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Address Delivered Before the National Association Claimants' Compensation Attorneys

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ADDRESS OF JUSTICE JESSE W. CARTER OF THE SUPREME COURT OF CALI-
FORNIA, DELIVERED BEFORE THE NATIONAL ASSOCIATION CLAIMANTS'
COMPENSATION ATTORNEYS AT ITS ANNUAL BANQUET, ON AUGUST 11, 1951,
AT THE ST. FRANCIS HOTEL, SAN FRANCISCO.

The subject of my address this evening suggests desirability of a change in the trend of decisions of the Supreme Court of California. I am sure that those of you who are familiar with the recent decisions of that court have no doubt as to my views with respect to some of those decisions. While I do not venture to suggest the reason for this trend, I have a feeling that it may be said to be the product of imperfect, uncertain and misleading tradition.

There can be little doubt that the philosophy of lawyers, and particularly of judges, is hamstrung and restricted by tradition, and that the anomalies and inequities which exist in our law today, are due largely to the inability of those who chart the course of our judicial system to throw off and discard traditional concepts which are entirely out of harmony with modern institutions and our present day way of life. It has been said that: "The tradition of all past generations weighs like an Alp upon the brain of all living." Since turn of the century vast changes have been made, not only in
our social structure, but in the law with respect to the rights of those suffering injuries in our industries and in the mechanized transportation facilities which have developed so rapidly in recent years. Many of us here tonight, have in our own lifetime, observed a transition which has almost entirely removed from the jurisdiction of our courts, cases arising out of industrial accidents and placed them under the jurisdiction of Commissions, many of which are presided over by laymen, which have power to award compensation in accordance with a formula provided by statute. I think it must now be conceded that the primary reason for this change was to overcome the effect of the archaic and unjust rules of the common law which barred recovery for injury or death to an employee which resulted from his contributory negligence, the negligence of his fellow servant or the assumption of the risk of his employment.

It is now recognized that these rules were so unjust to the employee that a social problem arose which created the necessity for the enactment of workmen's compensation laws which now exist in every state in the union. Our federal government has kept pace with the states by enacting similar legislation in the Federal Employers Liability Act and the Jones Act, both of which acts entirely abrogate the defenses of negligence of a fellow servant and assumption of risk and modify the contributory
negligence rule to one of comparative negligence which affects
the amount of recovery in degree only. In the light of what
has transpired in the last three decades, I am confident
scarcely anyone, even the most reactionary minds, would publicly
advocate a reversion to the common law rules relating to
industrial injuries, but it must be remembered that in practically
every instance, these rules were changed by legislation and not
by court decisions.

Another archaic doctrine of the common law which is
still revered by our judiciary, where it has not been abrogated
by statute, is that of the abatement of tort liability as
result of the death of the tortfeasor. While this doctrine has
been abrogated in some states, including California by statute
in 1949, it still exists in many states throughout the Union.
Under this doctrine, a man worth $20,000,000, could drive an
automobile, while intoxicated, down a crowded street, kill 10
persons and injure 20 more, half of whom were children, maimed
and disfigured for life, and if he were killed or died before
judgment could be recovered in an action against him, none of
these injured persons, or the dependents of those who were
killed, could recover one cent against his estate. The Supreme
Court of California sustained this doctrine for almost 100 years,
and it required an act of the Legislature to abrogate it.
All of you have undoubtedly had experience with the standard of care exercised by the "reasonable man" -- another obsolete relic of the common law. The best definition of the reasonable man I have found is in the decision of Fardell v. Potts published in a little book called "Misleading Cases of the Common Law" by A. P. Herbert. Mr. Herbert says that the reasonable man is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound; who neither star-gazes nor is lost in meditation when approaching trapdoors or the margin of a dock; who records in every case upon the backs of checks such ample details as are desirable, scrupulously substitutes the word "Order" for the word "Bearer", crosses the instrument with the words "on account of Payee Only" and registers the package in which it is sent; who never mounts a moving streetcar and does not alight from any vehicle while it is in motion; who investigates exhaustively the BONA FIDES of every beggar before distributing alms, and informs himself of the history and habits of a dog before petting it; who believes no gossip, nor repeats it, without firm basis for believing it to be true; who never drives his ball until those in front of him have definitely vacated the putting green which is his own objective; who never from one year's end to another makes an excessive demand upon his wife, or neighbors or his servants; who, in the way of business looks only for that narrow margin of profit which twelve
men such as himself would reckon to be fair, and who contemplates his fellow merchants, their agents and their goods, with that degree of suspicion and distrust which the law deems admirable; who never swears, gambles, or loses his temper; who uses nothing except in moderation, and even while he spanking his child is meditating only on the golden rule. Mr. Herbert says that this excellent but odious character stands like a monument in our Courts of Justice vainly appealing to his fellow citizens to order their lives after his own example. Whether the case of Fardell v. Potts, as reported by Mr. Herbert is fiction or reality, I am not sure -- I am sure, however, that there is a certain amount of truth to be found there. In that case Lord Justice Morrow is supposed to have said that the reasonable man is so rare that he might be called a myth, and must be hateful to his fellow citizens, but it was odd that when twelve good men and true were gathered together in a jury box, they were easily persuaded that they themselves were, each and generally, such reasonable men without stopping to consider how strange a chance it must have been that had picked, so fortuitously, from a whole people twelve examples of so rare a species. The ladies present may not enjoy the ultimate holding in the case wherein it was decided that there was no such thing as a REASONABLE WOMAN, and that the learned trial judge should have directed the jury that, while there was evidence on which they might find
that the defendant, Mrs. Fardell, had not come up to the
standard required of a reasonable man, her conduct was only
what was to be expected of a woman, as such, and therefore,
reversed the judgment.

If juries assume that they possess the admirable,
impossible characteristics of the reasonable man, the learned
members of our courts often do the same thing when they follow
blindly the outmoded concepts of early cases and construe
statutes literally without regard for common sense or the
changing world

During this past week, I am sure that many very able
gentlemen have addressed this convention, and have given you
the benefit of their experience and study in the field of
compensation law. I do not intend to try to duplicate their
efforts. I do want to give you my ideas on what I consider to
be "needed legislation" in this state, and the reasons why that
legislation would be beneficial to you, as attorneys, to the
courts, and to the people of this state.

The first and most important matter of corrective
legislation which I would suggest, arises as the result of
the recent decision of the Supreme Court of California in the
case of Sanguinetti v. Moore Dry Dock Company (36 A.C. 775).
In that case the majority of my court held that incurable
misconduct, amounting to reversible error, was committed by counsel for plaintiff by moving in the presence of the jury to amend the prayer of the complaint for the purpose of increasing the amount of damages prayed for, even though the order granting leave to amend was made out of the presence of and never called to the attention of the jury. Such a holding makes of the law "a ass, a idiot" as Mr. Bumble remarked in Dickens' Oliver Twist.

Because of the implications in the majority opinion in the Sanguinetti case that a lawyer who moves to amend a pleading in the presence of the jury is guilty of incurable misconduct, and that the allowance of such amendment, whether in or out of the presence of the jury, constitutes reversible error, I feel constrained to emphasize the importance of this case to all trial lawyers and judges for the dual purpose of vindicating trial lawyers who have engaged in such practice and to warn both lawyers and judges of the lamentable pitfall created by the decision of the majority of my court in the above mentioned case.

It appears from the record in the Sanguinetti case that at the close of plaintiff's case, and while the jury was present, counsel moved to amend the prayer of the complaint by increasing the prayer for damages from $50,000 to $75,000. Thereupon,
counsel for defendant assigned such request as misconduct and moved for a mistrial. The trial court did not then rule on motion to amend, but excused the jury and heard arguments on the motion out of the presence of the jury. The motion was later granted by a minute order which was not called to the attention of the jury, and the only way that the jury were advised that the motion was later granted was five days later, when the court instructed the jury that it could not return a verdict in excess of $75,000, the amount demanded in the complaint. No request was made by counsel for defendant to instruct the jury to disregard the statement made by counsel for the plaintiff when he made the motion to amend, and neither was the court asked to instruct the jury relative to the purpose of the motion to amend or that they should not consider said motion as evidence that plaintiff was entitled to the increased amount of damages prayed for.

At the conclusion of the case, the jury were instructed fully as to the measure of damages in personal injury cases, advised that the amount of damages to which plaintiff was entitled was solely within their discretion and that the court did not intend to intimate that it was its opinion that plaintiff was or was not entitled to damages and that any damages awarded must be reasonable.
The jury returned a verdict in favor of plaintiff $75,000, which was affirmed by a unanimous decision of the District Court of Appeal but reversed by a bare majority of the Supreme Court on the sole ground of misconduct in making the motion to amend. The majority opinion apparently concedes that the motion might properly have been made out of the presence of the jury -- that the trial court would later inform the jury that it could not return a verdict in excess of the increased amount prayed for. Jurors are not fools and it follows that they must then be aware that the complaint had been amended by increasing the amount of damages claimed. The majority opinion in this case is so out of harmony with present day concepts of trial procedure that it resembles some of the skeletons of the dead past when conservative minded judges found such technical and finespun reasons for reversing judgments based on jury verdicts that the people of this state were constrained to adopt section 4-1/2 of Article VI of our Constitution, imposing upon appellate courts the requirement of determining that any error committed by a trial court must have resulted in a miscarriage of justice before reversing a judgment based on a jury verdict. The liberal concept of this constitutional provision apparently escaped the majority of the court as it does not suggest a miscarriage of justice resulted from the error for which it reversed the judgment.
As I pointed out in my dissent in the Sanguinetti case, the practice of permitting such amendments had prevailed during the 26 years I practiced before the courts of this state and has continued since I have been on the Bench. Since the opinion in this case has been handed down, that practice now constitutes reversible error. If the majority of my court are to be consistent, they would also be required to hold that a motion to amend the answer, made in the presence of the jury, for the purpose of pleading a defense, is reversible error. Either holding is, of course, absolutely absurd because it is imperative that the jury be informed as to the contents of both the complaint and answer at all stages of the proceeding. Therefore, legislation to this end is desirable in order to overcome the effect of this ridiculous holding which shocks both the intelligence as well as the sense of justice of those who have read it.

Legislation is also suggested to correct the regrettable situation arising out of the decision of the Supreme Court of California in the case of Zaragoza v. Craven, 33 Cal.2d 315, wherein the husband's contributory negligence was imputed to injured wife, and she was precluded from any recovery for injuries because the recovery would have been community property. In this state, as many of you are only too well aware, the wife is given a cause of action for her personal injuries (Code of Civil Procedure §370) and yet her recovery, if any,
becomes community property of which her husband has control and management. The stringency of the situation would be somewhat alleviated under a comparative negligence statute but that would entirely obviate this particular difficulty. It appears to me that legislation should be exacted to provide that a recovery for personal injuries of the wife should constitute her separate property. It should be clearly provided that the contributory negligence of her husband may not be imputed to her when she is suing for her own personal injuries. Suppose a wife loses both legs or arms in an automobile accident which occurred when she was riding in a car driven by her husband which collided with that of a third person who was clearly negligent. Would not considerations of natural justice require any recovery of general damages for such injuries constitute her separate property? To hold that the entire recovery is community property subject to the control and management of the husband is to ignore the realities of life. Times have changed since the wife was a possession or mere chattel of the husband; further, the husband might dissipate the monies received, the parties might be divorced, or the husband might be taken by death. The wife would then be left with her earning power seriously impaired and no means with which to care for herself. Denial of all recovery to an innocent plaintiff for injuries inflicted by a negligent wrongdoer, merely because the plaintiff's negligent husband might also share in the compensation,
is not in accordance with my ideas of justice and right.

The malpractice cases present another obstacle. The alacrity with which members of the medical profession rush to testify against their fellow members is NOT a matter of which judicial notice may be taken. Judicial notice COULD be taken of the fact that a plaintiff may be denied his day in court by the fact that he cannot procure the expert testimony which has been held to be essential before his case can even go to the jury. In Huffman v. Lindquist, 37 A.C. 467, the majority of the Supreme Court of California held that the trial court had not been guilty of an abuse of discretion in refusing to permit plaintiff's expert witness to qualify as an expert. By the time-worn rule that the qualification of an expert lies within the discretion of the trial court, and by the equally time-worn, and I do not say time-honored rule, that an appellate court will not interfere therewith in the absence of an abuse of discretion, a plaintiff is effectively denied his day in court. His case is not possible of proof without the testimony of an expert witness since the matters in issue are usually within the knowledge of experts only, and a plaintiff cannot produce, at a moment's notice, a panel of experts whose qualifications might meet the capricious standards set by the trial judge. In the Huffman case, the plaintiff's expert witness was Dr. Webb of Los Angeles who is not only an able
physician and surgeon with years of experience, but one who had been held qualified to testify in a previous case. (Valentin v. La Societe Francaise, 76 Cal.App.2d 1.) The effect of the majority holding in the Huffman case is to place in the hands of a trial judge the power to prevent a plaintiff in a malpractice case from presenting any evidence on the issue that a defendant failed to exercise the degree of care and skill usually exercised by reputable physicians in the same community. So long as the qualification of the expert witness lies within the sole discretion of the trial judge, and an appellate court will not interfere in the absence of a showing of an abuse of that discretion, this situation will arise. I am of the opinion that legislation should be enacted providing that in reviewing the ruling of the trial court, in either permitting or refusing the qualification of an expert witness, the appellate court is not bound by the abuse of discretion rule, but may review the ruling and determine as a matter of law whether or not reversible error was committed.

Another outmoded doctrine stoutly adhered to by the California courts is that of sovereign immunity from tort liability. This absurd doctrine stems from the old common law idea that the king could do no wrong. It needs no citation of authority that both state and federal governments have entered into almost every field of endeavor in one way or another, and
that they, as well as private enterprise, should be held liable
the wrongs inflicted upon those with whom they come in
contact. It has been aptly said: "If we say with Mr. Justice
Holmes, 'Men must turn square corners when they deal with the
Government', It is hard to see why the government should not
be held to a like standard of rectangular rectitude when
dealing with its citizens." (48 Harv.L.Rev. 1299.)

The general expression of the doctrine of sovereign
immunity is that the state may not be sued without its consent.
It is true that the governmental immunity doctrine is being
gradually eaten away by exceptions such as the proprietary
capacity rule (People v. Superior Court, 29 Cal.2d 754), and the
doctrine of estoppel (Farrell v. County of Placer, 23 Cal.2d
624), but under present day conditions, there is no logical
reason why the government should not compensate those injured
by the torts of its servants and agents. Just recently the
Supreme Court of California denied a hearing in the case of
Latham v. Santa Clara County Hospital (104 A.C. 413). In that
case the plaintiff alleged facts which, if taken as true, as
must be, showed that he had been injured through the
negligent conduct of the hospital employees. He also alleged
that he was a regularly paying patient and that there were four
other hospitals in the community charging the same rates as he
paid in the county hospital. The trial court sustained the
defendant's demurrer to plaintiff's complaint without leave to amend. The District Court of Appeal reviewed the California cases on governmental liability and concluded that by judicial decision and the controlling statutes (Welfare & Institutions Code, §203.5) the demurrer had been properly sustained because the Legislature (presumably cognizant of the court decisions), had not intended to allow county hospitals to enter the proprietary field. I was of the opinion that the demurrer should have been overruled inasmuch as the complaint raised a question of fact -- whether or not the county was operating its hospital in a proprietary capacity, thereby waiving its immunity. The entire doctrine is outmoded -- the government, through its employees can do wrong and inflict injuries. New York has waived both its immunity from suit and its immunity from liability and has expressly consented to have its liability determined in accordance with the same rules of law as are applied in actions against individuals or corporations. The federal government has also so provided (Federal Tort Claims Act, Tit. IV, Pub. L. 601, ch. 753). But not California or its municipalities, except in rare instances. Where California has given its consent to be sued, the claims statutes present, as some of you undoubtedly know, a mass of confusion. This appears to me to be a field where corrective legislation is badly needed.
While I feel that it is unfortunate that it is necessary to resort to legislation to overcome the effect of judicial decisions which could be corrected by the courts themselves, I see little hope of a departure from the trend of the decisions of the Supreme Court of California in the fields which I have discussed, and therefore, if the effect of these decisions is to be overcome, it must be done by legislation, and I trust that an effort in this direction will be made by this organization.

While I envisioned an organization of this character when I was engaged in the practice of law, no effort was made to bring it into being at that time, and I want to commend and congratulate the members of the bar who had the vision and foresight to bring this organization into being. I am sure it can be made a vital force in the advancement of the science of jurisprudence and give aid to the institutions engaged in the administration of justice. With this objective in mind I commend it to those members of the legal profession who have seen fit to espouse the cause of those who have suffered disability as a result of the negligence or wilful misconduct of others.

While the practice of the law may be said to be on a competitive basis on a higher plane than that generally encountered in the business world, there are many matters of
common interest to all lawyers which can only be discussed and fostered by organized groups who are interested in a common objective. It is a matter of common knowledge that those members of the bar specializing in defenses of negligence cases have a more or less cohesive organization and are quite articulate in sponsoring and opposing legislation which might affect their line of endeavor. So it is important to those interested in the claimant's side of the case to take united action in support of legislation which has for its objective the advancement of the welfare of their present and prospective clientele. With proper leadership and the zeal and enthusiasm which has been shown by those participating in this convention, I have little doubt that this organization will be a potent force in establishing the standards by which justice may be more equally administered so that the concept so dear to the heart of the american lawyer of "equal justice under law" shall become a reality.