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AUTOMOBILE LIABILITY INSURANCE AND THE COURTS

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DURING the past decade, automobile liability insurance has come to play an important and vital role not only in the lives of its policyholders and claimants but in its effect on the bar and the judiciary. This result has been brought about largely by the passage of financial responsibility and compulsory insurance laws and the enormous increase in the number of automobiles on our highways and consequently the number of accidents out of which claims arise.

In discharging this role, the insurers have an obligation to do so to the best interests of the public, the bar, and the judiciary. That they are doing so, or at least making a valiant effort to do so, will, I think, be borne out by this article.

Rising insurance costs of recent years have caused policyholders to feel that companies are too liberal with their premiums in paying claims. Conversely, the claimants and particularly the plaintiffs' bar feel that the companies are extremely conservative along these lines. But on one thing both sides seem to agree and that is that the companies are making big profits. Nothing could be further from the truth. As a matter of fact, during the ten year period 1951 through 1960, the country-wide results of all stock companies licensed to do business in New York State sustained an underwriting loss of $681,182,000 on the two basic coverages, bodily injury and property damage liability. The chart below depicts the results:

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Country-wide Results
Stock Companies Aggregate

(Stock Companies Licensed to do Business in New York State)

Years 1951-1960 Inclusive

	Net Premiums Written	*Net Premiums Earned*	*Underwriting Loss*	*% To Earned*
Bodily Injury	$10,683,519,000	$10,286,850,000	$680,254,000	6.6%
Property Damage	$ 4,869,112,000	$ 4,731,927,000	$ 928,000	—
Bodily Injury & Property Damage Combined	$15,552,631,000	$15,018,777,000	$681,182,000	4.5%

During the corresponding period, the same stock companies improved their total expense ratios as shown in the next chart.

Total Automobile Expenses
Stock Companies Aggregate

Year 1950	*Net Premiums Earned*	*Total Expenses*	*% To Earned*
Total Automobile	$ 887,797,000	$ 424,039,000	47.8%
Year 1960			
Total Automobile	$3,237,327,000	$1,358,031,000	41.9%

Patently, these figures show that the losses incurred during this period were produced by the dollars paid out under the bodily injury and property damage coverages. If the expense of doing business had not been improved by 12.4%, the loss picture for the ten years would have been worse.

In an article entitled, "Auto Insurance Battered by Its Own Boom," appearing in *Fortune* (October, 1960 issue), its author noted the following:

For more than fourteen years the automobile insurance business has been in a peculiar situation. Premiums earned on liability policies sold by over 700 casualty companies last year reached a total of more than $3.7 billion, about four times what they were in 1945. But this boom in volume has been accomplished by a cyclical movement in profits; rises in accident claims put nearly all the big insurers into the red on liability insurance in 1946-47, again in 1951-52, and again in 1956-58. From 1956 through 1958 the

casualty stock companies lost $700 million on insurance for bodily injuries and property damage caused by auto accidents.

Thus, the falsity of the assertions that automobile casualty insurers are making large underwriting profits is apparent.

The reason for the underwriting losses indicated is basically that the premium rate levels have not kept up with the increasing cost of claims. Claim costs have risen sharply chiefly because of: (1) increases in the cost of labor and parts for automobile repairs and in the special damages, such as doctor, nursing, hospital bills and lost earnings, that form the basis for bodily injury settlements; (2) increasing numbers and severities of accidents; and (3) the ever increasing claim consciousness and tendency to exaggerate claims on the part of the public and certain members of the bar.

That these costs can get out of hand seems obvious; there is, therefore, a duty on the part of all involved to keep such costs at reasonable and fair levels. Failure to do so will lead to unreasonable rate levels which in turn can lead to the destruction of our present system for handling these claims.

While it is doubtful that the plaintiffs' bar and the insurance companies may ever see eye-to-eye on the value of any individual claim, both sides have much more in common and fewer areas of conflict than is generally imagined when this system is looked at in larger perspective. For example, both sides would prefer, I am sure, the preservation of the fault or liability principle and the jury system rather than the establishment of a compensation system under which fixed awards and fixed attorneys' fees would be paid—where recoveries are averaged out so that the deserving get less than they should in order that the nondeserving can also be paid. Both sides realize too, I believe, that a healthy casualty insurance business, under private enterprise, charging reasonable rates for the average motorist will always produce the healthiest climate for the proper disposition of claims on behalf of the public and for the plaintiffs' and defendants' bar.

Based on the premise that the goals of the public, the bar, the judiciary, and the insurers are fundamentally (1) to keep automobile liability rates reasonable and, (2) to preserve our present liability system with respect to claims and suits, our efforts then should be devoted to improving this system and removing from it all factors which seemingly prevent it from reaching its proper objectives. To this end, certain committees such as the "Joint Conference Committee" of the Insurance Law Section of the New York State Bar Association serve a vital purpose in formulating policy and solving problems between the bar and insurers. Serving on this committee are leading executives of the insurance companies as well as leading trial lawyers in the State of New York who represent both plaintiffs and defendants.

How Automobile Liability Insurance Companies Handle Claims and Suits

In order to understand the insurance company's point of view on some of the problem areas in the disposition of claims and suits, I would like to review briefly the manner in which claims and suits are handled. As counsel for the insurer writing more automobile liability insurance in New York and the United States than any other company, I have had, in over twenty years experience, considerable opportunity to observe their processing. While the handling is simple and uncomplicated, many who are not intimately acquainted with insurance operations find it somewhat mysterious and confusing. Most carriers operate in substantially the following way:

Claims — Not in Suit

The basic policy of the company with which I am associated and of insurers generally is to dispose of all just claims quickly and fairly. Such disposition may involve payment in full, partial or compromise payment, or complete denial, depending on the negligence or contributory

negligence, or extent of damage sustained in the accident, as established by the investigation.

All claims involving bodily injury, as well as the more serious property damage claims, are assigned to adjusters for personal investigation as soon as possible after the report of the accident is received. If the case is one of liability, and minor injuries exist, such an injury claim is settled just as soon as practicable for a fair and reasonable amount. If the case is one of doubtful liability, a compromise settlement is sometimes in order. But where the investigation shows there is no liability, no offer of payment will be made.

Needless to say, especially in dealing with bodily injury claims, we are not operating in a field of science where mathematical formulae can be applied in determining what constitutes legal liability or a fair and reasonable settlement. However, these matters are capable of proper evaluation and the insurer makes certain that the adjusters, examiners and supervisors who handle these claims have the necessary education, training, and experience to make such evaluations of cases assigned to them. In making an evaluation of a bodily injury claim, all aspects of the claim are considered, including:

(1) Negligence of the insured;
(2) Contributory negligence of the claimant;
(3) Actual injuries sustained;
(4) Special damages incurred such as doctor, nursing, and hospital bills, and lost wages;
(5) Pain and suffering, and possible permanent or disfiguring injury.

Surprisingly, it seems that claimants, particularly in the Metropolitan New York City area, have a very good idea what their claims are worth. That these evaluations and settlements are fair and reasonable seems to be clearly indicated by the lack of complaint on this point by claimants and by the dearth of litigation wherein the validity of releases has been challenged. This result is significant when

one considers the percentage of bodily injury claims settled directly with claimants.

Careful studies made of court records by the Columbia University Project for Effective Justice declared that in the City of New York about 193,000 accident victims present claims each year to insurance companies and that 116,000, or 60%, are disposed of before any lawsuit is instituted by the injured claimant.[1] For the entire State of New York, our own figures indicate that about 75% of bodily injury claims reported are settled without suit. The 60% settled without suit on a New York City basis and 75% on a New York State basis include bodily injury claims in which the claimant was represented by an attorney as well as those in which he was not represented. The figures indicate that there is a willingness on both sides in a majority of the bodily injury claims to dispose of them without any involvement in court processes or procedures.

Claims — In Suit

Allstate applies the same basic principles of evaluation to all claims whether the claimants are represented or not and whether suit has been filed or not. Therefore, the filing of suit in the vast majority of cases adds nothing to the value of the claim but does, of course, require additional expense to handle. Too often, from my point of view, it appears that suit is filed before the plaintiff's attorney has made any effort to settle the claim. In fact, in a surprising percentage of cases, the company's first notice of the claim is a suit. I believe a great many of these cases which are subsequently settled could have been settled without suit. And again, in far too many cases, after suit is filed, time seems to march on interminably to the detriment of the plaintiff and the carrier. Early and realistic negotiations in these cases, where settlement is indicated, could reduce the number of pending suits substantially.

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[1] Franklin, Chanin & Mark, *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation,* 61 COLUM. L. REV. 1, 10 (1961).

The Columbia University Project for Effective Justice determined from their survey that in 25% of the cases recoveries were $300 or less, in 47% were $600 or lower, and in 70% were $1,000 or less.[2] The 70% group is the basic area wherein casualty insurance carriers run into problems. It is also a problem area in the courts of the State of New York—particularly in the Supreme Court.

The Columbia Project reports that of the 193,000 accident victims seeking damages in the City of New York, only 77,000 institute an action at law. Of the 77,000 who sue, only 48,000 file a note of issue and by the time of trial, only 7,000 remain. Of this 7,000, some 4,500 close during trial by settlement or discontinuance leaving only 2,500 cases that reach verdicts.[3] It should be borne in mind that approximately 70% of this group effect recoveries of $1,000 or less. Moreover, among the 48,000 claimants who file a note of issue, 80% are disposed of before they reach the trial calendar. Statistically, at least, these 48,000 are the cause of court congestion. Assuming that this 80% should be disposed of faster or without the necessity of the filing of the note of issue, the question is why they are not settled earlier. The causes are many and fall on both the plaintiffs' and the defendants' shoulders. Without any intent to list the causes in any order of precedence, some of them are:

(1) Unrealistic offers
(2) Unrealistic demands
(3) Very questionable liability cases
(4) Lack of verified special damages
(5) Lack of verification of injuries
(6) Unnecessary legal motions
(7) Unnecessary examinations before trial.

It is the goal of my company, and I am sure of others, to entertain reasonable demands and make reasonable offers

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[2] *Id.* at 15.
[3] *Id.* at 10.

as promptly as possible on meritorious claims or suits. Equally, however, it is our goal to be ready, willing, and able to try the lawsuit which is nonmeritorious from the standpoint of liability or damages.

A typical case which arises in the 70% (who recover $1,000 or less) is what is commonly referred to as the "rear ender" which results in a so-called "whiplash" type of injury—if there is such an injury. Oftentimes the damage to the front of defendant's automobile and the rear of plaintiff's vehicle is nominal and yet severe "whiplash" injuries are claimed to have been sustained by as many as five occupants of the plaintiff's vehicle. The medical treatment is usually rendered at a cost of ten dollars per visit to the doctor's office (my doctor charges five dollars per office visit), although no injury was claimed at the scene of the accident nor was any reported on the official police blotter. Months elapse before the defendant can secure a physical examination by a doctor of his selection and, when the examination is conducted, no objective findings of any injury are evidenced by the patient. Lost earnings of several days are alleged and, depending upon the employer, the defendant may or may not be able to verify this item of special damages. An examination before trial often is not satisfactory in the determination of the issues. Plaintiff's counsel will be contacted and the initial demand will be in the thousands for each plaintiff and the claim adjuster who now has an evaluated file probably in the hundreds will start a series of bargaining sessions. Most of these cases are eventually settled but some do go to trial because both sides cannot agree on the liability and value of the case.

It is interesting to note what happens to a typical group of cases involving "whiplash" type injuries. During the calendar year 1960, we kept records of all cases tried in New York City wherein an injury to either the cervical or lumbar area, or both, was claimed, and medical information revealed little or no objective evidence of injury. While many of the cases were of the "rear ender" variety, some were not. The total number of these cases tried

to a conclusion in all courts in the City of New York was 44; 30 of them, or 68%, resulted in a defendant's verdict. Of the 44 cases, 23 were labeled by us as "probable to full liability." Of the 14 cases tried which resulted in a verdict for the plaintiff, the amounts ranged from a low of $100 to a high of $2,000; one was for $3,750, but a codefendant was liable for half of that amount. These 44 cases were then separated into four groupings in accordance with the alleged special damages as follows:

Group A—Special Damages $ 1 to $199
Group B—Special Damages $ 200 to $499
Group C—Special Damages $ 500 to $999
Group D—Special Damages $1,000 and above

The breakdown of the above groupings by results attained were:

Group A — Special Damages $1 to $199

Number of Cases Tried	22
Number of Defendant's Verdicts	17
Number of Plaintiff's Verdicts	5
Average Plaintiff's Verdict	$663
Combined Average Verdict	$150

Group B — Special Damages $200 to $499

Number of Cases Tried	12
Number of Defendant's Verdicts	9
Number of Plaintiff's Verdicts	3
Average Plaintiff's Verdict	$550
Combined Average Verdict	$146

Group C — Special Damages $500 to $999

Number of Cases Tried	9
Number of Defendant's Verdicts	3
Number of Plaintiff's Verdicts	6
Average Plaintiff's Verdict	$1,192
Combined Average Verdict	$784

Group D — Special Damages $1,000 and Above

Number of Cases Tried	1
Number of Defendant's Verdicts	1
Number of Plaintiff's Verdicts	0
Average Plaintiff's Verdict	$0
Average Combined Verdict	$0

Why were these results attained? Needless to say, there were many reasons, but in the main there was one basic failing on the part of the plaintiffs in the cases that they lost—the jury did not believe either the plaintiff or his witnesses.

What about the other cases that reach the courthouse and are tried when settlement cannot be effected? During the same calendar year, 1960, our records reveal that in the Supreme Courts of the five counties of the City of New York, a total of 69 lawsuits were tried through to conclusion. In the City Court, 65 bodily injury cases were tried and 73 in the Municipal Court. Our records on cases tried are maintained in three categories: (1) when the lawsuit results in a defendant's verdict, (2) where the amount of the verdict or decision is equal to or less than the amount actually offered (which we consider a win), and (3) where the plaintiff recovered an amount in excess of our actual offer.

On the above basis, a breakdown of the total cases tried during 1960 is as follows:

Trials

(1) *Defendant's Verdict*

	Number	*Percent*
Supreme Court	52	75%
City Court	45	69%
Municipal Court	49	67%
Subtotal	146	71%

(2) *Won on Amount of Verdict or Decision*

	Number	*Percent*
Supreme Court	10	14%
City Court	16	24%
Municipal Court	10	13%
Total Won	182	88%

(3) *Plaintiff's Verdict (In Excess of Amount Actually Offered)*

Supreme Court	7	10%
City Court	4	6%
Municipal Court	14	19%
Total	25	12%

According to the figures of the Columbia Project only 40% of the cases tried in the City of New York result in a defendant's verdict.[4] Allstate's percentages of 75% in the Supreme Court, 69% in the City Court, 67% in the Municipal Court and on a total basis, 71%, are therefore considerably above average. During the same period, 83 bodily injury suits were discontinued during trial in the Supreme, City and Municipal Courts. This figure is not included in the above chart.

Court Congestion

What is court congestion? Following a comprehensive study of calendar congestion, certain distinguished members of the law school faculty of the University of Chicago made the following findings:

(1) Delay in the New York Court is not a recent problem *due to the emergence of the automobile.* It is an inherited evil that must be viewed against a history reaching back into the last century.[5]

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[4] *Id.* at 38.

[5] ZEISEL, KALVEN & BUCHHOLZ, DELAY IN THE COURT 19 (1959) (emphasis added).

(2) [*In*] *1849,* the New York Commissioners on Pleading and Practice had reported with respect to New York City: "It is *well known* that in that city the Supreme Court is weighed down by the accumulation of former years. . . . *Unless relieved of that load, it can never perform its proper functions in respect to accruing business.*" [6]

(3) Court delay, it appears, *is an old problem,* which at least *in New York City* has plagued the court and the community which it serves for over *a century.* However, some comfort may be found in noting that the *delay reported in 1904 was substantially greater than that in recent years.* Not only was the calendar for *all categories of cases three years behind* but even the *Appellate Division was seriously in arrears.*[7]

(4) . . . *This history warns against too readily blaming the delay on such latter-day developments as the emergence of the automobile and automobile accident litigation.* In 1904, before the mass use of the automobile had begun, delay was higher than it is now. In 1921 and again in 1953, the average delay was 21 months; yet during this interval the number of automobiles in New York City increased from 260,000 to 1,420,000.[8]

Those who would lay the problems of calendar congestion primarily at the doorstep of automobile insurance companies may well consider the following statement by a judge now sitting on the Appellate Division bench:

. . . The holdings of the past few years have had their fruition in the unmanageable increase in tort jury claims. The Bar and the public have been encouraged by example in the belief that no claim is so far fetched that it will not result in damages if a jury can be found to endorse it. And by the judicious use of the peremptory challenge such a jury is not too difficult to find. The breakdown of the entire system is postponed by having the judiciary devote a considerable, if not the major portion of their time to acting as insurance adjusters. And the wholesale disposition of claims by settlement . . . is hailed as a judicial accomplishment.

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[6] *Ibid.* (emphasis added).
[7] *Id.* at 19-20 (emphasis added).
[8] *Id.* at 20 (emphasis added).

By allowing recovery in a case such as this, the goal of injury as the sole qualification for damages is brought nearer with the obvious consequence that the courts will be relieved of disposition of such cases. Unless that is the desired end, the only proper outcome is to reverse and dismiss the complaint and I so vote.[9]

In the same respect, the following statement by the authors of the Columbia University Project for Effective Justice report deserves consideration:

In the absence of exact data on the extent to which other factors prevent recovery, it is not possible to reach even a tentative estimate of the *actual* debarring effect of the fault rules. We can only conclude that they prevent recovery by something less than 25 per cent of the victims. Since it seems unlikely that as many as 75 per cent of the accidents are characterized by both clear fault on the defendant's part and clear lack of contributory negligence on the plaintiff's, the 25 per cent rate of debarment would seem to offer empiric support for what is a *well-known fact* to most practicing attorneys—that recoveries are often achieved in cases of doubtful liability.[10]

Bearing this in mind along with the fact that out of 193,000 claims in New York City there were only 1,500 verdicts in favor of the plaintiff,[11] it does not appear that insurance companies are forcing claimants to file suit or to go to trial in an unreasonable number of cases. It should also be remembered that defendants do not start litigation but plaintiffs do, and, as stated previously, the great majority of these suits are begun long before any attempt at settlement is made by the attorney.

"Delayed justice," "calendar congestion," "court reform," "simplification of judicial procedure," "too many accidents," "not enough settlements of accident cases," and the like

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[9] Foussadier v. Bartolo, 13 Misc. 2d 461, 465-66, 177 N.Y.S.2d 140, 143-44 (Sup. Ct. 1958) (dissenting opinion of Steuer, J.).

[10] Franklin, Chanin & Mark, *supra* note 1, at 34 (emphasis added).

[11] Trials completed: 2,500. *Id.* at 10. Favorable to defendant: 40%. *Id.* at 32. The remaining 60%, or 1500 verdicts, therefore, were rendered in favor of plaintiffs.

have been (and will be) topics of conversation and study for the bench and the bar as long as there has been (and will be) a bench and a bar.[12] When (and if) justice is no longer delayed and court calendars are no longer congested and almost all bodily injury accident cases are settled out of court, it is quite likely that the condition will be short-lived.[13] History and past experience have already taught us that the thing we speak about is of such a nature that the cure reproduces the evil and the evil produces the cure. In a word, and apart from the fact that the increase in calendar congestion is due to the fact that the size of judicial manpower is never equal to the size of increased judicial business,[14] the problem is one involving a study in human nature. When the evil exists, the general public, seeking to avoid increased costs in the judicial system, finds fault with the administrative efficiency of the courts. The courts, in turn, implore the bar and the litigants to make greater efforts to eliminate congestion in the courts by effecting more settlements, asking for less adjournments

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[12] Judge Ulysses S. Schwartz of the Illinois Appellate Court recently stated: "The law's delay in many lands and throughout history has been the theme of tragedy and comedy. Hamlet summarized the seven burdens of man and put the law's delay fifth on his list. If the meter of his verse had permitted, he would perhaps have put it first. Dickens memorialized it in *Bleak House,* Chekhov, the Russian, and Molière, the Frenchman, have written tragedies based on it. Gilbert and Sullivan have satirized it in song. Thus it is no new problem for the profession, although we doubt that it has ever assumed the proportions which now confront us. 'Justice delayed is justice denied,' and regardless of the antiquity of the problem and the difficulties it presents, the courts and the bar must do everything possible to solve it." Gray v. Gray, 6 Ill. App. 2d 571, 578-79, 128 N.E.2d 602, 606 (1955).

[13] "[I]n the year 43 A.D., the Emperor Claudius was unable to perpetuate the measure [to reduce judicial delay] beyond one year's effort." ZEISEL, KALVEN & BUCHHOLZ, *op. cit. supra* note 5, at 17.

"'It is well known that in that city [New York City] the Supreme Court is weighed down by the accumulation of former years. . . . Unless relieved of that load, it can never perform its proper functions in respect to accruing business.'" *Id.* at 19.

[14] Under the Constitution of the State of New York, the Legislature has the power to provide for the election of the number of justices of the Supreme Court according to the size of the population as shown by census reports. Since census reports are made every ten years, it naturally follows that the number of justices are never equal to the size of the *existing* business of the court. In a word, judges are not appointed to prepare for more business, but rather to take care of *accumulated* business. Thus, the court is always dealing with a backlog of cases.

and speeding up the rate of trials—and the evil is eliminated. When the evil is eliminated the general public—pleased with the efforts of the judiciary—praises the courts for their accomplishments. The courts, in turn, praise the bar and litigants for their cooperation and this praise produces the seed of the evil.

Let us take a look at the report of January 1, 1960 by the Judicial Conference of the State of New York, consisting of the Chief Judge of the Court of Appeals of the State of New York, the presiding justices of each of the Appellate Divisions of the State of New York, and other justices, to the Governor of the State of New York. This report shows that during the years *following* any severe calendar congestion in 18 of the 62 counties in New York State, the number of jury cases disposed of was greatly in excess of the number disposed of during the year in which the very severe delay existed, but that the moment the severe delay was eliminated or greatly reduced, the number of cases disposed of fell off sharply! The only exception to this situation was in counties in which there has been a tremendous increase in population.

Let us look at a few examples in this lesson in human nature: Erie County reported that in 1954-55, the delay was 10 months. That year the court disposed of 3,530 jury cases. The 10-month delay persisted the following year even though a few hundred more cases (3,749) were disposed of. Apparently actuated by this situation, the pressure was applied and 4,271 were disposed of during 1956-57 with the result that calendar congestion and delay were completely eliminated. The bench and bar kept up their good work and disposed of even more cases the following year (5,514) and they maintained the praiseworthy result—"no delay" during 1957-58. But, note the eventual effect upon the bench and the bar of Erie County: In 1958-59 they disposed of less cases than they had in 1954-55 with the result that by the end of 1958-59 calendar delay was worse than it had been in 1954-55. The reason is obvious. If an outgo of 3,530 cases in 1954-55 produced a 10-month delay that year and the year following, is it not logical

that an outgo of 3,287 cases in 1958-59 should produce a 14-month delay for the opening of the year 1960?

The same pattern and history is observable in several other counties including specifically Saratoga County and New York County. The following statement of one of the speakers at the 1958 Attorney General's National Conference on Congestion in the Courts, seems to confirm this aspect of calendar congestion:

> What we need and what these figures provide is a reminder that the problem is not hopeless. That reminder is of the utmost importance because *the cure of delay depends so largely upon psychological attitudes.* Those who believe that undue delay is not inevitable, who refuse to succumb to defeatism, usually manage to find means for solving the problem. As the old saying goes, "Where there's a will, there's a way."
>
> Unfortunately the matter of attitude is so obvious that it is sometimes overlooked. We tend to seek solutions for problems of delay in judicial machinery rather than in men who operate it.
>
> To illustrate how important attitude is I would like to discuss three areas of judicial administration.
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> . . . .
>
> My own feeling is that methods of assigning cases had relatively little to do with the improvements effected in New Jersey or in Dade County [Florida]; that the key factor in both places was an increased consciousness on the part of judges to the problem of delay. A change in methods focuses attention on the problem of congestion and stimulates a will to solve it. If a jurisdiction having separate calendars switches to a central calendar system because of a desire to cut down delay, the objective probably will be achieved. If a jurisdiction having a central calendar switches to individual calendars out of a desire to cut down delay, again the objective probably will be accomplished. *The important thing is not so much the method, but the will.*[15]

One must distinguish between court congestion and trial congestion. Statistically our metropolitan counties are any-

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[15] INSTITUTE OF JUDICIAL ADMINISTRATION, Report of June 16, 1958, at 5-6 (emphasis added). That institute also operates under a grant and is connected with New York University. Since 1953, it has been studying and reporting on calendar congestion throughout the United States.

where from 18 to 60 months behind in the jury personal injury calendar. On the other hand, judges as a group when they sit in the calendar part have a difficult task in securing a sufficient number of ready cases in order to keep the trial parts working. In other words, while thousands of cases are placed on the court calendars each year, relatively few seem desirous of an actual trial.

In the City of New York, if a Supreme Court case does not secure a preference under the rules of the particular court and if plaintiff's counsel insists upon Supreme Court jurisdiction, the practical result is that the case will never be tried but will remain on the court calendar and be a part of the court congestion. With a preference and counsel on both sides ready when the case is called on the trial calendar (day calendar) as distinguished from the court calendar (general and reserve calendars), the delay between the filing of a note of issue and trial is materially reduced.

Most of our present concepts of the judicial process were gained by those before us at a tremendous sacrifice. Consequently, we should not lightly or by any snap judgment be willing to change our present system. The proposed solutions, many of which are drastic, such as making jury fees prohibitive or dispensing with jury trials, utilizing the auditor or master system, the arbitration plan, or others, should not be experimented with until every other avenue to a solution has been explored and tried.

Let us look then at some of the less drastic solutions to this problem. The other alternatives are:

(1) *Increase in Judicial Manpower.* Article 6, Section 1 of the Constitution of New York reads:

> The legislature may from time to time increase the number of justices in any judicial district, except the number of justices in any district shall not be increased to exceed one justice for each sixty thousand, or fraction over thirty-five thousand, of the population thereof as shown by the last federal census or state enumeration.

In the 1961 legislative session, a bill to increase the number of justices in New York City failed to become law

because of a political situation that existed in the city to the detriment of the public, the bar and the judiciary. The first judicial district comprising New York and Bronx Counties has not had an increase in the judiciary since 1923—*39* years ago. Can you imagine our school problem or our traffic problem, bad as they are, if we had the same school facilities and the same roads as we had in 1923? Yet, with our increase in litigation, particularly jury personal injury actions, the courts are charged with the responsibility of dispensing prompt justice in 1962 with the same judicial manpower they had in 1923.

Mr. Justice L. Barron Hill, charging a jury in an automobile accident case tried in the Suffolk Supreme Court, in *Ebling v. Curadi,* October 1961, opened his charge in the following manner:

> Ladies and gentlemen of the jury, the case is now finished except for the charge of the court and your decision. . . . One attorney mentioned that it was a long time ago since this action was started, and calendars are "way behind in this County." That's true. Maybe under these circumstances you members of the jury have a right to know the reason for it. Of course, you do know that this is the fastest growing county in the United States. We have what we call an exploding population. If we had the required number of judges here in this County we would have either ten or eleven instead of four. And we never had four until this year. The law of the State of New York is that you may have one judge for 60,000 of population. It isn't a requirement, it is a "may." And of course the Legislature is the one that has to pass the laws and provide for it. I don't know the reason for it, it's not my business anyway; but they just never keep up with it, they are always a little bit behind. Maybe you members of the jury can figure that out; I can't. Anyway, that's the reason for it. We are trying to carry this load, we are trying to do everything to get cases tried speedily. But these lawyers have a right, and their clients have a right, to come in and try their case, and present it, and not be pushed around too much.

The problem of judicial manpower is not confined to these three counties, New York, Bronx and Suffolk, but

it is common to all of the other counties in Metropolitan New York City and at least one upstate judicial district, namely the Eighth, wherein the City of Buffalo is located.

Governor Rockefeller has recommended legislation for the 1962 session for 38 additional Supreme Court Justices, 35 of whom would be assigned to the Metropolitan New York City area and 3 to the Eighth Judicial District. The chances of such legislation passing during this session, prior to the establishment of a central court system in New York State effective in September 1962, are considered excellent. These two measures, at least the former, should do much to alleviate our present problems. On the other hand, the increased number of trial parts will place greater responsibility on the shoulders of the trial bar to cooperate with the courts, settle all settleable cases, and be ready to try those cases which have to be tried.

(2) *Pre-Trials.* While some members of the judiciary, a bare minority, decry the fact that they have to act as glorified claims adjusters, the fact still remains that the presence of a Supreme Court Judge, at a pre-trial conference, assists materially in the disposition of a given lawsuit. Both sides seem to make a stronger effort to get together where settlement may be in order. Also, if the plaintiff is present, his attorney often has the help of the judge in advising the plaintiff as to the reasonable value of the case. Of course, the defendant, too, is brought to task if his value of the case is unreasonable or distorted.

What type of pre-trial is best? It is the consensus of opinion that the mass pre-trial concept, while it settled cases, tended to increase the amount of litigation in the Supreme Court because it encouraged an attorney to commence his action there rather than in a court of inferior jurisdiction. The reason is simple: he can receive a relatively fast pre-trial and has the hope that judicial pressure on the defendant will settle the lawsuit. Further, the chances are that if the case was not settled in the first mass pre-trial it will be pre-tried again, again and again.

Cases of little or no liability should be tried. If the judge at pre-trial puts pressure on the defendant to settle

such cases he encourages the philosophy that every case has some value. In this way he unwittingly solicits the filing of more nonmeritorious actions which causes more court congestion. Where evidence of nonliability seems clear, the plaintiff and his attorney should be encouraged to dismiss the action or try it at an early date.

It is, of course, important that the trial itself be conducted expeditiously. A two or three day trial should not require counsel for both sides to remain in the court house for five to ten days after a jury has been selected. Such goings on cause frustration and discouragement not only to the parties involved but to the attorneys.

Experience would seem to dictate that a case should be pre-tried once as a general rule and such pre-trial will be fully effective, provided the imminence of trial exists in the event the lawsuit is not settled or discontinued. The Appellate Division, First Department, apparently tends toward this formula in their continuation of the so-called "Block Buster Parts." In the past year or so New York County has been designating two justices to given parts, with an assignment of approximately sixty cases per judge for a two month term, and each jurist is to dispose of his assignment in this period either by settlement, discontinuance or trial. The system so far has produced results and in the March 1962 term of court seven justices will be assigned to these "Block Buster Parts." The consensus is that certain jurists with the necessary temperament for this type of work accomplish the best results.

To sum up, the ingredients of an effective pre-trial system would be:

(a) One pre-trial on a regular scheduled basis—not the mass variety type;

(b) Pre-trial coupled with the imminence of trial if the lawsuit is not settled or discontinued;

(c) Right of either side to a trial in the event settlement cannot be accomplished without any undue pressures. Once it has been determined that a case

has to be tried, the trial should be expeditious and not dragged on for several days;

(d) The selection of jurists with the proper temperament to sit at such pre-trial sessions.

(3) *Availability of Counsel.* According to the survey in New York County by the Chicago University Law School, five per cent of the trial bar make over twenty per cent of the trial appearances. This concentration of business in the hands of a relatively small number of firms can and does cause some problem and delay in moving cases because counsel is on another trial or pre-trial. Since so many members of the bar have their offices in Manhattan, the problem is not as great in New York County as it is in the four other surrounding counties which are more difficult to cover. This matter is primarily one for the plaintiffs' bar to solve since the insurers generally have trial counsel available in each of the counties.

In this area, agreement by the courts of the various counties, such as has been made between the First and Second Appellate Departments, on uniform rules of practice can be very helpful in solving this type of problem.

(4) *Speeding Up the Over-all Legal Process.* Unquestionably, much can be done to speed up and streamline the trial process. Whereas pre-trial procedures were designed to narrow the issues in anticipation of trial, it has become solely a means for effecting settlements. When settlement is not accomplished, the issues should immediately be defined in preparation for an early trial. However, trials must not be streamlined to a point where fundamental rights of the parties are affected. For example, the suggestion is made that juries be waived or abolished with respect to tort litigation. It is stated in "Delay in the Court" that the average length of time in hours in New York County for a jury trial is 17.4 as against 8.4 for a nonjury trial. While there are several reasons for the 2 to 1 ratio of time, the authors state:

. . . If the extreme remedy of total abolition of jury trial in personal injury cases were adopted, the savings in the New York Court would be the equivalent of about 1.6 judges per year. . . .

These figures can be read in two ways, depending upon one's viewpoint as to the values of jury trial itself. They may impress some with the fact that jury trial is expensive in court time and that the abolition of jury trial offers an effective remedy for delay. Or they may be read, as we ourselves would incline to read them, as a price tag for the jury system. On this view, what is impressive is that the addition of only 1.6 judges per year would net the same impact on delay as the abolition of a basic institution.[16]

In the State of New Jersey, according to the same survey, roughly comparable jury cases are tried in approximately forty per cent less time than in New York.[17] The savings come basically from the differences in the internal trial process itself. If this differential could be eliminated in our Supreme Court, it would offset the difference in time between a jury and a nonjury trial in New York County.

CONCLUSION

I, for one, believe that the public is best served under our present concept of liability and insurance protection, and that it is up to the bar and the insurers to work together to improve its operation and effectiveness and eliminate those things which cause unnecessary expense or delay. Failure to do so may cause others to solve the problem in ways that may be unpalatable to all parties concerned. It is gratifying to note that bar association committees on which insurers are represented, and other organizations, are facing up to the problems and doing something about them.

There seems to be no single cure-all for calendar congestion, but the problem is not insurmountable. Working together, the bar, the bench, the legislatures, and the insurers can, I am sure, find a proper solution within

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[16] ZEISEL, KALVEN & BUCHHOLZ, DELAY IN THE COURT 9 (1959).
[17] *Id.* at 10.

the framework of our present concepts. In this effort, great attention should be paid to the part that "claim consciousness" plays in the number of claims presented to insurers and in its effect on court congestion.[18] On this subject, the authors of "Delay in the Court" make these observations:

> Of all the ways of reducing the Court's workload we have so far given only passing mention to the possibility of reducing the number of original claims out of which court actions may grow.[19]
>
> But if it is difficult to reduce the frequency of accidents it must be even harder to influence what is called the degree of claim consciousness. Behind that phrase a variety of motivations may be concealed. At one extreme, motivation is highly rational and obvious: defendants who are neither insured nor financially responsible are simply not sued. *At the other extreme may be pure fraud.* Motives in between are less clear: where to draw the line between pursuing a claim and not bothering may depend on the unconscious or half-conscious magnifying of either the consequences of the accident or of the degree of liability.[20]

To help reduce "claim consciousness," and more especially unmeritorious claims, every effort should be made for more complete disclosure of the facts, both as to liability and as to injury, so that objective and fair analysis of cases can be made—preferably as early in the case as practicable. Rules or tactics which hide or obscure the facts or which permit recovery where it is not deserved, serve only to encourage "claim consciousness," the exaggeration of claims, and the filing of suit in any kind of a case. The failure to allow early independent medical examinations on cases of slight or nominal injury is the sort of tactic that typifies this problem.

The disclosures of the Arkwright and Botein investigations make it imperative that all garage bills and other special damages be verified, and that the existence of the

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[18] *Id.* at 223-40.
[19] *Id.* at 223.
[20] *Id.* at 224 (emphasis added).

attending physician or the employer be ascertained. Therefore, means for prompt verification should be developed.

Suits on clearly nonmeritorious claims should be discouraged by the bench and plaintiffs' bar, as well as by the insurers. The plaintiff is eventually going to learn he has no case—why not do it before suit is filed?

Suits should not be filed routinely, in my opinion, without having made reasonable efforts to dispose of the case with the insurer. Unquestionably, the great majority of claims can and should be settled without the necessity of a suit. If suits are filed principally to establish an "attorney's lien" on the proceeds of a settlement, other means of accomplishing such a lien should be established.

Court congestion should not be used as a "tactical weapon" by either the plaintiff or the defendant in the prosecution or settlement of a claim or suit.

Let us solve our problems in the only right way—the way that serves the highest principles and best interests of the public, under whose gaze we are being challenged.