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A PROPOSAL FOR THE REFORMATION OF THE TRIAL OF PERSONAL INJURIES CASES

BY FRANCIS H. PATRONO *

HAVING recently discovered the Earth, the men of Mars appointed a suitable commission to study the cultural and governmental organization of the newly found planet. The Earthlings were glad to form committees of their accomplished ones to assist in the Martians' work.

Naturally, the Martians were interested in the operation of the juridical systems of the Earth. In Pennsylvania they observed the trial of a personal injuries case.

"These witnesses whom you see are very learned physicians", explained the host Committee of Lawyers. "They are explaining the plaintiffs' injuries and stating how long they will continue."

"And who are these twelve who are listening?" inquired the Curious Visitors.

"They are the Triers of the Fact: these twelve will decide which of the opinions they are hearing is the true one", the Interested Travelers were told.

Being logical men, the Martians rejoined, "These twelve must, then, be the most learned and experienced of earthlings in the ailments and physical misfortunes which beset your kind".

"Oh, no", was the reply; "They are selected by a system which is well designed to bring about the selection for Triers of the Fact of those who know the least concerning the ills which humanity suffers or has imposed upon it".

"This, then, is your system", summarized the Astounded Guests. "You select the least informed to make decisions concerning those matters which are the subject of the most profound and careful deliberations of your most eminent savants".

"Yes", said the Learned Lawyers. "Indeed this system is a fundamental tente of our Law and has therefore been written into our basic governmental compacts".

There can be no denial of the proposition that the trial of personal injuries cases consumes most of the time and energy of the trial courts of Pennsyl-

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vania.[1] By far the greatest number of these personal injuries cases results from automobile accidents. There are, however, an appreciable number arising from accidents resulting from negligently maintained real estate, negligently conducted industrial activity, and the like. Whatever their source, cases involving claims that the plaintiff has sustained bodily damage are being filed every day—in steadily increasing numbers.

As is well known, the deluge of law suits to redress injured persons has resulted in a great undigested glut of litigation in most of the urban communities of the state—and of the nation, for that matter. One cannot expect his case to be tried in Pittsburgh for better than two years after it has been filed—or for an even longer time in other metropolitan centers. Many thoughtful observers regard the inevitable delays as a substantial denial of justice to the litigants involved.

Many a voice has sounded to protest against the grinding weight of the load which is bearing down upon the courts. Many a palliative has been suggested. The disappointing fact is, however, that despite all the well intended activity the load of personal injuries cases becomes greater with each passing year.

This article will add still another item to the considerable volume of literature on the subject, but it is intended to do what much of that literature does not do—suggest a cure for the consideration of the profession.

In considering any reformation of the method of trying personal injuries cases certain basic assumptions must be made. This article accepts the following premises:

A. As to Liability. It is assumed that the concept that fault is the basis of liability will remain.

There are those who take the view that fault should be declared irrelevant in cases arising out of automobile accidents. The advocates of the elimination of fault point to the analogy of the development of the law pertaining to the compensation of workmen who have sustained injury in the course of the pursuit of their industrial occupations. They maintain that injury on the highways must be regarded as inevitable, and that the cost of redress for that injury should be borne by the motoring public generally.

The advocates of the abolition of the concept of fault do not generally propose their reform for those cases which arise out of negligently maintained

[1] See the remarks of Chief Justice Stern at the 1956 summer meeting of the Pennsylvania Bar Association, at Spring Lake, New Jersey.

real estate. Although not frequently considered, the arguments which they advance in automobile cases would logically be applicable also to cases arising out of the negligent conduct of industrial activity.

The proposal that fault be eliminated in some personal injury cases is by no means universally accepted. The argument of the opponents is that fault must be retained to encourage a sense of responsibility on the highways, and in other activities. The frightful carnage on the roads can only result in more dead and injured, say these conservatives, if the law accepts the proposition that negligence bears with it no financial responsibility other than that of buying insurance.

Some of the opponents also argue that the operation of an automobile has become a necessity, rather than a luxury, for a large number of the public. They conceive that a system in which all those injured by automobiles are compensated will result in prohibitively high insurance rates, with a resultant hardship for those whose station in life makes automobile operation a necessity.

Since the decision between these conflicting points of view is rather irrelevant to the thesis of this article, it will be assumed that the present concept of liability depending on fault will remain.

B. As to the Measure of Damages. It is assumed that the present idea of full redress to the person injured will remain.

In this field there are also two schools of thought. On the one hand are the advocates of the proposition that compensation should be determined solely by the nature of the injury. For instance, a person who has sustained a compound fracture of the femur would be entitled to X dollars; but for a simple fracture of the femur he would receive Y dollars. On the other hand, an aggravated lumbar arthritis would be valued at Z dollars. This school is, of course, influenced by the example of the workmen's compensation laws.

Such a development is a departure from the present notion that one who has been injured by reason of the fault of another is entitled to that amount which will restore him, so far as money can do it, to his condition before his injury. The bank president who has sustained a fracture of the femur and has sustained loss of wages now receives a greater amount than does his janitor who has sustained the same injury and been unable to work for the same length of time. The reformers would have both men receive the same amount.

Without belaboring the point, the author accepts the proposition that one who has sustained injury is entitled to full redress, rather than to an entirely artificial and fixed schedule of recovery.

He would formalize only that item of recovery granted for pain and suffering, which under any conceivable circumstances eludes precise monetary definition as an item of redress. The idea of redress is rather fundamental to our culture. The problem is to provide it within the limits of the amount of time and energy which the courts can provide.

Any logical approach to the problem of the volume of personal injuries litigation must start with the inquiry—why are so many personal injuries cases tried? To the author the answer is obvious: the reason is UNCERTAINTY. Most cases go to trial because the plaintiff thinks a jury will award him more than the defendant's insurance carrier has offered in settlement, and because, at the same time, the insurer thinks the jury will award less than the plaintiff demands.

The actual trial of cases is not, however, the whole story. It is a fact that many more cases are settled than are tried. However, this fact does not warrant the assumption that the courts are not called upon for any activity in connection with those cases which are settled. Frequently the settlement is made only after the parties have employed all the pre-trial machinery which the courts can provide: discovery procedures, pre-trial conferences, and the like.

Actually our Martian friends may well regard the settlement negotiations which characterize a personal injuries case as the nearest thing to the haggling of the Oriental bazaar which the American scene can provide. The prospective seller and the prospective buyer of the injured person's release weigh an assortment of factors in arriving at their opinions of value—an assortment which even Oriental bargainers might regard as weird. Undoubtedly the degree of culpability of the parties is a factor: other factors being equal the plaintiff who has been run down in broad daylight while a pedestrian on a sidewalk will receive a larger verdict than will a driver who has emerged just prior to the accident from a subservient highway onto a through highway.

Many another factor, however, enters into the sense of value. The following catalogue of inquiries is by no means fanciful:

1. Who is the defendant? The plaintiff's injuries presumably hurt worse (and certainly in practice result in a greater verdict) if he has been struck by a railroad than they do if he has received his injuries from a railroad worker when the latter was driving his car home.

2. Is the plaintiff a socially deserving person? For example, a widow with a number of minor children would pass this test with a high grade.

3. What sort of witness will the parties make? An irascible, assertive, opinionated client will rate poorly with the jury.

4. Who is the opposing counsel? His histrionic and oratorical ability are likely to be of more consequence than the extent of his legal knowledge.

5. Who are the physicians who are going to testify? Here too an important consideration is the facility of the physician as a witness, often as important a consideration as the professional rating of the physician.

It is small wonder, when all these factors have to be weighed, that the contenders frequently arrive at completely irreconcilable opinions of the value of the case. The apologist will say that such uncertainties are inevitable in any system operated by humans. However, the writer believes that the area of uncertainty could, as the result of a rational approach, be considerably minimized.

Such a result would follow, it is submitted, if a system could be devised wherein those qualified by training and experience for the task were given the responsibilities of forming decisions as to the extent of the injury to which the plaintiff has been subjected and the prognosis thereof.

Not the least of the uncertainties which result in trials and extensive court-supervised pre-trial activity is that which revolves in the area which responds to the question: how badly was the plaintiff injured?

The impact of the foregoing observation is strengthened when one considers how many trials involve injuries which are based on subjective symptoms. Herniated disks, cervical sprains and strains resulting from whip-lash injuries, lumbosacral sprains, post-concussion syndromes—usually manifested only by pain related by the patients—are legion. In those cases a jury has little on which to base a decision other than the opinions of the physicians who appear before them and the judgment they are able to form as to the integrity of the plaintiff who relates his symptoms to them.

An analogous group of cases is that which involves aggravation of pre-existing ailments. Many a jury has been called upon to decide whether a plaintiff's discomfort is the result of an aggravation of a previously existing arthritis or the result of the natural progress of the disorder. Many another jury has had to determine whether or not the plaintiff's present heart condition has been contributed to by an accident.

In their consideration of these perplexing problems juries always have the assistance of physicians who testify before them. Two remarkable facts emerge: (a) in a high proportion of cases the same physicians appear—and

they generally testify on the same side of the case as they have previously testified in other cases, either for the plaintiff or the defendant, and (b) the physicians who testify have widely divergent opinions as to the nature, extent, and prognosis of the injury involved in the case.

There are undoubtedly a variety of reasons why the same physicians testify so repeatedly. Among these are:

1. The majority of physicians will not testify except in cases in which they have attended the plaintiff, and then often reluctantly.

2. Many physicians do not have the skill to express themselves in terms laymen can understand. Those who are called upon to testify are known to possess didactic talents.

3. The physicians who testify are interested in those branches of medicine which are concerned with traumatic injuries.

Whatever the reason, juries are repeatedly confronted with the perplexing fact that they must decide what those who are presented to them as experts are unable to agree upon. It would be fantastic to expect the results to be predictable. Every trial lawyer knows that the verdict is bound to express the jury's very human reaction to the unfathomable dilemma it faces with respect to the medical testimony, and to the supposedly irrelevant but quite fathomable other factors which surround every trial.

The trial lawyer operating under the present system has to attempt to guess what will be that reaction by the jury. Here is the germ of the uncertainty which causes trials. The trial lawyer knows fairly well in advance of trial what will be the medical testimony presented at the trial. He often knows that that of the plaintiff will be quite contradictory to that presented by the defendant. His evaluation of the case generally represents his guess, not as to the testimony his opponent will present, but as to the reaction of the jury to the testimony which he knows will be presented. His guess will take into account not only the facts of the case but also the psychology of a jury faced with testimony which it does not have the training to assess. The latter he can evaluate only in the light of his experience as a fellow human and lawyer.[2]

No one could expect that the guesses of the contending lawyers in such a situation will be harmonious. As a result they engage in the customary pretrial barter in an attempt to evolve the best possible figure for their clients.

[2] For example, the people of Greene County, Pa., must be a more stoical genus than those of Washington County, Pa.: it is well known to insurers that verdicts in the former are on the average only one-fifth to one-eighth of the size of those in the latter.

If these efforts do not succeed in reaching a value approximating the preformed guess of the attorney, a trial is the only alternative.

The author submits that a tremendous forward step will have been taken if the area of uncertainty can be reduced to the extent that it involves medical testimony.

The elimination of such uncertainty must take into account the following phenomena characteristic of the present system:

1. *The physicians who appear in trials are often not impartial.* The plaintiff's physician is his choice and will be compensated by him. Frequently the payment of his bill will depend on the result of the trial. Similarly, the defendant, or his insurer, has selected his physician and will compensate him. Often the same physician has been employed by the defendant's insurer in a similar capacity in many other cases. For that matter, the physician who appears for the plaintiff may frequently have previously performed the same service for the plaintiff's attorney.

2. *The physicians who appear in trials are often not the best trained in the problems which the trials present.* The plaintiff's doctor is often not the best qualified in the community for several reasons: he may have been selected by the plaintiff, a layman who has no training or experience to qualify him for making the selection; he may have been selected by a plaintiff's lawyer who is more concerned with the successful prosecution of the case—depending as it does on the personality qualifications of the physician to project his views to a jury—than with the securing of the best available medical training. The defendant's physician has likewise been selected primarily as a vehicle in the successful result of the law suit.

A more important factor, however, is the very general reluctance of many members of the medical profession to testify if it can in any possible way be avoided. Whether we like it or not, there is a not inconsiderable weight of attitude in the medical profession that the business of testifying in court is unprofessional and vaguely unclean. One suspects that this attitude is rooted in a distaste for exposing one's professional training—or lack of it—and to a revulsion from the tribulation of justifying to laymen the judgment one has formed. Whatever the real reason, the fact is that, however honest their intentions, litigants cannot avail themselves of the services of many members of the medical profession for purposes of testimony.

3. *The physicians who appear in trials for defendants often have had an inadequate opportunity to make a proper evaluation of the case.* The law grants a defendant of right no opportunity to have a physician examine the

plaintiff. The courts will, in practice, always grant the right to one examination. If the court is persuaded that it is necessary to a just result other examinations may be granted. However, it should be obvious that the examining physician, and not the judge, is the person qualified to determine whether more than one observation—and, if so, how many—are necessary. Cases involving aggravation of a heart condition, aggravation of arthritis, change of personality due to brain injury—to mention only a few—can rarely, if ever, be adequately appraised as the result of the data secured in a single observation.

Having, for better or worse, made a diagnosis of the cause of the lingering ailment which besets the courts, the author submits a therapeutic program. In essence, the proposal is that the trial of personal injuries cases be separated into segments, each to be handled by the group with the greatest competence in that segment.

The specific blueprint suggested would consist of the following steps:

A. The question of liability should be decided by a jury, in much the same way as is done now. The verdict would be a finding in favor of the plaintiff or the defendant. In the event there is more than one defendant the verdict would find which one or ones of the defendants are liable, if any are liable. In the event that the current proposal that the principle of comparative negligence be substituted for contributory negligence should become law in Pennsylvania, the verdict of the jury would specify what proportion of the accident was due to the negligence of the plaintiff.

B. If the case presents a claim of loss of earnings the jury should also make a finding as to the earning power of the plaintiff from the date of the accident until the date of trial or the date when the plaintiff admits loss of earnings ceased. It should not find what aggregate amount of earnings was lost by the plaintiff as a result of the accident. If the case presents a claim of loss of earning power, the jury should make a finding as to the future earning power of the plaintiff.

C. In the event that the plaintiff claims that it was necessary to hire household help the jury should find whether or not household help was employed, and what was the fair rate of the compensation of the household help. It should not find what was the aggregate amount paid for the household help as a result of the accident.

Other claims of out-of-pocket loss which pertain to items the evaluation of which do not require special scientific knowledge should be similarly handled—for example, a claim for damage to the plaintiff's car or clothing.

D. After the jury has rendered a verdict for the plaintiff, the court should refer the case to a board of impartial physicians for examination and report to the court. This board should be made up of what may be called specialists in Forensic Medicine, for want of a better name. This group of specialists should have qualifications to be established by an appropriate accrediting agency to be established by the medical profession.

The report should present a diagnosis, specification of the treatment appropriate to the ailment, and a prognosis. It should consider whether or not the nature and duration of the treatment which the plaintiff has received to the date of the examination is an appropriate consequence of the accident, or how much of it is such an appropriate consequence. In the event that the plaintiff should not have recovered from his injury, the report should specify how long, and to what extent the effects of the injury will continue. If the panel is unable to determine how long the effects of the injury will continue, the report should state at what time in the future a re-examination should be made.

For the purpose of securing a history to use in its work the board should of course interrogate the plaintiff. It should also be entitled to call before it any physicians who have treated or examined the plaintiff, without regard to whether they have been employed by the plaintiff or the defendant. It should have the right to examine any x-rays or other records of examination, care, or treatment previously made. In the event that the defendant has testimony which is contradictory to the history presented by the plaintiff, he should have the privilege, subject to cross-examination, to present that testimony. The history and contradictory evidence would probably be most effectively prepared and preserved by deposition taken before the examination by the board and presented in writing to the board.

It is contemplated that the history and evidence contradictory thereto will be only for the information of the board. The board should be free to accept or reject such of it as it, in its sole discretion, sees fit to accept or reject. Its decisions should be based on its own tests devised by it to test the accuracy and reliability of the history.

There should also be presented to the board the plaintiff's claims as to (1) the amounts he had to expend for physicians, hospitals, nurses, medicines, theraputic devices, and the like as a result of the accident; (2) the length of time he claims to have been unable, either totally or partially, to be employed at his customary occupation as a result of the accident; (3) future expenditures which will be required for medical care; and (4) disfigurement, and

the permanency thereof. These claims should be included in the same deposition as is employed to present the history of the case.

The board should, in its report, evaluate these claims. It should have the power to accept, modify, or reject the claims. For example, a plaintiff may claim total disability from the date of the accident to the date of examination, a period of 6 months. The board might, however, find that the plaintiff was totally disabled for 4 weeks, 50% partially disabled for 20 weeks, and not at all disabled thereafter.

The board's compensation should be paid by the county where the litigation is filed, but the board should not necessarily be composed of persons residing in the county. It should, within reasonable limitations, have the sole discretion as to where examinations are to be made, and how many examinations are required.

The medical profession should form an agency which will be empowered to review the work of board members, and apply disciplinary pressures, if necessary.

E. The report of the impartial board should be subject to question in the event either party to the lawsuit should desire it. The attack should be made at a hearing before the court. At this hearing the complaining party should present such medical testimony as he desires in contradiction to the report. The members of the panel should be summoned to support the report if the other party, or the court, desires their attendance.

In the event that the court should find that the weight of the evidence overcomes the report, the court should specify in what respects the court finds the report to be in error. The findings of the court so made should be subject to appeal, in the manner now in effect.

F. The original report, or the report as altered by the findings of the court, should be the basis of a monetary evaluation by the court. This evaluation should conform to certain standards set by law. It will be the amount of the plaintiff's judgment.

The following are suggested standards to be established for the guidance of the court:

1. EXPENSES OF TREATMENT. These should not usually present any difficulty, but should be the amount of the plaintiff's bills for doctors, hospitals, medicine, therapeutic devices, and the like. If the report of the impartial board has found that any of these bills are not an appropriate consequence of the

injury received in the accident, the amount of these bills shall be reduced to such amount as is consistent with the report.

2. LOSS OF EARNINGS. This sum will be calculated by multiplying the amount of the earning power determined by the jury by the length of the plaintiff's disability shown by the report.

3. LOSS OF FUTURE EARNINGS. This sum will be calculated by multiplying the amount of the future earning power found by the jury by the length of the plaintiff's future disability shown by the report, and by reducing the sum so derived to its present worth. In the event that the report has been only an interim report specifying a date for a re-examination, the finding shall be calculated only to the date suggested for the re-examination. In the event that the report at the time of the re-examination shall indicate a disability which will continue into the future, the court shall make another award in the same way as the first was made.

4. FUTURE MEDICAL EXPENSES. If the report has indicated that future treatment is necessary, the amount allotted for that purpose shall be the amount estimated in the report.

5. COST OF HOUSEHOLD HELP, PROPERTY DAMAGE, AND SIMILAR ITEMS. These items will be calculated at the rate set by the jury, for the length of time which the report of the impartial board indicates is warranted.

6. PAIN AND SUFFERING. Obviously, this item cannot be handled without an artificial formula. It is submitted, however, that such a formula will be as just as are the presently haphazard results. Moreover, the object is to achieve certainty. Certainty will surely be made more definite if a formula is employed. Many formulae can be conceived; the author suggests that a figure of, say, ten times the cost of the medical and hospital expenses recognized by the report would be appropriate.

7. DISFIGUREMENT. This item presents all the same problems as does the item called pain and suffering—and some additional ones. Actually, the jury is probably the tribunal best qualified to place a monetary evaluation on disfigurement. However, at the time at which the jury would act the plaintiff's appearance then might not accurately reveal his future appearance: revision by a plastic surgeon might well erase nearly all of his disfigurement. The jury, under the proposal here made, would not have any medical testimony presented to it so it would be unable to evaluate the amount of improvement which could be wrought by surgical intervention.

The most efficient method of handling this item will be for the court to place a monetary value on disfigurement on the basis of the report of the board—within limits set by law. The maximum limit could well be related to the cost of surgical procedures pertaining to the disfigurement, as, for instance ten times the fair cost of such procedures and the attendant hospitalization.

G. In the event that either of the parties should request it, the court could at any time, in its discretion, order that a plaintiff, actual or prospective, be examined by an impartial board. It is contemplated that this referral could be made before any suit has been filed. The court should have the power to order that the cost of the examination be reimbursed to the county by the party requesting the examination or made a part of the costs to abide the outcome of a trial on the liability question.

It is obvious that the existence of specialists in forensic medicine is essential to any such scheme as that here outlined. To some the assumption that such a group of specialists can exist is inconsistent with the present aloofness of a great portion of the medical profession toward participation in litigation. However, it is submitted that the scheme here proposed will counteract the causes of that aloofness: (1) physicians who examine, report, and testify as members of a board under the conditions proposed will be truly impartial and will not have reason to regard themselves as the hirelings of either party; (2) physicians accredited under the system here proposed will have training and experience adequate to face the problems which arise in connection with personal injuries litigation, and (3) the examinations will be made under such circumstances as the physicians themselves select, so that they will no longer have reason to believe that they are afforded an inadequate opportunity in which to perform their work. As a consequence, the system proposed should prove palatable to the profession as a whole.

Admittedly, there is not at present a very large segment of the profession which has either the training or experience necessary to be specialists in Forensic Medicine. The successful inauguration of the plan would require first the establishment of criteria of training, accomplishment, experience, and integrity which a candidate for certification as a specialist in Forensic Medicine would have to meet. Such criteria should be developed as the joint activity of appropriate bodies of the medical and legal profession. Once the criteria have been established the certification of training courses in medical schools and of candidates for accreditation as specialists should be the responsibility of the medical profession.

Undoubtedly the development of a smoothly functioning system will require strenuous effort on the part of both professions. However, the author is

certain that, if they are convinced of the social utility of such a development, both professions have more than enough mental acumen and social conscience with which to bring the plan to fruition.

The professions, and the public, must first be convinced of the social utility of the plan. The author submits that the following considerations demonstrate its social utility.

As has been said, the premise of this article is that the reason for the glut of lawsuits now experienced by the courts is the prevalent uncertainty as to the monetary value of the case of an injured person. This uncertainty results from the great disparity in the results of jury trials. Such disparity is not just, for justice contemplates the equal and uniform redress of wrongs.

Accepting the premise as true, it is submitted that the plan here advanced will remedy the uncertainty in that:

I. Contested issues will be determined by tribunals competent to evaluate the testimony. The present system requires an incompetent tribunal, the jury, to assess testimony relating to injury. Unpredictable results naturally follow the efforts of a tribunal inadequate to the task it faces. When those best able to evaluate a physical condition are entrusted with the problem predictable results should follow.

II. The provision for pre-suit and pre-trial examination and report should bring certainty into the case at the earliest possible moment. The effect of the present system of attempting to bluff one's opponent as long as possible in an effort to get the most favorable figure from him should thus be eliminated. The provision giving the court discretion as to the person on whom falls the cost of such pre-suit or pre-trial report should, if properly administered, prevent hardship to an impecunious litigant.

III. The impartial character of the board should result in the board's report being accepted as the facts of the case, in so far as the nature or extent of the injury is concerned. It is contemplated that the report will be so accepted in the vast majority of the cases. The plaintiff's attending physician and the defendant's examiner will—so far as the litigation is concerned—be in distinctly auxiliary roles. This situation should result in the lawyers on both sides withdrawing from their present reliance on the frequently widely disparate views of the physicians employed by the parties.

IV. The formalization of the award for pain and suffering should eliminate what is presently the area which gives rise to the greatest amount of uncertainty.

The foregoing proposal is unquestionably a radical departure from the present law and practice. The adoption of it will require a constitutional change. Yet if the proposal has merit the fact that it will be difficult to put into effect should not be a barrier. It was difficult to adopt workmen's compensation laws, but once their social utility was demonstrated the changes in basic legal structure which were required were promptly brought about.

The legal profession has a responsibility which goes beyond the comprehension and application of precedent. It has the ultimate duty of providing acceptable methods of compromising social tension. The present spate of personal injuries cases is undoubtedly symptomatic of an area of social tension: that in which the desire of the public to operate that modern necessity, the motor vehicle, without prohibitive cost for insurance contends with the desire of the victims of the motor vehicles for remuneration for their injuries. It is time, in the opinion of the author, that his profession accept its responsibility to ease that tension. To that end this article has been written.