

Tulsa Law Review

Volume 1 | Number 2

1964

Medical Prophecy and the Single Award: The Problem and a Proposal

Ralph C. Thomas

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Ralph C. Thomas, *Medical Prophecy and the Single Award: The Problem and a Proposal*, 1 Tulsa L. J. 135 (1964).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol1/iss2/3>

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

MEDICAL PROPHECY AND THE SINGLE AWARD: THE PROBLEM AND A PROPOSAL

Ralph C. Thomas*

Personal injury litigation is the target of much criticism. This criticism ranges from thoughtful analysis to uninformed vituperation. Emphasis is placed on its delay, uncertainty, lack of scientific method and disregard of social or economic considerations. Blame is conferred impartially, or at least generously, upon all its participants: lawyers, litigants, witnesses, juries and trial judges. Although no one of its participants is likely to emerge unscarred from an examination of the problem, it is submitted that even if all were

*Mr. Thomas received his B.A. in 1949 from the University of Tulsa and his LL.B. from the University of Oklahoma in 1955. From 1950 to 1955 he was in private practice before he became professor of law at the University of Tulsa. This article is based on a paper prepared for a seminar on Medical Proof in Legal Proceedings presented at New York University.

the best disposed, the instrument they work with is so imperfect that most of the deficiencies would remain.

this element which conditions the whole process.

Assuming that we often fail to see a familiar object in all its detail until we consciously focus on it, this study will begin with a necessarily brief dissection of the damage elements of personal injury litigation. The damage element is singled out because it is

Personal injury damages are compensatory rather than punitive. They follow only on a finding of liability. This is the articulate premise of personal injury litigation.¹ Compensatory damages partake of the notion of repairing the economic imbalance caused by the tortious act. Their function is restoration of money expended for palliative action taken as the result of trauma, compensation for lost earning capacity and compensation for non-economic deprivations such as pain and suffering and physical impairment which has not caused economic loss. The community has a stake in the reparation of the economic imbalance caused by debts and deprivation of earnings. The allowance of compensation for non-economic

¹That there are inarticulate premises such as retribution and covert conduct regulation is recognized. That the fault concept as a basis for award is under attack is likewise conceded, but it is beyond the scope of this paper to treat of these factors in detail. It is against the articulated premise that the significant phenomena will be measured.

loss is a recognition of social and psychic factors as distinguished from purely economic ones.²

A singular, but commonplace, fact is that the award is made in a lump sum and is payable, or at least is due in toto at the time of the award. Any variables which would affect the amount of the award must be presented at trial. Any mistake in proof latent in the factual situation at trial time does not affect the verdict unless brought to the court's attention within the compass of the short period of time allotted for perfecting an appeal on the ground of newly discovered evidence. This rule, calling for a single determination of liability good for all time, is based upon the interdict against splitting causes of action.³

Reliance on a single trial provokes considerable strain. The participants, lest they suffer irreparable error, will ask, or refuse, or give too much or too little. Perhaps the most pernicious influence of the guessing game this rule imposes on the jury is that many of their verdicts result from compromise, thereby, in a factual sense, insufficiently compensating plaintiff in some cases and over-compensating him in others.⁴

An analysis of the elements of damage in the typical personal injury action reveals that they divide principally into six categories.⁵ These categories are past medical expenses, prospective medical expense, loss of earnings in the past, prospective loss of earning capacity, past or experienced pain and suffering, and future or prospective pain and suffering. Of these categories, such medical expense and loss of earnings as have been experienced in the past are capable of satisfactory proof in the sense that they need not be established by the unsupported oral assertions of plaintiff himself,

² TRACY, *THE DOCTOR AS A WITNESS* 135-137 (1957).

³ This rule stems from *Fitter v. Veal*, 12 Mod. 542, 88 Eng.Rep. 1506 (1701). Plaintiff, who filed a second suit when a piece of bone came out of his head after final judgment, was denied a second trial, the court holding that it was or should have been within the intendment of the first trial to compensate him for all eventualities. This case has been generally relied on. See *Eller v. Carolina & W. Ry.*, 140 N.C. 140, 52 S.E. 305 (1905); and SEDGEWICK, *DAMAGES* § 84 (9th ed. 1912). The inadequacy and danger of rule is noted in MAYNE & MCGREGOR, *DAMAGES* 186-188, (12th ed. 1961).

⁴ Rectification of errors by the litigants after they become apparent is, of course, possible, although unlikely. The plaintiff whose pessimistic prognosis is proven wrong is free to refund. In like fashion the defendant who sees that plaintiff's injuries were more grave in fact is free to enhance. It would be a good guess that incidents such as these are so rare that few lawyers have seen one. Basically the non-existence of such conduct shows that there is little co-incidence between damages sought or defended against and human compassion or morality. In addition to human cupidity there is another reason why these amelioratory actions do not occur. When the occasion arises the parties may not be able to rectify. The plaintiff may have spent all his award. The defendant may have dedicated his money to other pursuits after the passage of the danger of damage dedication.

⁵ That there are others is recognized. See *Ratner v. Arrington*, 111 So.2d 82 (Fla.App. 1959) where plaintiff asked for damages for "inability to lead a normal life," as well as for physical disability and loss of earning capacity.

but may be established by other witnesses as well as by documents and records. The remaining categories are subjective in the sense they do not lend themselves to precise measurement and award by a confident trier of fact.

Pain differs from pathological lesions in that it does not manifest itself to the eye, ear or touch. It must either be shown by other means or go unacknowledged unless the claims of plaintiff are accepted for other reasons than inhere in satisfactory real proof. Accordingly its establishment is attended by considerations which do not obtain in establishing the cognizable physical trauma. The dilemma of the patient who seeks to verbalize his pain is thrown into sharp focus by the medical position that no one can tell by any known means when one is or is not suffering pain.⁶

There would seem to be a high content of validity in the theory that pain and suffering ordinarily have secondary manifestations which are reliable factors in assessing plaintiff's complaints. To the extent that this is acceptable, this theory or technique serves to refute the assertion that no known means exists for ascertaining when another is suffering pain. Typical objective symptoms are: emotional depression, physical weakness and change of facial expression at the onset of pain, involuntary muscle spasm, perspiration and abnormalities of pulse and blood pressure under the stimulus of pain.⁷

As the medical witness's duty is evaluative with respect to pain, its recognition and quantification is an important part of forensic medicine. Because pain is highly subjective and difficult of identification and measurement⁸ it is often scamped by practitioners of industrial medicine.⁹ As a result, one indignant lawyer has advocated that the doctor should be warned against minimizing or ignoring the patient's complaints of pain lest he be subjected to the "fiercest type of cross examination."¹⁰

In addition to evaluation of pain and its concomitant disability, the diagnosis of objective findings carries with it the duty to

⁶ Schlemmer, *The Doctor's Role in the Medical Legal Case*, 14 U. DET. L. J. 184, 186 (1951).

⁷ Kornblitt, *Proof and Disproof of Exaggerated Disability in Personal Injury Cases*, 1955 CURRENT MED. 27, 28.

⁸ Serious attempts to meet this burden are reflected in such devices as a machine for measuring pain, the Dolorimeter. See the description in CURRAN, LAW AND MEDICINE 525 (1960); and Kornblitt, 1953 CURRENT MED. 2, suggesting a graduation of units of pain, "dols," from a value of one to ten. A grade of ten, for example, is assigned to a burning cigarette held against the skin, a blow to the testicles, and to some labor pains during the second or third stage of delivery. Two dols are assigned to most toothaches, most back injuries, and to arthritis. Kornblitt also suggests that the tolerance of pain is affected by body type and disposition, the ectomorph suffering most and the mesomorph least.

⁹ Barritt, *The Evaluation of Subjective Disability*, 25 IND. MED. SURG. 417 (1956).

¹⁰ Longan, *Preparation of Medical Testimony*, 17 MONT. L. REV. 121 (1956).

evaluate the attendant disability in terms of quantity and duration.¹¹ A physician aware of the prophetic and evaluative demands of the trial must provide a prognosis good for all time or someone, either plaintiff or defendant, suffers. The medical witness must not only establish the residual disability and its probable duration, but also must testify to the quantum of probable future pain and its estimated life. To say this constitutes a heavy burden is to understate.

A rational approach by both doctor and lawyer recognizes the character of the burden. The impact of injury on the variable factors of personality, the compensatory bodily reactions and the difference in the physical and psychological reactions of each individual must be assessed. Recognition must also be accorded that the doctor's own subjective approach colors his diagnosis and prognosis and must be guarded against. These few considerations sketch the alarming outlines of the problem. Some consolation is found in the fact that the doctor may call to his aid the accumulated experience and knowledge of the medical profession and apply the great general average to the individual, as a conditioning factor in particular evaluation.¹²

The problem of causation is a vexing one to the doctor. Doctors complain that medical cause is different from cause in law and that unreasonable demands are made on them to define cause in terms of legal rather than medical concepts. Physicians, it is argued, are occupied with determining in what fashion a human being has met injury only in order to apply the proper corrective and palliative procedures. The law asks them to assign a cause to the pathology they find and to narrow that cause to either include or exclude the asserted tortious act.¹³

One lawyer, in his text for doctors, points out that the hypothetical question addressed to a doctor asks him to base his answer on the "reasonable probability" of the opinion he renders being true. He continues:

"That is a difficult problem for a doctor witness, for he is accustomed to thinking not of probabilities but of scientific proof, which usually is conclusive proof. However, in deciding a legal controversy, we can seldom hope for conclusive proofs. Otherwise, real wrongs would go unremedied. What the law demands of the doctor is his opinion on the reasonable probability of a certain result from the facts submitted to him. The doctor, in testifying, must be careful to keep in mind this distinction between scientific proof and legal proof, and he should not shrink from venturing his opinion if he thinks his conclusion is reasonably probable"¹⁴

¹¹ TRACY, *op cit. supra* note 2, at 125, 134.

¹² *Id.* at 127.

¹³ For a thoughtful discussion of this conflict see Brahdly & Kahn, *Clinical Approach to Alleged Traumatic Disease*, 23 B.U.L. Rev. 238 (1943).

¹⁴ TRACY, *op. cit. supra* note 2, at 45.

This not only takes the doctor outside of his chosen domain, but it introduces him to avenues of thought alien to his experience and training. Particularly is this so in those fields which are really battlegrounds of belief where medical analysis has not stabilized and where opposing theories contend for supremacy.¹⁵

A truly formidable burden is discerned when attention is directed toward the duty of the jury. It is but a truism to say that none of the participants, with the possible exception of the litigants, know the truth in a lawsuit, but it falls the jury's duty to approximate truth and express it in their verdict. Unlike the witnesses who testify in the hope that they will be believed but who have no adjudicatory function, the jury must evaluate, must search for objective truth and must express this truth in terms of money.¹⁶

Although the limits have not been marked out, it would seem that there exists a large area of community tradition about wounds and their pains.¹⁷ Suffering is an item of proof that is little questioned by the jury if the asserted suffering coincides with their experience. When the plaintiff with the mangled or amputated extremity testifies to pain the jury believes because all jurors have had some experience, although possibly misleading, with the pain of bruises and wounds. Kalven's Chicago jury experimentation led him to this generalization:

"Whatever the law's interest in keeping the trial record aseptic, it cannot in fact prevent the juror from augmenting it out of his own experience . . . One recurring instance of this has special relevance for the damage issue. It concerns the juror's reactions to medical testimony and to illness in general. It may be as simple as the juror's identification with the injured plaintiff where he himself or a close friend or relative has experienced a comparable injury . . . It may take the form of grave suspicion of ills less obvious than the broken leg . . ."¹⁸

¹⁵ A current controversy is the relationship between trauma and cancer. See the conflicting opinions of the doctors in the trial transcript of *Menarde v. Philadelphia Transp. Co.* reprinted in CURRAN, *op. cit. supra* note 8, at 89-113.

¹⁶ "The first point that impresses is simply how difficult the job really is. The jury almost always is asked to reach decision on imperfect, incomplete and conflicting evidence. And to a stunning degree this is true where future damages are claimed in the personal injury action. Here the jury is asked to guess the future. How long will plaintiff live? How quickly and how fully will he recover? How long will he need medical treatment? How long will the pain last? . . . This ambiguity . . . disturbs them . . ." Kalven, *The Jury, The Law And The Personal Injury Damage Award*, 19 *OHIO ST. L. J.* 158, 165 (1953).

¹⁷ Two physicians have written: "Certain courts have taken judicial notice that the greater the wound the greater the resultant pain. This is false though appealing logic . . . A very small lesion may produce very great pain, while a much larger wound may produce substantially less pain." Smith & Hubbard, *Doing Scientific Justice: Psychological Reactions to Traumatic Stimuli*, 1962 U. Ill. L. F. 190, 195.

¹⁸ Kalven, *supra* note 16 at 175.

It is in the more exotic injuries that the lingering trauma provides problems of credulity for the jury. When the assertion of persisting pain is made, although the bruise has vanished without trace, belief comes less readily. There is strong suspicion in lay as well as legal minds that the field of perjury in the category of pain and suffering is wide. Curiously the very vagueness of complaints may help a plaintiff in some instances. The inference created that plaintiff is a malingerer backfires when the juror or a trusted relative or friend has experienced the same subjective disorders and met the same seeming medical indifference.¹⁹

The remaining two categories, future medical expenses and loss of earnings, have a high content of incredulity. Proof offered on these categories must come from the lips of expert witnesses who offer prognosis of future events for evaluation by the present day jury. Likewise, there is a reservoir of community awareness, for instance, that a paraplegic will consult a doctor frequently and suffer loss of earnings. This recognition is generally reserved for those whose wounds and lesions are still fresh, or, if of some duration, are familiar and recognizable.²⁰ The threshold of belief is less high. But where plaintiff has no external manifestations of residual injury and testimony is presented that his normal appearing neck is painful and that the cervical vertebrae need periodic stretching to alleviate pain, disbelief is ready.

In addition, the jury's evaluative duties encompass matters not considered by the doctor such as the rise and fall of the dollar and the demand for reduction of the lump sum judgment for future wages to present worth.²¹

To these legally defined considerations the jury adds other of its own genesis, such as the possibility of change of occupation, with consequent mitigation of damages; the possibility of fortuitous death or equally fortuitous recovery which would make meaningless a prospective award for pain and loss of earnings; and their assessment of plaintiff's actual need for the money and defendant's ability to pay it. The jury's operations might be likened to combining the prophetic capabilities of a Daniel with the arithmetical infallibility of an electronic computer.

Little is known of the actual rationale of juries, or for that matter, of judges sitting as triers of fact.²² In general it is recog-

¹⁹ *Ibid.*

²⁰ See generally Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L. J. 200, 204 (1958). "Of course, where plaintiff has suffered a tangible physical injury such as the loss of a bodily member, the jury is not likely to err in determining that in fact there was pain and suffering. A person who loses an arm . . . undoubtedly endures pain. It would be phenomenal if he did not. The difficult cases are those in which there are no objective symptoms with which the existence of pain can be associated."

²¹ Leasure, *How to Prove Reduction to Present Worth*, 21 OHIO ST. L. J. 204 (1960).

²² See Green's wry comment: "[T]rial by jury is an admirable device for enabling trial judges to avoid uncomfortable responsibilities by passing them

nized that plaintiff suffers in his award according to the amount of participation in his own injury.²³ It is also recognized that the economic circumstances of the parties, apparent or divined, condition the award. It is not known how much or how important a factor is the uncertainty of the jury stemming from the non-objective nature of the proof. It is a matter of conjecture how much if any it affects their judgment when there is no liability or resource issue to temper their judgment.

In most personal injury actions the damages are established in the sense that testimony is offered to support the whole of the ad damnum, with the exception of the value assigned to pain and suffering, which is totally incapable of objective measurement. The remainder of the evidence consists of medical prognosis of definite content which applied to known factors such as wages earned before injury and the cost of medicine, drugs and hospital attention is capable of producing by simple arithmetic the sums of special damage in the prayer. There is enough evidence to "get to the jury" on every item. Despite this, in countless cases, less than the ad damnum is returned where liability is not a real issue. Kalven notes this phenomenon and comments:

"It is a major characteristic of the jury's approach to damages that it does not much concern itself with the damage components as an accountant might but searches rather for a single sum that is felt to be appropriate. Whether any instruction could turn the jury away from its gestalt approach to a more explicit concern with adding component sums I do not know. But I do have a fairly firm impression from our project materials that the result would be in general to increase damages rather than to deflate them. If one seriously assesses the components in any case of any magnitude they are likely to add up to a surprisingly large figure."²⁴

It is submitted that the jury has in many instances discounted the verdict because they have seen that there has been exaggeration both of injury and of freedom from injury. Their compromise verdict is the litmus paper which discloses their realization that the typical personal injury case encourages over evaluation on the one side and under emphasis on the other. It indicates their appreciation that the belief of litigants is that anything said by an interested litigant is suspect and therefore must be enlarged enough that the correct measure will be retained when the suspected surplusage is discarded. This, after all, is the process of bargaining. It is a familiar concept to the jury. Neither side in a bargain dares

on the juries." M. Green, *Juries and Justice—The Jury's Role in Personal Injury Cases*, 1962, U. Ill. L.F. 152, 156.

²³ *Id.* at 159.

²⁴ Kalven, *supra* note 16 at 161-162.

state at the outset the terms of the exchange he will accept for fear that the other will take that as his own point of departure.

It is submitted that the uncertainty factor emanating from the elusiveness of truth leads the jury to temper their verdicts in cases where defendant's liability has been made apparent in the same fashion they temper them in the cases of doubtful liability or doubtful pecuniary need or pecuniary responsibility.

This uncertainty factor also seems to be one of the most powerful inducements for trial. The same factors which make for incredulity in the jury affect the litigants. The plaintiff, assuming he recognizes the uncertainty problem and its pressures on defendant, is largely helpless to condition his conduct, on this account. If he reduces his demand to eliminate all those factors which do not lend themselves to precise computation he will surely settle his case. But he realizes that if he eliminates an aspect uncertain of fruition which later becomes certain, the mischief is done.²⁵ Nor can defendant indulge him. Accordingly, each person has reason to seek the intervention of the trier of fact who will dispose of the controversy despite its uncertainty.²⁶ Each side hopes the uncertainty will be resolved in his favor and this is the incentive to seek trial.

The majority of the comment leveled at the conduct of personal injury litigation centers around the plethora of trials with the consequent delay in the courts²⁷ and the uncertainty of result with its concomitant social disadvantages. The proposed solutions are many, in the main calling for some way of expediting the disposition of automobile accident claims which comprise the major part of personal injury litigation. These proposals run the gamut from the simple expedient of adding more judges and more courtrooms, to some form of compulsory insurance and reparation payments made as in Workmen's Compensation.²⁸ Partial solutions are advanced in plans for impartial medical testimony, abolition of contingent fees and elimination of damages for pain and suffering.²⁹

²⁵ Of course, there are instances where his release may be set aside for mutual mistake of material fact, but usually a release once signed is allowed to rest unchallenged.

²⁶ M. Green, *supra* note 22 at 158.

²⁷ See generally L. GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* 81 (1958) and ZEISEL, KALVEN & BUCHHOLZ, *DELAY IN COURT* (1959), the latter a careful exhaustive study of court congestion and proposed solutions.

²⁸ See L. GREEN, *op. cit. supra* note 27 at 87-103; and Berger, *Compensation Plans for Personal Injuries*, 1962 U. ILL. L.F. 217, discussing the Saskatchewan Plan of accident compensation which is companion to ordinary common law liability.

²⁹ "But why we may ask *should* the plaintiff be compensated in money for an experience which involves no financial loss. It cannot be on the principle of returning what is his own. Essentially that principle rests upon an economic foundation: on maintaining the integrity of the economic arrangements which provide the normally expectable basis for livelihood in our society." Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 *LAW & CONTEMP. PROB.* 219, 224 (1953).

Court administrators, pre-trial conferences, certificates of readiness and arbitrators have also been suggested.³⁰

It is submitted that most of the palliative devices suggested either miss or beg the question. Many of the compensation plans suggested contain the device of limitation of damages. Like Workmen's Compensation, they sacrifice the ideal of exact or near exact reparation for certainty of some payment.³¹ The abolition of payment for pain and suffering would simplify greatly the trial of personal injury cases because it would leave as subjective only that portion of the damages which relates to prospective medical expenses and loss of wages. The question remains whether this is not too high a price to pay for celerity of disposition.³² If pain and suffering is to be eliminated because of its difficulty of expression, in terms of money it is arguable that a great many other items of damage which arise in a derivative fashion from personal injury and death must go also. To be consistent in ridding ourselves of imponderables in proof we should eschew causes of action for loss of consortium and social deprivation stemming from death. In addition, the avoidance should touch fields other than personal injury and do away with damages for alienation of affection, and social deprivation, through enticement.³³

The ideal of impartial medical testimony is the elimination of the "Swearing match" between partisan doctors or the choice of physicians of known views by partisan lawyers. Assuming that objective truth would be spoken by the doctor testifying it must still be admitted that the basic problem discussed in this article remains. A great deal of the jury's evaluative problem is alleviated, but this is primarily because there is less testimony to evaluate. The absence of conflict gives less reason for them to be incredulous but this testimony will still be measured and evaluated against their own common sense and experience. This would seem to be one of the lessons of the Chicago Jury Project. The jury would likely take the doctor's impartial testimony with the same grain of salt they take all testimony.

Other partial, but worthwhile solutions are to be found in the proposals which recommend court administrators, pre-trial conference, certificates of readiness, and arbitrators. Each has to do with the efficient disposition of cases which actually progress

³⁰ Gilliam, *How May the Disposition of Personal Injury Litigation be Improved?*, 48 A.B.A.J. 834 (1962), the 1962 Ross Prize Essay; and Schulman, *Reducing Congestion in Trial Courts*, 46 A.B.A.J. 999 (1960) also a Ross Prize Essay.

³¹ Berger, *supra* note 28. Cf. L. GREEN, *op. cit. supra* note 27 at 88 who would give full damages with the exception that there would be no award for pain and suffering.

³² Plant, *supra* note 20, suggests that pain and suffering is worthy of recognition because of the dignity of the individual but would limit the award to one half of the medical and hospital expense.

³³ For a comprehensive survey of such items of damage see generally Foster, *Relational Interests of the Family*, 1962 U. ILL. L.F. 493.

as far as the pleading stage. In a certain fashion they affect cases yet unfiled in their *in terrorem* effect. However, as the delay in the courts is only partially caused by inefficient methods, lazy judges, and pettifogging lawyers, methods which will militate against these ills will only partially cure. Each is good and should be adopted for its own worth rather than as a desperate expedient designed to clean up a bad situation.

The big offender is the unitary trial with the lump sum judgment. This produces the uncertainty factor which plagues the doctors and the jury and causes the litigants to exaggerate for fear their true position will not receive recognition in the verdict.

It is urged that if there is to be radical change, and this seems foregone, that it consist in the change of verdicts from immutable lump sums to lump sum payable by installments, susceptible to modification. In more colorful words, we should establish an "open end verdict."

To take a simple illustrative case, we might imagine a worker with a work-life expectancy of ten years, earning three thousand dollars a year without hope of more income. Let us further assume that he has suffered blindness due to traumatic injury of the optic nerve and is totally disabled, but without pain. His prospective damages will clearly be thirty thousand dollars if the psychological damages are ignored. Aside from his psychological damages, which are difficult of computation, there are other uncertainty factors in this case. If he is awarded thirty thousand dollars and dies from non-traumatic causes within anything short of the ten years, his heirs will receive a windfall of his future wages which they would not have gotten had there been no tortious act of defendant. But by hypothesis, the defendant's tortious act did not produce the worker's death. Accordingly, whatever compassion might say, logic compels the realization that injustice has been worked. The same thing would be applicable if, to be more cheerful, he miraculously recovers. Again, barring technological or other economic unemployment, the defendant provides a windfall. The social machinery is creaking.

These considerations not only cause the defendant to refuse to settle, but they may govern the jury's deliberations. It is folklore, for instance, among trial lawyers that in a suit for wrongful death a pretty young widow is likely to get less at the hands of the jury than her plainer sister. The jury has discounted the verdict because of the likelihood of remarriage in the offing and a diminution of need.

If, however, the verdict is capable of rectification in case the need for reparation of wages disappears, this anxiety will not trouble the jury, nor need it be a bargain conditioning factor in the minds of the parties as they explore settlement. The verdict will be given for the full amount and will be modified only if the fortuitous event takes place.

One of the most vexatious problems confronting the doctor and the jury which must act upon his testimony is the possibility of some enhancement of plaintiff's disability which has not manifested itself at trial time but which may occur at a later date. This poses a true conundrum to the jury in that if they indulge plaintiff they may give him money he will never merit, and if they do not, and the doleful prediction comes to pass, their mistake is beyond recall. A verdict containing in gross all of the items of damage present and prospective, including an apportionment for the yet unmanifested damages, would alleviate this uncertainty factor. If the event comes to fruition then the sum will be paid. If, for instance, the possibility is blindness resulting from a now apparently innocuous eye injury, the defendant will not object to being cast in judgment for this event, because he will not have to pay for it unless the event occurs.

Upon the rendition of the verdict which would specify the various damage elements and their value, the retrospective components would be payable forthwith. The prospective elements would be payable according to the schedule set out in the jury award. The periodic loss of earnings would be payable for the work-life expectancy of the plaintiff. The fund for pain and suffering would likewise be divided into periodic payments conditioned, as would be the future medical expenses, on the duration ascertained by the jury from the doctor's testimony. These installment payments would continue until one party or another believes that they are no longer applicable because of an alleviation or worsening of plaintiff's condition or the fortuitous death of plaintiff.³⁴

The remedy would be by motion raising the issue of changed condition. Some sanction, such as imposition of attorney's fees, should be available for flagrant abuse of the court's time. This would prevent not only the defendant's fishing expedition to reduce his damages, or his attempt by harassment to effect some concession from plaintiff, but would also prevent plaintiff from chancing a hearing in the hope that defendant's motion although well taken would fail because of his inability to marshal convincing proof. Where good faith is apparent there should be no allocation of costs.

The field for abuse of such a scheme is limited. Malingering is possible here, as it is in the present scheme. However, it is sub-

³⁴ This proposal has advanced the theory that a complete prognosis should be a part of the trial and that damages, including inchoate ones should be found and apportioned in the verdict so that later reference could be made to it if the injury worsened. This is not to say that a scheme which would allow subsequent issues of fact to be tried as new ills arise would not be workable. There seems little reason to make an exclusive choice of procedure. The principal argument against successive trials is the defendant's vulnerability to plaintiff's claims which might stem from other causes than the accident. The more remote the trial is from the occurrence the more difficult is disproof of causation. It would seem that some outer limit should be set

mitted that this scheme will discourage malingering, rather than encourage it. Under the present method the determined malingerer need only keep up his pretense until the award is final and then he is free to do as he pleases. In the proposed scheme malingering on a life time basis is rendered necessary.³⁵ The strain is never lifted from the faker and he truly earns his daily bread by his histrionic talents. If he forsakes the act for labor he risks getting caught and not only is his likely distaste for the constant, now poorly-paying gamble calculated to lead him away from this course of conduct, but also, the chance of getting more lucrative means of support may direct him into paths of rectitude.

The principal risk lies in the possibility that juries, on their own motion or aided by counsel, may cram into the item of experienced pain and suffering all the money they want plaintiff to have, thus giving him prospective damages in praesenti. Any such device, whatever its genesis, is transparent and should be a fundamental inconsistency between future disability for labor and freedom from pain. If the award for pain is all retrospective and an award for future medical expenses and loss of wages is given the improper device is exposed.

The problem of administration would not seem to be an insuperable one. Proof of return to activity incompatible with the basis for damages would indicate a justification for termination of payments. If plaintiff returns to work or engages in recreational or other activities of a similar nature, examination should proceed into the possibility of terminating his award for loss of earnings, and possibly his award for pain and suffering. In short, if he returns to work or ceases to seek medical help he does not hurt, or at least he does not hurt so much, and should no longer be compensated in full for pain. This is not to say that the law should be insensitive to reality. A plaintiff whose return to non-work activity indicates freedom from pain and freedom from disability is not ipso facto employable and therefore undeserving of damages. If his period of disability has rendered him incapable of resuming employment because of non-medical economic factors, such as technological incompetence, he is nonetheless disabled and his economic distress is traceable to defendant. Reduction of damages in this situation should not follow.

Evidence of resumption of work should be relatively easy to garner. The record keeping attendant upon economic by-products such as taxes, insurance and Social Security makes a surreptitious return to work an unlikely event. This assurance does not apply

to proof of new ills allegedly stemming from the accident. A principle of remoteness would seem apposite.

³⁵ See Annot., 29 A.L.R.2d 1408 (1953) the cases indicating that the maintenance of artificial conduct for long periods of time is unlikely even though to abandon such conduct jeopardizes money interests. This annotation treats of violations of the "confinement to the house" provisions of disability insurance policies.

to the self employed nor to casual or itinerant workers, but these compose only a small fraction of the labor force. And, as society becomes more complex, the paper depositing activities increase in ever widening circles.

Account must be taken of the fact that personal injury litigation is not a simple contest between two antagonists. Two other powerful forces are in the field and are directly affected by the proposal. These are lawyers whose fees are contingent on success and the insurance companies. The latter not only provide the bulk of defense representation but pay the lion's share of the money which changes hands as the result of tortious activity.

In the typical personal injury case the lawyer is compensated for his services by a percentage of the recovery, if any. Although practice varies, the fee is generally computed on the net sum after deduction of medical expenses and costs of litigation. This results in plaintiff's net recovery, his "take home" damages, being less than his proof has established he needs. His economic equilibrium has not been, in fact, restored. This is an inescapable conclusion. The only instances in which plaintiff becomes economically whole is where substantial damages have been awarded for pain and suffering or where his prospective damages for other than pain and suffering have been inadvertently or intentionally exaggerated. The fee, in these cases, is taken from the non-economic damages.

The impact of the proposed scheme on this pattern of activity would be dramatic. Of the six items of damage only the three retrospective ones would be paid at the time of verdict. Barring the possibility of a well insured or affluent plaintiff the damages representing medical and hospital expenses are spoken for upon receipt. And, in like fashion, deprivation of earnings is probably reflected in creditors with outstretched hands. The only unencumbered fund is that for past pain and suffering. Arguably it would be applicable in totality to the lawyer's fee. If this did not retire the client's debt to his lawyer then the future components would become subject to his demand. The same considerations apply in this aspect. Unless those to whom plaintiff is or will become indebted are ignored, the only available fund is that for prospective pain and suffering. Whether such delicacy in allocation of verdict components to fees and debts obtains now, or could be made to obtain, reflection indicates that the lawyer's compensation, if it remains contingent, would be tied to the accuracy of the trial prophecy and subject to the same infirmities. This is not likely to be a popular predicament. However, one bright note is seen in the tax advantage to the lawyer who would be drawing his fee over a period of years instead of all in one year, and paying taxes accordingly.

Benefit is also to be seen for the insurance companies. Inasmuch as the verdicts would not be payable in toto the money not yet due would be *their* funds available for investment. The sums

paid in excess of plaintiff's needs under the present system could be saved entirely as future events demonstrate the faultiness of trial prophecy.

There would be, of course, problems of supervision which are not part of the present system. In the current practice attention is focused on the claimant for a relatively short period and then, when disposition is achieved through settlement or trial, the file is closed and scrutiny is abandoned. Such scrutiny, when needful, would be of much longer duration, but the key to the burden is the needfulness of scrutiny. The insurance industry has vast experience in such matters, and their accumulated knowledge would tell them whether to close a file or to continue surveillance. A blinded art critic's file might well be closed. A blinded school teacher, singer or disc jockey would bear watching.

Of course the sums available under the limits of insurance policies are often insufficient to satisfy the damages proven. When this is the case, the insurance obligation to pay installments should be proportionate. If their insurance covers one half of the verdict their responsibility should be for one half of the installment. This, at least, would seem to be the workable solution.

The last head of inquiry pertains to the desirability or acceptability of such innovation. That it is acceptable is indicated by Kalven:

"And more than one jury has been puzzled as to why the future cannot be left in the custody of the court to be adjusted as the future events require much in the fashion of alimony payments."³⁶

Perhaps a more pragmatic test of acceptability is the verdict of an Oklahoma jury which provided that the gross sum of damages should be paid in installments over a period of years.³⁷

CONCLUSION

It takes little discernment to see that the whole spectrum of personal injury handling is disquieting. Not only is it evident from the raw statistics of court delay and the imposing figures of economic dislocation, but the quantity and quality of serious studies directed toward this sector of legal endeavor indicate well informed concern. The situation calls for a remedy. Many have been proposed and caution urges discrimination in our choice, but a remedy must be found.

³⁶ Kalven, *supra* note 16 at 165.

³⁷ *M. & P. Stores, Inc. v. Taylor*, 326 P.2d 804 (Okla. 1958). The verdict was for \$36,000, to be paid at \$150 per month for 20 years. The court said the verdict was improper but not invalid.