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Tort Trends in 1957

Melvin M. Belli

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*Tort Trends in 1957**

*Melvin M. Belli***

The Adequate Award

TO DISCUSS FURTHER the theory here of the Adequate Award might be to overprove the now apparent. But what is not apparent to plaintiffs' lawyers is that most insurance companies have become aware of the Adequate Award, have adjusted their premiums upward; they have tried to give currency to their actuarial figures, rather than wait the one or two years lag which sometimes is devastating to a company's finances.

But it is still necessary for counsel to pause during the trial of a law suit to examine "*inflation*" (or whatever it is now called). A jury must be reminded (as must counsel himself) how few quarts, feet, seconds or bites the dollar "goes" today. The \$40 or \$50 a day charged by skilled labor, the 50¢ and \$1.00 for the five-cent commodity, the lack of response to the 25¢ and 50¢ tip, and, indeed, almost the disdain for money itself, as a yardstick, must shock one's conscience. It should shock a conscientious plaintiff's lawyer, "liberal" on the subject of damages, as much as the accountant actuary for a conservative casualty company. Both use the same dollar yardstick for the same commodities of life, a college education, a coffin, an automobile, a farm, flowers for an injured plaintiff, a surgeon's fees.

Amputated legs were "selling" at around \$35,000 in 1940. They now "bring" on the open market over \$100,000.

Is this shocking? Had I bought \$10,000 of Life Insurance Company stock¹ in 1943, that \$10,000 today would be worth \$238,000—and I would have received \$12,600 in dividends! Soon, we may all realize that a share of stock in an insurance company shouldn't increase in value, as time goes on, more than a leg. The theory of the Adequate Award is easy to absorb.

While some areas, noticeably the New England states (with

* This article is a condensation of the author's Introduction to *Trial and Tort Trends, 1957* (Belli ed.), soon to be published by Central Book Company, Inc., Brooklyn 21, N. Y., 850 pp. Price: \$15.00.

** Member of the California Bar, past president of the NACCA, present Dean of the International Academy of Trial Lawyers, well-known trial lawyer, author of *Modern Trials* (three volumes) and other books and law review articles.

¹ \$2,500 in each of the following four companies: Aetna Life, Connecticut General Life, Continental Assurance and Jefferson Standard.

the exception of Massachusetts), Colorado, Arizona, New Mexico, North Carolina, Alaska and Honolulu remain "low verdict centers," the general trend upward continues everywhere, not only in verdicts but in settlements. *Federal* court verdicts have been generally larger than *State* court verdicts in the same jurisdiction. And almost universally, a trend (not perceived and not even admitted by most plaintiffs' lawyers), showing Judge awards have proportionately jumped upwards compared to jury awards. The exception is the volatile "all or nothing" case and the case of "good liability" and most serious damages, the \$200,000 and \$300,000 class. (Federal tort claim judgments where no jury is allowed have been entered for amounts comparable or even higher to jury awards in the same community.)

With the new industry and economy in the Southern states, verdicts there generally have kept apace. Mississippi and Texas continue upward although Texas is "spotty" still. Alabama gives promise of increasing awards, and indeed has done so in several instances.

Florida is not uniquely southern, and the adequacy of its awards can, in large part, be attributed to its unique six-man jury makeup (women may sit but rarely do).

South Carolina awards have tended upward, but generally are still low. North Carolina is one of the lowest verdict centers in the United States. This may be directly attributable to the lack of cooperation between doctors and lawyers in that state, and the *control* of litigation (not the courts) and medical proof by corporate interests.

The State of Washington is extremely low in awards and settlements in the Eastern portion around Spokane, but on the Pacific seaboard, *i.e.*, Seattle, verdicts recently have moved precipitously upward. Oregon still remains a tragically low verdict center but with several "break throughs" and the promise given, as with Alabama that it is "ready" to take its place in the Union of Adequacy, where the commodities of personal injury and wrongful death are not treated as vices and diseases but as *capacities* adequately to be compensated under the law of the whole land—not the provincial land.

Dollar a Day Argument

The argument breaking down pain and suffering into periods of time and inviting a jury to consider so much in dollars ("\$2 a day argument"—See 1 BELLI, *MODERN TRIALS* 870-872) for each

day or hour, etc., was approved as one legitimate means of admeasuring these elements of general damages in *Imperial Oil Ltd. v. Drlik*, 234 F. 2d 4 (6th Cir. 1956). It was thought that this case, with others, now indicated the overwhelming weight of authority.

But, we dip into 1958 to find a most disturbing decision from the Supreme Court of New Jersey, decided Feb. 3, 1958, *Nancy Botta v. Herman Brunner, et al.*, 26 N. J. 82. This court, collating all the available authority, both case and text law, comments that the question is novel in New Jersey, then proscribes the "right of plaintiffs' counsel in personal injury damage suits to suggest monetary mathematical formulas to a jury for the computation of compensation for pain and suffering."

The New Jersey Court relied heavily upon the singular and unrealistic procedures of the neighboring state of Pennsylvania where counsel may not even suggest to a jury for what amount he is suing and in fact what really the law suit is all about! This New Jersey case is decidedly and distinctly *against* trial and tort trends in almost every jurisdiction, but it is a storehouse of citations.

"Secret" Evidence

There is a growing tendency to treat much available evidence as "secret" in civilian courts: The Interstate Commerce Commission, for example, requires a full report of an accident from carriers under its jurisdiction. An honest and accurate report is generally forthcoming because, even though such a report is available to both litigants' counsel on the writing and asking, the content of such report cannot be used in any manner in evidence directly, in cross examination, or indirectly.

Other state and national boards have similar requirements, both as to reports and the privilege attendant upon it. The theory, of course, behind the privilege is that if the report were mandatory but could be used against the party mandated, not only would constitutional questions arise, but, practically, honest reports might be forthcoming.

I have heretofore discussed what to do when counsel has such a report available before him on the actual trial of the case and opposing counsel attempts to impress the jury that a different cause than that reported occasioned the accident: The privileged or "secret" report should be introduced "for identification" only (never shown to the trier of the facts for its full

probative value), and opposing counsel should be cited for contempt for disavowing his duty as an officer of the court and attempting to convince the jury (or the trier of facts) that an unfactual event occurred, *i.e.*, compare the report with what the lawyer said.

The requirement of such reports with the attendant prohibition against their use increases with the many new state and national boards and commissions by which man, his commerce, his industry and his every breath is increasingly regulated. For the present, at least, we leave to the legislatures the decisions as to whether public policy "for the greater good" overweighs individual justice *i.e.*, a disclosure in court as to the cause of the accident at bar versus nondisclosure and a true report that may be used to prevent future accidents.

What concerns us is the growing tendency on the part of the military, and its many branches and subdivisions (It's difficult to tell where the military leaves off and civilian activities begin), to say of the facts of an accident, "They are secret!" A military airplane falls out of the sky, a whole city block is destroyed, the living bodies are left with mangled limbs or lives are exploded out. Suits are filed and the usual discoveries and depositions are commenced, only to be met with, "Yes, we made a full investigation, and we know the cause of the accident, but that's a military secret—we can't tell you." In the case of *United States v. Reynolds*, 345 U. S. 1 (1953), a B-29, which was obsolete at the time, was held to involve a military secret when discovery was demanded.

Of course, it is necessary in many instances to keep secret for the greater good, the security of the nation, evidence which might entitle an individual to recover in a law suit. But the absurdity of some rulings is manifest when that which is claimed secret *pro forma* has already appeared in national magazines, in speeches, in the public press, not only of this country but *abroad*. There is no "secret" about it except in court. Everybody may "know" the answer, but still it remains hearsay unless it comes from the lips of a responsible first-hand person in court. These are the cases that impress with an unsalutary illegal bureaucratic trend.

If the matter has already been published and if it's true, what damage could there be to "national security" in the retelling? There can be much more damage from the inference

that the matter is neither true nor wholesome for us to hear officially!

An unhappy extension of this "secret evidence" or "privilege" trend is expressed in *Wojciechowski v. Baron*, 80 N. W. 2d 434 (Wisc. 1957). The report of the accident from the assured to the insurance company was held "privileged," could not be seen, and was not admissible in evidence in the personal injury action, assured being the defendant sued.

See *Doherty v. Shamley*, 132 A. 2d 862 (D. C. 1957), the attorney for the insurance company was not required to produce the signed statement of the driver of the vehicle involved in the collision. (It was said that plaintiff had his name and address and could take his deposition. Certainly he could be examined on the statement then).

Jury "Fixing"!

The most apparent, to me, insidious and brazen of "TRIAL AND TORT TRENDS OF 1957" is the procedure of "fixing" juries in personal injury cases, particularly the malpractice case! The new attempt is at once more indirect and insidious but even more effective: A doctor is sued in malpractice. As soon as a jury is selected, the wives of all doctors of the particular community spontaneously appear in the courtroom, eagerly to profess their interests in the law suit. Their presence subtly and not so subtly warns the jurors "The doctor on trial is a friend of my husband. Some of you are patients of my husband. If you vote defendant 'guilty' of malpractice, my husband, your doctor, won't like it!"

I saw this procedure tried in Omaha, Nebraska, in Spokane, Washington, in San Diego, California and in eastern courts. The procedure was apparently "directed from above." It appeared too spontaneously, too generally, to have been undirected. In Spokane, Washington, there was started a "Citizens Committee" for the "protection of doctors," during the course of trial! Neighbors of prospective jurors, tradesmen, and those who could directly or indirectly "get" to the jury were solicited for membership. Too, the leading newspaper was asked to run stories and "editorials."

Plaintiffs' lawyers are criticized for "trial by newspaper." Is this criticism an anticipatory defense and forerunner to planned newspaper publicity in defendant's cases? Defendant is generally the "monied interest" in the community. He's likely

to have more of a relationship, both business and official, with the editor of the local newspaper than the plaintiff, Joe Acropolis, the stevedore who was run over by defendant's truck. I have found most newspaper men and editors more conscious than lawyers in realizing the ethical duties of the press during pendency of litigation. They know that "freedom of the press" depends upon press good behavior and they know what is good behavior.

But, in a number of instances recently, not only have editorials and newspaper reporters slanted stories *during* the trial, but men from the *public relations* department of the defendant on trial have attended hearings every day, adding encouragement and "interpretation" to the day's proceedings—and to the press reports.

Too, in the malpractice case, that very human man, usually of good and great ethics and integrity, the family doctor, seems to forget his "bringing up." Too many times will he discuss the case with a juror or a juror's neighbor while the malpractice case of one of his brethren is on trial.

It's true that there are more malpractice cases than ever before, and the relationship between doctors and lawyers has worsened to the point where "something drastic should be done." But that "something" is not the destruction of the jury system by receiving "expert advice" out of court!

Lawyers Learning Medicine

At last, many centers of learning have taken cognizance of the need for medico-legal training. Doctors everywhere are being lectured upon "legal relationships." They are told how to keep records, how to testify. They are told what is "hearsay," what is "expert" as distinguished from "lay" testimony, what is the "hypothetical question."

Fortunately, there is a definite *trend* toward teaching *lawyers* medicine. Without a doctor's prognosis, there would be a nonsuit, at least on the issue of damages. The recently graduated lawyer is not equipped to settle a case with the medically knowledgeable insurance adjuster, nor is he prepared to go into court against the defense insurance counsel, who is as much medicine man as he is a skilled "unavoidable accident" and "contributory negligence" man.

Wrongful Death

Whether because of, or coincident thereto, man, in his race toward complete annihilation, has momentarily paused to urge more monetary considerations (the trend continues) in wrongful death awards.

A recent case is *Daggett v. Santa Fe*, 48 Cal. 2d 100 (July 2, 1957) (also unusual because of the manner of impeachment in cross examination), where the Supreme Court of California, reversing the District Court of Appeal, reinstated the jury verdict, \$50,000, for the loss of a three-year-old and an 18-month-old child (the mother, driver of the automobile also deceased, held contributorily negligent and the father, heir plaintiff, not recovering for her death).

Federal courts recognize the "value" of wrongful death actions. In *O'Toole v. United States*, 242 F. 2d 308 (1957), the Third Circuit affirmed a wrongful death award of \$400,000 as not excessive, a federal tort claim case, without a jury, but the cause was sent back for re-trial because some elements of damages were not considered; i.e., the verdict should have been larger! See also, \$125,000 wrongful death, *North American Aviation, Inc. v. Hughes*, 247 F. 2d 517 (9th Cir. 1957).

\$100,000 was awarded in December 1957 by an El Centro, California Jury for the death of a mother of Mexican ancestry, the highest award for this sex and race in a border (near Mexico) community. See also *Connie's Prescription Shop v. McCann*, 316 P. 2d 823 (Okla., 1957), \$62,000 not excessive for death of wife, mother, medical malpractice.

Aviation Law

The trend is to make this a specialty in the lawyer's practice. There are already specialists in personal injury who do nothing but try F. E. L. A. cases, or Jones Act cases. There is a small group of specialists growing up in the Airplane cases.

The limitation on international crash verdicts is still unfair to Americans, both as to *amounts* and as to proof of *willfulness*, the latter ingredient being necessary to take this case out of the "Warsaw Convention."

To date, the breaking of Warsaw has been almost impossible. Cases are pending testing the constitutionality of Warsaw and some lawyers have sued the *pilot* along with the airline, claiming that the pilot is not covered by Warsaw. See *Pierre v. Eastern Airlines*, 152 F. Supp. 486 (D. N. J. 1957) wherein the

court held that the provisions of the Warsaw Convention limiting recovery for passenger injury to \$8,300 does not violate the right to trial by jury as prescribed in the seventh amendment to the United State Constitution.

Argument

To argue that a jury should "return a *large verdict* thereby protecting their homes" was held error in *Stafford v. Steward*, 295 S. W. 2d 665 (Texas 1956). Since the suit was for both *punitive* and general damages (\$2000 general and \$3000 punitive returned) was the ruling not error? Punitive damages are to punish, to set an example and certainly comments such as were made, though improper when only *general* damages are pleaded, are legitimate and relevant argument in an *exemplary* damage case.

For plaintiff to argue that "Defendant isn't interested enough to sit at the counsel table with his lawyer, . . . no concern of his who pays the judgment" is error. It infuses insurance into the case, *Sandomierski v. Fixemer*, 163 Neb. 716, 81 N. W. 2d 142 (1957).

But an important case is *Haid v. Loderstedt*, 133 A. 2d 655 (N. J. 1957). It is just as reprehensible and just as much error to attempt to show that defendant is *uninsured*.

Refusal to Settle

The problem of plaintiff's recovery over against an insurance company which failed to settle within policy limits has generally not been solved in the majority of states. The paucity of opinions may be due to the desire of the insurance company not to have such decisions. In *Paul v. Kirkendall*, 311 P. 2d 376 (Utah 1957), the Utah Supreme Court held that plaintiff obtaining a \$20,000 judgment on a tort claim against the defendant, who was insured only for \$10,000 policy limit, could not sue on a writ of garnishment against the insurer for the excess, even though he alleged that the defendant had an unliquidated tort claim against the insurer because of negligence and bad faith in failing to settle plaintiff's tort claim for less than the policy limits.

\$4,000 demand on \$5,000 policy rejected. Verdict \$75,000. Direction of verdict error, *Springer v. Citizens Casualty Co. of N. Y.*, 246 F. 2d 123 (5th Cir., 1957). The *trend* is to allow such cases to go to the jury—and a jury does not treat kindly an insurance company's refusal to disgorge (in many instances) the premiums they have swallowed.

Discovery of Insurance Policy Limits

California first provided for plaintiff's right of discovery of defendant's insurance policy limits and provisions in *Superior Insurance Co. v. Superior Court of L. A. County*, 37 Cal. 2d 749, 235 P. 2d 833 (1951). Nevada denied the right, but Kentucky followed California. Illinois now joins California in *People of the State of Illinois ex rel. Terry v. Fisher*, 145 N. E. 2d 588 (1957). This trend, an extension of the overall discovery, is an *inducement to settlements* and open discussions. See TRIAL & TORT TRENDS, 1955, 1956.

But for denial rulings see *Peters et al. v. Webb*, 316 P. (2) 170 (Okla.), *State v. District Court*, 277 P. (2) 536 (Mont.), *Jeppesen v. Swanson*, 68 N. W. (2) 649 (Minn.), *State v. District Court*, 245 P. (2) 999 (Nev.).

However, the states denying policy limits discovery may rule otherwise if a different and more thorough showing of *necessity* for policy provisions and amount of facts are presented to the court of first resort. Even in the states allowing the information, it is not "automatic."

Loss of Consortium

By recognizing a *wife's* right to recover for loss of consortium caused by the negligent injury of her husband, California, in *Deshotel v. Atchison, Topeka & Santa Fe Ry.*, 319 P. 2d 357 (Cal. 1957), rejected the outmoded majority rule, stating: "We are not limited to a mechanical count of noses, but rather deem it our duty to select the rule supported by logic and better reasoning over the one supported by the mere weight of numerical authority."

In *Gist v. French*, 288 P. 2d 1003 (Cal. 1955), a malpractice suit, the husband was permitted to recover for loss of consortium of his injured wife. This case is noteworthy for its views on "geographical expert testimony" appearing on page 1017 of the interesting opinion. See also *Acuff v. Smith*, 78 N. W. 2d 480 (Iowa, 1956) recognizing the right of the wife to maintain an action for loss of consortium caused by defendant's negligent injury to her husband. Also reflecting the trend to recognize the wife's interest in the precious intangibles comprising consortium is *Missouri Pacific Transportation Co. v. Miller*, 299 S. W. 2d 41 (Ark. 1957).

The cases immediately following *Hitaffer v. Argonne Coal Co.*, 183 F. 2d 811 (D. C. Cir., 1950) seemed to trend away from

any recognition of a "consortium" doctrine. The trend now is the other way, to recognize the several types of "consortiums," of wife, husband, and children (part of the trend to break down damages).

Adverse Witness Statutes

Many states have "Adverse Witness Statutes." Typical of these is California Civil Code of Procedure, Section 2055. These statutes permit plaintiff to call defendant or his agents and employees (some states limit to *defendant* and *officers* of the company, not employees) any time during the law suit and, not being bound by their testimony, examine them as though under cross-examination. One of the best and most recent discussions is *Daggett v. Atcheson, Topeka & Santa Fe Ry. Co.*, 313 P. 2d 557 (Cal. 1957).

On the subject, see also *Leonard v. Watsonville Community Hospital*, 291 P. 2d 496 (Cal. 1956) an unusual decision, wherein the court said that evidence elicited from adverse witnesses under the adverse witness section is not binding on the plaintiff and cannot be considered as plaintiff's own evidence—but then held against plaintiff.

Where the adverse witness statutes are law, plaintiff may put on his whole case and defendant's case (all of defendant's witnesses) as part of plaintiff's case.

Liability of Notary Publics and Lawyers Drawing Will

It has long been established law in California that a legatee cannot recover from an attorney who negligently prepared the ineffective document under which such legatee claims, because the duty the lawyer owed was to the testator, not to the legatee (*Buckley v. Gray*, 42 P. 900 (1895)). Recently the California Court of Appeal, *Mickel v. Murphy*, 305 P. 2d 993 (Cal. 1957) held that a legatee under an improperly attested instrument could not recover from the scrivener of that instrument. However, the same court now holds that a Notary Public, *not a licensed attorney*, but who acted as an attorney when he drew the will, is liable to the beneficiary for the difference between the amount she would have received had the will been valid, and the amount actually distributed to her on her intestate succession, *Biananja v. Irving*, 310 P. 2d 63 (Cal. 1957). (*Trend toward penalizing unauthorized practices of the law.*)

Key Left in Automobile by Owner

This tort continues to perplex, most courts holding immune the owner of an automobile who leaves his key in the ignition accessible to a thief. The thief takes the auto, has an accident. Pending in California and elsewhere are cases under a theory wherein plaintiff, injured in such a situation, has sued in *nuisance* against the car owner rather than negligence. See also *Richardson v. Ham*, 285 P. 2d 269 (Cal. 1955) where boys ran an unlocked unattended bulldozer over a hill injuring third person plaintiff and wife asleep in their homes. New trial for plaintiff ascertained on evidentiary insufficiency after defense verdict. Case decided on "foreseeability."

Are there "special circumstances," *i.e.*, compelling factual reasons of foreseeability, *gross* negligence of defendant, to take your "*key in the car case*" out of the general rule? If so, plead them and urge them in negligence with a *separate* count (if your jurisdiction permits) in *nuisance*.

Charitable Immunity

Eleemosynary Institutions

The *trend* is definitely away from immunizing a charitable defendant's tort. Some courts, although clinging to the immunity doctrine, hold that use of profits from operation of a building not otherwise connected with the charitable enterprise does not entitle defendant to immunity from tort liability arising out of operation of the building, *Blatt v. Geo. H. Nettleton Home for Aged Women*, 275 S. W. 2d 344 (Mo. 1955).

In *Bing v. Thunig*, 163 N. Y. Supp. 2d 3 (1957), New York avowed the liability of a hospital for injury suffered by a patient through the negligence of its employees. The New York rule apparently was that recovery had depended on whether the injury-producing act was *administrative* or *medical*. The Court of Appeals in disavowing the former rule, announced, in part, "The rule of nonliability is out of tune with the life about us, at variance with modern-day needs, and fair dealing . . . the hospital's liability must be governed by the same principles of law as applied to all the other employers."

The New York Court also said: "The doctrine of *stare decisis* was intended, not to effect a petrifying rigidity, but to assure justice that flows from certainty and stability; if adherence to precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive, . . ."

Liability of City for Jailors' Torts

Because of governmental immunity, or other statutory admonitions, the city frequently escapes liability when a sheriff, jailor or policeman injures a prisoner in his custody. Of course the policeman may be sued, but how about the city?

A trend case is *Hargrove v. Town of Cocoa Beach, Fla.*, 96 So. 2d 130 (Fla. 1957): Plaintiff's deceased was incarcerated in the town jail. He was stuporously intoxicated. It was contended that he was locked in a cell and left unattended and suffered from inhalation of smoke when the fire broke out. The Supreme Court of Florida declared that a municipal corporation could have no immunity from liabilities of torts of police officers; "to continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism." See also, another Florida case, *Bourgeois v. Dade County*, 99 So. 2d 575 (1957). New York State was held liable for the "wanton and negligent" conduct of a state trooper. *Hayes v. State*, 167 N. Y. S. 2d 566 (1957).

Assumption of Risk

The trend is away from allowing this defense. When it is applied, courts make certain that plaintiff actually *knew* of the specific risk which he is alleged to have assumed.

That the doctrine does not apply to longshoremen was reaffirmed in *Klimaszewski v. Pacific Atlantic Steamship Company*, 246 F. 2d 875 (3rd Cir., 1957).

Nor does the doctrine apply to passengers aboard a commercial airline. *Urban v. Frontier Air Lines*, 139 F. Supp. 288 (D. C. Wyo. 1956).

It was reversible error to charge a jury on assumption of risk where one student was killed and another injured as a result of an explosion in an auto shop class caused by a third student; the evidence was insufficient to show that the two students *knew* and *appreciated* the risks involved. *Dutcher v. Santa Rosa High School District*, 319 P. 2d 14 (Cal. 1957).

Last Clear Chance

The doctrine, like the rescue doctrine, is rarely used. Plaintiff's lawyer is loath to admit plaintiff's negligence and, while he, plaintiff's lawyer, so frequently criticizes defense counsel for refusing to admit liability, he, the plaintiff's lawyer, is just as loath

to admit his contributory negligence. But the doctrine has its place. It's another way of pleading "wantonness" or "willfulness" of defendant's conduct and asserting that contributory negligence of plaintiff is no defense.

A most unusual case tried last year was *Connolly v. Pre-Mixed Cement*, 319 P. 2d 343 (Cal. 1956): Maureen Connolly was the world's women's champion tennis player. She was riding a horse, a gift of the City of San Diego, when a cement truck driver rounding a corner a good block away, saw her skittish horse and also saw Maureen wave her hand that she was in danger. The truck ran into the side of the girl.

If ever a last clear chance was *acknowledged* by a defendant, it was here, and if ever there was a plaintiff who needed this last clear chance, it was Maureen.

The jury awarded her a verdict of \$95,000.00. The District Court of Appeals reversed this judgment on the grounds that Maureen, *not being negligent*, could not invoke last clear chance! A hearing was granted by the California Supreme Court upon the theory that the opinion of the District Court of Appeals, in reversing the trial court, in effect admitted defendant truck driver was negligent, that Maureen was free from negligence and how could an instruction of last clear chance have mislead this jury when it would seem almost as a matter of law that plaintiff was, in any event, entitled to a verdict? The Supreme Court reinstated the verdict.

Res Ipsa Loquitur

Res ipsa loquitur was originally intended to "shift the secondary burden of proof" in an unusual fact situation, *i.e.*, the happening of an unusual event presupposed an unusual (syn. "negligent") force. The party charged was not foreclosed from disproving "negligence." Such is still the law, or, rather, the rationale purported by most appellate courts. But, in practical effects, it's not the *res ipsa loquitur* today "that our fathers knew."

In some states (California), the doctrine applies even though specific acts of negligence are pleaded and proved. In other states, courts reason that the inference of the doctrine is not necessary when specific proof is available. *Midland Valley R. Co. v. Conner*, 217 Fed. 956 (8th Cir., 1914), *O'Rourke v. Marshall Field*, 307 Ill. 197, 138 N. E. 625 (1925). Historically this would seem to be correct.

I have suggested before that the trend to liberalize and extend the *res ipsa* doctrine is the trend toward absolute liability in many fields of law. Few courts have stated such reasons openly. Many courts seem to be completely unaware of such a motivation—present or not.

Workmen's Compensation

Liberality in this field of law *trends* to extend itself; however, benefits still remain, generally, unrealistic. The benefits are so unrealistic that some courts, through the various Workmen's Compensation boards, have considered some claims more in the nature of a "gratuity" to be awarded if at all possible, rather than "compensation" only to be accorded if proved to a preponderance!

Several notable cases: A tree surgeon's heat stroke paralysis was held compensable in Kansas, *Taber v. Tole*, 313 P. 2d 290 (1957). A troublesome problem of jurisdiction was answered in *Richard v. Lake Charles Stevedores*, 95 So. 2d 830 (La. 1957), wherein the longshoreman had a choice of remedy. He had either federal or state compensation remedies. He was injured on navigable waters.

Another "jurisdictional" dispute, the right to a suit over in common law—was decided by the appellate division of the New York court in *Artonio v. Hirsh*, 163 N. Y. Supp. 2d 489 (1957). Here the corporate employers, *officers* and *directors*, who made safety devices on the offending machine inoperative were held to a suit at common law as third parties. The *corporation* was held liable only for *compensation* benefits.

Then the limitation of review of a referee's findings continues its trend in *Massachusetts Bonding and Insurance Co. v. Industrial Commission*, 82 N. W. 2d, 191 (Wis. 1957).

In *Edwards v. Travelers Insurance Co.*, 304 S. W. 2d 489 (Tenn. 1957) held that a workman's refusal to have a ruptured spinal disc operation did not entitle his employer to suspend his Workmen's Compensation benefits. Quære: If this operation ever becomes a less herculean surgical procedure, should not the rule change?

The Supreme Court of North Carolina in *King v. Arthur*, 96 S. E. 2d 846 (N. C. 1947) held that an injury received during a day worker's compulsory blood test was not compensable, the injury not arising out of the scope and in the course of the employment, and even though the employer, pursuant to his duties under the Board of Health regulations, had ordered employee

to take the test. *Contra-trend* case, but North Carolina has preserved, generally, some cruel and inadequate verdicts, judgments and appellate rulings.

A *contra-trend* case from Kansas is *Rutledge v. Sandlin*, 310 P. 2d 950 (Kan. 1957). A workman, in the course of his employment, sustained a severe blow which several months later necessitated surgical removal of a malignant tumor. The workman contended that the Statute of Limitations did not begin to run until discovery of the injury. Robb, J., held that the Kansas statute requiring a written claim to be served within 120 days after the "accident," began to run from the day of the blow, regardless of when the resulting injury was discovered.

King v. Chrysler Corp., 150 F. Supp. 440 (E. D. Mich. 1957), held that where plaintiff's wife received fatal injuries while in the course of her employment, the husband could not recover for loss of services and for funeral expenses. The Michigan Workmen's Compensation act provides an exclusive remedy and bars a recovery by the husband in tort.

Injuries in Utero

A decided trend is to allow an infant, if born alive, and injured in utero or in delivery, to sue the tortfeasor. This is a definite trend away from historical common law.

A most interesting off-shoot is *Stewart v. Rudner*, 84 N. W. 2d 816 (Mich. 1957) in which a mother successfully sued her physician for mental suffering, her child being stillborn. Suit was made for *breach of contract* to perform Caesarean section. Proof was made that had Caesarean section been done, child probably would have been viable.

See also *Poliquin v. MacDonald*, 135 A. 2d 249 (N. H. 1957), where the right to recover for the death of a stillborn but viable in utero child was recognized. Important *trend* case.

Warranties

The *trend* extends in 1957 into the more frequent use of warranties in the personal injury or tort case.

The modern trial man first should review the subject to become acquainted with the availability of the several warranties, what they are (express and implied; of the implied, the

two: 1) merchantability, 2) for a particular purpose), their histories, how to plead.

The big problem today in warranty is "Privity." Will the warranty extend to others than the immediate purchasers? It has generally in the food cases, *Klein v. Duchess Sandwich*, 14 C. 2d 272, 93 P. 2d 799 (1939); *Vaccarezza v. Sanguinetti*, 71 Cal. App. 687, 163 P. 2d 470 (1945). Will the trend continue to include other articles of personalty? Will an "inherently dangerous" doctrine arise?

I discern a definite *trend* towards suits vs. manufacturers for careless or fraudulent claims in *advertising*, e.g., the cigarette cancer cases. This type of suit is best expressed in *Johnson v. Capital City Ford Co.*, 85 So. (2) 75 (La. 1955): a newspaper advertisement may create a valid contract (or warranty). "If defendant argues that . . . the advertising offer . . . was not in good faith and only a lure . . . the Ohio court said . . . 'there is entirely too much disregard of law and truth in the business, social and political world today. . . . It is time to hold men to their primary engagements to tell the truth and observe the law of commerce, honesty and fair dealing'" (at p. 82). See also 2 Negligence and Compensation Service 24 (Sept. 1957); 6 CLEVELAND-MARSHALL LAW REVIEW 94.

Plaintiff may, for some reason, want to avoid a warranty suit but desires to introduce the warranties, i.e., advertising as evidence. This is the claim in certain of the cigarette cancer suits: Plaintiff sues manufacturers for the tort "*failure to warn*," or "*duty to warn how to use*" etc. The warranty advertisement, etc. then are introduced evidentiary-wise to show the failure to warn, indeed that manufacturer, etc. positively did otherwise. Plaintiff was severely burned when vapors created by a rubbing ointment manufactured and distributed by defendant ignited under plaintiff's clothing when he attempted to light a cigarette. The Supreme Court of New Jersey, in a well documented opinion, reversed both the trial court's and the intermediate court's dismissal of the action stating *inter alia*: "On the other hand, the products may not be defective but the manufacturers and suppliers may negligently *fail to warn* of concealed dangers with resulting foreseeable injury; here again the courts find no difficulty in sustaining liability." Contributory negligence, and foreseeability of harm were jury questions. (Emphasis supplied.) *Martin v. Bengue*, 136 A. 2d 626 (N. J. 1957).

Intrafamilial Suits

The modern appellate court takes a modern and practical approach to the intrafamilial suit. With all members of a family generally covered by insurance, the general *trend* to allow inter-family suits is not deterred by the previously urged arguments of possible "conspiracy" to defraud the carrier.

The trend of allowing such suits is exemplified by *Leach v. Leach*, 300 S. W. 2d 15 (Ark. 1957): The Emancipation Act of Arkansas gives married women the right to sue and be sued. The Supreme Court of Arkansas forty years ago in *Fitzpatrick v. Owens*, 186 S. W. 832 (Ark. 1916), announced that a wife could sue her husband for negligence in view of this act. The Arkansas court now holds that this is a reciprocal right and that the husband may sue his wife in tort. See the *Leach* case *supra*.

Note, too, that in *Ennis v. Truhitte*, 306 S. W. 2d 549 (Mo. 1957) a judgment for the defendant was reversed, and a wife was permitted to sue her husband's estate, alleging that the deceased husband was guilty of intentional wrongdoing, negligence, wilfulness, and wantonness.

Plaintiff passenger sued host driver for auto accident but the trauma and litigation did not deter a subsequent marriage—which did not quash the tort. *Koplik v. C. P. Trucking Corp.*, 135 A. 2d 555 (N. J. 1957).

Extension of Expert Testimony

New Experts

Daily it seems to *trend* that courts take more cognizance of more experts. This isn't unusual since actually there are more experts, *i.e.*, specialists. Man is forever specializing rather than generalizing in this complex world. For the courts to say that the words of a particular artisan theretofore within the domain of *lay* testimony, now come within the expert's domain and he may give him "opinion" is only in keeping with progress.

In each new case tried, therefore, counsel should examine whether he may not now introduce expert testimony upon a subject heretofore solely within the domain of lay fact witnesses.

Pretrial Discovery Depositions

The *trend* is toward acceptance of the Federal Rules of Civil Procedure everywhere and the benefits of full pretrial conference, deposition, and discovery proceedings, oral as well

as written interrogatories, are being reaped by defendants and plaintiffs alike. Some jurisdictions still cling to the old procedures, but the trend to the new rules is apparent in the increased number of settlements, the cutting down on clogged court and jury trial calendars.

In *Walczak v. Detroit-Pittsburgh Motor Freight, Inc.*, 140 F. Supp. 10 (N. D. Ind. 1956) (45 GEORGETOWN LAW JOURNAL, 683, 1957), defendant's attorney may refuse to reveal "privilege" names of witnesses communicated to him by his client or learned by him in the course of preparation for trial. The rationale: Diligence by an attorney in preparation for his case would reward his *opponent* whereas a slothful preparer would nevertheless be an undisclosed and surprising preparer—at least at trial. Contra trend case.

Jury Trial

While the ABA Journal, January 1958, pp. 51 et seq. has one of the best defenses of trial by jury I've seen, I believe the *trend* by more and more of the top trial men on the *plaintiff* side is to try their cases 1) before *Federal courts*, if an election, 2) before *judges* rather than *juries*.

Federal Judges particularly are trending toward more adequate awards, are fully recognizing the *severability* of damages, adequately considering pain and suffering, the depreciated value of the dollar, and the tremendous salaries and wages today paid ("*salaries*" have far exceeded professional "*fees*" in a disproportionate rise).

Process

In *McGee v. International Life of Texas*, 78 S. Ct. 199 (1957), a Texas insurance company, not resident or otherwise doing business in California, was effectively "served in California" since it sold its policies there and the premium money was sent from there. A *trend* decision in harmony with modern communications and with interstate doing of insurance business. Plaintiffs served the Texas company by sending the summons registered mail from California to Texas. They took a default judgment. The court notes how the doctrine of *Pennoyer v. Neff*, 95 U. S. 714, has "evolved" ("overruled"?).

This "evolution" is further pointed up by a Federal court's literal interpretation of rule 4(d)(1) in *Kincaid v. Smith*, 249 F. 2d 243 (6th Cir. 1957). In an action arising out of an automo-

bile accident, papers were served on the defendant's *landlady* by the marshal. A default judgment for \$57,500 was entered. On appeal, affirmed; *held*: (1) jurisdiction over the defendant was acquired even though he was not personally served nor was there any showing that the landlady delivered the papers to him; (2) the trial court, because of the unimpressive showing by the defendant, did not abuse its discretion under 60 (b) by denying motion to vacate the judgment because of "mistake, inadvertence, or excusable neglect."

See also *Florio v. Power Tool*, 248 F. 2d 367 (3d Cir. 1957) where Oregon manufacturer sends an "instructor" into Pennsylvania. Held, doing business in Pennsylvania.

Fright

The tortuous *trend* toward a complete recognition of the tort resulting in (or from) fright alone, without any bodily touching continues. In *Reed v. Moore*, 319 P. 2d 80 (Calif. 1957), damages are recognized allowable where the fright is for one's *own* safety, but not if for a third person's.

Generally the law requires some "touching" accompanying the fright. In some jurisdictions a direct fear for oneself will do. In most jurisdictions an *intentionally* induced fright (as distinguished from defendant's *negligent* act) is sufficient.

Lessard v. Tarca, 20 Conn. Supp. 295, 133 A. 2d 625 (1957), *Preece v. Baur*, 143 F. Supp. 804 (E. D. Idaho 1956), *Brisboise v. Kansas City Pub. Ser. Co.*, 303 S. W. 2d 619 (Mo. 1957), all deny recovery for fright.

Burden of Proof

In one particular of trial procedure the *trend* is to maintain the status quo: In the many attempts to elaborate upon *burden of proof* or quantum of evidence or to introduce novelty to time honored definitions, there have been reversals.

In *Dods v. Harrison*, 319 P. 2d, 558 (Wash. 1957), it was held error to tell the jury in effect that "if they had any difficulty in determining whose negligence had been the proximate cause of the accident" they should find for defendants in an automobile accident death case.

Evidence

Demonstrative. I would be the first to admit that some courtroom procedures characterized as "demonstrative evidence" can, though not necessarily, result in excessive awards. But defendants are too prone to lump all inflammatory courtroom procedures as "demonstrative evidence."

Unfortunately, verdicts that might otherwise have been sustained, are reversed because the *inflammatory slogan* "demonstrative evidence" is appended to the procedures at trial. Appellate courts often overlook the question that the *adequacy of the amount is the sole consideration.*

In *Musgrave v. Kitchen*, 157 N. Y. S. 237 (1956), a \$150,000 verdict for a hand loss was upset because plaintiff's counsel repeatedly exhibited an artificial hand to the jury.

Is \$150,000 "too much" for the loss of a hand, anyone's hand?

Photographs. The trend is to extend their use in trial procedures. In *Louisville & Nashville R. R. Co. v. Hines*, 302 S. W. 2d 553 (Ky. 1957), plaintiff's verdict was reversed, the picture taken by defendant being held *conclusive over oral testimony by the reviewing court* to show plaintiff's contributory negligence! Very important case.

But see *Atchison, Topeka & S. F. R. R. v. Barrett*, 246 F. 2d 846 (9th Cir., 1957), defendant's movies showed plaintiff's "twitchings," etc. had subsided after verdict. Judge refused to set aside verdict.

Blood tests. A blood test of deceased for alcohol to show his *intoxication* was held admissible in a civil suit by his estate. Interesting trend and novel, *Fretz v. Anderson*, 300 P. 2d 642 (Utah, 1956).

Hospital records. The trend is to allow conclusions and hearsay into evidence when incorporated into hospital records in such manner as to be done in the ordinary course of business without the possibility of "extraneous motives." Admissions of such are in the trial court's discretion, generally.

See *Lewis v. Woodland*, 140 N. E. 2d 322 (Ohio, 1955), the opinion of a roentgenologist in a hospital record held inadmissible.

Mortality tables. It is error to admit mortality tables when there is no proof of permanent disability. *Seaboard Air Line R. Co. v. Ford*, 92 So. 2d 160 (Fla. 1956).

See the leading case *Allendorf v. Elgin, Joliet & Eastern Ry.*, 8 Ill. 2d 164, 133 N. E. 2d 288 (1956).

Note: Mortality tables are only permissible where there is proof of *permanent* injury, otherwise error. Furthermore, the jury should be instructed to apply them only if *first* they find some permanency of injury. *Selman v. Davis*, 95 S. E. 2d 44 (Ga. 1956).

Earning "Capacity" Not "Earnings"

A case vs. the trend is the refusal to allow loss of future wages when plaintiff is earning more at time of trial than at accident, *Western and Atl. R. R. v. Hart*, 99 S. E. 2d 302 (Ga. 1957).

The trend is to allow a *non-working wife* loss of earnings in futuro, and even to *infer* loss of wages from type and severity of injury in all classes of plaintiffs. The key is "*capacity*." It's not *what* plaintiff is actually earning, if any, at trial time, but his *capacity, ability*, in the future, considering, in the jury's sound discretion, whether his *type* of injury would put him in the "marginal labor market," *Ridley v. Grifall Trucking Co.*, 136 Cal. App. (2) 682, 289 P. 2d 31 (1955).

Impeaching Juror's Verdict

The *trend* is away from the narrow exception that a jury's verdict cannot be inquired or impeached except when shown to have been result of chance.

Wright v. Bernstein, 23 N. J. 284, 129 A. 2d 19 (1957) is a trend case: A juror falsely answered on voir dire that her mother had only a property damage claim pending. In fact, the next case on the calendar was a personal injury suit by the juror's mother. On appeal, an \$82,000 verdict was new trialed. See *Shipley v. Permanente Hospitals*, 127 Cal. App. 2d 417, 274 P. 2d 53 (1954) for new trial for improper jury room *deliberations*.

F. T. C. A.

An interesting Federal Tort Claim case is *Bright v. U. S.*, 149 F. Supp. 620 (E. D. Ill. 1956). A canopy from a United States Aircraft fell, striking deceased, causing his death. United States

District Court for the Houston District of Illinois, Juergens, *J.*, held that the evidence disclosed that the pilot was negligent in not avoiding the storm clouds and in failing to take proper precaution after entering the overcast, and that the airbase was negligent in not warning the pilot of the thunderstorm. Such negligence resulted in the government's liability under the Federal Tort Claims Act.

An interesting case: *U. S. v. Taylor*, 236 F. 2d 649 (1956), the government held not liable for student pilot, who, against orders flew 300 miles from base and crashed, buzzing home town.

Dead Man's Statutes

This rule is truly an anachronism and, according to many respectable text writers, never was intended to apply even in a minor role in its today's starring drama defeating justice. Unfortunately, little legislation has dissipated the rule and many courts still adhere to it. See McCormick, *Evidence* p. 142. But the *trend* is definitely to limit its availability.

See *Sears, Roebuck and Co. v. Jones*, 303 S. W. 2d, 432 (Texas 1957): a jurisdiction that has heretofore heeded the doctrine with unwarranted respect, even in its most severe applications.

See *Gibson v. McDonald*, 91 So. 2d 679 (Ala. 1956) for a relaxation of the rule: Passenger sues driver, two cars, two drivers, both dead. Held, passenger could testify to facts of accident. (Interesting analogy used: the court likened the passenger in the car to the same legal position as a passerby on the sidewalk.)

Interesting case: claim v. a partnership or joint venture and not against deceased partner alone allows admission of evidence, *Panno v. Russo*, 82 Cal. App. 2d 408.

Proposed Personal Injury Law Reforms

In *Gair v. Peck*, 6 Misc. 2d 739, 165 N. Y. S. 2d 247 (1957), Supreme Court Justice Stephens ruled that the appellate division of the Supreme Court in New York did not have the constitutional and statutory power to enact a rule (controversial rule 4 of the first district) which sought to regulate contingent fees in personal injury and wrongful death cases.

In principle, I oppose the regulation of attorneys' fees. One of the most solemn relationships in this life is that of attorney

and client. It is recognizably akin to that of priest and confessor. To say that a lawyer would cheat his client on a fee is to say that the whole relationship is fraught with fraud. Legislation cannot, piecemeal, nor generally, make of a lawyer an honest man—if he already isn't one.

On the other side of the coin, I do recognize that some personal injury lawyers in some cities customarily charge 50% as a contingent fee. That may in some exceptional cases be proper. Some even "take the costs out of the client's share."

I like Professor Oleck's comment² in this year's TRIAL AND TORT TRENDS on some of the well-deserved criticisms of personal injury lawyers. I do believe we should, in our castigation of the insurance companies and defense lawyers, confess our own misdeeds, when they are proved. There are some current. Unless we so recognize them, unless we so confess them and discuss them, neither can we be sincere nor should we be entitled to criticize the other side of the house and profess we, alone, are interested in the welfare of the injured man!

² "Reforms Needed in Negligence Practice," 6 Cleve.-Mar. L. Rev. 388 (1957).