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Compulsory Arbitration in Pennsylvania - Its Scope, Effect, Application, and Limitations in Montgomery and Delaware Counties - A Survey and Analysis

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COMMENTS

COMPULSORY ARBITRATION IN PENNSYLVANIA—ITS SCOPE, EFFECT, APPLICATION, AND LIMITATIONS IN MONTGOMERY AND DELAWARE COUNTIES—A SURVEY AND ANALYSIS.

The history of American courts in the past decade has been one of increasing litigation. The ensuing abnormal lapse of time between institution of suit and final adjudication has been a cause of due concern to our federal and state governments alike.[1] The United States Attorney General's Conference on Court Congestion and Delay in Litigation summarized the problem as follows:

> "1. The inordinate lapse of time between the institution of suits and their final disposition in many of our State and Federal Courts constitutes a threat to the effective administration of justice in this country. Excessive delay may result in the denial of reparation for wrongs. It may force parties into unjust settlements. It involves the risk that some witnesses may die or otherwise become unavailable and the virtual certainty that the memories of others will become dim before legal rights which are dependent upon their testimony can be resolved. Prolonged and unjustified delay is the major weakness of our judicial systems today.
>
> 2. Unless effective action is undertaken to remedy this serious situation it may further deteriorate and result in bringing the administration of justice in this country into disrepute.

1. "The nation-wide 1956 average for jury cases is 12.1 months from 'first filing' to trial in the 71 jurisdictions reporting thereon and 10.5 months from 'at issue' to trial in the 88 jurisdictions reporting thereon. The reports for 1955 showed an average of 11.4 months from 'at issue' to trial. The 1956 reports for non-jury cases shows an average of 6.5 months from 'first filing' to trial in the 70 jurisdictions reporting thereon and 4.4 months from 'at issue' to trial in the 85 jurisdictions reporting thereon as against the 1955 average of 4.6 months from 'at issue' to trial." INSTITUTE OF JUDICIAL ADMINISTRATION, CALENDAR STATUS STUDY, STATE TRIALS COURTS OF GENERAL JURISDICTION, 1-2 (1956).

The majority of courts report an increase in delay, whether it be from "first filing" to trial, or from "at issue" to trial. *Id.* at 5. The Supreme Court, Queens County, New York reports 46 months delay from "at issue" to trial in trials by jury. *Id.* at iii. See also Campbell, *Paralyzed Justice: A Threat to Legal Process,* The Philadelphia Inquirer, February 8, 1957, p.3, col.1.

New York State has attacked the problem by appointing a commission to design a modern court system. In Pennsylvania, on January 22, 1957 a resolution was introduced in the Senate for the appointment of a committee to investigate the problem of court congestion in Pennsylvania. *Compulsory Arbitration in Pennsylvania,* Address by the Honorable William F. Dannehower, Judicial Conference, Pittsburgh, January, 1957, at p. 27.

> 3. . . . The public with the exception of those who have had to seek recourse in the courts, is not fully aware that justice is often unnecessarily slow. It does not know that the administrative machinery of most of our courts is not geared to keep pace with the tempo of our times. . . ."[2]

In an effort to resolve the situation existing in Pennsylvania,[3] the General Assembly, in 1952, amended the existing arbitration laws and attempted to create an effective method of compulsory arbitration by what is popularly known as The Compulsory Arbitration Act.[4] The several courts of common pleas were allowed to implement this statute by enacting rules for their respective counties. By January, 1957, the courts of 43 of the 67 counties in the Commonwealth of Pennsylvania had formulated such rules,[5] and the experiment with compulsory arbitration in Pennsylvania was well underway.

This Comment is directed toward analyzing the scope, effect, application, and limitations of compulsory arbitration in Delaware and Montgomery Counties since its adoption by the courts thereof in the spring of 1955. To aid in this investigation a survey was taken among the members of the Delaware and Montgomery County bars.[6] The results are incorporated in this Comment, and summarized in the chart in the Appendix. In addition interviews were granted to the writers of this Comment regarding

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2. THE ATTORNEY GENERAL'S CONFERENCE ON COURT CONGESTION AND DELAY IN LITIGATION, REPORT OF THE INITIAL MEETING OF THE EXECUTIVE COMMITTEE, 1 (1957).

3. In Philadelphia County where there was a delay of 10.5 months from "at issue" to time of trial in jury cases; in Allegheny County the average time reported was 24 months from "at issue" to trial in jury cases; while in Delaware County there was a delay of only 5 months from "at issue" to trial both in jury and non-jury trials. INSTITUTE OF JUDICIAL ADMINISTRATION, CALENDAR STATUS STUDY, STATE TRIAL COURTS OF GENERAL JURISDICTION, at 6 (1956). In Montgomery County the situation was even more acute, for ". . . in May, 1955, there was a forced delay of two years from the filing of a suit until it could be brought to trial." Swartz, *Compulsory Arbitration: An Experiment in Pennsylvania*, 42 A.B.A.J. 513 (1956). See also Reynolds, *Compulsory Arbitration in Montgomery County*, 19 SHINGLE 77 (1956).

4. PA. STAT. ANN. tit. 5, §§ 1-209 (Supp. 1956). The sections dealing specifically with compulsory arbitration are sections 21-81.

5. *Compulsory Arbitration in Pennsylvania*, Address by the Honorable William F. Dannehower, Judicial Conference, Pittsburgh, January, 1957, at p. 14. There is some question as to whether Philadelphia and Allegheny Counties may adopt compulsory arbitration, because there exists in each county a court of limited jurisdiction which disposes of small claims (the municipal court in Philadelphia County, and the county court in Allegheny County). However the enabling statute does not specifically exclude either county.

6. Questionnaires were sent to 387 attorneys from both counties, of which 130 were answered and are on file in the offices of the *Villanova Law Review*. In general, the attorneys were asked to report on the number of times they participated in arbitration hearings and in what capacity; the length of time hearings usually lasted; whether they thought the arbitrator's fee adequate; whether they favored an increase in the jurisdictional amount and extension of arbitration to real property claims; their opinion of the appeal provision; difficulties encountered in administration of the system; the effect, if any, the system has had on settlements where an insurance company was involved; whether they would favor bringing their claim before a justice of the peace or an arbitration board where the jurisdictions overlapped, and; in general, whether they thought the system was achieving its purpose. As has been stated, the results are summarized in the chart in the appendix.

the implementation and effect of compulsory arbitration in Delaware and Montgomery Counties.[7]

I.

THE HISTORY OF ARBITRATION IN PENNSYLVANIA.

Arbitration has had a long history in Pennsylvania. The first act regarding the subject, the Act of January 12, 1705,[8] antedates Pennsylvania's status as a commonwealth. It permitted arbitration by rule of the court upon agreement of the parties to the action. Following this, the Act of March 21, 1806,[9] allowed the parties to a dispute to submit it to a referee, but, this act was later found to be impractical.[10] Subsequently, the Act of March 20, 1810, provided for compulsory arbitration on the application of one of the litigants. In the first half of the nineteenth century, the major step in the area of arbitration was the Act of June 16, 1836.[11] This statute supplanted the Acts of 1806 and 1810, and was designed to provide for a complete system of arbitration.[12]

In order to implement section 27 of article 5 of the Pennyslvania Constitution of 1874,[13] the General Assembly passed the Act of April 22, 1874,[14] which had the effect of providing arbitration by the trial judge, and the supplemental Act of May 14, 1874,[15] which provided for the arbitration of civil cases upon agreement of the parties by a referee learned in the law. The Act of April 25, 1927,[16] allows arbitration under contracts which have a provision for it, and leaves in effect the Acts of 1705, 1836, the two Acts of 1874, and the common law of arbitration.[17] The arbitration act which is the concern of this Comment [18] is an amendment to the Act of 1836, and represents the last of a long chain of attempts in Pennsylvania to find a workable system of arbitration.[19]

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7. The writers would like to extend formally the appreciation of the *Villanova Law Review* to the Honorable Henry G. Sweeney, President Judge of the Court of Common Pleas, Delaware County, and the Honorable William F. Dannehower, Judge of the Court of Common Pleas, Montgomery County, for their invaluable assistance, and to members of the bars of Delaware County and Montgomery County for their courtesy and cooperation in completing the questionnaires sent them.

8. PA. STAT. ANN. tit. 5, § 8 (Supp. 1956).

9. Act of March 21, 1806, P.L. 558.

10. Bellas v. Dewart, 17 Pa. 85 (1806) states that the act was found to be impractical.

11. PA. STAT. ANN. tit. 5, §§ 1-145 (Supp. 1956).

12. Subsequent to the enactment of the Act of 1836, there was some doubt as to whether the 1806 statute had been supplanted by the Act of 1836. The question was settled in 1868 by the Pennsylvania Supreme Court in Steel v. Lineberger, 59 Pa. 308 (1868).

13. PA. CONST. art. 5, § 27.

14. Act of April 22, 1874, P.L. 166.

15. PA. STAT. ANN. tit. 5, § 201 (Supp. 1956). PA. R. CIV. P. 1550 suspends this section in so far as it relates to actions in equity.

16. PA. STAT. ANN. tit. 5, §§ 161-179 (Supp. 1956).

17. Meche v. Sheridan, 22 Del. Co. Rep. 56 (1929).

18. PA. STAT. ANN. tit. 5, §§ 8-38 (Supp. 1956).

19. There are several other enactments dealing with arbitration in special instances (e.g. employer-employee disputes) which are not pertinent to this Comment and have been excluded.

II.

PROCEDURE UNDER THE COMPULSORY ARBITRATION ACT OF 1952.

The act provides that the court of common pleas of any county by appropriate court rules may decree the submission to arbitration before a board composed of three members of the bar within the judicial district of all cases where the amount in controversy does not exceed $1,000, excepting, however, cases involving title to real estate.[20] The arbitrators are to be appointed by the prothonotary from the list of attorneys qualified to act, and the names are to be selected from the list in the manner prescribed by the rules of the court, or, absent such rules, in alphabetical order.[21] In addition, not more than one member of a firm of attorneys may be appointed to sit on the same board.[22] Upon either the filing of a praecipe by counsel for either party, and the giving of notice to the opposing counsel or the filing of an agreement of reference, the arbitrators must be appointed within ten days, and the board of arbitration must make its report and render an award within twenty days after the hearing.[23]

The fees of the arbitrators (which are paid by the county) are determined by the rules of the court and vary in the several counties from $15.00 to $35.00 per case for each arbitrator.[24] Either party is allowed to appeal from the award to the court of common pleas.[25] However, a condition of appeal is payment to the county by the appealing party of the arbitrators' fees which may not be recovered even if the appealing party

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20. PA. STAT. ANN. tit. 5, § 30 (Supp. 1956).

21. PA. STAT. ANN. tit. 5, § 31, VII (Supp. 1956). The court rules of both Montgomery County and Delaware County provide specifically for an alphabetical list. MONT. COUNTY C.P. (CIV.) RULE II(D); DEL. COUNTY C.P. (CIV.) RULE 524(2). Of course the attorneys cannot be compelled to serve as arbitrators, yet, most attorneys are more than willing to have their names included on the list. However, in Delaware County, as an added incentive, attorneys who do not wish to have their names included on the list of arbitrators are also excluded from the masters' list. Interview with the Honorable Henry G. Sweney, President Judge of the Court of Common Pleas, Delaware County, February 25, 1957.

22. PA. STAT. ANN. tit. 5, § 31, VII (Supp. 1956); MONT. COUNTY C.P. (CIV.) RULE II(D); DEL. COUNTY C.P. (CIV.) RULE 524(2).

23. PA. STAT. ANN. tit. 5, § 31, VIII (Supp. 1956). The rules of Montgomery County provide that the Arbitration Administrator (an office created specifically to administer the act in Montgomery County) shall fix a time for hearing, to be held not less than ten nor more than twenty days after the board has been appointed. MONT. COUNTY C.P. (CIV.) RULE III(A). The Delaware County rules provide that the Chairman of the Arbitration Board (the first of the arbitrators chosen from the list) shall fix the day and time of the hearing, again, to be held not less than ten nor more than twenty days from the time of the selection of the board. DEL. COUNTY C.P. (CIV.) RULE 523(3).

24. Swartz, *Compulsory Arbitration: An Experiment in Pennsylvania*, 42 A.B.A.J. 513, 514. The arbitrator's fee in Montgomery County for his service in each case is $30.00, excepting where the sole issue to be adjudicated is the assessment of damages, in which case he receives $10.00. MONT. COUNTY C.P. (CIV.) RULE V(A). In Delaware County the fee is $25.00.

25. PA. STAT. ANN. tit. 5, § 71 (Supp. 1956); MONT. COUNTY C.P. (CIV.) RULE VI. The Delaware County rules make no specific provision in this regard.

prevails, but with this limitation: that the fee shall not exceed fifty per cent of the amount in controversy.[26]

The arbitrators are not required to make a record of the hearing, but any party requesting a record may have it at his own expense.[27] In addition, an oath must be taken by the board of arbitrators that they will perform their duties and decide the case before them justly.[28]

Finally, according to the rules of Montgomery County, the hearings are to be conducted ". . . with due regard to the law and according to the rules of evidence, which however shall be liberally construed to promote justice, and [the arbitrators] *shall have the general powers of a court,* but not limited to the following . . ."[29] (Emphasis added) The rules then state that the board shall have the power to subpoena witnesses; issue an attachment for failure to comply therewith; to compel the production of books, papers, etc.; to administer oaths or affirmations to witnesses; to determine the admissibility of evidence; to grant continuances; to decide the law and the facts of the case before them; and finally that the rules of procedure shall be those which obtain in the trial of any case before the court without a jury.[30]

This, in sum, is the system as it is in effect in Montgomery County and Delaware County. Although the rules from county to county may differ in particulars, substantially they are as have been set forth.[31]

III.

PURPOSE, EFFECT AND APPLICATION—ITS ACCEPTANCE BY THE BAR.

Certainly the main purposes of the Act are to offer an effective means for the quick disposition of small claims, thus reducing the backlog of cases, and, by means of its appeal provision, to effect a marked limitation of the numbers of appeals taken. This it has accomplished to a remarkable degree, as shown by the Honorable William F. Dannenhower's survey.[32]

26. *Ibid.* As originally enacted the statute did not contain this limitation. It was added to insure the constitutionality of the act in view of the dictum in Application of Smith, 381 Pa. 223, 112 A.2d 625 (1955), *appeal dismissed sub. nom.* Smith v. Wissler, 350 U.S. 858 (1955). See note 48 *infra.*

27. PA. STAT. ANN. tit. 5, § 121 (Supp. 1956); MONT. COUNTY C.P. (CIV.) RULE III(B). The Delaware County rules have no specific provision in this regard.

28. PA. STAT. ANN. tit. 5, § 44 (Supp. 1956); MONT. COUNTY C.P. (CIV.) RULE III(E). The Delaware County rules have no specific provision in this regard.

29. MONT. COUNTY C.P. (CIV.) RULE III(C). The Delaware County rules have no specific provision in this regard.

30. In general these provisions are substantially the same as those contained in the enabling act, PA. STAT. ANN. tit. 5, § 120 (Supp. 1956).

31. An adjunct to compulsory arbitration which has been initiated in both counties is the pre-trial conference. However, discussion of the pre-trial conference is not within the scope of this Comment.

32. In an address given to the Judicial Conference in Pittsburgh, January, 1957, Judge Dannehower sets forth the results of a survey which he conducted among ten counties to determine the worth of the compulsory arbitration system after its use for several years. The results of the survey are remarkable. In the ten counties examined, 3,612 cases were arbitrated since the adoption of compulsory arbitration by those ten counties, with adoption varying from 1952 in Butler, Erie, and Crawford Counties

This survey shows that in Montgomery County, from the inception of compulsory arbitration in May, 1955, until about January, 1957, 652 cases were arbitrated, 19 of which were appealed, and, of these, 10 were still pending with no reversals.[33] In Delaware County, since April, 1955, 247 cases were arbitrated, 7 appealed, and again none were reversed.[34] Quick disposition of small claims has also been achieved in a very effective manner. In Montgomery County before the adoption of compulsory arbitration, the average time for the disposition of a case listed for trial by jury was from one and one half to two years. The average time in which a case reached final adjudication under the compulsory arbitration system was six weeks.[35]

In Delaware County the problem was not so acute since there the trial list was current.[36] While the average time required for a case listed for trial by jury to reach final disposition was only three months, the average arbitrated case was disposed of in six weeks.[37]

From this standpoint then, there can be no question that the experiment with compulsory arbitration has been a success in achieving two desired results—the prompt disposition of small claims, and the limitation of appeal.

In general the acceptance of compulsory arbitration by the bar has been almost unanimous. More specifically the recent survey[38] conducted by the writers shows that of the 130 attorneys of Montgomery and Delaware Counties who completed the questionnaires sent them, only six believed that the system was not an efficacious means of achieving speedy and substantial justice. Although the system has shortcomings, which shall be discussed subsequently, it is the consensus of the members of the bar that its advantages more than discount its shortcomings. In particular the chief advantages noted were:

(a) Small claims can now be adjudicated quickly and economically, without the prohibitive costs and counsel fees entailed in a trial by jury.

(b) The holding of the hearing at a time certain has been of great benefit to both attorneys and clients, since it eliminates the loss of time

to 1955 in Montgomery and Delaware Counties. Of these 3,612 cases only 147 were appealed, and only *one* was reversed. The time lapse from filing of the complaint to hearing was as little as ten days (Northampton County), and only one report exceeded three months (Erie County reported after from three to four months). *Compulsory Arbitration in Pennsylvania,* Address by the Honorable William F. Dannehower, Judicial Conference, Pittsburgh, January, 1957, at appendix.

See also Swartz, *Compulsory Arbitration: An Experiment in Pennsylvania,* 42 A.B.A.J. 513 (1956); Reynolds, *Compulsory Arbitration in Montgomery County,* 19 SHINGLE 77, 78 (1956).

33. Of these 19, 5 were sustained on appeal, 3 settled, and 1 withdrawn. *Compulsory Arbitration in Pennsylvania,* Address by the Honorable William F. Dannehower, Judicial Conference, Pittsburgh, January, 1957, at p. 11.

34. Of these 7, 3 have been sustained. *Id.* at appendix.

35. *Id.* at appendix.

36. Interview with the Honorable Henry G. Sweney, President Judge of the Court of Common Pleas, Delaware County, February 25, 1957.

37. See note 34 *supra.*

38. For a tabular summary of the survey results, see the Appendix.

previously experienced in awaiting the inception of trial, especially as far as witnesses are concerned (above all the expert).[39] Consequently expert witnesses are more easily obtained.

(c) It does away with the "sympathy verdicts" of juries, since the awards of the arbitrators are more in accord with the facts and the law. Cases are decided without regard to whether the defendant is insured or the plaintiff is a subrogee; and awards are generally satisfactory.[40]

(d) It eliminates the time used in selecting a jury, opening and closing speeches of counsel, and the charge of the court. Almost invariably, the hearings begin and are concluded within the same day.[41]

(e) The absence of public attendance[42] greatly decreases the tension under which witnesses testify in the ordinary jury trial.

(f) When the costs to the county in a jury trial are compared with those entailed in arbitration there is found to be a great saving.[43]

The fee of the arbitrators is generally accepted as being adequate.[44] However, it must be mentioned that many believed that the fee was adequate only because they regarded sitting as an arbitrator a public service which the attorney must perform. In addition, many attorneys favored an increase in the jurisdictional amount, some as high as $5,000.[45] All of these factors indicate the general attitude with which the attorneys of both counties regard compulsory arbitration. They have given the system their full cooperation, a major factor in its successful establishment.

IV.

THE CONSTITUTIONALITY OF THE ACT.

A noteworthy aspect of compulsory arbitration which has caused some concern, but which has been definitely settled by the Supreme Court of Pennsylvania, it is constitutionality under the Pennsyslvania Constitution. In *Application of Smith*[46] the Pennsylvania Supreme Court held that

39. The average length of time for the duration of hearings in both counties was 1.3 hours, the average maximums 4.6 hours, and the average minimums 1.3 hours.

40. There were one or two opinions to the contrary noted on this point. See note 64 (c) *infra.*

41. Only seven attorneys reported hearings lasting longer than a single day.

42. The public is not excluded from the hearings, however, since the hearings are not as attractive to the spectator as trial cases, attendance at them is meagre.

43. Montgomery County and Delaware County report "great savings"; Butler County: $175.00 per day; Lehigh County: $6,000 per year; Luzerne County and Dauphin County: "Savings of 50%; Crawford County: "Substantial savings." *Compulsory Arbitration in Pennsylvania,* Address by the Honorable William F. Dannehower, Judicial Conference, Pittsburgh, January, 1957, at appendix.

44. Of the 130 attorneys who completed questionnaires, only 38 felt that the fee was inadequate.

45. Forty-nine attorneys favored an increase in the jurisdictional amount.

46. 381 Pa. 223, 112 A.2d 625 (1955), *appeal dismissed sub. nom.* Smith v. Wissler, 350 U.S. 858 (1955).

the provision requiring an appealing party to make payment of the arbitrators' fees to the county without chance of recovery was not an unconstitutional deprivation of the right to trial by jury which the Pennsylvania Constitution makes inviolate.[47] However, the court implied that where a comparatively small claim was involved the provision might amount to a denial of the right to a trial by jury.[48] This engendered the 1955 amendment to the effect that the fee shall not exceed fifty per cent of the amount in controversy,[49] thus apparently concluding the issue.

The Pennsylvania Constitution provides that

> ". . . the General Assembly is hereby prohibited from creating other courts to exercise the powers vested by this Constitution in the judges of the courts of common pleas and orphan's courts." [50]

Seemingly, from this clause it might be argued that the Compulsory Arbitration Act is an unconstitutional creation of another court, exercising the powers vested in the judges of the courts of common pleas, regardless of the name given the adjudicators. However, this section of the Constitution has been construed literally, and the "powers vested" applies only to powers vested in the *judges* of the courts of common pleas, and the section does not directly vest any powers in the courts of common pleas which the legislature cannot abolish.[51] This interpretation is thoroughly consistent with article 5, section 1 of the Constitution which provides:

> "The judicial power of this Commonwealth shall be vested in a Supreme Court, in the courts of common pleas, courts of oyer and terminer and general jail delivery, courts of quarter sessions of the peace, orphan's courts, magistrate's courts, *and in such other courts as the General Assembly may from time to time establish.*"[52] (Emphasis added.)

Therefore, even if we regard the system as in fact the creation of a new court by the legislature, it still would not be violative of article 5, section

47. PA. CONST. art. 1, § 6. "Trial by jury shall be as heretofore, and the right thereof shall remain inviolate."

48. Application of Smith, 381 Pa. 223, 112 A.2d 630 (1955). The Court further rebuts the arguments that the act violates article 3, section 7 of the Pennsylvania Constitution which forbids the passage of special laws; article 5, section 26, providing for the uniform operation of laws relating to the courts; or that it is an unconstitutional delegation of legislative power. *Ibid.*

49. PA. STAT. ANN. tit. 5, § 71, V (Supp. 1956). See also note 26, *supra.* The rules of Montgomery County go even further and provide: "The Court may, on petition of any party to a case, on cause shown and to prevent injustice or hardship, reduce the amount of this repayment or relieve appellant from such repayment in its entirety." MONT. COUNTY C.P.. (CIV.) RULE VI(A) 3.

50. PA. CONST. art. 5, § 26.

51. Gottschall v. Campbell, 234 Pa. 347, 83 Atl. 286 (1912). For example one of the powers of a judge of the court of common pleas which the legislature cannot take away is the power to sit as a judge of oyer and terminer. *Id.* at 358, 83 Atl. at 290. See also Gerlach v. Moore, 243 Pa. 603, 90 Atl. 400 (1914).

52. PA. CONST. art. 1, § 5.

26.[53] Having survived these attacks on its constitutionality, compulsory arbitration, armed with this supreme court decision, seems firmly entrenched in the jurisprudence of Pennsylvania.

V.

PROCEDURAL AND SUBSTANTIVE DIFFICULTIES ENCOUNTERED IN ITS APPLICATION.

As is to be expected in any undertaking of the magnitude and novelty of compulsory arbitration, problems of a substantive and procedural nature have arisen since its inception. The first difficulty worthy of note is the high number of continuances which have been granted. In Montgomery County, during a period of twenty months (May, 1955 to January, 1957), 930 cases were scheduled for arbitration, of which 276 were continued.[54] The chief reasons given by the attorneys for this high number[55] of continuances was the difficulty in getting five attorneys together at a time suitable to all, the ease with which the continuances may be obtained,[56] and the low priority rating given to arbitration cases by the attorneys in respect to their other cases. Naturally, when a continuance is granted at the last minute, undue hardship is imposed on all involved, especially the arbitrators, who have set time aside from their practices as attorneys to serve on the board. A new time must be set for the hearing; court room arrangements must be made; and delay, however short, ensues. Certainly we can never expect to expunge the granting of continuances in compulsory arbitration cases, for they are a necessary part of legal procedure, and when given for a valid reason, serve a useful purpose. However, the suggestion of a few attorneys that they be made more difficult to obtain and a fine imposed on counsel seeking one within a certain period (two or three days) prior to the scheduled hearing, seems reasonable.[57]

A further difficulty is one which was expected and will no doubt cure itself with the lapse of time. It arises from the fact that the arbitrators

53. Kilpatrick v. Commonwealth, 31 Pa. 198 (1858). But see Commonwealth *ex rel.* Attorney General v. Potts, 79 Pa. 154 (1873); Commonwealth *ex rel.* Hite v. Swank, 79 Pa. 154 (1872) which held the creation of an additional court of record in Cambria County unconstitutional because it was not a wholly independent new court.

54. *Compulsory Arbitration in Pennsylvania,* Address by the Honorable William F. Dannehower, Judicial Conference, Pittsburgh, January, 1957, at p. 9. However, Judge Sweney did not feel that the number of continuances granted in Delaware County was high or that they were too readily granted. Interview with the Honorable Henry G. Sweeney, President Judge of the Court of Common Pleas, Delaware County, February 25, 1957.

55. Again it must be fairly noted that several attorneys felt that the number of continuances granted in Montgomery County arbitration proceedings were no greater proportionally than the number granted in jury trials, and that they were granted for compelling and necessary legal reasons.

56. See also *Compulsory Arbitration in Pennsylvania,* Address by the Honorable William F. Dannehower, Judicial Conference, Pittsburgh, January, 1957, at p. 16.

57. The suggestion of a few attorneys that the parties be made to appear or suffer a default judgment seems too harsh.

themselves are practicing attorneys, and therefore subconsciously project themselves into the case. This accounts for the complaints that the arbitrators attempt "to ferret out evidence" from the witnesses much as opposing counsel would; that they "tend to try the case and supply what they feel is a deficiency in the evidence"; that they "tend to an excessive cross-examination of witnesses which subjects the witnesses to four cross-examinations; and finally that some arbitrators have an inadvertent prejudice against either plaintiffs, or defendants, or insurance companies."[58] These complaints were by no means unanimous, but if not corrected could pose a threat to the effectiveness of compulsory arbitration. Yet, as has been stated, it is a drawback which is to be expected in the early stages of such a system. The total number of arbitrators available in Delaware and Montgomery Counties is almost four hundred attorneys. When they are asked to be "part time judges" one cannot expect them to forget immediately and entirely that they are first of all advocates. In time, with increasing experience, the difficulty should vanish, and with it any complaints of subconscious bias.

A tendency toward too much informality in the hearings is an additional problem, which, if not corrected, the lapse of time will magnify rather than cure. Such a tendency is noted only on a few of the questionnaires, nevertheless, if it became the rule rather than the exception it could be destructive of the whole system.[59] The solution to this difficulty lies with the arbitrators themselves. Though a relaxed and informal atmosphere to a degree is desirable, court room decorum and formality which stems from and fosters the high esteem in which our courts are held and which should accompany the dispensation of justice must be maintained.

Some question has arisen concerning the power of the board of arbitrators to grant a non-suit.[60] Since the Act of 1952 [61] was merely an amendment to the Act of 1836,[62] the sections of the latter act not amended still apply. Therefore, the section which lists the powers and duties of arbitrators and referees still controls. It states:

58. In addition twelve attorneys felt that the arbitrators made too minute an examination of the facts in an attempt to find contribuory negligence on the part of the plaintiff.

59. The few hearings that the writers have attended have been conducted with due courtroom decorum though in a relaxed atmosphere—the ideal situation.

60. Several attorneys noted that the board was reluctant to grant a nonsuit since the statute merely authorizes them to bring in an "award." One attorney noted the fact that the board refused to grant a nonsuit because it did not think itself empowered to do so. However, whether we regard the decision of the board as an "award" or a nonsuit their power to grant it to the defendant when the plaintiff has not made out a cause of action seems clear. The interpretation given in the text is considered to be correct by the Deputy Prothonotary of Montgomery County and the Court Administrator of Delaware County. Letter from the Deputy Prothonotary of Montgomery County to the writers, March 29, 1957; Letter from the Court Administrator of Delaware County to the writers, March 27, 1957. (Both letters are on file at the offices of the *Villanova Law Review*).

61. PA. STAT. ANN. tit. 5, §§ 21, 22, 24, 30, 31, 57, 71, 121 (Supp. 1956).

62. PA. STAT. ANN. tit. 5, §§ 1-145 (Supp. 1956).

> "Referees and arbitrators in every case . . . shall have power . . . . V. To decide both the law and fact that may be involved in the cause submitted to them." [63]

Since they thus have the power to decide questions of law, the power to grant a non-suit where plaintiff has not made out a cause of action would follow. More explicitly, the rules of Montgomery County provide that the arbitrators ". . . shall have the general powers of a court . . . ," [64] necessarily include the power to grant a non-suit.

A final problem,[65] if it may be classified as such, worthy of discussion, is whether the jurisdiction of the arbitrators should be extended to cases involving title to real estate. The Act of 1952, expressly excluded claims involving title to realty from the purview of compulsory arbitration.[66] It is interesting to note that of the 130 attorneys who completed questionnaires, 49 were in favor of extending the jurisdiction of the board to include claims involving title to realty.[67] The reason assigned almost unanimously was that attorneys are more capable than juries to determine questions involving title to real estate, and are more likely to adjudicate the issues objectively. On the other hand, when we consider the reasons offered by those who were not in favor of so extending the jurisdiction, the conclusion seems inevitable that under the present system it is not advisable. First of all many attorneys consider litigation of realty claims too technical and specialized a field where the determination of the issues involved is necessarily a long and complicated process better suited to a regularly constituted court. The determination of the jurisdictional amount ($1,000) would almost involve a trial in itself. Of necessity briefs would have to be submitted, and because of the serious questions of law involved, written opinions would

63. PA. STAT. ANN. tit. 5, § 121 (Supp. 1956).

64. See note 29 *supra.*

65. Several attorneys mentioned the following as difficulties which they had encountered:

(a) Lack of experience on the part of some of the arbitrators. (This is inevitable in view of the fact that the system is new and that among the some 400 lawyers eligible for appointment variety in degree of experience and ability is certainly to be expected. Also worthy of note is the fact that all attorneys who sit as arbitrators are not trial lawyers.)

(b) Attorneys are not ready for trial. (This is not a problem peculiar to compulsory arbitration, and although excessive informality would engender poor preparation, correction of the former would make poor preparation no more of a problem in compulsory arbitration than it is in the ordinary trial.)

(c) Lack of knowledge of the rules of evidence on the part of some lawyers and lack of ability to measure damages. One attorney stated that he was granted an award on an express, written contract, and that the award was 20% below the contract price, and he was awarded no interest. (Again, this is lamentable, but it is not a problem peculiar to the arbitration system. The system is only as good as those who operate it, and since this difficulty was noted only on three of 130 questionnaires, the arbitrators must be said to have won the respect of their colleagues as able administrators of justice.)

66. PA. STAT. ANN. tit. 5, § 30 (Supp. 1956).

67. Fifty-nine answered in the negative and twenty were without opinion. See Appendix.

be highly desirable. The arbitrator, with the limited fee granted him, cannot be expected to devote the necessary time involved in the adjudication of the technical questions involved,[68] for he is primarily an attorney and the time he is able to devote to his duties as an arbitrator is limited.

All the above considerations are in themselves compelling reasons, but when we reconsider the purposes of compulsory arbitration, we find no reason for extending the ambit of the act to claims involving title to realty. The *raison d'etre* of compulsory arbitration is the quick disposition of small claims which tend to congest the court calendars. First of all, most claims involving title to real estate are not small, and secondly, they are not the type of claims which have produced the tremendous backlog in our courts.

VI.

OVERLAPPING JURISDICTION.

A final area which remains to be considered is that of overlapping jurisdiction. The jurisdiction of the justice of the peace in Montgomery and Delaware Counties, in civil matters is $500.[69] Thus, in claims where the amount in controversy is $500 or less, an attorney in Delaware or Montgomery County has a choice of bringing the claim before a justice of the peace or submitting to arbitration. However, in fact, the choice is more apparent than real. In the survey conducted in connection with this Comment, it was found that of the 130 questionnaires answered, 55 attorneys categorically stated in one way or another, that they would choose arbitration rather than submit cases to justices of the peace who, in the words of most attorenys of this opinion,[70] are more often than not relatively incompetent in the law and nearly always find for the plaintiff. Twenty-one others stated that they would bring their action before a justice of the peace if they represented plaintiff, whereas they would choose arbitration if they represented defendant. Those who categorically selected a justice of the peace gave as their exclusive reason that it was cheaper and quicker. Twenty-five others[71] selected arbitration because of limited appeal, and stated that they would prefer bringing their claims before a justice of the

68. It should be noted that most judges have the assistance of a full-time clerk to aid him in the research involved.

69. PA. STAT. ANN. tit. 42, § 241 (Supp. 1956).

70. Attorneys prefer men learned in the law as members of the minor judiciary. Many of the present members of the minor judiciary are thought to be far from learned in the law, according to the survey. Some quotations from the questionnaires received will show this to be true: ". . . Justices of the Peace are woefully lacking in knowledge of the law . . ."; ". . . most Justices of the Peace favor plaintiff regardless of the facts and law . . ."; a frequent comment was that "J. P." was equal to Judgment for the Plaintiff; "Justices of the Peace are generally prejudiced and not learned in the law."; ". . . Arbitrators apply law rather than illusory ideas of substantial justice." (Reason given for preferring arbitration to a justice of the peace.)

71. These last figures overlap since, at times, more than one comment appeared on the same questionnaire.

peace only if the claims were not to be contested, because where the claim is contested, appeal from the decision of a justice of the peace is practically automatic. When we analyze the reasons given by the attorneys for their choices, the consensus seems to indicate that the sole utility of the civil jurisdiction of a justice of the peace is in ordinary uncontested collection claims.

Since justices of the peace have been viewed by the members of the bar with such antipathy, a secondary legislative purpose in creating the compulsory arbitration system may have been to curtail the effectiveness of the minor judiciary system by offering an economical mode of adjudication of small civil claims by men presumed to be more learned in the law.

VII.

CONCLUSION.

In summary, the system of compulsory arbitration has been accorded whole-hearted acceptance by the members of the legal profession in Pennsylvania. Its disadvantages are more than compensated for by its effective administration, and most of its other disadvantages can be easily corrected. There seems to be no doubt that since the system enjoys good favor, an increase in the jurisdictional amount will soon be forthcoming.[72] However, in attempting to broaden the scope of the system because it has been a success, one must not lose sight of the original purpose of the system. Compulsory arbitration is not a panacea. Its original purpose was the quick adjudication of small claims. To increase the jurisdictional limit to a very large sum [73] or to include claims involving title to real estate, would be an admission by the legislature of our need for another court or for more judges in our courts of common pleas. The better solution in that case would be to create another court or increase the number of judges in the courts of common pleas rather than create permanent extra-judicial boards to carry on judicial functions.

If it is a secondary legislative purpose of compulsory arbitration indirectly to curtail the frequency of resort to the minor judiciary in civil cases because of its apparently less than happy reputation among lawyers, then this purpose would be better accomplished by a long-awaited reform of the minor judiciary system in Pennsylvania by a constitutional amendment.[74]

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72. A bill to increase the jurisdictional amount was introduced in February of this year. PA. H.R. 293, Sess. of 1957.

73. An increase in its jurisdictional amount to $1500 or $2000 would be in keeping with the avowed purpose of compulsory arbitration since in these days of heavy traffic a large number of negligence cases in excess of $1000 is usual.

74. If compulsory arbitration is to become a permanent part of the judicial system in Pennsylvania, it should be put on a more stable basis, that is, permanent arbitration boards, and a complete abolition of the civil jurisdiction of the minor judiciary, as now constituted, should be effected. But if this happens, will not the General Assembly in effect have created another court?

All in all, the experiment with compulsory arbitration in Pennsylvania may be counted a success. Only time can disclose the value of a matured system which is now only developing, but if it stays within the bounds indicated it will be an invaluable aid to the effective administration of justice in Pennsylvania.

Anthony L. Bartolini
Anthony L. V. Picciotti

APPENDIX

	Montgomery County	Delaware County	Average
1. Average Number of Times before Arbitration Board:			
(a) Arbitrator	9.6	3.4	6.5
(b) Plaintiff's Attorney	6.2	2.2	4.2
(c) Defendant's Attorney	5.8	1.4	3.6
(d) Insurance Company's Attorney	4.2	0.5	2.4
2. Average Length of Hearings (in hours):			
(a) Maximum	5.1	4.0	4.6
(b) Minimum	1.6	1.0	1.3
(c) Average	0.75	1.9	1.3
3. Fee of Arbitrators Adequate Compensation:			Total
(a) Yes	52	37	89
(b) No	7	31	38
4. Favor Increase in Jurisdictional Amount:			
(a) Yes	29	20	49
(b) No	23	48	71
5. Proceedings Tend to Favor:			
(a) Plaintiffs	4	3	7
(b) Defendants	2	9	11
(c) Neither	53	56	109
6. Payment of Arbitration Fee as Condition of Appeal:			
(a) Favored	47	44	91
(b) Disapproved	9	21	30
7. Insurance Company Settlements:			
(a) Helped	3	7	10
(b) Hindered	5	11	16
(c) No Effect	30	26	56
8. Provision Allowing Liberal Construction of Rules of Evidence:			
(a) Aided	25	(Delaware has	25
(b) Not aided	11	no such provision)	11
(c) No effect	19		19
9. Extension of Jurisdiction to Realty Claims:			
(a) Yes	24	25	49
(b) No	24	35	59
10. Use Justice of Peace or Arbitration Board Where Their Jurisdictions Overlap:			
(a) Justice of Peace	9	24	33
(b) Arbitration	55	46	101

TORTS—PERSONAL INJURY—PROOF OF CAUSATION OF HERNIATED INTERVERTEBRAL DISC.

Perhaps in no other field of law must the trial lawyer digress as far from his own realm and transgress so deeply, a neophyte, into the pulsating and somewhat frightening field of medicine, as when he comes face to face with a personal injury case. The problem becomes more complex, when he must attempt to prove the causation of the "slipped" intervertebral disc, which was unknown to the physician himself until comparatively recent years. In proving his case, the lawyer must have a comprehensive understanding of the spinal column, and of the disc as a medical entity. For his client's welfare the attorney must put himself into the shoes of the physician, and analyze the medical approach to the problem to be better able to understand the legal implications involved. It is not within the scope of this Comment to attempt a solution to the myriad problems concerning the proof of the causation of the "slipped" disc, but, rather, to stimulate apprehension of the problems, so that the legal practitioner, in conjunction with the physician, may present his case in the best possible light.

I.

THE SPINAL COLUMN.

In order to discuss adequately the causation of a disc injury, the attorney must have a working knowledge of the entity of which the disc is an integral part, namely, the spinal column. The following is considered to be an accurate general account of the anatomy and physiology of the spine.[1]

The spinal column consists of thirty-three vertebrae, soft tissue known as intervertebral discs, and ligaments which serve to hold the spinal column together. The spine extends from the base of the skull, continues down the back, to a point midway through the pelvic area. There are two main divisions in the column: *the true, or movable vertebrae,* and *the false, or immovable vertebrae.*

The true vertebrae division is further divided into three areas, namely, the cervical, the thoracic, and the lumbar. The upper section is the cervical or neck area, consisting of seven vertebrae. The second area, the thorax or middle back, consists of twelve vertebrae to which the ribs are attached. The third section of the true vertebrae, the lumbar or lower back, consisting of fourteen vertebrae, is where eighty-five to ninety-five per cent of disc injuries occur.[2]

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1. See COLONNA, REGIONAL ORTHOPEDIC SURGERY 122 (1950); Lecture by Tuby and Bernstein, Philadelphia Legal-Medical Institute, Oct. 12, 1956.

2. Wiltberger, *The Medicolegal Aspects of Low Back Pain,* 389 INS. L.J. 410 (1956).

The false or immovable vertebrae consists of the sacrum, a triangular bone upon which the lumbar rests, and the coccyx, or more commonly, the tail, which has no movement.

The spinal column is formed somewhat like the letter "S." The cervix has a lordatic, or forward curve; the thorax, a kyphotic, or backward curve; and the lumbar, again a forward curve. Awareness of these curves is most important, for loss of either is one of the elements which may be shown to prove a disc injury.[3]

II.

THE INTERVERTEBRAL DISC.

Quite often, in reference to the injury under consideration, the term "slipped" disc is used rather than the technically correct term of "herniated" disc. As a matter of fact, the disc does not slip, but ruptures and the inner substance of the disc, called the nucleus pulposus, infringes upon and exerts pressure on the nerves emerging from the spinal cord. Use of this misnomer, while not extremely important, does cause unnecessary confusion and misapprehension on the part of laymen and lawyers alike. In one case the herniation was referred to as a fracture,[4] which is completely fallacious and ambiguous.

In presenting a herniated disc case one should be certain to have a precise knowledge of medical terminology. A brief definition of the disc and its function would serve a useful purpose. The disc is an oval washer type structure consisting of the annulus fibriosus, or hard outer covering, and the nucleus pulposus, or gelatinous material which has a spongy consistency, so that when compressed it has a springlike movement.[5] In short, the disc might be termed the "shock absorber" whose purpose is to ward off severe jarring which might possibly injure the vertebrae. An apt analogy has been drawn between the herniation of an intervertebral disc and the blowout of an automobile tire.[6] When there is sudden and extreme force exerted on a portion of the disc, there may be a break in the hard outer case, or annulus fibriosus, thereby allowing the nucleus pulposus to flow through and infringe upon the nerves. There it solidifies, causing pain and possible impairment of the functions of the extremities. It must be remembered that to be a true herniated disc, the nucleus pulposus must flow through the rupture at a place where it can irritate nerve roots.[7]

3. 1 CURRENT MEDICINE FOR ATTORNEYS 25 (1953).

4. Kabinski v. George Weston Ltd., 306 N.Y. 432, 99 N.E.2d 217 (1951).

5. MEDICOLEGAL ASPECTS OF HEAD, NECK AND BACK INJURIES 165 (Stumpf and Horwitz ed. 1955).

6. 1 BELLI, MODERN TRIALS § 88 (1954).

7. Smith, *The Intervertebral Disc in Forensic Medicine*, 24 INDUSTRIAL MEDICINE & SURGERY 36 (1955).

III.

ELEMENTS OF PROOF.

Because of the comparatively recent recognition of the herniated intervertebral disc by medical men,[8] it has been the popular opinion of many lawyers that it is nearly impossible to prove whether there has or has not been a herniation of the disc. In truth, the converse of this is correct, for, while the only positive method of determining the presence of a ruptured and herniated disc is by operation,[9] there are certain objective signs of a herniation.

The legal practitioner, through a physician, should make absolutely certain that the following symptoms are thoroughly tested for: history of acute "abnormal motion," [10] spasm of the muscles in the back which cannot be feigned,[11] loss of the lordatic curve,[12] pain radiating down the back of the leg,[13] and loss of the Achilles tendon reflex.[14]

Three other vital tests should be made in order to insure adequate pretrial investigation of the existence of the herniation. The first of these is the Lasque Test.[15] In this test the muscles of the back are stretched by placing the patient on his back, bending his leg and suddenly, and while the hip is in flexion, moving the leg back down again. The second test is called the Faber Test,[16] wherein the physician takes and places the heel of one leg of the patient, who is lying on his back, on the knee of the patient's other leg, and then pushes the knee to the table, thus rocking the pelvis and causing excruciating pain if a herniation is present. The third, and most widely used test is the McBride Disability Evaluation Test,[17] the popular name of which "toe to mouth," explains its operation.

If time has been taken, and an effort made to see that the basic symptoms have been tested for, and one of the aforementioned vital tests performed, the chances of obtaining a favorable verdict will be greatly enhanced, provided the symptoms are present and the tests positive. Likewise, the defendant's attorney would do well to bring out on cross-examination the fact that the vital tests were not performed, or that some of the basic symptoms have not been tested for, or the tests were negative.

8. Young, *Additional Lessons Stimulating Protruded Intervertebral Disc,* 17 J INT. COLLEGE OF SURGEONS 831 (1952); 1 CURRENT MEDICINE FOR ATTORNEYS 26 (1953).

9. Smith, *supra* note 7.

10. Khedraoo and Scuderi, *Herniation of the Intervertebral Disc,* 23 J. INT. COLLEGE OF SURGEONS 194 (1955).

11. *Ibid.*

12. 1 CURRENT MEDICINE FOR ATTORNEYS 26 (1953).

13. Denker and Kennedy, *Medico-Legal Aspects of Spinal Cord Injuries,* 11 Mo. L. REV. 111 (1946).

14. 1 CURRENT MEDICINE FOR ATTORNEYS 26 (1953).

15. WILES, ESSENTIALS OF ORTHOPEDICS 36 (1949).

16. Lecture by Tuby and Bernstein, Philadelphia Legal-Medical Institute, Oct. 12, 1956.

17. *Ibid.*

IV.

THE XRAY.

The Xray should be briefly mentioned because of its prominent use in the field of medicine for determining internal injuries. But it is mentioned only to quickly dispel any belief of its value in determining the existence of a disc herniation. Because of the nature of the substance of the disc, it will not show up on an ordinary Xray. The sole use of the Xray would be to detect a narrowing of the interspace between the vertebrae which may lead to a suspicion of an abnormal disc.[18] An abnormal disc may only be suspected because the thickness of a *normal* disc can vary with those immediately above or below any given vertebrae. Also, the thickness of a disc can vary from the time of arising to the time of retiring; therefore, the importance of a narrowed interspace in diagnosis may be insignificant.[19]

However, the use of the Xray is not entirely without value. When combined with a pontopaque, that is a contrast media of iodized oil or air injected into the spine, evidence that a herniation extends to the spinal canal may be shown by means of an Xray.[20] This is known as a myelogram, and is generally accepted as the most objective of all the tests employed to delineate herniations of the intervertebral discs.[21] But the use of the myelogram has not escaped criticism by prominent neurologists and orthopedic surgeons.[22] This so-called positive Xray is performed by injecting dye (the pontopaque) into the space between the second and third lumbar vertebrae. The solution then moves by gravitation, and positive Xrays are taken. If a herniation is present, there should be a defect in the pontopaque at that point. It should be pointed out that this procedure is far from perfect, in that there may be defects in the column where there is in fact no herniation, thus giving birth to the term "False Positive" myelogram.[23] Medical authorities are virtually in unanimous agreement that the myelogram should not be resorted to unless an operation is definitely otherwise indicated, mainly because of the difficulty in removing the pontopaque solution.[24] The courts have generally been aware of the harm which may result from the myelogram and have not required the

18. Smith, *supra* note 7.

19. *Ibid.*

20. Donaldson, *Medical Facts That Can And Cannot Be Proved By X-Ray,* 41 MICH. L. REV. 875 (1943).

21. Epstein and Davidoff, *Iodized Oil Mylography of the Cervical Spine,* 52 AM. J. ROENTGENOGRAPHY 253 (1944).

22. French and Trowbridge, *The False Positive Lumbar Myelogram,* 4 NEUROLOGY 339 (1954); Smith, *The Intervertebral Disc in Forensic Medicine,* 24 INDUSTRIAL MEDICINE AND SURGERY 36 (1955).

23. French and Trowbridge, *The False Positive Lumbar Myelogram,* 4 NEUROLOGY 339 (1954).

24. Lecture by Tuby and Bernstein, Philadelphia Legal-Medical Institute, Oct. 12, 1956.

injured party to submit to its use.[25] Difficulty in removing the dye (usually this can be done only by operation) is the cause of concern, since the potential for infection is increased by its retention.

V.

WHIPLASH INJURY.

When a herniation of an intervertebral disc occurs in the cervical area of the spine, generally it is the result of the so-called "whiplash" injury. Briefly, this injury can be described as occuring when an automobile passenger snaps his neck in a series of rapid, more or less violent, oscillations usually due to a rear-end collision.[26] The person with a long thin neck is especially apt to sustain substantial disability.[27] Because of his unsuspecting, relaxed condition at the time of the collision, the victim is prone to develop a disturbing emotional reaction.[28] The attorney should be careful to consider this factor when calculating his damage claim.

Coincident with the factor of the relaxed condition of the injured party, and his oftentimes complete unawareness of the impending collision, is the fact that the victim is seldom incapacitated immediately after the accident. It is usually several hours later or even the next day that the symptoms appear: neck pain, stiffness, and back pain.[29] It should be noted that the extent of property damage to the automobile is practically irrelevant when considering whether or not to bring suit because tests have shown that there is more likelihood of a disc injury occurring when the offending automobile was being driven at ten miles per hour than at twenty miles per hour.[30]

VI.

THE ATTORNEY'S PROBLEM AT THE TRIAL STAGE.

The attorney's task of convincing the trier of fact that his client has suffered a bona fide disc injury is indeed difficult. The way is a tedious one, and it must be remembered that the symptoms of a herniated intervertebral disc may come and go. For his reason, the same individual may be examined by two equally competent physicians on two distinct occasions

25. Sultan & Chera Corp. v. Fallas, 59 So.2d 535 (Fla. 1952); Crawford Paint Works v. Pascatore, 72 R.I. 471, 53 A.2d 452 (1947).

26. Abbott and Gray, *Common Whiplash Injuries to the Neck,* 152 A.M.A.J. 1698 (1953).

27. Shenkin, *Motorized Intermittent Traction for Treatment of Herniated Cervical Disc,* 156 A.M.A.J. 1067 (1954).

28. Abbott and Gray, *supra* note 26.

29. *Ibid.*

30. Severy, Mathewson, and Bechtol, *Controlled Automobile Rear-end Collisions, an Investigation of Related Engineering and Medical Phenomena,* CANADIAN SERVICES MED. J. 727, 759 (1955).

with varying results in diagnosis—a fact which is difficult for attorneys and jurors to understand.[31]

The problem is further compounded by the nature of the injury. Not only may the classic symptoms come and go, but also there is often a delayed reaction, and it may be from six months to a year after the accident before such symptoms arise.[32]

The problem is less one of law than of trial technique. The attorney should leave no stone unturned. Because of sharp critical cross-examination, he must require complete examination of his client by his physician witness before he takes the witness stand. The medical expert must be prepared to testify concerning the use of the tests previously mentioned. Of course the physician is not required to establish the fact beyond a reasonable doubt, nonetheless, he must explain why he believes his conclusions correct.[33] The trial lawyer should beware of a superficial approach by the physician for otherwise it is usual that the physician will not give the matter more than superficial attention either in preparation or while being examined on the witness stand.[34]

Even in the field of workmen's compensation, where a favorable attitude towards the employee permeates the whole proceeding, the courts will ordinarily not allow recovery when the claimant testifies that while doing his *normal* work he "got a pretty sharp pain in the small of [his] back" and was not able to straighten up.[35] It seems that a majority of courts require a showing that the injury was due to an "accident" (as the term is defined in the statute) arising out of the course of employment, and will find no "accident" unless the injury occurred while the injured person was performing his usual work in the usual manner.[36] However, in the case of *Purity Biscuit Co. v. Industrial Comm'n*,[37] recovery was allowed even though the disability was caused by ordinary exertion without unusually heavy labor. The court found that the usual exertion of the employee was a causative factor in bringing on the ultimate disabling condition. It is submitted that the latter rule is the better since causation is the real problem involved in these cases, and if usual exertion is found to be a causative factor there seems to be no reason to deny recovery, even though an "accident" cannot be shown. As an aid in establishing causation, medical

31. Wiltberger, *Medicolegal Aspects of the Low Back Pain*, 389 INS. L.J. 410 (1956).

32. McNeal, *"Whiplash"—Defense Counsel's View*, 6 CLEV.-MAR. L. REV. 38 (1957).

33. Gray, *Requisites and Importance of Sound Medical Examination in Medica-Legal Cases*, 18 ROCKY MT. L. REV. 173 (1946).

34. Curphey, *The Medical Preparation of a Medico-Legal Case: The Physician's Viewpoint*, 154 A.M.A.J. 487 (1954).

35. Landis v. General Motors Corp., 180 Pa. Super. 332, 119 A.2d 645 (1956).

36. McNeill v. Thompson, 53 So.2d 868 (Fla. 1951); Schaefer v. Central News Co., 179 Pa. Super. 559, 118 A.2d 268 (1955); Apker v. Crown Can Co., 150 Pa. Super. 402, 28 A.2d 551 (1942).

37. 115 Utah 1, 201 P.2d 961 (1949).

treatment should be procured so soon as possible after the injury. The Pennsylvania Superior Court emphasized this in allowing a claim for injury occurring in unusual circumstances saying:

> "The present claim does not rest solely on an employee's testimony of experiencing sharp pain followed sometime later by a disability which might be attributed to a condition not traumatic in origin, but due to a long standing infection. Here, pain was promptly diagnosed by a skilled orthopedic surgeon as a ruptured disc resulting from that strain and an operation a few days later demonstrated the correctness of the diagnosis and restored the patient to a sound condition of the body; thus proving the causal connection between the accident and the disability." [38]

As the court indicates above, early medical treatment will facilitate the establishment of causation.

Cognizance should also be taken of the fact that an operation will not always lead to a complete cure of the herniation. Even after a rather successful lamenectomy (disc removal), it is frequently necessary for the injured party to pursue a new and less laborious occupation. One reason advanced for this is that, in spite of a successful operation, there usually will be some residual disability.[39]

Recently the courts have held that an injured party is not required to submit to a disc operation, usually on the ground that such an operation is uncertain as to ultimate beneficial result, is in some degree dangerous to life and limb, and might involve extraordinary suffering.[40]

There have been cases allowing recovery on the specific ground of "wear and tear", rather than requiring a specific trauma.[41] This possibility should not be overlooked where the particular employment is of a nature which could cause an increase in the normal degeneration of the body.

VII.

DAMAGES.

The signs and symptoms of an intervertebral disc herniation may come and go, the client being disabled for various periods and then returning to full capacity between such periods.[42] For this reason a monetary evaluation of disability is, to say the least, difficult. The following examples, while not solving the difficulty, demonstrate the possibilities for

38. Gavula v. Sims Co., 155 Pa. Super. 206, 38 A.2d 482, 485 (1944).

39. See note 31 *supra*.

40. Sultan and Chera Corp. v. Fallas, 59 So.2d 535 (Fla. 1952); U.S. Coal and Coke Co. v. Lloyd, 305 Ky. 105, 203 S.W.2d 47 (1947); Maneini v. Superior Ct., 78 R.I. 373, 82 A.2d 390 (1956).

41. Stokes v. Miller, 50 So.2d 509 (La. 1951); Caddy v. Maturi & Co., 217 Minn. 207, 14 N.W.2d 393 (1944).

42. 11 CURRENT MEDICINE FOR ATTORNEYS 2 (1955).

total recovery. Probably one of the largest awards given for this type of injury was to a seaman injured when a catwalk gave way from under his feet, causing herniation of two lumbar discs. After undergoing a fusion of the lower spine he was awarded the sum of $149,788.[43] Other illustrative figures are: $50,000,[44] $30,000,[45] $25,000,[46] down to a low of $5,000.[47] Since juries do not give a schedule of apportionment to elements of damage, these figures can be misleading.

The *Marquette Medical Review* has reported the use of a new acrylic plastic which can be moulded into the space between the vertebrae, from which the disc has been removed by surgery.[48] It appears that this device markedly reduces overall disability. The possibility of using the device should be explored by the defendant's attorney as a means of reducing the amount of damages.

VIII.

THE MEDICAL EXPERT.

Possibly, the greatest difficulty at trial with which the attorney must contend is the medical expert.[49] Both parties call their own experts, and more often than not, they give testimony which is contradictory in every respect and often of no help to the trier of fact. In truth, the attorney himself may be completely surprised at the testimony of his own expert. The lawyer and the physician should meet in person and study with care the information currently available.[50] In this way confusion will be avoided and perhaps the case won.

Expert medical testimony is admissible to show causation.[51] However, oftentimes, rather than being educated on the medical aspects of the case, the trier of fact is confused, much less enlightened, by the testimony of the expert witness. Doubtless, the technical nature of the testimony contributes to this confusion. Another factor adding largely to the confusion is the fact that since each litigant procures his own expert, and the expert, consciously or subconsciously, is anxious to please his "employer", he frequently gives biased testimony. The medical expert has become a persuader rather than an informant.[52] Too often the worth of the expert's testimony depends

43. Jackson v. Sabine Transportation Co., (Texas County Ct. 1954) as cited in 15 NACCA L.J. 424 (1955).

44. Kaup v. Crawford Trucking Co., 283 App. Div. 838, 128 N.Y.S.2d 699 (3d Dep't 1954).

45. Sandifeor v. Thompson, 280 S.W.2d 412 (Mo. 1955).

46. Knoehe v. Meyers Sanitary Co., 177 Kan. 423, 280 P.2d 605 (1955).

47. Berg v. Ullievic, 244 Minn. 390, 70 N.W.2d 133 (1955).

48. 20 MARQ. MED. REV. 62 (1955); 11 CURRENT MEDICINE FOR ATTORNEYS 2 (1955).

49. 6 WIGMORE, EVIDENCE § 1692 (3d ed. 1940).

50. Curphey, *The Medical Preparation of Medico-Legal Cases: the Physician's Viewpoint,* 154 A.M.A.J. 487 (1954).

51. Langenfelder v. Thompson, 179 Mo. 502, 20 A.2d 491 (1941).

52. 1 BELLI, MODERN TRIALS § 82 n.11 (1954).

not on what he says, but on how he says it. The remedy for this situation seems to be found in the plan of providing impartial, independent medical experts, as is done by the Supreme Court of New York.[53] The experts are chosen by the court from a panel selected by the New York Academy of Medicine and the New York County Medical Society. While it is not within the scope of this Comment to enter into a detailed discussion of this plan, it must be mentioned that it has met with remarkable success during its short existence (2 years).

IX.

CONCLUSION.

While the problem of proving to the trier of fact any personal injury and, in particular, a herniation of an intervertebral disc is Herculean, it is not impossible. The problem stems from an even greater one, that is, lack of a basic understanding between the medical and legal professions. There should be greater emphasis placed on medico-legal problems in both medical schools and law schools. The intervertebral disc herniation is but one facet of a many-sided prism, where cooperation between the professions is needed. As is succinctly stated in the concluding section of the Interprofessional Code of the Wisconsin State Medical Society and Bar Association:

> "It is an obligation which each profession owes to the other in the best interest of the public as well as in the best interest of the separate reputations of the two professions, and that while law and medicine may each be termed a science, each is an inexact science; and such inexactness is and always will be accented by the human limitations of its practitioners." [54]

Without this cooperation, no medico-legal case will ever be completely fruitful.

John F. Gaffney

TORTS—RES IPSA LOQUITUR—THE PROBLEM OF PROOF IN THE EXPLODING BOTTLE SITUATION.

Established tradition within a jurisdiction has ever militated against the application of novel doctrines. Their ultimate application is frequently prompted by the recognition of an important need. The resoluteness of adherence to their tenets is often tempered as if in deference to a once undoubted authority. Within many American jurisdictions there

53. Peck, *A Successful New Plan: Impartial Medical Testimony,* 42 A.B.A.J. 931 (1956).

54. *Medicine and the Law: Mutual Understanding Between Physicians and Attorneys,* 160 A.M.A.J. 1415 (1956).

is evidence that the doctrine of res ipsa loquitur is usurping the power of the traditional methods of proof of negligence in cases of injury arising from exploding bottles. This Comment has as its purpose a review of this phase of the doctrine; documenting the difficulties which it initially encountered, and the changes in the doctrine resulting from this encounter.

I.

APPLICATION OF THE DOCTRINE.

The application of the doctrine of res ipsa loquitur to cases involving injuries through exploding bottles is at most an exception to one of the essentials of the doctrine or at least an extension of the doctrine as to this particular. Illustrative of the nature and limitations of the doctrine is the case of *Cohn v. United Airlines Transport Corp.*,[1] wherein it is pointed out that the following must be shown in order to invoke the rule:

1. The injuring instrumentality must have been in the management or control of the defendant or his servants.
2. The accident must have been such that ordinarily it would not have occurred if those in control had exercised due care.
3. The inference of the defendant's negligence is reasonable under the circumstances.

A further element, often proffered as the sole reason for the application of the doctrine, is that the circumstances surrounding the accident are peculiarly within the knowledge of the defendant.[2] This last requisite partakes of the prior element of control, but it further recognizes an evidentiary advantage enjoyed by the defendant.

Control, as a necessary factor, has confronted litigants in exploding bottle suits with their most difficult problem. This control is physical in its nature under the classic interpretation of the doctrine.[3] In addition it has been held that the control or management of the instrumentality causing the injury must be exclusive.[4] When it is realized that the significance of the doctrine is one of probabilities, the reason for the emphasis placed upon this element becomes quite apparent.[5] Under the doctrine it is in-

1. 17 F.Supp. 865 (D.C. Wyo. 1937).

2. Auzene v. Gulf Public Service Co., 181 So. 54 (La. App. 1938); Joly v. Jones, 115 Vt. 174, 55 A.2d 181 (1947).

3. Sanders v. Nehi Bottling Co., 30 F.Supp. 332 (N.D. Tex. 1939); Gerber v. Faber, 54 Cal. App. 674, 129 P.2d 485 (1942); Stodder v. Coca Cola Bottling Plants, 142 Me. 139, 48 A.2d 622 (1946); Winifree v. Coca Cola Bottling Works, 19 Tenn. App. 144, 83 S.W.2d 903 (1935); Alagood v. Texas Bottling Co., 135 S.W.2d 1056 (Tex. Civ. App. 1940); 17 ALBANY L. REV. 200 (1953); 27 ST. JOHN'S L. REV. 159 (1952).

4. Sanders v. Nehi Bottling Co., 30 F.Supp. 332 (N.D. Tex. 1939); Gerber v. Faber, 54 Cal. App. 674, 129 P.2d 485 (1942); Naumann v. Wekle Brewing Co., 127 Conn. 44, 15 A.2d 180 (1940); Stodder v. Coca Cola Bottling Plants, 142 Me. 139, 48 A.2d 622 (1946); 27 ST. JOHN'S L. REV. 159 (1952).

5. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344 (1952).

ferred from the happening of the event and the surrounding circumstances that defendant's negligence more probably than any other agency has been the proximately causative factor in the plaintiff's injury.[6] With the presence of exclusive physical control, this probability is increased. In its absence, the probability that some other cause has intervened is increased, and to that extent the probability of causation on the part of the defendant decreases.

Ordinarily control on the part of a defendant-bottler is lacking when the consumer or the retailer is injured by the explosion of a bottle. Both possession and control terminate upon delivery of the commodity to the retailer.[7] It became necessary therefore to change this element of res ipsa loquitur if the doctrine was to be applied to such instances. This was accomplished in *Payne v. Rome Coca-Cola Bottling Co.*,[8] which has since been regarded as a leading case in the field. There the court recognized that under the doctrine of res ipsa loquitur the injuring act must bespeak the negligence of the defendant, and that, prima facie, want of due care should be referred to the one under whose control the instrumentality was found. Admitting, however, that inferential negligence should be imputed to those intervening after the defendant bottler has lost possession, this inference is rebutted when it affirmatively appears that the intervenor (usually the retailer) neither handled the bottle improperly, nor did anything to change its condition from that in which it was received. The inference of negligence remains, however, and is ultimately cast back upon the defendant by a systematic process of elimination. Previously the court had satisfied the other requirements of the doctrine, reasoning that bottles filled with a harmless beverage do not ordinarily explode, and when they do, an inference of negligence may arise.

Control as an essential element has since been channeled so that the rule as it exists today states that where the defendant had control of the instrumentality at the time of the allegedly negligent act, though not at the time of the injury, this will suffice, always provided, however, that the plaintiff disproves any intervening negligence and that the instrumentality had not been changed since it left the defendant's possession.[9] Unlike contributory negligence which at times must be shown affirmatively by the defendant, the burden of eliminating intervening causation is always cast upon the plaintiff.[10]

6. Stewart v. Crystal Coca Cola Bottling Co., 50 Ariz. 60, 68 P.2d 953 (1937); Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344 (1952).

7. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344 (1952).

8. 10 Ga. App. 762, 73 S.E. 1087 (1912).

9. Hoffing v. Coca Cola Bottling Co., 87 Cal. App. 2d 371, 197 P.2d 56 (1948); Cole v. Pepsi Cola Bottling Co., 65 Ga. App. 204, 15 S.E.2d 543 (1941); Macon Coca Cola Bottling Co. v. Crane, 55 Ga. App. 573, 190 S.E. 879 (1937); Payne v. Rome Coca Cola Bottling Co., 10 Ga. App. 762, 73 S.E. 1087 (1912); Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601 (1941); Kees v. Canada Dry Ginger Ale, 289 Mo. App. 1080, 199 S.W.2d 76 (1947); Stalle v. Anheuser-Busch, 307 Mo. 520, 271 S.W. 497 (1925); Honea v. Coca Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968 (1944).

10. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344 (1952); Auzene v. Gulf Public Service Co., 181 So. 54 (La. App. 1938); Sater v. Griesedieck Western

Courts, in electing whether or not to apply res ipsa loquitur often point out that the greater weight of American authority favors applying the doctrine to cases involving exploding bottles.[11]

In some jurisdictions the application of the doctrine gives rise to a presumption of negligence.[12] In others it only permits an inference of fact.[13] In either case, it may be rebutted by defendant's showing that he discharged the duty of care imposed upon him.[14]

II.

INTERVENING CAUSATION.

Assuming the availability of res ipsa loquitur to a plaintiff injured by an exploding bottle, he must initially, in order to enjoy its benefits, disprove intervening causation.[15] If, despite his efforts, it remains equally probable that the injury could have come about by means other than the negligence of the defendant, the doctrine is inapplicable.[16]

Some jurisdictions have been more lenient than others with regard to the discharge of this burden. The standards vary from requiring a disproving of their causative relation to a degree of reasonable certainty,[17] to those which hold it sufficient if the evidence permits a reasonable inference that the instrumentality was not accessible to extraneous forces and was carefully handled by the plaintiff and any third person.[18] The general rule states that the plaintiff has discharged his burden if he has disproven intervening causation by a preponderance of the evidence,[19] circumstantial or otherwise.[20] The effect of plaintiff's successfully dis-

Brewery Co., 200 Okla. 302, 193 P.2d 575 (1948); Boykin v. Chase Bottling Works, 32 Tenn. App. 518, 222 S.W.2d 889 (1949); Benkendorfer v. Garrett, 143 S.W.2d 1020 (Tex. Civ. App. 1940).

11. Boykin v. Chase Bottling Works, 32 Tenn. App. 518, 222 S.W.2d 889 (1949); Benkendorfer v. Garrett, 143 S.W.2d 1020 (Tex. Civ. App. 1940); 4 LA. L. REV. 606 (1942).

12. Macon Coca-Cola Bottling Co. v. Crane, 55 Ga. 573, 190 S.E. 879 (1937); 6 FORDHAM L. REV. 483.

13. Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944); Cole v. Pepsi Cola Bottling Co., 65 Ga. App. 204, 15 S.E.2d 543 (1941); Payne v. Rome Coca Cola Bottling Co., 10 Ga. App. 762, 73 S.E. 1087 (1912); 17 ALBANY L. REV. 200 (1953); 4 SYRACUSE L. REV. 148 (1952).

14. Vargas v. Blue Seal Bottling Works, 12 La. App. 652, 126 So. 707 (1930).

15. Zentz v. Coca Cola Bottling Co., 39 Cal. 2d 436, 247 P.2d 344 (1952); Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944); Hoffing v. Coca Cola Bottling Co., 87 Cal. App.2d 371, 197 P.2d 56 (1948); Canada Dry Ginger Ale Co. v. Jochum, 43 A.2d 42 (D.C. 1945); Meyers v. Alexandria Coca Cola Bottling Co., 8 So.2d 737, (La. App. 1943); Kees v. Canada Dry Ginger Ale, 239 Mo. App. 1080, 199 S.W.2d 76 (1947); 42 MICH. L. REV. 536 (1943).

16. Stewart v. Crystal Coca Cola Bottling Co., 50 Ariz. 60, 68 P.2d 952 (1937); Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344 (1952); Boykin v. Chase Bottling Works, 32 Tenn. App. 518, 222 S.W.2d 889 (1949).

17. Auzene v. Gulf Public Service Co., 181 So. 54 (La. App. 1938).

18. Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944); Pattinson v. Coca Cola Bottling Co., 333 Mich. 253, 52 N.W.2d 688 (1952); Honea v. Coca Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968 (1944).

19. Benkendorfer v. Garrett, 143 S.W.2d 1020 (Tex. Civ. App. 1940).

20. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344 (1952); Escola

charging this burden has been described in capsule form as a process whereby the plaintiff proves the defendant's negligence by disproving that of others.[21]

Conflicts arise in the application of these rules to both intervening negligence and unavoidable accident. It is generally agreed that every remote possibility need not be considered by the plaintiff.[22] However, what constitutes a remote possibility has led to some disagreement. This is particularly manifest when the bottle has been channeled through a supermarket. In such instances an almost insurmountable barrier has been placed before the plaintiff, the courts often dismissing his efforts with the curt observation that the bottle could have been injured or shaken while in the supermarket.[23] To add to the difficulty, the testimony of the manager as to the condition of the bottle while in his place of business has been held inadmissible as mere conjecture and speculation.[24] Of some importance in the supermarket cases is the duration of the bottle's stay in the store, as this reflects on the probability of its being rendered defective. Though of somewhat similar characteristics, the courts have been less demanding with regard to self-service bottle dispensers.[25]

Furthermore, in view of the low elasticity of glass, the plaintiff, in his proof must consider any unusual temperature changes to which the bottle might have been subjected.[26] An explosion of a bottle upon being exposed to ordinary and anticipated refrigeration is not evidence of intervening causation or contributory negligence,[27] but points more readily to a defect in the glass or to excessive carbonation.[28]

Illustrative of this conflict are cases wherein it is held not to amount to contributory negligence for the plaintiff to have emptied a warm case of Coca-Cola into ice,[29] and others which hold the doctrine of res ipsa inapplicable due to the probability that bottles in a cooler were injured by emptying ice upon them.[30]

Finally while some courts refuse to apply the doctrine on the basis of the possibility that the injury arose from a latent defect,[31] that is, an

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v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (1944); Pattison v. Coca Cola Bottling Co., 333 Mich. 253, 52 N.W.2d 688 (1952).

21. Auzene v. Gulf Public Service Co., 181 So. 54 (La. App. 1938).

22. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344 (1952); Hoffing v. Coca Cola Bottling Co., 87 Cal. App.2d 371, 197 P.2d 56 (1948); Boykin v. Chase Bottling Works, 32 Tenn. App. 518, 222 S.W.2d 889 (1949); Honea v. Coca Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968 (1944); Benkendorfer v. Garrett, 143 S.W.2d 1020 (Tex. Civ. App. 1940).

23. Hughes v. Miami Coca Cola Bottling Co., 155 Fla. 299, 19 So.2d 862 (1944); Kees v. Canada Dry Ginger Ale, 239 Mo. App. 1080, 199 S.W.2d 76 (1947).

24. Kees v. Canada Dry Ginger Ale, 239 Mo. App. 1080, 199 S.W.2d 76 (1947).

25. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344 (1952); Macres v. Coca Cola Bottling Co., 290 Mich. 567, 287 N.W. 922 (1939).

26. Kees v. Canada Dry Ginger Ale, 239 Mo. App. 1080, 199 S.W.2d 76 (1947).

27. Coca Cola Bottling Works v. Shelton, 214 Ky. 118, 282 S.W. 778 (1926).

28. *Ibid.*

29. *Ibid.*

30. Boykin v. Chase Bottling Works, 32 Tenn. App. 518, 222 S.W.2d 889 (1949).

31. Slack v. Premier-Pabst Corp., 40 Del. 97, 5 A.2d 516 (1939); Stodder v. Coca Cola Bottling Plants, 142 Me. 139, 48 A.2d 622 (1946).

unavoidable accident, others reason that the mere possibility of a latent defect is insufficient to prevent its application.[32]

III.

STANDARD OF CARE.

The duty of care owed the retailer and consumer by a defendant-bottler is not a high standard of care even though issues of public health might be argued,[33] nor is the standard raised upon the basis of inherent danger, which doctrine does not govern cases of exploding bottles.[34] The defendant, usually the bottler, must exercise that degree of care which an ordinary prudent man would exercise under the circumstances.[35] Thus even if a defect in the bottle be shown, it must be further shown that such a defect would be discoverable through the exercise of ordinary care.[36] In fashioning his product it is observed that the bottler need not be the first to employ new precautions, but it is indicative of carelessness if he is the last to lay the old aside.[37]

If his beverage is such as will explode under sudden changes in temperature, which is the exceptional case, or conversely necessitates a gradual cooling, his duty includes warning those who would come into contact with it, or taking other precautionary measures such as encasing the bottle in wire mesh.[38]

The duty of care will, of course, depend upon the status of the person injured. To the consumer and retailer his duty is one of ordinary care.[39] A similar duty is owed an invitee, such as one touring his bottling plant.[40] However, it was held in *Vargas v. Blue Seal Bottling Works,*[41] that proof of negligence under the doctrine of res ipsa loquitur will not aid a bare licensee, to whom the owner owes only the duty of abstaining from wanton and purposeful injury. As such, the plaintiff takes the premises as he finds them.

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32. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344 (1952); Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601 (1941).

33. Graham v. Clour, 30 Tenn. App. 306, 205 S.W.2d 764 (1948).

34. Gerber v. Faber, 54 Cal. App. 674, 129 P.2d 485 (1942); O'Neill v. James, 138 Mich. 567, 101 N.W. 828 (1904); Graham v. Clour, 30 Tenn. App. 306, 205 S.W.2d 764 (1948); 21 TENN. L. REV. 334 (1950).

35. Hoffing v. Coca Cola Bottling Co., 87 Cal. App.2d 371, 197 P.2d 56 (1948); Cole v. Pepsi Cola Bottling Co., 65 Ga. App. 204, 15 S.E.2d 543 (1941); Graham v. Clour, 30 Tenn. App. 306, 205 S.W.2d 764 (1948).

36. Loebig's Guardian v. Coca Cola Bottling Co., 259 Ky. 124, 81 S.W.2d 910 (1935); Coralnick v. Abbott's Dairies, 337 Pa. 334, 11 A.2d 143 (1940).

37. Grant v. Graham Chero-Cola Bottling Co., 176 N.C. 256, 97 S.E. 27 (1918).

38. Coca Cola Bottling Works v. Shelton, 214 Ky. 118, 282 S.W. 778 (1926).

39. Hoffing v. Coca Cola Bottling Co., 87 Cal. App.2d 371, 197 P.2d 56 (1948).

40. Vargas v. Blue Seal Bottling Works, 12 La. App. 652, 126 So. 707 (1930); 4 SYRACUSE L. REV. 148 (1952).

41. 12 La. App. 652, 126 So. 707 (1930).

IV.

DEFENSES.

Of importance in determining whether the defendant has adhered to his standard of care, are the tests employed in his plant before placing his product on the market. Whether the bottler exercised due care to discover defects is decided by weighing the evidence as to the availability of reasonable and practicable tests and their effectiveness against evidence as to the actual tests employed by the defendant.[42] It thus becomes apparent that testimony concerning these tests is important both to the plaintiff and to the defendant.

Initially the defendant will offer testimony as to the reputation of the firm from which he purchases his bottles, and the tests which they employ. But evidence of their tests is of less importance when the defendant re-uses his containers, for in such instances he cannot rely upon the tests of the manufacturer.[43] The defendant will then point to his modern machinery and in particular will introduce evidence as to the processes used in the examination of the bottles and the regulatory gauges governing the insertion of carbonic acid gas into the beverage. From these two sources (*i.e.*, defective bottles, and excessive carbonation) most explosions result.

Evidence of the resistance of the bottles as compared with the pressure used in the bottling process will be submitted.[44] Where feasible, a demonstration of the pressure gauges used in his plant will be introduced as further evidence of the exercise of due care.[45]

Some of the tests utilized within the industry in order of their popularity include:

1. Visual examination, which often takes place under a magnifying glass,
2. Pressure test,
3. Thermal test which reveals fatigue,
4. Polariscope test, capable of revealing deviations in the width of the bottle walls.[46]

Perhaps the most effective method of discovering defects in the anneal is the immersion test in which the bottle is submerged in iced water after having been subjected to an increase in temperature.[47]

The importance of such tests to the litigants is revealed when it is recognized that if the defendant used machinery, methods, and processes

42. Loebig's Guardian v. Coca Cola Bottling Co., 259 Ky. 124, 81 S.W.2d 910 (1933); Sweeney v. Blue Anchor Beverage Co., 325 Pa. 216, 189 Atl. 331 (1937).

43. Luciano v. Morgan, 267 App. Div. 785, 45 N.Y.S. 2d 502 (2d Dep't 1943).

44. Gerber v. Faber, 54 Cal. App. 674, 129 P.2d 485 (1942); Winifree v. Coca Cola Bottling Works, 20 Tenn. App. 615, 103 S.W.2d 33 (1937).

45. *Ibid.*

46. Hoffing v. Coca Cola Bottling Co., 87 Cal. App.2d 371, 197 P.2d 56 (1948).

47. Torgesen v. Schultz, 192 N.Y. 156, 84 N.E. 956 (1908).

accepted as standard in the trade, and which are as reliable and satisfactory as others in detecting defects, there is no breach of his duty of care.[48] The bottler is not required to resort to impracticable methods in order to prevent injury.[49]

V.

JURISDICTIONS LIMITING THE APPLICATION OF THE DOCTRINE.

Those jurisdictions refusing to apply res ipsa loquitur to cases involving exploding bottles often reason along traditional lines in holding that the control of the defendant-bottler was lacking at the time of the casualty.[50] Others point out that when management of the instrumentality is divided among two or more agents, a plaintiff cannot invoke the doctrine by disproving negligence on the part of all but one.[51] This is in direct opposition to the reasoning of courts which apply the doctrine despite the lack of exclusive physical control on the part of the defendant.

A Delaware court, subsequently criticised in other jurisdictions, held the doctrine of res ipsa loquitur inapplicable by applying the doctrine of unavoidable accident, apparently equating explosions due to sudden temperature changes with unavoidable accidents.[52]

Still other jurisdictions, such as Michigan, though they expressly reject the doctrine, in effect follow the reasoning of those courts which openly apply it. The Michigan courts maintain that the mere explosion of a bottle will not give rise to an inference of negligence, but negligence can be shown by circumstantial evidence; and when circumstances are such as to take the case out of the realm of conjecture and place it in the realm of legitimate inference, a prima facie case is made out.[53] No jurisdiction holds that the mere occurrence of the accident will suffice. Those which apply the doctrine look to the peculiarity of the circumstances as indicative of negligence.[54]

In North Carolina, whereas the explosion of one bottle, whatever be the circumstances, will not suffice to take the case to the jury, proof of the explosion of other bottles placed in commerce by the defendant, which occurred proximately in time and under similar circumstances will form the basis for an inference of negligence on the part of the defendant.[55]

48. Gerber v. Faber, 54 Cal. App. 674, 129 P.2d 485 (1942); Sweeney v. Blue Anchor Beverage Co., 325 Pa. 216, 189 Atl. 331 (1937).

49. Honea v. City Dairies Inc., 22 Cal.2d 614, 140 P.2d 369 (1943).

50. Slack v. Premier-Pabst Corp., 40 Del. 97, 5 A.2d 516 (1939); Stodder v. Coca Cola Bottling Plants, 142 Me. 139, 48 A.2d 622 (1946); Wheeler v. Laurel Bottling Works, 111 Miss. 442, 71 So. 743 (1916); Winifree v. Coca Cola Bottling Works, 19 Tenn. App. 144, 83 S.W.2d 903 (1935).

51. Gerber v. Faber, 54 Cal. App. 674, 129 P.2d 458 (1942).

52. Slack v. Premier-Pabst Corp., 40 Del. 97, 5 A.2d 516 (1939).

53. Macres v. Coca-Cola Bottling Co., 290 Mich. 567, 287 N.W. 922 (1939).

54. Payne v. Rome Coca Cola Bottling Co., 10 Ga. App. 762, 73 S.E. 1087 (1912).

55. Davis v. Coca Cola Bottling Co., 228 N.C. 32, 44 S.E.2d 337 (1947); Ashkenazi v. Nehi Bottling Co., 217 N.C. 552, 8 S.E.2d 818 (1940); Dail v. Taylor, 151 N.C. 284, 66 S.E. 135 (1909).

Tennessee and Kentucky also apply this rule known as the North Carolina Rule.[56]

The difficulty with which the plaintiff is confronted when res ipsa loquitur is unavailable is appreciable. Even those courts which have steadfastly refused to apply the doctrine have recognized and allowed rather strained inferences. As to the requirement of similar circumstances under the North Carolina Rule, it has been held that evidence of an explosion of a bottle upon its removal from a refrigerator is admissible in a suit involving the explosion of a bottle wherein there was no issue of temperature change.[57]

Quite frequently the bottle has burst into many fragments and is incapable of presenting any evidence as to causation. When sizeable fragments have been salvaged, they have been examined by a micrometer in seeking to discover variations in the thickness of the walls of the bottle.[58]

Whether the doctrine is available or not, the plaintiff generally will allege that his injury resulted from defendant's negligently overcharging the bottle, or from his failure to detect a defect in the glass. Even where the doctrine is available, such allegations have not prevented it application.[59] It can be readily seen that in seeking to prove either of these causes the plaintiff is confronted with evidentiary difficulties. His method as to the overcharge usually consists of expert testimony as to the standard regulatory processes in the industry. He proffers this in an effort to combat defendant's anticipated testimony as to the tests employed in his plant. Further, any inadequacies in defendant's plant with regard to the regulation of pressure will be investigated. Even plaintiff's expert testimony frequently fails to establish whether the explosion arose from an overcharge of carbonic acid gas, or from a defect in the glass. The explosion itself, which is often quite violent, renders it difficult to prove through an examination of the fragments that the explosion resulted from a defect in the glass.[60] Should the defect be latent, there is no breach of defendant's duty of care.[61] When possible the plaintiff will introduce the temperature at the time of the accident and the temperature of the factory during the bottling process, since the liquid will admit more carbonic acid gas at a lower temperature than at a higher temperature.[62]

VI.

CONCLUSION.

Those jurisdictions in which the doctrine of res ipsa loquitur is deemed inapplicable to cases involving exploding bottles justify their reluctance to

56. Coca Cola Bottling Works v. Shelton, 214 Ky. 118, 282 S.W. 778 (1926). Graham v. Clour, 30 Tenn. App. 306, 205 S.W.2d 764 (1948); Winifree v. Coca Cola Bottling Works, 19 Tenn. App. 144, 783 S.W.2d 903 (1935).
57. Graham v. Clour, 30 Tenn. App. 306, 205 S.W.2d 764 (1948).
58. Gordon v. Nehi Beverage Co., 298 Ky. 836, 183 S.W.2d 795 (1944).
59. Boykin v. Chase Bottling Works, 32 Tenn. App. 518, 222 S.W.2d 889 (1949).
60. Lanza v. De Ridder Coca Cola Bottling Co., 3 So.2d 217 (La. App. 1941).
61. Cases cited note 36 *supra*.
62. Nolan v. Fach, 178 App. Div. 115, 164 N.Y. Supp. 1011 (2d Dep't 1917).

apply the doctrine in an apprehension that should traditional safeguards be eliminated, complete justice between the parties must suffer. This position has been adhered to despite an awareness that the plaintiff is laboring under a distinct evidentiary disadvantage. Consideration of the interests of both parties suggests a test which could be resorted to in applying the doctrine to a novel situation. Does the requirement of calling upon the plaintiff to disprove intervening causation when the injuring instrumentality has left the exclusive control of the defendant sufficiently safeguard the rights of both parties so as to justify the application of the doctrine? An analysis of this test as applied to the circumstances would tend to convince the court that the effect of the amelioration of the doctrine is not so severe as to deny its application.

John J. Collins