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Beginnings in Pre-Trial

Leonard Keyes

BEGINNINGS IN PRE-TRIAL

LEONARD KEYES*

The relationship between court and counsel by reason of the diverse functions which each is required to perform in the administration of justice, is remindful of what someone has said in describing marriage as "a relationship of antagonist cooperation." There always has been, and I presume must of necessity be some area of conflict between court and counsel in the disposition of a lawsuit. The judge represents society, and counsel for the respective parties represent their clients. It is incumbent upon counsel to use every lawful means to advance the cause of the client regardless of the justice or injustice of the final result. On the other hand, it is the duty of the court to afford to each party equal advantage under the law to the end that a just result may be achieved.

The Minnesota Rules of Civil Procedure for the District Courts became effective January 1, 1952. The immediate utilization of these rules has made manifest this divergence between court and counsel. Rule 1.01 reads as follows:

> "These rules govern the procedure in the District Courts of the State of Minnesota in all suits of a civil nature, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Essential to the effectuation of this purpose is the complete cooperation between court and counsel. This is particularly true of pre-trial procedure. Considering two of the words in the last sentence of the rule points up some of the differences which may arise between court and counsel at the outset.

The word "speedy" in the rule may be productive of conflict between the court and counsel, particularly counsel for the defense. To activate the rule, it is necessary in many cases for the court to align itself with the attorney for the claimant and to rule against defendant's counsel. Justice delayed is justice denied. Since June 15, A. D. 1215 at Runnymede, a fundamental guaranty of our law has been, "To none will we — deny or delay right or justice."

The words "inexpensive determination" may have some annoying connotations. From the lawyer's point of view, the more expensive the litigation, the larger the fee. However, from the standpoint of the fee earned for services performed, there should be no conflict between the court and the lawyers by reason of the word "inex-

*Judge of the District Court for the Eighteenth District, Minnesota.

pensive." The contract relationship between counsel and client is a personal relationship with which the court is not particularly concerned.

The court, however, is greatly concerned with the "inexpensive" operation of the judicial department of the government for the benefit of all of the people. This is the area in which conflict between court and counsel may arise and very often does. The court must oppose with vigor counsel who assume that the judicial department of the government is their own private domain in which they may hunt and shoot as they please in season and out of season. The courts do not belong to the lawyers any more than the court house belongs to the workmen who participated in its construction. The courts belong to the people and should be operated for them in the most inexpensive way possible consistent with good government. Our courts at best are expensive to operate.

My judicial district consists of four rural counties. The operation of the court for the trial of jury cases costs the taxpayers of the county about $300.00 per day. This outlay is small when compared to the loss suffered by the individuals who are called upon to leave their work or businesses in order to serve as jurors or appear as witnesses. Their time is valuable and they cannot be blamed if they resent any unnecessary and useless infringement upon their lives or property.

To dismiss the rules summarily by saying that their use is a matter of discretion, impugns the very framework in which our courts are required to function. The first and fundamental task of the judge is to require that the rules which govern the procedure of the court be scrupulously followed. It is my submission that in the performance of his high office, the judge is under duty to insist as follows:

1. On the disposition of all nuisance and meritless claims by pretrial and summary judgment procedure without sacrifice of the rules of fundamental justice.

2. To insist that the parties be present with their witnesses at the trial and that no delay be caused by the absence of witnesses.

3. To insist that no time be wasted on matters about which no substantial controversy exists.

4. To require that all exhibits be identified and be offered and considered before trial so as to do away with time consuming procedures during the trial with which the jury is in on way concerned.

5. To require counsel before trial, to state the basic claims of the

parties, the number of witnesses and the testimony to be offered at the trial.

6. To require counsel before trial, to state to the court, the law which applies to the case so that the trial may proceed without delay pending search for, or discussions between counsel and the court as to the law.

Several years ago, a negligence action was tried before a jury in my district. Many hours were consumed in selecting a jury. Witnesses were called by both plaintiff and defendant. The court and jury listened attentively and patiently for three days. At the close of all of the evidence, counsel for the defendant made a motion for a directed verdict. The court asked counsel for the plaintiff to indicate to the court any evidence in the entire record from which the jury could find negligence on the part of the defendant. Plaintiff's attorney frankly stated that there was no evidence of negligence in the entire record, and then for the first time stated that he was basing his claim on the rule of res ipsa loquitur. Unfortunately for plaintiff, the rule did not apply to the facts in the case, and the court directed a verdict in favor of the defendant. What waste of time and effort.

In another negligence case, plaintiffs were being transported by the defendant to a resort in northern Minnesota. The defendant operated his car in such a manner that it left the highway and both plaintiffs were injured. The selection of a jury and taking of the testimony in the case consumed about five days. Much of the testimony involved the question of whether the plaintiffs were employees of the defendant and were engaged in the usual course of their employment while riding in his automobile. Numerous exhibits were offered in evidence for the purpose of proving the relationship of the parties as employer and employees. At the close of the evidence, defendant's attorney made a motion for a directed verdict on the ground that the plaintiffs were covered by the compensation act and hence had no remedy in tort against the defendant. In support of this motion, counsel submitted to the court a voluminous brief setting forth the law which counsel contended applied.

As a practical matter, with a jury waiting in the court room, the court could not possibly delay the trial for the purpose of reading the proffered brief. The jury could hardly have been expected to sit around for a day or two waiting for the court to consider and rule upon a difficult question of law. The circumstances required the court submit to the jury all fact questions involved and ask the jury to determine whether the plaintiffs were engaged in the course of

their employment under the compensation act, and whether the defendant was negligent, whether his negligence was the proximate cause of injury to the plaintiffs and further, the question of damages to the plaintiffs. Under the new rules, most of these questions could have been disposed of at pre-trial with a good possibility that summary judgment might have been entered to the effect that the plaintiffs were governed by the compensation act because most of the evidence relating to that question was uncontroverted.

I relate this because subsequent to the enactment of the new rules, a case came before me in which identical issues were involved. That case was disposed of on the basis of a pre-trial order, setting forth the undisputed facts upon which a summary judgment was entered finding that the plaintiffs were governed by the compensation act, thereby saving the judge, the court attaches, 12 jurors, counsel for the parties and the many witnesses the necessity of wasting a week or possibly two weeks in court.

Five years ago, 35 persons were injured in Wright County riding on a hayrack which was preceeding down a country highway at night without any lantern or warning light on its rear. The hayrack was struck by a car approaching it from the rear. One of the occupants was killed and the other 34 sustained injuries. Thirty-five lawsuits were on the calendar for trial. To have tried each of these cases separately might have resulted in injustice for the reason that it could be possible for one occupant to recover of one defendant or another by one jury and a different result to another occupant might be reached by a different jury. It would have been possible for one passenger to recover at the hands of one jury and another passenger fail to recover anything from a different jury. The court, therefore, ordered all cases tried together. When that order was made, a number of the cases were dismissed, some were settled, and when finally submitted, the actions litigated were between four plaintiffs and five defendants.

In disposing of the issues between the parties, it was necessary for the court to submit 32 verdict blanks to the jury. The jury was instructed to return four of the 32 blanks submitted. To the surprise of the court and counsel, the jury reached an unexpectedly flawless result. Under the new rules, the issues in all 35 cases could have been simplified through pre-trial and liability determined between the five defendants, and the court could have entered judgment accordingly for each plaintiff for the amount due each plaintiff as stipulated between the parties or as determined by the jury in a special finding as to damages.

After three weeks of trial, the evidence reduced the issues between the parties to these questions: whether the lights on one of the defendant's automobile were on high or low beam; whether such automobile was impeding traffic; whether the operator of another vehicle involved had his car under proper control; whether any one or more of such violations or the lack of a light on the hayrack was the proximate cause of the collision. With that simplification of the issues, all 35 cases could have been submitted to one jury and that jury could have disposed of all of the issues involved by its answers to the disputed questions in the form of a special verdict.

On January 2, 1952, pursuant to Rule 16 of the Rules of Civil Procedure for the District Courts of the State of Minnesota, the rules of the District Court of the Eighteenth Judicial District were revised to read as follows:

> "Pursuant to Rule 16, Rules of Civil Procedure for the District Courts of Minnesota, a pre-trial calendar is hereby established. All jury actions, and such other actions as the Court may order, shall be placed on such calendar for consideration.
>
> Pre-trial hearings of the cases on the pre-trial calendar shall be held on the first day of each general term of court and on such following day or days as may be necessary and desirable.
>
> In all causes on such calendar, the Clerk of Court shall mail to all parties and their attorneys, notice of hearing to be held at a time to be fixed by said clerk, not less than seven (7) nor more than thirty (30) days after the date of mailing. On the date and hour fixed, only those attorneys (representing all the parties) who are familiar with the cause and are fully authorized to make binding sitpulations therein will be permitted to appear, and such attorneys are required to appear, together with their complete files. In the event of any default, the Court will exercise the same powers as in the event of a default."

Under this rule, every jury case on the calendar is pre-tried a week or more before the jurors report for service. Following is the form of notice.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF JUDICIAL DISTRICT

_____ Plaintiff,

vs. Number_____

_____ Defendant.

To_____

Attorney for _____

NOTICE OF PRETRIAL CONFERENCE

A pre-trial conference, under Rule 16 of the Minnesota Rules of Civil Procedure and the Rule II of this Court, will be held in the above case on_____at_____O'clock ____m., at which Counsel are directed to appear with their complete files and be prepared to:

1. State and simplify the issues and amend pleadings accordingly.
2. Stipulate to facts and documents about which no substantial controversy exsits.
3. Offer all documentary evidence and exhibits to be marked and offered in evidence. Unless objection is made to a given exhibit, it will be considered as admitted without objection.
4. Specify all damage claims as of the date of the conference.
5. Discuss points of law and such other matters as may aid in the disposition of the action.

BY ORDER OF THE COURT
CLERK OF COURT

By_____
Deputy

Such notice operates as an order from the court and is enforceable just as any other order of the court. The court requires counsel to come to the pre-trial as fully and completely prepared as for trial. Counsel are expected to know all of the evidence which will be presented and to state accurately to the court what that evidence will be. A statement of conclusions is not sufficient nor was any such statement sufficient before the adoption of the new rules. It has always been the law that counsel in his opening statement to the jury was required to state facts and not conclusions, and in the event the facts stated were not sufficient, the court was required to direct a verdict against counsel on the opening statement.

Hence, no litigant is entitled to have a jury called for the hearing of his cause unless at pre-trial counsel is in a position to supply the court with facts which entitle him to have a jury called for the purpose of hearing the evidence which he claims to have in his possession.

If exhibits are to be offered at the trial, they should also be available at pre-trial, should be identified and offered. If any exhibits are not available, the court should be advised as to those that are not available. This eliminates surprise and usually permits agreement that they may be received in evidence without objection to foundation.

All matters which are not controverted should be stipulated or admitted. Counsel should be prepared with the law on both liability and damages. During pre-trial, the court should assist counsel in eliminating unnecessary controversy and should make every effort to assist in arriving at the basic dispute or disputes of fact. The court should discuss the law with counsel that applies to the facts presented. The court should advise and assist counsel toward a solution of the case, without trial, when such course appears to be proper.

The court, at the conclusion of the pre-trial hearing, draws a pre-trial order incorporating all agreed matters, setting forth the basic dispute between the parties. This order is signed by both court and counsel at the pre-trial hearing. The order takes the place of the pleadings and controls the case throughout the trial.

Pre-trial procedure in my district is conducted in open court. The parties may be present if they wish. It, however, is conducted exclusively between counsel and the court. The hearings are informal. It should be the time for counsel and the court to "let their hair down" and discuss all phases of the case honestly and without reservation.

If plaintiff has a good case, he need have no fear. The same is true of the defendant if he has a defense. If plaintiff has no case, he has no right to be in court, and if defendant has no defense, plaintiff should obtain judgment forthwith.

The following are samples of pre-trial orders and verdicts used in my district since the enactment of the new rules.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF JUDICIAL DISTRICT

(Husband and wife, two cases tried together.)

The Attorneys for the parties to the above actions, having appeared at a pre-trial conference at Anoka, Minnesota on (date), stipulated and agreed to the following:

That Plaintiff's Exhibit A to X inclusive are received. That plaintiff has a life expectancy of _____ years. That the collision between these motor vehicles occurred at a time of day when lights were required on motor vehicles under the statute. That both cars were proceeding northerly on Highway _____, and that the car owned by both defendants, as tenants in common, struck the car owned by plaintiff _____ from the rear.

The only questions in dispute between these parties are as follows:

1. Was the tail light on the _____ car lighted?

2. Was the lack of a tail light a contributing cause of the collision?

3. Damages sustained by each plaintiff.

The case is set down for trial on _____.

Dated this _____ day of _____, 19____.

_____
District Judge

_____
Attorney for Plaintiff

_____
Attorney for Defendants

At the close of the evidence, on the basis of the pre-trial order, the following special verdict was submitted.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF ANOKA JUDICIAL DISTRICT

Agnes _____ & Anthony _____,
Plaintiffs,

vs. SPECIAL VERDICT

Lawrence _____ & Eleanor _____,
Defendants.

* * * *

Pursuant to the instructions of the Court, the Jury makes the following Findings of Fact as its Special Verdict herein:

Was the tail light on the Doege automobile lighted?

(Yes)

_____
Answer "yes" or "no"

If your answer is "no" to the above question, was the lack of a lighted tail light a contributing cause of the collision?

(No answer)

_____
Answer "yes" or "no"

What sum of money will compensate Agnes _____ for damages sustained in this collision?

$9,500.00

_____

What sum of money will compensate Anthony _____ for damages sustained in this collision?

$1,750.00

_____

Dated this _____ day of _____, 19____.

_____
Foreman or Forewoman

* * * *

Too much is expected of jurors, when they are required to understand and apply long instructions involving complicated legal principles. The jury's sole duty is to determine disputed questions

of fact. Have we not in the past gone far afield in our procedure and permitted the jury to act as the judge of the law as well as the facts?

Were it not for pre-trial procedure, the jury would have been given general verdicts for plaintiff in each case, and general verdicts for the defendants in each case. The court would have been required to instruct the jury as to negligence, contributory negligence and concurrent negligence, proximate cause, the speed statute, lookout, proper control, the statute with reference to lights on motor vehicles, the *Christensen* rule[1], with reference to imputed negligence as between a bailor and bailee, and the immunity of the husband from suit by the wife.

Procedure under pre-trial practice makes it possible in most cases for the jury to truly act as judge of the facts and for the court to then apply the law to the facts as determined by the jury.

Another pre-trial order follows:

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF JUDICIAL DISTRICT

* * * *

Four Plaintiffs,
vs. Case No.
Several Defendants.

* * * *

PRE-TRIAL ORDER

That on the 3rd day of January, 1953, at about 11:00 o'clock a.m., an automobile owned and driven by the plaintiff Kenneth C. _____ in which the plaintiffs Wayne _____ and Gary _____ were riding as passengers, was being operated in a northerly direction on Highway Number ____ in Anoka County, Minnesota, at a point near where the _____ Road enters Highway ____ to form a "T" intersection from the west, came into a collision with an automobile owned by the defendant Earl _____, which was being operated in a southerly direction on said highway by his son Donald _____, who is now deceased.

That Donald _____ at the time was operating the automobile with the knowledge, consent and permission of the defendant Earl _____.

Highway Number ____ at the point of collision is a three lane concrete highway consisting of three, nine foot lanes. That the visibility was good, weather conditions were good except that there was scattered ice on the highway, and the highway was covered with a thin sheet of ice at the point of the accident.

The plaintiff claims that the collision occurred in the most easterly lane of the highway, the lane reserved for north bound traffic.

1. Christensen v. Hennepin Transportation Co., 215 Minn. 394, 10 N. W. 2d 406 (1943).

It is agreed that another car was being operated in a southerly direction on the highway at or immediately before the happening of the accident.

There is no issue of contributory negligence on the part of the passenger plaintiffs.

Plaintiff _____ Exhibit A to C inclusive are received. No objection will be made as to foundation of the bills of Dr. _____. Plaintiff _____ Exhibits 1 to 12 are received.

It is ordered that the Plaintiff _____ complaint be amended in the following particulars: By adding to Paragraph II of the complaint the following: "And permanent malalignment of his jaw with malocclusion of the teeth throughout his mouth, and impairment of his speech." By changing in Paragraph III, $1,500.00 to $750.00, by adding to the last sentence, "And will incur medical expense in the future in an amount estimated at not less than $500.00." By changing in Paragraph IV, the sum of $450.00 to $415.80. By changing in Paraghaph V, the sum of $1,000.00 to the sum of $850.00.

The case is set down for trial as the second case for trial on October 15, 1953, at 10:00 o'clock a.m.

That the reading and signing of this order by Counsel is waived.

Dated this ____ day of _____, 19___.

_____

District Judge

* * * *

Recently it was my pleasant experience in a negligence case to secure agreement from all of the parties on all special and general damages at the pre-trial conference. The only question submitted to the jury by way of special verdict was the question of liability as between the two drivers. On the basis of the jury's answers, the court was in a position to apply the law and enter judgment accordingly in each of the cases.

A number of parties were involved. One of the plaintiffs was the wife of the driver of the car in which she was riding as a passenger. It was stipulated at pre-trial that her general damages was in the amount of $2,500.00. The jury by its special verdict found that her husband was negligent in the operation of his car and that his negligence was the sole cause of the collision. Under the law, she could not recover from her husband. Her claim, however, was against the other driver. Had all of these cases been submitted together in the form of a general verdict with instructions from the court to the effect that she could not recover against her husband, but that she could recover against the other driver if he were found to have been the negligent cause of her injuries, it may be that she

would have recovered a verdict against the other driver in view of her admitted injuries.

The jury, however, were not permitted to speculate as to which was to recover from the other. No evidence was permitted during the trial as to injuries or damages sustained by any party. There was no possibility of any feeling of sympathy creeping into the case. The only questions submitted to the jury related to the operation of the vehicles by the two drivers.

Time does not permit a detailed enumeration of the many fact questions susceptible to final determination at pre-trial. One more instance will suffice. The Supreme Court of Minnesota in the recent case of *Dockendorf v. Lakie*[2] admonished the trial courts as follows:

> "It is not amiss to call the attention of trial courts to the importance, in action brought under § 176.06, subd. 2, against a third-party tortfeasor, of requiring a special verdict on the issue of special damages for medical expenses. In the absence of such special verdict, it is impossible to determine whether the jury allowed anything to the employee for medical expenses. In a subsequent subrogation action by the employer—or his insurer —the employee should be required to reimburse the employer for medical expenses paid *only to the extent that he has received an award therefor under the jury's verdict.*"[3]

Proper pre-trial practice in such actions eliminates the use of special verdicts. The amount of the medical expenses is seldom controverted. The total thereof can be agreed upon at pre-trial and incorporated in the pre-trial order, thereby completing the record without reference to a jury by special verdict or otherwise.

The above examples of pre-trial procedure illustrate what can be done in tort cases. The possibilities are even greater in cases where the issues are numerous, involved and complicated. In such instances much of the chaff can be eliminated at pre-trial, the issues clearly defined, and the work of the jury greatly simplified. Such procedure may make it possible even in a complicated case to reduce the issue to a few specific questions which the jury can answer by a special verdict rather than by a general verdict. The use of the special verdict is extremely helpful in cases where the questions are few and where they can be phrased in non-technical language requiring simple answers.

By the use of pre-trial hearings and orders based thereon, I have had occasion since the enactment of the new rules to enter summary

2. 61 N. W. 2d 752 (Minn. 1953).
3. *Id.* at 756-757.

judgments under Rule 56 in a number of cases. This practice has been approved by the Minnesota Supreme Court in the case of *Lindgren v. Sparks.*[4]

The procedure was as follows: Under Rule 56 of the Rules of Civil Procedure, the plaintiff moved for summary judgment in his favor against the defendant Sparks or in lieu thereof, directing that the issue of damages be submitted to a jury for its determination.

A pre-trial conference was held on March 17, 1952, at which time the defendant Sparks moved for judgment in his favor exonerating him from liability to the plaintiff. On the basis of the facts stipulated to between the parties and incorporated in the pre-trial order, summary judgment was entered in favor of the defendant on April 3, 1952, which order was affirmed by the Minnesota Supreme Court.

The procedure followed in the above case represents the ultimate accomplishment of the purposes of the new rules. It saves the time of the court, jurors, parties and witnesses and removes from the shoulders of society responsibility for financing much time consuming litigation.

The result in this case is not an exception. In the past two years, many cases have been disposed of in my district in this manner. Such dispositions would not have been possible without pre-trial procedure.

During the first year of the new rules, it is no exaggeration to say that at least one solid month of jury work was saved by the operation of the rules in my judicial district. Considering the expense of litigation to the taxpayer, it is a fair estimate that at least $10,000.00 was saved. The application of the rules also has made possible additional saving of time to jurors, parties, lawyers and others, and afforded them an opportunity to apply themselves to other pursuits.

The success or failure of the Rules of Civil Procedure of the District Court will depend in a great measure upon the proper use of pre-trial. Pre-trial is the essence of the rules. Its use or non-use rests primarily with the judge. The judge, however, cannot do everything alone. He must have the cooperation of the bar. Difficulties will be encountered during the adjustment period which can be overcome by practice and experience.

Other difficulties may be created by certain members of the legal profession who do not measure up to proper standards of

4. 58 N. W. 2d 317 (Minn. 1953).

competence and integrity. Fortunately, such individuals are few in number and can be subjected to proper restraints and control with pre-trial more easily than under the old procedure.

However, the lawyers with whom I have dealt have shown a cumulative appreciation of the use of pre-trial. The firm insistence on pre-trial which was first required by me, is now conjoined by counsel. Pre-trial has tended to bring the divergent functions of the court and counsel together so that it is now possible to envision the day when the members of the bar, as officers of the court, and the judge, can cooperate in unison "to secure the just, speedy and inexpensive determination of every action."

To those who may still doubt the efficacy of pre-trial, may I commend it to them in the words of the poet.

> "Only engage and then the mind grows heated.
> Begin and then the work will be completed."