict of the jury to the possible reduction of that amount. The result will be a fair award to the personal injury claimant, and fair also to the defendant: the plaintiff can no longer "shoot for the moon"; the defendant can not hang any hope on the technical doctrine of contributory negligence.

CONCLUSION

Through our examination of the personal injury case, we have come up with some concrete suggestions which would completely revitalize an area where the reputation of the law for giving justice is in very bad repute. In motor vehicle accident cases, we have introduced a system of compensation according to schedule without regard to fault; we have provided for the recovery of the economic loss of the victim and we have assured him, through compulsory compensation insurance, of the fact that he will be able to recover that loss. We have dispensed with the principle of fault in that field, because we do not believe that it is any longer a relevant factor. We have taken such cases completely out of the courts because we believe that they can be handled with much greater efficiency by a workmen's compensation type of administration.

In negligence cases not involving motor vehicle accidents, we suggest that the principle of fault should be retained and that the jury continue to decide that question, but on the basis of comparative negligence. We believe that the court is better equipped to apply the standard of damages that our negligence law will set forth, and therefore the question of damages should henceforth be decided by the court. Since there is no group

¹² *Feldkamp v. Cincinnati Traction Co.*, 1 Ohio L.Abs. 52, 20 Ohio L. Rep. 316, (1922).

which can be fairly asked to bear the expense of the payment of such claims, the claimants will have to continue to rely on the collectibility of the individual defendant as is the case today.

I suppose, in glancing back over this article, that it represents a pretty appetizing invitation for lusty criticism and complaint. I hope that this is so. I can only express the additional hope that such criticism will be offered with the same aim of promoting the administration of justice that has prompted me to undertake this analysis.