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THUMBS IN THE DIKE: PROCEDURES TO CONTAIN THE FLOOD OF PERSONAL INJURY LITIGATION†

JOSEPHINE Y. KING*

I. INTRODUCTION

If calendar congestion in the metropolitan areas of New York State is a product of tort litigation and its affinity for juries, and if negligence claims arise primarily from motor vehicle mishaps,¹ then perhaps it is a disutility to invest intellectual effort in honing the procedural tools of adjudication. Why not simply sever this hypertrophic limb from the general body of litigation and assign it to another forum, e.g., arbitration or a special agency such as the Workmen's Compensation Board?² The answer is not so simple and, in the opinion of many judges and lawyers, such a solution is hardly desirable. Large segments of both groups, although not necessarily for the same reasons, would prefer to preserve the jurisdiction of the civil courts over meritorious negligence claims.³

Improving the “delivery system” in personal injury litigation is a goal

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¹ The number of vehicles registered in the United States in 1968 was 101,048,000, of which 83,281,000 were private cars. In New York total motor vehicle registration was 6,310,000, private cars numbering 5,616,000 of that total. There were 103,172,000 licensed drivers in the United States in 1968 and 7,903,000 in New York State. Bureau of the Census, U.S. Dept of Commerce, Statistical Abstract of the United States 550 (1969).


³ For a negative reaction to automobile compensation plans, see Temp. Comm'n on the Courts, Recommendations Respecting Calendar Congestion and Delay, 1957 N.Y. Legis. Doc. No. 6(c), at 45.
which cannot be solely or primarily pursued on a quantitative plane. Comprehensive revisions of the present system of compensation and more limited proposals directed toward specific malfunctions of that system have burgeoned in recent years. Books, law review articles, insurance industry publications and statements at legislative hearings deal in varying degrees with the substantive problem of whether fault should remain the criterion of compensation. Institution of partial or total no-fault plans, coupled with tort liability exemptions and emphasis upon first-party coverage, might well affect the character and incidence of personal injury lawsuits. Such a decision, however, ought to be made on substantive grounds. While a high priority must be assigned to the task of perfecting judicial administration, we have come to recognize that the issues surrounding personal injury compensation are more substantive than procedural—in fact, more social than legal.

Assuming that a proposal to abolish tort liability or to exile personal injury cases to another tribunal would not survive the state legislature, what affirmative but less drastic attacks upon "systemic delay" are feasible? The interval between the date on which the plaintiff brings his action and the date when final disposition is achieved can be contracted in relatively few ways: "[T]he time required for the disposition of cases can be shortened; the number of cases requiring official disposition can be reduced by affecting the settlement ratio; or the amount of available judge time can be increased, either by directly adding judges or by increasing somehow the efficiency with which the current judge power is now used." This study will be primarily concerned with the second of these three approaches, i.e., affecting the settlement ratio.


5. This assumption will be put to the test as the legislature of New York considers the compulsory, no-fault insurance proposal recommended by the Governor in February 1970. See N.Y. Dep't of Insurance, Automobile Insurance... For Whose Benefit? (1970). See also Proposed Addition to the N.Y. Ins. Law §§ 670-76, N.Y. Assembly A6133, 193d Sess. (1970).

II. Past and Present Techniques to Control the Calendar

Examples of procedures which divert a portion of civil actions from the courts entirely or by referral are Pennsylvania’s compulsory arbitration plan for cases involving damages under three thousand dollars,7 and the auditor system in Massachusetts.8 In nonfinal referrals in Massachusetts, and in arbitration awards in Pennsylvania, the parties may seek a retrial. The considerations advanced by Professor Rosenberg and his associates in studying the two procedures must, however, be carefully weighed by any jurisdiction contemplating their adoption.9

In Philadelphia, there appears to be general satisfaction with the operation of the Pennsylvania plan. In the first ten years under compulsory arbitration, more than sixty thousand cases were processed,10 Its simplicity, promptness and low cost (about sixty-two dollars per case) have been noted.11 Moreover, the rate of appeal from arbitrators’ decisions is estimated to be as low as five per cent.12 In a committee report of the Association of the Bar of the City of New York, however, the Pennsylvania system was not recommended for adoption in New York.13 Contrast in the size of the population served by Philadelphia and New York City courts, the fact that New York claims generally exceed three thousand dollars, absence of compulsory automobile insurance in Pennsylvania, and the large volume of minor controversies accommodated by the Small Claims Part of the Civil Court of the City of New York were cited as distinctions which militated against the transplantation of the Pennsylvania plan to this state.14

Nevertheless, the New York legislature in 1970 enacted compulsory arbitration for money claims not exceeding three thousand dollars for a three-year trial period.15 The statute reposes authority in the Judicial

9. See Rosenberg & Schubin, supra note 7, at 466-71.
11. Id. at 4, 8.
14. Id. at 640.
Conference to promulgate necessary rules. Initially at least, the program will not be statewide but will be tested in the City Court of Rochester. Its success or failure there may well influence the continuation and extension of the system to other parts of the state.

Another useful device, utilized in an attempt to reduce the number and duration of trials for those claims which have entered the court system, is the pretrial conference. In some jurisdictions, such as New Jersey, the purpose of a pretrial conference is to shape and refine the controversy so that a better quality trial process results. Thorough exploration of the issues might conduce parties to settle without trial, or shorten the trial if one ensued. A study of the New Jersey pretrial conference, however, revealed that the procedure did not result in fewer cases being tried or in a reduction of trial time.

In New York, where the objective of the pretrial conference is settlement, one can review statistics demonstrating that such conferences dispose of many cases. The system, however, is not a panacea for court delay. It absorbs an appreciable amount of judge time and might be prohibitively time consuming if the practice approached the federal and New Jersey standards.

Another device which might achieve economies in court time is the split trial, in which the issues of liability and damages are separated. If there is a judgment for the defendant on the issue of liability, the trial on damages is avoided. If there is a judgment for plaintiff on the issue of liability, the defendant's self interest might dictate settlement, and again the second trial could be avoided. From a study based on experience developed in the United States District Court for the Northern District of Illinois, Professor Zeisel determined that "in personal injury jury trials separation saves trial time of the magnitude of about 20 per cent." Another result emerged, however, which cautions against indiscriminately embracing the separation of issues as a method of re-

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17. Id. at 68-89.
19. To avoid postponement of personal injury trials by attorneys seeking to delay a final judgment (either as plaintiff's counsel patiently waiting for the entire brood of injuries to hatch, or as defense counsel loath to relinquish hard cash prematurely) some continental systems have provided for split trials. If liability is found in the first proceeding, interim damages are awarded. The second stage represents a final assessment of plaintiff's injuries after they have matured. Fleming, Damages: Capital or Rent?, 19 U. Toronto L.J. 295, 304 (1969).
ducing trial time. In the separated trials, the proportion of defendants' verdicts was substantially higher than that statistically established for the usual trial procedure.21

Studies of the experience of Massachusetts, Pennsylvania, New Jersey and Illinois suggest no convincing solution to the delay problem in other states. It is apparent, however, that any court system encompassing large metropolitan areas must devote energy and imagination to coping with the tort backlog. Since knowledge of the remedies which have been pursued sharpens the ability to evaluate new recommendations, it is instructive to examine the responses of the overburdened civil courts of New York.22

The recent history of the struggle in New York to break the logjam is chronicled in the Annual Reports of the Judicial Conference. The first Report, dated 1956,23 noted the delays24 in tort jury cases for the supreme court as of December 31, 1955. Queens County had a delay of 48 months; New York County, 44 months; Bronx, 43 months; Nassau, 36 months; Westchester, 32 months; Kings, 31 months; and Suffolk, 28 months.25 In the latest compilation of statistics, the following figures were reported: Rockland (which had a 20-month delay in 1955), 45 months; Bronx, 44 months; Queens, 32 months; Dutchess, 30 months; New York, 39 months; Westchester, 33 months; Nassau, 31 months; Kings, 29 months; and Suffolk, 20 months.26 Incoming jury cases for the judicial year ending June 30, 1969 totaled 40,210 for the supreme court, as contrasted with 37,072 for the year ending June 30, 1955.27

The early Reports signal a concern with the well-entrenched pattern of delay, while subsequent Reports unfold the many-faceted efforts to improve established procedures and gain new perspectives on suggested reforms. Calendar practice, pretrial conference, trial without a jury or

21. Id. at 1617.
22. See Tolman, Court Administration: Housekeeping for the Judiciary, 328 Annals 105 (1960).
24. "Delay for statistical purposes is considered by the Judicial Conference as delay owing solely to calendar congestion of over six months in tort cases and over two months in commercial and equity cases." Id. at 18.
25. Addendum following 1 id. at 18 (1956).
27. Id. at A139; 1 id. at 21 (1956).
with a six member jury, simplified procedures and court reorganiza-
tion recur as topics of study throughout the nineteen fifties and sixties.

The readiness rule adopted by the appellate division of the supreme
court in New York and Bronx counties became effective on January 1,
1957. This rule required filing a certification that the action was ready
for immediate trial before a case could be assigned to a trial calendar,
\textit{i.e.}, discovery procedures, depositions and settlement conferences must
have been completed. Within six months of its effective date, more than
two thousand pending cases were dropped from the calendar for failure
to comply with this rule, and the intake of new cases declined sharply.
Unfortunately, however, this salutary development proved to be a tem-
porary respite rather than a sustained reversal.

In 1956, the first and second departments launched a summer trial
program to reduce the number of pending jury cases. Only three courts
participated, and the results were modest. When a summer session was
arranged for 1957, however, it failed to gain support from the bar. A
mere handful of cases reached disposition.

The "blockbuster" technique was instituted by the first department
in 1958. A number of trial justices were assigned for a period of
months to the special task of clearing up cases which had aged on the
calendar, and their efforts produced good results. The procedure has
been continued in the supreme courts and was adopted by the Civil
Court of the City of New York in 1963.

The civil court had also developed a system of utilizing law secretaries
to pre-try small property claims. The secretaries' function was to achieve
settlement or a consent of the parties to arbitrate. Although the format
of the program has been altered—law secretaries no longer pre-try cases
—the pretrial settlement of small property claims in New York County
has proceeded with notable success under the direction of one of the
judges of the civil court.

28. See N.Y. C.P.L.R. § 3031 (McKinney 1963); 7 Ann. Rep. 48 (1962); 3 id. at 102-18
(1958).
30. See 3 id. at 28-29 (1958). The statement of readiness became a requirement in the
Supreme Court of Erie County on January 1, 1957, id. at 39, and in the second depart-
ment with the March 1957 term, id. at 49.
31. See id. at 28-29.
32. See 7 id. at 45-46 (1962); 5 id. at 24 (1960); 4 id. at 47 (1959).
33. The participating courts were: Supreme Court in New York County; City Court
in New York County; Municipal Court in Bronx County. 3 id. at 31 (1958).
34. Id. at 32.
35. See 4 id. at 12-13 (1959).
36. Id. at 27-28.
A recent innovation in the civil court is the system of conference and assignment. Judges are scheduled to work in teams of three; the conference judge calls about thirty-five cases each day and attempts to achieve disposition of the controversies without trial. If the case cannot be settled at conference, it is assigned for trial before one of the assignment judges, who may proceed immediately to try the case if another matter is not pending before him. The case does not return to a general calendar or require clerical processing; it is either disposed of at conference or tried. In its first few months of operation, the conference and assignment system has substantially eroded the congestion in civil court. Thirty percent of the backlog was disposed of in the first six months of 1970, and the time between the notice of trial and the appearance of the parties’ representatives before the conference judge has been reduced for tort jury cases in all counties of New York. The conference and assignment system merits close attention and analysis, particularly as statistical data and experience develop.

The expense, delay and trial complications engendered by calling opposing medical experts as witnesses in personal injury actions prompted the First Department of the Appellate Division to establish a Medical Report Office in New York County in 1952. At any time before the end of a trial, a judge may refer a personal injury case to this office, which maintains a confidential list of physicians designated by the major medical societies. Upon receiving the reference, the Office selects a doctor to examine the plaintiff and submit a report, without cost to either party. About two hundred cases come to the Medical Report Office each year, of which eighty per cent are settled without trial. The merit of the system lies in the fact that evaluation of personal injuries can be made by an impartial, court-appointed expert—a service which is particularly valuable in complicated cases otherwise productive of highly technical and divergent medical testimony.

At the same time that judges and court administrators have devoted their efforts to achieving speedier justice, state legislators have introduced many bills affecting personal injury litigation. One of the more frequent legislative proposals in recent years relates to interest on per-

38. During the period January 1, 1970 to July 1, 1970, the time from notice of trial to conference was reduced in New York County from 24 to 18 months; in Bronx from 38 to 20 months; in Kings from 51 to 29 months; in Queens from 41 to 30 months; and in Richmond from 12 to 6 months. Telephone interview with the Honorable Edward Thompson, Administrative Judge of the Civil Court of the City of New York, Sept. 2, 1970.


It is an anomaly of the common law that interest from the time of the breach or damage has been recognized in contract and property claims but not for personal injuries (with the exception of wrongful death actions). Imposition of interest charges from the date of personal injury or from the date an action is commenced must be considered under two heads: (1) the logical basis for analogizing the "liquidated" damages in personal injury claims (e.g., medical expenses; lost wages) to a contract debt which has not been discharged on the agreed date; and (2) the effect which liability for pre-judgment interest might have on the tortfeasor's incentive to settle.

With reference to the first point, it may be argued that the victim of an accident experiences losses as genuine, if not so easily ascertainable, as the contract creditor. Both are deprived of the use of money which would have been available but for the acts of the defendant. The argument encounters more difficulty, however, when the indeterminate elements of damages in personal injury actions become a possible predicate for pre-judgment interest. It would be impracticable to charge the jury with segregating past and future, physical and psychic damages. Therefore, if interest on the whole verdict is to run from some pretrial date, the decision to change the law must rest on equitable grounds.


42. "[I]nterest was initially added to a cause of action only when the debtor had agreed to pay interest. It was next allowed on liquidated contract claims . . . . The transition from interest on liquidated debts to interest on unliquidated claims had to await the abandonment of the view that interest is a penalty to be inflicted on tardy debtors. With the acceptance of the idea that interest is an award for the creditor's loss of use of the money, there began a gradual progression from interest on all unliquidated contract debts . . . to interest on some tort claims resulting in property damage . . . and concluding with the award of interest as a matter of right on all claims for property damage . . .

. . . .

"The [Law Revision] Commission believes that interest should be awarded as a matter of right in all personal injury actions." Recommendation of the Law Revision Commission, supra note 41, at 409-10. The present provision, N.Y. C.P.L.R. § 5001, has not been amended to conform to this recommendation.

43. N.Y. Est., Powers & Trusts Law § 5-4.3 (McKinney 1967). Compensatory damages in wrongful death actions are derived from the pecuniary loss suffered by the survivors, and such damages include future losses.

A few states allow interest on personal injury actions. See McLaughlin, supra note 41, at 439-40.

44. See Recommendation of the Law Revision Commission, supra note 41, at 410. The Law Revision Commission recognized that pre-judgment interest for personal injury claims would entail interest on future losses such as loss of earning capacity and future pain and suffering, but notes that in contract cases "interest is presently awarded from the date of the breach, even though part of the verdict includes future losses." Id.
The contention that the defendant-insurance carrier will accelerate its efforts to settle if confronted with the spectre of mounting interest charges is not substantiated by the limited data which are available.\textsuperscript{46} In fact, the authors of \textit{Delay in the Court} reach a contrary conclusion, asserting that the availability of interest to the personal injury claimant will tend to increase the amount at which he will settle, even though the defendant may at the same time offer somewhat more than he would under the present rule.\textsuperscript{46} It therefore would seem that the defendant's increased amenability to prompt settlement will be counter-balanced by the plaintiff's resistance to offers not in accord with his greater expectations. If such be the case, no net gain will accrue to the tort calendar. Accordingly, pre-judgment interest—without more factual data on its bilateral impact—cannot be enthusiastically recommended on strictly procedural grounds.\textsuperscript{47}

Another proposal advanced in recent legislative sessions has recommended revision of the offer to compromise procedure\textsuperscript{48} to permit charging a party with interest and costs, or costs and attorney's fees, if he has refused an offer which the outcome of the trial proves to have been reasonable.\textsuperscript{49} It is the proposal invoking the sanction of attorney's fees which we shall examine in some detail to assess its feasibility.

\section*{III. THE OFFER TO COMPROMISE IN NEW YORK}

The current text of the offer to compromise in New York reads:

Except in a matrimonial action, at any time not later than ten days before trial, any party against whom a claim is asserted, and against whom a separate judgment may be taken, may serve upon the claimant a written offer to allow judgment to be taken against him for a sum or property or to the effect therein specified, with costs then accrued. If within ten days thereafter the claimant serves a written notice that he accepts the offer, either party may file the summons, complaint and offer, with proof of acceptance, and thereupon the clerk shall enter judgment accordingly. If the offer is not accepted and the claimant fails to obtain a more favorable judgment, he shall not recover costs from the time of the offer, but shall pay costs from that time. An offer of judgment shall not be made known to the jury.\textsuperscript{50}

\textsuperscript{45} See Zeisel, Kalven & Buchholz, supra note 6, at 129-30.
\textsuperscript{46} Id. at 131-33. Thus the settlement level may rise, but not the settlement ratio.
\textsuperscript{47} Id. at 140. See also McLaughlin, supra note 41, at 436.

Fed. R. Civ. P. 68 is substantially the same as N.Y. C.P.L.R. R. 3221 (McKinney 1963). The controlling provision with reference to costs is: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer."
Only the defending party may make an offer.\textsuperscript{51} The offer must be in writing, and the date of the offer fixes the time from which plaintiff may be liable for costs. The inchoate liability for costs does not mature unless: (1) Plaintiff fails to serve a written notice of acceptance; (2) within ten days after the defendant's offer; and (3) fails to obtain a judgment more favorable than the defendant's offer. When these conditions are present, the plaintiff, even though he is the prevailing party,\textsuperscript{53} is not entitled to costs "from the time of the offer, but shall pay costs from that time."\textsuperscript{53}

If the purpose of the present rule and its predecessor is to encourage plaintiffs to forego a trial where reasonable settlement is possible,\textsuperscript{64} the obvious question is: Does the imposition of a portion of the costs qualify as a realistic inducement? For a case that involves more than a trivial amount, the answer to this question must be that it does not. The basic costs in an action, as provided by the CPLR, total one hundred and fifty dollars.\textsuperscript{55} The party to whom costs are awarded may, in addition, tax "necessary disbursements,"\textsuperscript{56} and certain expenses incurred in prosecuting his claim.\textsuperscript{67} Taken together, the risk of paying statutory costs and of foregoing disbursements (if the latter is a corollary) has not impelled plaintiffs to accept offers of compromise.\textsuperscript{68} The historical inefficacy of similar provisions in the Civil Practice Act invited an effort, by those charged with drafting a new practice act for New York, to infuse some vitality into the old procedure.

In the Tentative Draft appearing in the First Preliminary Report of

\textsuperscript{51} Since the terms of the statute are broad enough to cover any party against whom a claim is asserted, there is no need to describe separately the procedure applicable to a counterclaim. See Temp. Comm'n on the Courts, Rep. III, First Prelim. Rep. of the Advisory Comm. on Prac. & Proc., 1957 N.Y. Legis. Doc. No. 6(b), notes to Proposed Rule 31.11, at 112 [hereinafter cited as Temp. Comm'n].

\textsuperscript{52} N.Y. C.P.L.R. \textsection 8101 (McKinney 1963); 8 J. Weinstein, H. Korn & A. Miller, New York Civil Practice §§ 8101.21, 8102.01 (1965).

\textsuperscript{53} N.Y. C.P.L.R. 3221 (McKinney 1963).

\textsuperscript{54} For comparison of the offer to compromise with the offer to liquidate damages and with tender, see 4 J. Weinstein, H. Korn & A. Miller, supra note 52, at § 3219.01.

\textsuperscript{55} N.Y. C.P.L.R. \textsection 8201 (McKinney 1963); N.Y.C. Civil Ct. Act § 1904 (McKinney 1963). But see graduated scale of costs in id. § 1901.

\textsuperscript{56} But see N.Y. C.P.L.R. \textsection 8301(c) (McKinney 1963): "The court may allow taxation of disbursements by a party not awarded costs in an action . . . ."

\textsuperscript{57} Id. \textsection 8301(a).

\textsuperscript{58} Anomalously, in the light of the undistinguished history of this settlement technique, the House of Delegates of the American Bar Association recommended enactment of statutes permitting defendant to make an offer of judgment and charging plaintiff with costs from the time of the offer, should plaintiff fail to recover a judgment more favorable than the offer. ABA Summary of Action, House of Delegates 5(C)(2) (Jan. 27-28, 1969).
the Advisory Committee on Practice and Procedure,\textsuperscript{50} the drafters revised the language of section 177 of the Civil Practice Act\textsuperscript{50} to permit “any party against whom a claim is asserted” to serve a written offer. More significantly, they introduced attorney’s fees as a charge against the claimant who unreasonably refused to accept an offer.\textsuperscript{61} No modification of this 1957 draft appeared in the Advisory Committee’s Reports of the succeeding three years.\textsuperscript{62} Rule 31.11 was incorporated in one of a number of bills introduced in the 1960 legislature,\textsuperscript{63} and circulated for

\textsuperscript{59} Temp. Comm’n, supra note 51, Proposed Rule 31.11.

\textsuperscript{60} Ch. 925, § 177, [1920] Laws of N.Y. 79 (repealed 1962). “Defendant’s offer to compromise; proceedings thereon.

“Before the trial, the defendant may serve upon the plaintiff’s attorney a written offer to allow judgment to be taken against him for a sum, or property, or to the effect, therein specified, with costs. If there be two or more defendants, and the action can be severed, a like offer may be made by one or more defendants against whom a separate judgment may be taken. If the plaintiff, within ten days thereafter, serve upon the defendant’s attorney a written notice that he accepts the offer, he may file the summons, complaint, and offer, with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If notice of acceptance be not thus given, the offer cannot be given in evidence upon the trial; but, if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time.”

\textsuperscript{61} The text of the proposed rule was: “31.11 Offer to compromise. At any time more than ten days before trial, any party against whom a claim is asserted, and who may be liable to a separate judgment, may serve upon the claimant a written offer to allow judgment to be taken against him for a sum or property or to the effect therein specified, with costs then accrued. If within ten days thereafter the claimant serves a written notice that he accepts the offer, either party may file the summons, complaint and offer, with proof of acceptance, and thereupon the clerk shall enter judgment accordingly. If the offer is not accepted and the claimant fails to obtain a more favorable judgment, he shall not recover costs from the time of the offer, but shall pay costs, plus a reasonable attorney’s fees fixed by the court, for defending the action from that time. An offer of judgment shall not be made known to the jury.” Temp. Comm’n, supra note 51, at 112.

Similarly, in Proposed Rule 31.10, “Tender,” the Advisory Committee incorporated an allowance for attorney’s fees in addition to costs, “[i]f it be determined upon the trial that the tender . . . was sufficient to have satisfied the obligation due under the contract . . . .” Id. at 109. In Proposed Rule 31.12 “Offer to liquidate damages conditionally,” if claimant refuses the offer and the damages awarded do not exceed the offer, “he shall pay the reasonable expenses incurred by his opponent in preparing for the trial of the question of damages, including reasonable attorney’s fees.” Id. at 113.


study by bar associations and attorneys. Public hearings were conducted on the proposed legislation and many suggestions were received from judges, attorneys and bar associations. The Codes Committees of both Houses concluded, in 1961, that there was "sufficient disagreement amongst the bar" to warrant certain changes in the bills. At the top of the list was the instruction that "[s]anctions by assessment of attorneys fees as costs should be omitted throughout." Accordingly the Fifth Preliminary Report, dated 1961, reflected this mandate and incorporated, as Rule 3262, the offer to compromise shorn of any sanction but the traditional costs. Rule 3221 in the CPLR follows the language of proposed Rule 3262.

IV. PROPOSED REVISION

Although the offer to compromise reverted to its traditional form in the CPLR, the earlier recommendation of the Advisory Committee—Rule 31.11-generated interest and discussion. As previously noted, this Rule permitted "any party against whom a claim is asserted" to serve a written offer upon the claimant. Failure to accept the offer, followed by failure to achieve a better recovery after trial, would result in the claimant being deprived of costs and charged with reasonable attorney's fees from the time of the offer. Using Rule 31.11 as a springboard, Justice Abraham N. Geller wrote a series of provocative articles critical of the established and suggested procedure, and recommended the following text:

Offer to compromise. At any time not later than thirty days before trial any party to an action based upon tort may serve upon any other party a written offer to accept, if he be the plaintiff, or to allow, if he be the defendant, a judgment to be entered against defendant for a sum or property or to the effect therein specified, with costs then accrued. At any time not later than ten days before trial the party served with such an offer may serve a written counter-offer to accept or allow, as the case may be, judgment to be entered for a sum or property or to the effect therein specified, with costs then accrued. If, within twenty days after service of an offer, or within

65. Id. at 12.
67. Id. at 507-08.
68. The notes following Rule 3262 point out that: "Attorneys' fees are not a part of these costs so that the rule provides far less inducement to offer a compromise than it did in the 1960 draft." Id. at 508.
five days after service of a counter-offer, the party served with an offer or counter-offer serves a written notice that he accepts same, either party may file the summons, complaint and offer or counter-offer, with proof of acceptance, and thereupon the clerk shall enter judgment accordingly. If no offers or counter-offers are accepted and the case proceeds to trial, the following shall apply: If plaintiff obtains judgment for at least the sum specified in his last offer or counter-offer, he shall recover costs, plus reasonable attorney's fees fixed by the court, for prosecuting the action from that time. If plaintiff fails to obtain judgment in excess of the sum specified in defendant's last offer or counter-offer, plaintiff shall not recover costs from the time of defendant's last offer or counter-offer, but shall pay costs, plus reasonable attorney's fees fixed by the court, for defending the action from that time.  

Immediately apparent innovations in Justice Geller's proposal are its limitation to tort actions, its availability to plaintiffs as well as defendants, and the facilitation of bilateral initiatives by permitting an exchange of offers and counter-offers. The plaintiff thus would have the opportunity to revise his original demand, which may have been inflated, while the defendant would be able to respond to a change in his adversary's position.

There are situations in which the rule would not be effective. Thus, for example, where neither side wished to engage in bargaining and where the judgment was for a sum less than plaintiff's offer but more than defendant's offer, neither party would be awarded attorney's fees. Furthermore, the author suggested that the defendant be awarded attorney's fees only if the plaintiff prevailed, i.e., the fees would be a reduction of plaintiff's verdict.  

The principle stated in the Geller revision, that the court shall fix the fees, is intended to permit the exercise of discretion. Thus the court

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71. See Geller & Spindel, supra note 70, pt. 1, at 4, col. 4-5.
72. Justice Geller confined his suggested procedure more specifically to personal injury cases for the reason that "[t]here is no pressing calendar problem associated with contract and equity cases . . . ." Geller, supra note 70, at 478.
73. The procedure in N.Y. C.P.A. § 177 [Ch. 925, § 177, [1920] Laws of N.Y. 79 (repealed 1962)] permitted only a defendant to make an offer. Under Proposed Rule 31.11 and N.Y. C.P.L.R. R. 3221 (McKinney 1963), an offer can be made only by the party against whom a claim is asserted. Thus only the claimant would be subjected to whatever coercive force the rule possessed.
74. Certain details of the suggested text—such as the time sequence of interchange of offers, the incorporation of attorney's fees in the recovery for purposes of determining the contingent fee, etc.—could be modified without striking at the substance of the revised procedure.
75. The author puts the case of a seriously injured plaintiff facing a defendant whose liability is doubtful. The defendant makes a nominal offer; the plaintiff refuses and loses on the liability issue. Imposition of attorney's fees might work a severe hardship upon such a plaintiff. Geller, supra note 70, at 479. See Geller & Spindel, supra note 70, pt. 3, at 4, col. 2.
could refuse to allow attorney's fees if, under all the circumstances, it would be inequitable to award them.\textsuperscript{77}

At the heart of Justice Geller's suggestions is the desire to preserve the court's role in personal injury adjudication and to avoid the transfer of such claims to an agency or administrative bureau.\textsuperscript{78} The proposal is logical but generates certain problems. It is logical in the sense that it applies leverage at the critical pretrial point. It might accelerate the compromise of claims which would otherwise be settled during trial. As a practical matter, however, judges might find the task of fixing fees, and decisions on when not to award them, troublesome. Furthermore, the most pronounced effect of the rule would be upon attorneys, who probably would consider the imposition of attorney's fees as costs a measure of coercion. Apart from a natural reluctance to change, some lawyers might look upon the proposed rule as a threat to their freedom to accept cases which they now are willing to undertake, or to conduct the prosecution of a claim or of a defense in accordance with their established pattern of practice.

The contingent fee is an issue in any rule affecting the source and amount of payment to attorneys in negligence cases.\textsuperscript{79} Attorneys in the United States, unlike their English brethren, have not been nurtured on the concept of fees as a part of costs.\textsuperscript{80} While contingent fees are subject at least to the general supervision of the courts and the self-discipline of the profession,\textsuperscript{81} lawyers might adopt the view that the proposed modifi-

\textsuperscript{77}. See Geller & Spindel, supra note 70, pt. 4, at 4, col. 2. Further to strengthen the compromise procedure, Justice Geller recommended revisions in the Insurance Law (N.Y. Ins. Law § 167(1)(b) (McKinney 1966)), to induce insurers "to settle serious and deserving cases by offering or contributing their policy limits . . . ." Geller & Spindel, supra note 70, pt. 2, at 4, col. 1. If the plaintiff served an offer or counter-offer for a sum within the applicable limit of coverage or for a sum in excess of the policy limits and it was rejected because the insurer refused to contribute the policy limits, the plaintiff, upon obtaining a judgment equaling or exceeding his offer, would become entitled to fees and costs from the time of the offer, "even though such costs and fees may constitute sums in excess of the policy limits." Id. On the consequences of "bad faith" on the part of the insurer, where a recovery in excess of policy limits is a possibility, see Brockstein v. Nationwide Mut. Ins. Co., 417 F.2d 703 (2d Cir. 1969); Young v. American Cas. Co., 416 F.2d 906 (2d Cir. 1969), petition for cert. dismissed, 396 U.S. 997 (1970).

\textsuperscript{78}. See Geller & Spindel, supra note 70, pt. 1, at 4, col. 1.

\textsuperscript{79}. Examination of justifications for and criticisms of the contingent fee in American practice is not a part of this study. See Radin, Contingent Fees in California, 28 Calif. L. Rev. 587 (1940).

\textsuperscript{80}. Id. at 595. See also R. Jackson, The Machinery of Justice in England 325-30 (5th ed. 1967).

cation of Rule 3221 would unduly interfere with the economic arrangements they have customarily entered into with clients in personal injury cases.\textsuperscript{82} If the bar concluded that the new procedure placed its members in a more precarious position vis-a-vis clients and the expectation of remuneration,\textsuperscript{83} its representatives in the state legislature could be expected to act unfavorably upon the proposed revision. Under the shadow of sanctions, lawyers might refuse the cases of impecunious claimants,\textsuperscript{84} and claimants apprised of the risk of a recovery diminished by attorney's fees might forego legal action. If only meretricious claims were discouraged by the rule's operation, the public and judicial administration would benefit. Such preferential discrimination, however, can hardly be expected.

How would the proposed rule affect the number of hard core cases which reach trial? In their article \textit{Delay and the Dynamics of Personal Injury Litigation},\textsuperscript{85} Professors Rosenberg and Sovern focused attention upon identifying claims which resist settlement and become consumers of court time due to their potential for high recovery.\textsuperscript{86} In such cases, the adversaries are willing to face the expense of a trial.

It is not hard to understand why the large potential value of a suit should predispose it to reach trial. The explanation lies in basic economic considerations. If a plaintiff is serious in his estimate that his case is worth about $50,000 and the defendant is equally convinced that it is worth no more than about $20,000, neither is likely to give up $30,000, or even $15,000, to avoid the expense of a trial. There is enough at stake to make the expense worthwhile. But this plainly is not true if the plaintiff's figure is $1,000 and the defendant's $300 . . . \textsuperscript{87}

It is questionable whether the added risk of attorney's fees as a cost would alter the economic and psychological factors in such cases to the point of dictating pretrial settlements. Rather, it is possible that this situation would produce the same result that might occur if prejudgment interest were imposed in personal injury actions:\textsuperscript{88} parties would adjust their demand and offer levels to accommodate the new risk. Thus the bargaining might be conducted on a higher monetary plane, without

\textsuperscript{82} For a contrasting view of fees as costs, see comments pertaining to the practice in continental legal systems in ABA Section of Int'l & Comparative Law, supra note 70, at 117-34 (1962).
\textsuperscript{83} For the problems and pressures experienced by practitioners, see generally J. Carlin, Lawyers' Ethics (1966); J. Carlin, Lawyers on Their Own (1962).
\textsuperscript{84} See R. Jackson, supra note 80, at 330-31.
\textsuperscript{85} Rosenberg & Sovern, Delay and the Dynamics of Personal Injury Litigation, 59 Colum. L. Rev. 1115 (1959).
\textsuperscript{86} Id. at 1137-39. Based on data from the first department, the authors found that one out of twenty suits recovering $3,000 or less reached trial, whereas one out of five suits recovering more than $3,000 reached trial.
\textsuperscript{87} Id. at 1136 (footnote omitted).
\textsuperscript{88} See text accompanying note 41 supra.
bridging the gap between the positions of the parties. Justice Geller's suggestion that attorney's fees be assessed against a plaintiff only if he recovered, so that the fees could be subtracted from his award, clearly leaves the defendant with more to fear from this proposal than the plaintiff.

Let it also be recalled that the wording of the suggested rule\textsuperscript{89} makes the initiation of the offer procedure a voluntary matter. Any party may serve an offer. Could we anticipate that there might arise a fraternal boycott of the entire procedure by negligence lawyers, analogous to the conspiracy of silence attributed to the medical profession? If the mechanism of offers and counter-offers is never initiated, who can be called to task for recalcitrance or unreasonableness? That a tacit understanding, manifesting itself in forbearance, might vitiate the proposed inducement to settle is not an idle supposition. The lawyer, expecting to face his current adversary on future occasions in court, might well be tempted to adhere to the golden rule.

It appears, therefore, that the probable reaction of the legal profession to the stern inducement of attorney's fees can be predicted. The proposed rule's effect upon prospective claimants and upon the size and number of cases which will resist its influence will also largely depend on the attitude of lawyers. Without polling the profession—a formidable undertaking not within the scope of this study—that attitude cannot be statistically defined. There are, however, some aspects of the offer to compromise problem which do lend themselves to a more modest scale of investigation.

Initially, the parochial view can be at least temporarily relinquished, and the procedure examined in a more general context.

Secondly, it is possible to advance beyond the present and proposed forms of the procedure to test reaction to a mandatory rule which would eliminate some of the infirmities of the voluntary systems.

Thirdly, questions may be directed to a random sample of judges to obtain the reaction of the judiciary to a new form of the offer to compromise.

V. THE OFFER TO COMPROMISE IN OTHER JURISDICTIONS

The offer to compromise under the New York Civil Practice Act, sections 177 and 178, languished in desuetude. There is no evidence that its restatement as Rule 3221 in the Civil Practice Law and Rules has achieved a more prominent role than its progenitor in fostering pretrial settlement. Is there some quality indigenous to New York practice which has perpetuated the lifeless state of this procedure? What has been the

\textsuperscript{89} See text accompanying note 71 supra.
experience in other states with rules similar to CPLR 3221 or Federal Rule 68? If the results parallel those in New York, do other jurisdictions contemplate any revision of their procedures?

To answer these questions, the writer initiated correspondence with the chief justices of twenty-eight states having an offer to compromise or offer of judgment provision which imposes costs upon the party who has refused a reasonable offer. Replies were received from 18 states. In two instances, the respondent could not supply any of the requested information, while in other instances only part of the requested information was received. The questions and answers are set forth below. For purposes of categorizing the answers received, the questions posed can be summarized as follows:

1. Do attorneys in personal injury litigation in your state invoke this procedure to encourage settlements before trial?

2. If so, would you estimate the frequency with which the offer to compromise is utilized? (E.g., rarely, substantial number of cases, very frequently, etc.)

3. Has there been any sentiment in the judiciary or the legislature to change the voluntary nature of the offer to compromise by requiring defendant to tender an offer or plaintiff a demand (with opportunity for a counter-offer by defendant) close to the trial date?

4. Do you think that a mandatory provision of this kind is feasible in your jurisdiction?

5. Has there been any sentiment in the judiciary or the legislature to augment the sanction of costs (chargeable to the party unreasonably refusing his adversary's offer) by imposing upon such refusing party the reasonable attorney's fees of his opponent?

6. Do you believe that such a penalty provision is:
   (a) workable from the viewpoint of judicial administration;
   (b) acceptable to the bench and bar; and
   (c) a fair method of applying pressure on litigants to settle?


91. See text accompanying note 48 supra.

92. Replies were received from Alaska, Arkansas, California, Connecticut, Delaware, Idaho, Iowa, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New Mexico, Ohio, South Dakota, Utah, West Virginia, and Wyoming.

93. In other instances, the responses were incomplete. However, all the classifiable information that was supplied is included in the text, with the exception of the "don't know" answers.

94. The reference relates to the first paragraph of the letter, which discussed offer to compromise provisions.
The following table reflects the answers which were received:

### TABLE A

**Responses from Other States**

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<th>Question</th>
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<tr>
<td>(c)</td>
<td>3</td>
<td>7</td>
<td>5**</td>
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* The response, in all 11 cases, was “rarely.”
** 3 replies stated that such a provision would be unacceptable to the bar; 2 stated that it would be acceptable to the bench.

Summarizing these responses, it appears that the offer to compromise, when utilized at all in other jurisdictions, is only rarely invoked. In some states, “rarely” means “practically never” or “in only a few cases.” In no state responding is the procedure employed in a substantial number of cases or very frequently.

The overwhelming sentiment is **against** making the offer **mandatory**. This is supplemented by the opinion that it would not be deemed **feasible** to require offers by the parties. Similarly, there is no reported inclination on the part of the judges or legislators in other states to **impose attorney's fees** as an inducement to settle. The respondents were split on the question of the utility—in the abstract—of attorney's fees as leverage. But on the realistic proposition of whether or not such a change would be acceptable to the bench and bar, five found it unacceptable to both groups and an additional three concluded that the bar would oppose assessing fees. A majority of those answering question 6(c) believed that imposition of fees would be an unfair method of pressuring litigants to settle.

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95. One respondent from the west stated his belief that the attorneys in his state are generally opposed to the exertion of any pressures, judicial or otherwise, seeking to accomplish out-of-court settlements of personal injury cases rather than trying them. Although most of the states in the sample had no court congestion problem comparable to that in the metropolitan New York area, those which could be expected to experience court delay concurred in the lack of sentiment to make the offer to compromise mandatory.

96. See answers to questions 3 and 4.
97. See answers to question 5.
98. See answers to question 6(b).
It may be concluded, therefore, that other jurisdictions have matched New York's experience with the offer to compromise. The procedure is ignored by the bar and consequently plays no demonstrable role in avoiding personal injury litigation. At the same time, there is no general enthusiasm discernible in other states to re-shape the procedure by introducing sanctions of more import than costs, or by requiring the parties to exchange offers before trial.

VI. SOME OPINIONS OF NEW YORK JUDGES

In the interest of acquiring additional data, the writer sought the reaction of members of the New York judiciary to revision of the offer to compromise. A questionnaire was prepared for distribution at the New York State Trial Judges Conference in June 1969. The number of judges receiving the questionnaire is not known. In addition, sixty-seven names were selected at random from the list of Supreme Court Justices and New York City Civil Court Judges. The response was so minimal that it cannot be given statistical weight. The results are, however, interesting and are reported below. The following questions were asked:

1. Should Rule 3221 require that defendant submit an offer to compromise?
2. If so, should plaintiff be required to make a counteroffer?
3. Should plaintiff be permitted or required to make a demand close to the trial date specifying the amount for which he would settle? (Presumably this demand will be lower than the amount specified in the complaint.)
4. If so, should defendant be required to make a counteroffer?
5. If plaintiff rejects defendant's offer to compromise and plaintiff fails to obtain judgment in excess of defendant's offer, should defendant recover costs and reasonable attorney's fees: (a) from the time the offer is made; (b) from the time the offer is rejected; or (c) for the action as a whole?
6. Similarly, if defendant rejects plaintiff's demand and plaintiff obtains judgment in excess of his demand, should plaintiff recover costs and reasonable attorney's fees: (a) from the time the demand is made; (b) from the time the demand is rejected; or (c) for the action as a whole?
7. Should costs and attorney's fees allowed to a defendant be awarded only in reduction of plaintiff's verdict?
8. Should the statute specifically provide that the trial court has discretion

99. Seventeen completed questionnaires were returned.
to deny the award of costs and attorney's fees where such award would be inequitable?

9. If the sanction of attorney's fees is imposed for defendant's unreasonable refusal of plaintiff's demand, should the insurer be obligated to pay costs and attorney's fees over and above the payment to the plaintiff of the policy limits?

The answers which were received to the preceding questions are reflected in the following table:

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<tr>
<th>Question</th>
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<th>Other</th>
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<td>6 (a)</td>
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<td>9</td>
<td>12</td>
<td>2</td>
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</tbody>
</table>

* Permitted—2; required—4.
** No answer because the answer to question 3 was "No."
† Should recover costs but not attorney's fees.
†† None of these.

The questionnaire concluded with the request that the respondent "note any procedural changes you think would be effective in reducing delays in personal injury litigation." One judge who had carefully answered all the nine questions wrote: "Aren't these enough?" Other comments contained the following suggestions:

1. Amend Rule 4011 to make initial trial of the liability issue mandatory.
2. The medical exchange rule should provide mandatory preclusion for failure to comply.
3. The sanction of attorney's fees should be invoked only where the award is 25 per cent more or less than the last offer rejected.
4. Cases under $10,000 should be tried by a panel of one judge and two
laymen. Rules of evidence should be relaxed. Written reports of doctors should be used instead of personal testimony.

5. Interest should be imposed from the date of the accident to the date of judgment.

6. Filing fees should be scaled to the amount of the demand.

As noted previously, it would be idle to draw conclusions from seventeen completed questionnaires. A number of reasons could be offered for the paucity of response, but the reason for putting the questions to the judges is clear. They are the instrumentality through which a rule becomes functional. Their lack of faith in the efficacy or justice of a rule is likely to influence the incidence of its use. As an illustration, summary judgment, available in any action, is seldom granted in personal injury actions. A mandatory offer to compromise rule, if enacted, could not and would not be disregarded by the bench. Nevertheless, if the rule permitted exercise of discretion in applying the sanction of attorney's fees, then as one judge responding to the questionnaire commented, discretion "would probably be exercised to such an extent that the rule would become ineffective." The anticipated attitude of judges must be given serious consideration in projecting procedural changes.

Had a much larger number of judges answered the questionnaire and had the distribution of responses approximated those noted above, we could have made the guarded observation that judges would favor strengthening the offer to compromise. Such affirmative support would be in direct contrast to the negative reaction anticipated from the negligence bar. As matters stand, however, one can detect no positive forces at work which would commend the proposed revision of the rule to the practicing profession, hold out any promise of its efficacy as a voluntary procedure, or indicate the feasibility of its adoption.

In sum, a voluntary offer to compromise rule incorporating the sanction of attorney's fees as an inducement to pretrial settlement is not, under present circumstances, the answer to court delay. A mandatory rule could

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100. The pressures of time and/or reluctance to submit to another in the stream of endless polls may explain the lack of response. More importantly, however, judges may have thought the offer to compromise of so little significance that it was not worth the effort to reconstruct it. It is possible that those judges who do favor more vigorous settlement inducements were more inclined to respond.


103. See question 8 and answers in text following note 99 supra.

104. The basis for this observation would be the answers to questions 3, 4, 5, & 6.
be effective, but would have even less chance of surviving a legislative veto. The choice appears to be twofold: (a) To continue applying all the procedural techniques now employed in the hope that eventually they will erode the backlog; or (b) to transfer personal injury actions out of the courts to a substitute forum.

The latter choice necessitates a difficult and unpopular decision. Nevertheless, the decision may be inescapable if the crisis in criminal justice continues and if more civil cases are not disposed of without time-consuming jury trials. If the necessary resources of judicial administration are to be devoted to clearing the backlog of criminal cases, consideration must be given to more economical and different methods of adjudicating the accident cases which dominate the civil calendar.

VII. Compulsory and Voluntary Arbitration: Court Panels

The most obvious substitution-forum is arbitration. In its compulsory form, arbitration is widely used in certain categories of accident claims. Reference has been made to the Pennsylvania system of compulsory arbitration for civil cases under three thousand dollars. While successful in reducing the backlog of the Philadelphia Municipal Court, the plan is subject to certain limitations: it is confined to small claims; it absorbs large quantities of attorneys' time as arbitrators; plaintiffs' lawyers are allegedly overrepresented on the panels; and arbitrators decisions are reversed in about one-third of the appealed tort cases reaching verdict. It is doubtful that this system could be transposed to a court of general jurisdiction where high potential recovery cases persist to trial.

Another example of arbitration operating in the accident field is the system maintained by insurance companies for disputes relating to physical damage claims. The Nationwide Inter-Company Arbitration Agreement provides for a network of local arbitration committees appointed by the Committee on Insurance Arbitration from among representatives

105. If it would be difficult to aggregate, from lawyers within and without the legislature, the support necessary for amending Rule 3221, one can easily prophesy the reception which would greet a change of forum proposal. On the other hand, in a crisis situation, public opinion may build to a point where sweeping reform is more popular and plausible than manipulations of obscure details.


107. See text accompanying note 7 supra.

108. See Rosenberg & Schubin, supra note 7, at 462-63.

109. Id. at 464-66; Reparations Rep., supra note 4, at 57-59.

110. The Committee on Insurance Arbitration represents the American Insurance Asso-
of signatory insurance companies. Signatories of the Nationwide Agreement are bound to forego litigation of any disputes involving automobile physical damage subrogation claims not in excess of $2,500.\textsuperscript{111} The hearings before the local committees are informal,\textsuperscript{112} and their decisions are final and binding upon the parties.\textsuperscript{113}

As of July 1, 1969, there were 472 insurance companies subscribing to the Agreement.\textsuperscript{114} In 1968, 97,093 cases were brought before 119 arbitration committees.\textsuperscript{115} Almost 100,000 cases were closed in 1968,\textsuperscript{110} representing claims in excess of $31,000,000.\textsuperscript{117}

The Special Arbitration Agreement, also sponsored by the large insurance associations, applies to bodily injury as well as property damage claims. The signatories\textsuperscript{118} bind themselves to arbitrate disputes where each has issued liability coverage to one or more parties, or where each has issued separate liability insurance to the same party against whom a claim arises and where the overall settlement value does not exceed ten thousand dollars. By this procedure, the insurers bind themselves to the apportionment of damages determined by the arbitration committee. Taken together, these compulsory, inter-company arbitration arrangements relieve the courts of many small claims.\textsuperscript{110}

Another area in which arbitration plays a prominent role concerns the determination of certain issues under the Uninsured Motorist Endorse-

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\textsuperscript{111} Signatories may agree to submit higher claims or other controversies to the committees.


\textsuperscript{113} It should be noted that the Philadelphia plan and the compulsory arbitration system enacted in New York in 1970 (see text accompanying notes 7-15 supra) provide for appeals in the form of a trial de novo.

\textsuperscript{114} Comm. on Insurance Arbitration, Arbitration Newsletter, Vol. 1, No. 4, at 1, col. 2 (July 1969).

\textsuperscript{115} Id., No. 3, at 1, col. 1 (April 1969).

\textsuperscript{116} Id.

\textsuperscript{117} Letter from Charles F. Berryman, Director, Casualty Claims, American Mutual Insurance Alliance, July 24, 1969.

\textsuperscript{118} As of February 1969, approximately 200 insurance companies were parties to the agreement.

\textsuperscript{119} "The tremendous public service that is rendered by those who conceived and operate this agreement without burden to the taxpayers is not less valuable because it is so little known. It is probably the largest arbitration system in the world." Reparations Rep., supra note 4, at 52 (footnote omitted).
ment attached to the basic automobile liability policy. If the insured and the insurer do not agree that the insured is "legally entitled to recover damages from the owner or operator of an uninsured highway vehicle, or do not agree as to the amount of payment which may be owing," the matter shall be submitted to arbitration. By a narrow reading of this clause, the scope of arbitration is limited to the two issues of fault and damages. Thus, arbitration will be stayed while the parties revert to the courts to settle a vexatious number of questions dealing with coverage, disclaimers, notice and other details. Unlike the Pennsylvania plan, which permits appeal (actually a trial de novo before a jury), arbitration under the Uninsured Motorist Endorsement results in a final decision.

A comparison of these two major compulsory systems reveals interesting differences but does not point to the conclusion that either can provide a satisfactory substitute for court adjudication. Inter-company arbitration functions in an industry setting and is primarily devoted to physical damage claims. One can assume that it is efficient, economical and apparently fair enough to satisfy the participants. It deals with relatively simple problems such as the apportioning or exchanging of payments, where liability and the overall settlement figure have been pre-decided.

By contrast, these very issues of fault and compensation are the only matters with which Uninsured Motorist arbitration may concern itself. Furthermore, the system deals solely with personal injury claims, an area inherently more complex than bent fenders and crushed bumpers. While its fairness cannot intelligently be challenged in the absence of data measuring the quality of the proceedings, some observations on efficiency and economy can be ventured. As the system now operates, it cannot achieve maximal efficiency. Even though arbitrators dispose of their cases with dispatch, their consideration of a case is often interrupted by necessary recourse to the courts to resolve some non-arbitrable question. The total time spent in arbitration and before the courts may not show a net gain in efficiency. For the same reason, those cases which commence in arbitration and are then deflected to the courts may result in

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120. The "insured" is specifically defined by the statute. See N.Y. Ins. Law § 601(1) (McKinney 1966).
123. But see the favorable commentary of Aksen, Arbitration of Automobile Accident Cases, 1 Conn. L. Rev. 70 (1968).
little or no economy in total cost over the dispute that proceeds solely through normal court channels. In justice, it must be noted that such shortcomings cannot be laid to arbitration as a system, but rather stem from the limited charge given by the statute to the arbitrators and from the courts’ interpretation of the statute. If the decision is reached that accident claims must be removed from the courts and transferred to an arbitral forum, the legislature should eliminate the confusion and constraints which now characterize arbitration of claims against uninsured motorists.

In the field of voluntary arbitration, one can find no evidence to support it as an auspicious alternative. In a recent report, the American Bar Association’s Committee on Automobile Accident Reparations recommended that “efforts to bring about a fair and workable plan for the voluntary arbitration of appropriate categories of small tort claims arising from automobile accidents be continued,” but also observed that “purely voluntary arbitration of ordinary automobile claims has neither been popular nor successful in disposing of large numbers of cases.”

A voluntary arbitration plan, administered by the American Arbitration Association, was implemented in Erie County in 1968. It is limited to personal injury claims not exceeding five thousand dollars. The basic fees per case are two hundred and fifty dollars and there is no right of appeal. Relatively few cases have been submitted for arbitration under the plan. The very fact that it is voluntary and somewhat expensive may account for the plan’s unenthusiastic reception in Erie County.

All of the arbitration plans discussed above involve relatively small monetary amounts. As Professor Rosenberg pointed out: “[There] is a prevailing attitude that, whatever its procedural advantages, arbitration is not an acceptable substitute for the court process where large sums of money are at stake . . . . If lawyers are convinced that large cases deserve courtroom trials they can be counted on to appeal arbitrators’ awards in such cases.” Consequently, unless drastic limitations on appeals were enforced, large cases would resist final disposition by arbitration and their contribution to calendar congestion would not be diminished. But gains could be realized for suits below a pivotal figure, for example five or ten thousand dollars, provided the system was compulsory.

Another alternative was proposed by Justice Samuel H. Hofstadter

124. See generally Widiss, supra note 121, at 538-42.
125. See Reparations Rep., supra note 4, at 60.
127. Rosenberg & Schubin, supra note 7, at 468.
more than a decade ago. Since enactment of a compensation plan (his first suggestion) did not appear to be practicable, Justice Hofstadter suggested that automobile accident cases be tried before special courts composed of three members: a judge, a physician and a layman. He characterized the procedure as midway between the traditional trial by jury and trial by court.

The advantages which Justice Hofstadter attributed to the tripartite court were both general and specific. The backlog of personal injury suits could be reduced, and the expense of full jury trials in automobile accident cases could be eliminated. The panel would represent a combination of talents and virtues: "The jurist will provide legal learning and experience; limiting the number to one will conserve judicial manpower. The leavening impact of lay thinking will be provided by the nonprofessional member. And the physician will provide . . . impartial medical guidance—not advocacy . . . ." The parties to the controversy would find assurance in the representativeness of the panel and in the collective judgment they would render. And for counsel, the special court procedure would have the appeal of maintaining the adversary system.

Justice Hofstadter's proposal merits fresh consideration, although difficulties must be noted. It would necessitate a constitutional amendment, and would encounter the opposition which is generic to any plan contemplating the elimination or curtailment of trial by jury. Attracting the necessary number of medical panelists might also prove to be very difficult. Nevertheless, if the necessity of revising and improving the method of personal injury adjudication is accepted, and particularly if the legal profession becomes reconciled to that necessity, it might find the Hofstadter plan a more attractive alternative than an administrative board, or arbitration for all negligence claims. Negligence cases would remain in the courts, and the roles of the judge and the advocate would be intrinsically preserved. As a starting point for serious examination of compromise solutions, the panel-court idea offers possibilities which should not be ignored.

129. Id. pt. 1, at 4, col. 2.
130. Hofstadter, supra note 2, at 60. That part of Justice Hofstadter's proposal which advocates substituting comparative negligence for contributory negligence is omitted, not because it lacks importance but because it is a substantive matter not included within the scope of this study.
After a quarter of a century of struggle to reduce the tort jury calendar to manageable proportions, it is time to lay aside individual preferences, the security of established patterns, and the insistence upon trial by jury. The facile initiation of lawsuits as arch bargaining weapons for those who suffer personal injury or property damage as a result of a traffic accident must be abandoned. Severe restrictions upon the right of claimants to commence negligence actions are, of course, inadvisable. A citizen's access to the courts or to a substitute forum supported by the state ought not to be curtailed, even though some complaints can be summarily dismissed as devoid of good faith or substance. Apart from these sham claims, there remains the large number of lawsuits in which the plaintiff and his attorney honestly believe there is a good cause of action. If even a relatively small percentage of these persist to trial or to the eve of trial, and in the meantime are adjourned and recalendared, the backlog of civil cases in the metropolitan courts will continue. Court delay in the densely populated areas of New York continues, even though only about three percent of civil cases are actually tried.

The solution may be reached through an increase in the number of pretrial settlements, or alteration of the trial format or forum, or through a combination of these two measures. As to the first method, it is apparent that section 3221 of the CPLR has been an inefficacious tool for encouraging conciliation of the parties at an early stage of the controversy. Court costs do not represent a realistic inducement. Under the present rule, only the claimant may be penalized for refusing an offer to compromise. The revision proposed by Justice Geller possesses the advantages of permitting offers by both sides, and providing a forceful sanction—imposition of attorney's fees—for rejection of a reasonable offer. Parties may, however, be willing to assume the risk where the monetary stakes are very high. So long as the offer to compromise remains permissive, lawyers may continue to avoid its use.

When the CPLR was drafted, there was no enthusiasm in the legislature for assessing attorney's fees as costs. There is no evidence that a favorable reception would greet such a proposal today. A mandatory offer and counteroffer procedure, buttressed by attorney's fees, would produce a potent inducement to settle. Nevertheless, if the legislature and the profession are hostile to assessing attorney's fees as a voluntarily initiated measure, they would scarcely support it as the end result of a compulsory procedure.

Rather, if pretrial settlement is to continue as the major technique to
combat delay, courts must find means of utilizing pretrial conferences more effectively. The conference and assignment system introduced in the Civil Court of the City of New York early in 1970 has produced dramatic results in that court. It presents the parties and their counsel with the alternative of immediate trial if differences cannot be adjusted in conference. Where judicial manpower is available and where the character of the cases before a court lends itself to conciliation and compromise, judges might consider implementation of some form of the conference and assignment system upon a trial basis to determine its effect upon the civil calendar of their jurisdiction.

If the second method—altering the trial format or forum—is pursued, several possibilities arise. A liminal concession is necessary, i.e., that this approach will not produce the desired results unless the role of the jury is eliminated. Juries are time consuming. Not only the formal impaneling of a jury, but also the process of notification, preliminary determination of eligibility, maintaining a pool available for trial, emphasis upon the rules of evidence at trial, charging the jury—all make substantial demands upon court personnel and jurors. Juries are expensive. While the recently increased per diem fee of jurors is still a modest day’s pay, the aggregate of such fees in a large metropolitan area may mount to millions of dollars. There is also a substantial cost incurred by business enterprises whose employees are absent on jury duty. Finally, there is the physical as well as financial problem of providing facilities for jurors at the courthouses.

One might argue that if jurors are indeed superior to judges as triers of fact, then the burdens of extra delay and costs must be borne in the interest of achieving better justice. Of course, there is no consensus that jurors possess more sagacity, objectivity and fairmindedness than judges. Even if there were a public conviction on this point, however, it would not eliminate the necessity for some compromise with the ideal tribunal based upon the present exigencies of the criminal and civil calendars. The practical goal is to select the best possible forum and procedure for adjudication under existing circumstances.

Arbitration by a panel of lawyer-arbitrators is one alternative. New York already has instituted a pilot program to evaluate compulsory arbitration for controversies not exceeding three thousand dollars. Nevertheless, several questions arise. If the plan is successful in one area or court, can a valid projection of its effect upon a complex metropolitan area such as New York City be extrapolated from the data which will be available? To what extent will lawyers be able or willing to offer their services for a modest remuneration as arbitrators? What will be the rate

132. See p. 229 supra.
of appeal? Unless it is minimal (for example, four or five per cent), cases reverting to the courts for a new trial with a jury may dissipate initial savings of time and expense.

Is the cut-off point too low? While the average recovery after trial in city courts may be less than three thousand dollars, information concerning the average demand or the distribution of demands is unavailable. Such data are necessary in estimating the number of cases which could be diverted from the courts to arbitration. It is probable that a maximum of five thousand dollars or more should govern the area of compulsory arbitration. Perhaps a screening procedure to test the validity of the amount demanded should also be part of the program, so that a fictitiously inflated demand would not automatically be channelled to the courts. These as well as other considerations will require appraisal as the plan is perfected and its implementation in other areas of the state becomes a possibility.

Another alternative is to arbitrate all personal injury claims arising from automobile accidents. It is submitted that if this approach is adopted, compensation should not be according to a schedule (as is the case in Workmen's Compensation), but rather directed to reimbursement of net economic loss.

Finally, consideration could be given to a combination of arbitration for claims under five thousand or seventy-five hundred dollars, together with a panel-court such as Justice Hofstadter suggested. The advantage would lie in permitting complex personal injury cases to be heard and decided by a bench which includes a highly qualified and impartial physician. The tripartite participation of lay judgment and judicial and scientific expertise brings together the essential elements for a fair and comprehensive trial of difficult controversies.

The possibilities presented above do not exhaust the innovations in trial structure or forum which might be proposed to accelerate personal injury litigation. The legal profession and the legislature have taken a major step by supporting compulsory arbitration of small claims, while judges and court administrators continue to pursue and perfect many techniques to reduce delay in the courts. These efforts could not be more timely, first because the crisis in criminal justice demands the maximum

135. See text accompanying note 128 supra.
utilization of judge-time and court facilities, and secondly, because sub-
stantive changes in the automobile accident compensation system are on
the horizon. A more equitable scheme of accident reparation demands as
a counterpart an efficient and speedy process of adjudication. If courts
and court-supervised arbitration are to constitute the forums for accident
claims in the future, present efforts to master the backlog cannot abate,
but instead must be supplemented by an imaginative search for improve-
ments in traditional trial processes.