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Samuel H. Hofstadter

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# ALTERNATIVE PROPOSAL TO THE COMPENSATION PLAN\*

*By Samuel H. Hofstadter†*

Congestion of calendars is not a new evil. Resentment of the law's delay is probably as ancient as law itself. Magna Carta refers to it—Shakespeare expands on it. Rabelais' description of the slow ripening of a lawsuit is as much social comment as it is human comedy.

But our courts have come a long way. Procedural reforms have modified their fundamental approach and touched the substance of the law. By a continuous process of self-evaluation in the light of need, the common law, originating in a controlled landed feudalism, has evolved to meet the requirements of modern society. The business community is competently served in our courts; the individual citizen finds in them the guardian of his civil liberties. In one area only have our courts failed to keep pace with the times—and that is in actions to recover damages from personal injuries arising out of automobile accidents.

## THE PROBLEM

Whereas our Equity, Contract and Non-Jury Tort Calendars are current, the Tort Jury Calendars in the First Department—and elsewhere in New York—remain years behind.<sup>1</sup> And all this despite pre-trial procedures, transfers to lower courts, a medical panel,<sup>2</sup> free assignment of justices, rules of preference, and consolidation of law and equity calendars. Unfortunately, these procedural modifications—excellent expedients—do not reach the heart of the problem. Its enormity becomes obvious when we realize that personal injury cases in the New York courts constitute 80 per cent of the Trial Calendar and represent in turn 35 per cent of all personal injury actions throughout the nation. From thirty to fifty per cent of all such actions arise from automobile accidents.

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† See Contributors' Section, Masthead p. 74, for biographical data. In formulating this plan, the author has been fortunate in the collaboration of Shirley R. Levittan of the New York Bar, a scholarly lawyer and devoted friend. Such participation included arrangement, research and editing; and the article represents a joint effort to find a solution for a vexing problem in legal procedures.

<sup>1</sup> State Trial Courts of General Jurisdiction, Calendar Status Study, Institute of Judicial Administration (June 30, 1955).

<sup>2</sup> This pilot project is fully described in "Impartial Medical Testimony," A Report by a Special Committee of the Association of the Bar of the City of New York on the Medical Expert Testimony Project (1956). The report is summarized in Botein, "Impartial Medical Testimony," 135 N.Y.L.J. No. 21, p. 4, col. 1 (January 31, 1956).

Palliatives are ineffectual to cure so large a growth, and for some time past I have urged the drastic step of a compensation plan for automobile accident cases.<sup>3</sup> The idea is not new; it was first projected forty years ago.<sup>4</sup> It is no longer the distraction of theorists.<sup>5</sup> It is an imponderable in every serious discussion of court congestion. Executives, legislators and judges consider it with respect.<sup>6</sup> Some favor it forthwith—in deference to the actuality of things; others, as the only alternative to the abolition of jury trials in civil cases—and at least, in tort actions. Despite such consideration, neither in New York<sup>7</sup> nor elsewhere in the United States has a compensation plan for automobile accidents been adopted.<sup>8</sup> We must recognize that it is not immediately possible.<sup>9</sup>

<sup>3</sup> Hofstadter, "A Proposed Automobile Accident Compensation Plan," 131 N.Y.L.J. No. 35, 36, p. 4, col. 1 (February 23 and 24, 1954); "Traffic Jam in the Courts," *New York Times Magazine*, February 21, 1954; "Let's Put Sense in the Accident Laws," *Saturday Evening Post*, October 22, 1955. In 1927, as an Assemblyman, the author proposed legislation along these lines (Int. 747, Pr. A. 776) and in 1931, as a member of the State Senate, introduced bills calling for a Commission to study the problem. (Int. 351, Pr. S. 361).

<sup>4</sup> By Arthur A. Ballantine in 1916.

<sup>5</sup> For a closely reasoned evaluation of compensation in automobile accidents see Report of the Committee, headed by Arthur A. Ballantine and Dean Young R. Smith of Columbia Law School, to Study Compensation for Automobile Accidents (Feb. 1, 1932), addressed to the Columbia University Council for Research in the Social Sciences. This report is summarized in Smith, Lilly and Dowling, "Compensation for Automobile Accidents, A Symposium," 32 *Colum. L. Rev.* 785 (1932). See also, Suzman, "Motor Vehicle Accidents—Proposals for a System of Collective Responsibility Irrespective of Fault," 72 *So. Afr. L.J.* 374 (1955); Van Voorhis, Address before New York State Bar Association, 135 N.Y.L.J. No. 3, p. 1, col. 4 (Feb. 14, 1956). For an interesting proposal re "voluntary compensation," see Ehrenzweig, *Full Aid Insurance for the Traffic Victim* (1955). This monograph has a comprehensive bibliography. A recent study of compensation from a different point of view also appears in the *Economic and Business Bulletin of Temple University*, March, 1955.

<sup>6</sup> Legislation has been considered in Connecticut, Virginia, Wisconsin and Great Britain. Senator Zaretski and Assemblyman Katz recently introduced a bill to establish a Commission to study a Compensation Plan. (S. Int. 314 Pr. 314; A. 1125, A. Pr. 1137 (1955)). See also Address to the New Jersey Bar by Gov. Robert B. Meyner, reprinted, 133 N.Y.L.J. No. 105, p. 4, col. 1 (May 31, 1955); and Charles E. Clark, "Summary and Discussion of the Columbia Plan," 135 N.Y.L.J. No. 8, p. 4, col. 1 (Jan. 12, 1956). The latter has a fine brief bibliography.

<sup>7</sup> In 1956 Senator Desmond introduced a bill into the Senate of New York State (S. 398, Int. 398) relating to automobile accident compensation. See also Kaye and Breslow, "Legislation to Replace Adjudication—Planned Compensation for Auto Accident Victims," 35 *B.U.L. Rev.* 488 (1955) which sets forth a suggested Vehicle Accident Compensation Act.

<sup>8</sup> A Compensation Plan was adopted by the Province of Saskatchewan, Canada, in 1946 and as amended is still in operation. Revised Statutes of Saskatchewan, vol. IV, c. 371 (1953). The operation of the plan is discussed pro and con in Fines, "The Saskatchewan Plan," 3 *Fed. Ins. Coun. Q.* 51 (1953); Kilroe, "Necessity for Preservation of the Judicial Process in the Interest of Persons Injured in Automobile Accidents," 25 *N.Y.S. B. Bull.* 315 (1953); "All Phases of Automobile Insurance," Alberta Legislative Report of Special Committee of the Legislature (1949).

<sup>9</sup> Leo S. Kreindler, "Against Automobile Compensation," 12 *N.Y. County Lawyers B.*

Up to now our law has refused to recognize the obvious—that automobile accidents are not of the same character as accidents generally, and cannot be dealt with in the same fashion. They involve special considerations which place them in a unique category. Indeed, they present a much broader problem than that of finding a remedy for congested court calendars. The alternative proposal—unlike the compensation plan—deals with them in a frame of reference restricted to calendar congestion.

Industrial and traffic accidents are the two greatest single causes of accidental injuries.<sup>10</sup> The problem of the industrial accident has been met by the enactment in all of our forty-eight states of workmen's compensation acts. Underlying this legislation was the recognition that accidents are an inevitable concomitant of modern industry. We have seen an increase of automobiles in the United States from 15 million in 1923 to 60 million in 1956. The number of automobiles is controlling—liability hazard has become intrinsically quantitative.<sup>11</sup>

From an actuarial standpoint such accidents are unavoidable, for the fault lies not with man but with the automobile's tremendous potential for mischief in the exigencies and tensions generated by our complex society on wheels.<sup>12</sup> They are as inevitable a concomitant of our mode of living as is the industrial accident.<sup>13</sup>

The greater proportion of accident victims belong to the low income group which can neither afford the burden of trial delay nor the cost of the accident itself. They are faced not so much with an outright denial of justice as with its circumvention by economic expediency. Since society demands the automobile, society should provide an equitable method of meeting its cost. It is a common burden to be dealt with on a collective, not an individual, basis.<sup>14</sup>

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Bull. 32 (1954); Flynn, "Answering Justice Hofstadter—Compensation Is No Solution," 27 N.Y.S. B. Bull. 406 (1955); Ryan and Greene, "Pedestrianism: A Strange Philosophy," 42 A.B.A.J. 117 (1956).

<sup>10</sup> Grad, "Recent Developments in Automobile Accident Compensation," 50 Colum. L. Rev. 300 (1950).

<sup>11</sup> Kulp, *Casualty Insurance*, p. 163.

<sup>12</sup> Report, Wisconsin Legislative Council, Committee on Motor Vehicle Accidents (1953).

<sup>13</sup> James and Dickinson, "Accident Proneness and Accident Law," 63 Harv. L. Rev. 769 (1950); Ehrenzweig, "A Psychoanalysis of Negligence," 47 N.Y.U.L. Rev. 855 (1953); Bingham, "Psychology and Highway Safety," 30 Scientific Monthly 553 (1930).

<sup>14</sup> Re absolute liability in other countries, see Esmein, "Liability in French Law for Damages Caused by Motor Vehicles," 2 Am. J. Comp. L. 156 (1953); Ussing, "The Scandinavian Law of Torts," 1 Am. J. Comp. L. 359 (1951); Ishimoto, "A Study on the Liability for Torts," 1 Osaka L. Rev. 47 (1952); Motor Vehicle Damage Compensation Guarantee Law No. 97, July 29, 1955 (*Jidosha Sougai Hoshō-Hō*). This recent statute was brought to the attention of the author by Brigadier General Bert E. Johnson, USAF, Staff Judge Advocate, stationed with the Far East Air Force.

That compensation as a solution is logically and juridically justifiable I do not doubt.<sup>15</sup> It would also be socially and economically sound. Compensation does more than shift the burden of loss; it spreads it, and through "loss distribution" the group creating the risk carries the cost—a result that dilutes the financial weight and inures to the benefit of the community.<sup>16</sup>

But ingrained conceptual habits of thought and loyalty, avowed and unconscious, compounded by self-interest, make a compensation plan impracticable in the immediate future. The plaintiff, avid for large recoveries, will be reluctant to substitute assured but restricted indemnity on the basis of loss suffered, for the alluring though oftentimes illusory prospect of a windfall in the lottery of personal injury litigation. The lawyer in his zeal not only for monetary return but for the practice of his skills will be unwilling to abandon the adversary approach for the administrative procedure of a compensation board. The instinctive group loyalty of the Bar generally, along with its concern for the economic well-being of all its members, will support this position. Finally, insurance carriers—which oppose compulsory insurance,<sup>17</sup> although carrying 90 per cent of all risks—will vigorously repel any departure from present litigatory practice.

Thus, honest convictions clouded by sheer irrelevancies, and understandable self-interest compounded by error, engender the same bitter antagonism that greeted workmen's compensation,<sup>18</sup> and, at this time at least, bar a compensation plan which offers a solution of a social problem in the context of a society out of which it arises. Since "legislatures and courts move in proud and silent isolation," it is incumbent on us—the

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<sup>15</sup> In addition to the Columbia Report, *supra* note 5, see Brown "Automobile Accident Litigation in Wisconsin: A Factual Study," 10 Wis. L. Rev. 170 (1935); Survey Analysis of Studied Cases of Victims, Report of the Joint Legislative Committee to Investigate Automobile Insurance, N.Y. Leg. Doc. No. 91 (1938).

<sup>16</sup> Marx, "Motorism' Must Compensate its Victims," 42 A.B.A.J. 421 (1956).

<sup>17</sup> Lilly, "Compulsory Automobile Association Insurance," Compulsory Compensation for Motor Vehicles and Motor Vehicle Responsibility Laws, Association of Casualty and Surety Executives (1930). The Massachusetts Plan, in operation over 30 years, is explained in the California Semi-Final Report of the Interim Committee on Finance and Insurance § 3, "Automobile Compensation Insurance," (1953). Re compulsory insurance generally, See Bohlinger, "Which Road for the Uninsured Motorist?" (1951) Ins. L.J. 433; Bolgar, "Motor Vehicle Accident Compensation," 2 Am. J. Comp. L. 515 (1953); Déak, "Automobile Accidents, A Comparative Study of the Law of Liability in Europe," 79 U. Pa. L. Rev. 371 (1930); Marx, "Let's Compensate and Not Litigate," 3 Fed. Ins. Coun. Q. 62 (1953); Moser, "The Financially Irresponsible Motorist," 25 N.Y.S. B. Bull. 326 (1953); Rosenzweig, "Why Agents and Brokers Oppose Compulsory Automobile Insurance," Ins. Advocate (February, 1953).

<sup>18</sup> Mechem, "Employers Liability," 44 Am. L. Rev. 231 (1910).

legal profession, Bench and Bar—to propose another method to secure the desired result—to offer an honorable compromise by pragmatic approach in keeping with the American tradition itself—adaptation of philosophy of idea to reality of fact. The American community, which five years ago already passed the million mark in automobile deaths—more than all the deaths of our wars combined<sup>19</sup>—commands us to achieve a solution—to adopt a viable plan!

#### AN ALTERNATIVE PROPOSAL

Hence, I would now offer an alternative proposal. Automobile accident cases would be assigned to special courts and heard before a three-man tribunal, composed of a jurist, a layman and a physician, with the principle of comparative negligence substituted for the rule of contributory negligence.

The alternative proposal of a multiple tribunal,<sup>20</sup> consisting of jurist, layman and physician, applying a rule of comparative negligence to measure extent of liability and consequent damage, will, I submit, provide a decent solution for all parties, including the community, without doing violence to the psychological climate in which we live. Sole negligence as predicate of liability is modified, but strict liability is avoided. And a collective, mixed judgment—as in the conventional jury trial—is retained to a degree in a juridical, not an administrative, forum, which can dispatch cases with speed relatively equal to that of a court without a jury.

As the first element of the plan, the doctrine of contributory negligence must be discarded in favor of comparative negligence, though the concept of liability based on fault is retained.

#### CONTRIBUTORY V. COMPARATIVE NEGLIGENCE

Contributory negligence has little basis in logic or legal history. It was a creature of social policy rather than a reasoned outgrowth of the law.<sup>21</sup>

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<sup>19</sup> James and Law, "Compensation for Auto Accident Victims: A Story of Too Little and Too Late," 26 Conn. B.J. 70 (1952). In the first six months of 1955, personal injury automobile accidents reached 62,761, an increase of 9% over the same period the year previous. The number of traffic deaths during the period was 933 and property damage aggregated \$50,382,420.

<sup>20</sup> The proposal of a multiple tribunal is not new; see McNiece and Thornton, "Automobile Accident Prevention and Compensation," 27 N.Y.U.L. Rev. 585 (1952); but cf. Templar, "Doctrine of Comparative Negligence," 18 Kan. Jud. Coun. Bull. 148 (1944). The usual component of suggested multiple tribunals has been a three judge bench.

<sup>21</sup> William, *Joint Torts and Contributory Negligence* (1951); James, "Contributory Negligence," 62 Yale L.J. 691 (1953); Malone, "The Formative Era of Contributory Negligence," 41 Ill. L. Rev. 151 (1946); Philbrick, "Loss Apportionment in Negligence Cases," 99 U. Pa. L. Rev. 572 (1951).

Negligence of itself did not exist in early common law, where strict liability was the rule. It was only in later evolution that negligence began to be generally recognized as a separate basis of tort liability.<sup>22</sup> It was stimulated by the increased number of industrial accidents and the invention of the railroad. Infant industry, struggling for a foothold in our society, required protection for financial expansion. As a matter of social policy, then, the burden of strict liability—of acting at one's peril—was gradually abandoned in personal injury liability proper. It survived, in a sense, being inverted and transferred to the victim by embodiment in the concept of contributory negligence as an absolute bar against any recovery. In rationalizing this involution many theories have been advanced to explain the defense of contributory negligence:<sup>23</sup> that it has a penal basis to punish the plaintiff for his own misconduct; that plaintiff's conduct is an intervening cause between defendant's negligence and result; that it will prevent accidents by inducing each member of society to act with care. In its essence, however, it is an expression of the highly individualistic attitude of early common law, compounded by then existent public policy influenced by industrial and economic need. With the change in social viewpoint in the last century, and the disappearance of the protective motive that brought it into being, it is high time that the applicable law be modified. "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past."<sup>24</sup>

Freedom from fault in the slightest degree as a prerequisite to indemnity is a "complete fantasy"<sup>25</sup> in the light of present conditions—apart from inevitability, most accidents are the result not of wrongdoing but of inadvertence or poor judgment on both sides. This has been recog-

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<sup>22</sup> While some disagree, it is widely held that negligence grew out of the action on the case and the disintegration of the old common law writs. See Holdsworth, *History of English Law* 375 et seq. (1937); Winfield, "History of Negligence in the Law of Torts," 42 *L.Q. Rev.* 184 (1926); McNiece and Thornton, "Is the Law of Negligence Obsolete?" 26 *St. Johns L. Rev.* 255 (1951). See also foreign works: Esser, *Grundlagen und Entwicklung der Gefährdungshaftung* (1941); Strahl, *Föreläsnings Utredning angående Lagstiftning på Skadeståndsträttens Område* (1950).

<sup>23</sup> Lord Halsbury, L.C. in *Wakelin v. London and S.W. Ry.*, 12 *A.C.* 41 (1896); Bohlen, "Contributory Negligence," 21 *Harv. L. Rev.* 233 (1907); Lowndes, "Contributory Negligence," 22 *Geo. L.J.* 674 (1934); Schofield, "Davies v. Mann: The Theory of Contributory Negligence," 3 *Harv. L. Rev.* 263 (1889).

<sup>24</sup> Holmes, *The Path of the Law* (1897).

<sup>25</sup> Peck, "The Complement of Court and Counsel," Thirteenth Cardozo Lecture of the Association of the Bar of the City of New York, 9 *Record* 272 (1954).

nized by layman and professional alike.<sup>26</sup> Rejecting the harshness of the rule which offends their innate sense of justice, juries circumvent what someone has called "the judicial nonsense" of contributory negligence, and the plaintiff gets damages based on crude "kangaroo" adjustments. Even judges disesteem the doctrine; it was branded by Justice Peck as "barbaric."<sup>27</sup>

Indeed, the concept has long been discarded in other fields of the law. The Federal Employer Liability Act at an early date abandoned contributory negligence as a bar to recovery. The Merchant Marine Act (Jones), the Death on the High Seas Act, state railway labor acts and admiralty law generally have all substituted the principle of comparative negligence for the contributory rule. In the common-law personal injury action itself, comparative negligence has found surreptitious acceptance by means of the doctrines of "last clear chance"<sup>28</sup> and of "active and passive tort" feasons.<sup>29</sup> Resort to such obliquities is deleterious to law generally. We should be prepared to face up squarely to the concept of apportionment of fault and, by allowing it in the front door, to obviate the practice of subversion of the law at the back entrance.<sup>30</sup>

Unsuccessful attempts to enact comparative negligence legislation have been made for several years in our State Legislature.<sup>31</sup> Each of the bills introduced a "diminution of damage" type of comparative negligence with varying degrees of responsibility barring recovery. In some, the power to apportion damages was vested in the court; in others, in the triers of the fact. Provision was also made for multiple-party suits.

In the areas in which comparative negligence already operates, the apportionment of damages is governed by different criteria. American admiralty courts have adopted the arbitrary practice of dividing the total damages equally between the parties.<sup>32</sup> Such a rule of thumb is obviously inequitable, and all other leading maritime countries base apportionment

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<sup>26</sup> Leflar, "The Declining Defense of Contributory Negligence," 1 Ark. L. Rev. 1 (1946-47); Thornton and McNiece, "Torts," 29 N.Y.U.L. Rev. 692 (1954).

<sup>27</sup> Peck, Report on Justice (Feb. 5, 1953).

<sup>28</sup> James, "Last Clear Chance: A Transitional Doctrine," 47 Yale L.J. 704 (1938); McIntyre, "The Rationale of Last Clear Chance," 53 Harv. L. Rev. 1225 (1940).

<sup>29</sup> *McFall v. Compagnie Maritime Belge*, 304 N.Y. 314, 107 N.E.2d 463 (1952); Bohlen, "Contribution and Indemnity between Tortfeasors," 21 Conn. L.Q. 552 (1936).

<sup>30</sup> For an extensive bibliography on the subject of comparative negligence, see "Comparative Negligence," a study by the Institute of Judicial Administration.

<sup>31</sup> Mitchell-Wilson Bill, S. Int. 2572, Pr. 2741; A. Int. 2835, Pr. 2970 (1955); Cf. various bills over the years of Senator Williamson and Assemblymen Brook and Teller.

<sup>32</sup> Robinson, "Legal Adjustment of Personal Injury in the Maritime Industry," 44 Harv. L. Rev. 223 (1930).

on relative fault.<sup>33</sup> In most of our federal legislation recovery is reduced in accordance with degree of negligence. In general, the doctrine of comparative negligence based on proportion of damage is the rule in civil law areas,<sup>34</sup> and it is gradually finding its way into common-law jurisdictions.<sup>35</sup> While the problem of apportionment presents certain difficulties, there is no doubt that once the basic doctrine of comparative negligence is accepted, the details of operation can be worked out.<sup>36</sup>

New York, which has always been in the vanguard of progressive legislation, cannot lag behind in so significant a legal area. It is becoming increasingly evident that the idea of contributory fault is a vestigial remainder that has no place in automobile accident litigation today. Opposition may come from some of the legal profession because of tradition and the usual initial inertia to change to which all men are heirs, but perhaps the principal resistance will be found among the insurance carriers. While this is understandable, a compromise should, and can, be reached.

The basis for compromise is to be found in the second element of the alternative proposal—substituting for a conventional jury trial adjudication by a three-man forum. Just as strenuously as casualty companies will oppose any modification in the rule of contributory negligence, so would plaintiffs—and the legion of prospective plaintiffs—vehemently insist on retaining the principle of trial by jury. Both groups must be prevailed upon to subordinate, in part, individual interest to the common good; under the proposal each will be served well. Economically, while there may be a greater number of recoveries against the carriers, inflated verdicts for slight damage will be less likely; on the other hand a really injured plaintiff will be more assured of some recovery despite inevitable

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<sup>33</sup> Rule established by Brussels Maritime Convention of 1909-10 and incorporated into the English Maritime Convention Act of 1911.

<sup>34</sup> With the exception of Louisiana.

<sup>35</sup> In England the Law Reform Act of 1945 substituted comparative negligence for the common law rule. In Arkansas, Michigan, Nebraska and Wisconsin, the right to recovery of the contributorily negligent party is dependent upon the relative negligence of plaintiff and defendant. In Alabama, Canal Zone, Florida, Mississippi, Missouri, South Carolina, Tennessee and Wyoming, indemnity is diminished in accordance with fault. The four Canadian provinces of British Columbia, New Brunswick, Nova Scotia and Ontario operate under a similar system with Ontario providing elaborately for multiple party actions. Comparative negligence is now also the law of France, Germany, Spain, Italy, Norway and Sweden. Generally, see Gregory, *Legislative Loss Distribution in Negligence Actions* (1936).

<sup>36</sup> Mole and Wilson, "A Study of Comparative Negligence," 17 *Cornell L.Q.* 333 (1931); Ohlbaum, "The Case for Comparative Negligence," 1 *The Advocate* 30, 65 (1954). (Contains good discussion of comparative negligence legislation introduced in New York.)

fault. Both will have the benefit of a collective judgment of a mixed court.

For pragmatic reasons, my proposal regarding juries is narrower than other suggestions. First, it is restricted to the trial of automobile cases only; and, secondly, it contemplates a *modification* of the conventional jury trial, *not its abolition* altogether. For a multiple tribunal is in essence a form of jury trial.

Historically and semantically, "jury," like "court," connotes an agency of adjudication. Its character is not determined by the precise number twelve. Grand juries consist of more, Municipal Court juries of less; and in our own court, sometimes one or more jurors are dispensed with by agreement to meet the exigencies of trial. Unanimity is no longer required. There is no magic in the number twelve. What is fundamentally characteristic of the jury forum is its multiple nature. The alternative proposal retains its basic features in measurable degree.

#### JURY V. JURIDICAL PANEL

Strictly speaking, therefore, consideration of the abolition of jury trials in civil cases, generally or even in all tort cases, is not essential to the present discussion—concerned as we are with a unique category of litigation, i.e., automobile accident cases. But civilizing and defining the terms of the discussion is helpful to greater clarity; this has become more necessary because of the clouds of imprecision which have been raised.

Let me say at once that in common with the great majority of my brethren of the Bench, I do not share the distrust of juries expressed in and outside our profession. We believe that in deciding who is right and who is wrong the jury's judgment is as good as, and sometimes apt to be better than, that of the judge.<sup>37</sup>

Our experience in Trial Term has been that in 95 per cent of the cases the same result is achieved by juries as by the court without a jury. In Massachusetts, where two concurrent courts operate; one with juries, the other without, the percentage of plaintiff and defendant verdicts is the same, as are, in most cases, the amounts of the awards.<sup>38</sup> Both as trial judge and as appellate justice I deprecate greatly the spate of verdicts set aside by both trial courts and appellate tribunals. "There is no objective standard to apply . . . the decision must come to rest on the sense of the judge addressed to the reasonableness of the jury's verdict,

<sup>37</sup> Cf. Hartshorne, "Jury Verdicts: A Study of their Characteristics and Trends," 25 A.B.A.J. 113 (1939).

<sup>38</sup> Peck, "Report on Justice," February 15, 1953.

but this in turn is a subjective process strikingly similar to the jury's own judgment of the facts in the first place.<sup>39</sup> All too often misgivings directed at a particular verdict are a reflection of an unconscious suspicion of juries generally. But the judicial system can be as strong as the trial judge.<sup>40</sup> Judicial leadership based on the instructed intuition of experience can obviate the necessity of setting aside a verdict. If the judge retains "creative command"<sup>41</sup> of the course of action, the jury will instinctively absorb the objective direction it is his function to provide.

Many agree with G. K. Chesterton: "I would trust twelve ordinary men, but I cannot trust one ordinary man." In general, most libertarians, and minority groups in particular, favor jury trials. For greater assurance, their resistance extends against their abolition even in civil cases—because in their view the best protection against oppression and discrimination is in dilution of authority—or perhaps in widening its base. Thus, opposition to doing away with jury trials in civil actions is not restricted to the plaintiffs who oppose such a move specifically in personal injury actions. I strongly hold, myself, that there is no valid distinction intrinsically between contract and tort actions, and that a fractured limb should not be accorded different treatment juridically than a broken promise. As an original matter, if there is abolition of juries in negligence actions, the same change in practice logically should be extended to all civil cases.

But the life of the law is not logic but experience—and response to felt necessity. We have to take a second, hard look at the matter in the context of automobile accident cases.

Most of the distinguished judges who would dispense with juries in civil actions, or in tort cases generally, favor such a course not as a virtue and end in itself. They affirm the soundness of jury judgment. Primarily, their concern lies in eliminating jury trials as a matter of dissolving the intolerable traffic jam in our courts; the system cannot work any longer, they hold, in the automobile age, however well it may have operated in the past. What is brought in question is not its validity, but its practicality.

As Presiding Justice Peck has repeatedly pointed out,<sup>42</sup> the process of

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<sup>39</sup> *Rapant v. Ogsbury*, 279 App. Div. 298, 109 N.Y.S.2d 737 (3d Dep't 1952).

<sup>40</sup> Lymmus, *Journal of American Judicature Society* (August, 1953).

<sup>41</sup> Botein, Address to newly admitted members of the Bar, 131 N.Y.L.J. No. 56, p. 1, col. 3 (Mar. 24, 1954), quoting from Harry and Bonaro Overstreet, *The Mind Alive*.

<sup>42</sup> Peck, "Crisis in the Courts," address to the Alumni of the Graduate Schools, Harvard University, June 15, 1955; "Do Juries Delay Justice?" *New York Times Magazine*, Dec. 25, 1955; Address to New York County Lawyers Association, Dec. 10, 1953; "The Pillar of Justice," January 14, 1952.

jury trial in personal injury actions, more than any other factor, is the root of delay in the courts. One hundred and eight jurors are required to do the work of one judge, and it takes three times as long to try a case with a jury as it does with a judge. The average cost to the public of a jury trial is \$3,000 per case; nor does this figure reflect the payment to lawyers of waiting time and the cost of the public in increased insurance premiums.<sup>43</sup> But pragmatically, the profligacy of time and money—which might be justified were the desired results obtained—has failed the individual and society. As a result of adherence to the present jury system, with its concomitant delay and expense, litigants are kept from our courts and verdicts as finally rendered “lose their equity.”

It is not jurors who are at fault; it is the automobile giving rise to the inevitable accident and its sequel of the present conventional jury trial. It is desirable to restrict the discussion to that frame of reference. If the modification here proposed works well, it can be extended to other personal injury actions.

Actually, we need not reach the question of dispensing with juries in civil actions generally. The need for such innovation may never arise, if the present proposal is adopted. There are those, however, so devoted to the principle of trial by jury that they are apprehensive lest any change in the present system lead to the drastic result of their elimination altogether. Even in contemplating such a possible contingency, these honorable adherents of trial by jury owe to themselves and to others not so minded—but equally well disposed—a judicious assessment of the system in civil trials which must not be based on an illusory analysis of motive, but must begin with a historical examination of the matter. “A page of history is worth a volume of logic.”

Whereas trial by jury in criminal cases is fundamental to Anglo-American jurisprudence, in civil actions the right to jury trials is something of an historical accident.<sup>44</sup> In criminal cases it became a symbol of liberty, and the philosophic forerunners of the French Revolution hailed it as a “badge of freedom.” The right to a jury exists in most European states today, but confined to criminal prosecutions. Actually the origin of the jury system is not rooted in the rise of democracy, but was introduced into England by the Norman kings and can be traced back to the Ro-

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<sup>43</sup> Peck, “Perspective on Justice,” Mar. 3, 1955.

<sup>44</sup> For a brief but concise history of the origin of juries, see Mayer, *The American Legal System* (1955). Also, Thayer, “The Older Modes of Trial,” 5 *Harv. L. Rev.* 45 (1891); Thayer, “The Jury and its Development,” 5 *Harv. L. Rev.* 249 (1891). See also, Brunner, Schwurgerichts Lesser’s *History of the Jury System*; Pettingal, *An Enquiry into the Use and Practice of Juries among the Greeks and Romans*; Holdsworth, *History of English Law* 299-302 (1937); Plucknett, *Concise History of the Common Law* (3d ed. 1940).

mans, in whose hands it served quite a different purpose, as its original title, *inquisitio*, grimly suggests. The procedure as a method of invoking the aid of yeoman of the vicinage was transferred to England, where its early use was in such administrative matters as the compilation of the Domesday Book. This was the epoch of trial by battle and ordeal and of the wager of law. The oath in the Middle Ages had a mystique of its own, and the body of neighborhood freemen were called on not only to give testimony out of their own knowledge but to swear to the guilt or innocence of the accused. Over the centuries these compurgators became transformed into triers of the fact. During the absolutist reign of the Tudors the jury became a safeguard against the oppression of the crown as exercised in the Courts of High Commission, the Star Chamber and the Council of the North, which operated without juries. The original purpose and development of the jury were lost in the surge against tyranny. This attitude was carried over to our colonial period, and popular sentiment for the jury system as a guardian of liberty still persists. However derived, such public attachment is very strong. Nevertheless, perhaps those who identify the right in criminal proceedings and civil actions might be less insistent on the indispensability of a civil jury were they fully aware of the extent to which its use has been limited. In England—where they originated—civil juries have been generally eliminated. In our own law impartial administrative agencies dispense with their use. Matters as important as marriage and child custody and a whole complex of equity cases are adjudicated without juries within the broad exercise of the court's chancery jurisdiction. And even criminal cases not involving felonies are tried without jury in Magistrates' Courts, as well as in Special Sessions—where liberty is in jeopardy. In many jurisdictions even the most serious crimes are tried without juries when waived by defendants.

To revert to the accident problem, hard necessity drives us to disregard the purely theoretical considerations otherwise obtaining for not differentiating between cases. Deadly congestion vindicates a plan which, though it involves innovations, is not a revolutionary break with the traditional framework of judicial determination. Compromise is required in the light of the exigencies of reality. Conventional jury trials must be modified in automobile accident cases, if our courts are not to be permanently pervaded with the bleak, obstructive fog of *Jarndyce v. Jarndyce*, and not only "Trial by Jury" but the law itself should become the subject of mockery—and in less kindly hands than the Savoyards. The opponents of comparative negligence and the protagonists of the

present mode of trial must each yield some ground and settle on a plan which would inure to the benefit of the community.

And it is the legal profession which must assume leadership in formulating the decision.<sup>45</sup> Heretofore, lawyers, including judges, have not been conspicuous in achieving legal reforms. In common with other specialized groups, callings and professions, we are afflicted by *vis inertiae*, not so much perhaps to self-interest as, to loyalty to caste transmuted into collective self-esteem which inhibits recognition of need for elimination or even modification of prevailing institutions and methods.

#### BENEFITS OF THE PLAN

The proposal of a three-judge tribunal would go far in winning over adversaries of comparative negligence and of change in trial by jury. It is my long-standing conviction that legislative, popular and professional support for the required constitutional amendment to abolish civil jury trials will never be forthcoming unless, at least, multiple judges constituting a court were substituted. But I have believed that a three-judge court plan, conditioned on comparative negligence, would prevail by reason of the legal and social emergency generated by court congestion. For compelling reasons the plan provides for the inclusion of a layman and a physician on the Bench.

By having only one jurist we conserve judicial manpower. Then again: in the appraisal of facts—and personal injury actions present largely issues of fact—not of law—the leavening impact of lay thinking is most salutary to counteract the over-professionalism that is inevitable in any specialized calling.<sup>46</sup> And impartial medical guidance—not advocacy—in personal injury litigation is requisite, as has been demonstrated by the pioneer operation of the medical report office in our department. We use experts in fields other than the judicial, why not in the area of judicial decision? The inclusion of a physician is an extension of the medical panel, which has already proved its worth. If objective testimony is essential to an appraisal on the merits, how much more effective, in decision, would be the presence of an impartial physician on the Bench. *Medico-jurisprudence* is a study in itself, and the support of a qualified physician-expert as part of this tribunal would be invaluable.<sup>47</sup>

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<sup>45</sup> Conway, Address before Brooklyn Bar Association, 134 N.Y.L.J. No. 111, p. 1, col. 6 (Dec. 12, 1955); Heck, "The Duty of the Legislature to Improve the Courts," 135 N.Y.L.J. No. 45, p. 1, col. 3 (Mar. 7, 1956).

<sup>46</sup> Mueller, *Laymen as Judges in Germany and Austria* (1954). (Prepared for Law Project conducted by University of Chicago).

<sup>47</sup> Botein, "The Role of the Physician as an Expert Witness in Civil Actions," 133 N.Y.L.J. No. 69, p. 4, col. 1 (Apr. 8, 1955) (address at New York Academy of Medicine).

Claims for veterans' disability pension are adjudicated by Veterans Administration Rating Boards. Each rating board consists of three members: a doctor, a lawyer and the third is the lay or industrial member. What the American people regard as good for their veterans would be good, too, for all.

The jurists in the special courts—erected by constitutional amendment—would be drawn from already existing courts—from time to time; no new judges would be required. They would be called by the Appellate Division from any court, civil or criminal, less burdened than others, within each department—and, by arrangement, from other departments as well. In our own, a vast pool would be provided by Magistrates', Municipal, Domestic Relations, Special Sessions, County, City, General Sessions and Supreme Courts. Thus, the greatest economy in and widest use of—statewide use, when necessary—judicial manpower, beyond any contemplated heretofore, will be effected. Broadened medical panels would supply the physicians, and jury commissions would be adapted to furnish the lay judges.

Such a Bench—jurist, physician and layman—operating under a rule of comparative negligence and limited to automobile accidents would of itself allay some of the doubt of the opponents of the separate component parts of the plan. For the lawyer it would have the advantage of maintaining the adversary as against the administrative system, and it would provide a judicial and not a board determination. To the plaintiff the multiple court would give the assurance of lay representation on the tribunal. The comparative negligence rule would eventuate in reasonable expectation of justifiable recovery rather than a gamble on exaggerated claim. The defendant (insurance carriers and others) would benefit from a Bench less inclined to base its judgment on sentiment than on fact. Both litigants would profit from the presence of a non-partisan physician as part of the court, limiting, if not altogether eliminating, the unseemly and confusing rivalry of medical experts. Libertarian and minority groups would be less disturbed were the elimination of juries restricted to a limited group of cases—automobile accidents. The judiciary would take heart from the more expeditious handling of litigation. The community at large would gain immeasurably from the dissolution of the bottleneck of court congestion. There is no doubt that such a plan would not only speed the trial process itself, but would also augment the probability of settlement both before trial and during trial.

Midway between the present mode of adjudication and disposition by administrative boards, midway between conventional jury trial and trial by court without a jury, this plan might indicate further moderate

changes, if partially successful. If substantially successful it would obviate far more drastic reform. Clearly something must be done; the present state is intolerable and cannot continue indefinitely. But the action should be considered and planned to preclude spontaneous, perhaps explosive, results which would surprise us all, especially the contending groups now unwilling to yield a particle of their present advantage and to compose their differences. The law is not a straight jacket, and the time has come for a fresh approach to this problem in harmony with our present-day needs.

#### CONCLUSION

What this alternative proposal supplies are, essentially, procedural devices fashioned by dire necessity. But even as the great masters have transmuted law into literature, at times, so the collective judgment and will of our profession—which is always greater than any of her sons—can present the inspiring phenomenon of form and substance merging—for the common good.

The resultant increased efficiency of the administration of justice to the average citizen would enhance justice itself, and would illustrate the capacity of the American people and their law for accommodation—not surrender; their genius for honorable compromise, which has kept us strong in freedom. And solicitude for the ordinary man in the halls of justice would translate into reality our ideal of the dignity as well as the equality of the individual.