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In April, 1953, the North Dakota Law Review was able to reprint the text of a lecture on the Scandinavian law of torts which Professor Henry Ussing of the University of Copenhagen, Denmark, delivered at this law school while visiting the United States. Professor Ussing's discussion stressed the impact of insurance upon tort law and inspired Mr. Robert S. Marx to submit to the Review a discussion entitled "Let's Compensate — Not Litigate." This was reprinted in January, 1954. The Review is now able to present a vigorous rejoinder to Mr. Marx' fine article . . .

WHAT ABOUT THE NON-NEGLIGENT INJURED PARTY?

P. W. LANIER, SR.*

THE ARTICLE in the *North Dakota Law Review* entitled "Let's Compensate — Not Litigate"[1] is ably written by an able lawyer. In passing I note this article was first printed in the *Federation of Insurance Counsel Quarterly*.[2] So let's proceed with the natural presumption that Mr. Robert S. Marx, the author of this article, is at least slightly prejudiced. On the other hand, let us proceed with the further presumption that I, in view of the fact that I am a plaintiff's lawyer, may also be somewhat prejudiced.

I join with Mr. Marx in asking the question he poses at the outset of his article: "How much longer shall we try to force an automobile-atomic age into a legal pattern cut to fit the horse and buggy days of a century ago?" But I also ask: "Is the great backlog of personal injury cases a good reason for establishing a system that would take away from an injured party either his common law or statutory right to recover for personal injuries incurred without negligence on his part?" And still a further question: "Is it right to make the careful person free from actionable negligence pay for the injury to a negligent person?"

Certainly anything that will reduce personal injury cases is in order and much to be desired. But the fact that something is going to reduce the number of lawsuits does not mean that it will adequately compensate a person who in the exercise of ordinary care is negligently injured by the act or omission of another. And this

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1. 30 N.Dak.L.Rev. 20 (1954).
2. 3 Federation of Ins. Counsel Q. 62 (1953).

is the all-important factor. The remedy needed is one that will leave to the person injured who feels that he was not at fault his right of action for damages to be tried by a jury of his peers. How this can be done is the sixty-four dollar question.

Chapter 162 of the Session Laws of North Dakota for 1919 was the beginning of what is euphemistically termed Workmen's Compensation in this state. In the caption of the Act it is stated:

> "An act creating the North Dakota Workmen's Compensation Fund, for the benefit of employees injured and the dependents of employees killed in hazardous employment."

Under this act, all common law and statutory remedies against employers falling within the coverage of the act — which is very extensive — are barred.[3]

Workmen's Compensation Laws have done much to give financial aid to persons and their dependents who never had a chance of recovery in a common-law action or one based on statute. But in the schedules of payments the maximums have been fixed at a figure that obviously contemplates taking away from the careful employee and adding to the negligent employees's compensation.

The caption of the act introducing compensation laws is misleading to a major extent. The insurance companies, through their actuarial departments, have been carefully watching and summarizing developments under the various Workmen's Compensation Laws, and have definitely decided that it is to the advantage of liability insurance companies to compensate and not litigate, by paying all persons injured, if and when cases of actionable negligence can be limited in recoveries to a ridiculously low figure.

To illustrate, the schedule of workmen's compensation benefits in North Dakota compensates an employee for the loss of an arm at the shoulder by a payment of $22 per week for 250 weeks, or a total of $5,500. If suit were permitted in such a case and actionable negligence could be proven, this situation might well result in a verdict of from $35,000 to $75,000 or more. Yet a careful claimant will get $5,500 while just across the street, perhaps under the same employer, a grossly negligent employee loses his arm at the shoulder and is entitled to precisely the same compensation.

Who is paying for whom? The caption says that the law is for the benefit of the "employee and his dependents." For which employee? The answer is obvious: the negligent employee. At

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3. N.D. Rev. Code § 65-0428 (1943).

whose expense? The answer: at the expense of the careful employee.

The foregoing illustration applies to the schedule generally.

And some cases are not taken care of in the schedules in any way. To illustrate: a woman came to me who was working in a room where there was an unguarded, unprotected shaft upon which pulleys operated. Her work required her to go close to this exposed shaft. In leaning for some purpose, her shirtwaist was caught on the shaft and quickly she was drawn against the shaft and one of her breasts was torn away, causing a painful, horrible wound and permanent disfigurement. She was a healthy woman and recovered without permanent disability — doctor bills and measly payments.

This case illustrates many injuries for which recovery substantially is barred. For pain and suffering, nothing is allowed. For disfigurement, nothing is allowed.

Should we wonder when we read about insurance company lawyers who say, "Let's Compensate—Not Litigate?" But, says the insurance lawyer, when the employer pays his premiums he should have protection. The insured is not protected against a law suit, this is true; and he should not be at the expense of the injured. But the premium could well be adjusted by the actuarial departments of insurance companies in such a way as to substantially reduce premiums for liability insurance without barring a worthy case from being tried to a jury by the injured party.

I say let's compensate. But if necessary to compensate, let's litigate. Finally, any form of compensation in insurance liability cases based upon a schedule should not take away from the injured party his common law or statutory remedies. The right to trial by jury should not be denied any American.

One way, and I am not prepared just yet to say it is the best, would be to have compensation without litigation such as Mr. Marx suggests, with the right of election by a claimant as to whether he takes under the compensation laws or proceeds under the common law or such statutory law as he now has, with the provision that if he elects not to take under the compensation laws he would, if he failed to recover in his lawsuit, only collect three-fourths or some sum less than provided by the schedule of his compensation under the compensation laws. This would discourage the nuisance cases

and thereby give great relief against the backlog of personal injury cases cluttering calendars in congested centers.

To say, however, to a careful person injured without personal fault, "We are withholding from you a part of what you should have and giving it to one who was negligent" just is not right under the theory of American jurisprudence.

I could go into a long discussion on the subject of what claim departments of insurance companies could do today under present conditions toward giving relief against the backlog of cases complained of by showing that, if fair settlements were made, there would be fewer cases on the calendars. Knowing how long it takes to bring a case to trial is used many times to force unjust settlements on worthy claimants with serious injuries. But space will not admit of this discussion just now.

"Fault, which is at the theoretical bottom of liability, is largely fiction," says Mr. Marx. With this statement I take positive issue. Then he says: "Who wins depends upon both the vagaries of the trial and the vagaries of the jury." When applied to all personal injury cases, this is not a fact. To admit that such assertions are true is to strike at the very foundation of our jury system under the fundamental law of the federal and the several state governments, which our forefathers have sought to have safeguarded.

There are, it is true, many many personal injury cases which are filed for nuisance purposes and should never have been brought. But there are also a great many cases that are eminently proper for submission to a jury as the trier of facts under proper instructions from the courts. And there are many cases, as well, where there is little if any doubt as to liability; the disagreement rests in how much should be paid. A remedy that would eliminate nuisance cases would go a long way in eliminating congestion in metropolitan centers both by making fewer cases and by taking away from claim departments the threat held over the heads of injured parties that it will be years before money is paid unless an unfair adjustment is made in cases of definite negligence.

I quote Mr. Marx again:

> "The amount of the verdict is equally speculative. It is frequently too big or too low. There is no standard upon which juries base the amounts of their verdicts."

Much truth lies in this statement.

Many conditions contribute to such diversification. Economic conditions cover practically all the reasons for this divergence. Is

this a reason for abolishing the jury system? If so, then the same arguments can be used against a jury in a criminal case. Under convictions under our criminal laws, widely divergent sentences are imposed by different judges for identical offenses. Even in our federal courts this is true. Shall we abolish our jury system and install a uniform practice under which offenses, whether committed with criminal intent or not, will meet with equal punishment for the innocent and the guilty alike? It might as well be suggested that there be a uniform sentence for murder, first, second or any other degree, but that the penalty be made moderate so that the innocent, that is the defendant who has been guilty of justifiable homicide, will pay part of the penalty for the cold-blooded murderer.

Of course we want more uniform laws and uniform application of such laws, and we are working in that direction. But let us not be misled by high-sounding phrases such as "Let's Compensate — Not Litigate." Workmen's Compensation Laws were inaugurated as progressive, and they were intended so to be; but in their operations they have been costly to the careful employee who has been deprived of his right to a jury trial and forced to take under a schedule which pays to the careless as much as it does to the careful.

This article is not intended to resist progress. The condition to which Mr. Marx refers is one that needs much remedying. But let us see that the remedy is not worse than the ailment. And that is exactly what we would have if the entire Marx plan, as is, is set in operation.

So, a remedy that fixes a schedule that covers *all* injuries, available to *all injured parties,* the negligent and the non-negligent alike, is acceptable provided it leaves to the injured party his option to proceed under the common law or statutory law as it now exists, and further provides that the election to so proceed in case of failure will carry a penalty reducing the amount recoverable under the schedule. This is a move in the right direction without the sudden abandonment of our fundamental law.

It has been correctly said that as to vulnerability to attack upon constitutional grounds the statutes providing for workmen's compensation fall into two groups:

1. Those which are optional and afford an opportunity to the parties to elect whether or not they will be bound by them; and

2. Those which are compulsory and furnish no such election.[4]

My remarks are addressed particularly to the second group. And while the courts have been getting around this constitutional objection they have been doing so reluctantly and with their fingers crossed. When we come to apply to the whole field of personal injuries rules which abrogate trial by jury, the courts must stop, look, and listen unless they are willing to get away from the fundamentals of American government.

When money is plentiful and freely in circulation and the cost of living is high, generally verdicts are higher. And verdicts vary in sections where these conditions vary; the well-known fact that in agricultural sections verdicts are lower than in industrial centers attests as much.

Of course where the insured pays the required premium and the right of election is permitted, and there is an election and trial and judgment in favor of plaintiff, the premium fixed and paid should protect the insured, and the actuarial departments of liability insurance companies would naturally take into consideration this contingency in arriving at a fixed premium. But even here, owing to the removal of nuisance cases and the early settlement or trial of cases where plaintiffs have elected not to take under the compensation laws, there would generally be a reduction of premiums and delay incident to personal injury cases.

In the early days of Workmen's Compensation Laws, the Supreme Court of Kentucky considered this question, and its discussion is well worth listening to today when we contemplate broadening the operation of the theory under which Workmen's Compensation Laws are now being administered. The court had this to say:

> "When an injured employee elects to decline the compensation given him by this Board, why should he be denied these causes of action — why penalized in this way? To this there is but one answer, and that is: It was the purpose and intent of this Act to compel an employee to accept its provision and take the compensation allowed by the Board in lieu of any cause of action he might have against his employer for his injuries. When the employer accepts the provisions of this act, the employee is automatically drawn into this so-called contract and made subject to its provisions upon pain of being deprived of all his causes of action. It cannot, then, be said that he has voluntarily elected to accept the provisions of the contract, because he is told that unless he accepts the provisions of this

4. 58 Am. Jur. 580.

Act he will be deprived of all these causes of action. This certainly imposes a limitation upon his right to recover . . . His election should be free, not even in the alternative. The law has no right to force him to accept the compensation fixed by this Board by depriving him of his causes of action. The only remedy left to him is to accept what he can get from this Compensation Board. The action of the employer in paying into this fund his premiums and accepting the benefits of this Act necessarily brings the employee within the Act. The employee can go nowhere else; he has been legislated out of his causes of action, and all he can do is accept such amount as is allowed him by this Board of Compensation. The legislature has no right to say to one of its citizens that 'unless you accept the provisions of a law impairing your constitutional rights, it will take from you other rights more valuable.'

"If any employer should determine that he wanted to carry his own risk and make his own contracts, instead of having the law to make a contract for him, he can do so. He can operate his industries and pursue his business, however hazardous, and ignore this Act entirely. But what is the result? The law says to this employer: "You may go on with your business industries, but if one of your employees is injured or killed you shall not avail yourself of the following defenses: the defense of the fellow servant; the defense of the assumption of risk; or the defense of contributory negligence.'

"These are practically all the defenses the employer has, and they are taken from his unless he accepts the provisions of this Act. He cannot, under these conditions, successfully defend any suit for personal injury. If he is sued by an injured employee, about the only question a jury will have to determine will be the amount of recovery. Under these conditions an employer has practically no choice, no volition. If he continues to operate his business, he is compelled to pay his premiums into the fund and accept the provisions of the Act.

"It has been well said in one of the briefs: The employer is told: 'You may refuse to accept the provisions of this Act, but if any suit is instituted against you for injuries received by your employees, you are deprived of all defenses thereto, and to all intents and purposes a default judgment will be rendered against you.'

"We cannot subscribe to the proposition that this is a voluntary contract, even on the part of the employer."[5]

So it can be seen that both employer and employee have been deprived of fundamental rights under the general theory of Workmen's Compensation. However, it must be admitted that much good has come to many people on account of payments received

5. Kentucky State Journal Co. v. Workmen's Compnsation Board, 161 Ky. 562, 170 S.W. 1166, 1169 (1916).

through Workmen's Compensation laws. But no one has stopped to figure out yet how much has been taken away from injured people by virtue of having them placed compulsively under a fixed schedule of damages for personal injuries in cases where there was absolute liability.

Certainly we need progress in this field, but we must keep in mind that the right to trial by jury must remain inviolate if we are to keep our American form of government.