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## PERSONAL INJURY LITIGATION: SETTLEMENT OR TRIAL, FROM THE DEFENSE POINT OF VIEW

J. A. GOOCH\*

It has been said, and with considerable truthfulness, that any personal injury case has some value. The value may be of the nuisance caliber or it may have a value of many, many dollars. The ordinary tort case will be discussed here from the defense attorney's point of view, which, contrary to public opinion and that of most plaintiffs' lawyers, is not to try to beat the claimant down to the last penny, but to arrive at an equitable and fair settlement. A fair settlement has been defined as an amount in contemplation of which neither the plaintiff nor the defendant can afford to take a chance on submitting the case to the trier of facts.

In most personal injury cases there are generally some talking points as to liability, and, of course, as to just compensation for injuries incurred. Most accidents which result in claims are between two or more vehicles on the streets and highways of the country, in which at least two drivers are involved. In most instances each driver seeks to lay the blame for the accident on the other. The typical defense attorney rarely hears of a specific case until after suit has been filed, at which time the claim file built by the local adjuster for either the insurance carrier or the self-insured corporation is delivered to his office with the citation and petition. The defense attorney reads and digests the file as presented to him in much the same manner as the office practitioner examines an abstract of title to real estate or a complicated contract. He begins with the report of the accident, statement of the defendant or of the active participant he is called upon to defend, the statements of such witnesses as have been located and have given statements, the medical reports if same have been obtained, statements as to special damages—such as medical bills, loss of earnings, and property damage estimates—law enforcement reports, diagrams, pictures, and the time, place and circumstances of the accident, including the condition of the weather, traffic controls, if any, the age and occupation of the parties, the health of the parties prior to the accident, the allegations of negligence, the situs of litigation, the disposition of the court in which the case is pending, the probable time of the year in which the case is likely to be placed on the trial calendar, possible witnesses overlooked, and negative statements from witnesses who could

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possibly have been near the scene of the accident, and, last but not least, the ability of the plaintiff's attorney.

All of the elements above set forth have a direct bearing on the handling of the case. Is the case at first blush one for settlement negotiations or one for trial? Mind you, that decision is not made at the time of the original examination of the file.

As the file is being examined, the defense attorney makes a note of the elements of the case to be considered, and if the above elements or any of them are missing, he immediately requests the claim man or adjuster to supplement the file with the missing data or give his reasons for his inability to furnish it.

We will assume, however, that the file when complete contains information on all of the above-described elements, so that the defense attorney is now ready to check the points and to test them with the view in mind of determining whether the case is one for trial or one for settlement. The first step, after the file is as complete as it can be made, is to interview the defendant or the defendant's agent in the case, both in the office in a relatively calm atmosphere and also at the scene of the accident, in order that natural objects can be recalled, distances tabulated and marked, and generally the topography of the situs clearly recalled. It is also advisable to interview as many witnesses as possible, preferably at the scene of the accident if the scene of the accident is important in an evaluation of the case. The interview of the witnesses is very important in order that the defense attorney may determine the value of each witness. He must determine the following with respect to each witness:

1. Is the witness entirely truthful?
2. Is he sincere or sensational?
3. Can he be confused as to what he knows or thinks he knows?
4. Does his appearance convince of sincerity and will his demeanor in the court room probably react favorably on the trier of facts?
5. Is he prone to exaggerate or under-state his testimony?
6. Is he excitable or calm under fire?
7. Can he stand the test of cross-examination?
8. Can he, within normal bounds, estimate accurately speeds, distances and time?
9. What is his interest, if any, in the controversy?

After the examination of the witnesses, the defense attorney pretty well knows what chance he has at a defense. The important question then becomes what matters he will be called upon to rebut. What is the next step?

A partial answer, of course, may be obtained from discovery depositions. There is no point in ignoring what you will be called upon to

rebut when you can be reasonably sure by taking depositions. It is necessary, however, to know all you can about the case prior to the taking of discovery depositions of the adverse party. Ordinarily, when defendant's attorney gives notice to take the deposition of the plaintiff, plaintiff's counsel will suggest that he be allowed to take the defendant's deposition. Usually after the taking of the depositions, with the testimony of the prime parties fresh in the minds of all, an opportunity is afforded, and usually accepted, to discuss settlement. Thus, a by-product of taking depositions is a discussion of settlement. The mere suggestion of settlement or negotiations toward settlement is not evidence of weakness on the part of the suggestor, and often leads to a frank discussion of the value of the case.

The defense attorney will usually make inquiry of the plaintiff's attorney as to the valuation he places on his case. Plaintiff's counsel is ordinarily reluctant to name a figure, but will usually do so and will also ordinarily name a much higher figure than he ultimately hopes to get, under the theory that he can always come down but can never go up. If, however, plaintiff's attorney is interested in settlement, he will not name such an outlandish figure as to close settlement discussions before they begin.

It is well known to all attorneys, plaintiff and defense, that plaintiffs' attorneys must settle a majority of their cases, as, from a time standpoint alone, they cannot afford too many trials. The plaintiffs' attorney must pick and choose the cases he wants to litigate, but he must of necessity settle far more than he actually tries. The plaintiffs' attorney does not work by the day nor by the hour, as most defense attorneys do, nor does he work on retainers. Rather, in most instances he has to receive his fee based on the results of his settlement or trial, and he receives no fee in the ordinary case unless he is successful either at settlement or in trial. Also of vital importance to plaintiff's attorney is his knowledge that he takes a calculated risk when he tries a case before a jury, inasmuch as he may possibly lose the case, and if so, not only has he done his work for nothing, but he has not helped himself in the trade, so-to-speak, by having an adverse result against him at the court house. He must also take into account the vicissitudes of trial, the age-old sanctuary of defense attorneys—to-wit, reversible error—time consumed on appeal, and the necessary appellate work to be done in the event of an appeal to a higher court. Truly, the plaintiff's attorney must have for his adage, "Quick settlements make fast friends."

What is discussed in a settlement conference and what is considered without discussion? Usually the dollars and cents value of the injury is the primary topic for discussion. What is plaintiff's out-of-pocket ex-

pense? What are his obligations to doctors, hospitals, and nurses, and his expenditures for medicine? What is his loss of earnings up to the time of the discussion and his probable time table with respect to returning to his employment? Permanent and temporary disabilities are, of course, usually discussed on the basis of known medical testimony. Unfortunately, medical reports of doctors vary almost as much as the thinking of attorneys on case values. Usually, however, competent medical testimony can be obtained and made available to both defendant's and plaintiff's attorneys alike through the method of submitting the injured person to a neutral physician for a complete physical examination. Most able plaintiffs' counsel will agree to a physical examination by a doctor mutually acceptable to both plaintiff and defendant, and, in this event, there is usually a satisfactory medical report by which both sides can more or less be guided. It is usually true that when plaintiff's attorney refuses to allow his client to be examined by a competent physician of the mutual selection of the parties, the defense attorney becomes suspicious of the plaintiff's medical and is not apt to place too much credence in plaintiff's doctor's reports. It is usually true that when plaintiff's counsel refuses such a request for a physical examination, the plaintiff's claims of injury are greatly exaggerated.

A difficult decision, from the defense standpoint, is presented when plaintiff's counsel submits to defendant's counsel his medical report and eagerly suggests that if defense counsel does not wish to take his medical report as being indicative of plaintiff's complaints, defense counsel should have plaintiff examined by a physician of his choice. If defense counsel accepts the tender and has plaintiff examined by a physician of his own choice, whose findings coincide with the findings of the plaintiff's doctor, defense counsel has furnished to plaintiff an additional excellent witness, and it is well known that a witness for one adverse party who corroborates the other side is much more valuable than a witness placed on the stand by the other party in his own behalf. So, in most cases, the opinions of medical experts are available to counsel for both plaintiff and defendant when serious settlement discussion is had.

Having found out as best he can the medical significance and probable duration of the injury, defense counsel is confronted with a problem, in the event of a conflict in medical testimony, of determining which medical expert will be more favorably received by the judge or the jury. Here again, the defense attorney must take a calculated risk based on the standing, reputation and demeanor of the rival physicians. The words "rival physicians" are used because most physicians

are just as much advocates as are trial lawyers. They are zealous in attempting to sustain their findings and conclusions.

A matter that is rarely discussed in settlement negotiations is the question of liability or negligence on the part of the parties in connection with the accident. In most cases, the parties' respective versions of the accident differ considerably. Both attorneys have knowledge, after the taking of depositions, as to the claims of the parties, and though the matters of negligence and contributory negligence are rarely discussed, they are certainly taken into consideration by the attorneys in their own minds. The plaintiff's attorney weighs his chances of securing from the jury findings holding the defendant guilty of negligence and exonerating his own client from contributory negligence. The defense counsel primarily weighs his chances of having a jury find plaintiff guilty of some act of contributory negligence, with concern, of course, as to freeing his own client from negligence, but well knowing that a finding of the jury of one act of contributory negligence on the part of plaintiff voids, in so far as recovery is concerned, a dozen findings of negligence on the part of defendant. (The writer practices in jurisdictions where contributory negligence on the part of the plaintiff is a complete defense to the cause of action. He has never practiced in jurisdictions where the doctrine of comparative negligence is used. This discussion is based on the practical experiences of the writer. But make no mistake—both plaintiff and defense counsel take into consideration in their own minds comparative negligence in attempting to arrive at a compromise money figure.)

Let us take a case wherein counsel for the parties have been unable to arrive at a settlement figure satisfactory to both sides. Plaintiff's counsel has placed on his case a greater value by far than has defense counsel. Settlement negotiations have broken off, and the case is apparently headed for a jury trial. The defense attorney again evaluates his chances of winning and his chances of securing a verdict for a lower figure than the settlement figure offered by plaintiff's attorney. Having reached this stage of proceedings, the entire case has to be re-evaluated and a number of check points studied and passed upon.

The following list is not all-inclusive by any means, but contains standard points to be checked and evaluated:

1. The amount of money plaintiff actually has been out in the way of special damages.
2. The length of time that plaintiff has been away from gainful employment.

3. The probable duration of plaintiff's injury in so far as pursuing a gainful occupation is concerned.

4. The degree of any permanent or temporary disability.

5. Whether plaintiff will be able to show a fact chargeable against defendant which would inflame the minds of the jury against defendant, such as intoxication or evidence of drinking at the time of the accident, abuse heaped on plaintiff in anger at the time of the accident or later, arrogance, bad reputation, prior accidents, age, his conduct under cross-examination, appearance, and any conflicting answers given in discovery depositions.

6. The personal life of defendant and the personal fortune of defendant. Is he known to be a man of means or is defendant a large corporation?

7. Whether defendant will be able, by sincerity and fairness, to convince the average juror of his version of the case.

8. Whether plaintiff is exaggerating his claim in the opinion of defense counsel and defendant's medical experts.

9. The history of plaintiff as to prior accidents, injuries and claims.

10. The ability of plaintiff's counsel, with specific thought to the following check points:

(a) Is plaintiff's counsel a careful pleader?

(b) Will he throw caution to the winds in so far as proof is concerned, regardless of committing reversible error?

(c) How effective is his forensic talent?

(d) How well does he prepare his cases?

(e) What is his standing in the community in so far as it is known to the average juror?

(f) Is plaintiff's counsel prone to bluff both in his pleadings and in his statements to the jury?

11. The quality of the medical witnesses, with reference to the following check points:

(a) Are the doctors advocates or just plain fact witnesses?

(b) Are the doctors prone to exaggerate or play down the injury and its ultimate consequences?

(c) What is the doctor's standing in the community?

(d) Is the doctor a specialist or a general practitioner?

(e) Can the doctor stand cross-examination?

(f) Is the doctor regarded as a plaintiff's doctor or a defendant's doctor, or is he fair in his appraisal?

(g) Does the doctor study the authorities and keep abreast of the times in so far as medical education is concerned?

(h) Can he take care of himself on hypothetical questions?

12. The season of the year in which the case will likely be called for trial. (This item is rather important in farming communities but not so important in industrial communities.) Will the average juror be able to get an excuse from jury service by reason of crop planting or harvesting emergencies? If so, what will be the caliber of the pick-up jurors who are usually court house sitters? Most of the court house sitters who are called as special veniremen consider themselves quite good lawyers, in that they hear all of the cases that are tried and become quite jury conscious and become advocates themselves on one side or the other. Most of these court house sitters hang around the court house with the sole purpose in mind of hearing the cases that are tried and picking up a few dollars as jurors when legitimate excuses cut the regular jury panel below the required minimum.

13. The county in which the case will be tried, from a jury standpoint. It is quite well known that a given case such as a broken arm, or a death case, for that matter, may have a value in one county quite different from the value it has in another county. This is usually due to the type of jurors or the type of community selected as the forum for the disposition of the case. In farming and ranching communities, the dollar seems to have a much greater value, and therefore the verdict is much less than in counties that are highly industrialized. In the farming and ranching counties, the jurors ordinarily feel that claims are exaggerated and are prone to figure rather closely in rendering a verdict. On the other hand, in industrial communities, where wages are higher and where union men constitute the majority of jurors, the verdict is likely to be much higher. Those men, who work by the hour at high rates, are prone to use the hourly method in computing lost time and to assign inflated values to pain and suffering. In several counties where I have had experience, the subject of jury verdicts has been discussed in union meetings and the members urged by the leaders of the union to give, in connection with injuries, what has been called in some circles, the "more adequate award." I have known of instances where union spokesmen in union meetings have given careful instructions to their members with respect to their duties as jurors and have explained to them the niceties of the meaning and effect of contributory negligence. Of course, where a defendant's lawyer is confronted with a situation of this sort, it is quite proper to take into consideration and evaluate the probable jury that will be called to sit on the case. Ordinarily these facts are available, and, with

a little investigation through the District Clerk's records on personal injury cases, the alert defense attorney can determine, from a perusal of the judgments and jury verdicts, some idea as to what an ordinary jury in such county would do with a given set of facts.

14. The judge before whom the case is to be tried:

- (a) Is the judge a good lawyer who keeps up with the rules of evidence?
- (b) Does he have the courage to rule fairly and quickly on legal points?
- (c) Does he allow the plaintiff's attorney to control the case, under the theory that it is the plaintiff's responsibility to make out his case and therefore of little or no importance to the judge?
- (d) Will the judge carefully prepare his charge to the jury or merely submit any issue regardless of proof?
- (e) Will the judge see to it that proper court room etiquette is observed or will he allow the court room to be used as a show place without decorum and dignity?
- (f) Is the judge jealous and proud of his appellate record?
- (g) Is the judge plaintiff-minded or defendant-minded, by reason of training, education or temperament?

The above items must be considered and weighed. The defense attorney must evaluate all of these points and take a calculated risk of coming up with the right answers to the questions.

If a majority of the check points are in favor of defense counsel, he will set a figure he is willing to recommend to his client in settlement and stand on his judgment. In most instances, if he has given careful consideration to evaluation, his honest and careful judgment will be sustained. If on the other hand the check list preponderates in favor of plaintiff, defense counsel must arrive at a different conclusion as to case value and either begin doing what is known as horse trading or accept the offer made by plaintiff's counsel.

There is no set formula for evaluating a case, and each practitioner must of necessity devise his own means of evaluation. The young trial lawyer who attempts to ape a lawyer whom he admires for his ability will usually find himself in trouble, because he cannot know the mental processes of his idol. It is good practice for the young attorney, or for the old attorney, for that matter, to use anything from an experienced practitioner that he finds in his own mind to be good practice, but only if he can adapt such tactics to his own personality.

Showmanship in the trial of a case is important, but it can be overdone. The words "demonstrative evidence" have sprung up in all

quarters in the last few years. It is true that the trial of a case has some of the aspects of a drama, but, like drama, it must be of a nature to appeal to the average juror and not a show-off or grandstand performance. Proper demonstrative evidence, such as pictures, plates and surveys, are always helpful in supplementing oral testimony of witnesses. Jurors are, of course, ordinary human beings. The ear can catch only so much. The eye is much more accurate.

The defense attorney should never use delaying tactics if he can properly prepare his case and if he is reasonably convinced that his investigation and file are complete. The only excuse for using delaying tactics is that defense counsel has every reason to believe that plaintiff is a malingerer and has some evidence to back up that belief. Many plaintiffs' attorneys honestly believe their clients' stories, not knowing that the claimant is a malingerer and claims conscious. Delaying tactics, without legitimate excuse, work a terrific hardship on defendant on the day of judgment, for the reason that if plaintiff has an injury even closely similar to his claim, the elapsed time that plaintiff is out of work, either by reason of his injury or by reason of the pendency of litigation, will ordinarily be added to the jury verdict at the expense of defendant.

This last statement perhaps needs some clarification. It is well known to plaintiff's attorney, and usually either known or imparted to the claimant, that if he does any work at all after his injury and before trial, such fact will become known to defendant's counsel, who will make much of the fact that claimant is able to work in some degree, so as to contradict the usually extravagant claims of the plaintiff in his petition. In most instances plaintiff's attorney will see to it, in the framing of the pleadings, that they sound just as bad as they can be made, for two reasons: first, to be sure that he does not understate his case; and second, for the psychological advantage of either reading the pleadings to the jury prior to trial or making an opening statement based on what the pleadings will show. Because of the fact that defendant will make much of plaintiff's engaging in a gainful occupation after injury, the claimant will, of necessity, have to remain idle, so that when the case is tried he can testify truthfully that he has not worked since the date of the injury, and therefore his loss of earnings can be mathematically computed by plaintiff's counsel, to add to other measures of damages. If the case is tried soon after the injury, there will be a shorter time for which to figure accumulated actual damages sustained by reason of inability to perform a gainful occupation and the resultant loss of earnings. An early trial is usually beneficial to the defendant, as juries are prone to award to plaintiffs dam-

ages for the time lost from work, regardless of whether or not they have substantially recovered as of the date of the trial. Thus it will be seen that if a case is tried in sixty to ninety days after it is filed, the jury can take into account only two or three months' loss of earnings capable of accurate ascertainment, whereas, if the case is delayed for six months to a year or more, then the jury will, in most instances, multiply the claimant's monthly wage by the number of months lost and arrive at a larger verdict.

Another reason for an early trial is that it is well known, from a psychological standpoint, that a claimant who is out of work because of having to abide by his and his attorney's decision not to work during the pendency of a claim or suit will develop a mental trauma which, in some instances, is as much an injury as physical trauma. Thus the claimant actually suffers by reason of his mental reaction to getting his case disposed of, and he himself becomes convinced that he is totally and permanently disabled for life because he has nothing to do but think of his own pain, either real or imaginary. In some instances such a complex has been known to destroy a claimant's usefulness, even though his original injuries have healed.

During the past few years quite a number of law schools and bar associations have sponsored medico-legal seminars. Such seminars have a value, but in my opinion do not have nearly the value that is claimed for them. Usually a specific injury, rather remote in so far as ordinary experience is concerned, is discussed, and the medical experts and the legal experts attempt to complicate the situation by each trying to out-do the other in order to show his proficiency in his given field.

During the past few years there has been agitation in some quarters for the abolition of jury trials in tort litigation. To the writer this trend will be the end of the true advocate—the trial lawyer—and, with the end of the advocate, will come more and more administrative interference with the principles upon which this country was founded. The trial of a case by true advocates before a proper tribunal, a regularly constituted court, is the main stay of our form of government. Let there always be the court, the advocate, and justice as it is meted out by a jury of the party's peers.

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