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ASPECTS OF PERSONAL INJURY PRACTICE IN NORTH DAKOTA

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Personal injury litigation has greatly increased in North Dakota during the past few years. The increased need for representation must be taken up by the beginning lawyer and the attorney who has shunned the court room. The ensuing observations, which deal with matters not generally covered in "how to" trial boooks, will hopefully aid them.

STRATEGY

In planning the strategy of the case, one of the first decisions to be made is whether to make a claim for workmen's compensation. The assumption is that the jury will not love John Jones as much when it is informed he is suing as trustee for the North Dakota Workmen's Compensation Bureau. Thus the lawyer may wish to advise Mr Jones to make no claim for workmen's compensation in order to avoid mention of the subrogating Bureau. However, the liability situation—coverage and financial responsibility on the other side, loss to the client, and the collateral source rule—must be taken into consideration in making this decision.

In securing medical reports it is not advisable to send for the "usual" medical report on the plaintiff. A hastily written medical report included in the doctor's file will be subject to defense counsel's scrutiny at the deposition or at the trial. Written reports are not necessary in many cases; a telephone call or short conference at the doctor's office will give enough information for starting the suit. When a written report is desired for submission in settleable cases, the lawyer should talk to the doctor personally, go over the file carefully with him, and make sure the doctor knows how to write a medical report so that the plaintiff's injuries will be discussed fully and fairly Furthermore, the accuracy of the pertinent medical history of the patient should be checked.

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It is also desirable to examine hospital records. Not only will counsel learn of potential witnesses and aspects of his client's injuries not uncovered before, but he will find what may be his most effective exhibits at trial. If the records are not legible, a typed translation of the doctor's notes could be agreed upon and submitted to the jury

Two frequent errors in planning case strategy are: overlooking the possibility of bringing a personal injury action on behalf of the estate along with the wrongful death action, and failure to recognize an additional source of recovery in an Unsatisfied Judgment Fund case. When the decedent's mortal injuries have caused him conscious pain and suffering, the survival statute permits an action for such to be brought on behalf of the estate.[1] If the client has uninsured motorist coverage and the company will settle with the insured and waive its subrogation rights, two recoveries can be had. *Pearson v State Unsatisfied Judgment Fund*[2] says the Fund has no set-off for the amount of the insured motorist settlement.

In preparing the pleadings for the case two things which lawyers have overlooked are (1) defendant's allegation that plaintiff has failed to state a claim for relief, and (2) the assertion that the widow and children would statistically have outlived decedent. The plaintiff, thinking the allegation of failure to state a claim for relief frivolous, will ignore it, only to learn later of its merit and the consequent striking of his case from the calendar To prove the life expectancy of decedent, and of the widow and children, life expectancy tables can be secured from the Department of Health, Education and Welfare. Tables through 1964, which is a six year improvement on the standard tables in popular use, are now available for $1.00.

For years, the better personal injury textbooks have advocated the use of settlement brochures; yet their use in North Dakota is rare. It is suggested that the brochure treatment is desirable in cases with strong to certain liability and with injuries worth more than a few thousand dollars. The brochure (a leather covered photograph album with celluloid inserts will suffice) should contain pleadings, pictures, medical reports, bills and special information pages. These latter might include: a page listing and comparing both side's witnesses, one suggesting factors which could influence the verdict, one covering verdict experience in the county, one analyzing the current jury panel, and so forth. The final sheet should have a summary of all special and general damages, and a settle-

1. N.D. CENT. CODE § 28-01-26.1 (1960).
2. 114 N.W.2d 257 (N. Dak. 1962).

ment figure. The persuasive value of a well-prepared brochure can be high. It asserts that the plaintiff's attorney knows his business and especially this particular case—and the ability of the attorney is a definite factor the company weighs in settlement negotiations. Also the company may learn something new about the file, favorable to plaintiff, which it could have missed in strictly oral negotiations. Even if settlement negotiations fail, the brochure is preparation for trial.

The master plan for conducting a trial by either side is what the writer calls the trial "book." It is the only way to insure adequate preparation. The plaintiff's "book" should contain, in order· notes on motions or discussions to be had in chambers just before selection of the jury—the last minute notations; jury questions written below a jury box diagram; opening statement; questions for all witnesses; rebuttal to defense motions after resting; cross examination of defense witnesses; rebuttal witness questions and at least the first argument which should be detailed later There should also be a section devoted to legal questions, evidentiary and others, which are anticipated—if a trial brief is prepared it could substitute. Although spontaneity and creativeness are desirable, it is suggested that they be used within the framework of a trial book.

DEPOSITIONS

While North Dakota lawyers take a substantial number of depositions each year, it is submitted that most of them do not really know how to effectively take a deposition and use it at trial. The most common fault in the taking of a deposition is being unconscious of the record. It is elementary to indicate certain physical things for the record ("The record will show he is holding his hands about a foot apart;" "You're pointing to the left side, Doctor?"), but easy to neglect the more difficult. The counsel who has a sophisticated awareness of the record states: "The record will show the witness is smirking;" "Let the record show the witness was silent for 70 seconds during which entire time he looked at opposing counsel, before answering;" "Let the record show (my) witness' inflections in the preceding answer were such as to indicate sarcasm or levity and were obviously not meant to be taken seriously"

The handling of x-rays on deposition is most important. Marking and identifying them is simple enough, but the problems begin when the doctor testifies about and from the x-ray Any area of the picture which the doctor speaks of should be identified by having the doctor paste on or draw a numbered arrow or other symbol. Then counsel can state at that time "Doctor, I see you are putting

red arrow number 3 at that spot and either I or the person who reads your deposition at trial will now indicate by use of the pointer the arrow showing the intramedullary rod you mentioned." If at all possible one should secure prints of the x-ray; they are easy to read and don't require a view box—which North Dakota jury rooms don't have—and in all respects are better than negatives.

Although the writer has not seen it done, it is likely that portions of discovery depositions can be read at the trial. The Rules state that the adverse party can then require the other side to introduce all of the deposition relevant to those portions.[3] Thus if certain apparently damaging testimony given by a party on the discovery deposition were read to the jury, the pain of waiting until one can get to his explanation could have been avoided by having rehabilitated the witness right at the deposition. Usually one lets the opposing counsel attack the deposition and asks no questions of his own, but the possible use of the Rules indicated suggests a reappraisal of this custom.

It is important to plaintiff that his depositions, especially the medical ones, impress the jury as much as live testimony One means of assuring this is to have the court rule on all objections, motions to strike and the like in chambers. It is possible that counsel will agree that the unnecessary colloquy of the attorneys may also be stricken, so one is left with nothing but eminently readable prose about his client's injuries. Also the deposition could be made more effective by having a doctor—or some impressive figure who can read aloud well—who has rehearsed the reading of the deposition a number of times read the deposition into the record. Accent, inflection and other pronunciation marks as well as tone and decibel suggestions could be noted on the "script." This, of course, does not mean that one should make the deposition something other than a fair characterization of the witness' testimony

TRIAL

The automatic demand for a jury trial is not always the best medicine for a plaintiff. Cases involving drinking, relatives suing relatives, shifty-eyed parties and similar unfavorable situations are particularly susceptible of puncture by a jury, whereas the court may be unaffected. Naturally the defense counsel will be aware of this and will frequently demand a jury and even if he does not the court may decide to call a jury despite lack of demand by either side. Nevertheless there are enough cases where defendants

3. N. D. R. CIV. P., Rule 26(d) (4) (1960).

neglect or decide not to make the demand and the court agrees to hear them, making plaintiff's omission of the demand worthwhile.

A good method of stressing damages is to have a number of the plaintiff's acquaintances such as neighbors and fellow employees testify about the changes in him since his injury His limp, difficulty with a collar or back brace, use of crutches and so on can be described in detail. Especially forceful is testimony about such personality changes as irritability, forgetfulness. Overwhelming the opposition with witnesses, both as to liability and damages is another means of building a case which has been effectively employed. To illustrate the injury one might call the ambulance driver, nurses, ministers who make hospital calls, physical therapists, hospital barbers and so on ad infinitum. It would, however, be necessary to know one's jury well before using this approach.

Improper conduct by opposing counsel is one of the unpleasant facts of life in the courtroom. These improprieties may take the form of offers of proof in front of the jury, objections which are actually speeches, attempts to impeach on collateral issues, arguing the case during jury selection, speaking too loudly in conferences at the bench, persisting with objectionable questions, and using matters outside the record in summation.

Two cures for improper conduct come to mind. One is simply to outshout the other man when he begins—shout anything to drown him out—while you hustle him to the bench where the judge can control him and the jury cannot hear him. The other cure is to imagine before trial all possible improprieties (a healthy cynicism can be rewarding) and then go into chambers with counsel and make a statement for the record—"It has come to my attention that some of the following may come out at trial, and I would simply like to make a record of it and ask that the court admonish all counsel to avoid these areas." At least, the psychological effect is satisfactory

There is no excuse for a poorly organized final argument, perhaps the most important part of the trial. Plaintiff's counsel should have a reasonably thorough outline of his first argument before trial; during trial he can note various additions, so that all that remains to be added is the law This can be filled in after instructions have been gone over with the court. The time provided by recesses is sufficient to complete these additions. A tentative rebuttal outline should also be prepared even though final notes for the second argument can only be made during defendant's argument.

When asked by the court for comments on or exceptions to the instructions, counsel should read and analyze the proposed in-

structions and make intelligent exceptions. To decline to do so because of thought that the judge won't like having his offerings rejected is, of course, nonsense. On the other hand, one should not be so carried away with his own case as to lead the court into error While it may not be necessary to dig counsel's law out for him (a sin of omission at worst), it is bad strategy and ethics to try to mislead the court in requested instructions.

RECENT VERDICTS AND SETTLEMENTS

Although North Dakota has been much maligned as a "low verdict center" North Dakota juries and courts have returned a number of adequate verdicts. The following information about verdicts and settlements in personal injury and wrongful death cases, secured from attorneys involved, may be of interest. Some of the jury cases involved inflammatory factors and others have since been reversed or settled at lower amounts; but the verdicts along with the settlement figures discussed, do serve to illustrate dollar values of injury and death in this State.

JURY VERDICTS - PERSONAL INJURY

A 1958 federal court jury in Fargo returned a $38,250.00 verdict for a stiffened left hand and 30 per cent loss of grip to a one-armed man who sold artificial limbs for a living. In 1959 a 16 year old girl, paralyzed below the waist, recovered $53,000.00 in Bowman County Medical bills in the amount of $7,092.45 were recovered by her father [4]

Permanent, crippling injuries to the feet, ankles and legs of a man were responsible for a $141,000.00 verdict in Ward County in the early 1960's.

In 1961 two Stutsman County plaintiffs recovered a total of $90,000.00: The man $39,000.00 for femur damage and the shortening of a congenitally bad leg; his female companion $51,000.00 for disfiguring facial scars and leg injuries.

A very shapely 34 year old woman received $12,000.00 from a Stutsman County jury in 1964, her chief complaint involved a bruise to her breast and consequent "cancerphobia." Medical bills and loss of earnings were less than $500.00.

Some medical testimony about 50 per cent permanent disability of the entire body resulted in a $95,000.00 federal court jury verdict in Bismarck in 1964. Plaintiff, a young engineer, sustained a serious brain concussion and multiple fractures of the face, arms and legs.

4. See Sheets v. Pendergast, 106 N.W.2d 1 (N. Dak. 1960).

A 40 year old woman with a whiplash injury involving medicals of $1,500.00 was awarded $11,200.00 by a Foster County jury in1965; her husband received $2,000.00 for loss of services. In the same year a Burke County jury returned a $25,000.00 verdict to a woman whose major complaint was a whiplash; she also sustained an eye injury

In the spring of 1965 a Barnes County jury awarded $35,000.00 ($42,000.00 according to plaintiff's counsel) for a broken ankle with 15 per cent permanent partial disability and $3,500.00 in special damages. Settlement of this dramshop case was later made for $9,000.00. A 1965 federal court jury in Fargo awarded the full $25,000.-00 asked for by an electrical lineman with a broken ankle, 15 per cent permanency and specials of $1,700.00.

Considerable facial scarring to a young man brought a $26,500.00 verdict from a Sheridan County jury in 1965.

A plaintiff whose arm would most likely require amputation received $38,778.00 after a 1965 trial in Ramsey County Other 1965 cases and verdicts were $35,000.00 in Cass County for a protruded disc and $6,120.00 in Ward County for a whiplash with medicals of $216.00.

A 1966 Morton County jury awarded $18,000.00 to a 77 year old man with back injuries and some disability

Emmons County has been well thought of by plaintiffs' attorneys. In 1966 an elderly woman with fractures of the pelvis and a permanent limp received $20,000.00; loss of a hand and part of the forearm brought a man $30,000.00.

There have of course been some large judgments ordered in cases heard by the courts sitting without juries. The largest and most recent was a $500,000.00 award in a products case by the federal court at Grand Forks, involving a child, a drug company and a celebrated San Francisco attorney

JURY VERDICTS - DEATH CASES

Several years ago a widow and her children were awarded $45,000.00 by a Williams County jury for loss of a husband and father [5]

In Adams County the death of a 29 year old man with earnings of $6,000.00 per year, leaving a widow and three children, was worth $65,000.00.

In 1964 the death of a 76 year old man drawing Social Security brought his widow a $17,500.00 verdict in Cass County

5. See Serbousek v. Stockman Motors, Inc., 106 N.W.2d 879 (N. Dak. 1960).

In 1964 a Burke County jury returned a verdict of $75,000.00 for the wrongful death of a 32 year old housewife with three children.

Loss of a wife and mother resulted in a $61,147.36 verdict in Barnes County in 1965.

The death of a 26 year old unmarried son of a widowed mother to whom he made occasional cash contributions brought a $12,000.00 verdict from a federal court jury in Bismarck during 1965. In the spring of 1966, two $18,000.00 verdicts for the deaths of two 18 year old boys (both planning to stay on and operate the family farm) were granted by a Richland County jury

SETTLEMENTS

Nelson County: $62,000.00 for brain damage to a 21 year old man.

Burleigh County: $55,000.00 for deaths of a 9 year old son and 40 year old husband and father with earnings of $4,000.00 - $5,000.00.

Burleigh County: $50,000.00 for the death of a 35 year old man, $2,000.00 earnings, widow and three small children.

Stark County: $75,000.00 for the death of an oil field worker.

Stark County: $35,300.00 for comminuted fractures of both femurs of a 54 year old farm laborer

Federal Court, Bismarck: $82,500.00 for the deaths of a 24 year old man and his 21 year old wife leaving three small children, his earnings small as a beginning farmer

Federal Court, Minot: $125,000.00 for electrical burns and paralysis of lower extremities.

Cass County: $75,000.00 for severe brain damage to a 6 year old boy

Cass County: $50,000.00 for the death of two parents leaving an 18 month old child.

Cass County: $117,000.00 for loss of a leg to a young man.