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NEW CONCEPT FOR TRIAL OF AUTOMOBILE ACTIONS

BY HAROLD R. PROWELL *

IN THE Magna Carta, in the works of Dickens, and in today's press, the delays in the administration of justice have been the subject of unfavorable comment. The condition is chronic and the advent of the automobile has accentuated the normal congestion of court calendars; but such delays are obviously not an invention of our generation.

With characteristic American ingenuity, the condition has been met, in many jurisdictions, by reforms in adjective law. In most fields of the law, the courts have kept pace with the demands of the times. But in the field of negligence actions—particularly, actions for property damage and personal injuries arising out of automobile accidents—the problem remains acute.

Pennsylvania has made some strides to unchoke the calendars of its trial courts, but the degree of effectiveness of these attempts depends largely on the attitude of the judges in the Courts of Common Pleas throughout the state toward these innovations. It can be stated that there has not been unanimous and enthusiastic acceptance and utilization of the authorized facilities for expediting litigation, by the trial judges in all judicial districts of the Commonwealth.

It must be recognized, however, that the problem is not one that will be solved by the judges themselves, so long as they operate within a system which was not designed to meet, and does not meet, the demands of society as presented by automobile accident cases. It is *the system* which must be revised if the problem is to be met and solved.

Specifically, the jury system is out of step with the requirements of present day litigation of automobile negligence cases. While issue must be taken with those who see a difference in kind between automobile accidents and accidents generally, the press of motor vehicle litigation demands that it be treated as such.

Lest the purists be shocked by a suggestion of revising the jury system as applied to this type of case, let it be said that a *modification only* is contemplated. There is no need, and, indeed, I should oppose a suggestion, to abolish the jury system in order to ease the congestion of our calendars. The basic values of the jury system must be retained even though the traditional

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form of the jury be altered materially to eliminate those factors which seem to render the system unfit for the volume of automobile accident cases.

For example, why do we have twelve persons on a jury? The number itself has no magic—and we have seen many expressions of this thought; for, in many municipal courts, the number of jurors is less than twelve. Coroners' juries are less than twelve; grand juries number more than twelve. The Code, known as the Duke of York's Laws, promulgated in 1664, provided that no jury should exceed seven, nor be less than six in number, except that in capital cases, twelve might be appointed. Furthermore, except in capital cases, a verdict was to be found by a majority of the jury. With Penn's "Laws, Agreed Upon in England", adopted in 1683, came the requirement of twelve man juries and Pennsylvania courts have held that "the substantial features which are to be 'as heretofore' (Constitution of 1874) are the number twelve and the unanimity of the verdict." [1] Yet, even in Pennsylvania, the parties, by agreement, may submit a controversy for trial before fewer than twelve jurors.[2] Juries consisting of fewer than twelve persons are provided for in California, Idaho, Iowa, Louisiana, Montana, New Jersey, New Mexico, North Dakota, South Dakota and Wyoming. Oklahoma provides for trials in courts not of record before six men, and Utah establishes a jury of eight in courts of general jurisdiction. Furthermore, there is, in a number of American jurisdictions, a perceptible movement away from the requirement of unanimity.

The trial of criminal cases before a jury is a fundamental of English as well as American thinking and jurisprudence. History has made it synonymous with the dignity and integrity of free men. And so, we have come to associate trial by jury as an inherent right in *civil* as well as in criminal cases.

Having its origin in Roman law and finding its way into English law through the Normans, the jury was not always a symbol of democracy. But the genius of the English mind shaped it, from the compurgator and trial-by-ordeal and wager-of-law stages, into an instrumentality to "find the facts" in an action at law. It was during the reign of the Tudor kings that the jury became the shield against arbitrary government; and our own colonial experience was merely a reflection of the transformation which had been crystallizing in England.

Yet, in England itself, the concept of requiring jury trials in civil as well as criminal cases has faded, for the use of civil juries has been drastically limited there. A parallel trend manifests itself in America where the growth

[1] Smith v. The Times Publishing Co., 178 Pa. 481, 498, 36 Atl. 296 (1897).
[2] Krugh v. Lycoming Fire Ins. Co., 77 Pa. 15 (1874).

of administrative bodies has been phenomenal. Furthermore, equity cases are largely decided without juries, as are most Orphans' Court matters. Were it not for the provision in the Pennsylvania Constitution of 1874 that the right of trial by jury shall be as heretofore and shall remain inviolate,[3] there is little doubt that Pennsylvania would be following that trend.

One of the important virtues of a jury is that the base of its decision is wider than in that of a decision by a judge alone. One man can be biased by reason of emotion, prejudice, misconception or malice, or err by sheer inadvertence. With a jury of many persons, the likelihood of all being swayed by the same factor is reduced. The eccentricities of the one are balanced and checked by the multiple nature of the jury. The decision of the jury is a composite of the group. This virtue, then, must be preserved as against suggestions for trials by a single judge.

To those who have tried criminal cases before a judge without a jury, it should be apparent that a single judge is no sufficient substitute for the jury. The factors of collective thinking and multiple reasoning, involving, as they do, checks and balances of erratic individual thinking, are lacking. The accelerated tempo of the trial without a jury is a desirable objective to achieve, but it must be sought within the basic framework of the jury concept.

It is for this reason, as well as for others, that the suggestion of substituting a compensation system for our present jury trial system, must be rejected. Whether he be a referee, administrator, examiner or a judge, one-man decisions on the facts of a case should not be recklessly or even deliberately substituted for the system whereby a jury "finds the facts."

Joseph H. Choate, in an address before the New York Bar, stated, ". . . the united judgment of twelve honest and intelligent laymen . . . is far safer and more likely to be right than the sole judgment of the . . . judge would be. There is nothing in the scientific and technical training of . . . a judge that gives his judgment (on questions of fact) superior virtue or value . . . there is something in the technical training and habits of mind of the judge that tends really to unfit him . . . and for his caprice, prejudice, his errors of judgment, there is no (adequate) check or balance. . . ."[4]

By the same reasoning, a panel of legally-trained judges, although preferable to a trial by a single judge, would not serve to bring to the trial the fresh point of view and diversity of thinking that is found in, and is one of the great values of, the jury. A panel of judges tends to reflect a common back-

[3] CONST. art. I, § 6.

[4] MOSCHZISKER, TRIAL BY JURY, p. 71 (1930).

ground, similar habits of thinking and a distinctly professional approach. A court of three judges, for example, might represent, in some respects, a magnification of at least some of the weaknesses of a one-judge court.

The waste of time in trials before juries can be justified only if the results obtained are worth the inordinate expenditure of time and public funds and, in addition, if the same results cannot be otherwise attained. Not only does it require a greater length of time to try a case before a jury, but one must consider the economic loss reflected in the additional fees to the lawyers who conduct the protracted trial (a factor in insurance rates); the immobilization of twelve citizens (jurors), as well as the parties and their witnesses, in their efforts to earn a living; the salaries paid the judge, court attaches and attendants; and the overhead heating (or cooling), lighting, cleaning, and maintaining a court room.

A suggestion for the solution sought may be found in a long established practice in some counties in Pennsylvania, to wit, the use of associate judges who are lay judges, that is, judges not "learned in the law". They do not have the same background or the same scientific and technical training as judges learned in the law.

Of course, the office of a lay judge had no existence at common law [5] nor was it created by the Constitution. In fact, the Constitution of 1874 abolished the office in counties which form separate judicial districts[6]; but the office still exists as a purely statutory creation. (By the Act of April 4, 1834, the Courts of Common Pleas were set up to consist of a President Judge and two Associate Judges). This statutory device has demonstrated its utility wherever it has been used.[7]

A trial court consisting of one judge learned in the law and two associate judges not learned in the law—and all of them elected by the people—would furnish a system of checks and balances and give a composite aspect to decisions on the facts in the case, similar to that of a jury.

Of course, the functions of the law judge and the lay judges might be spelled out with greater clarity than under the present law relating thereto. The law judge might be assigned the exclusive jurisdiction over questions of law with the lay judges acting in only an advisory capacity. On the other hand, the three judges might, by majority vote, pass on questions of fact involved in the trial, that is, perform the functions now assigned to the jury.

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[5] Re Manck, 41 Co. Ct. 683 (Pa.)

[6] O'Mara v. Commonwealth, 75 Pa. 424 (1874); Re Jurisd. of Assoc. Judges, 3 Luz. Leg. Reg. 7.

[7] Glamorgan Iron Co. v. Snyder, 84 Pa. 397 (1877).

The two lay judges would inevitably reflect a contrasting background and a distinct approach to the questions presented, from those of the law judge. The lay judges would, by reason of their dissimilar training and contrasting social and business contacts, bring to the court that freshness and spontaneity of thought and mental attitude which is often lacking in a trial judge learned in the law and immersed in legal tradition.

By this device, we preserve and retain in good measure the composite aspect of a jury verdict, and at the same time gain the greater simplicity and speed of a trial without a traditional jury. For the present, and until the experiment gives an expectation of success in expediting the disposition of the present backlog of automobile accident cases, it should not be extended to other types of cases or other fields of law.

It will be noted that no list of qualifications has been advanced for eligibility to the position of lay judge. This is deliberate. If it were to be proposed that certain educational requirements be established, we should decrease pro tanto the value of the lay judges to the panel. It might be tempting to suggest that one lay judge be a medical doctor and the second an engineer or accountant or member of some other profession. Such a course, however appropriate in theory, would pack the court with professional attitudes rather than bring to the court the unfettered approach of the layman selected from a cross-section of the community.

The members of the legal profession owe a duty to the public, as well as to the profession, to expedite the administration of justice, without sacrificing civil rights. It is apparent that any movement toward abandoning those bulwarks of human liberties with which our Anglo-Saxon tradition has endowed us, will be (and, of right, should be) scrutinized with a suspicious eye; but, there must be a greater acceptance and more general use of pretrial conferences and discovery procedures, as well as other time-saving innovations, if the substance of justice is to be retained. A court with a chronically back-logged calendar is better than no court at all—but, to more than a few litigants, it amounts, in effect, to a denial of civil rights.