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Appeasement of Tort Claimants

S. Burns Weston*

A PPEASEMENT is defined as "pacification; satisfaction." The verb *appease* means "to reduce to a state of peace, to pacify, often by satisfying demands; hence, to make quiet or calm." Since Munich, it has come to mean, "yielding to pressure."

There are many today who ask, "Is this what is happening to our courts, under the pressure of floods of tort claims?"

The charge is made that too often interest is not in justice but rather in its pacification. *Should* justice be pacified? *Should* it be made quiet or calm? *Should* it be compromised or appeased? *Should* it yield to pressure?

To ask the question is to answer it. Obviously the answer is "No."

But let us be more specific.

Justice does not always mean that a case should be tried. By the same token, justice does not always mean that every case should be settled without trial.

One of our difficulties is that too often there is more interest in the expedient settlement of differences between litigants than in a judicial determination of rights according to principles of law.

The jury system has been both overpraised and over-maligned. There is no fool-proof method of insuring a jury's impartiality or sense of justice. Mostly, one must rely upon the basic sense of fair play possessed by most citizens who are called for jury duty. The court itself can aid materially; the lawyers, too. Both have a valuable role in weeding out those with obvious prejudices or inadequacies. Fundamentally, the tone of the courtroom is set and controlled by the judge. That tone can help justice, or hinder it.

Some judges, lawyers and laymen blame the jury system as inefficient and unenlightened in our administration of justice. It is true that juries are cumbersome, and one cannot deny that

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there are times when technical issues might better be decided by the court or a referee or by court-appointed experts.

Juries are unpredictable, they say. They are, if you mean the reasoning process by which they reach a decision. Or they say that juries are frequently pro-plaintiff. They are, if you mean that their natural human sympathies lean towards a genuinely injured plaintiff. However, as one who travels primarily the lonesome road of defense counsel, I am convinced that no one element of our system of jurisprudence has a higher batting average in resolving issues justly than do our juries. If juries reach wrong verdicts—and occasionally they do—it is less their fault than that of the lawyers and judges in the preparation and trial of the case, or of legislators in establishing the procedure by which the trial of the case is governed. Furthermore, if a jury goes wrong, its errors are unlikely to be missed by the trial judge, or three (Ohio) Court of Appeals judges or seven judges of the (Ohio) Supreme Court.

The trial lawyer has a dual role. He must be an effective advocate on behalf of his client, and he must also serve as an officer of the court. Sometimes the two roles come into conflict. Hence the age-old query: Is the lawyer's duty first to his client or to the law? Too often forgotten is the fact that lawyers, as officers of the court, are charged with the responsibility of a public trust.

Recently a series of two articles appeared in Harper's Magazine, on *Wall Street Lawyers*. Martin Mayer, the writer, alluded to the lawyer's dilemma between what the law is and what his client wants. He referred to a 1934 speech by Justice Harlan Fiske Stone, at the University of Michigan Law School. Justice Stone, who himself had been a Wall Street lawyer, charged that the successful lawyer "must look for his rewards to the material satisfaction derived from profit as from a successfully conducted business, rather than to the intangible and indubitably more durable satisfactions which are to be found in a professional service more consciously directed toward the advancement of the public interest." While he stated that such lawyers have "brought to the command of the business world loyalty and a superb proficiency and technical skill," at the same time he said, "it has made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestations."

Certainly the trial lawyer who enters the courtroom with any other thought than to see justice done becomes a shyster and quack. By the same token, any lawyer who is afraid to give battle should remain at his desk where he can enjoy the luxury of more lucrative, less arduous and much duller matters.

What of the client? His interest rarely is objective. But when the client loses perspective, usually his lawyer can correct the distortion, if he assumes his proper role.

Then there are the newspapers. I share, in general, the newspapers' view that the public has "a right to know" what goes on. Unfortunately, much newspaper reporting is concerned only with what the newspaper considers "news value." I refer, for example, to the almost universal reporting of high verdicts in personal injury actions and the almost universal failure to report when a defendant wins, or when the verdict is less than the amount the plaintiffs could have received by settlement. The result is to encourage litigation. It gives false hopes to plaintiffs. It diminishes the possibilities of settlement.

When lawsuits are first filed, the tendency of the newspapers is to play up those cases which ask for large amounts, quite forgetting that the only limit upon the amount a plaintiff can ask in any personal injury or wrongful death case is the judgment and the imagination of an attorney. Suits for \$50,000 to \$100,000 are common. Suits for \$500,000 occur fairly often, and of course when one is filed for \$1,000,000, it is bound to receive newspaper coverage. In rare instances only does the public later learn that most of these prayers go unanswered.

Appeasement of justice is a problem primarily in the personal injury cases that compose so large a part of the jammed court dockets in our metropolitan centers. Insurance protection today makes justice more readily available to the litigants on both sides. It makes it possible for plaintiffs who have a just cause to be compensated, and provides resources for defense when the plaintiff's cause is not just. Such it can be. Such it not always is.

Actually, a strange cold war is going on. In one corner you have the plaintiff: that innocent, poor, horribly injured, mangled or mistreated individual. In the other corner is that rich, callous, soulless defendant. In most instances, among the shadowy background figures, is that merciless remnant of capitalism, the hard-hearted insurance company. Plaintiffs' attorneys have an organization called the *National Association of Compensation*

and *Claimants Attorneys*, more familiarly known as NACCA. On the other hand, most of the active defense or insurance counsel are members of the *International Association of Insurance Counsel*. Occasionally, they do try a plaintiff's case. Only on the rarest occasions do specialists on the plaintiff's side ever represent the defense.

Originally, NACCA members' purpose was to make certain that their clients would receive an "adequate reward." More recently their concern has been with "the more adequate reward." In contrast, insurance companies and their counsel are interested in keeping down the amount of the settlements and verdicts. Perhaps there never can be agreement as to what is a fair award to a plaintiff, but at least both sides should be concerned solely with whether or not, under law, justice indicates that the plaintiff is entitled to anything, and if so, then what is a reasonable amount.

At some stage every lawsuit merits consideration of its settlement possibilities. However, too often a lawsuit becomes nothing more than a cynical device designed to force settlements regardless of the merit of the legal issues. Settlement negotiations, in turn, too frequently become an open and bald *appeasement* of justice, encouraged by plaintiffs, aided by their lawyers, and abetted sometimes by the defendants and their counsel, the courts and newspapers. As a result, plaintiffs are being paid in many cases without regard to the legal responsibility of the defendant.

All kinds of reasons are given to justify the procedure. Thus: "My client was hurt, wasn't he?"; avoiding the expense of trial; fear of what a jury will do; or fear even of a particular judge or of one of the lawyers. These lead to *expediency* rather to justice.

Because plaintiffs can file suits with impunity, regardless of their legal merit, expediency becomes involved when an insurance company offers to pay something just to avoid the expense and gamble of trial, even though it is convinced that the defendant is not responsible for the plaintiff's injuries, or that the injuries claimed do not exist, or are exaggerated. Then there is expediency when the plaintiffs press for payment simply because the plaintiff was injured, regardless of the question of fault.

Not long ago I asked a plaintiff's counsel to give me one good reason why the defendant should pay anything in the particular case, because I could see no legal liability. His answer was, "The plaintiff was hurt, wasn't he?"

Then there is the expediency of *the court*, harassed by clogged dockets, interested only in getting the case *settled*, and pressuring the defendant to make some payment regardless of liability, simply because the defendant has insurance or because the parties should avoid the expense of trial. I once heard a judge say that *because the defendant is covered by insurance a settlement should be made*. Most juries assume that insurance exists in most cases, but I find that this has little, if any, effect upon their verdicts. Should the presence or absence of insurance be permitted to influence a judge's interest in settlement? Ironically, in many instances insurance coverage is less than the amount of damages the plaintiff seeks.

Nowadays a directed verdict (on the law) is rare indeed. In this connection the following comments of Justice Frankfurter may be of interest. In *Wilkerson v. McCarthy*, 336 U. S. 53, 65, the court said:

"If there were a bright line dividing negligence from non-negligence, there would be no problem. Only an incompetent or a wilful judge would take a case from the jury when the issue should be left to the jury. But since questions of negligence are questions of degree, often very nice differences of degree, judges of competence and conscience have in the past, and will in the future, disagree as to whether proof in a case is sufficient to demand submission to the jury. The fact that a third court thinks there was enough to leave the case to the jury does not indicate that the other two courts were unmindful of the jury's function. The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge."

We all know that in order to direct a verdict the court must rely upon the evidence that is most favorable to the plaintiff. One wonders sometimes whether this doctrine—which is in itself perfectly sound—has been extended to mean that in applying the law to the facts, the *law* as well as the facts must be given that interpretation which is most favorable to the plaintiff.

Fear of what a court or jury will do, or the economic cost of defending should not determine who is right or wrong in a legal action. That encourages more lawsuits without merit.

I thought one of those occasions had arisen a year or so ago. A matter came into my care, which on its face appeared to be ludicrous.

Mr. Plaintiff had sued my client, Mr. Defendant, claiming that my client had thrown some over-ripe food on his house, causing slight stains. The evidence appeared the day after Halloween. He asked \$50 for actual damage and \$1,500 for punitive damages. The plaintiff was generally unpopular in the neighborhood, with a reputation as a trouble maker. All of the people on the street owned their own homes, except for the defendant. The plaintiff called him a "damned renter." Most of the neighborhood people were foreign born. The defendant was not, but his neighbors rallied around him, morally if not financially. They knew that in spite of provocations by the plaintiff, the defendant would not engage in such petty nonsense. Furthermore, there were stains on the defendant's own house, also, the day after Halloween.

The defendant had no insurance, and had a modest income from which he was trying to save enough money to buy a house.

At one time that case could have been settled for \$25. Even by keeping fees to a minimum, the cost of trial alone would run between \$400 and \$500. The defendant refused to pay one cent. We went to court, with an array of neighborhood witnesses. Through the good offices of the court, the plaintiff was persuaded to dismiss the case. My client was right. But justice was done mainly because Mr. Defendant insisted upon fighting for a principle. He did not whimper about possible trial expense rather than paying \$25. *He would not let justice be appeased.*

In all metropolitan areas the time has been increasing between the dates when a lawsuit is filed and when it is reached for trial. In the Cleveland area it has ranged from two to three years. In New York City it runs between three and four years. Too long a delay is a denial of justice to both the plaintiff and the defendant. Some 70 to 75 per cent of all civil cases filed in the Common Pleas Court of Cuyahoga County involve personal injury matters. Of all of the cases tried to a jury, approximately 90 per cent involve the law of torts.

It is entirely natural for judges to be concerned with clogged dockets, but clogged dockets in themselves are not a justification for urging settlements. Might it not be better, for example, to find ways of discouraging the filing of worthless lawsuits? I have in mind a case where the plaintiff claimed injury on certain property. The defendant did not own or have anything to do with the area where the injury occurred. If this was not known to the plaintiff at the time of filing the suit, it was known

later. Nevertheless, the defendant was forced to the expense of defense, and at pre-trial the court urged the defendant to pay something to get the case out of the way. The defendant refused. Eventually, plaintiff's own counsel dismissed the case.

Or take the case where the plaintiff and a friend were driving on a three-lane highway. The friend admitted having stopped at a tavern for drinks. It was dark. The plaintiff's car, which was going west, crossed the road and ran into a car going east. The eastbound car at the time of impact had pulled as far to the righthand side of the road as possible. The plaintiff sued the driver of her car and *also* the driver of the car that was coming from the opposite direction on its own side of the road!

Perhaps the answer is the system used in Canada. There the plaintiff can agree to pay his lawyer on a flat fee, time, or contingent basis. If the plaintiff wins, then the fee of plaintiff's counsel is taxed as costs against the defendant, the fee being subject to approval of the court. If the defendant wins, the defendant's legal expenses are taxed as costs against the plaintiff.

The defense lawyer is in the enviable position of never starting litigation. It is, of course, noted that sometimes a lawsuit has to be filed by the plaintiff because the claim was appraised incorrectly. Of course, such action forces the claimant into the eager arms of a plaintiff's lawyer. More frequently the plaintiff already has a lawyer who deals directly with the insurance company before filing suit. Some plaintiffs' lawyers make a practice of filing suit first and negotiating later, sometimes not until pre-trial or even until they are in the trial room.

In a recent case an accident occurred approximately a year ago. A pedestrian was hit under circumstances that could result in a verdict for the plaintiff or the defendant. One hospital found no evidence of injury. Another reported bruises and shock.

The insurance coverage limit was \$5,000. The adjuster sought to settle the case but could obtain no demand, and the pedestrian and her husband refused to provide any medical information to support her complaints. After several contacts by the adjuster, the claimant each time refusing to discuss settlement, he was finally told to contact her attorney. The adjuster reported, "We have never been able to settle any claim with him this side of a lawsuit and know of no other adjuster who can do so, unless he gives him his shirt." Thus, another lawsuit was born.

Recently an insurance company client called for advice. The company received a letter from a lawyer, stating that he represented Mr. X. The insurance company called its assured, to point out that this was the third claim that had arisen recently in connection with the insured property. The insured knew the claimant and, on his own, spoke to him. He found that the claimant had never spoken to the lawyer and did not even know him. The claimant gave a sworn statement to that effect and signed a release for a settlement that the claimant was willing to accept. Thus, a potential lawsuit died.

Of late, some proposals have been made to take automobile cases out of the courts. While there are more automobile casualty cases than any other type, the proposal would tear the house down to repair a leak in the roof. It is no solution, at least not until it is decided, after careful analysis, that disputes between strangers cannot be decided upon principles of justice.

In the Saturday Evening Post for October 22, 1955, Judge Samuel H. Hofstader, a trial judge of the New York Supreme Court (equivalent to Ohio's Common Pleas Court) lent his name to an article called "Let's Put Sense in the Accident Laws." Judge Hofstader said:

"After more than 20 years on the bench, I am convinced that it is time—well past time, in fact—to get automobile-accident lawsuits out of our overburdened courts and to dispose of them in a sound and up-to-date manner patterned after the universally accepted system of workmen's compensation. This, as I will explain later, would mean that anyone injured in such an accident would be assured of the compensation within a short time and on the basis of established payment schedules administered by a state board, without regard for the question of who was at fault in the accident. Such a system would eliminate the risk that injured persons, after years of litigation, may get no compensation at all, and it would, in my opinion, be fairer to all who become involved in an accident.

"As a judge, I have no hesitation in saying that in our modern civilization almost anyone, including yourself, can end up in court in connection with a suit to recover damages suffered in an automobile accident, no matter how carefully you drive or even if you don't drive at all. And once you are in court you may well find yourself in for some real surprises."

Judge Hofstader then mentioned as such *surprises*, examples which certainly are not typical of the vast majority of cases. He

disagreed with the law as it applied to a certain case, or he noted that it took three years to reach trial and another year before the appellate court made a ruling. Or that a jury cannot determine between "just plain negligence and gross negligence." He then added, "and anyway, what difference does it make to the 'guest' who has lost a leg in the accident?"

Judge Hofstader went on to say:

"The concept that an automobile accident is due to individual fault is utterly unrealistic in modern civilization. It defies common sense and everyday experience. It fails to consider that, from an actuarial standpoint, such accidents are inevitable and that they should be considered on the same legal basis as accidents that occur in factories. Or, let me put it another way: Society demands and needs the automobile and, in fact, could not do without it any more than it could do without our great industrial plants. Experience shows that no matter how carefully people drive or how stringent the traffic laws there will be automobile accidents. Therefore, society must accept collective responsibility for such accidents. They are a common burden of our society and should be dealt with on a collective rather than on an individual basis, due to their unique character in our social and economic life."

Judge Hofstader's plan may sound socialistic. In a sense it is. But I doubt that it is any more so than the workmen's compensation laws to which he refers. Whether we like the socialism of it or not, the fact remains that if our American ingenuity cannot devise a better way of meeting the problem, then the day may come when some such program will be undertaken in some states. It seems to me, however, that Judge Hofstader overlooks a number of considerations. In the first place, he favors some state system of insurance, without first inquiring as to whether or not there are ways in which we can improve our present administration of justice. His plan presupposes that a person should be paid just because of injury, regardless of whether it is due to his own negligence. If his theory is sound, then why stop with automobile cases?

The Honorable Judge emphasizes the plight of our overburdened courts. Some not very complicated administrative changes in procedure would correct much of the situation. Furthermore, his plan would hardly aid the court dockets. In Ohio, for example, our last legislature passed a law that now permits a workmen's compensation claimant to have a jury trial *de novo*, if he is dissatisfied with the rulings of the Industrial

Commission. Formerly the record of testimony before the Commission was the basis for an appeal to the Common Pleas Court. Now the issues must be retried as though there had never been a hearing. These are some of the cases that are jamming up our own court docket.

Judge Hofstader also seems to lack confidence in the intelligence of juries. I have a firm conviction that the error of many lawyers and judges is to underestimate the intelligence of juries. They are much more sophisticated and much more capable of resolving differences than most people realize. Or, if the law being applied is not sensible, then the recourse is to the legislature.

There are many improvements that can be made. For example, let us improve our pre-trial system, as has been done in Cuyahoga county, whereby the parties and their counsel present to the court what they expect to prove, determine those things about which the lawyers can stipulate in order to save time at trial and then, after these considerations have been discussed, explore the possibilities of settlement. The time required to try lawsuits can be reduced. It has worked well in New York.

We can improve court procedures regarding pleadings and the discovery rules. We can re-examine the total administrative machinery of the courts, as was done in New Jersey. We can pay our judges higher salaries, provide a decent retirement system, and give them better facilities to handle their work. We can consider the advisability of setting limits on the amounts the plaintiff can recover for different types of injury. We can explore the possibility of bringing some balance between the value of an arm or a leg in Cleveland and its worth in other parts of the State. Today, a person who has lost an arm can recover much more money from a jury in Cleveland than if the suit is filed for example in Mansfield, Elyria, Lorain, Painesville or Coshocton.

Most important of all, we must decide whether the handling of personal injury claims is to be on the basis of the legal rights of litigants or according to expediency.

Any important disregard of law endangers you and me and our right to live as free citizens in a free country. The appeasement which I have been discussing is most insidious because its slow erosion of justice brings forth no cries of alarm.

The absurdity of the error is that the solution is simple. In general, I refer to abolishment of nuisance settlements. The policy of paying a claimant or his lawyer something, just to

avoid the probability of a lawsuit, encourages groundless claims, and encourages the view that mere injury entitles one to compensation from someone else regardless of respective fault.

A few years ago, a St. Louis chain store told its insurance carrier to stop making nuisance settlements. The insurance company told the chain store to run its own business and let the insurance company handle insurance problems. The chain store then cancelled its insurance and became a self-insurer. Within one year the number of claims and lawsuits dropped dramatically, because the self-insurer instituted a firm policy of no payment without liability.

Of course, insurance companies could outlaw nuisance settlements, but the initiative is not entirely theirs. The general public needs education, and lawyers for plaintiffs and defendants who condone nuisance settlements must abide more rigidly by their professional oaths.

Specifically, I suggest that adherence to the following rules would do much to eliminate nuisance settlements, which are only a form of appeasement of justice:

1. *The lawyer should be a lawyer.* He should determine first whether or not the plaintiff can make out a cause of action. If the plaintiff cannot make out a case, then he should recommend that nothing be paid, regardless of the nature and extent of the damage. Yet he must understand that there are some trial judges who send every case to a jury. Then the only recourse is to the wisdom of the jury, or to seek relief from the appellate courts.
2. *Do not fear juries.* A defense lawyer may believe his client not to be liable even when there is conflicting evidence that will require the facts to go to the jury. (e.g., Who had the green light?) In such a situation, no lawyer should be *positive* that a jury will find for, or against, his client. The lawyer should have the courage of his convictions, that the evidence will convince the jury of his client's allegations. In this situation, usually the plaintiff's case does have some value, assuming the alleged claims of injury to be legitimate. Still, even when there is a jury issue, there may be some occasions when a case has no settlement value.
3. *Be willing to recognize when the odds are against you.* It is important to weigh the plaintiff's evidence as objectively as your own, and to be willing to recognize

when the odds are in favor of a plaintiff's verdict. In these instances, the pocketbook must be more generous. This involves a dispassionate consideration of a possible minimum and maximum amount a jury is likely to render. Different factors enter here, some legal, some psychological. Be accurate in judging the psychological subtleties of the case, as much in settlements as in trials.

4. *Be realistic.* There are cases in which the defendant's liability is absolute. Then appraise the reasonable value of the damages. On the one hand, plaintiffs frequently raise their demands because they have the defendant cornered. On the other hand, defendants sometimes fail to be realistic, to the opposite extreme. If settlement fails, the defendant frequently can cut trial time and the amount of the verdict, by being willing to admit negligence and/or liability, so that the only issue for the jury is either proximate cause or the amount that the case is worth.

One's reaction to the above principles may well be that they are sound in theory, but impractical; that they tend to force cases to trial and thereby to increase the cost of defense. Such fears are not supported by the facts. The chain store, to which reference was made earlier, reduced the number of lawsuits filed against it by about 50 per cent within one year after adopting a policy of no payment without liability.

There is another instance where an insurance company kept a record of 48 cases that went to trial between the years 1949 and 1953. They took place in Columbus, Cleveland, and outside of Ohio. The company found that the amounts it finally paid out, including attorneys' fees, were nearly \$200,000 less than they would have been had they accepted the lowest plaintiff's demand at the trial table.

I am sure the following results are typical of any office that does a substantial amount of defense work. The following figures are based upon cases disposed of during a period of 34 months:

Settled before pre-trial	48.75 %
Settled at pre-trial	18.30 %
Settled after pre-trial but before trial	14.31 %
Settled at the trial room but before a jury was impanelled	2.83 %
Settled during trial	4.83 %
Settled after trial	1.116%
Verdict for plaintiff	1.996%

Verdict for defendant	4.99 %
Directed verdict for defendant	.67 %
Defendant's motion for summary judgment granted	.499%
Dismissed for want of prosecution	.998%
Demurrer sustained and motion by defendant to dismiss granted	.67 %

Some additional figures that may be of interest show that in 51 cases that were tried to conclusion the total of the lowest settlement demands was \$748,903. The total amount paid out by way of verdicts or settlements after verdict, including attorneys' fees, was \$288,468.75, or \$460,494.25 less than if the total amount of the demands had been paid. Of the total of \$288,468.75 that was paid out, \$150,000 of that amount represented the full amount of the policy limits that had been offered prior to trial.

Need justice be pacified? Should it be made quiet and calm? Should we abolish the jury system? Should we tear down the house to repair a leak in the roof? Or should we make a thorough study of the administrative structure and problems of our courts? Should we continue to perfect the pre-trial program that the judges in Cuyahoga County have so ably begun? Should we take a new look at "nuisance settlements"? Can we find ways of discouraging lawsuits which any responsible lawyer would recognize as having no merit?

Should justice be compromised or appeased?