

A TRIAL LAWYER LOOKS AT PRE-TRIAL

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Pre-trial can be one of the most useful procedures in the administration of justice. It can do much to silence talk about abolishing the jury system or developing a state compensation system for automobile cases. Also, it can eliminate much of the appeasement of justice that goes on, due in part to crowded dockets.

Pre-trial is used with varying degrees of success by some judges in different courts in different parts of the country. There is no uniform policy or practice. More often than not, pre-trial as a procedure has been honored more in the breach than the observance.

My own personal experience is limited primarily to my home community. Within the past three years pre-trial has come to have meaning in Cuyahoga County. In 1953, Judge William K. Thomas, of our Common Pleas Court, with encouragement from the bar, was given free rein by our then Chief Justice Kramer to see what could be done to establish a pre-trial program that would not be a waste of time. With a background of experience as a trial lawyer, careful study and also learning by doing, Judge Thomas demonstrated that pre-trial can make an important contribution to the administration of justice.

In essence, pre-trial means an opportunity for litigants to determine the extent to which their disputes can be resolved. It may have to do with stipulations of fact, clarification and narrowing of issues, the resolution of all outstanding procedural questions including the state of the pleadings, and completion of medical information. It may result also in a settlement.

I have been asked to comment about pre-trial from the point of view of a trial lawyer. My trial experience is primarily that of a defense lawyer, but I hope my views can be accepted as an effort to look at the question objectively. Contrary to the impression held by some people, defense lawyers also are human. If the reader finds himself in disagreement with my comments, I hope that my failure to persuade may be charged to human error.

My discussion will be devoted first to the significance of pre-trial as it bears upon the administration of justice generally and secondly, specific factors which in my judgment make pre-trial effective.

PRE-TRIAL AND THE ADMINISTRATION OF JUSTICE GENERALLY

Daniel Webster once said, "Justice is the great concern of man on earth." If this is not true universally, at least it is true where democratic governments exist. Without dedication to the cause of justice—in every aspect of life—a free society cannot come into being or, once established, endure.

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Justice is defined by another Webster, in the sense that we use it here, as "the establishment of a determination of rights according to the rules of law and equity." And in its philosophical context, Webster defines it as "the principle of rectitude and just dealing of men with each other; also conformity to it; integrity; rectitude—one of the cardinal virtues."

A large segment of the responsibility for insuring justice among the daily affairs of men—in our country at least—lies within our courts which offer to the citizens a means of resolving their differences. Once within the courts the responsibility of seeing that justice is done falls to the judge, the jury, the trial lawyers and their clients and, yes, the newspapers.

Justice does not always mean that a case should be tried. Some times a settlement brings justice. Too often, however, settlement means only an appeasement of justice. Sometimes justice is best served by trying the case.

The appeasement of justice has come about for several reasons. Foremost perhaps is the problem of overcrowded dockets in many of our metropolitan centers which makes for a long lapse of time between the filing of a case and when it is reached for trial. Too often this produces an open, acknowledged and bald acceptance of negotiations designed to effect settlements, regardless of the merits as to liability or injury. Such appeasement is encouraged by some plaintiffs, aided by some of their lawyers, abetted by the newspapers, by some defendants and their counsel and occasionally even by the courts themselves.

All kinds of "logical" reasons are given for justifying unmerited settlements; such as, higher verdicts due to inflation (which should be expected), excessive verdicts where juries go haywire (where this occurs there is a remedy in the higher courts), the practice of some judges in refusing to direct any verdicts (a calculated risk) and the extension of theories of negligence which place responsibility upon people in new areas of conduct (the law must take cognizance of change). Other reasons given are the expense of trial, fear of what a jury will do or fear even of a particular judge or one of the lawyers. I submit, when viewed in the larger perspective, that none of these reasons justify settlement.

Within the past few years I learned much from a client who was not insured. He brought to me a matter which on its face appeared to be a ludicrous situation. It involved a suit being filed against him by his next-door neighbor who blamed him for a Halloween prank committed against both the property of the plaintiff and my client. The case could have been settled for a very nominal sum. The neighborhood rallied, with moral support, to the defense of my client. I explained that the cost of defense would exceed many times the cost of settlement. My client felt an injustice was being done by virtue of the lawsuit and that any payment by him would be regarded as some indication of responsibility.

He stood his ground. He refused to pay. Eventually, through the good offices of the court, the plaintiff was persuaded to dismiss his case. My client had insisted upon fighting for a principle. The fees, although kept to a minimum, exceeded substantially what he would have had to pay in settlement, but he did not whimper. His example made a profound impression on me. He would not let justice be appeased.

Effective pre-trial can eliminate unjustified settlements because it provides a judicial forum through which the parties can come to grips with the issues more objectively; speedier and less expensive trials can be held, and there can be a more accurate trial of the basic issues or a just settlement can be effected.

By way of background and with reference to civil litigation only, it may be useful to consider briefly the role of judges, lawyers, juries, clients and newspapers, all of whom have great influence upon the administration of justice.

Clearly, one of the most important qualifications of a judge is impartiality in the administration of his court, a quality no less important in a jury case than in those matters decided by the judge. Most judges are impartial. Until the last three years pre-trial in our country was considered only as a possible aid toward settlement, without any consideration of the issues and merits. Judges who are more concerned with an expedient settlement of differences between litigants than with a judicial determination of rights according to principles of law cannot be effective in pre-trial and are not serving justice. The fact that the defendant is a prosperous individual or corporation or has insurance has nothing to do with settlement, and yet I have heard judges state that because there is insurance a defendant should make some payment.

As for juries, they are both overpraised and overmaligned. There is no fool-proof method of insuring their impartiality or sense of justice. Although the court and lawyers have a valuable role in weeding out those with obvious prejudices or inadequacies, one must rely mainly upon the basic sense of fair play possessed by most citizens who are called for jury duty.

Some judges, lawyers and laymen castigate the jury system as inefficient and unenlightened. Under date of April 16, 1956, Judge David W. Peck, presiding justice of a division of the New York Supreme Court, in a speech before a regional meeting of the American Bar Association is quoted as follows:

It is the jury system which is principally responsible for the flight of commercial litigation from the courts.

He said also that,

the slow process of jury trials constitutes a bottleneck and is the cause of all the delay which has come to characterize the courts and brand the courts in public estimation as dilatory . . .

He recommends that,

All we need do is cast off the shackles of the jury system and realign the law with reality and justice.

Recently, Judge Samuel H. Hofstader, another trial judge of the New York Supreme Court, in an article which appeared in the Saturday Evening Post October 22, 1955, also took a poke at the jury system. He selected a few examples which symbolized a lack of jury intelligence. I am sure this is true occasionally. I am sure, also, that there are occasional judges and lawyers who are not intelligent, but does that justify doing away with judges and lawyers?

It is true that juries are cumbersome, but no client who is represented effectively and who believes he has a just cause should fear having a jury determine his civil rights. There may be possible exceptions that should be made, such as technical issues of fact which might better be decided by a court or court appointed experts. From my own experience I have a firm conviction that many laymen, lawyers and judges underestimate the intelligence of juries. Juries are more sophisticated and much more capable of resolving differences than most people realize.

Juries are unpredictable, they say—and they are, if you mean the reasoning process by which they reach a decision. Or, juries are frequently pro-plaintiff, and they are, if you mean their natural human sympathies lean toward a genuinely injured plaintiff. However, as one who travels primarily the lonesome road of defense counsel, I am convinced that no element of our system of jurisprudence has a higher batting average in resolving issues justly than do our juries. If juries reach wrong verdicts—and occasionally they do—it is less their fault than the fault of lawyers and judges in the preparation and trial of the case, or of legislators in establishing the procedure by which the trial of the case is governed. Furthermore, if a jury goes haywire, their errors are unlikely to be missed by the trial judge, or three Court of Appeals judges or seven judges of the Supreme Court of Ohio.

The trial lawyer has a dual role, be he for the plaintiff or the defendant. He must be an effective advocate on behalf of his client and also serve as an officer of the court in order to help maintain the principles of justice upon which our system of jurisprudence is founded. Sometimes the two roles come into conflict, whence the age-old query: Is the lawyer's duty first to his client or to the law? Too often forgotten is the fact that lawyers as officers of the court not only have a responsibility to their clients, but also, as with judges, they are charged with the larger responsibility of a public trust.

There are quacks and shysters in all professions, but the lawyer, more than most professions, has been the butt of such criticism. Recently a newspaper reporter wrote a story about a doctor who had been cross-examined. The story was killed by the City Desk. The reporter said, "You see, we only go after the lawyers."

Certainly the trial lawyer who enters the courtroom with any other

thought than to see justice done becomes a shyster and a quack. Unfortunately, justice often is that which each protagonist wants and not that which represents the best interests of the general public. However, the lawyer who is afraid to give battle should remain at his desk where he can enjoy the luxury of more lucrative, less arduous and much duller matters. The lawyer who does trial work and does not like it goes crazy. Probably the reverse is true; he who does trial work and does like it is crazy. Be that as it may, those lawyers who have never faced a jury—and that includes most of them—have missed one of the most thrilling and nerve racking experiences in life.

What of the clients? No one will argue that their interest rarely is objective or have we a right to expect that it be?

Justice to them is what they want. Their outlook is conditioned by their experiences, be they individual or corporate. However, it is rare that a conscientious effort by their lawyer will fail to bring their attention to the trees in spite of the forest. When the client loses perspective, frequently it is something their lawyer could have corrected had he assumed his proper role.

Clients engage in expediency too. Plaintiffs will press for payment simply because the plaintiff was injured and the defendant is insured, regardless of the question of fault. Insurance companies can be vulnerable, too, in being willing to make payment to avoid the expense and gamble of trial, even when convinced that the defendant is not at fault or that the plaintiff received no injury. I can report, however that insurance companies are doing this less and less. Some are maintaining a firm position in making no payments unless there is a reasonable basis for believing that the defendant is or may be responsible.

And then there are the newspapers. In the courts the bench and the bar work in a fish bowl. It is public business. The courtroom offers much of human interest and I share, in general, the newspapers' view that the public has "a right to know" what goes on. In the recent trial of the communists under the Smith Act Cleveland newspapers did a superb job of objective reporting and certainly the law profession took some well deserved pats on the back, but most lawsuits do not have such public importance. Unfortunately, much newspaper reporting is concerned only with what the newspaper considers "news value" and ignores the ways in which it contributes to the delinquency of justice. I refer, for example, to the almost universal reporting of high verdicts in personal injury actions and the almost universal failure to report when a defendant wins or when the verdict is less than the amount plaintiffs could have received by settlement. The result is to encourage litigation that should never be brought. It gives false hopes to plaintiffs. It diminishes the possibilities of settlement without the necessity of a lawsuit being filed or even of settlement after it is filed.

Even in civil matters newspapers do not limit themselves to reporting

the results of verdicts. Certain cases find their way into the headlines before trial and during trial wherein the newspapers play up the human interest and sympathy factors—as to the plaintiff. Or, they emphasize the large amount of the prayer. The higher the prayer, the greater the probability it will find its way into a news story.

Even as to the result of verdicts, the newspapers are slanted almost 100 per cent for the plaintiff. During the first two months of the January term of our Common Pleas Court nine jury verdicts were rendered, five defendants' verdicts and four for the plaintiffs. Not one of the defendant's verdicts reached the newspapers. The plaintiff's verdicts were for \$2,500, \$5,400, \$35,000 and \$150,000. Only the two high verdicts were mentioned in the newspapers, and the verdict for \$150,000 became a front-page headline without any reference to the fact that the defendant had tendered the full amount of its insurance coverage before trial. In at least one of the defendant's verdicts, the defendant had admitted negligence in a rear-end collision. The newspapers say that such is not news! If the newspapers insist upon reporting trials, the least they can do is to give a fair picture to the public. The biased reporting of newspapers concerning personal injury actions not only encourages the filing of lawsuits without merit, but also gives every claimant an inflated notion of the value of his alleged grievance.

Actually a strange sort of cold war is going on. In one corner you have that "poor, innocent, horribly injured and mistreated individual," the plaintiff. In the other corner, the defendant, that "rich, callous, merciless remnant of capitalism," particularly if the defendant is a corporation or is covered by insurance.

Plaintiffs' lawyers formed the National Association of Claimants' Compensation Attorneys, more familiarly known as NACCA. They are interested in obtaining the largest possible sum in settlement or by verdict. Originally, NACCA was interested in receiving an "adequate award". More recently they refer to the "more adequate award." I have never understood what is more adequate than adequate. Also, adequate in terms of what?

In contrast, many defense counsel are members of the International Association of Insurance Counsel. They and their clients are interested in keeping down the amount of the settlements and verdicts. Perhaps there will never be an agreement as to what is a fair and just award to a plaintiff (assuming the plaintiff is entitled to anything), but at least both sides should be concerned solely with whether or not, under law, justice indicates that the plaintiff is entitled to recover and if so, then in a reasonable amount.

Judge Hofstader, to whom I have already referred, proposes that all automobile cases be taken out of the courts. He suggests they be handled in a manner similar to the system of Workmen's Compensation. He feels

this is essential because of the clogged dockets in New York, which are some four years behind.

Judge Hofstader's proposal would tear the house down to repair a leak in the roof. It is no solution, until it is decided, after careful analysis, that disputes between strangers cannot be decided upon principles of justice. Judge Hofstader would adopt the principle that any person injured as a result of an automobile accident should receive compensation, regardless of fault. If his view is valid, then why limit it to automobile cases? To apply the principle to the general public through a system of state controlled insurance seems a curious way of solving some of the procedural weaknesses of our courts.

While I do not agree with the solution suggested by Judge Hofstader or even the more recent statement by Judge Peck, *supra*, we cannot deny that a problem does exist. If our American ingenuity cannot devise a better way of meeting the problem of crowded dockets, then the day may well come when some program of state insurance will be instituted. First, however, should we not inquire as to whether there are ways we can improve our present administration of justice? What about a re-examination of our entire court system such as was done in New Jersey? What about an administrator for our courts? What about more efficient use of the time of the courts? What about the institution of effective pre-trial procedures where none exist and continued improvement of the ones that are in operation?

There are still other things that can be done. We can determine whether we need more judges and in some states like Ohio we can see that they are paid more adequately. We can provide a decent retirement system. We can consider the need for law clerks. We can require plaintiffs to pay the court costs where the amount of the verdict is less than the amount offered in settlement. We can explore the possibility of bringing some balance between the value of an arm or a leg in Cleveland and what it is worth in other parts of the state. In a wrongful death action, should the heirs be entitled to recover more because they file a lawsuit in Cleveland than they would obtain were it filed in their home community? Many lawsuits are not filed in the home community and are filed in metropolitan areas only because the verdicts are higher. We can give more attention to such questions as highway safety, the training and licensing of automobile drivers and safety practices in general.

Most important of all, we can make more certain that the handling of personal injury claims and lawsuits is based on the rights of litigants according to law rather than expediency. Some people say "why worry about a little expediency? To be governed by the law may be a fine theory, but if people want to resolve their differences regardless of the law, why prevent them?" When and how do we break out of the circle?

Any important disregard of law that is democratically made endangers you and me and our right to live as free citizens in a free country.

This is true whether it be a refusal to abide by a decision of the United States Supreme Court on a great constitutional question or whether it involves the payment of money to a plaintiff on a nuisance basis. Acceptance of nuisance money by a plaintiff or payment of it by a defendant necessarily involves an acknowledgment that either the plaintiff does not have injuries as claimed and/or there is no legal liability on the part of the defendant.

An effective pre-trial system is not the sole cure, but it can be a significant aid in meeting some of our problems. Pre-trial can do much to produce a fair result, fair to the plaintiff and fair to the defendant, whether the case is tried or settled.

THE ELEMENTS AND GUIDING PRINCIPLES OF PRE-TRIAL

Specifically, what are the elements that make pre-trial effective? In the first place, pre-trial objectives rule out any kind of coercion. Secondly, settlement, if it occurs, comes only as a by-product. Finally, in the Common Pleas Court of Cuyahoga County there are certain essential requirements, and to the extent that they are accepted and applied by the pre-trial judge, the procedure is effective. The most important of these requirements are that all of the real parties in interest must appear; an informal conference is held between the court, counsel and litigants which involves a discussion of the issues of the case and, insofar as possible without prejudicing the rights of either party, there is an exchange of information (such as medical reports, statements of witnesses and photographs). Once the foregoing is done, then and only then, do settlement discussions take place. If the case is settled that ends it. If not, then there may be further pre-trial hearings. In any event, there is need on the part of the court and counsel to see that the results of the pre-trial are followed through.

When a settlement results from the pre-trial no party should complain that it is not fair or not based upon the law, because the pre-trial procedure permits the clients and their lawyers to appraise the pros and cons of the case, both as to the evidence and the law.

In addition to the foregoing steps, there are certain guiding principles in an effective pre-trial procedure which, when used, can have more influence than any other single measure in placing the consideration of disputes on a basis of professional self-respect. Pre-trial procedures become effective to the extent that judges, lawyers and clients apply these principles. At the same time their application diminishes the problem of clogged dockets and discourages settlements not founded upon consideration of actual damage or liability.

These guiding principles are:

1. *Has the plaintiff made out a cause of action? If not, no settlement should be considered.*

This requires not only an analysis of the petition, but also of the evidence that will be offered by both parties. Will the facts raise a jury question as to defendant's liability? If defendant's

counsel is convinced, upon the basis of conscientious legal judgment, that the plaintiff *should not* be entitled to a jury, then nothing should be paid, regardless of the nature and extent of the damages. This is true, regardless of the fact that there are some trial judges who send every case to a jury.

2. *Where the evidence leans more heavily in favor of the defendant, but conflicting testimony will require the facts to be sent to a jury, then the case may have a modest value.*

In this type of situation, a defense lawyer cannot be certain that the jury will find in his client's favor and for that reason it may be that a modest sum should be paid in order to buy the gamble that a jury may find for the plaintiff. Whether or not anything should be paid or how little the plaintiff should agree to accept depends upon the extent to which the lawyers have confidence in their case and how confident they are that the jury will support the position of their respective clients. The decision may depend upon the strength or weakness of the case as to liability, whether damage was sustained, or as to whether the damages claimed are related to the cause of action.

3. *Where there is no doubt of a jury issue but the evidence leans more heavily in favor of the plaintiff, clearly the case has settlement value and the pocketbook must be more generous.* In this situation there is a somewhat different emphasis in considering the factors that determine the value of a case. There is need to make a careful appraisal of the possible minimum and maximum amount a jury is likely to render. The greater the chance of a favorable plaintiff's verdict, the greater likewise is the value of the case to the plaintiff.

To determine what is a fair settlement there must be, of course, a competent understanding of the legal issues. This involves the thoroughness of preparation of the case and the accuracy with which the legal opinions have been reached. Also, there must be a careful appraisal of the nature and extent of injury.

Finally, and of equal importance, counsel must be skilled in appraising the psychological subtleties of the case. He may be accurate as to the law and as to the nature and extent of injury, but if he ignores or misinterprets the psychological factors then his decision as to whether to accept or reject an offer may mean a substantial difference in dollars as to how much his client will receive or pay.

The following epitaph found in a cemetery in Ithaca, New York may well apply to the defendant who makes the wrong appraisal:

"Here lies the body of Elephalet Pease
Underneath the sod and underneath the trees,
Pease is not here, only the pod,
Pease shelled out and went to God."

4. *Where the liability is absolute, then usually the only question is, how much?*

Where liability is absolute and there is no question that the plaintiff received some damage, then liability should be admitted. Normally it should be done at the pre-trial, although there are occasions when it is important for the defendant to withhold the admission of liability until opening statement, during the course of trial or in final argument. Regardless of the stage at which it is admitted—and that depends upon the idiosyncracies of each case—usually the admission will produce a fairer settlement or verdict.

Not only is an admission of liability sound from the standpoint of frankness with the court and jury, but it seems to me that it is a moral obligation as well. Furthermore, admission of liability reduces the length of trials and thereby does not unnecessarily tie up the trial rooms.

Reaction to these four principles may be to the following effect: "We do not disagree with the principles. That is the way it ought to be, but from an economic point of view it tends to force cases to trial and thereby increases the cost of defense."

In the first place, I know of no evidence that following such principles increases the number of cases that are tried. On the contrary, I know of one large company that decided to become a self-insurer because it rebelled against nuisance settlements that were being made regardless of fault. Within one year after becoming a self-insurer the number of claims and lawsuits against that company was reduced about 50 per cent.

As to the question of expense, which is one of the major arguments made by the insurance companies in favor of paying the plaintiffs, I know of only two statistical answers. A certain insurance company made a study that covered 48 cases that were tried to a jury in Columbus, Cleveland and outside of Ohio between 1949 and 1953. In one column the company added the total of the amounts it would have had to pay had it accepted the plaintiffs' lowest settlement demand. In the opposite column, it added the total it actually paid as a result of trial, including attorneys' fees. If the company had not gone to trial and had paid the lowest plaintiffs' demands at the trial table it would have paid out \$194,566 more than it had to pay as a result of going to trial. In other words, it saved nearly \$200,000.

The other example is from records we have kept in our own office. I am sure other offices which do a substantial amount of defense work have found the same results. By following the principles above outlined,

insurance companies or self-insurers have had to pay out less money, including attorneys' fees, than they would have had to pay if in every instance they had accepted the plaintiffs' lowest settlement demand.

In conclusion, before we abolish the jury system which is one of the keystones of our democracy or before we establish a new bureaucracy devoted exclusively to handling of automobile accident claims regardless of fault, let us make a thorough study of the administrative structure and problems of our courts. In the meantime, we can act while we talk. We can give support to such pre-trial programs as exist in Cuyahoga County, improving our techniques as we proceed and instituting such pre-trial procedures in all communities, whether the dockets are behind or not. If the dockets are behind, a sound pre-trial program can do much to reduce the congestion. In any event, whether the dockets are behind or not, a pre-trial program along the lines indicated above can make for more efficient and fairer trials or settlements based upon justice and not expediency.