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"Gentlemen of the jury, have you agreed upon your verdict?" inquired the trial judge.

"We have, your Honor," replied the foreman.

"And how do you find?"

"We find for the plaintiff in the sum of $160,000."

The plaintiff was a four year old boy. The defendant was a railroad company. The injury was the amputation of the boy's hands sustained when, as a babe of thirteen months, he had strayed from his home and crawled on the defendant's track where he was struck by its train.[1]

The case involved rather elementary rules of substantive negligence law. The $160,000 verdict was the result of a third trial. A hung jury had been unable to reach a decision after having been instructed on the substantive law of negligence by the trial judge at the plaintiff's first effort to recover. A second jury had brought in a verdict of $100,000 only to have it set aside by the appellate court for errors in the trial court's charge as to the negligence law applicable. Finally,[2] after more travail and another charge by the trial court on the substantive law of negligence the verdict above mentioned was returned.

Simply stated the question of negligence left to the jury at the

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[1] Armentrout v. Virginian Ry. Co., 72 F. Supp. 997 (S.D.W.Va. 1947). In this very interesting decision the trial judge sustains the verdict as not being excessive. Not only does he consider the life expectancy of the child but also future income taxes and a possible 30% reduction in those taxes from their present level.

[2] The word "finally" is used with some misgiving. Following the entry of judgment on the $160,000 verdict given at the third trial, an appeal was taken to the circuit court of appeals. That court reversed the judgment, ruling that the failure of the trial judge to set aside the verdict on the ground that it was excessive was an abuse of discretion, notwithstanding the fact that said judge after great consideration had found the verdict not excessive. Since to the appellate court the verdict appeared grossly excessive, the fact that the trial court found it not excessive was immaterial. See Virginian Ry. Co. v. Armentrout, 166 F. 2d 400 (4th Cir. 1948). For the opinion reversing the same trial judge on the judgment entered at the second trial for $100,000, see Virginian Ry. Co. v. Armentrout, 158 F. 2d 358 (4th Cir. 1946), where the appellate court found the trial judge had not only committed errors of law but had also used prejudicial language. A settlement of this protracted litigation was finally negotiated for $75,000. See 4 N.A.C.C.A.L.J. 281 (1949).

time of the third trial was whether or not the defendant's engineer had failed to exercise due care to stop his train in time to prevent injury to the plaintiff. There was the usual evidence both for and against the defendant on that point.

It may well be that the verdict in the above case was the result of a proper application by the jury of the legal rules of negligence law as laid down by the court. On the other hand, it is very possible that the verdict was the result of sympathy for the maimed child and prejudice against the corporate defendant. Perhaps, because of the emotional appeal of the plaintiff's attorney, the jury entirely disregarded the substantive rules of negligence law as announced by the court. Conceivably the verdict instead of being in accord was, in fact, *contrary* to those rules.[3]

That emotionalism and prejudices enter into the molding of jury verdicts no one with any courtroom experience will deny. So powerful are these two factors at times that one is often tempted to believe the liability of a large corporate defendant is that of an insurer. But to the person who studies the law from the purely theoretical standpoint as embodied in reported decisions the defendant's liability would always seem to be controlled by some legal rule rather than by non-legal factors. The latter is the impression gained by one at the end of three years of study in the average law school. To the extent that any verdict, based upon non-legal factors and in contravention of the legal rules declared by the court, is embodied in the final judgment which the defendant must pay, liability is indeed not controlled by our rules of law. But if, at some stages of the proceedings, legal rules have enabled the plaintiff to reach the jury where the non-legal factors find the most fertile field for operation, then the ultimate liability of a defendant cannot be said to be based solely upon the non-legal factors any more than entirely on the legal rules. Rather by the operation of the two, now the legal rule being dominant, now the non-legal factor holding sway, the liability is finally determined.

It shall be the purpose of this paper to consider the respective roles played by legal rules and non-legal factors in accident litigation. This field is chosen because it is here that the non-legal factors play a more active part than in many other types of litigation. So effective are they at times that the legal rules of negligence and contributory negligence which in theory should determine liability are seemingly rendered impotent. This is because the non-legal factors frequently play a domi-

[3] It is not the purpose of this article to endeavor to answer this question in respect to the particular verdict. The case is used merely as a means of introducing the larger and more general problems which make up the subject matter of this paper.

nant part in the formation of a jury verdict. While verdicts may be and on occasion are set aside by the trial court, or judgments founded on verdicts reversed by the appellate court, in the vast majority of cases the liability of a defendant is established upon the rendition of the verdict. Let us then consider first some of the non-legal factors which come into play at that vital point of litigation—the fixing of the verdict. We shall after a consideration of these study the effects of certain legal rules as they come into operation at various stages of the litigation.

In a discussion of the non-legal factors we shall have occasion to consider the behavior of lawyers. We shall see how this behavior is frequently designed to produce a verdict which is not founded on the substantive rules of negligence law. Some of the practices will appear to the reader as clearly unethical; others may be so near to the borderline that reasonable lawyers would differ as to their proper characterization. It is not my purpose, nor would it be practicable in this paper, to explore the ethical implications of the practices reported. The fact that such practices do exist is of itself sufficient reason for appraising the rules of law which have provided the occasion for their development.

Extent of the Injury

"Just give me the broken back and I'll not worry about who's been negligent!" The speaker was my adversary, a so-called "plaintiff's attorney." The occasion was one of those courthouse corridor conferences engaged in by counsel while waiting for their case to come up for trial. It was ten years since I had left the cloistered halls of law school and twelve since my torts professor had drilled into us the rules of negligence and contributory negligence. Yet, as I stood there in the corridor of the courthouse, I was not at all shocked by my adversary's statement. I *knew* he was correct. Ten years of trial work, chiefly as defense counsel, had materially altered my views of the law school rule that a defendant is not liable to a plaintiff who has been guilty of contributory negligence. In fact, I did not continue the discussion for I was then still suffering from one of those blows which severely test our confidence in the machinery we have established for administering justice.

The blow I have reference to was a case in which a Mr. Toper (that is not his real name but will serve the purpose) drove his car in such a manner that it collided with a car operated by my client. Toper and one of his friends had decided to go hunting in a rural county of southern New Jersey. As auxiliary "ammunition" he and his friend had each taken a quart of liquor with them. Apparently the

hunting had been disappointing but our huntsmen had kept up their spirits by frequent recourse to their respective bottles. The expected result happened. Toper, thoroughly intoxicated, was driving homeward in zigzag fashion, at a reckless rate of speed and collided with the car operated by my client. Considering the nature of the accident all the parties got off fairly well with the exception of Toper who suffered a severe back injury. He was hospitalized and an operation was performed whereby a piece of bone was taken from his leg and used to fuse together three of the vertebrae in his spine. Whatever the doctors might have chosen to call the injury, for the negligence lawyer's purpose, Toper's case was a broken back!

Investigation by my client's insurance carrier turned up a wonderful case from the defense standpoint. There could be no question that the accident was wholly Toper's fault, and even if some one might think my client had been slightly negligent Toper's contributory negligence was so gross that on the basis of what Judge Ulman[4] has aptly called "law-in-the-law-book" there should be a verdict for the defendant.

The case was duly listed for trial. Negotiations were had from time to time between plaintiff's counsel and myself looking to a possible settlement. For, despite our clear case of no liability, the good sense of the claims manager for the insurance carrier had told him that he might save money if he could "buy" the case for a reasonable amount. Up until the date of trial these negotiations accomplished little. Plaintiff had reduced his demand from $10,000 to $6,000. We had raised our offer ultimately to $2,750 and there we stuck. The case would have to be tried.

Except for the fact that Toper presented a pathetic picture in court—he had to be practically carried to the stand—or at any rate was, the case was a most beautiful one from the standpoint of a defendant's attorney. The intoxication was established, that ideal disinterested witness, the state trooper, was on our side. In fact, from the negligence point of view it was an "open and shut" case for the defendant. While Toper of course testified he was on his own side of the road when suddenly the defendant ran into him, it was apparent that this statement, which was in conflict with all the other evidence of interested as well as disinterested witnesses was only introduced so as to enable Toper's case to get to the jury. No one believed that part of his testimony, yet under our judicial procedure Toper's statement as to where he was

[4] ULMAN, A JUDGE TAKES THE STAND 30 (1933). Judge Ulman vigorously attacks the law of contributory negligence as laid down by the courts since Butterfield v. Forrester, 11 East 59 (1809), and unhesitatingly affirms that for many years juries have been deciding cases just as though there was no such rule of law.

when struck was enough to enable him to reach the jury. Credibility is always for the jury and in theory at least Toper might have been the sole witness telling the truth and all the others guilty of perjury. The plaintiff's evidence had been largely taken up with horrifying descriptions of the nature of the injury and evidence of loss of earnings—past and future. Hospital and doctor bills some of which were still unpaid in the amount of $456 had been proved. The evidence on damages would easily support a $10,000 verdict.

In due course the jury retired and when it returned to the courtroom I was delighted to receive a smile from one of the jurors. It was the sort of telegraphic signal for which trial counsel scan the faces of returning jurors. It was, I knew, intended to indicate a defendant's victory and I confidently awaited the verdict. The foreman spoke, "We find for the plaintiff for $456!"

To the uninitiated that appeared as a defendant's victory. Had we not been willing to pay $2,750 in settlement? To me it spelled disaster! Apparently my face showed my dismay for as counsel and jurors left the court room the juror who had smiled at me said, "What's the trouble Mr. Baer? Aren't you pleased with the verdict?"

"Did you think my client was to blame?" I answered.

"Of course not," replied the juror. "We knew it was the drunk's own fault but we just gave this little amount so that the hospital and doctor would be able to get their money."

I then took the juror aside and told him, "I appreciate what you tried to do. But, frankly your verdict ruins my client's case. It won't stick. Either the plaintiff was entitled to several thousands or to nothing. By giving him this sop you have opened the door to a motion by plaintiff's attorney for a new trial which I fear may be limited to damages only." The juror could not understand how his $456 verdict could possibly result in a later verdict for several thousands and I left him despairing about the rules of law.

The inevitable happened. Toper's attorney served me with a notice that he would move to set aside the verdict as inadequate and apply for a new trial as to damages only. And here we come to one of the grossest outrages in the negligence law practice as it prevails in certain states.[5] The trial judge heard the motion. I readily admitted that if

[5] There is nothing improper in granting a new trial on the issue of damages only where the original amount awarded is excessive. It is, I submit, highly improper to award a new trial limited to the amount of damages where the original award has been inadequate. The indequacy of such an award shows either that there has been a compromise in the jury room on the question of liability, or that the jury, despite the court's charge as to contributory negligence operating as a complete bar, has applied the rule of comparative negligence, or that some element, as in Mr. Toper's case, occasioned the obviously inadequate verdict. New Jersey is not alone in permitting trial courts to award new trials on the issue of damages

the plaintiff was entitled to recover the verdict was inadequate but I contended, as everyone knew, that justice required an entire new trial—not a trial on the single issue of damages alone. The judge, as is the habit of some judges, preferred not to render his decision orally but said he would write us. A few weeks later I received a copy of his memorandum in which he concluded that the verdict of the jury had established the negligence of the defendant and the right of the plaintiff to recover, that the verdict was erroneous only in that the damages awarded were on the evidence inadequate and that therefore he was ordering a new trial on the issue of damages only, liability having been already established. The new trial was had. We could not go into the question of negligence or liability. The sole issue at the second trial was the amount of the damages. I was not surprised to hear the second jury's foreman return a verdict for $8,500 which the insurance carrier for my client eventually paid.

One of the ironies of our present accident litigation is that when the amount at stake is so large that a jury, in order to protect the rights of the defendant as well as the plaintiff, should be all the more careful to follow the rules of negligence law as laid down by the court—just then does it disregard those rules. In fact, there is a distinct inverse relationship between the degree of the injury and the extent to which a jury applies the substantive law of negligence.

Let us take my adversary in the courthouse corridor. He knew he had little cause to worry about the rule of contributory negligence in a broken back case. He would not have been so confident had the injury been a bruised ankle which had cleared up within a few weeks. He would have been still less confident had the case involved only $25 property damage to his client's automobile. He knew, as every trial attorney of any experience knows, that the greater the injury, the less a plaintiff's attorney need fear the defense of contributory negligence. He knew too, that in so far as proving the defendant's primary negligence was concerned, the severity of the injury would make up for any inability on his part to establish his case by a preponderance of the evidence. Now why do we almost invariably find this inverse ratio?

Let us assume Jones and Smith are two laborers who are driving their respective uninsured cars to work. The cars collide at an intersection. No one is hurt but there is some property damage to both cars. Jones sues Smith and Smith counterclaims. The evidence, as

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only in negligence cases where the original verdict is inadequate. The same practice prevails here in North Carolina, although the local Supreme Court has on occasion admonished trial judges to use this discretionary power with caution, lest injustice be done. See Jarrett v. Trunk Co., 144 N.C. 299, 56 S.E. 937 (1907); Benton v. Collins, 125 N.C. 83, 34 S.E. 242 (1899).

usual, is conflicting as to who caused the accident. The court charges the jury that in order to succeed Jones must establish his case by a preponderance of the evidence, etc. He then tells them that if Jones has been guilty of contributory negligence he cannot recover at all. He makes the same sort of charge as to Smith's counterclaim. The jury is in doubt—neither Jones nor Smith has sustained the "preponderance of the evidence" burden. In some way the jury may have gathered that neither one of the litigants is insured. There is no practical reason, therefore, to favor either party. There is no catastrophic injury crying for relief. No emotions have been aroused. The jury, in this ideal case, coolly and deliberately applies the rules of law as laid down by the court and brings in a verdict of no cause for action as to Jones' main case and Smith's counterclaim. Here, at least, justice has been done in accord with our common law rules of negligence.

But now let us assume another accident. The plaintiff this time is Mary Lou, a pretty stenographer, who was driving herself to work. The driver of the other car involved is Frank Novak, who was then on the business of his employer, the United States Steel Corporation. The acts of negligence have been identically the same, both in nature and degree, as in the case of Jones v. Smith. There is the same conflict in the evidence. But this time fate has operated differently. Frank Novak was not hurt at all; the car of the United States Steel Corporation was only slightly damaged. But the collision caused Mary Lou to lose control of her car, it swung across the road into a telegraph pole and Mary's face was so badly cut with flying glass that she has suffered a horribly disfiguring scar and the loss of sight in one eye. In the subsequent action of Mary Lou against the United States Steel Corporation can we rest assured that there will again be a verdict of no cause of action? Every judge, every trial attorney and every insurance adjuster knows we cannot. The odds are definitely that the young lady will recover.

Assuming we have an equally intelligent jury as in the Jones v. Smith case, what then has happened to the law of negligence as given to the jury by the court? The answer is simply that the jury has said, "What the judge told us may be the law but we are not going to apply it!" In both cases the jury was in doubt as to who was responsible for the accident. Under the law they should have resolved that doubt against Mary Lou. But is it the natural course of human conduct that man should resolve a doubt against the maimed plaintiff who cries for relief? It surely is not. Every juror will sleep better when he goes home at night satisfied that although he was in doubt he gave the breaks of the game to the injured party. Even had the defendant not

been the United States Steel Corporation, the juror, believing that perhaps both parties were responsible for the accident, would feel that a sense of justice requires each should bear a part of the loss which fate has cruelly placed on the shoulders of only one. And so Mary Lou would get a verdict which while probably not for the full amount of the damages would at least result in the defendant who escaped unharmed from the accident sharing the loss. The jury would apply its own theory of comparative negligence although such doctrine might not prevail in the particular jurisdiction. The jury follows its own sense of what is fair and socially desirable. Lawyers anticipate such action on the part of jurors and act upon it in valuing cases for settlement.[6]

We will have more to say about the nature of the injury as a factor in determining liability later on when we discuss conduct of counsel. The suggestion in the preceding case, however, that the defendant was the United States Steel Corporation leads to a discussion of our next factor.

The Type of Defendant

It is an axiom among courthouse lawyers that the public service corporation, such as a railroad or light and power utility, starts off to the trial court room with two strikes against it merely because of what it is. The same is true for all large private corporations. Trial counsel know that the burden of proof does not rest on the plaintiff who has suffered personal injuries but that it is shifted to the corporate defendant as soon as the case is called for trial. This shift is not recognized by the law in the law books. It is not acknowledged by the trial judge who still charges the jury that the burden is on the plaintiff but it is court room law to every negligence lawyer whether he is trying his case for or against the corporate defendant. It is acted upon by every insurance adjuster who knows he will have to pay more to settle a case against the United States Steel Corporation or the Public Service Corporation of New Jersey than he would if the same litigation were against John Doe.

It will make little difference how the trial judge expounds the substantive law of negligence. It will be useless for him (in tacit recognition of the shift of the burden to the defendant) to instruct the jury that they are not to be influenced by the wealth or relative economic position of the litigants. The jury will not apply the substantive law of negligence in the same way in the case of the corporate defendant as in

[6] See Eldredge, Modern Tort Problems 240 (1941). Mr. Eldredge is fully convinced that jurors apply the more equitable rule. He finds the old rule of contributory negligence as a complete bar is distinctly outmoded and legislation is suggested as a remedy.

that of the individual. If a corporate defendant receives a verdict from the jury, and occasionally that does happen, it will not be because the plaintiff has failed to sustain his affirmative case by a preponderance of the evidence but it will be because the corporate defendant has made an overwhelmingly strong case in its own defense. It will be because the defendant has sustained the *jury imposed burden* of showing itself free from negligence and in most instances establishing by a substantial preponderance of the evidence that the accident was caused solely by the plaintiff's own fault.

Many a juror would resent being told that he applies one law for the rich and another for the poor. We like to think of ourselves as people who hand out justice evenly without favor. Of course there are always those who freely advocate a "share the wealth" program and that would be sufficient to explain their attitude toward the large corporation. But a considerable percentage of our jurors do not have that philosophy and yet, nonetheless, decide against the large corporation in direct disregard of the law as declared by the trial judge.

An explanation for this attitude on the part of the fair-minded juror is found in the economic position which the large corporation holds and which enables it to pass on the cost of a given verdict to the public in increased rates for its services or prices for its products. While the amount of the verdict is thus ultimately borne by each of us, the actual burden on any of us is so infinitesimal as to go unnoticed. In short, the juror has said that he, as a member of the public, is willing to contribute an infinitely small amount so that the injured plaintiff might be made whole. After all, in the great bulk of the cases the plaintiff was injured merely because, being human, he could not at all times exercise the care of that mythical "ordinary, reasonable, prudent man." Surely, in an era when paternalism and social security are the guiding principles of our political theorists this attitude of the juror is wholly understandable. In fact, the juror is merely applying a policy which has already been given legislative sanction in our Workmen's Compensation Acts. We consider such legislation as our next factor.

Workman's Compensation Legislation

Workmen's Compensation Acts have now become so common that practically every juror knows an employee injured while on the job may recover compensation for his injuries even if the employee was himself negligent and the employer free from negligence. The juror knows that had Frank Novak of our previous case been injured his employer, the United States Steel Corporation, would have been called upon to compensate him for his injuries irrespective of fault. If compensation is sanctioned by the legislature for Frank is there any reason

why compensation should not be given to Mary Lou? The juror knows that had the young lady been on the business of her employer at the time of the accident instead of merely going to work she would have received compensation. He is impressed with a legislative desire to protect the injured employee; he is aware of legislative sanctioned liability without fault; he now sees a case which within the spirit of this legislative policy calls for relief. The result is he becomes legislator; he discards the common law rules of negligence and in his own imperfect but effective way writes an automobile injury compensation act. He has stepped ahead of the judges and anticipated the acts of the legislature.[7]

INSURANCE

One of the most powerful non-legal factors which tends to result in verdicts contrary to the legal rules governing accident litigation is knowledge, on the part of the jurors, that the defendant is insured against an adverse verdict. Once this information has reached the jury (and as we shall see it may do so in a variety of ways) the juror no longer pictures before him the individual defendant but rather the financially responsible insurance company. All the forces which work against the large corporation defendant again come into play with the added factor that the insurance company has been paid for its coverage and, as the juror sees it, must necessarily have contemplated the payment of unfavorable verdicts against its assureds.

It is a common impression among laymen that if the prospective defendant in an automobile accident case is insured all is well. There is nothing to be done now but to make a claim and have the insurance company pay. The fact that the obligation of the insurance company depends, in the first instance, on a finding that the insured has been negligent and the plaintiff free from contributory negligence is ignored. Even the insured, on occasion, although he himself has been free from negligence assumes that his insurance company will pay the injured party. Sometimes an unconscionable assured will, with apparent equanimity, notify his insurance company that he was responsible for the accident so that the claimant who was at fault, but the only person injured, may collect. This practice has been engaged in by men of otherwise good repute in their community.

[7] See Stern, *Negligence as a Basis of Liability in Automobile Accidents*, 14 PA. B.A.Q. 6 (1932). Judge Stern reveals what appears to him to be the hopeless inadequacy of negligence law as a basis of determining liability in automobile accident cases. A statute fashioned after the Workmen's Compensation Acts would promote greater justice and would certainly do much to eliminate the inequities that follow from jury prejudices and the "breaks of the game" in the ordinary accident litigation. See also COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN SOCIAL SCIENCES, COMPENSATION FOR AUTOMOBILE ACCIDENTS (Feb. 1932).

The tremendous advantage to be gained by a plaintiff in having the jury apprised of the defendant's insured status has caused some plaintiffs' counsel to resort to a variety of tactics—all designed to communicate this information to the jury. Let us consider some of them.

If a prospective juror is an employee of the insurance carrier which would be called upon to pay any verdict entered against the defendant it is apparent that he may not be unbiased and should be excused from serving on the particular case. In some jurisdictions, therefore, the plaintiff's attorney is permitted to ask a juror on his *voir dire*, "Are you employed by the X Automobile Liability Insurance Co.?" Or the question may be put even more generally, "Are you interested in any automobile liability insurance company?"[8]

The purpose of this question is clear to everyone—except some trial and appellate judges. Had the attorney desired to learn of the juror's employment, rather than to inform the jury of the insurance factor, he need only to have asked, "By whom are you employed?" In fact, an attorney with any sort of investigation of the jury panel already has this elementary information.

It is interesting to note that the very courts which permit insurance to be brought to the jury's attention in this quite effective manner repeatedly affirm that "evidence that a defendant carried indemnity insurance is incompetent."[9] It is difficult to distinguish between the effect of the question asked of a prospective juror, "Are you employed by an automobile liability insurance company?" and the question that cannot properly be asked a defendant, "Did you carry automobile liability insurance at the time of the accident?"

Not infrequently a plaintiff's attorney informs the jury of the insured character of the defendant by asking his client, "You say you were examined by Dr. Jones. Did any other doctor examine you?" The plaintiff replies, with or without the aid of preliminary coaching, "Yes, the doctor for the insurance company examined me." Immediately the defendant's attorney is on his feet and demands a mistrial. If the court is satisfied the "slip" of the plaintiff's tongue was not an intentional disclosure of insurance the mistrial may be denied. Some courts have naïvely stated that the prejudice caused by the men-

[8] See Bell v. Panel Co., 210 N.C. 813, 188 S.E. 621 (1936); Johnson v. Transfer Co., 204 N.C. 420, 168 S.E. 495 (1933); Fulcher v. Lumber Co., 191 N.C. 408, 132 S.E. 9 (1926); and Notes, *Bad Faith of Counsel as a Basis for Granting a New Trial Where Fact that Defendant Was Insured Was Brought to the Attention of the Jury*, 39 MICH. L. REV., 608-613 (1941); *Inquiries Made on Voir Dire as to Interest in an Insurance Company*, 35 MICH. L. REV. 338 (1936); *Questioning Jury on Voir Dire Regarding Relation to Insurance Company*, 30 MICH. L. REV. 981 (1932); *Right to Question Juror as to Financial Interest in Insurance Company*, 87 U. OF PA. L. REV. 234-235 (1939).

[9] Bell v. Panel Co., 210 N.C. 813, 814, 188 S.E. 626 (1936).

tioning of insurance is "neutralized" when the trial judge instructs the jury, "Dismiss it (the insurance) from your mind and erase it from your memory. That is your duty and I so instruct you."[10] But the damage has been done and no juror can erase from his memory the fact that apparently the defendant is insured.

Another method employed by plaintiff's counsel is the following question, "What did the defendant say to you at the time of the accident?" Answer, "He said he was sorry the accident happened, that it was his fault and he would report it to his insurance company." In fact, the way in which the insurance may be brought to the attention of the jury in some jurisdictions without resulting in a mistrial is only limited by the ingenuity of counsel.

Not only does the insurance factor determine the liability of a defendant before a jury but it also frequently fixes the amount of the recovery. On more than one occasion I have heard the jury return a verdict of $5,000 in an automobile accident case. Later in talking with some of the jurors I was told, "We didn't bring in any more because we figured the defendant only had a five and ten policy."

Types of Jurors

Whether or not a defendant will be called upon to pay damages and to what extent is necessarily governed by another non-legal factor—the type of jurors. It is a common belief among trial attorneys that the white collared citizen, the merchant, banker, accountant and the professional man in general makes a better juror from the standpoint of the defendant and that the person who comes from the lower social and economic brackets makes a better plaintiff's juror. The greater the intelligence of the juror the more likely is he to pay attention to the substantive rules of law laid down by the judge. Certain racial types of persons are subject to greater emotional appeal than others. A juror's profession may on occasion cause him to favor the plaintiff or defendant. Many attorney's believe the non-moneyed class of juror to be liberal with the money of others which of course is desirable from the plaintiff's viewpoint. On the other hand, the merchant realizes that tomorrow it may be he who is being sued because a customer slipped on the sidewalk in front of his store. He tends to look after the interests of the defendant.

There is, of course, no hard and fast rule.[11] But throughout the entire process of selecting jurors counsel are consciously endeavoring to pick that class of juror who will be favorable to his side of the case.

[10] Lane v. Paschall, 199 N.C. 364, 154 S.E. 626 (1930); Holt v. Oval Oak Manufacturing Co., 177 N.C. 170, 98 S.E. 369 (1919).

[11] An excellent discussion of what the author calls the "psychological make up" of jurors is found in Goldstein, Trial Technique 152-200 (1935).

Assuming then that the entire panel is made up of those who would normally be deemed "plaintiff's jurors" the chances of the defendant are slim. Much will depend, therefore, on the method of selecting jury panels and the ease with which the white collared class of juror may be excused from jury duty so as to leave a panel composed chiefly of jurors from the lower social and economic classes.

During the trial of a case the complexion of a jury may be such as to induce the defendant to raise his offer of settlement and dispose of the case without trusting to what appears to him to be an unfavorable jury. The character of the jury, a wholly non-legal factor, materially influences the settlement of a pending case as well as the nature of the verdict returned.

Quite apart from characteristics of certain types of jurors as a class are the varied experiences of life which have molded the outlook of each individual juror. A juror's own experience in litigation or that of members of his family will greatly influence his attitude toward the present litigants. His own physical condition will have a bearing on his verdict. The juror who is himself incapacitated as a result of an accident is inclined to be sympathetic toward a disabled plaintiff. A juror who by virtue of his occupation as a bus driver has been confronted with the negligence of motorists and pedestrians is more apt to find contributory negligence than a juror who has spent his day on the farm. And so all these non-legal factors play their part in determining the attitude of the individual juror. When as a result of discussion in the jury room the personal inclinations of the various jurors are resolved in an unanimous verdict we have a product which is most certainly founded on the non-legal factors mentioned. It may also be in line with the legal rules declared by the court. It may be entirely contrary to such rules. It may be contrary to the reasonable expectations of counsel on both sides of the case.

I will illustrate the last sentence by an experience I had while defending a life insurance company in a suit on a $500 industrial policy which had been issued to the widowed plaintiff's husband. Under the law as declared by the New Jersey Supreme Court it was my position that the policy was void by virtue of a breach of certain conditions contained therein. The plaintiff's position was that I was obliged to prove intentional fraud on the part of the assured. I was satisfied that if the trial judge followed the decisional law of the state he would direct a verdict for the defendant. Both counsel for the plaintiff and I were equally satisfied that if the judge permitted the case to go to the jury there would be a verdict for the plaintiff.

When the case was called for trial a jury composed of both men

and women filed into the box. Fully convinced that if the case went to the jury I would lose the verdict, I had no particular concern as to the nature of the jury and indicated my acceptance to the jury as drawn. The trial proceeded and during the course of the examination of one of the plaintiff's witnesses the investigator employed by the insurance company leaned toward me and said, "We should have excused juror number five. She is the lady in black. Her husband recently died." I told him not to worry, that if we didn't get the directed verdict in our favor from the court the jury would decide against us irrespective of the presence of number five.

The court denied my motion for a directed verdict and left the case to the jury which retired at approximately 4:00 P.M. I anticipated they would quickly return but much to everyone's surprise the jury did not report back until 6:30 P.M. at which time they announced they could not agree. Next to a verdict for the defendant, a defense attorney likes best a disagreement. I knew that my prospects of settling the case at a favorable figure were now substantially increased.

As I was leaving the courthouse a woman came up to me. She was juror number five. "You do not know me," she said, "but I thought you would be interested to know that all of them wanted to bring in a verdict for the plaintiff but me. I held out for you." I was nonplussed. Here was the lady in black against whom I had been warned by the insurance investigator and now she was the one who had brought us the next best thing to victory. I indicated my appreciation and in response to my query as to why she favored the defendant she said:

"Well, a good many years ago I knew your grandfather. He did me a real favor when I was a young girl and I was never able to pay him back. When it occurred to me that now his grandson was trying a case, I made up my mind that I would return that favor and so I held out for you."

Counsel

The character and ability of counsel representing the litigants necessarily has a great deal to do with whether or not a defendant will ultimately be called upon to pay damages. Even assuming that both counsel are of equal legal learning and ability there are certain attorneys who have greater success in swaying jury sentiment than others. To the extent that counsel exerts this influence the substantive law of negligence may suffer. Whether by a calm persuasive conversational approach or by emotional histrionics counsel leads the jury into his way of thought is immaterial. The important fact is that counsel is influencing the jury to decide his way and his way *may or may not*

be the way that the legal rules and facts produced at the trial would indicate.

Jurors enjoy the conflict between counsel. They watch them as they would gladiators in an arena. They take sides albeit they may be unconscious they are so doing. It may be they sympathize with the young inexperienced lawyer. Perhaps they are overcome by the dignified eloquence and assurance of a staid member of the bar. A juror may favor one or the other counsel because he knows him or his family personally. Counsel may even have represented him in times past. In rural communities it is not always easy to obtain a jury panel in which there are not a substantial number of jurors who have either had social or business relations with one of the counsel involved.

Although lawyers frequently with ostentation excuse a juror because he is known to them by reason of business or social relations, it is common practice for out-of-town counsel to engage the services of a well-known local attorney as associate counsel. The duties of this associate are to draw the jury and to "sit in" on the case. Occasionally the associate may deliver the summation. Primarily, his function is to be seen by the jury. Experience of counsel has proven that this use of local counsel is most beneficial to the client represented by the non-resident attorney.

Occasionally one finds that a political connection exists between particular counsel and the local trial judge. The latter gentleman may be indebted to counsel for his appointment or election. Such a political relationship cannot be ignored. I recall another instance when I was defending litigation on a life insurance policy. The attorney for the plaintiff and I were both from the same city. The trial was to be held in a county some sixty miles distant where neither of us had any connections and both were equally unknown to the local trial judge. The case was such that I believed a nonsuit would be in order. At the end of the plaintiff's evidence I made the necessary motion. The court quite properly granted the nonsuit. While counsel for the plaintiff and I were returning to our offices he confided to me that he had at all times entertained doubts about his client's case and that he was now convinced it was worthless.

Some months later I received a notice from another attorney stating that the case was being relisted for trial and would come up in a few weeks. I observed that the new attorney was a resident of the same county seat in which the judge sat and was, I had good reason to believe, politically close to the judge. When the trial was had the plaintiff testified just as he had done before. All the rest of the evidence was put in by reading a transcript of the testimony given at the former

trial. The basis of my motion for non-suit was in that testimony and was just as valid at the second trial as at the first. I so moved at the end of the plaintiff's case. This time the motion was denied. I called the court's attention to the fact that the basis of my motion and the evidence in the case was exactly the same as at the previous trial when he had granted the motion. The court stated that even though that might be so he thought it would be better policy to let the case go to the jury and intimated that I would have nothing to fear as he thought the jury would have to find in my favor on the facts. Besides, he added, he always had control over the jury verdict.

The jury found against the insurance company. I then moved to set aside the verdict as against the weight of the evidence. The court reserved decision and ultimately denied the motion. I had no doubt that my unfavorable result owed its existence to politics.

Another situation will illustrate the effect on a defendant's liability of the non-legal factor found in the political relationship of judge and counsel. Judge X presided over a particular court where I had occasion to try many cases. The practice prevailing in his court was that unless either party demanded and paid for a jury trial the trial would be held without a jury. The judge would find both the facts and the law. After trying several accident cases before Judge X I came to the conclusion that my client would have as good a chance before the judge alone as he would have before a jury *unless* a certain attorney, whom I will call Attorney Y, represented the plaintiff. I then found that invariably Judge X would find the facts in favor of Attorney Y's client. As is true in most accident litigation, a trier of the facts can usually justify a finding for either party for in the majority of the cases the fact found depends on who the trier of facts concludes is the credible witness. As a consequence of my experience in this regard, whenever I found Attorney Y represented the plaintiff I paid the necessary fee and demanded a jury trial. This resulted in automatically delaying the case for a year or so because of the crowded jury calendar and had the further effect of inducing Attorney Y to accept a settlement which was suitable to my client.

After a few experiences with me of this type Attorney Y developed a practice which I could not very well combat unless I was to file a jury demand in all cases to be tried in Judge X's court. I found that in some new litigation Attorney Y's name did not appear as counsel for the plaintiff on the complaint as filed with the clerk. But when these cases, in which Attorney A, B, or C might be counsel of record, would come up for trial Attorney Y would appear at the counsel table and announce to the court that he had been requested to try the

case by the plaintiff's counsel of record. It was then too late for me to demand a jury trial and the result of the litigation was determined by the non-legal factor of the political relationship between Judge X and Attorney Y.

THE JUDGE

In the preceding discussion relating to counsel we have seen that the judge plays a non-legal role in the litigation when and if he is subject to political pressures. But even though there may be no political pressure brought to bear on the trial judge, that gentleman by his very attitude in the courtroom can do much to determine the ultimate liability of a defendant through non-legal factors. The court, not infrequently, takes over the examination of a witness who he believes is not telling the truth. The manner in which he questions the witness indicates to the jury the attitude of the judge. He might, in some instances, just as well tell the jury, "Gentlemen, you may do as you like, but it is obvious this witness is not telling the truth." This statement although unspoken is often included in the innuendo of the trial court's charge as he reviews the evidence of the various witnesses. In those jurisdictions where a judge may comment on the evidence it is frequently apparent that he is endeavoring to influence the jury by non-legal factors—by his own impression of the veracity of the witnesses.[11a]

The court's attitude to one of the counsel may be hostile. All this may react unfavorably to the one side or the other. Occasionally, if the judge has been unfair to one side the jury will endeavor to rectify what seems to it an injustice and favor the abused party with its verdict. However, if the jury has been in doubt, an indication by the trial judge as to where he thinks the truth lies will often be just enough to sway the jury over to the court's point of view.

GENERAL ECONOMIC FACTORS

Jurors are very responsive to the economic conditions of the times. During the prosperous twenties plaintiffs' verdicts in accident litigation were numerous and substantial in amount. With the advent of the depression in the thirties jurors became defendant-minded. Many motorists ceased to carry automobile liability insurance. Either the claimant did not institute suit against the non-insured or financially depressed defendant or, if he did so, the litigation was settled for a

[11a] In North Carolina the trial judge may find himself reversed by reason of his examination of a witness *even though he did not intend to convey an opinion as to the veracity of the testimony.* He must use extreme caution lest the Supreme Court find his examination of the witness revealed his personal appraisal of the witness's credibility. See State v. Kimrey, 236 N. C. 313, 72 S. E. 2d 677 (1952).

comparatively small amount and never reached the trial courtroom. When and if a case did go to trial and a verdict for the plaintiff was returned, the size of the verdict was considerably less than returned in similar cases during the twenties. The juror was loath to award large sums when prices were declining and the dollar was in short supply.

At the present time when we have an excess of purchasing power and are in the throes of inflation we find the reverse process at work in the jury room. Jurors take into consideration that the dollar is now worth but a fraction of its former self in purchasing power. The $20,000 verdict of today will barely afford the injured plaintiff the relief found in the $10,000 verdict of yesterday.[12] Not only do periods of prosperity and inflation result in larger verdicts, but they result in more verdicts for the plaintiffs because jurors know that the corporate defendants are making money, have the money and can pay.

Having thus far discussed non-legal factors, let us now turn to a consideration of some of the legal rules and examine the operation of those rules either independently or in conjunction with non-legal factors at the various stages of litigation.

The Legal Cause of Action

When the client has finished relating the story of his accident to his counsel the attorney may do one of two things. He may immediately file suit or he may endeavor to negotiate a settlement without legal action. Assuming no settlement is effected counsel must then draw his complaint. At this stage of the proceedings he is not concerned with the character of the jurors, the presence of insurance or the other non-legal factors mentioned. His one concern is that he draft a complaint which will state a legal cause of action. The client may have been hurt. The injury may have been the result of the defendant's conduct. The client may deem himself entitled to redress. But, unless the facts are such that a legal cause of action can be stated the litigation will soon come to a close. The defendant will demur or make the appropriate motion to strike the alleged inadequate complaint depending on the local practice and if the pleading is found wanting in legal sufficiency it will be stricken. The plaintiff will find himself out of court and without redress entirely by reason of the operation of a legal rule. Non-legal factors have played no part. The legal rule is dominant.

But it is conceivable that even though the complaint does not state a cause of action on the basis of existing statutes or precedents the trial judge may refuse to grant the motion to strike. Assuming the judge's

[12] In Armentrout v. Virginian Ry. Co., 72 F. Supp. 997 (S.D.W.Va. 1947), the trial judge sustained the $160,000 verdict against a charge that it was excessive and stated that both the court and jury were entitled to take cognizance of the rapidly depreciating value of the dollar.

position is not the result of ignorance of existing law, we shall have to look to non-legal factors for the answer to the court's apparent improper action. An off-the-record statement by one of the appellate judges may have given the trial judge cause to believe that old precedents would not be followed.[13] A change in the personnel of the upper tribunal might also lead the trial judge to hope his action will be sustained although it is contrary to existing precedent. This is especially true where the appellate court has heretofore divided on the question involved and the place of one of the old majority has been filled by a new judge whose views are unknown but may be in accord with the old minority. Social and economic conditions of the times may be such as to satisfy the trial judge that a change of the law is in order. Spurred on by these non-legal factors the trial judge breaks the path for the promulgation of a new legal rule. He will create a duty where heretofore a duty did not exist in law.

Establishment of Legal Duty

For the injured plaintiff to have a cause of action in negligence against the defendant there must have been a breach of a legal duty owed by the defendant to the plaintiff. It is a matter of law for the court to determine whether under a given set of facts a legal duty exists. Should the trial judge find there was no duty owing, the complaint will be dismissed or a motion for nonsuit or directed verdict granted. Non-liability will have been established by the operation of a legal rule. Should the trial court, however, rule that a legal duty was owing by the defendant to the plaintiff the case will be left to the jury where the non-legal factors play their part.

Take as an example the case of the plaintiff child who suffered prenatal injuries because an automobile operated by the intoxicated defendant jumped the curb and struck the plaintiff's then expectant mother. Assume that competent medical evidence has been introduced establishing the causal connection between the impact and plaintiff's injury. The jury is prepared to allow the plaintiff damages. But the defendant's counsel moves for a nonsuit on the theory that no legal duty was owing to the unborn child by the defendant. In most jurisdictions the court would agree with the defendant's attorney and grant the motion. In the language of the New York Court of Appeals the

[13] Consider in this connection the approach of the circuit court of appeals in Cooper v. American Airlines, 149 F. 2d 355 (2d Cir. 1945), where Judge Frank refused to follow the law as declared by the intermediate courts of New York and applied what he prophesied would be the law of the New York Court of Appeals, which had as yet not passed on the subject, because, "knowing the sitting judges," he was satisfied they would not follow the decisions of the intermediate courts.

judge might say, "No liability can arise . . . except out of a duty disregarded and defendant owed no duty to the unborn child. . . . "[14]

Notwithstanding its position, the court may appreciate the interests of the plaintiff and add, "Strong reasons of public policy may be urged both for and against allowing the new right of action."[15] It is likely that when the courts are satisfied the relationship between the impact and the child's injuries can be scientifically established so as to reasonably exclude the operation of fraud or superstition the legal duty will be found. Its existence has been repeatedly urged by writers on the subject[16] and in a few recent cases has been recognized.[17] Today, however, under the legal rule prevailing in most courts the defendant's nonliability is established by the court simply declaring that no duty existed.[18]

Since the courts recognize the unborn child in both the criminal law[19] and property fields,[20] the failure to recognize him in the law of torts is doubtless the result of the operation of non-legal factors on the minds of the judges. The fear of fraud, the danger of jurors being guided by superstition, and the lack of confidence in scientific proof have given rise to a legal rule which results in absolving a defendant from liability for an injury he has caused. The rule thus established by non-legal factors prevents the plaintiff from reaching the jury where the operation of other non-legal factors might result in a verdict in his favor.

Interim Between Filing Complaint and Trial

Assuming the complaint stated a cause of action and the answering pleadings have been filed, the case is ultimately placed on the trial calendar. Meanwhile, both counsel for the plaintiff and defendant have been preparing for the battle in court. Ammunition by the way of witnesses committed to the one side or the other has been accumulated. Legal rules relating to the examination of witnesses before trial and

[14] Drobner v. Peters, 232 N.Y. 220, 224, 133 N.E. 567, 568 (1921).
[15] *Ibid.*
[16] Albertson, *Recognition of New Interests in the Law of Torts*, 10 Calif. L. Rev. 461 (1922); Frey, *Injuries to Infants En Ventre Sa Mere*, 12 St. Louis L. Rev. 85 (1927); Notes, 6 Cornell L. Q. 341 (1921), 34 Harv. L. Rev. 549 (1921), 36 Mich. L. Rev. 512 (1938).
[17] See, for example, Williams v. Marion Rapid Transit, 152 Ohio St. 114, 87 N.E. 2d 334 (1949), and Verkennes v. Corniea, 229 Minn. 265, 38 N.W. 2d 838 (1949). In the latter case the court permitted a death action to be brought by an administrator of a child who was killed *en ventre sa mere.*
[18] An excellent collection of cases on the subject will be found in Stemmer v. Kline, 128 N.J.L. 455, 26 A. 2d 489 and 684 (1942). The New Jersey Court of Errors and Appeals divided nine to six on the right of a child to sue for prenatal injuries, the majority following Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).
[19] State v. Walters, 199 Wis. 68, 225 N.W. 167 (1929).
[20] Deal v. Sexton, 144 N.C. 157, 56 S.E. 691 (1907).

other means of obtaining discovery will have been resorted to according to the desires and diligence of counsel. But let us suppose that, despite the interval of time which has elapsed, when the case is listed for trial the injured female plaintiff is still in a cast and her face is covered with fresh scars which are both disfiguring and shocking. Were she to appear before the jury now, the sympathies of those gentlemen would be easily aroused in her favor.

Defendant's counsel, under these circumstances, wishes to obtain a delay of the trial. He wants time to elapse so that the ugly scars will become less disfiguring and the cast be removed before the plaintiff comes to court. To obtain delay he resorts to legal rules or non-legal factors whichever serve best. Some of his tactics may be questionable. He discovers that a witness resides in another state. He makes application to take the deposition of that witness. There will be some delay. The case will have to be put off for the present trial term. Or, should the case actually be called for trial, defense counsel may very conveniently find himself engaged in the trial of a protracted case elsewhere. He cannot very well be present at both trials, and so the court out of courtesy to counsel continues the plaintiff's case. If the defendant's counsel is fortunate, this may result in the trial being put over till the next term of court by which time the cast should be removed and the scars be less disfiguring. Such delay will lessen the likelihood of an exorbitant verdict based on emotional response of jurors and will also decrease the value of the case from the standpoint of settlement.

Conversely, the case may be well at the bottom of the trial calendar. Plaintiff's counsel would like to have it reached at the present term of court. He realizes the jury should see that cast on the plaintiff. He finds that the plaintiff is in dire need of funds. The situation, as he sees it, cries for immediate relief. He serves notice on opposing counsel that he is going to make application to have the case advanced on the trial calendar and disposed of at the present term. The motion is in due course argued and here, depending largely upon local practice and the inclinations of the calendar judge, the case may or may not be advanced on the trial calendar. If it is advanced, if the jury gets the benefit of seeing the cast and the ugly scars, the likelihood of a favorable verdict for the defendant is materially lessened. This jockeying for trial position—sometimes determined by the application of legal rules—sometimes decided by non-legal factors—plays its part in determining the ultimate liability of the defendant.

Selection of Jury

Assuming we have now reached the point where the case is called

for trial and the jury is to be drawn, we find legal rules and non-legal factors operating simultaneously. The method of obtaining the jury panel and selection of jurors is ostensibly controlled by legal rules. Challenges are to be had only for certain causes and within certain limitations. The machinery is established by law. But the actual makeup of the petit jury is determined by a great many non-legal factors. Jury panels are frequently carefully investigated in advance by counsel. This is in some instances done by hiring private detectives to get a full statement of the background of each juror, his religion, politics, employment, accident history, jury service history, family and social connections, experience as a litigant, physical well being, etc.

While the actual process of selecting the jury is carried out in accordance with legal rules, the all important question—should this juror be or not be accepted—is determined by non-legal factors revealed either in the investigation of the jury panel or on the *voir dire* examination. The litigant whose counsel has a detailed preliminary investigation on the jury panel has a distinct advantage over his adversary who is without such information. This is especially true in metropolitan areas. In smaller communities, as has been previously mentioned, it is often the practice for the non-resident attorney to engage a local "associate counsel" who is familiar with the jury panel. Particularly is this true if a substantial amount is involved in the litigation. Whatever the method employed, the selection of the juror is determined by non-legal factors.

The jury having been drawn, the pleadings are then read or opening statements of counsel made depending upon the local practice. The trial proceeds and evidence is admitted or ruled out according to the rules of evidence prevailing. The law of evidence presumably permits the jury to consider all testimony that is relevant and competent. However, there is nothing in those rules which guarantees the veracity of the testimony offered. The statements of a witness may satisfy the relevant and competency tests of evidence law and thus reach the jury. The witness, however, may be either honestly mistaken in what he tells the jury or deliberately committing perjury.

PERJURY

Perjury is more readily committed in accident litigation than in other types of cases.[21] A man who would not think of denying he had entered into a certain contract finds no difficulty in testifying to a speed of thirty-five miles per hour when in fact he was going fifty-five. He has no trouble in stating that he was on his own side of the road when

[21] For a discouraging view as to the ease with which perjury is committed in automobile accident litigation, see Stern, *supra* note 12.

in reality he was straddling the center. The fact that witnesses for the plaintiff in an automobile accident case all claim the defendant came out of a stop street at a fast rate of speed without stopping, whereas the defendant's witnesses all say he stopped, cannot satisfactorily be explained on the theory of honest mistake. While no two witnesses will recollect an accident in exactly the same way, there are certain basic facts which when contradicted on the stand can only lead one to believe that perjury has taken the place of honest mistake or is at least working hand and hand with it.

Not only does perjury result in deceiving a jury as to the true fact situation, but it also effectively renders useless certain legal rules which were designed to protect the parties. The result is that under our present system of determining liability in accident litigation the plaintiff who is prepared to perjure himself (with practical assurance of never being criminally prosecuted) is enabled to reach the jury where he may obtain a favorable verdict while the plaintiff who testifies honestly may find himself denied the benefits of jury consideration. Accident litigation is not unique in this respect. The perjurer in any type of case may reach the jury. But the fact is that accident litigation as now conducted definitely tends to foster perjury of a sort that can rarely lead to the conviction of the witness for perjury.

Consider the case of our friend Mr. Toper. Had he told the truth as to the position of his car at the time of the accident his case never would have been submitted to the jury. He would have established his own negligence. Yet, by simply stating he was on his own side of the road when run into by the defendant, he overcame the danger of the court holding him guilty of contributory negligence as a matter of law and enjoyed the benefits of the jury's verdict.

Res Ipsa Loquitur

Let us examine another field of negligence law. Assume that Mr. Brown has purchased a bottled beverage. He partakes of its contents, notices a peculiar flavor and is made ill because the bottle contains a decomposed body of a mouse. Shocking as the incident may appear, reported litigation from the states of Arkansas, Arizona, Kentucky, Mississippi and North Carolina would lead one to believe that mice have a peculiar affinity for bottled beverages.[22] Every layman would say that Brown should have a cause of action against the bottler. Surely, if he reaches the jury he will receive their verdict. But Brown knows

[22] Eisenberger v. Payne, 42 Ariz. 262, 25 P. 2d 162 (1933); Coca-Cola Bottling Co. v. Davidson, 193 Ark. 825, 102 S.W. 2d 833 (1937); Coca-Cola Bottling Co. v. Creech, 245 Ky. 414, 53 S.W. 2d 745 (1932); Jackson Coca-Cola v. Chapman, 106 Miss. 864, 64 So. 791 (1914); and Enloe v. Bottling Co., 208 N.C. 305, 108 S.E. 582 (1935).

nothing about the bottling of drinks. He is unable to introduce evidence of negligence other than such as may be implied from the very existence of the foreign substance in the bottle.

In most jurisdictions Brown need not be concerned about his lack of proof. The legal doctrine of *res ipsa loquitur* will come to his aid. Most trial judges will instruct the jury that the presence of the deleterious substance in the drink is sufficient for them to draw an inference that the defendant bottler was negligent. They will not be compelled to find for the plaintiff but are at leave to do so. A minority of jurisdictions take the position that the doctrine of *res ipsa loquitur* raises a presumption of negligence which it is the duty of the defendant to rebut by evidence.[23]

In either case Brown will have an opportunity to have the jury determine the extent of his recovery. The legal rule of *res ipsa loquitur* has enabled him to reach the jury even though he had no actual proof of negligence on the part of the defendant. But if Brown should happen to be in North Carolina his position would not be so favorable. This is because the North Carolina Supreme Court has repeatedly declared that in such instances "the plaintiff is not entitled to call to his aid the doctrine of *res ipsa loquitur*."[24] The same court has said, however, that "direct proof of actionable negligence on the part of the defendant is not required. Such negligence may be inferred from relevant facts and circumstances."[25]

Then the question is—what are relevant facts and circumstances? The court answers by saying that the negligence of the defendant may be proved by the plaintiff showing "like products, manufactured under substantially similar conditions and sold by the defendant at about the same time, contained foreign or deleterious substances."[26] The result is that if Brown knows only of his own unfortunate case mere proof of the existence of the mouse in his bottle will not enable him to reach the jury. If he is to succeed he must either prove actual negligence in the bottling of his particular drink (and this he cannot do) or he must introduce evidence of another similar occurence arising under similar circumstances at about the same time.

If Brown should be fortunate enough to have knowledge of such a similar occurence he may offer proof of the same and thus his case will be given to the jury. But if Brown does not know of a similar

[23] See Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936).

[24] Davis v. Bottling Co., 228 N. C. 32, 44 S. E. 2d 337 (1947); Smith v. Bottling Co., 213 N. C. 544, 196 S. E. 822 (1938); Enloe v. Bottling Co., 208 N. C. 305, 180 S. E. 582 (1935).

[25] See cases cited note 24 *supra*.

[26] See cases cited note 24 *supra*.

occurence he must either accept his illness with the knowledge he cannot prove a case against the bottling company or he must search for some sympathetic friend who, feeling the injustice in Brown's position, is willing to perjure himself and testify that at such and such a time he too found a deleterious substance in his beverage produced by the same bottler. Any attorney conversant with the position of the North Carolina Supreme Court on this matter will be obliged to instruct his client that he cannot succeed in the absence of proof of a similar occurrence. Proof may or may not then be forthcoming depending upon whether in fact such similar occurrence did actually take place or is now manufactured for the purpose.

Perhaps the North Carolina rule was originally designed to protect the defendant from the lone plaintiff perjurer who never did find anything in his beverage. Perhaps the court thought that requiring evidence of a similar occurence would assure greater probability of truth. I do not know. But if that be so, it is quite apparent that the position of the North Carolina court would tend to double the perjury in the originally dishonest case and invite the perjury as to a similar occurrence in the honest case. Wherever perjury is resorted to for the purpose of establishing the similar occurrence this non-legal factor succeeds in overcoming the barrier established by the legal rule adopted by the North Carolina Supreme Court. Where a similar occurrence cannot be established and perjury is not resorted to as an escape from the harshness of the legal rule the plaintiff is thrown out of court and the non-liability of the defendant established solely as a result of a legal rule. No non-legal factor has then entered into the picture unless it be that unknown factor which originally induced the North Carolina Supreme Court to rule out the *res ipsa loquitur* doctrine in this type of case.

Conduct Negligent as a Matter of Law

Returning to the automobile accident field let us examine another type of situation. Mr. Black is driving along in the pitch darkness of the night. On the road in front of him a truck is parked without any rear lights or other warning signal. At the same time a car is approaching Black. The lights of the oncoming car momentarily blind Black so that he is unable to see the parked truck ahead and collides with it as a result of which he suffers both property damage and personal injury.

Black institutes suit against the owner and driver of the truck. He alleges negligence in leaving the truck parked on the highway without proper lights. He may even call to his aid a state statute which declares such parking to be illegal and thus establishes negligence per se.

Everyone is sympathetic with Black as he tells his story from the witness stand. The jury is waiting to render a verdict against the truck owner. But on cross examination Black is asked, "Were the headlights on your car lit?" Answer, "Yes." Question, "Then why did you not see this truck on the highway even though it had no lights on it if your own headlights were lit?" Answer, "I was temporarily blinded by the lights of an oncoming automobile."

If Mr. Black had his accident in the State of Florida his attorney might as well pick up his brief case and return to his office for under the decisional law of that state Mr. Black was guilty of contributory negligence as a matter of law and must be nonsuited or have a verdict directed against him.[27] He never will be able to reach the jury which was prepared to be sympathetic. The legal rule that a driver "must not outrun his headlights" operates to dispose of the litigation then and there. If Black's accident had occurred in Washington or Colorado the court would have dealt with him more kindly.[28] The fact that he was outrunning his headlights would be a matter for the jury to consider in determining whether or not Black was guilty of contributory negligence. But a finding either way would be permissible. Black would most likely recover a favorable verdict.

Were Mr. Black to have his accident and bring his suit in North Carolina it would be most difficult indeed to predict whether he would be nonsuited or would be permitted to reach the jury. This is so because the North Carolina Supreme Court has from time to time changed its position in declaring the applicable rule of law. The result is that there are now two lines of authority in this state. By the one Black would be nonsuited. By the other he would reach the jury. Thus as late as 1951 the majority of the court in a four to three decision said, "The plaintiff cannot be charged with contributory negligence as a matter of law merely because he did not stop when the high shining lights of oncoming traffic partially blinded him and interfered with his vision of the road ahead."[29] But in 1952 when sustaining a nonsuit the court declared the legal rule to be that it is the duty of the motorist "in the exercise of due care to keep his automobile under such control as to be able to stop within the range of his lights."[30] There is ample authority for either position in the court's own earlier decisions.[31]

[27] See Spell v. United States, 72 F. Supp. 731 (S.D. Fla. 1947), and Mathers v. Botsford, 86 Fla. 40, 97 So. 382 (1932). The same rule of law has been announced in other states. See Ruth v. Vroom, 245 Mich. 88, 222 N. W. 155 (1928).

[28] See Denver Alfalfa Mill & Products Co. v. Erickson, 77 Colo. 583, 239 Pac. 17 (1925), and Griffith v. Thompson, 148 Wash. 234, 268 Pac. 607 (1928).

[29] Powell v. Lloyd, 234 N. C. 481, 486, 67 S. E. 2d 664, 667 (1951).

[30] Morris v. Jenrette Transport Co., 235 N. C. 568, 578, 70 S. E. 2d 845, 852 (1952).

[31] See, for example, Beck v. Hooks, 218 N. C. 105, 10 S. E. 2d 608 (1940)

Where the decisional law of a state has established fixed standards of conduct, the violation of which is negligence as a matter of law, the liability of a defendant tends to be determined by the legal rule and not by non-legal factors. If the plaintiff has himself violated the standard established by the court it is a foregone conclusion the defendant will not be liable if precedent is followed. The rule against outrunning one's headlights is matched by the "stop, look and listen" rule as applied by some courts in the earlier days of this century under which a plaintiff who failed to stop on approaching a railroad crossing was deemed guilty of contributory negligence as a matter of law and could not recover.[32]

And so we see that in certain jurisdictions the legal rule against the application of *res ipsa loquitur* in bottled beverage cases and the legal rules which establish a standard of conduct, the violation of which is contributory negligence as a matter of law, result in absolving the defendant from liability without regard to non-legal factors.

Legal Rules in Automobile Guest Cases

The insurance factor has been responsible for much of the litigation existing between host and guest, brother and sister, and even husband and wife in automobile accident cases. In all but the rare instance the suit is in reality a friendly action brought only for the purpose of recovering against the motorist's insurance company. While at one time people may have been loathe to appear in court against their close relatives, today there is little reluctance for everyone is aware that sister is suing brother only because brother is insured. In many states it is only necessary for the plaintiff passenger to prove that the defendant driver has been negligent in the operation of his car. In others the plaintiff is confronted with what are commonly referred to as "Guest Statutes."[33] The usual language of a guest statute is to the effect that the automobile host will not be liable for injuries sustained by his guest *unless* the host has been guilty of wilful, wanton, or gross negligence, or has driven in reckless disregard for the safety of others.

If after the plaintiff guest has concluded his evidence the trial judge is not satisfied that the acts of the defendant were so careless as to fall within the terms of the guest statute he will direct a nonsuit.

(upholding the nonsuit), and Cummins v. Fruit Co., 225 N. C. 625, 36 S. E. 2d 11 (1945) (leaving the issue of contributory negligence to the jury). For a partial collection of the cases constituting the two lines of authority, see Tyson v. Ford, 228 N. C. 778, 47 S. E. 2d 251 (1948).

[32] See the now rejected case of Baltimore & Ohio Ry. v. Goodman, 275 U. S. 66 (1927), and the later decision in Pokora v. Wabash Ry., 292 U. S. 98 (1934), which eliminated the hard and fast rule requiring the driver to always stop.

[33] Weber, *Guest Statutes,* 11 U. of Cin. L. Rev. 24 (1937).

The court will find that mere ordinary negligence has been proved and no acts of gross, wanton, etc. negligence have been established. The non-liability follows as a result of the application of the guest statute in a manner which was favorable to the defendant. The uncertainties and difficulties involved in the application of these statutes are obvious. What distinguishes ordinary negligence from gross negligence? When is a careless driver really wilful in bringing about the accident? What differentiates a disregard for the safety of others from a reckless disregard of such safety? There is confusion and disharmony in the cases.[34] Such is the inevitable result of judges interpreting those words in the light of facts developed on the plaintiff's case. One thing is certain—if the court is sympathetic with the plaintiff he will more readily find in the evidence enough to warrant his leaving the case to the jury with instructions under which they in turn could find the host had been guilty of gross, wanton, or willful, etc. negligence. If the court is disposed to look upon guest suits with disfavor he will very likely find that the evidence submitted while proving negligence does not establish that additional something from which wilfulness, recklessness or gross negligence may be found.

Whatever may have been the non-legal factors which have given rise to the attitude of the judge toward this type of litigation they will determine the manner in which he will interpret the character of the evidence and apply the legal rule established by the guest statute. His interpretation, if favorable to the defendant, will establish the non-liability of the host through the legal rule without the intervention of non-legal factors in the jury room.

There is still another legal rule which on occasion operates to defeat recovery by the guest. Just as the plaintiff driver who outruns his headlights is barred recovery in some jurisdictions because he is deemed contributorily negligent as a matter of law, so may a guest in an automobile be denied a recovery if his conduct is such that the court considers him guilty of contributory negligence as a matter of law. And in this connection the courts have said that a guest is guilty of such negligence if he rides with a driver who he knows is unfit because of intoxication [35] or otherwise. In fact, in one North Carolina case a wife, who had sued friend husband for injuries sustained because of the husband's alleged negligent driving, talked herself directly out of court when

[34] See Conant v. Collins, 90 N. H. 434, 10 A. 2d 237 (1939), and the annotations in Note, 136 A. L. R. 1270 (1942), where an excellent collection of cases illustrates the confusion existing in the interpretation of guest statutes. It is practically impossible to determine in advance whether on particular evidence of negligence the court will sustain a directed verdict for the defendant or hold the evidence warrants a submission of the case to the jury under proper instructions as to the character of negligence required to enable the guest to recover.

[35] Wayson v. Gould, 136 Wash. 274, 239 Pac. 559 (1925).

she stated that on most of the trip which had taken several days her husband drove sixty to seventy miles per hour and on one occasion raced with another car; that whenever he drove he looked at "the scenery instead of the road" and that he drives so recklessly that she has to "protest every day out of 365 in a year."[36] Had the good wife's proof not portrayed such a grossly outrageous course of conduct on the part of her husband she would probably have reached the jury for in North Carolina there is no guest statute and proof of ordinary negligence would have been adequate. Establishing too much negligence sometimes proves fatal.

BURDEN OF PROOF RE CONTRIBUTORY NEGLIGENCE

While we have been considering contributory negligence as a matter of law we might now also consider the effect of a procedural rule which places the burden of proving contributory negligence on the defendant or the burden of proving freedom from contributory negligence on the plaintiff. Does the imposition of the burden on one or the other party affect the ultimate liability of a defendant?

Theoretically the answer to the foregoing question might well be yes. Practically, if the plaintiff is enabled to reach the jury, there will be little difference as to where the law places the burden of proof. Let us assume the plaintiff is in a jurisdiction where the burden of proving contributory negligence is on the defendant. The plaintiff proves the primary negligence, the injury and then rests. The defendant introduces proof of contributory negligence. There is the usual conflict in the testimony and the court leaves the question to the jury under proper instructions; namely, that the burden is on the plaintiff to prove the defendant negligent and the burden is on the defendant to prove the plaintiff was guilty of contributory negligence. Whatever the language of the charge as to the burden of proof may be, the non-legal factors set out at the beginning of this paper will operate in the jury room and the verdict will be determined largely thereby.

If the plaintiff should happen to be in a jurisdiction where the burden is on him to establish his freedom from contributory negligence and he merely proves the defendant has been negligent he will of course be nonsuited. But no experienced trial lawyer would be so foolish as to end the testimony at that point. He will question the plaintiff further and establish that the plaintiff exercised due care. Of course, if he cannot do so, the nonsuit will again follow; but the odds are that before a personal injury case has been called for trial counsel for the plaintiff will be well prepared with evidence calculated to establish his client's freedom from negligence. Assuming then that such

[36] Bogen v. Bogen, 220 N. C. 648, 18 S. E. 2d 162 (1942).

evidence has been introduced the case will be placed in the jury's hands where the non-legal factors will operate irrespective of the court's charge regarding the burden of proof.

Last Clear Chance

Ever since *Davies v. Mann*[37] the legal profession has been confronted with the problem of the last clear chance doctrine. Is it applicable in the given jurisdiction? If so, is the application of the doctrine limited to cases of conscious last clear chance or is the defendant to be held to the greater duty imposed on one where the unconscious last clear chance theory is applied? In any case, does the use or non-use of either of these views of the doctrine affect the question of a defendant's liability to an injured plaintiff?

Whether the last clear chance doctrine was adopted as an escape from the harshness of the contributory negligence rule; whether in a particular jurisdiction courts resorted to the doctrine merely to enable jurors to return verdicts against defendant railroads; or whether it was an abortive attempt at comparative negligence is immaterial. The question is how does the doctrine function in practice?

Since the last clear chance theory has most frequently been applied in railroad accident cases it will be appropriate to take an illustration from that field. Assume John Doe has chosen the track of the X Railroad as a comfortable place to take a nap or to sleep off the effects of intoxication. Assume also that the last clear chance doctrine is *not* applied in the particular jurisdiction. Most courts, with little difficulty, would hold that Doe had been guilty of negligence as a matter of law and that, even if the railroad were negligent, Doe's own contributory negligence would prevent a recovery. The plaintiff Doe, or his representative, should Doe have been killed, will be nonsuited or a verdict will be directed in favor of the defendant railroad. The legal rule will have determined the non-liability of the defendant.

Let us next assume that the accident occurs while Doe is taking his nap on the track of a railroad in a jurisdiction which adopts the *conscious* last clear chance doctrine. What is then the likelihood of liability being imposed on the defendant? The plaintiff in such a jurisdiction will be able to reach the jury provided he can prove the defendant, through its engineer or other appropriate servant, knew of Doe's perilous position on the tracks in time to avoid the accident. Knowledge of an engineer or other suitable employee is not easy to prove in many instances. But assuming that the plaintiff does prove the engineer saw Doe stretched out on the track in what the jury can find was sufficient time to avoid the accident the plaintiff will reach

[37] 10 M. & W. 546 (1842).

the jury where the non-legal factors again come into operation. If, however, the plaintiff is unable to prove knowledge he will suffer a nonsuit or have a verdict directed against him and will be no better off than he would have been in a jurisdiction which did not apply the last clear chance doctrine in any form.[38] The legal rule in both jurisdictions will have established the non-liability of the defendant.

But if Doe should have selected a jurisdiction where the *unconscious* last clear chance doctrine prevails in which to take his nap he or his representative will in all likelihood be able both to reach the jury and obtain a favorable verdict.[39] For now the plaintiff need only prove that the defendant railroad could have, had it used due care, observed Doe in ample time to avoid the accident. Since Doe was lying on the track it is practically a foregone conclusion that the jury will find the defendant's engineer could have seen Doe in time to avoid the accident had he exercised due care in maintaining a reasonable lookout. The legal rule—the unconscious last clear chance doctrine—has enabled the plaintiff to reach the jury which will then determine the liability of the defendant largely on the basis of the non-legal factors heretofore mentioned.

Family Car Doctrine

A discussion of the role played by legal rules in accident litigation should include mention of the Family Car Doctrine.[40] The jurisdictions are fairly divided in the application of this doctrine. If Mr. Green is the owner of a car in a jurisdiction which does not apply the doctrine he will run no risk of liability should he permit his son, a competent driver, to take son's sweetheart for a ride. But should Mr. Green happen to reside in a jurisdiction which swears allegiance to the Family Car Doctrine he will find that when son John was taking his best girl out for a drive in Dad's car it was Father's little outing by proxy. Although Mr. Green was not aware of it, son John in driving Mary through the moonlight night was really engaged in carrying on Dad's business!

Here, if ever, is a legal rule created out of whole cloth for the sole purpose of enabling an injured plaintiff to reach the jury in his action against a presumably financially responsible party. Through the operation of the fictional agency embodied in the Family Car Doctrine a defendant who would otherwise be free of liability may have liability

[38] See Panarese v. Union R. R. Co., 261 N. Y. 233, 185 N. E. 84 (1933).
[39] See Pickett v. W. & W. R. R., 117 N. C. 616, 23 S. E. 264 (1895).
[40] See Lattin, *Vicarious Liability and the Family Automobile*, 26 Mich. L. Rev. 846 (1928); Prosser, Torts §66 (1941).

thrust upon him. It is interesting to see how the effect of this doctrine may be avoided in some jurisdictions where it is adopted.

Courts which apply the doctrine uniformly require as a prerequisite to liability that the owner of the car has consented to its use by a member of the family. An interpretation of this consent element has enabled a defendant father to avoid liability in North Carolina which is one of the states committed to the Family Car Doctrine. The son had been given permission to use Dad's car. While driving with his girl friend he had the accident that gave rise to the litigation. The mishap occurred in the city of Raleigh. At the trial the defendant testified that although he had given his son permission to use his car on the night of the accident he had expressly forbidden him to go to Raleigh. The Supreme Court of North Carolina held that since the permission could have been wholly denied it could be given with restrictions as to where the car might be driven. Those restrictions appeared in this case. Hence, while the son was operating the car in Raleigh he was exceeding the permission and therefore the court held the Family Car Doctrine would not apply.[41]

The effect of this case on the parent who has been advised thereof and who feels the injustice of being told his son was on father's business in taking out son's best girl is obvious. He realizes that a mere statement to the effect that son was forbidden to take the car to the town or area where the accident occurred will avoid liability. At the trial son John will not be apt to contradict his Dad. As in other instances where the legal rule is unsound and operates with seeming unfairness perjury is invited.

Proximate Cause

No discussion of accident litigation would be complete without mention of proximate cause. By these most controversial words courts have endeavored to place a limitation on the liability of a defendant for the consequences of his conduct. Practical considerations demand that legal responsibility end at some place in the sequence of events. The boundary line is fixed by the application of the principles embodied in proximate cause.

An accident occurs, fire breaks out and a series of losses variously distant, both in time and space, occur by reason of the defendant's original wrongful act. Under our present practice a court does one of two things. It may say that the defendant's conduct can be found by the jury to be the proximate cause of any and all of the results. In such case it leaves to the jury the task of determining for what

[41] Vaughn v. Booker, 217 N. C. 479, 8 S. E. 2d 603 (1940). *Contra*: Evans v. Caldwell, 184 Ga. 203, 190 S. E. 582 (1937).

results the defendant will be liable. The non-legal factors will come into operation in the jury room. Or the court may say that the defendant's conduct can be found by the jury to be the proximate cause of results A, B, C and D, but as to results E, F and G, the defendant's conduct, as a matter of law, is not a proximate cause.

Whether the line is to be drawn between results D and E or whether it should be drawn between results E and F is determined on a basis of expediency or public policy.[42] Do legal rules or non-legal factors determine what is expedient or good public policy? It would seem that the judges here are themselves influenced by non-legal factors very much as are the jurors. The economic and social background of the judge, the disposition of the judge for or against a given type of litigant, etc., all will influence his decision as to where the line shall be drawn. The judge may in addition be influenced by legal precedent. When as a result of the operation of non-legal factors on the mind of the judge he draws the line and declares as a legal rule that the defendant's conduct is not the proximate cause of results E, F and G we have the non-liability of the defendant for those results determined by non-legal factors which have found expression in a legal rule. And when the judge leaves to the jury the question of whether or not the defendant's conduct was the proximate cause of results A, B, C and D we have a situation where non-legal factors have given rise to a legal rule the operation of which passes the question of liability to the jury where non-legal factors are again dominant.

Conclusion

In the foregoing paper I have endeavored to illustrate how non-legal factors and legal rules function in accident litigation. It would appear that a defendant's liability is not founded in every case on "law", nor is it determined always by non-legal factors. We cannot say that in accident litigation there is liability without fault in every case when the defendant is a railroad or large corporation. Legal rules as well as non-legal factors will here and there operate to prevent such liability. But we can say that in many instances there will be liability without fault which our present legal rules do not recognize and still cannot prevent.

We find that although the judge is more closely bound to the legal rules than is the jury, the formation and application of those rules is

[42] Perhaps no judge has been more frank in acknowledging this approach by the courts than Judge Andrews in his dissenting opinion in Palsgraf v. Long Island R. R., 248 N. Y. 338, 162 N. E. 99 (1928), when he said, "What we do mean by the word 'proximate' is, that because of convenience, of public policy, or a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. . . . It is all a question of expediency."

often determined by the operation of non-legal factors on the mind of the judge. As to the jury, we are led to conclude that although they are presumably hemmed in by the legal rules set forth in the court's charge their verdicts are largely determined by non-legal factors.

It is definitely essential that non-legal factors play an active part in determining the ultimate liability of a defendant. If judges are not to be mere automatons controlled by legal precedent, non-legal factors must influence them in formulating new legal rules. Only in such a manner can law adjust itself to the needs of society. If the law is slow in making that adjustment the jury will subordinate the judge-declared legal rule to what appears to it to be more compelling non-legal factors.

The task of an attorney is not merely to advise on the basis of legal rules. Informing one's client that the plaintiff who has been guilty of contributory negligence cannot recover when in reality he may, or that the burden of proof is on the plaintiff when the jury shifts it to the corporate defendant is not rendering adequate service. *It is only when the attorney makes a careful appraisal of the respective roles played by the legal rules and non-legal factors that he can properly advise his client as to his rights or liabilities.*