

ACCIDENT LITIGATION.

Is Our System Adequate? Are Other Systems Possible?

The general use of machinery has greatly increased the quantity of accident litigation. There are daily in the United States many hundreds of accidental deaths and lesser injuries for each of which some one is responsible. The attempts to fix and to measure responsibility for such losses constitute the great mass of accident litigation which absorbs so much of the energies of our profession. Although the quantity of such litigation has been reduced to a considerable extent by workmen's compensation laws, there is a constantly increasing volume which presents a problem of importance.

If I am hurt or killed by your automobile, I or my family suffer a loss which must somehow be made up. The law recognizes the necessity of compensation, but allows it only if responsibility can be fixed on the driver of the automobile or on his master. The right to compensation is based on the conception that a wrongdoer should repair the wrong so far as possible by making individual reparation to the injured person; but there is no attempt to recognize the community's interest to save the injured man or his family from coming on public or private charity. In short, the problem is considered as individual rather than social.

The narrower conception is natural, and was sufficient for the communities of a hundred years ago. Is it sufficient today?

If no help or remedy were afforded today to one hurt by a machine, we should all admit the need of legislation. Such legislation would try to create a system by which an injured person or his family would receive compensation correctly calculated, easily fixed and quickly paid. Every lawyer knows that no such system exists today, except in cases covered by workmen's compensation acts. If we examine the familiar ground as impartial critics, we shall find defects which must seem to the lay citizen even larger than they seem to us.

The damages should be calculated so as actually to compensate for the loss sustained. The injured person and his family should be put, so far as possible, in the position which they would have occupied if the accident had not happened. In so far as the damages are above or below this standard, the equilibrium is disturbed for no good reason, and the plaintiff becomes either the victim of injustice or the beneficiary of chance.

When a jury calculates damages in an accident case, they consider (presumably) the former earnings of the injured person and the extent to which these will be reduced. This is necessarily the basis of any estimate of such damages, but unfortunately it can seldom be calculated accurately. If, for instance, a clerk forty years old, earning fifty dollars a week, receives internal injuries which are serious but not fatal, how much has he lost in earning power? The law allows him to prove by insurance tables the average expectation of life of a man of forty and the jury may jump to the conclusion that the plaintiff has the average expectation. Beyond this, all is largely guesswork. No jury can tell how much the plaintiff's injuries will interfere with his work, and so we generally have a verdict which shows its inaccuracy by its round figures.

To maim a bank president is more expensive than to maim a dog-catcher. But even if you do disable so great a financier you need not compensate him for his actual loss. Suppose that he is a young man earning \$25,000 a year, and suppose that the circumstances indicate that he will live for at least twenty years and will thus be deprived of half a million dollars of salary by your carelessness. No jury will give him the present value of that sum or anything like it, and if they did, the court would cut the verdict down to a figure within the popular comprehension.

In short, the amount allowed for loss of earning power is the result of a guess in most cases, and is not allowed to approach the actual amount of loss if that is very high.

The jury may also allow for physical pain. Of course pain cannot be measured by money any more accurately than pleasure can be measured by pounds or anger by gallons. The payment

of money to compensate for pain is really an effort to make the sufferer forget his suffering and to make the sinner repent him of his sin; it has no real relation to compensation except in so far as it affords future pleasure to counterbalance past pain. Pain is not financial loss and therefore cannot be compensated by financial gain. Punitive damages are of course not compensatory. They measure the defendant's loss, but not the plaintiff's.

When an accident case goes to trial twice or more, the juries usually differ in the amounts of their verdicts. In other words, the same facts elicit from one jury more dollars than from another. Where there is a difference between verdicts in the same case, it is plain that there will be, as we all know that there are, wide differences between verdicts in cases very similar to each other. Jones may recover \$2500 for a broken leg, while Brown in the adjoining courtroom is recovering only \$500, although all of the circumstances upon which the amount of the verdict theoretically depends are like those in Jones' case. The difference between the verdicts is due to the impression made by a clever witness on one side or by a stupid witness on the other, or it is due to the peculiarities of the judges or of the juries. But a difference there is, and that without logical reason.

The doctrine of contributory negligence is another factor which prevents verdicts from approximating actual compensation for the loss sustained. Where the common law rule prevails, the jury is instructed to find for the defendant if the plaintiff has been at all negligent. This often results in a compromise verdict, by which the greater negligence of the defendant and the less negligence of the plaintiff are compounded to produce rough and ready justice. The attitude of the jury is natural, almost inevitable, but the verdict awards damages not compensatory, because not calculated with a view to compensation.

When an accident case is settled before trial, the settlement often depends upon considerations which have no relation to compensation. Are verdicts running high or low just now? Does the defendant know that the plaintiff probably cannot prove agency? Is the plaintiff ignorant enough to settle a large claim for a small sum without advice of counsel? How great is the

plaintiff's immediate need for money? Such questions instantly suggest themselves to one's mind as questions which must be answered before a settlement can be had, and yet they indicate that the business of adjusting the claim without a trial resembles a game rather than a search for justice.

To litigate a claim for severe injuries or death requires frequently the payment of large sums to experts, investigators, counsel and witnesses. When the plaintiff receives his final check, he will, if he be philosophical, reflect that his loss has been the public's gain because it has given rise to lucrative employment for so many good citizens. A large share of the compensation awarded to the plaintiff goes necessarily to compensate those who have helped him to assert his right. It follows that in many cases the plaintiff does not even receive the compensation which the jury has determined to be adequate, although in many other cases the jury include in the verdict what they estimate to be the expense of the litigation.

It has been suggested that a person injured by the negligence of another should receive compensation calculated, so far as possible, to meet the loss sustained, no more, no less. The failure to realize this principle is due, in part at least, to the causes touched upon: (1) The difficulty of estimating loss in earning power; (2) the impossibility of measuring pain by a money standard; (3) the non-compensatory nature of punitive damages; (4) the vagaries of juries; (5) the doctrine of contributory negligence; (6) the element of chance in settlements; and (7) the expense of conducting litigation.

In the remedial system which would be created *de novo* if none were in existence, there would be, so far as possible, provision for the correct calculation of compensatory damages, and an adaptation of the machinery of the law so as to facilitate such calculations. The present machinery may, upon careful investigation, appear ill-fitted for a task grown so greatly beyond its dimensions of a century ago. If the total energy exerted by lawyers, clerks of the courts, sheriffs, judges, juries, tipstaves, printers, stenographers, messengers, investigators and experts could be expressed in kilowatt hours, how many of such units

would be found to have been expended in accident litigation? Although such a mathematical computation is impossible, an approximation of the truth could be gained by the gathering of certain data.

Taking for investigation a restricted field, such as one year's litigation in a large city, a comparison could readily be made between the total number of actions and suits brought and the number of actions brought to recover damages due to negligence. The comparisons could be extended to show for all cases, and separately for negligence cases, the number of cases brought to trial, the number of hours consumed in trial, and the number of appeals. From such data might be reached a fair approximation of the amount of energy spent in settling accident litigation.

Of course, conclusions based on the comparisons suggested would be inaccurate. They would rest only on measurable elements, failing to consider, for instance, the time spent in arguing and deciding questions of law before and after trial, or the time spent by lawyers and their assistants in preparation. But the results would be valuable because they would indicate the size of the problem of accident litigation.

The supposed ideal system would produce a payment of damages to the injured party as soon as possible after the accident. Under our present system payments are usually slow, unless speed is furnished by the meeting of an enterprising claim agent with an ignorant plaintiff. Failing such an achievement in behalf of the defendant, the causes of delay are numerous: the attorney's investigation and preparation, the length of the trial list, the absence of witnesses, the engagements of counsel, the errors which require a new trial and the errors, real or imaginary, which occasion an appeal. The months and years must run slowly for many a plaintiff who endures such mischances as these.

When the verdict has been rendered, it may be difficult or impossible to collect. If the owner of the Ford which struck you lives in a rented house on a small salary and carries no lia-

bility insurance, your hurt will probably turn out to be *damnum absque pecunia*.

In a consideration of the defects of the present system and of possible changes, it must be remembered that no human system is free from defects; each has its elements of delay, inaccuracy and perhaps injustice. We must be content with methods which on the whole have the greatest measure of advantage and the least measure of disadvantage.

A number of factors have been pointed out which contribute to make the amount of recovery a matter of guesswork and hence to increase the element of uncertainty in the administration of justice. The use of a fixed schedule of damages would greatly reduce this uncertainty. In such a schedule the amount should be based on (a) the amount of money actually disbursed by the plaintiff in consequence of the accident, (b) the actual and prospective loss in earnings, and (c) the gravity of the injury.

The first of these is of course susceptible of exact measurement. It includes money paid to doctors, druggists, nurses, and undertakers, and in this respect does not differ from the verdict as calculated under existing law. These items may be permitted to vary in accordance with the facts of each case, because they are so easily proved that there can seldom be a dispute with respect to their correctness.

The amounts recoverable according to the proposed schedule would also vary according to the actual and prospective loss of earnings. This, of course, introduces the element of inaccuracy into the calculation. If a man has lost his leg, it is often possible to tell just how much wages he has lost before he is about again, but it may be impossible to tell how much his earning power has been impaired. In some cases there may be no impairment and in others there may be a total destruction of earning power. Upon this matter the jury now exercises its guessing powers, sometimes approximating a figure subsequently justified by the facts, but more often taking simply a shot in the dark, or at best in the dusk.

To standardize this element of damages so far as possible is, admittedly, to adopt a system not exactly compensatory. This

is also true of the workmen's compensation acts which set a scale of compensation based on the earnings of the plaintiff and on the nature of the injury. For example, the Pennsylvania act allows for the loss of a hand 60 per cent. of wages for 175 weeks, for the loss of an arm 60 per cent. of wages for 215 weeks, and so on, varying according to the member lost. The amounts thus fixed seldom measure accurately the loss of earning power. But a great advantage lies in the fact that they are fixed, and that in these simple cases at least there is no room for dispute as to the amount recoverable. The same is true under the workmen's compensation acts with respect to death.

There must of course be many kinds of injuries which cannot be exactly defined before the event, for lack of space and of the prophetic gift. In these cases the schedule should limit the amount recoverable to the actual and prospective loss of earnings during a stated period. If, for example, this period were five years, it would be much easier to compute the probable loss than it is now with the plaintiff's whole future life to speculate upon. To dole the money out to the plaintiff week by week, or month by month, according as he should show his losses at the time, would be too onerous, because it would involve continual supervision to guard against fraud. Here again, it is necessary to balance advantages. A limit of five years would doubtless hurt some deserving plaintiffs whose disabilities extended far beyond that period. On the other hand, such a limit would greatly facilitate the calculation and settlement of claims, as it has under the workmen's compensation acts.

In all these cases a total disability can be provided for by schedule, irrespective of its cause, but a partial disability presents a question more difficult of solution. Some person or persons, a judge or a jury or a referee, must determine just what the loss of earning power has been, and probably there must be a limit to the period for which the compensation is calculated.

In the preceding paragraphs an analogy between the case of the injured employe and that of the injured citizen has been implied. There is of course a very important difference between the two. The employe has entered into a voluntary relation

which involves the risks of his employment; it is therefore reasonable that he should receive only a limited amount in case of injury. The ordinary citizen, on the other hand, enters into a strictly involuntary relation with the man who injures him and it will be said that there is no reason why he should not exact from the defendant every cent of his loss. If he can recover only according to a fixed schedule, his damages will probably be less than those which a jury would give him.

The answer to this objection is two-fold. In the first place, the public convenience, as well as the rights of the plaintiff, must be consulted. If it appears that a system strictly upholding the plaintiff's rights is costly, cumbersome, slow and wasteful of human energy, the plaintiff's rights must give way to the paramount rights of the public. In the second place, it must be remembered that to recover damages today one must show negligence on the part of the defendant, except under the workmen's compensation acts. If the analogy between the two kinds of accident cases were complete, so that it became unnecessary to show negligence in the non-employment case, the benefits thus given to many innocent plaintiffs would outweigh the possible injury done to those plaintiffs who could show that they were injured by the negligence of another. This aspect of the situation is referred to more fully hereafter.

Another difference between the operation of the workmen's compensation acts and that of the proposed schedule of damages lies in the calculation of earnings. Where a man is working for a salary or for wages, the basis of compensation is ready to hand. But if a schedule of damages based on earnings were applied to the case of a doctor, or a lawyer or a real estate operator, how should the plaintiff's earnings be calculated? Suppose, for instance, that a lawyer has earned (or at any rate received) a fee of \$100,000 just before he is injured. Should his annual earnings be figured at \$100,000 plus? And in the case of the real estate operator, it will be difficult to determine how much of his profits have been due to his work and how much to the use of his capital.

There is no escape from these difficulties under the present system, or under any system which allows compensation for decrease in earning power or for loss of earnings. In preparing a schedule it would be necessary to cut the Gordian knot by applying a rule of thumb. The lawyer, for example, might be allowed as annual earnings, the average of his earnings for the past three years. The real estate operator might be allowed a similar average, first deducting his income from capital, which could be calculated at a stated per cent. on his average capital during the three years period.

To work out a fair rule for cases of injury to children is more difficult. There is no present earning power; there are simply the seeds of possible earning power in the future. If a claim is made by a parent for the death of his child, the measure of compensation is and should be the difference between the earnings which the child would have paid the parent and the expense of rearing and education. Since these items are not susceptible of exact, or even of approximate calculation, a schedule fixing the amount of damages according to the child's age would be as fair as the ordinary verdict, and would have the advantages of certainty and speed.

Where the claim is by the injured child himself, the present value of his loss of future earning power is the measure of compensation. In a schedule, figures could be fixed for specified injuries occurring at specified ages—for instance, so much for the loss of a hand at the age of ten. But no such figures could be predetermined for the many injuries not susceptible of exact definition. A judge or jury or referee would have to fix the amount of compensation in such a case, probably using in the calculation a time limit provided by law.

The difficulties and the advantages of standardizing the measure of damages to meet loss in earning power have been pointed out. It remains to consider the part which the extent of the injury should play in fixing the amount to be recovered. Where the injury stops or impairs the earning power, the length of cessation or the extent of impairment is the measure of damages. But where there have been and will be no earnings, many

will think that there should nevertheless be compensation in addition to what is paid to cover the plaintiff's actual expenses. This would apply, for example, to the housekeeper of a family or to a retired business man.

Of course a payment made to such a plaintiff is not compensation at all; it is heart-balm only. But there is a widespread feeling that such payments are proper and it should accordingly be considered whether they should not be provided for in the schedule. An amount could be fixed for each of the more common injuries payable in addition to, or irrespective of, or as a minimum contribution toward, the loss of earnings. For less common injuries, not susceptible of exact definition in advance, there is no satisfactory way of fixing damages. For these injuries, it would be necessary either to abandon the idea of damages except for expenses or loss of earnings, or else to allow a jury to fix them.

To standardize damages would of course increase the number of settlements and so reduce the quantity of litigation and the consequent burden upon judicial machinery. Does experience indicate that the method of fixing damages and liability which is prescribed by the workmen's compensation laws should be employed in all accident cases? Can a referee reach a fair conclusion more quickly than a jury, and will the conclusion be so often fair? One is inclined to believe that on questions of liability for negligence the determinations of twelve average citizens will approximate fairness more frequently than will the determinations of a single man, no matter what his experience.

If this is true, a further thought suggests itself. Since liability for negligence can best be fixed by a jury trial, and since the system of trial by jury involves marked disadvantages of delay and expense, why not discard the question of liability altogether and assign to referees the duty of calculating compensation according to fixed schedules?

In many states workmen's compensation laws require the man who receives the profits of a business to pay the losses caused by the injuries and deaths which are recognized as unavoidable incidents to industry; the question of negligence plays no part

in the matter. So it is in the business of daily life; danger is a constant companion whom we cannot escape. As a man cannot work in a mill without exposing himself to the danger of flying belts, sagging floors or boiling vats, so a man cannot use the highway without exposing himself to the perils of trains, trolleys, and automobiles.

If the owner of a business pays for its inevitable destructions, is it not proper that the public should pay for the losses unavoidably incident to modern life? In short, why should not any person injured by a train, trolley or automobile recover compensation from a public fund, and that without reference to the question of negligence? In certainty, simplicity and speed the process would compare favorably with an action at law involving a trial by jury. Moreover the injured man would be sure of receiving the sum awarded, while now the successful plaintiff must depend on the solvency, and in many cases on the comparative wealth, of the defendant.

Under the jury system the trial will occupy perhaps a day, or even more, during which time a \$10,000 judge, three \$1800 court officers, a \$4000 stenographer, a whole panel of \$3 a day jurors, a roomful of witnesses and litigants losing a day's work, and two highly-paid attorneys, focus their minds on the plaintiff's troubles. Under the suggested system, the total of public time and money consumed would certainly be very much less.

It will be said that a system which eliminates the questions of negligence and of contributory negligence makes for recklessness on the one hand and for intentional injuries on the other. But today most train, trolley and automobile accidents are caused by persons who have no financial stake in the matter. They are either employes without resources or else they carry liability insurance. A man is deterred from carelessly injuring another by his shrinking from physical injury to a fellow man and by fear of the criminal law. Both of these incentives would operate as powerfully under one system of compensation as under the other. It is fair to assume, too, that interest in the adoption of safety measures would be stimulated if all accidents were plainly costly to the public.

As to self-inflicted injury, there is little doubt that this would give trouble. But it seems fair to assume that dislike of pain would cut the trouble to small proportions. Of course the law would refuse recovery to one guilty of a wilful act designed to inflict injury upon himself.

The proposed system would treat the accident problem as a social question and not as a strictly individual question. It would more fairly distribute the burden of the daily danger of living, because it would compensate all victims of mechanical accident, and not simply those who could fasten responsibility on others and show themselves free of negligence.

The province of this article is to call attention to the fact that there is a serious problem caused by the immense increase in accident litigation. The other large field of litigation, that which involves breach of contracts, does not present a similar problem because the right to compensation arises as a consequence of a relation voluntarily entered upon and accrues usually to a man able to await the issue of the case with some patience. The community properly feels only an obligation to act as umpire in the controversy. But in a case of accident the loss is sudden and not discounted in advance, it arises from a relation entered upon most unwillingly, and it falls frequently upon persons unable to sustain it and deprived by the accident itself of the means which make patient waiting possible. Besides these fundamental differences between accident and contract litigation, there are the differences which make the amount of the damages exactly ascertainable in most contract cases and impossible of exact ascertainment in most accident cases.

Changes in the substantive or administrative law should arise only out of a careful observation of recorded facts. Methods of compensation other than that now employed are here suggested to show that other methods are possible; but any change must be gradual, so that practice will not run too far beyond experience. For example, the principle of a public fund might be applied at first only to accidents caused by common carriers, and the fund could be created by contributions from the carriers and from the state treasury, the carriers contributing more or less

according to their several experience tables. Such a plan would encourage care because negligence would increase the carrier's premium the next year.

There can be little doubt that the present system is enormously expensive and cumbersome and that it is susceptible of very greatly needed improvement. The field of accident litigation is so extensive that the proper administration of justice within that field should greatly concern lawyers, by whom the situation can be best studied.

Such a study would cover (1) the magnitude of the problem as evidenced by the amount of energy and time spent on accident litigation; (2) a careful review of the disadvantages of the present system; (3) a review of the various possible improvements or substitutes. If accident insurance were recommended as desirable, the study would also include (4) the fixing of accident insurance premiums, this by means of accident experience tables; (5) the method of administering accident insurance; and (6) a draft of an act to carry the scheme into effect. A careful consideration of the constitutional questions involved would also be necessary.

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