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George E. Allen

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EVALUATION AND SETTLEMENT OF A PERSONAL INJURY CLAIM FOR DAMAGES

GEORGE E. ALLEN*

The problem of establishing for purposes of settlement the fair value of a claim for personal injuries or death resulting from the negligence of another is of growing importance. The figures for the nation for 1956 released by the National Safety Council demonstrate the alarming rate at which such casualties are occurring: 95,000 killed, 9,450,000 injured, and almost 11 billion dollars in cash losses. The economic loss caused by motor vehicles alone in this country was 27 billion dollars for the period from 1945 to 1955.[1] This figure is as appalling as it is enlightening. It impresses us with the price that our society is willing to pay in terms of human misery and death for the privilege of operating an automobile.

The automobile casualty is most often a member of a low or average income family, in which a serious injury to one or more members is usually a catastrophe. The average wage earner usually cannot afford to miss a single pay check. When he is injured or killed, the family is faced with the loss of earnings and ever increasing indebtedness. Without some form of economic assistance, society must eventually foot the bill.

A lawyer representing an injured person or the family of a person killed by the negligence of another acts in the capacity of a quasi-trustee for the interested parties. He owes the highest moral as well as legal obligation to prepare the case properly and to expedite the disposition of it, whether by settlement or trial, in order to lessen the hardships which normally follow such a tragedy.

*Member of the firm of Allen, Allen, Allen, and Allen, Richmond, Va. The writer gratefully acknowledges the able assistance of his associate, John T. Manning, B.S., University of Florida, LL.B., University of Virginia, in the preparation of this article.

[1]National Safety Council, Accident Facts (1955).

Justice delayed is usually justice denied. It follows that one acting as plaintiff's attorney is duty bound to make every reasonable effort to settle every claim for what it is fairly worth. With the exception of those instances in which an honest difference of opinion exists, there is no reason why competent representatives for both parties should not get together and agree upon the damages resulting from personal injury as well as a judge or a jury could.

The purpose of this article is to discuss some of the practical problems involved in trying to establish the fair value of a case. While the rules for preparation and trial of a case are reasonably clear, it is difficult to formulate any definite rule of thumb that will take into consideration all of the factors that might affect the value of a particular case. In the final analysis, each case is different in some particular from every other case. Any capable trial lawyer knows this, and through the years has followed certain mental processes or aids to evaluation based upon his own experiences and observations. Many of the observations and suggestions made here will, therefore, appear elementary or self-evident to the experienced trial lawyer. However, for the benefit of the less experienced attorney and those who like to see how other members of the bar approach the problem, an attempt will be made to discuss some of the factors that are known to affect the value of most personal injury cases.

I. PREPARATION AS A PREREQUISITE TO EVALUATION AND SETTLEMENT

A. *In General*

The majority of all claims for personal injuries or death resulting from negligence are settled by a representative of the negligent person before the case gets into court. Often this result is accomplished without the claimant's having the benefit of counsel. Of the cases that get into the courts, approximately 85 or 90 per cent of them are settled before trial. Therefore, it is natural for plaintiff's attorney to assume that any given case is likely to be disposed of by compromise. There is always a temptation to follow the path of least resistance and skimp on preparation in a given case by rationalizing that the cost of thorough preparation in time and money can be saved because the case will probably be settled. To yield to this temptation is the greatest mistake a lawyer can make, for few cases are settled for what they are worth until *after* they are thoroughly prepared for *trial.* Prepare the

case for trial and you need not worry about settling it. The settlement will come about almost as a matter of course.

Adequate preparation for settlement (and trial) comprehends complete familiarity with all of the facts discoverable by intelligent and persistent investigation, in addition to a knowledge, or source of knowledge readily at hand, of every question of law likely to arise upon the facts. Case preparation is the only way to acquire a thorough knowledge of the law and facts essential to the proper evaluation of the claim. It reduces the element of surprise, and is indispensable in providing the confidence so necessary to negotiate a settlement or to try the case. Defense counsel, in appraising the value of a case for settlement, will put a much lower price tag on it if he realizes that it is not being thoroughly prepared by plaintiff's lawyer. It follows, therefore, that for any lawyer to be able to negotiate a fair settlement of a personal injury case, he must have a reputation for thoroughly preparing *all* of his cases, and the courage, determination and ability to try every meritorious case, if necessary, and to appeal when warranted. It is only when he enjoys such a reputation that he will be able successfully to negotiate fair settlements for his clients.

It should be remembered that a lawyer does not build a reputation only on the cases he settles. To the contrary, he becomes better known by the cases he tries, even though he loses one now and again. Aside from the experience which a young lawyer acquires in the actual trial of a case, if he has thoroughly prepared his case and handles it well, everyone in court will be impressed with the extent of his preparations, including members of the jury. It is surprising the number of cases that are referred to a trial lawyer over the years at the instance of a juror who has served on a case he tried. Realizing this, the young lawyer who is seeking to establish his reputation should never hesitate to try a case if necessary, *provided he is prepared to try it well.*

Since an intelligent approach to negotiations is impossible until after plaintiff's lawyer has placed a reasonable value on the case for settlement purposes, it follows that the *minimum standard of preparation in any case is to the point where a fair settlement figure can be determined.* In serious cases, and in jurisdictions where early trial is possible, that point may well be reached only after preparations for the trial have been completed. In cases involving slight temporary injuries or limited financial responsibility, or in jurisdictions such as New Jersey, having an Unsatisfied Claim and Judgment Fund Law, it may become obvious in the early stages of investigation that the maximum amount that can be recovered will be small. In those cases, of course,

the costs of investigation and preparation should be limited to protect the small amount the client might be expected to receive.

B. *Investigation of Facts to Establish Liability*

It is absolutely imperative that a prompt investigation of all the facts be made to determine whether the plaintiff has a meritorious case, and if so, its value. Such an investigation comprehends seeking out every element of the case that might tend to influence a judge or jury. No two cases are alike and nothing should be taken for granted. In the words of Justice Ervin of the North Carolina Supreme Court:

"When the writer embarked on the practice of law, his father gave him this admonition: 'Always salt down the facts first; the law will keep.' The trial bench and bar would do well to heed this counsel. In the very nature of things, it is impossible for a court to enter a valid judgment declaring the right of parties to litigation until the facts on which those rights depend have been 'salted down' in a manner sanctioned by law."[2]

While, as Judge Ervin says, "the law will keep," a complete investigation of the facts cannot be properly made without a preliminary investigation of the law. It is well, therefore, first to make a preliminary investigation of the facts as a basis for a preliminary investigation of the law and then follow with the complete investigation of the facts.

The advantages of an early and complete investigation of the facts are numerous. Time changes everything. Skid marks wear off and disappear. The appearance of a locale changes. People change, move away, become lost, and their memories become hazy. Automobiles are towed away and repaired, painted or junked. Plaintiff's casts or other paraphernalia are removed and often lost for evidentiary purposes. Honest and sincere witnesses may differ on the evidence, and the greater the time lapse before the witnesses are contacted and their statements reduced to writing, the greater the possibility that irreconcilable differences of opinion may develop in their interpretation of the facts. Witnesses, including the defendant if he has not employed counsel and has not contacted his insurance carrier, are often willing to talk and will voluntarily give statements while the facts are fresh in their minds, and while the horror of the occurrence is vividly before them. Later, the defendant will be very forcefully reminded by his insurance company that he is to talk with no one about the accident, and many of the other witnesses may become influenced by the fear of having to testify, or the inconvenience of having to appear in court.

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[2]Erickson v. Starling, 235 N. C. 643, 659, 71 S. E. (2d) 384, 395 (1952).

A thorough and timely investigation of *all* the facts includes locating and interviewing all of the witnesses, starting with the plaintiff himself. Since the unending task of every lawyer is to seek out and preserve the truth, the plaintiff should be examined and cross examined concerning his version of the facts, when his condition permits. A statement should also be obtained from him which should include everything he knows about the accident, the names and addresses of all witnesses, background information about himself and any of the witnesses whom he knows personally, statements made by anyone about the accident, a description of his injuries, the names of all doctors who have treated him before and after the accident, and, in general, all leads or other information that might help in the conduct of the investigation.

The investigating officer should be interviewed as early as possible. All of the facts pertinent to the collision should be sought from him, including the names and location of all witnesses, any statements made by them or any of the parties to him, any statement as to liability and policy limits which the defendant may have made to him, and any other factual data within his knowledge, including measurements made, photographs taken, and the disposition of the motor vehicles involved. A copy of his report should be obtained as soon as possible, as should copies of the reports filed by the drivers involved. Members of rescue squads, ambulance drivers and tow truck operators often are able to furnish valuable information and leads. Signed statements should be obtained whenever possible, as their value in negotiations for settlement cannot be overestimated.

In obtaining signed statements the approach should always be courteous, and the lawyer should try to arrange his own schedule so as to cause the witness as little inconvenience as possible. The witness should be allowed to relate the facts in his own way, and the statement should include his exact words and expressions wherever possible. All of the facts should be elicited, including when, where, and how the collision occurred. The names, addresses and descriptions of all other persons who were witnesses, or might have been witnesses, to the occurrence should be obtained.

Whenever possible, an eye witness should be taken to the scene and asked to prepare and initial a diagram, roughly to scale, of the scene of the accident, which should be attached to his signed statement. Every witness should always be asked to read over the statement, to make and initial any changes that he desires to make, and sign his name at the bottom of each page. Whether required by statute or not, a copy of the signed statement should be left with the witness with

the suggestion that he keep it in his possession. He should be advised to show the statement to the insurance adjuster if the adjuster desires to take a statement from him. The witness should *never* be instructed not to talk to anyone else. To the contrary, he should be assured that he has nothing to fear in telling the truth.

It is quite important to obtain a signed statement from a *hostile* witness, particularly where such a witness appears to be in error or exaggerating the circumstances. The statement should be taken in question and answer form, and everything that he avers or denies should be recorded. If he refuses to talk at all, or refuses to sign the statement he has made, that fact should also be noted. If this course of conduct is suspected in advance, it is often prudent to have a court reporter present, particularly if the witness's testimony is likely to be vital at the trial. This precaution may prove useful to show bias or prejudice. It is also advisable to have a court reporter along when interviewing any key witness.

The burden of proving that the defendant is liable to the plaintiff for primary negligence rests upon the plaintiff's lawyer. In assembling and preserving the evidence, he should not overlook the photograph as one of the most effective ways of preserving and portraying evidence, both as to cause and effect. Photographs should always be taken of the *locus in quo* and the motor vehicles and other instrumentalities involved in the collision. Other essentials include obtaining a weather report, special charts for braking distances, and any other aid that plaintiff's attorney may find useful to help him establish what the true facts were at the time and place of the accident. Occasionally it is necessary to conduct experiments or to have models prepared to scale.

Full advantage should always be taken of statutes and rules permitting a pre-trial examination of adverse parties and witnesses if such evidence cannot otherwise be obtained.

C. *Determining Extent of Financial Responsibility*

A judgment against an insolvent and uninsured defendant is of little value. Until recent years, the automobile casualty has had to bear the risk that the defendant or his insurance carrier would be able to respond in damages. The general public has become progressively dissatisfied with this risk, and the legislatures in many states have passed financial responsibility statutes, compulsory insurance statutes, unsatisfied judgment fund statutes, impounding laws and other statutes of a similar nature, all designed to relieve the casualty claimant of at least a part of the risk of being injured by the uninsured or indigent motorist.

It is essential in the early stages of the investigation to determine whether or not the defendant is insured and what are the limits of his liability policy, if he has one. If the defendant is not insured, or if his policy limits are low, it is necessary to determine his independent financial status. Plaintiff's lawyer should not overlook the possibility of the defendant's being in the employ of or acting for a solvent entity. Some comprehensive type of insurance, car-for-hire, drive-other-car, newly-acquired car, or excess insurance may be available. The provisions of the applicable license or motor vehicle law may provide some form of financial guarantee from a parent, guardian or car owner for the negligence of a minor defendant. In addition, the plaintiff's own liability policy should be examined promptly for a new type of coverage which affords some protection to the plaintiff against an uninsured or unidentified driver.

D. *Injury and Damages*

Preparation of this phase of the case involves an investigation to determine the nature and extent of the injuries, the full extent of the damages, and the accumulation of evidence, particularly visual and demonstrative, to support each. For the purpose of portraying the injuries, if possible, photographs should be taken of the plaintiff while in the hospital to show the fractures, wounds, abrasions and bruised areas, and the discomfort of plaintiff while in traction, casts or other mechanical devices. Where permanent disability, scars or other forms of disfigurement exist, photographs should be taken to portray this condition accurately. A search should be made for any photographs taken of the plaintiff before the accident, at the scene of the accident or while enroute to the hospital. Discarded casts, mechanical devices and other paraphernalia worn by the plaintiff during the period of his recovery should be preserved as evidence.

Copies of all hospital records and nurses' bedside notes should be obtained. Whenever possible, 9 x 12-inch photographs of x-ray pictures should be made and put in the brochure. These can be effectively used both in negotiations and in the trial of the case. They are particularly effective in certain cases, such as where a pin has been inserted to secure bones together. A detailed record should be compiled to show all of the things that plaintiff could do before the accident but has been unable to do since.

It is incumbent upon plaintiff's attorney to acquire an understanding of the exact nature, extent, cause and effect of all the injuries. To do this, he should periodically obtain medical reports from each attending and consulting physician, and completely familiarize himself

with their contents. Every initial medical report should include at least: a brief medical history of the patient, together with some reference as to whether or not the accident caused or contributed to each symptom complained of, if known; a description of the examination and clinical tests performed, including the results of each; a record of the treatment rendered, and a description of how the patient responded to such treatment. Each physician should be asked to render a prognosis or estimate as to the permanency of the injuries, and how they may be expected to affect plaintiff in his job and in his normal everyday life. A report should also be obtained from plaintiff's regular physician to show what his physical and mental condition was before the accident. Copies of reports should always be obtained from physicians who examine plaintiff at the request of the insurance carrier.

Plaintiff's attorney should then consult with the physicians who have rendered reports. In addition to acquiring from them a better understanding of the injuries and resulting disabilities, he may be able to obtain references to standard medical authorities, with suggestions for cross examination of defendant's medical witnesses.

E. *Application of Law to Facts*

An examination of the law should be made in the early stages of the preparation. As the factual picture unfolds during the investigation, the most recent authorities on each point should be thoroughly reviewed. A theory of liability should be developed, although no theory should be so strongly adhered to as to prevent the attorney from fully appreciating the significance of other facts as they appear.

This procedure has several obvious advantages:

(1) If, in the early stages of the investigation, the facts conclusively indicate that plaintiff's claim does not have merit in a legal sense, the attorney can save the client the expense of a full and complete investigation.

(2) Where the early discovered facts indicate doubtful liability, the scope of the investigation may be restricted temporarily to allow the investigator to concentrate upon the discovery of the true state of facts upon which a case of liability would depend.

(3) A theory of liability helps the investigator in knowing what to look for. This is particularly true where he is not a lawyer.

(4) In reading through the texts and digests, the attorney will often pick up points applicable to the case which might not otherwise occur to him.

Plaintiff's attorney should brief the points upon which the case

depends as he goes along. It is essential, of course, that he be entirely honest in his approach to the law and record the authorities that appear to be against him, distinguishing them wherever possible. After the evidence has been accumulated, a trial brief should be prepared. Such a brief, properly indexed and cross-indexed, is most helpful in trying to evaluate the case during settlement negotiations. If the case goes to trial the brief is invaluable. The greatest benefit from it may be had by giving a copy to the trial judge about two days before the trial begins. If you deliver it to him sooner, he may lay it aside and overlook it. Of course, a copy should be delivered to opposing counsel.

F. *Filing Suit*

Should plaintiff's attorney file suit before or after attempting to negotiate? The answer to this question is important, because of its effect upon the settlement value of the case, the net amount recovered if the case is tried, the status of the already over-crowded dockets in most parts of the country, and the attitude of a few of the insurance companies and their attorneys who still adhere to the old "come and get it if you can" policy.

As a general rule it is the better practice to file the appropriate action as soon as the preliminary investigation discloses a meritorious claim against one or more financially responsible defendants. The reasons for this are many. (1) The burden of establishing the claim rests upon the plaintiff, and his attorney should take the initiative and keep it throughout every stage of its prosecution. (2) Lapse of time usually works to the disadvantage of the plaintiff. A complaint once filed may be amended to include further allegations of negligence or damage, but a trial date is seldom advanced. (3) The filing of the action tends to hasten negotiations for settlement. Most adjusters have limited authority, which means that they can only settle cases involving small amounts. An early filing of the action brings the insurance counsel into the case with his practical knowledge of the law, the courts and juries. (4) The long delay in obtaining a trial date in many jurisdictions makes it almost mandatory that action be filed as soon as practicable so that the case may take its place on the docket. (5) In cases involving serious injury, often to the head of the household, the plaintiff has been placed in dire financial circumstances as a result of the accident. Hospital, doctors' and other bills accumulate and there is no income with which to pay them or the current living expenses of the family. (6) Time may erase important details from the memories of witnesses. Some of them may move away, become lost for all practical purposes, or decide it is too much of an inconvenience for them to testify in

court, becoming antagonistic if forced to testify at some time in the distant future. (7) In cases involving serious injury where early trial is possible, the plaintiff may not have fully recovered, and he will appear at the trial wearing or using devices prescribed by his doctor to assist him in his recovery. (8) As a practical matter, it is almost impossible to settle a case involving serious injury in the absence of the pendency of a suit, except where the policy limits are well below any amount which would approach the fair value of the case. (9) Where plaintiff's claim is one of several arising out of the same accident and the total liability coverage is insufficient to pay all of the claims, filing suit at the earliest possible moment, together with a lis pendens, may enable the plaintiff to acquire a prior lien on the insurance funds.

G. *The "Brochure" as an Aid to Preparation for Settlement or Trial*

After the case has been thoroughly prepared from a factual, legal and medical standpoint, how can this accumulation of knowledge be used most effectively in trying to obtain a reasonable recovery for the plaintiff? Time was when nothing was disclosed to the opposition that might contain information of plaintiff's grounds of recovery. However, under modern rules of procedure, in most jurisdictions competent defense counsel can get sufficient information about plaintiff's case by the use of appropriate discovery procedures. But regardless of what plaintiff may be *compelled* to disclose, it is generally advisable to make a full disclosure voluntarily. This may best be done by the use of the "brochure."

The basic job of plantiff's lawyer in settlement negotiations is to convince the adjuster, the insurance company, and their counsel if suit has been filed, that plaintiff has a meritorious case which, in all fairness to both parties, should be settled. The insurance company owes a duty to its investors to protect the assets against false, unmeritorious or excessive claims, but it also owes a duty to the general public and to the plaintiff to pay a fair amount in damages where liability appears. Since protracted litigation is expensive to both parties, it follows that every effort should be made by each to effect an early settlement of every case.

Before an insurance adjuster completes his investigation of a case he must recommend a figure for which he thinks the case can be settled. The company sets up a "reserve" for each case that is not settled on the spot, which "reserve" is subject to reappraisal, particularly where plaintiff retains counsel. If the "reserve" is set below the figure which plaintiff's lawyer considers to be the fair value of the case for settle-

ment purposes, the *company must be convinced* that plaintiff has a good case on liability which entitles him to more in damages than the amount in reserve, and that, if plaintiff wins upon a trial, the damages may be greater than the amount for which plaintiff is offering to settle. How then is the most effective way to convince the company?

It has been the practice of successful salesmen, architects, engineers, chambers of commerce and others for years to use the "brochure method" in convincing prospective clients, purchasers and the public. This simply means that they have put into convenient form everything they could predict that the other party would want to know about an idea, plan, product or place. The contents, such as photographs, plans, maps, facts, figures, illustrations and arguments, vary to suit the purpose intended.

For several years now, the practice of preparing brochures on cases and delivering them to insurance companies and their counsel before trial has been followed by many of the more successful plaintiff's lawyers. Since the brochure method is a factual presentation of all phases of the plaintiff's case, which means the opening of plaintiff's file to the defendant, such a precedure contemplates good faith on the part of the insurance company, its agents and counsel. It goes without saying that a case without merit will fall flat when put in brochure form. It also follows that where the agents or counsel for a particular insurance company have not negotiated in good faith with plaintiff's attorney in the past, it would be foolhardy to turn a brochure over to them. But in most cases where all of the facts are considered by capable representatives on both sides, they will be able to arrive at a fair settlement.

Since the purpose of the "brochure method" is to convince honest men with a truthful representation of the facts, it becomes obvious why such great emphasis should be placed upon a thorough preparation of the facts, including the accumulation of every visual or demonstrative aid that may assist in their presentation. Actually, the brochure should contain a copy of every exhibit that will be used in the trial of the case, in addition to some other documents, such as copies of accident reports, which in many states including Virginia cannot be directly introduced as evidence in civil cases. In general, the brochure will include such documents as: copies of all accident reports filed in the case; transcript of the criminal hearing, if one was held; photographs showing liability (skid marks, scuff or scrape marks, etc.) and damage to the vehicles involved, including aerial and other photographs to show in detail the *locus in quo* and any property damage caused by the collision; any plats, charts or diagrams which support

plaintiff's theory of the case; the factual statements of all witnesses; copies of all medical reports, including those rendered by specialists selected by the defendant; photographs showing the condition of plaintiff before the accident, the injuries sustained in the accident, and, in general, every photograph taken of the plaintiff following the accident to indicate the extent of his injury and suffering; a photostatic copy of the hospital record; and a complete itemization of all damages sustained by plaintiff, including all bills for treatment, lost wages and other expenses caused by the accident. Where the injuries are of a permanent nature and are expected to incapacitate plaintiff in the future, an estimate of any future loss of wages, medical and nursing bills, and other items of damages should also be included. As a point of practical interest, where the hospital records are voluminous, these records should be summarized by some competent physician and the summary placed in the brochure in lieu of the entire record. If the injuries are of a permanent nature, a life expectancy table should also be included as the last item in the brochure.

Leading personal injury lawyers prepare a brochure in every case. Work on the brochure is started after the contract of employment is signed, and continues until the date of the settlement or trial. The most obvious advantage of the brochure is that once adequately prepared it constitutes "the case" in one bound volume. It also provides a convenient and up-to-date filing system for almost all of the demonstrative evidence in the case. If a case is weak in some respect, or needs further investigation in some particular, such inadequacy stands out like a sore thumb in the brochure.

It is good practice to have in the firm an investigative or case preparation section, and a trial section. When a case is assigned to a trial attorney, an examination of the brochure gives him the "feel" of the case in the shortest possible time and gives him a chance to prepare himself accordingly. In the final stages of preparation for trial the trial attorney usually takes only the brochure and a pad with him to the scene of the accident when he interrogates the witnesses. By simply flipping a few pages, a witness may be shown photographs of the scene and of all the instrumentalities involved for the purpose of refreshing his memory or familiarizing him with them.

In the trial of the case the attorney has only to reach under the cellophane cover of a page and produce a photograph or other document that he desires to introduce in evidence. Likewise, on the appeal of the case, the attorney can readily locate and direct the court's attention to an exhibit.

In conclusion, the brochure is indispensable to a proper prepara-

tion of the case for negotiations for a settlement, and if the negotiations fail, it is invaluable as a preparation for the trial.[3]

II. FACTORS THAT AFFECT THE VALUE OF A CASE

A. *In General*

No two cases are alike in all respects, and justice is not always done. The exact result of a particular personal injury case is never certain, except possibly where an ill-advised law suit has been instituted in which the plaintiff is destined to lose as a matter of law. But even then the growth and development of the common law makes the exact status of the law uncertain on a particular point at a given time. As was said by Chief Justice Parker of the United States Court of Appeals for the Fourth Circuit:

"It must be remembered, in this connection, that the common law is not a static but a dynamic and growing thing. Its rules arise from the application of reason to the changing conditions of society. It inheres in the life of society, not in the decisions interpreting that life; and, while decisions are looked to as evidence of the rules, they are not to be construed as limitations upon the growth of the law but as landmarks evidencing its development."[4]

In *Ross v. Hartman*,[5] an automobile accident case decided in 1943, the court overruled a case decided in 1916 upon the ground that it could not "reconcile that decision with facts which have become clearer and principles which have become better established than they were in 1916. . . ."

So in judging the value of a case involving any unique or unusual factors, which ordinarily would indicate no liability, the common law should be traced to its latest development.

There are many other intangibles which make the exact result of a particular case impossible to predict, such as the frailties of human

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[3]The method of preparing for trial herein discussed, including the use of the brochure, is referred to in Virginia Linen Service v. Allen 96 S. E. (2d) 86, decided by the Virginia Supreme Court of Appeals on Jan. 21, 1957.

[4]Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 128 F. (2d) 645, 648 (C. C. A. 4th, 1942).

[5]139 F. (2d) 14 (C. A. D. C., 1943). See also Schaff v. Claxton, 144 F. (2d) 533 (C. A. D. C., 1944) and Claxton v. Schaff, 169 F. (2d) 303 (C. A. D. C., 1948). On the subject of the flexibility and capacity for growth and adaptation of the common law, see also Funk v. United States, 290 U. S. 371, 54 S. Ct. 212, 78 L. ed. 369 (1933); Boland v. Love, 222 F. (2d) 27 (C. A. D. C., 1955); Russick v. Hicks, 85 F. Supp. 281 at 285-6 (W. D. Mich. 1949); Ney v. Yellow Cab Co., 2 Ill. (2d) 74, 117 N. E. (2d) 74 (1954).

nature, the appearance and fallibility of witnesses, the respective parties, their counsel, the jury and even the judge. These, combined with the unexplainable "breaks"[6] which develop during the preparation and trial of a case, render the trial of any law suit somewhat speculative.

Since the end result of the trial of any personal injury action is influenced to some extent by various factors known to have influenced decisions or verdicts in the past, it follows that an analysis of these factors should be of use to the trial lawyer. It also follows that, if one or more of these factors appears to be a constant or to have the same effect in most cases, such information would be of extreme value in handling future cases. Unfortunately, this does not appear to be the case. Therefore, the successful plaintiff's attorney and the insurance companies are forced to deal in probabilities. As the advocate Cicero said over two thousand years ago: "Probabilities direct the conduct of the wise man." Let us turn to the factors which are generally known to affect most personal injury cases.

B. *As to Liability, Is There a Jury Issue?*

Plaintiff's Chances of Convincing the Jury

Obviously, the first thing to consider in the evaluation of any personal injury claim is whether the plaintiff's case has sufficient merit to justify legal action—that is, whether the facts are sufficient to support a recovery under any theory of the law. Thus, in attempting to place a proper value on plaintiff's case, his lawyer must first decide whether he can get to the jury, and then decide whether he has a clear case of liability, a probable one, or a poor one for the average jury.

Utilizing his experience as a trial attorney and the results obtained in cases of a similar nature tried in the same area, the plaintiff's lawyer will find it helpful to consider what percentage of like cases, if tried in that area, would result in jury verdicts for the plaintiff. If the result of this calculation should be fifty per cent, for instance, then it behooves him so to notify his client and to keep this fact in mind during negotiations. Possibly he has a client that can afford to gamble, and then again his client may be destitute and cannot afford to take a fifty-fifty chance.

Another aspect to the liability factor which may affect the value of the case is the effect of doubtful liability upon the size of the

[6]"Breaks" come only to those who are thoroughly prepared to take advantage of them.

verdict. Where the evidence of liability is barely sufficient to take the case to the jury, a compromise verdict in a small amount only may be returned. On the other hand, where liability is clear, particularly if the defendant's negligence is of a reckless nature, the jury may resent the fact that plaintiff has been forced to the trouble and expense of proving liability, and may express its resentment in the form of a larger verdict.

C. *Defendant's Policy Limits and Financial Position*

The first factor to be considered under this heading is the *apparent ability of the defendant to respond in damages.* Where the defendant is a wealthy person, large company or corporation, juries have a tendency to return somewhat larger verdicts than they might return against an individual of limited means. Perhaps this is because they feel that an apparently well-to-do defendant is better able to pay *all* the damage done, and has higher insurance limits for this purpose, than the individual who works for a modest salary.

The second factor relating to the financial responsibility of the defendant concerns his *liability policy limits* and all other liability coverage available. Where there is serious injury, or where several claims result from the same collision, the limits of the policy may become important. This is true whether the defendant is actually able to respond in damages for an amount in excess of the policy limits or not. In a case in which the plaintiff's injuries are of such nature that, under the circumstances, he will probably be entitled to a verdict in excess of the amount of the policy limits, there is a direct conflict between the interests of the insurance company and those of the defendant. An attorney representing the personal interests of such a defendant may even find it to the defendant's advantage to settle for an amount in excess of the policy limits. Any insurance company, under such circumstances, has an obligation to notify the insured that since the suit is for an amount in excess of the limits he should retain counsel to represent him personally. Usually this is done by a letter stating that the defendant *may* employ his own attorney at his own expense for the purpose of cooperating with the company and to protect the defendant's own interest.

When it appears that a jury verdict will probably exceed the policy limits and the defendant is financially irresponsible, it is prudent for plaintiff's attorney to *lay the foundation for a recovery against the insurer in excess of the policy limits* if the company refuses to settle.

This may be done either before or after suit is instituted. When the defendant is represented by a personal attorney, plaintiff's lawyer should at the earliest opportunity notify both defendant's attorney and the insurance company of the amount required to settle the case. The offer should be in writing and within the policy limits. If defendant's personal attorney is convinced of the merits of plaintiff's demand, he will notify the company in writing that if the company declines to settle and a verdict is rendered in excess of the policy limits, the defendant will demand indemnity of the company for the excess. In this letter he should also set forth his reasons, based upon the law and the facts, for taking this position. Such a course usually brings about a settlement.

In the event that the defendant does not employ an attorney to represent him personally, a written offer of settlement should be sent to the attorney for the insurance company. Copies should be enclosed which can be forwarded to the defendant by the company. The letter should be written in such a manner that a prudent defense attorney will be induced to see that the defendant receives a copy, and to convince the defendant that he needs personal counsel if he does receive a copy. Many defense attorneys welcome such a procedure for obvious reasons. There is certainly no reason why insurance companies should not pay the maximum amount of the policy limits in many cases. Where the facts warrant such action, it is the duty of plaintiff's attorney to see that they do. Laying the foundation for a recovery in excess of the limits is generally the only way of achieving this result.

D. *Nature and Extent of Injuries—What They Mean to the Plaintiff Physically, Emotionally and Financially*

Where there is liability and financial responsibility, the defendant must be asked to respond in damages in an amount sufficient to compensate the plaintiff adequately for his injuries. In addition, punitive damages may be recovered if the acts of negligence are willful, or wanton and reckless,[7] although the insurer may escape liability if *willfulness* is proved.

Compensatory damages embrace bodily injuries, mental and physical pain and suffering, doctors', nurses' and hospital bills, and reasonable value of time already lost, or which will be lost in the future in the event the injuries are permanent. In the latter event, the jury may

[7]Sebastian v. Wood, 246 Iowa 94, 66 N. W. (2d) 841 (1954).

take into consideration the age and physical condition of the plaintiff and the probable duration of his life at the time of the injury.[8]

In Virginia, if the plaintiff is a married woman and is seriously injured, she may recover in her suit such damages as her husband might have recovered against the tortfeasor as damages for loss of her consortium.[9]

Sometimes the insurance carrier seeks to reduce the damages because of a pre-existing diseased condition of the plaintiff. But it should be remembered that one who negligently inflicts a personal injury on another is responsible for all of the ill effects which, considering the condition of health of the plaintiff when he sustained the injury, naturally and necessarily follow such injury. A defendant's liability is in no way affected by reason of the fact that the injuries would not have resulted had the plaintiff been in good health, or that they were aggravated and rendered more difficult to cure by reason of the fact that he was not in good health.[10]

So also where one has sustained a personal injury as a result of negligence of another, and exercises due care in the selection of a physician or surgeon to treat the injuries, only to have the injuries aggravated by negligent treatment; the person causing the original injury is liable for all the damages.[11] In death cases, while the plaintiff cannot recover for the physical pain and mental anguish of the *decedent,* the mental anguish of the *beneficiaries* may be increased by the mental and physical suffering of the decedent, and the beneficiaries may be able to recover for *their* mental anguish.[12]

E. *Personality of the Parties*

One of the more important factors to be considered in evaluating a particular case is the probable effect that each party's attitude, appearance, conduct and testimony will have on the court and jury. Although

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[8]Appalachian Power Co. v. Wilson, 142 Va. 468 at 490, 129 S. E. 277 at 284 (1925) (Instruction No. 6); Messick v. Basham, 194 Va. 382, 73 S. E. (2d) 530 (1952) (Record); Atlantic Rural Exposition v. Fagan, 195 Va. 13, 77 S. S. (2d) 368 (1953) (Record).

[9]See Floyd v. Miller, 190 Va. 303, 309, 57 S. E. (2d) 114, 116 (1950). See also Ford Motor Co. v. Mahone, 205 F. (2d) 267 (C. A. 4th, 1953).

[10]Virginia Ry. & Power Co. v. Hubbard, 120 Va. 664, 91 S. E. 618 (1917). For example, where an injury superimposed upon a dormant arthritic condition activates the condition, causing pain and limitation of motion for the first time, plaintiff can recover for the disability thus incurred. Virginian Ry. v. Hillsman, 162 Va. 359, 173 S. E. 503 (1934).

[11]See Fauver v. Bell, 192 Va. 518, 522, 65 S. E. (2d) 575, 578 (1951).

[12]See Virginia Iron, Coal & Coke Co. v. Odle, 128 Va. 280, 309-310, 105 S. E. 107, 116 (1920).

a plaintiff may know and be prepared to testify truthfully to all the material facts in a case, the effect of his testimony on a jury will be influenced by such things as his character, personality, candor, station in life, intelligence and ability to testify convincingly. Often an unlettered person, who has good old "horse sense" and the ability to think straight, is much more effective than an intellectual person who is either ill-at-ease on the stand or is trying to outwit counsel.

Aside from the probable impression that will be created by the testimony of the parties in court, their appearance and conduct and background has its influence on the verdict. At the trial of a certain case, the defendant appeared in flashy clothes. The testimony showed that his wife was in Florida at the time, but frequently he left the bar, sat by an attractive blonde and engaged her in conversation. The jurors gave him an inquisitive look each time. The verdict was for the plaintiff for a substantial sum. No doubt the defendant's conduct had its influence on the jury. As a matter of fact, it was later learned that the young woman was the sister of the defendant!

The race, creed, color, sex and social position of the parties may, and often do, affect the value of a case. These are touchy subjects, but have to be considered in the practical approach to a proper evaluation of the case.

F. *Circumstances Surrounding the Occurrence*

The location and kind of collision and the circumstances of the parties may affect the value of a case. A driver on his way home on a Sunday morning from an all night poker game, who strikes an infant pedestrian as she is crossing the street in front of her church on her way to Sunday school, may have a hard time before a jury. A married person injured while out riding at night with the spouse of another may have some explanations to make. A plaintiff usually fares better if he was in a generally accepted mode of conveyance alone or with acceptable company and on a proper mission; or if he was in a position that is usually considered to be safe, such as standing in a safety zone, crossing a street in a cross walk, sitting in a parked automobile or in an immobile vehicle waiting for a red light to change. Conversely, where plaintiff was on a motorcycle or was jay-walking, the case is generally worth less, other things being equal.

The actions of the defendant immediately before and after the collision may greatly affect the value of a given case. In a hit-and-run case, or where the defendant acts, says, or does things before or after a collision which indicate a disregard for the rights and feelings of others,

such evidence may often be introduced as a part of the *res gestae* and should substantially increase the value of plaintiff's case.

G. *Appearance and Probable Effectiveness of Witnesses Who Are Not Parties*

The average juror can readily estimate the losses resulting from the violation of property rights, but such intangibles as pain, suffering, mental anguish, loss of consortium, disfiguration and the like are difficult to evaluate. The importance of the human being as a great national resource, or the consideration of a working man's body and mind as his greatest and often his sole economic assets, are matters difficult to get across to the jury. This must be done through the testimony of witnesses.

Since everyone in the court room who can be identified with the plaintiff will be scrutinized to some extent by the court and jury, it follows that the attitude, appearance and general demeanor of plaintiff's *witnesses* are important. The testimony of an impartial witness generally carries more weight than that of a witness who has an interest in the case, or who is a relative or friend of the parties. Witnesses should be encouraged to relate the facts known to them in a fair, honest, straightforward and coherent manner.

The plaintiff must depend on doctors to prove the extent of the injuries and the probable duration of their disabling effects. Where the plaintiff has been examined by doctors selected by the insurance company, their reports may differ in one or more material respects from the reports of the doctors treating the plaintiff. In such a case plaintiff's attorney must give serious consideration to the ability of the various doctors to express themselves in court and to interpret their opinions to the jury in language that can be readily understood by laymen.

Insurance companies can be expected to select capable doctors who are in the habit of making such examinations and rendering reports, and who are experienced in testifying effectively. Some doctors seem to feel more at home in court than do the attorneys who examine or cross-examine them. Often their reputation and ability are well known to one or more members of the jury.

On the other hand, plaintiff may have been treated by a competent specialist who prefers not to testify in court, or he may have been a ward patient in a hospital, treated by a resident[13] whose prior train-

[13]A resident is a doctor who treats hospital patients under the direction and supervision of an attending physician who is a specialist.

ing may not have been sufficient to qualify him as a specialist in his own right or to prepare him to render adequate reports to an attorney. In addition, his ability to testify as an expert witness is generally untried, and it is always possible that he will not be available when the case is tried. Then again, the plaintiff may have been originally seen and treated by a general practitioner for serious and permanent injuries instead of by a specialist.

In each instance, plaintiff's attorney, in order to present the medical fully, might do well to make appointments for his client with well qualified specialists, whose reputation for fairness and impartiality to all parties is above reproach. In selecting the specialist, the plaintiff's attorney must also consider the capability of the doctor, his willingness to testify and his facility in expressing himself in language readily understood by laymen.[14]

H. *The Court, Jury and Place of Trial*

The court and the geographic location where the case is to be tried affect the value of a personal injury claim. Whenever a choice of courts and locations is available, the plaintiff's attorney should carefully analyze the probable effect that each will have upon the value of the case. Usually there are certain advantages and disadvantages attached to each choice. One court may offer a better chance of obtaining a reasonable verdict, but may have an overcrowded docket. The other may offer the advantage of an early trial but with the prospects of obtaining a lower verdict.

In general, the *history of jury verdicts* in an area for the type of case to be tried should be considered and will influence the choice of forum. One of the chief bases used in attempting to evaluate the worth of a particular claim is to estimate what the minimum and maximum limits of a jury verdict will probably be if the case is tried. Naturally the size of previous verdicts returned in similar cases in that area affect such an estimate.

As a general rule, verdicts returned in large cities and urban communities tend to be higher than those returned upon similar facts in small rural townships or in sparsely populated areas. In some areas verdicts in federal district courts tend to exceed those in state courts in the same area.

Another important factor to be considered in selecting the forum

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[14]Acknowledgement is made of the able assistance of Dr. William M. Deyerle, Assistant Professor of Orthopedic Surgery, Medical College of Virginia, Richmond, Va.

is the rulings of the judge in the past on particular points and motions, and his record for directing or setting aside verdicts. Rules of procedure may facilitate the presentment of plaintiff's case in one court, while the rules of another will make it more difficult for him to carry the burden of proof. In many jurisdictions, the issues are clearly defined and irrelevant matters eliminated at pre-trial conferences. This procedure often starts negotiations which result in a fair settlement. Pre-trial conferences in federal courts are more likely to lead to settlement than such conferences in state courts.

The economic and social background of each juror and the record of verdicts rendered by juries on which they sat in similar cases are helpful. It is well to keep a list of jurors who rendered verdicts for plaintiffs and a list of those who rendered verdicts for defendants.

Regardless of the merits of the jury system, a juror's verdict *will* be affected to some unknown extent by his environment, background and personality. The completely unbaised, wholly disinterested and unemotional man or woman has yet to sit on a jury. It is most helpful for plaintiff's attorney to know in advance whether or not any member of the jury panel is likely to be biased or prejudiced against either party due to his appearance, occupation, station in life, race, creed, or color, or by any untoward but irrelevant circumstances surrounding the accident.

In large cities the problem of acquiring adequate information about each juror is a difficult one. In the federal district courts there is always a real need for reliable information about jurors on the panel, due to the method provided for their selection. No capable lawyer would consider asking any questions on *voir dire* that may be offensive unless he knows the answers in advance. In trying to elicit information to show bias, care must be exercised to avoid affronting any member of the panel. The general type of question propounded by the judge certainly will not provide much of the information that the trial attorney should have to select the jury intelligently.

Where the importance of a case warrants the expense of acquiring such information in advance of trial, a qualified investigator should be employed who has had experience in this particular field, and who has a reputation for operating well within proper limits. In some of the larger cities private agencies regularly furnish this information to counsel for a fee. As a rule, lawyers going into a strange town or community to try a case will associate local counsel for the purpose of "picking the jury."

I. Plaintiff's Financial Position

No one realizes the importance of an automobile victim's financial condition any more than does a claims adjuster when he is out making an "on the spot" settlement. The law presumes that the parties know their rights and are fully capable of bargaining with an adequate understanding of the risks involved. Where an infant is the injured party, his father is usually considered to be capable of representing the child although he is not a lawyer and may be illiterate. The head of the family is usually faced with a physical as well as a financial crisis when any member of the family is seriously injured. In order to meet the immediate needs of the family, the demands of his creditors, or the needs of his business, he may consider a small, inadequate settlement to be a much more practical solution to the problem than the prospects of receiving a larger sum through prolonged negotiations or litigation.

If the injured party can resist the temptation to settle at a time when he probably dosen't know all of the facts, what his rights are, or how to protect them, or even the full nature and extent of his injuries, his financial position may later still have a direct bearing upon the settlement value of his suit. If subjected to the delays of litigation, he may be faced with the proposition of having to wait several years where court dockets are crowded, and then have to wait even longer if an appeal is taken. During this time the expenses of litigation also begin to accumulate. As already suggested, plaintiff may not be in a position to gamble on the liability feature of the case although the odds might appear to be heavily in his favor. His economic condition will be known to the insurance company, and will be considered by attorneys for both sides in evaluating the case for settlement. It constitutes one of the best reasons for a thorough and timely investigation and preparation of the case. Where the plaintiff has the benefit of medical pay coverage, this situation is relieved to some extent.

J. *Defendant's Evaluation of Plaintiff's Attorney*

The settlement value of a plaintiff's case is materially affected by the insurance company's appraisal of plaintiff's attorney's reputation for diligence and skill in preparing and trying cases and obtaining favorable verdicts. If the plaintiff's attorney is an experienced trial lawyer, and has the reputation of preparing his cases properly and trying them well, and particularly if he has the reputation of being ready and willing to try *every* case if necessary, the value of the plaintiff's claim is increased. On the other hand, if the plaintiff is repre-

sented by a lawyer who is inexperienced in trial work or, if experienced, who doesn't like to try cases and is inclined to avoid a trial wherever reasonably possible, the value of the plaintiff's claim is accordingly reduced.

It follows, therefore, that it is the duty of plaintiff's attorney sincerely to analyze his own qualifications to obtain the best results for his client, and if he feels that due to lack of experience or for any other reason, he cannot compete successfully with able and experienced insurance counsel representing the defendant, either in negotiations or upon the trial, he should then not hesitate to associate with him experienced trial counsel. Such an association has often proven to be in the interest of both the lawyer and his client.

Even in cases where the plaintiff's attorney is thoroughly experienced and highly skilled, it may be advisable in a particular case to associate local counsel where the case is to be tried in another jurisdiction and in the midst of local prejudices.

K. *Ability of Defendant's Attorney*

Capable defense attorneys are able to specialize to an extent that they become familiar with medical terms and with the causes and effects of traumatic injuries, their treatment and cure, and the comparative ability of local physicians to testify effectively in court. In addition, they can turn to experts in almost any field for technical advice, investigative work, or for the purpose of conducting experiments. Naturally, these defense attorneys are adept in the art of case evaluation, in knowing when and how to negotiate settlements, and are skilled in trial and appellate practice.

For the trial of any potentially "dangerous" case, the company will always employ a specialist, although local counsel may also be employed for their local influence. In larger cities one particular firm will usually represent the insurer in trial work, with the more experienced members handling the so-called "dangerous" cases.

A knowledge of the defense attorney's authority to recommend a settlement figure, how he has conducted settlement negotiations in the past, and the tactics that he uses in preparing and trying cases is important, since it affects the value of the case. While there are exceptions, defense attorneys generally constitute a very ethical group. Most of them honestly attempt to evaluate each case and to negotiate fairly, but they, too, may have problems that vary with each case.

In attempting to find the point of lowest cost disposition, some defense attorneys may follow the policy of *"walking the plaintiff to the court house steps."* Many of their clients insist that they follow this

procedure. This is most effective if plaintiff does not want to gamble, or if plaintiff's attorney is not fully prepared to try the case or does not like trial work. In either event, if plaintiff's attorney hasn't prepared the case to the hilt by the date of the trial, he has lost his bargaining position and the value of the case drops. Last minute settlements also have the disadvantage of requiring both parties to incur the full cost of preparation. To the plaintiff's attorney, on a contingent fee basis, this means that he receives less in proportion to the amount of time and effort expended. To the client, it means that the ultimate amount received is reduced by increased expenses.

While the insurer and its attorney are predicting that in all probability plaintiff's minimum demand will drop at the last minute and thereby justify the insurer's increased legal expenses, they realize that in a number of instances just the reverse will occur. Plaintiff may decide that having proceeded that far, he might as well go all the way for the most that a jury might award. In addition, that particular case might be just the type of case plaintiff's attorney wants to try, not only for the benefit of the client, but also for the effect on the particular insurer and its counsel and for the effect on the value of other cases in the office. At this point, the experience, ability and courage of the plaintiff's attorney are invaluable.

L. *Other Factors Affecting Settlement Value*

There are other factors which may affect the settlement value of a given case, such as: (1) the effect of financial responsibility laws; (2) the presence of two or more defendants, all insured; (3) the presence of several defendants, some insured and some not. Where all of the defendants are insured, the existence of statutes or rules permitting the plaintiff to call each of the defendants as an adverse party and examine him, according to the rules applicable to the cross-examination of a hostile witness, always increases the value of the case. Experienced trial counsel will then call each defendant and in the course of a proper examination each defendant will undertake to place responsibility on the other defendants. Insurance companies are afraid of this procedure. To avoid it they try to combine on some defense that is common to all. The plaintiff's lawyer should be prepared to prevent this maneuver.

Where some of the defendants are insured and some are not, the plaintiff may choose to sue only the insured defendants, but if he does so, he may be sure that those defendants will bring in the uninsured defendant wherever third party practice permits, and will undertake to place the entire responsibility upon that defendant. Generally speak-

ing, it is part of wisdom for the plaintiff not to join the uninsured driver if plaintiff thinks he will be brought in by another defendant. His failure to sue him and the fact that another defendant brings him into the case may lead the jury to believe that he is uninsured and irresponsible and therefore may influence the jury in returning a verdict against the insured defendants alone, or against them and the uninsured defendant jointly and severally.

III. SETTLEMENT NEGOTIATIONS

A. *The Settlement Approach*

1. *In General*

The settlement of a claim for personal injuries or death is a serious business and should be conducted in a courteous, professional manner. Since the object of all settlement negotiations is to achieve substantial justice by agreement, a joint realistic effort in good faith is required of the parties and their representatives if a fair, just and adequate settlement is to be accomplished.

Attorneys are human, and during their efforts at preparation and evaluation they often develop a "feeling" for the case that produces a certain degree of anxiety or tension concerning its outcome. Within limits this is desirable, and may serve to stimulate plaintiff's advocate to exercise even greater diligence in preparatory work. It may also serve him well in forcefully presenting the case to the jury.

It is well to remember, however, that man does not think or reason constructively when overly anxious or emotional. Regardless of the seriousness of the injury or the culpability of the defendant, the insurance company controls the money that plaintiff seeks. If plaintiff's attorney loses his sense of propriety, acts in a demanding or discourteous manner, or otherwise attempts to negotiate in a manner unbefitting the dignity of his profession, he will discredit himself in the eyes of those with whom he must deal in the future and injure his client's case.

While insurance attorneys and adjusters are not bluffed or frightened easily, they respond to an honest, forthright and courteous approach to a settlement.

2. *The Settlement Sheet*

As soon as a case can be prepared to the extent that its value can be judged reasonably, a settlement sheet should be prepared and placed

in the file. This sheet should contain: (1) the estimated value of the case; (2) date of evaluation; (3) factors upon which it is based; (4) name of the member of the firm making the evaluation; and (5) the suggested asking figure.

The advantages of having a "price tag" that can be justified are numerous. Time is required to go through a file and properly evaluate a case. Every settlement sheet should include an up-to-date itemized list of expenses. This will prevent the attorney from overlooking an item if called upon to negotiate on short notice. Such a course insures the accumulation of the necessary information to negotiate intelligently and also prompts the attorney to use sufficient time and thought to evaluate the case properly. Where other counsel are associated, or their opinion sought, the advantages are obvious. In a firm it provides an excellent opportunity for one member to benefit by the uninfluenced opinion of another, and, if necessary, allows a firm member to pick up a file and quickly prepare himself to negotiate.

3. *Time and Methods of Approaching Settlement*

The best time to begin discussing the probability of a settlement is as soon as a value has been placed upon the case. How can plaintiff's attorney initiate negotiations? Some attorneys seem to feel that it is a sign of weakness to be the first to suggest negotiations. We do not share this view. No case should be tried without "exploring" the possibilities of an amicable settlement out of court. The opportunity may arise (1) at the docket calling (2) at the pre-trial conference, (3) when plaintiff is asked to submit to a physical examination, or (4) on any appropriate occasion, even on the golf course if the subject is approached casually only and in a proper manner.[15] Almost any suggestion that will start a discussion will suffice. The important thing is that the discussion gets started and finally gets into a serious stage.

B. *The Settlement Conference*

1. *Full Against Partial Disclosure*

After the representatives of the parties have agreed to discuss seriously the probability of a negotiated settlement, each must decide whether he is going to disclose his entire case fully or a part of it only. Under the doctrine of *Hickman v. Taylor*,[16] a lawyer may not be com-

[15]Upon playing the 19th hole, when the attorney is talking about the poor shots he made, one might say, "I know why you played such a poor game; you are worrying about that case you have got to try next week."

[16]329 U. S. 495, 67 S. Ct. 385, 91 L. ed. 451 (1947).

pelled to disclose certain information which may be deemed "the work product of the lawyer." However, notwithstanding such rulings, a full disclosure is advisable in most cases. Such a disclosure, of course, is made in the brochure and should clearly show the insurance company exactly what it is paying for. When the company pays out a substantial sum, it must justify this payment, and the disclosure of plaintiff's entire case enables it to do so. If plaintiff's attorney has good reason to believe that the insurance company is not entering into negotiations in good faith, but simply for the purpose of getting information to be used in the defense of the case, the disclosure should be confined to what is compellable under the rules.

2. *Settlement Technique*

Just as it would be convenient to have a definite formula which could be used in evaluating all personal injury cases, so it would be most useful if there were a fool-proof technique or procedure for plaintiff's attorney to follow at the conference table. But there is no such procedure. The method followed in a particular case is prompted by the peculiarities of that case. The philosophy of the negotiations may be embraced in the following general rules: (a) Plaintiff's attorney must realize that all insurance companies have a real incentive to settle meritorious cases, and must, of necessity, settle the vast majority of them. (b) In addition to having a thorough knowledge of his own case, including the problems presented, plaintiff's attorney should understand the strategy or technique generally employed by the opposition, including the problems confronting the adjuster, the extent of his authority, the reserve set up and policy limitations. (c) The insurance adjuster or the company's attorney must be supplied with sufficient data to justify the company in paying the minimum demands of the plaintiff. (d) All conferences should be conducted in absolute good faith and upon a high level, generally with full disclosures on the part of plaintiff's attorney. Any agreement reached should be reduced to writing. A letter of confirmation embodying the terms agreed upon will suffice. (e) The client should be kept informed of the status of the negotiations. All offers and counter offers should be transmitted to him promptly along with the advice of the attorney on the subject. When an agreement is reached, a copy of the letter of confirmation should be sent to him. (f) Plaintiff's maximum figure should not be exorbitant; his minimum figure should be realistic—that is, a figure which under all the circumstances the defendant cannot afford to decline. (g) Any offer of settlement on the

part of the plaintiff should carry a reasonable time limit for acceptance to protect the plaintiff against any unexpected occurrences which might increase the value of his case. (h) If the insurance carrier fails to make a counter offer, plaintiff's attorney should review the case again thoroughly and submit a final offer.

CONCLUSION

The evaluation and settlement of a claim for damages for personal injuries for what it is reasonably worth requires thorough preparation on both the law and the facts, with emphasis on the medical and surgical phases of the case. Tact, patience, courtesy, time and a knowledge of human nature are required. Various and sundry approaches are to be tried. In general, a full disclosure must be made. And last, but by no means least, the negotiations must be conducted in good faith, in a conciliatory attitude and in an atmosphere of dignity, but with a courageous disposition to try the case, if necessary, and to try it well. In the language of Professor Lambert,[17] if a lawyer decides "to enter the field of personal injury practice with both its heartbeats of humanity and all its abrasions and anointments of the spirit, and pursue it with energy and dedication, hewing to the enlightened line, both sides of the counsel table can promise him a full life and one 'rich beyond the dreams of avarice.' "

[17]Professor Thomas F. Lambert, Jr., 23 Harv. Law Rec. No. 11, Dec. 6, 1956.