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Applicability of Methods of Trial and Administration Used in Workmen's Compensation Proceedings to Certain Civil Actions

AMONG suggested methods of simplifying procedure in the courts and improving the efficiency of judicial administration, occasional reference has been made to the possibility of adopting methods now in use by boards, commissions and other quasi-judicial bodies. It is the purpose of this article to outline the fundamental differences between such bodies and the courts, with some discussion of the applicability of commission methods to some types of civil litigation.¹

Throughout much of their history, the State and National Governments have entrusted quasi-judicial power to administrative bodies or officers, whose functions resembled those of courts in that they involve the trial and determination of questions of law and fact. Of such nature are hearings before the Federal Pension Office, Patent Office, Land Office, Income Tax Unit of the Treasury Department, Board of Tax Appeals and the Interstate Commerce Commission. In State Governments similar proceedings are had before Railroad and Public Utility Commissions and Industrial Accident Boards and Commissions. For the purpose of the present article the administration of Workmen's Compensation Acts will be taken as typical of the entire field of quasi-judicial bodies, and the discussion will be largely limited to workmen's compensation cases. Concretely, this article is based upon an analysis of the functions and procedure of the Industrial Accident Commission in the administration of the California Workmen's Compensation Act, of the Deputy Commissioners of the United States Employees' Compensation Commission in the administration of the Federal Longshore-

¹ For a fuller review of the function, organization, and constitutionality of administrative tribunals, see Pillsbury, *Administrative Tribunals* (1923) 36 HARV. L. REV. 405, 583. For a short discussion of the procedural methods used by the Industrial Accident Commission of California in its earlier history, see Pillsbury, *An Experiment in Simplified Procedure, Proceedings Before the Industrial Accident Commission* (1915) 3 CALIF. L. REV. 181.

men's and Harbor Workers' Compensation Act, and of certain aspects of the work of the New York Industrial Commission.

The existence of such quasi-judicial bodies is evidence of a revulsion against the more complicated procedure of the courts. The former have taken more definite steps towards simplification of procedure than has yet been attempted in judicial administration. Apparently the movement to vest portions of the work of the courts in such administrative bodies is still going on. Since 1910 Workmen's Compensation Acts have been passed in 46 out of 50 states and territories, and in only 7 has court administration been retained. In these 7 efforts are now being made to change to commission administration. In an address by Commissioner T. A. Wilson of the North Carolina Industrial Accident Commission before the December meeting of the American Association for Labor Legislation last year, an interesting argument is given in favor of change to commission administration in that state. This address will be printed shortly in the proceedings of the Association.

The Commonwealth Club of San Francisco has recently given consideration to this topic. Its section on Insurance presented to the last Legislature a compulsory automobile insurance bill in which provision was made for adjudication of automobile personal injuries through a commission similar to the Industrial Accident Commission. The measure failed of passage, due in part to the fact that other automobile legislation had already been proposed by a joint legislative committee. Doubtless the bill will again be presented at the next session of the Legislature, after the effectiveness of the 1929 legislation shall have been demonstrated.

At the time this article is written the Commonwealth Club section on the Administration of Justice, which has to its credit the original drafting of the Judicial Council Constitutional Amendment and section 4½ of article VI of the state Constitution, prohibiting reversals except for miscarriage of justice, is considering the possibility of research upon the application of commission methods of adjudication to personal injury cases generally or to automobile injury cases. Whether the section will actually undertake this study has not yet been determined.

In February, 1930, bills were introduced in the legislatures of New York and Wisconsin seeking to apply the provisions of the state Workmen's Compensation Acts, as far as possible, to automobile injuries, including administration by commission, and to supplant trial of automobile damage suits by the courts of those states. An interesting discussion of the application of compensation principles to automobile injuries is to be found in an article by Mr. Arthur A. Ballan-

tine² in which he reports the progress of a committee working upon this topic under the auspices of the Rockefeller Foundation, the Council of Research in the Social Sciences of Columbia University, and the School of Law of Yale University. The application of compensation principles to automobile injuries, other than of their procedural methods, is beyond the scope of the present article.

A consideration of the merits and defects of commission administration as a model for simplification of procedure in the courts is therefore timely.

The fundamental differences between commission procedure and administration and that of the courts may be listed as follows:

(A) *Procedural Differences:*

1. Elimination of pleadings, particularly of demurrers.
2. Elimination of procedural motions.
3. Trial upon facts rather than upon pleadings and record.
4. Trial based upon investigation rather than litigation.
5. Reduction of expense and time of litigation.
6. Abolition of rules of evidence.
7. Greater mobility of place of trial.
8. Limited and speedier appellate methods.

(B) *Administrative Differences:*

1. Greater control over attorneys, including fixing of fees and elimination of percentage contingent fees.
2. Schedule awards.
3. Prohibition of direct settlements.
4. Coördination of trial of controversies with accident prevention and other regulatory functions.
5. Placing of responsibility in a single body for formulation of policies and for proper administration.

1. DISCUSSION OF POINTS OF DIFFERENCES

(A) *PROCEDURAL DIFFERENCES:*

1. *Elimination of pleadings, particularly demurrers.*

In workmen's compensation cases, particularly in California and New York and in cases arising under the Federal Longshoremen's Act,³ the customary complaint or declaration, drawn in court proceedings by a skilled lawyer in accordance with the rules of pleading, is abol-

² Arthur A. Ballantine, *A Study of Compensation for Automobile Accidents* (1930) 16 AM. BAR ASSN. J. 97.

³ 44 STAT. 1424 (1927), 33 U. S. C. § 901 (1928).

ished. Substituted for it is a short printed form of claim which can be filled out by or for the injured workman without skilled advice.

This form of claim is not subject to attack by demurrer, motion to strike out allegations or other proceedings. The case comes on for hearing a few days after the filing of the claim without preliminary proceedings to determine the sufficiency of the statement of claim.

The advantages of this procedure are:

(1) The time of the tribunal is not taken up by preliminary hearings to determine the sufficiency of the pleadings.

(2) The case is ready for hearing upon its merits the first time it comes before the tribunal, which is usually about ten days after the filing of the claim.

(3) It is not necessary to devote labor and technical skill to the preparation of pleadings or in arguing their sufficiency.

It may be objected that in some cases the parties may be put to expense and labor of preparing the controversy for trial when a preliminary presentation of a point of law would dispose of the entire controversy. In important civil litigation a preliminary decision of a question of law going to the root of the controversy is frequently advisable, although in the experience of the writer the cases in which a demurrer is sustained without leave to amend are very small in proportion to the total number of arguments upon demurrers and motions to strike out allegations. In the modern English practice, the writer understands that the demurrer is abolished without harmful results.

In workmen's compensation cases the objection above mentioned is invariably avoided. Where the defendant has a complete defense *in limine*, such as the statute of limitations or want of jurisdiction of the tribunal, this can be, and usually is, presented first and the presentation of evidence upon the merits deferred for a continued hearing if the contention is overruled.

The defendant's answer is equally informal. Its only substantial purpose is to notify the claimant in advance of the hearing of the points upon which he should be prepared to present evidence. Having served such purpose before the hearing it is not thereafter of importance. The issues are informally determined at the commencement of the hearing by oral discussion between the examiner and the parties, and are not confined to the pleadings. There is no default for failure to file an answer and no demurrer or motion is permitted to attack its sufficiency.

2. *Procedural motions.*

All formal procedural motions, such as motion for judgment on pleadings, for non-suit, for directed verdict, *etc.*, are abolished. If the claimant fails to establish a right to compensation, his claim may be rejected without presentation of evidence by defendants or any formality of application for such decision.

3. *Trial upon facts rather than upon pleadings or record.*

After the claim is once filed and served, little further attention is paid to it. There is no occasion for argument as to whether proffered evidence is within the issues raised by the pleadings, it being sufficient that it be germane to the right to recover compensation. There is no incentive to "prepare a record" for use on appeal because of the limited nature of appellate relief as indicated below.

It is therefore possible to eliminate from the proceedings and record most procedural and evidentiary objections, rulings, exceptions, and arguments, such as are ordinarily used as a basis upon which to predicate error or secure an advantage on appeal. This shortens materially the time consumed in taking testimony and also the length of the record to be used if the case is carried to a higher court.

Needless to say, trial by jury is not a part of commission procedure.

4. *Trial based upon investigation rather than litigation.*

It is customary in the United States for counsel to exercise full control over the presentation of their evidence. The judge assumes much the position of an umpire and is largely deprived of the control over the conduct of the case which is exercised by English judges.

In workmen's compensation proceedings the referee or examiner exercises control more like that of an English judge. He assumes the initiative in examining witnesses, and may suggest further lines of evidence to be brought in by the parties or further witnesses to be produced. Sometimes he is authorized by statute to bring in necessary witnesses at the expense of the state, if the parties fail to produce them and he considers their evidence necessary for a just decision. Usually he will, upon his own initiative, make arrangements for further medical examination of the injured person by an impartial medical examiner and occasionally, with the consent of the parties, write to physicians, employers, and others, requesting statements as to facts within their knowledge. Each side is given opportunity to further examine and cross-examine all witnesses after he has concluded his examination, and copies of all letters, statements, or reports received outside of a hearing are served upon all parties to the case so that they may have opportunity to ask for further proceedings relative thereto if so advised.

This exercise of initiative in developing the evidence is similarly exercised by Public Utility Commissions in engaging their own experts to make investigations and submit reports at a hearing, subject to cross-examination by the parties.

The advantages of this initiative are:

(1) Saving of time, the direct examination by the referee or examiner being usually shorter than one conducted by counsel for a litigant. The cross-examination is very much shorter than in court, as the first examination has been impartially conducted.

(2) The first examination of the witness being impartial, the evidence is often more fairly presented. The attorney for a party will naturally endeavor to present the evidence in a manner most favorable to his cause, and may often skirt around danger points hoping that the opposing side will fail to discover them. Direct examination by counsel may often confine the witness to statements worked out in previous preparation of the case which do not exhibit the full knowledge of the witness. The examiner, on the other hand, is interested only in getting at the facts as they may exist, and in examining the witness impartially he frequently elicits the entire story more fully and expeditiously than by direct examination and cross-examination by counsel.

(3) The initiative of the examiner or referee also protects those litigants whom poverty, lack of legal representation or unskillfulness of counsel might otherwise place at a disadvantage.

5. *Reduction of expense and time of litigation.*

Cost of litigation is reduced by the abolition of fees, elimination of percentage attorneys' fees as described below, elimination of juries, and the trial of most controversies at places convenient to the witnesses, with consequent elimination of depositions. Usually the commission pays its own reporting costs. The time required to complete determination of a controversy is shortened because of the elimination of demurrers and procedural hurdles, and simpler procedure at hearings. The evil of excessive continuances on request of counsel sometimes remains as serious as in the courts, but is nevertheless subject to control.

6. *Abolition of rules of evidence.*

It is customary in statutes creating public utility or workmen's compensation boards to exempt them from the law of evidence. The purpose does not lie so much in any substantial inadequacy in the law of evidence itself as in the delay and expense arising from its application strictly and mechanically. Such harmful effects of the law of evidence are:

(1) Loss of the time of the trial court arising from objections, arguments, rulings, and exceptions upon offers of evidence.

(2) The encumbering of the record of the trial court by recording such matters in order to lay a foundation for appeal, and the expense of preparing records on appeal.

(3) Loss of time of the appellate court in passing upon asserted errors in admission or rejection of evidence.

(4) The danger of miscarriage of justice from too technical application of the rules of evidence, whereby an insufficiently skilled or adroit attorney may not be able to get before the court evidence material to his cause. Sometimes also a previously decided case will be applied mechanically to rule out evidence of real materiality, when greater latitude by the trial court would result in a more just presentation of the facts.

The exemption from rules of evidence should not be carried too far. It is important that the person presiding over a hearing be familiar with their general nature and purposes, and that the evidence offered be considered in their light, using them, however, as guides and not as strict rules. Procedural entanglements and delays arising out of objections, arguments, rulings and exceptions should at all times be avoided.

7. *Greater mobility of place of trial.*

In court proceedings it is generally necessary that the parties present their witnesses for examination at the county seat or other place where court is permanently held. Occasionally a view of the premises may be ordered, or the court may adjourn to a hospital bedside, but such cases are relatively rare. In commission proceedings generally the tribunal does not limit its hearings to county seats but will send its examiner with a reporter to any city or hamlet convenient to the parties and witnesses. This saves considerable expense to the parties in going to a distant place of trial and also almost wholly eliminates the necessity for taking depositions of witnesses within the state.

8. *Limited and speedier appeal.*

The method of review of decisions prescribed in workmen's compensation cases in the more advanced states is usually by writ of *certiorari* or review.⁴ In proceedings under the United States Longshoreman's Act a bill in equity for an injunction is allowed to review the lawfulness of the decision of the Deputy Commissioner (section 21). In some states, unfortunately, trial *de novo* in the reviewing court is still provided.

⁴ CALIFORNIA WORKMEN'S COMPENSATION ACT, § 67.

The advantages of *certiorari* or injunction as against the usual appeal are:

(1) Quicker determination, *certiorari* and equity cases usually being given priority on the calendar of the court. Frequently the entire controversy may be disposed of at the outset upon alternative writ or show cause order.

(2) In California, *certiorari* must be applied for from the appellate court originally, the Superior Court having no jurisdiction to review workmen's compensation decisions. This eliminates one entire court proceeding in securing final decision.

(3) *Certiorari* or injunction proceedings do not permit review of errors in procedure or of rulings on evidence, their scope being invariably confined to determining (1) whether the decision is supported by substantial evidence, and (2) whether it is in accordance with law.

(4) *Certiorari* is a discretionary writ. It must be applied for at the commencement of the review proceeding, and if not granted, the appellate proceeding ends at that point. A bill for injunction, being frequently returnable preliminary upon an order to show cause why a preliminary injunction should not be issued, may be given much the same effect, the entire controversy being often determined with the motion. An appeal is of right, and when a notice of appeal is filed, enforcement of the decision is automatically suspended until the case comes up in its usual course upon the calendar of the appellate court for argument. The newer methods permit the court to eliminate at the outset, appeals devoid of merit.

Incidentally the new appellate procedure provided by Congress for the United States Supreme Court has been so drawn as to largely reduce the obligatory jurisdiction of the Court (writ of error or appeal as of right) and substituted therefore a discretionary jurisdiction in *certiorari*. Even where jurisdiction is obligatory, a preliminary showing of probable jurisdiction is required before the case can be calendared. As a general proposition appeal as of right is unnecessarily burdensome and should be restricted.

(B) ADMINISTRATIVE DIFFERENCES:

1. *Control over attorneys.*

Compensation claimants, except for protective legislation, would be particularly susceptible to being over-reached by ambulance-chasing attorneys, interpreters and runners, particularly, experience shows, of their own countrymen. In this respect the situation is not strikingly different from other forms of personal injury litigation. To avoid such

evils, provision is usually made for power to fix attorneys' and representatives' fees, with penalties for exacting or receiving a larger fee than that fixed by the Commission. As a corresponding measure of protection to the attorney, the latter is allowed a lien upon compensation payments for the fee allowed, and payment is required to be made directly to him by the defendant. As a matter of practice, contingent fees based upon percentage of recovery are invariably refused approval, although any fee is necessarily contingent to the extent that if no recovery is secured, and no deposit paid the attorney in advance, he may be unable to collect any fee from his client.

2. *Schedule awards.*

In workmen's compensation proceedings, the statute prescribes the exact amount recoverable, instead of leaving damages to the discretion of the court or jury. No allowance is made for pain or suffering or other speculative items. For example, for temporary disabilities, the compensation is fixed at 65 per cent or 66 $\frac{2}{3}$ per cent of lost wages, depending upon the act involved. For permanent disabilities, the Federal Longshoremen's Compensation Act and the New York Act provide a statutory schedule of payments for different disabilities. The California Act authorizes the Commission to adopt such a schedule, which it has done. The latter is the preferable method, because of greater flexibility secured in classifying injuries. The death benefit is a statutory percentage of wages for a prescribed period.

The advantages of an official schedule prescribing the amounts recoverable are:

(1) It eliminates speculative chances of greater or less recovery, thereby eliminating much litigation where liability is not in dispute.

(2) It removes bargaining between the parties for settlements and releases.

(3) The recovery is more nearly proportioned to the need of the injured person, thereby removing inequalities between different recoveries for similar injuries. Fewer controversies find their way to the courts where a definite basis exists for fixing the amount of recovery, to which each side has equal access.

3. *Prohibition of direct settlements.*

In personal injury litigation generally, the parties are free to settle their controversy between themselves and are usually encouraged to do so. The amount which the plaintiff will receive depends, to a large extent, upon the skill of his attorney as a bargainer. This opportunity to bargain results in delay being used by defendants to exert pressure

against a poor litigant, and in inequality of settlements. Under workmen's compensation acts, settlements may not be made directly between the parties. Under the California act no release is valid unless approved by the Commission. Under the federal act compromises are wholly prohibited, the claimant receiving the amount to which the law entitles him, no more and no less. Under the federal and New York acts, insurance companies are required to report to the administrator the exact amount of compensation paid in all cases, together with medical reports showing the nature and period of disability. These reports are checked to see that full compensation has been paid.

The effect of prohibition of direct settlements is to eliminate bargaining over amounts and also the offering of lump payments in return for releases. This results in the parties receiving more nearly the payments to which the law entitles them. Litigation is also reduced because the certainty that the administrator will require payments to be made in accordance with the law causes the parties to abandon extravagant claims on the one hand and efforts to save on payments on the other.

4. *Coördination with preventive and other administrative functions.*

In workmen's compensation administration the trial and settlement of claims is coördinated with such administrative functions as the gathering of statistics upon cause, volume, and cost of accidents, the development of standards for proper safeguarding of places of employment, safety inspections to apply and enforce such standards, a self-insurance bureau to watch the solvency of employers, an insurance bureau to regulate compensation insurance coverage or to operate a state compensation insurance fund, a vocational rehabilitation office for reestablishment of permanently crippled workmen in industry, social service work to help widows and orphans receiving benefits, an advisory office to afford information concerning the law and rights under it to inquirants, *etc.* The field of industrial injuries is better cared for if it be dealt with as a unit or entirety rather than by having different aspects of the problem handled by wholly unrelated and separate departments. Accident compensation and accident prevention go hand in hand.

5. *Specialization and responsibility.*

All compensation controversies go to a single tribunal of state-wide jurisdiction for decision. The members of the staff of this tribunal become specialists in this type of cases and have all policies, precedents, and rulings at their immediate command. The commission through its power of appointment and removal, can instruct, train and supervise its staff in the administration of the law, thereby securing greater

efficiency than if the statute were to be applied through many independent judges not specialists and subject to no coördination or supervision in their work.

Commission administration also vests responsibility for the *successful administration of the law* in a definite body. A court, by reason of the vast field of law involved in the course of litigation before it, may be ignorant of the purposes and policies of particular statutes. A single judge is in no position to formulate policies by himself for the carrying out of special statutes. A body with statewide power enforcing a single statute, or a related group of statutes, will be familiar with the underlying purposes of the law, the social remedies to be secured, and the particular problems of administration which arise for solution. It constantly surveys the workings of the law and makes periodical recommendations to the Governor and Legislature concerning its operations. Any law is better administered if the responsibility for its successful execution is definitely placed in a particular office or body.

II. POSSIBLE APPLICATION OF PRINCIPLES OF COMMISSION ADMINISTRATION TO CIVIL LITIGATION

It is apparent from what has been said above that some of the characteristic features of commission procedure and administration could profitably be given further study in connection with simplification of judicial procedure. Others are applicable only to special types of civil litigation. Still other provisions are of such peculiar application to workmen's compensation matters as to be without value in other fields.

A. MATTERS APPLICABLE TO GENERAL CIVIL LITIGATION.

It seems probable that simplification could be made of forms of pleading in civil actions, avoiding, however, a return to the rigid demarcation of common-law forms of action. In some actions approved printed forms for complaints could be used, thereby making demurrers and motions to strike out futile. We have practically this situation today in actions pleaded upon the common counts. In more complicated cases it would, of course, be necessary to draft pleadings specially as at present. As successful attempts have been made in other jurisdictions to abolish demurrers, such abolition is worthy of consideration.

Further thought should be given to increasing the power of the trial judge to control proceedings before him.

Greater flexibility could be given to the application of rules of evidence, particularly in non-jury cases.

With simpler trial procedure, it would be possible, particularly in non-jury cases, to hold sessions in smaller towns throughout the county instead of having all sessions conducted at the county seat. This would constitute a large saving of time of the witnesses and counsel. Some advantage was lost when the custom of having the trial judge go on circuit was eliminated.

If the obligatory jurisdiction of appellate courts were lessened and their discretionary jurisdiction increased, the calendars of such courts could be shortened and delay in litigation avoided. If, for instance, an appeal could only be taken by the granting of a petition for leave to appeal by either the trial court or the appellate court, cases in which a meritorious grant of appeal does not exist could be disposed of within a short time after judgment, thus saving the preparation of a record on appeal and the delay in formal disposition while the case was awaiting its turn on the calendar of the higher court.

The administrative features mentioned above are applicable only to special types of controversies.

Regulation of attorneys' fees is necessary only where some element of social urgency is involved, as where the beneficiary of the right of action is of a class susceptible to becoming a public charge or to having their economic integrity as members of society impaired. No urgency exists for regulation of fees where only property rights are involved or where the support of the beneficiary is not imperiled. For example: pension matters, workmen's compensation claims, probate and guardianship proceedings, necessarily involving poor or unrepresented heirs, minors or incompetents, are cases involving a social responsibility.

Schedules fixing the amount of recovery are probably not applicable outside of personal injury cases because of the wide range of such miscellaneous litigation and difficulty of standardization.

The prohibition of direct settlements is needed, again, only where some social urgency is involved. Where the controversy concerns property interests only, the community is not especially affected by higher or lower recovery, and the parties should not be restricted in bargaining with each other for a settlement.

Coördination of administrative with judicial or quasi-judicial functions is of value in cases involving a topic susceptible of combined regulation and adjudication of controversies, the field constituting a subject matter of a demonstrable entity or unity. For example: the regulation of public utilities, the prevention and relief of consequences of industrial injuries (workmen's compensation), illness of wage earners (social insurance), investment securities and controversies arising therefrom (Corporate Securities Act), or regulation of motor vehicles, including

both prevention and redress of automobile injuries—all have such unity as a field for combined regulatory and judicial functions. The community would similarly be benefited if the entire problem of water conservation and distribution for purposes of power and irrigation could be handled by the state as a unit upon an engineering basis rather than by isolated litigation over private water rights, storage, reclamation, and irrigation district problems.

Constitutional restrictions must be considered. Under article III, section 1 of the California Constitution, all judicial functions are invested in the judicial department and all administrative power in the executive branch of the Government. Such functions cannot be combined in a single body except by constitutional amendment.⁵ All of the elements of commission procedure which involve simplification of proceedings and trial could be made applicable to the courts without constitutional amendment, but administrative and regulatory powers could not be conferred upon such courts. It is furthermore inadvisable to give to any court of general jurisdiction, regulatory or administrative powers, as the judicial machinery is not suitable to such administration. Where such union of functions is advisable, they should be vested in an administrative board, commission or officer, not only because of the inability of the judicial machinery to properly handle administration matters, but also because of the greater flexibility of administrative powers.

No provision of the Federal Constitution prevents amalgamation of executive and judicial functions in a single body under state law or would prohibit the use of commission procedure as described above by either a court or administrative office. The only requirement of the Federal Constitution binding upon the states in this respect is that of due process of law contained in the Fourteenth Amendment. This requires only a fair hearing after notice but does not require any particular form of procedure.

The foregoing principles of commission procedure and administration are capable of application to personal injury litigation generally and also to automobile injuries especially. The field of personal injuries, however, does not require further attention for the reason that its major component parts are necessarily considered separately. Personal injuries from industrial accident are already covered by the provisions of the Workmen's Compensation Act. If the field of personal injuries resulting from the operations of common carriers, and personal injuries resulting from automobile accidents be taken out, the small group re-

⁵ *Western Metal Supply Co. v. Pillsbury* (1916) 172 Cal. 407, 156 Pac. 491.

maintaining is of such scattering character that no general conclusions can be drawn concerning it.

Concerning the possibility of applying commission administration and procedure to automobile injuries, several definite points can be made.

Fundamentally the problem of automobile injuries should be viewed as an entirety rather than in isolated components. The vast development of motor vehicle transportation in the last twenty years has brought about problems for solution which are more or less inter-related. As far as the present topic is concerned, four major aspects exist:

(1) The providing of proper security by automobile owners and drivers for payment of any damages for injuries for which they may become liable (compulsory insurance).⁶ (Figures recently collected by the Commonwealth Club of California indicate that in over 50 per cent of injuries the owner or operator does not carry insurance and is apparently financially unable to respond to any judgment for damages of more than nominal amount. The existence of a large number of injuries for which redress is due and cannot be obtained creates both a serious injustice to the injured person and a loss to the community, it being necessary that the harm occasioned by such injuries be cared for through public and private charity, by relatives, or from other sources, with resulting economic loss to the community in any event.)

(2) Accident prevention work and enforcement of the Motor Vehicle Act.

(3) More efficient and less costly modes of settlement of automobile injury litigation.

(4) Reduction of economic loss to the community through automobile injuries.

To attempt to handle each of these phases separately or to legislate on portions of the field without keeping the entire field in mind, militates against real progress. Haphazard attempts to reach particular phases delay adequate solution of the problem as a whole.

⁶ See Chamberlain, *Insurance for the Benefit of Third Persons under Statute* (1925) 11 AM. BAR ASSN. J. 84; Chamberlain, *Compulsory Insurance of Automobiles* (1926) 12 AM. BAR ASSN. J. 49; Marx, *Compulsory Compensation Insurance* (1925) 25 COL. L. REV. 164; *Financial Responsibility of Owners and Operators of Motor Vehicles* (1930) 30 COL. L. REV. 109; Arthur A. Ballantine, *A Compensation Plan for Railway Accident Claims* (1916) 29 HARV. L. REV. 705; Snow, *Some Legal Aspects of Compulsory Automobile Insurance* (1927) 6 ORE. L. REV. 193. See also *Report of the Special Commission to Study Compulsory Motor Vehicle Liability Insurance and Related Matters* (Feb. 1930) 15 MASS. L. Q. 1.

B. COORDINATION.

Any system of compulsory automobile insurance should contain, in addition to its insurance provisions, a plan for the settlement of claims in a more economical manner than is now possible with present court procedure. It should also provide for coördination of the different state activities relating to automobile injuries in a single department with combined administrative and judicial functions. As the Industrial Accident Commission in its handling of industrial injuries has divisions dealing with trial of controversies, accident prevention, insurance, and statistics, so an organization dealing with automobile injuries should combine under one head the following functions:

(1) A division to care for registration of owners and drivers, secure the presentation of evidence of insurance, keep records of all insurance and registrations, and enforce the insurance provisions against violators.

(2) An accident prevention division, including the present activities of the motor vehicle police and traffic officers, with expansion of educational work for owners and drivers.

(3) A trial division to adjudicate injury claims.

(4) A statistical and research division to receive and tabulate reports of injuries with reference to causation, prevention, and cost to the community, and to draw proper conclusions therefrom for the use of the different divisions and to the public.

(5) A legal division to assist local prosecuting officers in enforcement of the compulsory insurance provisions, to assist the courts by intervention in securing such construction of the law as will better effectuate its purposes and reduce the economic cost of injuries to the community, also to advise the different divisions of the department.

C. RESPONSIBILITY.

Another point of importance is that greater progress can be made if responsibility for the enforcement of such a law and the development of proper policies of administration be vested in a single body instead of distributed impartially and equally over all prosecuting attorneys, judges, and police authorities, without special responsibility upon any or coördination of effort by supervision or conference.

A system of *schedule awards* similar to those used in workmen's compensation practice should be provided. By standardizing and equalizing recovery for similar injuries to persons of similar earning capacity or income, greater justice will be afforded injured persons. The funds of insurance companies, which in the last analysis distribute the burden of injuries distributed over the public, and thus represent the burden to

society, will be justifiably conserved by elimination of excessive verdicts, and excessive settlements based upon the possibility of high verdicts. High frequency of litigation would be reduced by elimination of the speculative element of a high or low verdict, both sides knowing in advance the exact recovery to which each will be obliged to submit if the fact of liability is established.

Prohibition of *direct settlements* is not of so much importance. If the injured person is able to deal on a basis of financial equality with the defendant or its insurance carrier so that he is not subject to coercion by delayed settlements or legal costs, there would be no reason for preventing him from entering into a settlement. In classes of cases where oppression might exist some form of official scrutiny of settlements would be advisable.

Regulation of attorneys' fees is necessary in the public interest and for the protection of litigants, where litigants as a class are of dependent or precarious economic status. The burden to the community at large of automobile injuries will be reduced by the elimination of contingent percentage fees of attorneys, which now leads to excessive verdicts by juries.

It would not be just, however, to place the entire blame upon the ambulance-chasing attorney. Even this much criticized individual confers a certain benefit upon the community through protecting litigants against unscrupulous claims attorneys and adjusters on the defendant's side. Casualty insurance companies and public utilities are often offenders in this respect, where not under public regulation. At the present time a personal injury is often followed by a race to the hospital between the ambulance-chasing attorney and the claims adjuster, the first one to arrive endeavoring to get the injured person to sign a retainer or release before the other can gain access to him. The question of whether the "hard boiled" claims adjuster or the ambulance-chasing attorney came first bears a marked resemblance to the similar inquiry concerning the hen and the egg. Both should be placed under regulation to secure elimination of improper practices. It is interesting to note that the President of the California Bar Association has just appointed a committee to investigate the activity of claims adjusters. The existence of an impartial tribunal with schedule recoveries, elimination of contingent and speculative fees and perhaps, the prohibition of direct settlements, will tend to control both ambulance-chasing attorneys and claims attorneys.

The contingent percentage fee is a serious evil. It causes attorneys with unstable professional ethics to commercialize their practice, looking at each damage suit as a speculative opportunity for a fee, rather

than as a redress for a wrong done the client. It causes juries to increase verdicts in order to allow a proper net recovery to the injured after the contingent attorney's fee has been paid, thus substantially increasing the burden upon society. It tends to provoke the filing of poorly founded suits in order to gain a settlement later for a small amount or for its "nuisance value" in return for a dismissal and release. By "nuisance value" is meant the cost to the defendant of successfully defending the action, which it is usually willing to pay the plaintiff for a dismissal before trial. It also leads to a growing practice of personal injury attorneys to accumulate suits against insurance companies and sell a group of such actions, good and bad, to a company for a lump sum, the attorney dividing the proceeds among his clients and himself, either honestly or otherwise.

The ultimate result of the contingent percentage fee is that the community is burdened with an economic cost and loss far in excess of the true burden. This harm is intensified by the circumstance that the real sufferer by the injury receives only a moderate proportion of the total amount spent by defendants because of possible liability for injuries, the greater portion being diverted en route to contingent fees, court costs, insurance overhead and acquisition cost, *etc.* To meet this situation, the speculative percentage fee should be abolished.

Inasmuch, however, as a large proportion of injured persons are unable to advance the costs of litigation and a proper fee for attorney's services without regard to the outcome of the case, a fair substitute must be provided or many claimants with meritorious cases will be deprived of justice. The contingent fee originated, not from the imppecunity of attorneys but from the necessities of a major proportion of personal injury litigants, who could not otherwise finance the prosecution of their cases.

Also, if attorneys' fees are fixed by a commission, they must not be fixed so low as to make it difficult for the client to procure skillful legal service. In workmen's compensation proceedings, the attorney's fee as fixed by the commission must come out of the compensation awarded, which is fixed by the statute at a sum barely sufficient for the sustenance of the injured employee. It is frequently impossible to allow a fee commensurate with the real value of the legal services performed.

The remedy, I think, is to provide for a reasonable attorney's fee to be fixed by the tribunal and to be paid by the losing defendant in addition to the award of damages. By reducing, through simplified procedure, the time and labor which an attorney is now required to give to any injury case, the fee may be kept to a lower basis than now

exists for damage suits, without injustice to the attorney. While the burden upon defendants would nominally be increased by such provision, it should be remembered that they will profit to a larger extent by the elimination of percentage contingent fees and provision for schedule awards. The effect of such provision will also be to discourage the defense of actions and encourage settlement without court action where a meritorious defense does not exist. Lastly, the injured person will profit, upon the whole, by a more secure and less speculative recovery, reduction of costs and delay of litigation, and prompt payment of damages to him.

The procedural improvements made use of in commission proceedings as outlined earlier in this article would also assist to reduce the burden of automobile injuries to injured persons and the community at large.

The requisites for successful administration of commission procedure largely coincide with those for successful judicial administration. The first and most important is that of higher salaries to secure competent administrators and staffs. The second is a mode of appointment which will be free from political influence and be based upon merit and capability. Coupled with this there should be a sufficient security of tenure to free the appointee from the fear of summary change of occupation upon every change of administration but at the same time permit of removal for unsatisfactory service. The third requisite is that of rigid adherence to the rules of simplified procedure when once adopted. A tendency is always present to gradually work back to more complicated methods because of the pressure of attorneys trained in the older practices and an inevitable tendency in governmental matters to accumulate red tape. All of these requisites, however, are susceptible of being met.

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