



1962

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Recommended Citation

Emil C. Rassman, *Of Torts and Defendants*, 16 Sw L.J. 244 (1962)
<https://scholar.smu.edu/smulr/vol16/iss2/3>

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OF TORTS AND DEFENDANTS

by

Emil C. Rassman*

THIS ARTICLE deals with some of the problems which confront the practitioner who undertakes the handling of personal injury litigation for the defendant. In view of its dimensions, no attempt has been made to relate the subject to a consideration of trial technique in the conventional sense. Instead, certain comments and suggestions are offered with respect to the principal steps that are involved in the handling of every personal injury case, *viz.*, (1) preparation, (2) settlement negotiations, and (3) trial. In addition, some emphasis is given to those qualities of work, spirit, and imagination, which it is believed make for effective advocacy in this burgeoning field of law.¹

I. THE NECESSITY OF APPRAISAL

The law of torts is in the midst of a substantial evolution.² Indeed, it has become, as characterized by one authority, "a battleground of social theory."³ As America passes from an era of materialism to one of expanding humanism, there has been a marked synthesis of traditional tort concepts with social, physical, and medical postulates.

The general trend has been toward an expansion of tort liability, a broadened concept of social responsibility, and a balancing of interests, with the latter often being measured in terms of capacity to bear the loss. Moreover, these changing concepts have been accompanied by judicial toleration of increasingly large jury verdicts dealing with such intangibles as the value of pain and suffering, psychic injury, subjective complaints, and all the sequelae of trauma.⁴

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¹ "In a recent year, as a nation, we spent almost \$4 billion in compensating victims of personal injury accidents." Conrad & Voltz, *The Economics of Injury Litigation*, 39 Mich. S.B.J. 32 (1960).

² "Indeed it may be said of the personal injury field that during the last — say thirty — years, the courts for the most part have been busy trying to escape the restrictive doctrines developed during the century before and in projecting new doctrines in their stead which expand both the basis and extent of liability far beyond the limits permitted by orthodox common law." Green, *Tort Law Public Law in Disguise*, 38 Texas L. Rev. 1, 13 (1959).

³ Prosser, *Torts* 12 (1955).

⁴ Franklin, Chanin & Mark, *Accidents, Money, and The Law: A Study of the Economics of Personal Injury Litigation*, 61 Colum. L. Rev. 1 (1961); *Personal Injury Damage Award Trends (A Survey)*, 10 Clev.-Mar. L. Rev. 193-312 (1961). "In addition, there has developed in the last decade an increased claim consciousness on the part of the American people. A general feeling has grown up that if something happens to injure a person or his property, someone else ought to pay for it, regardless of whether the injured person might have caused the damage himself." Knepper, *The Automobile in Court*, 17 Wash. & Lee L. Rev. 213, 216 (1960).

The changing image of tort law casts its shadow on virtually every personal injury case today. Hence, as a matter of sound practice, among counsel's first considerations is an assessment of the effect which these transitions may have upon his case. The resourcefulness, imagination, and judgment exercised by counsel at this stage may well determine the successful outcome of the case.⁵ In appraising his case, counsel must ascertain whether the plaintiff sustained an injury as a result of the defendant's conduct, whether the defendant owed a legal duty of some character to the plaintiff with respect to such injury,⁶ whether it can be established that the defendant violated a duty to the plaintiff,⁷ whether the plaintiff was guilty of contributory negligence,⁸ whether the accident was unavoidable,⁹ and what damages, if any, the plaintiff suffered as a result of the injury. These considerations are fundamental in any tort case. Frequently they must be reduced to more specific inquiries in order to define the issues and determine the all-important controlling theme of the case.

The purpose of counsel's appraisal is to determine the strength and weakness of the case, to join issues advantageously, to marshal the facts, and to fashion the case effectively. In some situations the appraisal can be no more than tentative, limited to what Judge Hutcheson once aptly described as "the function of the hunch."¹⁰ This is particularly true as to concepts and doctrines which may be under social pressure or judicial surveillance, such as interspousal torts,¹¹ pre-natal torts,¹² tort immunity of charitable institutions and political subdivisions,¹³ products liability and warranties,¹⁴ dead man's

⁵ "The value of analysis in tort cases can scarcely be overstated. There is nothing else so important in defining the issues in a case. . . . The struggle between counsel to formulate the issues is critical, for they seldom see the issues alike. Each desires to do battle on ground of his own choosing. Even though he has a good case, if he makes his choice of ground poorly or has to fight on his opponent's grounds his chances of victory are greatly jeopardized." Green, *The Study and Teaching of Tort Law*, 34 *Texas L. Rev.* 1, 19, 25 (1955).

⁶ While statements are frequently made that without a duty there can be no negligence, this is somewhat misleading. A driver of a vehicle, for example, can be negligent in failing to keep a proper lookout and yet not be liable to a guest passenger because, for reasons of policy, the courts and legislatures have restricted the defendant's duty of care in view of the relationship between the parties.

⁷ See Green, *The Duty Problem in Negligence Cases*, 28 *Colum. L. Rev.* 1014 (1928).

⁸ See James, *Contributory Negligence*, 62 *Yale L.J.* 691 (1953).

⁹ See *Texas Power & Light Co. v. Jezek*, 302 S.W.2d 196 (Tex. Civ. App. 1957—Waco) *error ref. n.r.e.*

¹⁰ Hutcheson, *The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision*, 14 *Cornell L.Q.* 274 (1929).

¹¹ See *Prince v. Prince*, — *Tenn.* —, 326 S.W.2d 908 (1959).

¹² See *Turnknett v. Keaton*, 266 F.2d 572 (5th Cir. 1960).

¹³ See Joachim, *Immunity Doctrine in the Southwest*, 4 *So. Tex. L.J.* 232 (1959).

¹⁴ "During the last century or more, the concept of negligence has been the chief vehicle for administering accident losses. As the need for distributing and compensating losses and for promoting safety has been increasingly felt, the concept of negligence has been liberalized

statutes,¹⁵ attractive nuisance,¹⁶ automobile guest statutes,¹⁷ *res ipsa loquitur*,¹⁸ constructive notice in slip and fall cases,¹⁹ *volenti non fit injuria*,²⁰ the duty of an owner or occupant of the premises to furnish an independent contractor's employee a safe place to work,²¹ the escape of deleterious substances from oil and gas wells,²² and cases involving seafaring and railroad employees.²³ Similarly, in cases involving severe injuries and substantial damages, but questionable liability, or, conversely, nominal injuries but obvious liability, or facts of first impression, counsel must consider the extent to which a court or jury might be tempted to extend the periphery of social responsibility. In each instance counsel's appraisal will largely determine the approach he will take in handling his case.

Despite the uncertainties inherent in transitional concepts of social responsibility, counsel's assessment of his case is seldom made in a sense of "fire and fall back." More often than not, a successful defense lawyer will employ a vigorous offense as the surest defense. However, he cannot prudently disregard the trend of personal injury litigation, and he must weigh the implications of this evolution in terms of its effect upon his particular case.

A similar estimate must be made in those cases which offer a reasonable opportunity to sway the pendulum of social responsibility back toward a less extreme position more nearly in accord with

to afford an even broader remedy to the foreseeable victims of unreasonably dangerous conduct." James, *Products Liability*, 34 Texas L. Rev. 44, 192, 227 (1955); see Sedgwick & Conley, *Products and Warranties: The Battle Has Just Begun*, 28 Ins. Counsel J. 201 (1961).

¹⁵ Harper v. Johnson, — Tex. —, 345 S.W.2d 277, 281 (1961). Justice Hamilton, speaking for the court with characteristic insight, held that Tex. Rev. Civ. Stat. Ann. art. 3716 does not apply to "circumstances surrounding an involuntary and fortuitous collision between two motor vehicles driven by two complete strangers."

¹⁶ Banker v. McLaughlin, 146 Tex. 434, 208 S.W.2d 849 (1948); King v. Lennen, 1 Cal. App. 665, 348 P.2d 98 (1959).

¹⁷ See Fancher v. Cadwell, 159 Tex. 8, 314 S.W.2d 820 (1958); Phelps v. Benson, 252 Minn. 457, 90 N.W.2d 533 (1958), noted, 38 Texas L. Rev. 110 (1959).

¹⁸ See Dement v. Olin-Mathieson Chem. Corp., 282 F.2d 76 (5th Cir. 1960); Mattox v. C. R. Anthony Co., 326 S.W.2d 740 (Tex. Civ. App. 1959—Beaumont) *error ref. n.r.e.*

¹⁹ See Furr's Inc. v. Bolton, 333 S.W.2d 688 (Tex. Civ. App. 1960—El Paso) *no writ hist.* Keeton, *Personal Injuries Resulting From Open and Obvious Conditions*, 100 U. of Pa. L. Rev. 629 (1952).

²⁰ Cummins v. Halliburton Oil Well Cementing Co., 319 S.W.2d 379 (Tex. Civ. App. 1959—El Paso) *no writ hist.* Although the defendant may be regarded as at fault in the sense of being negligent and the plaintiff may be regarded as free from fault in the sense that he was not contributorily negligent, the plaintiff may be denied relief either because there is no duty to protect against conditions of such nature or because of the defense commonly referred to either as "voluntary assumption of risk" or *volenti non fit injuria*.

²¹ See Gulf Oil Corp. v. Bivins, 276 F.2d 753 (5th Cir. 1960); James, *Vicarious Liability*, 28 Tul. L. Rev. 161 (1954).

²² See Brown v. Lundell, — Tex. —, 344 S.W.2d 863 (1961); Keeton & Jones, *Tort Liability and the Oil and Gas Industry*, 35 Texas L. Rev. 1 (1956).

²³ If the duty of care laid upon the employer in these cases is subject to characterization, it is that of a guardian angel rather than that of a reasonably prudent man. Liability in these cases is not based on fault because the acts complained of are not generally preventable by

counsel's conception of the public interest. Although tort law has undergone substantial changes, it is by no means a certainty that these changes, when applied to the given case, have always coincided with the ultimate public interest. Dean William L. Prosser has brought this question into focus in the following statement:

In determining the limits of the protection to be afforded by the law, the courts have been pulled and hauled by many conflicting considerations, some of them ill defined and not often expressed, no one of which can be said always to control. Often they have had chiefly in mind the justice of the individual case, which may not coincide with the social interest in the long run.²⁴

Although evolution in the law is both natural and desirable, there is a responsibility on the part of both court and counsel to strike a balance between change and certainty. In most instances, integrity of doctrine and stability of legal principles, as exemplified by *stare decisis*, have as much relevance and weight in the field of tort law as they do in any other field of law.²⁵ While it is not suggested that *stare decisis* should be applied by our courts with Gothic narrowness, neither can it be proposed that social feasibility be offered as a substitute for justice.²⁶ To do so is "to bring adjudication into the same class as a restricted railroad ticket, good for this day and train only."²⁷

How well these changing concepts of social responsibility are to be oriented in our system of law will depend upon the degree of responsibility exercised in this branch of law by the entire trial bar, the judiciary, the law teacher, and the legislator. The problem is complex, and often it is difficult to determine just where the public interest lies. In general it can be said that the transitional concepts of tort liability and the methods used to assert them must be governed by the inviolable principle that every party in a personal injury case should be afforded a fair and impartial trial.²⁸ The final test of the efficacy of any legal system is how well it provides for the adjudication of disputes between citizens of every character, whether

the employer. Nor is it based on negligence, for the injuries are not usually foreseeable.

²⁴ Prosser, *Torts* 13 (1955). Dean Roscoe Pound, in an earlier day and with characteristic acumen, labeled such transitions "social engineering." Pound, *Theory of Social Interest*, 15 *Papers and Proceedings of Am. Sociological Society* 16 (1921).

²⁵ Beale, *Justification of Injury*, 41 *Harv. L. Rev.* 553 (1928).

²⁶ "The civil law of torts, in other words, cannot alone solve the accident problem. We should not expect it to." 2 *Harper & James, Torts* 743 (1946).

²⁷ *Smith v. Allwright*, 321 U.S. 649 (1944). "Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time but whose birth is distant." Learned Hand, J., dissenting in *Spector Motor Service, Inc. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1943).

²⁸ *New York Cent. R.R. v. Johnson*, 279 U.S. 310, 318 (1929).

corporate or individual, affluent or indigent. The parties to tort litigation should stand equal before the law.²⁹ The plaintiff is entitled to his day in court and is not to be condemned for invoking the processes of the court. However, in this day of the "modern trial,"³⁰ care and restraint must be exercised by bench and bar alike to maintain basic standards of fairness and impartiality. It is the continuing duty of both the court and counsel to prevent the jury in a personal injury case from considering erroneous issues and irrelevant evidence and to guard the jury against the influence of passion and prejudice. Only in this manner can Anglo-American jurisprudence assure even-handed justice to tort litigants.³¹

Important as these broad considerations are to the defense lawyer, there also is a corresponding need on his part to appraise his case parochially in terms of the characteristics and problems of the local forum. As the case progresses toward trial, defense counsel will be called upon to deal with the trial court, the opposing counsel, the plaintiff, his own client, and his witnesses. On such occasions he must continue to weigh and sometimes revise his assessment of the case in the light of the trial judge's proclivities, the general atmosphere of the forum, the caliber of the probable jury panel, the demeanor and probable testimony of the witnesses, and the facts developed by additional investigation. These considerations are inherent in every personal injury case.

II. TRIAL PREPARATION AND INVESTIGATION

Contrary to popular conceptions, success in the handling of litigation of any character seldom has its genesis in a sudden stroke of good fortune during trial. More often success is attributable instead to hard work and careful preparation in advance of trial.

While preparation usually is the price of success in any adversary proceeding, perhaps in no other field of civil litigation is a greater premium placed on careful investigation of the facts than in a personal injury case. In personal injury litigation the facts are the springboard to victory. Knowledge of the law, while certainly essential, is of little avail if the facts have not been clearly developed to support its application. The experienced advocate knows that facts are the foundation of his case and he knows, too, how difficult it sometimes is to dig them out, even from his own witnesses.

²⁹ "Tort law, like all other law, is the product of environment. People's activities create problems for other people, and if there is to be a civilized society, there must be some way to settle their problems when the parties themselves cannot do so by peaceful means. Green, *The Study and Teaching of Tort Law*, 34 *Texas L. Rev.* 1, 3 (1955).

³⁰ Belli, *The Adequate Award*, 39 *Calif. L. Rev.* 1 (1951).

³¹ *Hockaday v. Red Line, Inc.*, 174 F.2d 154, 156 (D.C. Cir. 1949).

Careful preparation and requisite trial technique are the hallmarks of effective advocacy. However, of the two, the former is the more important.³² The preparation must be reflected in practical and efficient methods of investigation, aimed at thoroughly searching out and evaluating the relevant facts on both sides of the case.

The preparation should begin promptly. The practice of filing a routine answer and then deferring the investigation and preparation of the case until shortly before the time of trial augments an advantage already possessed by the adversary.

Successful preparation calls for an open mind during the investigation process. While the law properly places a burden of proof on the plaintiff which should never be discounted, a premature decision that the case is without merit may lead to trouble. Unless the claim is shown to be entirely spurious—and such cases are the exception—counsel would do well not to pre-judge the facts.

Since the law is not an exact science and no two cases are quite the same, rules of approach on trial preparation must yield to general observations. In most cases the preparation should include a consideration of the following questions: (1) Have available discovery devices, particularly depositions, been used to obtain a preview of the plaintiff's evidence?³³ (2) Are the pleadings in final form? (3) Is a motion for summary judgment in order?³⁴ (4) Have necessary trial motions and a requested charge been prepared for the court's consideration? (5) Has the plaintiff's previous accident or litigation history been investigated?³⁵ (6) Have the plaintiff's past and present hospital records been examined?³⁶ (7) Have the facts and circumstances preceding and surrounding the accident been fully explored? (8) Have the plaintiff's activities since the date of the accident been

³² "The outcome of a trial can never be stated with certainty until the jury returns its verdict. But it can be stated with certainty that personal-injury cases are seldom won without thorough and imaginative preparation." McNeal, *Trial Preparation for the Personal Injury Defense*, 28 Ins. Counsel J. 241, 248 (1961), (reprint by permission from the W. Res. L.J., December, 1960).

³³ Oral depositions are a valuable tool of discovery in personal injury practice. They often resolve questions of liability early in the case; they afford counsel an opportunity before trial to evaluate the plaintiff's effectiveness as a witness; and they commit the plaintiff to a definite version of how the accident happened, what his injuries and damages are, and what his work record, claim history, and general background have been, thus setting the stage for impeachment if the investigation reflects material inconsistencies.

³⁴ In proper cases such motions serve to dispose of claims promptly, to obviate the hazard and expense of trial, and to relieve congested dockets. See generally McDonald, *The Effective Use of Summary Judgment*, 15 Sw. L.J. 365 (1961).

³⁵ This information is usually obtained from regional index bureaus, court records, and depositions, and often furnishes a basis for properly contending that previous claims are being duplicated in the present case.

³⁶ These records can provide helpful information concerning the plaintiff's medical, surgical, and accident history, obtained from him at a time when litigation probably was not contemplated.

checked?³⁷ (9) If they will contribute to a better understanding of the case, have photographs, drawings, plats, or scale models been prepared? (10) Should motion pictures be taken of the plaintiff?³⁸ (11) Have the defendant's witnesses been interviewed and are they available to testify? (12) Has counsel himself viewed the scene of the accident? (13) If the accident arose from the use of complicated equipment, or in connection with an obscure mechanical process, has counsel endeavored to familiarize himself with its design and use? (14) If appropriate, has a memorandum of authorities been prepared on questions of procedure, evidence, liability, and damages, which are apt to be encountered during trial? (15) Is counsel thoroughly familiar with the decisions bearing on his case? (16) Has the plaintiff been examined by a qualified doctor of the defendant's choice, and is the doctor available to testify?³⁹ (17) In preparing the medical aspects of the case, has counsel conferred with reputable specialists in the field and familiarized himself with recognized standard medical texts on the subject?⁴⁰

III. SETTLEMENT NEGOTIATIONS

With the facts investigated and the case prepared, counsel is in a position to determine whether the case merits settlement, what its settlement value is,⁴¹ whether his client will authorize a settlement, and whether his adversary in turn will accept it. At no other stage in the handling of a personal injury case does defense counsel bear a heavier responsibility.

For evaluation purposes, virtually every personal injury case

³⁷ An investigation which establishes false denials by the plaintiff of previous claims, especially those involving the same parts of the body, or false denials of previous medical treatment of similar complaints, or doubt that the accident occurred as alleged, or conduct by the plaintiff after the accident which is inconsistent with his claim of disability not only impeaches the plaintiff's credibility and good faith but often reduces the claim to such stature that medical testimony cannot rehabilitate it.

³⁸ In general, motion pictures contribute to the defendant's case only when they definitely portray the plaintiff's ability to do something which he allegedly has not been able to do.

³⁹ If the plaintiff refuses to submit to an examination, counsel should be prepared to prove the refusal, since it often has as much effect upon a jury as would a negative medical examination. With the development of forensic medicine, the defendant who cannot win on the issue of liability should be prepared to eliminate or at least to minimize the damages by showing that plaintiff's physical complaints did not occur as a result of trauma, or that they resulted from disease or other organic conditions disassociated from trauma, and that the consequences of the injury have terminated and the damages are therefore nominal. Berman, *Medico-Legal Trial Technique From the Defendant's Point of View*, 31 Texas L. Rev. 724 (1953).

⁴⁰ Although a number of publications are available to the practitioner on the subject of forensic medicine, much of this literature is of a vocational nature, emphasizing how to capitalize on negligence and portray trauma, and as such is calculated to appeal primarily to the plaintiff's lawyer. Standard medical texts are still essential references and are the foundation of effective medical cross-examination.

⁴¹ See Smithson, *Odds-Valuation of a Lawsuit*, 1959 Ins. L.J. 629.

gravitates toward one of the following four categories: (1) *Cases in which there is no liability and no injury.* As a practical matter, cases in this category are seldom encountered. Manifestly, such cases have no more than a nuisance settlement value, and they are frequently compromised on that basis. The justification for such compromise is that the case may be settled for less money than it would cost to investigate and defend. While this view is economically plausible in an individual case, it sometimes encourages the filing of more such suits and adds to the congestion of dockets. (2) *Cases in which the liability is obvious and the injuries and damages are substantial.* Cases of this character are generally recognized and treated as cases for settlement, although sometimes the plaintiff's settlement demand will be of such proportions that the case must be tried. When this occurs in a case of clear liability, and there are no allegations by plaintiff of gross negligence, defense counsel should consider the advisability of admitting liability and submitting the case on the damage issues only.⁴² The initial benefit of such an approach is the elimination of prejudicial evidence relating to liability. Such an approach can reduce what otherwise might have been an excessive verdict by avoiding the unfavorable impression in the jurors' eyes of an injured plaintiff being put to the trouble and expense of proving the defendant's obvious wrong as well as the damages. (3) *Cases in which the liability is manifest but the injuries and damages are nominal.* Cases in this category sometimes present the problem of medical exaggeration. (4) *Cases in which there is no liability on the defendant's part but the plaintiff's injuries are severe.* Such cases, as a practical matter, are most likely to tempt a court or jury to extend the perimeter of liability in order to do justice in the individual case.

There are, of course, gradations within each of these general categories, which can best be determined by an evaluation of the following factors: The nature, extent, and permanency of the injury; the plaintiff's age and life expectancy, occupation, education, credibility, appearance, voice, prior state of health, race, sex, previous claim history, work record since the injury, and earning capacity; the amount of special damages incurred by plaintiff for medical, hospital, nursing, and drug bills, as well as other actual monetary losses that may be legally attributed to the injury; the presence or absence of aggravated or dramatic facts; the caliber of the probable jury panel; the technique of opposing counsel; the experience and attitude of the trial judge; the comparative effectiveness of the parties them-

⁴² Miller, *Tort Trends and Trial Tactics*, 27 Ins. Counsel J. 635, 639 (1960).

selves as witnesses; the weight of the probable medical testimony, and the effect of extenuating or mitigating circumstances. Each case must be evaluated individually, and the evaluation can be no better than the facts upon which it is based.

If the investigation shows that a case is worthy of settlement, the defense lawyer has a duty to report this to his client. He should be prepared to state his opinion of the value of the case and his recommendations as to what the client should do.

The settlement of a lawsuit generally is achieved by a frank exchange of viewpoints of the relative strength and weakness of the case. As a practical matter, however, the character of the settlement negotiations depends largely upon the integrity and approach of the participating counsel. Although it is not suggested that defense counsel should forsake his position as an advocate during settlement negotiations,⁴³ the successful defense lawyer soon learns that his effectiveness in negotiating settlements is measured in terms of the reputation which he acquires with the plaintiff's lawyers for absolute reliability in his statements and good faith in his dealings.

On the other hand, the defense lawyer must recognize that not every case can or should be settled. In some cases the plaintiff's settlement demand will remain sufficiently unrealistic, even after negotiations, so as to leave defense counsel no choice but to try the case. In other instances, the client may wish that the case be tried, regardless of its settlement possibilities.

In any event, it is the client who is entitled to make the final decision as to whether a case is to be settled. In those instances in which the client declines to follow counsel's settlement recommendations, duty demands that the defense lawyer put aside his misgivings, accept the decision realistically, continue to exert his best efforts, and proceed willingly to trial. In doing so, counsel will be discharging the final part of the obligation he assumed when he accepted employment.

IV. TRIAL CONSIDERATIONS

With trial dockets congested in certain areas, and with proposals under consideration to create compulsory administrative tribunals for the disposition of mounting automobile personal injury claims, one of the most controversial questions among trial counsel is whether delay of the trial of a personal injury case works to the de-

⁴³ "As anyone knows, settlements are desirable where possible, but a settlement is not and should not be considered the easy way out. In essence, both sides are trying to get the best deal possible for their respective clients." Magana, *Evaluation and Settlement of Personal Injury Claims*, 1959 *Ins. L.J.* 639, 647.

fendant's advantage, and whether defense counsel may ethically attempt to delay the trial purely as a dilatory measure in the absence of other considerations. Since the courts are chosen instruments of society for the adjudication of disputes between citizens, it would seem to follow that counsel, as an officer of the court, cannot properly attempt to delay a trial for an unreasonable length of time purely for the sake of delay.

While unreasonable delay is to be avoided, an unreasonably early trial date is also to be avoided. Without being arbitrary, it is believed that a delay of approximately twelve months from the time a lawsuit is filed until it is tried is not in most cases unreasonable.⁴⁴ Nor does such delay operate to deprive the plaintiff of his rights as a litigant in a personal injury case in which he puts in issue the question of the amount of his final incapacity. On the contrary, a delay of a year or so affords a reasonable length of time for an assessment of the permanency of the plaintiff's injury and the extent of ultimate disability, as well as a determination of whether the plaintiff is able or willing to return to work. If the plaintiff has not returned to work within a year after his lawsuit is filed, the probability is that he will not do so, regardless of when the case is finally tried. These are assessments of the case which a defendant should be entitled to make prior to trial.

Although justice unreasonably delayed may often be justice denied, the administration of justice in personal injury litigation must strike a better balance between the concerns of an injured litigant pressing for early redress, and the unqualified right of a defendant to know something of the nature, extent, and permanency of the injuries for which he must account at the time of trial. Without such a balance, plaintiff's rights are abridged or the defendant's property is confiscated, and in either case justice is miscarried.⁴⁵

In view of the increasing size of jury verdicts in personal injury litigation, a question has arisen as to the propriety of suggesting to a jury the monetary value of pain and suffering calculated on a unit-of-time basis. These suggestions usually are made by plaintiff's counsel during his closing argument, and often are demonstrated to the jury on a blackboard or prepared chart by itemizing the estimated cash value of plaintiff's pain and suffering, per hour, per day, or per year, multiplied by a total number of years which generally corresponds with the plaintiff's life expectancy.

⁴⁴ Rosenberg & Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 Colum. L. Rev. 1115 (1959).

⁴⁵ Gresham, *Objectives, Problems, and Methods of Defense Counsel in Personal Injury Litigation*, 31 Texas L. Rev. 696 (1953).

Since pain and suffering is not susceptible of exact measurement by an equivalent in money,⁴⁶ and the calculations on the blackboard or chart are not in evidence,⁴⁷ the cash value suggested by plaintiff's counsel is simply an estimate.⁴⁸ It has never been seriously contended that a plaintiff, despite his knowledge of his pain and suffering, may testify as to its cash value.⁴⁹ Nor are expert medical witnesses permitted to express such opinions.⁵⁰ Why, then, it has been asked, should plaintiff's counsel be permitted to do so?⁵¹

The rationale of permitting plaintiff's counsel to suggest to the jury the cash value of pain and suffering on a unit-of-time basis is that the plaintiff's life expectancy and earning capacity are matters of record, either by stipulation or from the evidence, and as legitimate inferences from such evidence, counsel may therefore argue the duration of the pain and suffering based upon the plaintiff's life expectancy, and the cash value of the pain and suffering based upon the plaintiff's earning capacity.

While it is not suggested that counsel should be afforded less than reasonable latitude in summation, and it is recognized that the right to argue reasonable deductions from the evidence should not be abridged,⁵² the rationale overlooks the fact that there is no correla-

⁴⁶ As stated by the Supreme Court of Pennsylvania, "The nature of pain and suffering is such that no legal yardstick can be fashioned to measure accurately reasonable compensation for it. No one can measure another's pain and suffering; only the person suffering knows how much he is suffering; and even he could not accurately say what would be reasonable pecuniary compensation for it. Earning power and dollars are interchangeable; suffering and dollars are not." *Herb v. Hallowell*, 304 Pa. 128, 154 Atl. 582, 584 (1931).

⁴⁷ *Warren Petroleum Corp. v. Pyeatt*, 275 S.W.2d 216, 219 (Tex. Civ. App. 1955—Texarkana) *error ref. n.r.e.*

⁴⁸ "The Damages are to be ascertained by the jury from the evidence, and are not to be determined by an estimate of counsel, not based on the evidence," *Quinn v. Philadelphia Rapid Transit Co.*, 224 Pa. 162, 73 Atl. 319, 320 (1909).

⁴⁹ "No one has ever argued that a witness, expert or otherwise, would be competent to estimate pain on a per hour or per diem basis." *Botta v. Brunner*, 26 N.J. 82, 138 A.2d 713, 723 (1958).

⁵⁰ "No testimony had been offered of the enumerated damages. Indeed, none would have been competent at any time as to some of them, for instance, the daily damage for pain, suffering and mental anguish. Estimating the damage was a matter for the jury. No witness would have been permitted to give his estimate of that damage." Justice Roberds dissenting, in part, in *Four-County Elec. Power Ass'n v. Clardy*, 221 Miss. 403, 73 So. 2d 144, 153 (1954). As stated by the Supreme Court of Virginia, "To permit plaintiff's counsel to suggest and argue to the jury an amount to be allowed for pain, suffering, mental anguish and disability, calculated on a daily or other fixed basis, allows him to invade the province of the jury and to get before it what does not appear in the evidence. Since an expert witness would not be permitted to testify as to the market value of pain and suffering, which differs in individuals and the degree thereof may vary from day to day, certainly there is all the more reason for counsel not to do so. The estimate of counsel may tend to instill in the minds of the jurors impressions not founded on the evidence. Verdicts should be based on deductions drawn by the jury from the evidence presented and not the mere adoption of calculations submitted by counsel." *Certified T.V. & Appliance Co. v. Harrington*, 201 Va. 109, 109 S.E.2d 126, 131 (1959).

⁵¹ *Ahlers, The Unsworn Witness*, 27 Ins. Counsel J. 257 (1960).

⁵² "Counsel must confine his argument to matters within the record — that is, to the facts and circumstances in evidence and to deductions fairly to be made from them. He is

tion between earning capacity and the monetary value of pain and suffering. The damages allowed for loss or impairment of earning capacity are distinguished from damages for pain and suffering. An injured party is entitled to seek reasonable compensatory damages for conscious mental and physical pain and suffering despite a modest earning capacity at the time of his injury. While his financial status may limit his recovery of damages for alleged loss or impairment of earning capacity, it does not restrict his claim of damages for pain and suffering. To infer a correlation between a party's earning capacity and the monetary value of his pain and suffering would seem to suggest that only an affluent litigant sustains relatively compensable pain while a litigant of humble financial status should be figuratively reduced to the remedy of licking his own wounds. Such conceptions are contrary to Anglo-American jurisprudence. The problem is fraught with difficulty, but it would appear that counsel should not be permitted to estimate the cash value of pain and suffering on a unit-of-time basis under the guise of the rationale mentioned.⁵³

The decisions by the Texas Courts of Civil Appeals on this question have not been uniform, and the Supreme Court of Texas has not passed on the question. The divergent views of the courts of civil appeals are illustrated by the cases of *Warren Petroleum Corp. v. Pyeatt*⁵⁴ and *Hernandez v. Baucum*.⁵⁵ In each of these cases counsel

not permitted to supplement the facts or to emphasize his contentions by injecting into the case a discussion of matters that are not fairly within any reasonable deduction from the testimony and circumstances. Nor may he go outside the record and indulge in inflammatory language in order to influence the jury to return a verdict favorable to his client. In other words, an attorney may not during argument give testimony or make 'an unsworn witness of himself.' " *Warren Petroleum Corp. v. Pyeatt*, 275 S.W.2d 216, 219 (Tex. Civ. App. 1955—Texarkana) *error ref. n.r.e.*, quoting 41-B Tex. Jur. 281 (1953).

⁵³ "If plaintiff's counsel is permitted to make such valuation suggestions to the jury, justice cannot be administered fairly in the trial of this type of case." *Botta v. Brunner*, 26 N.J. 82, 138 A.2d 713, 720 (1958). As observed by the Supreme Court of Minnesota, "To permit a per diem evaluation of pain, suffering and disability would plunge the already subjective determination into absurdity by demanding accurate mathematical computation of the present worth of an amount reached by guess-work." *Ahlstrom v. Minneapolis, St. P. & S. Ste. M. Ry.*, 244 Minn. 1, 68 N.W.2d 873, 891 (1955).

⁵⁴ 275 S.W.2d 216 (Tex. Civ. App. 1955—Texarkana) *error ref. n.r.e.*; *accord*, *Henne v. Balick*, 51 Del. 369, 146 A.2d 394 (1958); *Faught v. Washam*, 329 S.W.2d 588 (Mo. 1959); *Botta v. Brunner*, 26 N.J.L. 82, 138 A.2d 713 (1958); *Joyce v. Smith*, 269 Pa. 439, 112 Atl. 549 (1921), in which the court stated that "the amount of damages claimed is not to be determined by an estimate of counsel, but by the jury from the evidence before them, and any suggestion to the jury of an arbitrary amount is highly improper."; *Certified T.V. & Appliance Co. v. Harrington*, 201 Va. 109, 109 S.E.2d 126 (1959); *Crum v. Ward*, ___ W. Va. ___, ___ S.E.2d ___, pending on petition for re-hearing (1961); *King v. Railway Express Agency, Inc.*, 11 Wis. 2d 604, 106 N.W.2d 274 (1960); 2 *For the Defense* 54 (1961).

⁵⁵ 344 S.W.2d 498 (Tex. Civ. App. 1961—San Antonio) *error ref. n.r.e.*; *accord*, *Kindler v. Edwards*, 126 Ind. App. 261, 130 N.E.2d 491 (1955); *Four-County Elec. Power Ass'n v. Clardy*, 221 Miss. 403, 73 So. 2d 144 (1954); *Chemical Express Co. v. Cole*, 342 S.W.2d 773 (Tex. Civ. App. 1961—Dallas) *error ref. n.r.e.*; *Olsen v. Preferred Risk*

for the plaintiff displayed a chart to the jury during the closing argument which itemized on a unit-of-time basis the amount of damages that counsel estimated his client was entitled to for pain and suffering, for loss of earning capacity, and for medical expenses. In both cases plaintiff's counsel suggested to the jury the amount of damages which should be awarded for each item on his chart. Timely objections thereto were overruled in both cases by the trial courts and appeals were thereafter prosecuted upon judgments for the plaintiffs.

In reversing the judgment and remanding the cause in the *Warren Petroleum Corp.* case, the Texarkana Court of Civil Appeals stated:

Defendants objected to the placing of said charts upon the blackboard and to their use in the closing argument for many reasons, the chief objection being that "the use of the charts were highly prejudicial and effectively injected new and unsworn testimony for the jury's consideration." With this contention we agree. We do not believe the use of such charts would be permissible in any case over timely objection.⁵⁶

In the *Hernandez* case the San Antonio Court of Civil Appeals affirmed the judgment of the trial court without referring to the decision in the *Warren Petroleum Corp.* case, and upheld the use of a prepared chart and the propriety of argument which calculated the monetary value of the plaintiff's pain and suffering on a unit-of-time basis, as follows: "We consider it fair argument and a rational approach to treat damages for pain the way it was endured, month by month, and year by year."⁵⁷

In considering the approach to be taken in the trial of a personal injury case, the defense lawyer must recognize that the sympathy of a jury will generally rest with the plaintiff. Most citizens who are selected for jury duty have a basic sense of fair play, but given a chance to do so, they will sometimes award substantial damages to an injured plaintiff, even when the liability is doubtful.⁵⁸ With this in mind, it is believed that a sincere, dignified, and natural approach, rather than one of outrage or ridicule, will better serve defendant's case. And while defense counsel in a personal injury case may feel

Mut. Ins. Co., 11 Utah 2d 23, 354 P.2d 575 (1960). In some jurisdictions plaintiff's counsel is permitted to suggest the monetary value of pain and suffering on a unit-of-time basis only when cautionary safeguards are applied. See *Jones v. Hogan*, 56 Wash. 2d 23, 351 P.2d 153 (1959); *M.K.T.R.R. v. Jones*, 354 P.2d 415 (Okla. 1960); *Johnson v. Brown*, 75 Nev. 437, 345 P.2d 754 (1959).

⁵⁶ 275 S.W.2d at 218.

⁵⁷ 344 S.W.2d at 500.

⁵⁸ Dean Prosser has stated: "The inherent weakness of the jury system lies precisely in these psychological factors within the jury itself. Sympathy, bias, credulity, gullibility, susceptibility to impression to a good speech, a good display and a good show, lead all too often to the wrong verdict." 43 Calif. L. Rev. 556, 558 (1955), reviewing *Belli*, *Modern Trials* (1954).

pride in his cause, he must at the same time recognize that plaintiff is entitled to a fair hearing and is not to be condemned for invoking the processes of the court. In doing so, counsel will maintain the dignity of American courts, promote justice, and serve his client effectively in a calling of high purposes.

V. CONCLUSION

Although the transitional concepts of tort law have produced certain problems of balance, certainty, restraint, and technique, there is no reason to believe that these problems cannot be reconciled with the public interest. Meanwhile, the defense counsel who appraises and prepares his case well, conducts settlement negotiations realistically, and tries his case with propriety and sincere conviction will maintain a pattern of professional responsibility measuring up to the best standards of Anglo-American jurisprudence.

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