NEW YORK LAW SCHOOL

NYLS Law Review

Volume 6
Issue 2 *VOLUME VI, APRIL 1960, NUMBER 2*

Article 2

April 1960

Are Lawyers to Blame? (For Increased Insurance Premiums and Crowded Calendars)

Louis E. Schwartz

ARE LAWYERS TO BLAME?

(For Increased Insurance Premiums and Crowded Calendars)

*LOUIS E. SCHWARTZ**

SOME years ago a brilliant trial lawyer, representing a public utility and its insurance carrier, had an inspiration. In his summation, he would bring home to the jurors the thought that insurance rates are proportioned with relation to the loss ratio. He would say to them, "If you have a high loss ratio in any particular area, like this area for instance, naturally your rate advances with the loss ratio, and the more verdicts there are that are covered by insurance, the higher you gentlemen have to pay for protection."[1]

This appeal to the pocket nerve would, of course, be very effective. However, the courts did not see eye to eye with him at the time. It seemed that an appeal to the juror's own financial interest was not calculated to help him arrive at an entirely impartial verdict, and so, such statement was ruled to be improper.[2]

Evidently this powerful psychological argument was too good to be abandoned. Being estopped from making the argument on a retail basis to individual panels of jurors, the insurance fraternity enlisted the services of Madison Avenue and proceeded to "educate" the general public, from which prospective jurors must come, as to the fact that if injured persons are awarded verdicts, the insurance rates would reflect them. What a wonderful world it would be if premiums would be paid in and only stockholders' dividends and officers' salaries paid out.

In this campaign of "educating" prospective jurors, it would not be enough to stress the relationship existing between the size of verdicts and insurance premiums. Our basically fair-minded citizenry might think that it is only fitting and proper that there be such relationship. If motorists insist upon inflicting grievous injuries, in ever increasing numbers, then they should expect to pay in ever increasing premiums.

To insure the success of these "educational" messages, another ingredient had to be added. Subtle (and sometimes not so subtle) insinuations were made. Buckets of crocodile tears were shed over

* Louis E. Schwartz is a professor of Law at New York Law School. He is the author of "Trial of Automobile Accident Cases" and many other works.

1 Wood v. N.Y.S.E. & G. Co., 257 App. Div. 172, aff'd. 281 N.Y. 797.

2 Id.

the poor injured and maimed victims, whom the insurance companies were *so* anxious to help, who were not receiving all of the money. Their avaricious lawyers were pocketing a substantial share of the proceeds! If only there were no lawyers to spoil things. Advertisements on television demonstrated to the public that, if the insurance company received a claim by 9:05, by 9:15 the check in settlement was forthcoming—no lawyer being in the picture. Nor was this all. The clincher was in the innuendos that the large verdicts were the result of fraud, and that all plaintiffs threw away their crutches just as soon as they collected their judgments.

Evidently, the insurance companies have not completely sold their bill of goods to the public and to the jurors. Large verdicts are still being awarded by jurors where justified by the facts established in the cases tried before them.

Plagued by overcrowded calendars of negligence actions, judges have taken drastic measures. In New York, for example, by means of "Rules," many restrictions have been placed upon the activities of lawyers representing plaintiffs in personal injury actions. In the First Judicial Department, the freedom of lawyers to contract with competent, adult clients has been restricted as to the contingent fees which may be charged;[3] Pleadings and Bills of Particulars must now be verified; plaintiffs' medical reports and hospital records are open to inspection by the defendants' attorneys; the plaintiff is subject to examination before trial; in some counties, the plaintiffs' case cannot be put on the calendar without an affidavit from his doctor setting forth the nature, extent and permanency of his injuries; the courts evaluate the injuries on the basis of the papers filed and decide whether an action shall remain on the court calendar or be deferred until removed to a lower court; plaintiffs are sent to "impartial" doctors by judges who are not satisfied with the affidavits of the plaintiffs' doctors.

With all of these rules, with all of these restrictions, calendars nevertheless remain overcrowded and large verdicts and settlements are still quite common.

Investigations have been and are being conducted by well organized and fully-staffed committees in search of "ambulance chasing" and fraud. An ever watchful eye is being kept upon lawyers handling negligence cases. For many years lawyers have been required to re-

[3] Gair v. Peck, 6 N.Y. 2d 97, 160 N.E.2d 43, cert. denied, 361 U.S. 374 (1959).

port all contingent retainers in such cases as well as the names and relationship between the attorneys and the persons recommending the clients. In recent years, they have also been required, in the First Department, to file Closing Statements showing how each penny of the receipts was distributed.

These investigators have been and are working arduously and diligently. They subpoena and question the clients, the persons who recommended the clients as well as the attorneys. The insurance companys have, of course, been most co-operative. Not even the Bill of Rights is permitted to stand in the way of these investigators. The courts recognize, of course, that a lawyer has an absolute right to plead the Fifth Amendment. They have ruled, however, that any lawyer claiming this right is thereby impeding the judicial investigation and his "privilege" of practising law is taken away from him and he is disbarred.[4] Cleansing the Bar of those few who bring discredit upon our profession is, of course, laudable. Whether the sickness calls for the powerful medicines administered, and what the ultimate effects of these measures will be upon the independence of the general Bar is extraneous to this article.

At any rate, it seems clear that these measures will not change the basic situation. Calendars will remain overcrowded. Large verdicts and settlements will continue to be made. Insurance premiums will be higher. This must be so. Calendars are not crowded, verdicts are not high, and insurance premiums do not increase because of the few miscreants in the legal profession. All the investigations, all the restrictions on the fees and freedom of action of lawyers will not change the basic facts. The crowded calendars, large verdicts and increased insurance rates are rather due to the following factors:

(1) The vast increase in the number of personal injuries.

(2) The failure to provide an adequate number of judges and efficient organization and supervision of the courts.

(3) The increase in the number, size and power of automobiles and the speed at which they are operated.

(4) The effect of inflation.

(5) The recent advances in the knowledge of the medical profession as to the effects of trauma upon the human body.

(6) The increased interest of lawyers in medical facts and their effective presentation to court and jury.

[4] Re: A. M. Cohen (Apr. 1, 1960) — N.Y.2d —.

(1) *The vast increase in the number of personal injuries.*

The Travelers Insurance Company has just released the 1960 edition of their annual brochure entitled "The Dishonor Roll." One of the facts revealed is that the number of persons injured by accidents of all types in 1958 was 2,825,000. The number so injured in 1959 was 2,870,000.[5]

Obviously the number of claims will be the same irrespective of whether or not "ambulance chasers" are eliminated. The fact that one "ambulance chaser" obtains 100 retainers instead of 100 lawyers being retained in these same cases does not change the number of claims or the number of actions pending.

(2) *The failure to provide an adequate number of judges and efficient organization and supervision of the courts.*

The phenomenal success in clearing calendars in the State of New Jersey under the late Judge Vanderbilt is unique and points up the woeful conditions in other jurisdictions. New York State is moving slowly towards a court re-organization plan very much watered down due to political considerations.

In order to prevent complete stagnation in the courts, in addition to the imposition of the many restrictive measures already mentioned, the courts have also resorted to the ever increasing use of so-called pre-trials. This is an excellent procedure except for the fact that it is sometimes used to compel settlements. In some overcrowded courts it is well nigh impossible for the parties to try the issues rather than settle.

Ironically enough, it has been found that this practice has resulted in more cases being added to the trial calendars. Many insurance companies prefer to wait for these pre-trial negotiations. By so doing, they can show the presiding judge how co-operative they are in settling cases. Incidentally, they can make use of the money (which they previously would pay out in claims) while waiting until after all of the pleadings have been filed, the examinations before trial of the plaintiff concluded, and until the pre-trial. In years gone by, these same claims would have been settled early by the insurance company adjusters and would never have reached the trial calendar.

In connection with these pre-trials, there has developed the

[5] The Dishonor Roll, The Travelers (1960) Book of Street and Highway Accident Data, Table 2, p. 2.

practice of the courts calling upon "impartial" physicians to help in evaluating the injuries. The implicit faith placed in these impartial gentlemen is not shared by all judges.

A recent opinion by a very able and outspoken jurist[6] discusses the "useless expenditure of hundreds of thousands of dollars in fees paid to the 'impartial physicians' ". He points out that,

"The fees of the impartial physicians appointed by the courts are in many cases extremely onerous, particularly in view of the fact that in some instances where the same physician is 'partial,' i.e., retained by one of the parties to examine a plaintiff, his fee is as little as $50 and when the same physician is 'impartial,' i.e., appointed by the court, his fee runs as high as $125. In addition, if the report of the impartial physician is couched in extremely technical medical terms a 'consultation fee' of $50 is exacted for a conference at which the impartial physician 'explains' his report."

(3) *The increase in the number, size, and power of automobiles and the speed at which they are operated.*

This is self-evident and needs no documentation.

(4) *The effect of inflation.*

It is only natural that the size of verdicts should increase in keeping with the inflationary spiral. An automobile which sold for $1,000.00 twenty years ago sells for more than $3,000.00 today; a home purchased at that time for $15,000.00 would command $35,000.00 today. Loss of earnings have also increased in keeping with the cost of living. It is not unexpected that, in a time when judicial notice is taken of the inflationary spiral,[7] the size of verdicts as well as insurance premiums should go up.

(5) *The recent advances in the knowledge of the medical profession as to the effects of trauma upon the human body.*

It is difficult to realize that a few hundred years ago the surgeon was the village barber and his knowledge extended to cupping and blood letting. One hundred and fifty years ago every doctor and every impartial panel or association of doctors knew, beyond any question, that puerperal fever was a disease and was certainly not due to any

[6] Hart, J., in Fisher v. Smith, 196 N.Y.S.2d 405, 417.

[7] Kircher v. Atchison T. & S.F. Ry. Co. (1948), 32 Cal. 2d 176, "It is a matter of common knowledge, and of which judicial notice may be taken that the purchasing power of the dollar has decreased to approximately one half of what it was prior to the present inflationary spiral."

neglect of personal hygiene on the part of the physician. A doctor would not hesitate to perform an autopsy, wipe his hands on his lapels and forthwith proceed with an internal examination of a woman in labor. A most moving novel[8] has been based on a true story of how one dedicated doctor spent his life in the fruitless but gallant fight to convince his brethren that they should wash their hands before each such examination.

The medical profession has, of course, learned much since that time but it is astounding to contemplate how many things they did not know as to the effects of trauma only 25 years ago.

For a lawyer to criticize the medical profession is almost sacrilegious. Lawyers and judges have always held doctors in reverent awe and afforded them special consideration in the courts.[9] It would probably take a psychologist to explain the basis for this legal inferiority complex. Thanks to the efforts of the American Medical Association, the advertisements, movies and television enactments (so unselfishly paid for by drug manufacturers) the doctor (in contrast to the lawyer) has become the beneficiary of great good will. What follows, are, however, facts.

Since the Industrial Revolution and certainly since the invention of the automobile, hundreds of thousands of persons must have sustained herniated discs, traumatic neuroses, whiplash injuries, etc. These injuries were suffered by these hundreds of thousands of innocent persons without compensation simply because of the lack of knowledge of the medical profession.

It is hard to believe but, nevertheless, a fact, that it was not until twenty-five years ago, in the year 1934, that two brave doctors[10] pointed out that the harshness, injustice and brutal disregard of complaints shown by physicians and representatives of insurance companies and their frequent expressions of unjustifiable skepticism, itself engendered resentment, discouragement and hopelessness and often was itself the cause of the development of neurosis.

How many thousands suffered excruciating pains in their legs

8 "The Cry and the Covenant" by Morten Thompson.

9 For example, the short 2 year statute of limitations for malpractice which runs even though the patient is unaware of the malpractice, applies to doctors and not to lawyers.

Jasen, J., in Peters v. Powell (1960), 196 N.Y.S.2d 304, "Although this court does not believe that such a differentiation should exist, it feels constrained to follow precedent."

10 Strauss & Savitsky, "Head Injury, Neurologic and Psychiatric Aspects", Arch. Neurol. & Psychiat. 31: 893-955 (May) 1934.

after an accident and how many doctors swore in good faith that it was sciatica? It was not until 1934 that it was first demonstrated that a protruded intervertebral disc could cause sciatica.[11]

In a most prosaic field of medicine, to wit, injuries to the tendons of the shoulder, known as rupture of the rotator cuff, we find that up to the year 1934 laboring men suffering from such an injury, with its peculiar signs and objective symptoms were nearly all erroneously charged with malingering.[12]

As for the whiplash injury—that word was not even invented until 1945 when Dr. Davis coined the term which has been popular ever since.[13]

Thirty years ago, the writer remembers conducting a defense to the claim that an automobile accident had caused a tumor by using a book written by Prof. Ewing, an outstanding medical authority, in which trauma was not listed as even a possible cause of tumors. In the very next edition of that work trauma was included as a possible cause. Since that date, of course, it has been scientifically established that trauma may, under certain conditons, cause or aggravate tumors and cancers. Nevertheless, to this very day, doctors will blithely testify on behalf of defendants: (a) That the cause of cancer is unknown; and (b) Trauma positively was not a competent cause of the cancer or the aggravation of the cancer in question.

Everyone has read of the case currently being tried in which it is claimed that the plaintiff's lung cancer was caused by the nicotine tars contained in certain cigarettes. This action is an interesting and

[11] Lewin, "The Back", writes, page 703: "In 1934 Mixter and Barr demonstrated that a protruded intervertebral disc could cause sciatica. This was a bombshell in the diagnostic and therapeutic arena of back, neck and extremity disorders."

Dr. Young in Moritz & Helberg, page 609, writes: "There can be no doubt that in 1934 Mixter and Barry added immeasurably to our knowledge of the cause of low back and sciatic pain. Gradually, however, the pendulum swung the other way, until every patient with low back and leg pain was suspected of having a protruded intervertebral disc until proved otherwise."

". . . . The medical profession was at first reluctant to accept protruded intervertebral disc as a disease entity. . . . One can today read the papers of Key and the late Dr. Dandy and get the idea that with few exceptions low back pain is due to protrusion of an intervertebral disc."

[12] Watson-Jones, "Fracture and Joint Injuries", p. 45: "In former years insult was often added to injury when patients sustained ruptures of the rotator cuff of the shoulder. They were nearly all charged to malingering. . . . We owe a great debt to Codman of Boston who wrote "The Shoulder" (1934), for his studies of the shoulder. He explained the reality of these curious, apparently unconvincing signs and not only saved many labouring men from unjust charges, but showed us how to treat their tendon injuries."

[13] Moritz & Helberg, "Trauma and Disease", p. 575.

difficult one and no one can, or should, predict the result.[14] Should the action be successful, however, I venture to predict that the lawyers will not receive credit but rather be blamed for further crowding the calendars with similar actions.

In the same newspaper I read another item reporting on a seminar of eminent scientists to the effect that they suspected viruses as a cause of cancer.[15] The report included this significant excerpt: "Now there is evidence for a theory that some viruses may lie asleep innocently in the body until triggered into some cancerous growth by some abuse or injury or even by age." (Emphasis supplied).

(6) *The increased interest of lawyers in medical facts and their effective presentation to court and jury.*

I have heard lawyers criticized in public by a defendant's attorney for creating "styles" in bills of particulars. He related, with biting sarcasm, how claims of sacroiliac sprain gave way to herniated discs, traumatic neurosis; concussions of the brain; whiplash injuries and even the aggravation or causation of cancer. This I believe unfair. Actually these are not new "styles" but merely reflect new medical findings.

It is true that in recent years lawyers have kept abreast not only of the law but also the various sciences including that of medicine. In 1928, a law book which included questions to be put to medical witnesses was unique.[16] Since that time we have seen the publication of a wealth of medico-legal material in books, pamphlets, quarterlies, law journals and reports of seminars. Thousands upon thousands of lawyers have attended medical lectures and have read medical books in their quest for knowledge of the latest developments respecting the causal relationship between trauma and disease. They have also voluntarily attended classes designed to improve their ability as trial lawyers in effectively presenting this knowledge to courts and juries. Unquestionably this has helped to increase the number and size of verdicts. If this is blameworthy, then, to that extent, lawyers are to be blamed. Fair minded persons, I believe, would rather conclude that the legal profession should be praised rather than blamed for the extra study and effort expended on behalf of their clients, the innumerable victims of our machine ridden civilization.

[14] Since this was written, the complaint has been dismissed in that case.

[15] "Viruses Seen as Cause—and Killer—of Cancer" by Alton Blakeslee, Assoc. Press Science Writer.

[16] First Edition, "Trial of Automobile Accident Cases", by this author.