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Modernizing Trial Practice: The Economic Benefits

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MODERNIZING TRIAL PRACTICE: THE ECONOMIC BENEFITS *

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THE title of my address today bespeaks a thesis—that trial practice requires modernizing and that there will be economic benefits to our profession in doing it.

In highlighting professional interests, I do not want to be regarded as subordinating public interests. Indeed, I am convinced that the two interests are identical and that whatever makes court processes and professional practices more accommodating and serviceable to the public enlarges the opportunities and enhances the prestige of the profession.

Although now a judge and concerned primarily with court administration, there were many years of practice back of my judicial service, and I have ever felt an identity with the bar and been sensitive to professional interests. Indeed, I feel that as a judge I have learned as much about the problems of practice and the economics of practice as I learned as a lawyer. I have been able to observe more objectively the productivity of the expenditure of professional effort—to discern that which is effective and counts and that which is lost motion.

A lawyer's only working assets are his talent and time. He has no machinery or mechanical labor saving devices which can conserve his time or make it more productive. But he is not exempt from economic laws or pressures. He has the same problem as any other professional man or business man, if he is to share in the expanding economy, of increasing the volume of the matters he can handle and reducing the handling costs and waste time, of making the employment of his abilities and time as efficient and economical as possible. He is directly affected in this by the pattern and pace of court procedures. As court processes and procedures may be expeditious and economical or slow and wasteful, so will be the use of professional time.

We can observe the advances made, the enlargement of opportunities and the enrichment of life resulting from the adoption of modern methods and techniques in every other field. Surely it is possible, if not quite in the same ways or to the same degree, for us to devise means of handling more work with the expenditure of less effort, and so attract more business by rendering a better service.

Lawyers in an office practice have made changes and improved their life and livelihood. Whether influenced and inspired by the example of the business-

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men with whom they are associated, or dragged along in the association, the office lawyer has modernized his office, organization and procedures with an awareness of the need, possibilities and benefits of saving time and enlarging the effective use of his effort.

The trial lawyer has made no like changes. He is doing things no differently in his office or in the courts than his ancestors did them. He is not able to handle more cases or handle them more easily, economically or expeditiously than the lawyers of a generation ago. Indeed, essentially court processes are the same, only slower, as they were in rural England two centuries ago.

That the trial profession, by adherence to old ways, has lost ground and failed to realize opportunities is so apparent that it hardly needs documentation. In the past thirty years, my own life at the bar and on the bench, a period of unparalleled growth in industry, commerce and jural relationships regulated by law, and in the law itself, we have witnessed the decline of practice in the courts and the reduction of that practice in most courts to little more than the handling of personal injury litigation.

Because court procedures and the traditional judicial process were found too slow and costly to satisfy the need and demand for an expeditious and economical medium for resolving controversies, none of the vast new areas of litigation have been lodged in the courts and the courts have lost their regular custom. Congress and the state legislatures have felt compelled to sacrifice the fundamental of separation of powers and to vest the exercise of the judicial function in the widely ramified areas of administrative law in administrative agencies, because the courts and judicial process were not up to handling the work with the required dispatch. At the same time businessmen were creating their own tribunals for handling commercial litigation and withdrawing it from the courts, because court procedures were regarded as too dilatory and costly.

The courts and trial branch of the profession have thus been left with little more than personal injury litigation and there is growing dissatisfaction with the handling of this work in the court frame. The long delay in reaching cases for trial or effecting settlements, the long course of a jury trial, the high cost of dilatory procedures—the same considerations and dissatisfactions which prompted the withdrawal of commercial litigation from the courts and the denial to the courts of the new jurisdictions, are operating to withdraw personal injury litigation from the courts. There is mounting agitation to place automobile accident cases in a compensation board. Such a course is now vigorously advocated by men of high prominence and great influence in legal circles and public life. When men like Chief Judge Clark of the United States Court of Appeals and

Governor Meyner of the State of New Jersey advocate a compensation system in automobile cases, the profession should read the writing on the wall.

Obviously what is called for—indeed what is essential—if the courts are to be preserved as a major institution, is an overhauling of court procedures and processes to bring them in line with the modern need for the expeditious handling of a large volume of business. The challenge to the profession in the trial area today to is to find techniques and procedures which will preserve the essential qualities and good of the judicial process and at the same time facilitate handling the caseload with dispatch.

This can be done at each of the three stages of litigation, the pleading stage, the trial stage and the intermediate stage of trial preparation and waiting for a case to come to trial.

The pleading process is not only the first step in litigation, but it is the first block. The professional practices which have grown up around the pleading process have made it a cause of substantial delay at the threshold of a case.

Too often a complaint and answer do not draw an issue but motions to amplify the pleadings or to make them more definite and certain are necessary to reach a clarification of the issues. Months are usually consumed in the pleading process, with more issues raised or feigned than actually exist, or with more concealed than is disclosed. Not until a pretrial conference or frequently until the trial itself do the issues get reduced to the real controversy.

That battling out the pleadings is no essential part of the litigating process is manifest from the experience with arbitration. Whatever may be said against arbitration as a substitute for a trial court, it has one advantage which has been universally accepted and acclaimed by the participants in arbitration. That is the simple statement of issues and inauguration of a proceeding. Little time is lost in preliminary paper work. It would not be true to say that businessmen seek arbitration for this simplicity, expedition and economy alone, but it is a measure of what they seek and get in the tribunals of their own creation.

The trial profession can at least profit by this example. A much better professional practice than the one we now pursue, and one more consonant with the interests of the parties, would be to start a case not with a long drawn-out battle over the pleadings, but with a direct ascertainment and acknowledgment of the issues. What should be litigated is the issues drawn and not the drawing of issues. A case should start not with arms' length gladiatorial combat between lawyers

but with close conversation calculated to discover and find the real differences between them. Regardless of the heat generated by clients between themselves, lawyers should be able to meet on a professional plane and frame the issues. In so doing they would incidentally effect many an earlier settlement.

The lead in this direction has been taken by the Judicial Conference of our state. In a constructive effort to inaugurate and establish a practice of drawing issues which will avoid the long delay and expense involved in the present dilatory pleading process, the Conference recommended to the last session of the Legislature, and the recommendation was adopted and enacted as Section 218-a of the Civil Practice Act, a simplified procedure for drawing the issues. The new law permits the parties to commence an action without a summons or pleading by joining in a single statement of the claims and defenses and relief requested. That is all that is required to formulate a case. Upon filing the statement the case is at issue.

The Conference, speaking for all the courts of the state, has also promised litigants who adopt the new procedure that the courts will set a trial date by appointment with the parties. The means are thus at hand, by regularized procedure, of eliminating the delay ordinarily associated with the institution of an action. That is the right and realistic start in modernizing court procedures. It offers those advantages which characterize every improvement in procedures or techniques in any field—simplicity, economy and a conservation of time and effort.

The new procedure arms the profession with the means of regaining lost ground in the field of commercial litigation. The profession now has the opportunity to say to the business community that it can handle commercial litigation within the court frame as simply and expeditiously as it can be handled in arbitration. Businessmen have learned that arbitration is not an unmixed blessing and many of them will prefer to return their controversies to the courts if they know that they can have the benefit of law without the burdens they have previously experienced in the courts.

The new procedure need not and should not be confined to commercial litigation. It is as applicable to any kind of litigation, and much time can be saved even in the negligence cases by lawyers getting together at the outset of a case, talking it over and submitting it in the single statement or submission provided by the new statute. Such a start to a case would also be the end of many or most cases, because the settlement of a case begins and is usually completed whenever lawyers settle down to a case and come to grips with it.

The biggest delay, of course, is in waiting for cases to be reached. The great-

est time can be saved and largest economy effected if that delay and the expense of trial and final preparation for trial can be avoided. Professional thought and effort could not be better directed, therefore, than in finding and pursuing the means of short-cutting the trial process and disposing of cases without a trial and without the long wait for a trial. The elimination of this delay is important not only as a matter of substantial justice and timely justice but as a matter of economics for both the client and the lawyer.

There is a direct relation between trial delay and settlement delay, and in far too large a percentage of cases the ultimate and inevitable disposition by settlement is delayed while the case awaits trial. The most effective means of promoting prompt settlements, therefore, is speeding up the trial process and reducing the lag between the commencement of an action and the trial day. Independently of that approach and accomplishment, however, there is decided merit in courts and lawyers creating the machinery by which cases may be fully and fairly considered long in advance of trial and without the formalities of a trial.

The most direct and fruitful thing that lawyers can do—and this is in line with the suggested streamlined pleading procedure—is to sit down on their own and thrash a case out at the threshold, earnestly exploring the possibilities of settlement and effecting a settlement without the intervention of a court. Where this is not possible, court services should be available to give judicial attention to a case when it is still fresh and when a disposition can be timely and economical. The court agency for this purpose is the pretrial conference. It has been the most useful procedure which the courts have devised for the expeditious handling and disposition of cases. Still, in many courts pretrial procedures have never been adopted. In other courts the procedure has not been as effectively employed as could be.

The effectiveness of pretrial conferences is related to the earnestness, effort, good faith and good judgment of the presiding judge and participating lawyers. Either one can doom it to failure by not giving the fullest reasonable cooperation. But cooperatively, under the guidance of a wise judge, the conference can produce a mutually satisfactory disposition of most cases.

Th attributes and advantages of a pretrial conference are informality, frankness, and a purely professional approach to the case. The lawyers are more informed about a case than jurors will ever be and they have a sounder insight and sense of values than jurors will ever have. With the aid of a judge, they can arrive at a result which will be as close an approximation to justice as is likely to eventuate from a jury verdict. This trio of coprofessionals can examine, evaluate and

determine a case on a more informed, understanding and satisfactory basis than any body of laymen upon a formal trial.

Where the pretrial conference has not been established as a regular operation of any court it should be established. Judges and lawyers should give to the creation and conduct of the pretrial conference their best thoughts and efforts in a common professional determination to make this professional agency as effective as possible in serving its purpose.

In connection with the pretrial conference, one auxiliary procedure should be mentioned and emphasized as a contribution to the effectiveness of the conference and informed disposition of cases. This is the employment of independent medical experts to advise on the medical aspects of personal injury cases.

Nearly every personal injury case contains a question as to the nature and extent of the injuries and calls for expert medical consultants or witnesses. These privately retained and paid doctors become partisan and are suspect both by the other side and by court and jury. Frequently medical issues in a case are substantial, sharply drawn, and consume as much trial time as the issue of liability. Not only are trials drawn out in a battle of partial medical experts, but the jury is as apt to be confused as enlightened by their partisan testimony. The presentation of the medical aspects of the case in this manner is not satisfactory and hardly assures reaching the right result.

With the conviction that the right result could be better assured and that many of the toughest and longest cases, involving the sharpest disputes as to injuries, could be settled by having available at the call of the court independent medical experts of the highest professional standing, the Justices of the Supreme Court in the First Department undertook, in conjunction with the bar associations and medical societies in New York County, the establishment of a panel of independent experts in the various branches of medicine. The panel was established by a joint committee of the medical societies and consists of the leading authorities in their fields. Whenever upon a pretrial conference it is ascertained that the case involves a substantial dispute as to injuries, the case is referred to an appropiate member of the medical panel for examination and report. The report is made in triplicate to the judge and counsel for the parties.

The independent experts are paid from regular court funds. The rules governing the procedure permit the calling of the expert at the trial by the court or either party. We have found, however, that there is seldom occasion for calling the independent expert at the trial. The lawyers have found that the independent experts are so helpful and reliable that the medical issues are usually resolved with

mutual satisfaction and confidence on the basis of the reports of the independent experts. Anyone interested in studying the operations and results obtained under the panel system will find a full account and evaluation of the procedure in a report of a special committee of the Association of the Bar of the City of New York entitled "Impartial Medical Testimony" and published in book form by The Macmillan Company.

I have no hesitancy in recommending, upon the basis of more than two years' experience with the use of the medical panel, that a similar panel be set up in connection with any court handling a substantial volume of personal injury cases. The public expenditure involved is a positive economy in the saving of court time and jurors' fees. The use of such a panel within the frame of a pretrial conference adds much to facilitating and concluding a settlement of a case and saving trial costs and delay in the most serious cases.

Coming now to the trial process, it should be plain that we should have a trial process which can handle the cases which must go to trial with expedition both in assimilation and disposition. The trial process is now the bottleneck in the case line. It is because of the inherent slowness of the trial process and its inability to handle the number of cases which must be funneled through that there is a brake and block on the whole case line.

I have some sense of the emotions generated whenever the qualifications of the right to a jury trial is mentioned, but I would like to put the jury system into the perspective of reasoned analysis and let the profession see the real impact of the jury system upon professional preserves and prospects.

I would not undertake in this compass to discuss the merits or demerits of the jury system as it affects the quality of justice. I might say, however, that in over 13 years of observation as a trial and appellate judge I have never found that jury verdicts on the whole were not fair or responsive to reason. On the other hand, neither have I observed that the results overall were any different whether a case was tried jury or non-jury, and indeed all the evidence available, constituting a fair sampling from several jurisdictions, indicates that the decisions of judge or jury come out about the same both as to the percentage of plaintiffs' and defendants' verdicts, and the amount of the awards made.

The point which is beyond cavil is that the jury system is the root of nearly all the delay in the courts. It is the root of the delay which has driven commercial litigation from the courts and it is the root of the delay which threatens to drive personal injury litigation from the courts.

It is manifestly impossible to try any appreciable number of the vast volume of personal injury cases which now innundate the courts by the slow process of jury trial. We are presently making only a pretense of preserving the jury system Only a negligible number of cases are actually disposed of by a jury verdict. In the Supreme Court of New York County, the busiest trial court in the world, there were only 132 jury verdicts taken last year. Consistently our figures, month by month, show dispositions by jury verdict of only slightly more than one case a judge a month. This does not mean that the judges are not fully occupied. They are busily engaged in the settlement of cases, 96% of them—many of which settlements have been delayed because they have had to await the showdown which comes when the trial day is finally reached.

I do not have the corresponding figures for other communities, and I realize that there is not the same congestion in the less metropolitan cities. On the other hand, there is such an influx of automobile accident and other negligence cases in all courts that there is delay of varying extent due to adherence to the jury system. There is also approximately the same percentage of eventual settlements, except for which there would be a complete breakdown in court services, because the trial system cannot absorb but a small fraction of the caseload.

It may fairly be said, therefore, that we are not actually preserving the jury system as a means of determining cases, but rather we are preserving only the shadow of the jury system as a stalking horse for settlement negotiations, and all we are accomplishing is postponing and rendering more costly, less timely and therefore less just the settlements eventually made, which should have been made much earlier and which would have been made much earlier except for waiting for the jury trial day.

Another aspect of the matter is that we are incurring the displeasure, and forfeiting the confidence, of those representatives of the community who are called as jurors and feel that they are wasting their time waiting around to be impaneled, and feel even that judges are not working because they observe stretches of time at which the court is apparently not in session. They do not realize that court and counsel are really effectively employing their time in getting cases settled.

It is hard to explain to jurors that they are serving not as actual triers of the facts and deciders of cases, but as a psychological presence prompting the settlement of cases, and that as such they are contributing more than if they were in the jury box.

It is understandable why, so long as the rule of contributory negligence obtains, plaintiffs' attorneys prefer to try a case before a jury. There is some ground

for their fear that a judge might be more strict in his adherence to the law and take less liberty with the law. The other reasons which actuate plaintiffs' attorneys to ask for a jury are less well founded and illusory. I believe there is no basis for any feeling that may exist that a jury will be more generous in its awards than a judge would be. While the chance of winning an undeserved verdict might be slightly greater before a jury than before a judge, the risk of losing it on appeal counteracts any speculative advantage along that line. On the whole, a jury trial would hardly seem worth incurring the delay in getting to trial and the risks of missing witnesses and miscarriages of justice inherent in the delay.

That there is no partisan advantage one way or the other in a jury trial is evident by the fact, so far as I can observe, that the insurance industry seems equally addicted to the jury system, apparently feeling that there is a bargaining advantage in the delay inherent in the jury system and in the rule of contributory negligence, which the industry has so far insisted upon perpetuating.

I am diffident in differing with the judgment of others about their business or in pressing my own opinions against what seems to be their judgment, but in an altogether friendly spirit and with no antagonism to the interests of either plaintiffs or defendants, but with a desire to reconcile both interests and serve them fairly, I give it as my objective opinion that both plaintiffs and defendants are mistaken in their predilections for the jury system. I can see no advantage in it for either party and only disadvantages to both.

Frankly, it is amazing to me to hear reports that some lawyers feel that any questioning of the jury system is a threat to the livelihood of trial lawyers, particularly those engaged in personal injury litigation. If the only alternative were a compensation system, I would understand such a reaction. But that is not the only alternative and I trust that there is no misapprehension as to my own views in the matter. I have never favored a compensation system and I do not favor a compensation system. I have as strong a desire and determination as anyone to keep personal injury litigation in the courts, but I can see far enough ahead to know that we cannot keep the personal injury litigation, any more than the commercial litigation, unless the profession provides a forum and process for the trial and determination of controversies which are expeditious and economical and which meet the public demand for promptitude.

The jury system cannot meet the requirements and I give it to you as my considered, sober and sincere judgment that it is not the elimination of jury trials which is a threat to the trial profession but rather the continued insistence upon maintaining the jury system which is a threat to the trial profession. These things are certain. Commercial litigation will never return to the courts if it must be pro-

cessed through a jury trial. Businessmen will not put up with it. None of the controversies connected with administrative law will return to the courts under a jury routine. It seems to me inevitable in the end that personal injury litigation will follow commercial litigation and administrative litigation out of the courts if lawyers insist upon adhering to jury trials as the adjudicatory process.

Although it is right as well as expedient to dispose of the great majority of cases by settlement, still the ultimate process to which a case may have to be subpected for determination should be one which is prompt and fair and as certain to correspond with justice as a human institution can be. The best assurance of fair and timely settlements is the ready availability of a trial process which is fair and timely. I have advocated, and the more consideration I give to the subject and the more arguments I hear pro and con the more I am convinced in my advocacy of a system of trial by a judge without a jury, and in personal injury cases under a rule of comparative negligence.

While I have listened attentively to the arguments of the spokesmen for the insurance companies in favor of the rule of contributory negligence, I find the arguments lacking in either principle or practicality. No one attempts to defend the letter of the law of contributory negligence. The rule is defended upon the pragmatic grounds that a jury takes about the right liberty with the rule and that in settlement negotiations a rule of comparative negligence is in effect applied. This may be so, and by a rather complicated system of checks and balances, after long and unwarranted delay, a fair result may be reached. But lawyers should not rest their case or course on such a devious way of reaching results. It is not law or lawyer-like to maintain rules which are not expected to be observed and to place reliance not in the law or observance of the law but in liberties taken with the law by lay judgments or compromises based upon a guess or gamble as to what a jury will do with the law.

There should be no disagreement with the principle that a plaintiff who is equally to blame for an accident as a defendant should not recover anything. On the other hand, if it can be determined that a plaintiff's negligence was less as a contributing cause to an accident than the defendant's negligence, there is no reason in justice why a plaintiff should not recover but in an amount reduced by the proportion of his own contribution to his injury. A trained, disciplined and fair-minded judge could scrupulously try and determine cases in accordance with such law and the end results would be the closest approximation to justice that a government of law could provide.

There is nothing for either plaintiffs or defendants to fear under such a system. There is no reason to think that the ultimate cost to the insurance industry

and in turn to the public would be any greater than under the present system. To those who think that it would be the entering wedge toward a compensation system, I would say that it is the best assurance against the adoption of a compensation system.

We can learn a lesson and profit from the English experience. The British abandoned the jury system during the first world war. At that time it was a manpower measure. But after a short time, when the bar and the public became accustimed to trying their "running down" cases, as they call them, without juries, the later movement to return to the jury system was met with an overwhelming rejection. The bar and the people learned that with no sacrifice of justice they were saving immense time and expense by avoiding jury trials.

The English have not abolished jury trials in civil cases. They have simply eliminated the absolute right to a jury trial in most civil cases, allowing applications to the court in any case for the impaneling of a jury. Such a qualification of the right to a jury trial in civil cases could appropriately be adopted in this state. An application for a jury trial could be addressed to the discretion of the court in any case. In those communities where a jury trial would not unduly delay justice, the courts could be quite liberal in granting the applications. In more congested communities a stricter discretion might be expected. Again the English experience is of interest. Seldom is an application for a jury trial made.

I could not be more convinced of anything than I am convinced that if we once got away from jury trials and got on the basis of trying cases without juries, our bar would find professional life and work so much easier and that so many more cases could be handled with less effort and more profit, and with more confidence in results and satisfaction in the determinations, that we would look back with wonder that we had put up the with the jury system so long.

The pressure on the trial lawyer today is almost overwhelming. It is the pressure of trying by out-moded means to carry a load beyond the capacity of our processes and procedures. We struggle with stress and strain to hold and handle the business at hand with no share or participation in the expanding economy or larger life around us. Instead of breaking our backs, hoeing a narrow furrow with worn out tools, we should lift our eyes to the professional opportunities which abound, and reach out and embrace the means which are within our power to extend our area of service.

The trial lawyer, like the office lawyer or other professional man or business executive, can modernize his ways and thereby increase his usefulness and profit, reduce his burden, and enlarge his life. The economic benefits of modernizing trial practice are available for all of us to see and share.