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Richard H. Burgess

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## *Admission of Liability*

*Richard H. Burgess\**

**A** CONTROVERSIAL QUESTION sometimes arises as to whether or not to admit liability in a tort case. This is an extreme tactic which must be carefully considered before being used. The normally expected benefits include decreasing the length and cost of the trial and the exclusion of inflammatory evidence on the issue of liability.

A survey conducted among members of the International Association of Insurance Counsel in 1955 showed that 85 per cent of the attorneys replying had found the admission of liability a successful tactic, especially in cases of aggravated or gross negligence.<sup>1</sup>

There is a great amount of resistance to the admission of liability when the slightest defense is available. Many defendants' attorneys would prefer to take the long chance of hoping for an unexpected verdict rather than admit fault and leave only the issue of damages to the jury. Surprisingly, there have actually been cases in which liability was admitted and the jury returned a verdict of no cause of action.<sup>2</sup> Generally speaking, though, an admission of liability will tend to keep the damage award reasonable, but it will take away the slight possibility of an unexpected defendant's verdict.

### **Adjective Law**

The subject of this article forms a part of the laws of evidence, pleadings and trial practice.

The key question to be resolved is: Will the proposed admission cause the court to limit evidence to the dollar amount of damages and exclude evidence on liability?

Once liability has been conclusively established by a judicial admission of the defendant, either in the pleadings or in open

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\* B.S. in Nuclear Engineering, North Carolina State College; Third-year student at Cleveland-Marshall Law School.

<sup>1</sup> Schlotthauer, Report of Practice and Procedure Committee, 1955, *Admitting Liability*, 22 *Ins. Counsel J.* 326 (1955).

<sup>2</sup> Kennedy, *Admission of Liability—Strategic Advisability and Other Considerations, Part I, With Particular Reference to Common Carriers*, 22 *Ins. Counsel J.* 306, 310 (1955).

Buchanan, *Admission of Liability—Strategic Advisability and Other Considerations, Part II, As to Defendant's Generally, and a Consideration of Some of the Cases*, 22 *Ins. Counsel J.* 316, 326 (1955).

court, liability ceases to be an issue. Normally the major remaining issue is the extent of the plaintiff's damages.

Excluding inflammatory evidence on liability can often be greatly to the defendant's advantage. A broken arm does not cost the plaintiff more because the defendant was drunk when he ran the plaintiff down with his car. However, a jury might tend to give a larger verdict if they knew the defendant had been driving under the influence of alcohol, or that he was speeding on the wrong side of the street, etc.

A jury is more likely to give a plaintiff a substantial verdict if the defendant was guilty of gross negligence and reckless disregard for the safety of others than if the negligence merely amounted to an error of judgment.<sup>3</sup>

Wigmore, in his set on evidence, treated the subject so succinctly that a quote from that work covers the subject well.

A fact that is judicially admitted *needs* no evidence from the party benefiting from the admission.

But his evidence, if he chooses to offer it, may even be *excluded*; first, because it is now as immaterial to the issues as though the pleadings had marked it out of the controversy; next, because it may be superfluous and merely cumber the trial; and furthermore, because the added dramatic force which might sometimes be gained from the examination of a witness to the fact (a force, indeed, which the admission is often designed especially to obviate) is not a thing which a party can be said to be always entitled to.

Nevertheless, a colorless admission by the opponent may sometimes have the effect of depriving a party of the legitimate *moral force of his evidence*; furthermore, a judicial admission may be cleverly made with grudging limitations or evasions or insinuations . . . so as to be technically but not practically a waiver of proof. Hence, there should be no absolute rule on the subject; and the trial Court's discretion should determine whether a particular admission is so plenary as to render the first party's evidence wholly needless under the circumstances.<sup>4</sup>

The footnotes to this section of Wigmore indicate that the rulings in the various jurisdictions are variant depending on the facts. At the discretion of the court, evidence may be ad-

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<sup>3</sup> *Martin v. Pacific Gas Co.*, 203 Cal. 291, P. 246 (1928).

<sup>4</sup> 9 Wigmore on Evidence 589, § 2591, 3d ed. (1940). Footnote 2 to this section gives the then ruling cases in 18 states, the District of Columbia and the Federal Courts.

mitted or excluded on issues that have been settled by admissions.

Various authorities support each view: first, that such evidence should be excluded;<sup>5</sup> second, that the plaintiff should not be deprived of his right to place all the facts before the jury.<sup>6</sup> Most of the cases seem to turn more on the facts than on any concrete rule of law, although some are rather adamant in their views, for example: *Carter v. Ray*, in which the court said:

Evidence that is relevant cannot be kept from the jury by a waiver of proof on that point or admission of fact, if the party desires the testimony out.<sup>7</sup>

Both *Corpus Juris*<sup>8</sup> and *American Jurisprudence*<sup>9</sup> express a preference for the rule allowing the prolongation of a trial by allowing evidence on issues already decided by admissions. Actually, though, the *American Jurisprudence* statement is concerned mainly with criminal matters, and the *Corpus Juris* entry does not take into account any of the modern cases, resting mainly on the *Dunning* case of 1897.<sup>10</sup> *Corpus Juris Secundum* states,

A party is not required to accept a judicial admission of his adversary, but may insist on proving the fact.<sup>11</sup>

The more modern view is expressed in the *Barton* case<sup>12</sup> and in Rule 16 of the 1950 Federal Rules of Civil Procedure, which states:

In any action, the court may, in its discretion, direct the attorneys for the parties to appear before it for a conference to consider . . .

<sup>5</sup> *San Diego Land and Town Co. v. Neale*, 78 Cal. 63, 20 P. 372 (1888); *Jenkins v. Hollingsworth and Tabor*, 83 Ill. App. 139, 141 (1898); *Hanskett v. Broughton*, 157 Minn. 83, 195 N. W. 794 (1923); *Kurn v. Counts*, 247 Ala. 129, 22 So. 2d 725 (1945); *Fuentes v. Tucker*, 31 Cal. 2d 1, 187 P. 2d 752 (1947); *Carrigan v. State*, 206 Ga. 707, 58 S. E. 2d 407 (1950); *La Fon v. Continental Casualty Co.*, 24 Mo. App. 802, 259 S. W. 2d 425 (1953).

<sup>6</sup> *Dunning v. Maine Central Railway*, 91 Me. 87, 34 Atl. 352, 64 Am. St. Rep. 208 (1897); *Martin v. Pacific Gas Co.*, *supra*, n. 3; *Rupple v. Clayes*, 230 Mo. App. 699, 72 S. W. 2d 833 (1934); *Hawkins v. Gray Metal Products, Inc.*, 309 N. Y. 919, 131 N. E. 2d 914 (1955).

<sup>7</sup> *Carter v. Ray*, 70 Ga. App. 419, 28 S. E. 2d 361 (1943).

<sup>8</sup> 64 C. J. Trial § 116-D.

<sup>9</sup> 53 Am. Jur. 93 Trial § 105.

<sup>10</sup> *Dunning v. Maine Central Railway*, *supra*, n. 6.

<sup>11</sup> 31 C. J. 2d 1068, Evidence § 299.

<sup>12</sup> *Barton v. Miami Transit Co. (Fla. Sup. Ct.)*, 42 S. 2d 849 (1949).

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof . . . The court shall make an order which . . . limits the issue for trial to those not disposed of by admissions or agreements of counsel; . . .

Both the *Barton* case and Rule 16 illustrate a trend towards more efficiency in the courts. More recognition is being given these days to the fact that a large backlog of cases with as much as several years waiting time for trial can be a source of much injustice. Speeding up cases by the use of pre-trial proceedings and the exclusion of evidence on points not in issue can help clear the dockets.

The cases need to be divided into two classifications for analysis. Different procedure is called for in each of the following:

1. Death actions.
2. Personal injury actions.

In death cases the damages are not affected by such things as the force of impact in an automobile collision. On the other hand, in a personal injury case the force of an impact may have considerable bearing on the damages suffered by the plaintiff in the form of shock and injuries, the extent of which is not readily ascertainable, such as internal or back injuries. When the fact situations are clear cut and the admissions of liability are unambiguous the cases are rather uniform in death actions and in personal injury actions.

In death actions admissions of liability can generally exclude most of the evidence on the events causing the death.<sup>13</sup>

In personal injury actions admission of liability generally will not exclude evidence pertaining to the seriousness of the collision, etc.<sup>14</sup>

In one case involving both personal injury and death actions the court ruled that evidence of the force of the impact could be considered in determining damages in the personal injury action, but not in the death action.<sup>15</sup>

One of the greatest dangers in admitting liability is that the plaintiff might amend his pleadings to include an allegation of willful and wanton misconduct and a request for punitive damages. This puts a new cause of action into the pleadings and

<sup>13</sup> *Anderson v. Lavelle*, 285 Mich. 194 (1938).

<sup>14</sup> *Schroth v. Philadelphia Rapid Transit Co.*, 280 Pa. 36, 124 Atl. 279 (1924).

<sup>15</sup> *Sumrall v. Butler*, 102 Cal. App. 515, 227 P. 2d 881 (1951).

should allow the defendant to obtain a continuance to revise his defense, perhaps withdrawing the admission of liability.<sup>16</sup> A withdrawn judicial admission is treated as regular evidence, i.e. it must be introduced, and it is not conclusive.<sup>17</sup>

It is generally recognized that a court has the power to set aside an unsatisfactory verdict and limit a new trial to the issue of damages only.<sup>18</sup>

Several law review articles have been written in the last few years on the subject of judicial admissions,<sup>19</sup> and the author is indebted to those sources.

### Strategy

As noted in the previous section, the value of admitting liability lies mainly in keeping evidence of the sordid details of the accident from being considered by the jury in determining damages. Therefore, liability should never be admitted until an understanding is reached with the presiding judge that such evidence will be excluded from the trial.

The popularity of admissions seems to vary significantly on a geographical basis. In some states, notably the more rural states, admission of liability is practically unheard of, whereas in large urban areas it is used with caution by many attorneys.<sup>20</sup> This reflects the attitudes of both the local judges and juries. Where a court calendar is not too crowded an admission is sometimes viewed as a confession of guilt or "asking for it."

More than any other factor, an attorney needs to know the attitude of the local court before admitting liability.

The timing of an admission is quite important. Depending on the case, an admission in the answer could either facilitate a realistic settlement or give the plaintiff much more time to concentrate on preparing for the proof of damages. Proving the facts of an automobile accident, for instance, can be quite involved. If the plaintiff doesn't have to prove fault he can have much more time to concentrate on the damages.

<sup>16</sup> Horsley, Admission of Liability in Tort Cases, 5 Defense L. J. 105 (1959); Kennedy, *supra*, n. 2 at 311; 1 Trial Briefs 27 (Ill. St. Bar Ass'n) Snyder, ed. Waukegan, Ill.

<sup>17</sup> McCormick on Evidence 513, § 242 (1954).

<sup>18</sup> Paul Harris Furniture Co. v. Morse et al., 10 Ill. 2d 28, 139 N. E. 2d 275 (1957); Barrow v. Lence, 17 Ill. App. 2d 527, 151 N. E. 2d 120 (1958); Barry v. Keller, 1947 (Mass.), 76 N. E. 2d 158.

<sup>19</sup> Harper, Admissions of Party Opponents, 8 Mercer L. Rev. 252 (1957); Horsley, *supra*, n. 16; Kennedy, *supra*, n. 2; Buchanan, *supra*, n. 2; Schlotthauer, *supra*, n. 1.

In addition, the longer one waits before admitting liability, the more likely it is that new facts will turn up to take the blame off the defendant.

Admissions can be made quite effectively in the pre-trial proceeding or in the opening statement to the jury. When made in the summation they generally have little beneficial effect. All the evidence has already been presented to the jury and instructions to disregard part of the evidence made so late in the trial would not wipe it from the jurors' minds. In addition the jury might consider that the defendant never had a defense and took their time for no good purpose.

When a multiplicity of suits arise out of one accident, it is necessary to have a centralized co-ordination of the defense. An admission of liability in one suit might prejudice the defendant's position in another suit on the same accident. In such a situation the co-ordinating attorney must weigh the chances in all the cases before allowing an admission in any of them.

### Conclusions

The admission of liability is a dangerous weapon to be used only when there are no defenses. To use it is like abandoning a faltering ship just before a storm. The ship will be lost but perhaps more will be salvaged than if all stayed on board.

Liability is best admitted near the beginning of a trial before the opening statement of the plaintiff.

A knowledge of the attitude of the local courts is a prime requisite of an admission of liability.

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<sup>20</sup> Kennedy, *supra*, n. 2.