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Delay and the Dynamics of Personal Injury Litigation

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DELAY AND THE DYNAMICS OF PERSONAL INJURY LITIGATION

MAURICE ROSENBERG* and MICHAEL I. SOVERN†

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† Associate Professor of Law, Columbia University; Associate Director, Columbia University Project for Effective Justice (1959-1960). For their devoted efforts in collecting and evaluating the data that this article presents, we are deeply indebted to a number of associates in the Project's work. In 1957-1958, Dr. Irving Mark was in charge

I. THE PROBLEM

Delayed justice is one of man's stubborn maladies.¹ Just as stubborn is man himself, and this has led him to persist in prescribing for the delay affliction instead of trying to understand it. Today there are still those who believe that solution can precede understanding and that what this country needs is a good five-cent "cure" for delay. Happily, others have recognized the need to put first things first. All through the country more and more groups are at work methodically getting the facts that are essential to understanding what is wrong and what is needed.² The Columbia University Project for Effective Justice was founded in 1956 to aid in acquiring this type of basic knowledge.

In oversimplified terms, delay can be viewed as the product of too many cases and too few judges. If there were nothing more to the matter, the corrective would be obvious: since there is little prospect that the caseload will shrink,³ persuade the legislature to create additional judgeships despite the cost. But if excessive delay is also rooted in unrealistic and ineffective work methods, the prime objective should be to improve these. The Chief Justice of the United States is apparently convinced, along with many others, that

of the field research. He supervised the gathering, compiling, and analysis of materials from the closing statements and assisted in the drafting of preliminary reports on the survey. In 1958-1959, Sanford J. Fox, Esq. gave important help in the intermediate stages of the process of evaluating the data; and since July 1959, Robert H. Chanin, Esq. has made essential contributions in the final processing and presentation of the basic and supplementary data that are the core of this article. All three of our associates are members of the New York Bar. Dr. Allen H. Barton of the Bureau of Applied Social Research, Columbia University, gave us invaluable guidance during 1957-1958 as consultant sociologist. Space does not permit naming the other persons, including the distinguished members of the Project's Advisory Committee, who have given generously of their time and energies to the work reported here. On the financial side, the Project's work has been principally supported by grants from the Walter E. Meyer Institute of Law, Inc., and the New York Foundation, Inc.

1. For a brief history of the subject, see ZEISEL, KALVEN & BUCHHOLZ, *DELAY IN THE COURT* at xxiii & n.6 (1959).

2. See, e.g., HOLBROOK, *A SURVEY OF METROPOLITAN TRIAL COURTS*, LOS ANGELES AREA (1956); ZEISEL, KALVEN & BUCHHOLZ, *op. cit. supra* note 1, (first book of a projected series reporting the results of research on judicial administration conducted by the Jury Project at the University of Chicago Law School); the annual reports published by the Institute of Judicial Administration, New York University, on the status of court delay in approximately 100 courts throughout the United States; the basic fact studies of the state courts done by the various state judicial conferences, the best known of which are published by the states of New York, New Jersey, Pennsylvania, Massachusetts, and California; the annual statistical reports published by the Administrative Office of the Federal Courts; the report by the STAFF OF THE SENATE APPROPRIATIONS COMM., 86TH CONG., 1ST SESS., *FIELD STUDY OF THE OPERATIONS OF THE UNITED STATES COURTS* (Comm. Print 1959).

3. Indeed, the trend is to heavier caseloads. The Administrative Director of the New Jersey Courts reported that 42% more cases were added to court calendars in the judicial year 1957-1958 than in the year 1949-1950. 1957-1958 N.J. ADMINISTRATIVE DIRECTOR OF THE COURTS ANN. REP. 8-9. In Connecticut, civil case filings in the Superior Court have increased from 8,273 in 1950 to 13,804 in 1959. REPORT BY THE CONNECTICUT REPRESENTATIVE TO THE ATTORNEY GENERAL'S CONFERENCE ON COURT CONGESTION AND DELAY, schedule C (1959) (unpublished). California statistics show a similar pattern with the number of incoming civil cases in the Superior Courts rising from 106,000 in 1955 to 127,200 in 1958. REPORT BY THE CALIFORNIA REPRESENTATIVE TO THE ATTORNEY GENERAL'S CONFERENCE ON COURT CONGESTION AND DELAY 8 (1959) (unpublished).

there is greater promise in better techniques than in more judges, for he has recently said: "[W]e cannot expect our real strength to flow merely from expanding the judiciary. . . . Our strength must come mainly from improved methods"⁴

Before one can devise improved court methods it is vital to ask what sort of work bulks large in the court systems of this country. In the civil courts that inquiry leads straight to personal injury litigation—much of it arising from automobile accidents. In recent years, for example, personal injury suits have comprised about 60 per cent of all new issues filed in the New York State Supreme Court⁵ and more than half of the cases brought in the law divisions of the New Jersey Superior and County courts.⁶ Even the federal courts have become busy negligence forums, with personal injury actions constituting 49 per cent of all private civil cases in 1958, as compared with 28 per cent in 1941.⁷

Negligence suits have been especially troublesome in New York City, where an old backlog and a constant influx of thousands more of these cases have glutted the civil courts beyond their capacity to dispose of them in an orderly, dignified, and judicious way.⁸ Despite such recent expedients as "preference" rules,⁹ summer trials, and "readiness" requirements,¹⁰ these

4. Address by Mr. Chief Justice Warren to the American Bar Ass'n, reprinted as *The Problem of Delay: A Task for Bench and Bar Alike*, 44 A.B.A.J. 1043, 1046 (1958). See also, e.g., Murrah, *Opening Remarks, Seminar on Protracted Cases*, 21 F.R.D. 401 (1958); [1957] 4 TEMPORARY COMM'N ON THE COURTS REP. 7 (N.Y. Legis. Doc. 6(c), 1957); ABA, SPECIAL COMMITTEE ON COURT CONGESTION, TEN CURES FOR COURT CONGESTION (1959); Vanderbilt, *Improving the Administration of Justice—Two Decades of Development*, 26 U. CIN. L. REV. 155 (1957).

5. To be precise, personal injury actions accounted for 59.2% of the court's business in the judicial year ending June 30, 1958. 4 N.Y. JUDICIAL CONFERENCE ANN. REP. 179 (1959). When only the 30,745 law issues are considered, personal injury cases constituted 84.0% of the load. *Ibid.* This is probably a more realistic indication of the relative demands made by personal injury cases, for the 12,867 equity cases include many uncontested matrimonial actions that are disposed of by referees with minimal burden to the courts.

6. See Brennan, *New Jersey Tackles Court Congestion*, 40 J. AM. JUD. SOC'Y 45, 46 (1956).

7. Compare 1958 DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS ANN. REP., table C 2, with 1941 *id.* 109-10.

8. See Address by Presiding Justice Botein to the Association of the Bar of the City of New York, reprinted in 139 N.Y.L.J., No. 15, p. 4, col. 1 (Jan. 22, 1958).

9. E.g., N.Y. COUNTY SUP. CT. TRIAL T.R. V(5). This procedure is designed to keep out of the Supreme Court suits likely to recover sums below the \$6,000 jurisdictional limit of the City Court. A case cannot reach trial without first being reviewed by a judge sitting in the Calendar Part to determine if it can realistically be expected to recover more than the City Court's limit. If it can, it is granted a "general preference." If it cannot, a general preference is denied, and the case remains on the non-preferential calendar from which it may move to trial only after waiting about five to seven years. Plaintiff can avoid the long wait by consenting to transfer the case to the City Court.

A similar system operates in the City Court to encourage the transfer of under-\$3,000 suits to the Municipal Court. See, e.g., N.Y. CITY CT. R., *Special Rules for N.Y. and Bronx County Divisions of the City Court*, Special Rule I.

10. E.g., N.Y. SUP. CT., APP. DIV., SECOND DEP'T R., *Special Rule for the Supreme Court in the Counties Within the Second Judicial Department, Requiring the Filing of a Statement of Readiness in Order to Place or Retain any Action on Any Trial Calendar*; N.Y. COUNTY SUP. CT. TRIAL T.R., *Special Rule Respecting Calendar Practice*. Under these rules a case will not be placed on the trial calendar until one of the parties has filed a certificate of readiness, which states that the parties have completed, or had opportunity to complete, before-trial procedures and that the case is ready for trial.

cases remain the greatest single source of the log-jam in the trial courts.¹¹ As a prime problem area, New York City is a natural focus for investigation. It is, moreover, the site of an unusual collection of highly useful records on personal injury claims and suits.

II. SOURCES OF DATA

Since January 1, 1957, a rule of the New York State Supreme Court's Appellate Division, First Department, has required attorneys to file "closing statements" in certain personal injury and wrongful death cases.¹² Each statement shows, among other things, whether the case closed with or without suit, before, during or after trial;¹³ whether it terminated in settlement or judgment; how much was recovered; and how the proceeds were distributed.¹⁴

11. For the judicial year ending June 30, 1958, personal injury cases totalled 58.6% of all new notes of issue filed in the Supreme Court divisions in New York City. If only law issues are considered, personal injury cases accounted for 89.5%. 4 N.Y. JUDICIAL CONFERENCE ANN. REP. 179 (1959). In the City Court, negligence suits accounted for 95.1% of all new notes of issue filed. *Id.* at 200-01.

The volume of incoming suits gives a more realistic picture of the impact of personal injury cases than figures on how many of them are pending. The volume of pending suits of a particular type may merely reflect the relative priority that the court's procedures give to that type of action. It has been suggested that the New York County Supreme Court pursues a deliberate policy of keeping its other calendars up to date by concentrating all of its delay on the personal injury calendar. See ZEISSEL, KALVEN & BUCHHOLZ, *op. cit. supra* note 1, at 6-7.

12. N. Y. SUP. CT., APP. DIV., FIRST DEP'T R., *Special Rules Regulating the Conduct of Attorneys and Counselors-at-Law in the First Judicial Department*, Rule 4. A widely-used closing statement form appears as Appendix A to this article.

Long prior to the adoption of the present rule and its requirement that closing statements be filed, attorneys in the First Department had been obliged to file statements reporting their contingent agreements by a rule first adopted February 27, 1929. 80 N.Y.L.J. 2545 (1929).

The present contingent fee provisions evolved from rules that were originally proposed on September 21, 1956, which provided for a lower scale of "reasonable" fees than ultimately went into effect. After a hearing that brought forth strong protests from bar groups and attorneys in Manhattan and the Bronx, the rule was changed to its present form.

Soon after the rule became effective, suit was brought against the justices of the Appellate Division, First Department, by a group of attorneys who challenged the validity of the rule as exceeding the power of the justices. The New York Court of Appeals, reversing the Appellate Division, held the rule valid. *Gair v. Peck*, 6 N.Y.2d 97, 160 N.E.2d 43, 188 N.Y.S.2d 491 (1959), *reversing* 5 App. Div. 2d 303, 171 N.Y.S.2d 594 (3d Dep't 1958), *affirming* 6 Misc. 2d 739, 165 N.Y.S.2d 247 (Sup. Ct. 1957), *appeal dismissed and cert. denied*, 28 U.S.L. WEEK 3227 (U.S. Jan. 26, 1960).

13. In determining the point at which suits were closed, we have distinguished three stages: "before trial," which means at any time before the first witness is sworn; "during trial," which means after the first witness has been sworn but before the return of a verdict or award; and "after trial," which means after a verdict or award has been returned. Although the possibility exists that some lawyers employed different meanings when filing closing statements, interviews conducted with a random sample of attorneys practicing in New York City have convinced us that the above definitions are generally employed by members of the profession.

14. The Project's findings on this subject will be reported elsewhere.

About 44,000 statements were filed during 1957.¹⁵ Since then the annual rate has risen to 66,000.¹⁶

The closing statement requirement is one of the provisions regulating lawyers' fees recently added to a comprehensive set of special court rules regulating the "conduct" of attorneys in the First Department.¹⁷ The requirement applies to cases in which counsel (1) is retained on a contingent fee basis; (2) succeeds in recovering damages for personal injury or wrongful death; and (3) either has his office in Manhattan or the Bronx, or brings suit in a court located in one of those boroughs.¹⁸ Despite these limitations, a large majority of the personal injury cases arising throughout New York City fall subject to the closing statement rule.¹⁹ It deserves emphasis that the rule applies not only to suits, but also to the many thousands of these cases in which a First Department attorney obtains a recovery for his client without bringing a lawsuit.

With court authorization, the Project's staff drew from the closing statement files a random sample of 3,000 statements²⁰ and another random sample of 500 statements confined to cases in which more than \$3,000 was recovered.²¹ Other court records were sifted for an additional sample of

15. This has been reported to the Project by the Clerk of the Supreme Court, Appellate Division, First Department.

16. In the calendar year 1958 the number of filings increased to about 59,000. For 1959, figures are available only through the end of November, approximately 60,000 having been filed as of that time. *Ibid.*

17. N.Y. SUP. CT., APP. DIV., FIRST DEP'T R., *Special Rules Regulating the Conduct of Attorneys and Counselors-At-Law in the First Judicial Department.*

18. No similar rule obtains in Queens, Brooklyn, or Richmond. Elsewhere in the state it is found only in Erie and Monroe Counties in the Fourth Department. N.Y. SUP. CT., APP. DIV., FOURTH DEP'T R., *Rules Relating to Attorneys*, Rule IIIB.

19. Approximately five-sixths of all the attorneys in New York City have their offices in Manhattan or the Bronx. See AMERICAN BAR FOUNDATION, *THE 1958 DISTRIBUTION OF LAWYERS IN THE UNITED STATES* 48-49 (1959). The First Department lawyers institute approximately four-fifths of all of the personal injury suits started in the city. This estimate is based upon an analysis of 233 cases selected at random from the files of an agency to which most of the self-insurers and insurance companies underwriting in New York City report their personal injury cases. (This source will hereinafter be referred to as the Insurance Group.) Of the 100 suits in this sample, 78 were brought by First Department attorneys. Nor do the other limitations on the applicability of the closing statement rule prevent a majority of personal injury cases from falling subject to it. See Appendix C, note 16.

20. Court permission was necessary to obtain access to the closing statements because they are not public records. An order made on March 7, 1957, by Presiding Justice David W. Peck of the Appellate Division, First Department, authorized the Project to analyze the closing statements filed during the first six months of 1957. A random 2,000-case sample was then drawn by selecting every fourth statement filed between February 4 and April 17, 1957. Detailed analysis of the data suggested a number of hypotheses which warranted further investigation. Accordingly, upon the Project's application a second court order was made on February 3, 1958, by Presiding Justice Bernard Botein, who had succeeded Justice Peck, authorizing the Project to examine additional closing statements on file. A further random sample of 1,000 closing statements was then collected by extracting 1 out of every 35 statements filed between April 17, 1957 and the end of the year.

21. This sample was drawn under the authority of Justice Botein's order, see note 20 *supra*, from closing statements filed during the periods April 29 to May 27, and December 4 to December 17, 1957.

about 200 fully-tried personal injury actions.²² Then, to check further on a number of findings and to determine whether the data thus obtained comprised a cross section of New York City personal injury cases, we gathered information from the confidential records of several insurance companies cooperating with the Project²³ and from numerous other sources, some official, some private.²⁴ Sociologists and statisticians gave essential aid in the collection and processing of the data.²⁵

22. This sample was drawn from the records of the New York County Supreme Court. It constitutes all of the personal injury cases that the records reveal to have been fully tried in 1957 and for which closing statements had not previously been drawn.

23. The cooperating insurance companies have requested anonymity.

24. As the text's summary of the rule suggests, there are no closing statements for cases in which: no attorney was retained; suit was instituted in a borough other than Manhattan or the Bronx by an attorney without an office in the First Department; suit was not instituted and the claim was handled by an attorney without an office in the First Department; plaintiff's attorney was not compensated by a contingent fee; or plaintiff recovered nothing. With such cases omitted from the source, the possibility existed that findings based upon the sample would not reflect the facts about all personal injury cases in New York City. That would be true if the omitted cases differ from the sampled cases in material respects. Any differences between the omitted cases and the sampled cases would present the risk of statistical "bias" in the findings. The Project conducted a series of supplemental studies to discover whether such differences in fact exist and, if so, their significance. These studies rested on the premise that the bias or distortion attributable to any omitted types of cases—for example, the no-recovery cases—could be determined by comparing a group of closing statement cases with another group of cases in all respects similar except that it included no-recovery cases. Any differences between the groups would furnish a basis for estimating how much statistical distortion resulted from the absence of no-recovery cases from the closing statement sample.

Accordingly, the Project sampled sources of data outside the closing statement files. The outside samples were based upon city-wide sources, included no-attorney and no-recovery cases, and otherwise filled the gaps in the closing statement files. The outside samples and the closing statement sample were then compared. The results appear in detail at appropriate points *infra*. In general, the omitted cases exhibit the same basic characteristics as the closing statement cases. In the few instances where differences appeared, necessary adjustments were made. See, *e.g.*, Appendix C.

One other problem had to be disposed of before the closing statement findings could be regarded as reasonably accurate for personal injury cases throughout New York City. Our estimate of the volume of New York City's personal injury business left no doubt that many attorneys were not filing closing statements in every case in which a statement was required. See Appendix C, note 16. Would these many instances of noncompliance lead to "biased" findings? As before, what is crucial is not the mere extent of noncompliance, but unrepresentative noncompliance. Therefore, it was necessary to determine whether and wherein noncompliance introduced potential distortions. Only if distortions were found would adjustments or reservations be necessary. Accordingly, the Project obtained from representative insurance companies and self-insurers a random sample of suits and a random sample of claims. The relative sizes of the two samples were fixed in accordance with the suit:claim ratio observed in the 3,000-case closing statement sample. The two samples were then merged for comparison with the closing statement sample. These cases were like the closing statement cases in all respects except one—they could not possibly be contaminated by any noncompliance factor. By comparing these cases with the closing statement cases, we learned that the factor of noncompliance had not affected the representativeness of the closing statement sample to any significant degree. The comparisons are reported in detail in Appendix B. Circumstantially, noncompliance was further ruled out as a distorting factor by the fact that data from still other sources known to be immune from the noncompliance problem produced clear echoes of the closing statement findings. These data are discussed in detail at appropriate points *infra*.

25. The information obtained from the closing statements was transferred to punch cards and tabulated on IBM machines. In this regard, we owe a special debt to the Columbia University Bureau of Applied Social Research for its cooperation.

III. HOW "BAD" IS DELAY IN NEW YORK CITY?

The study began as an effort to assemble a comprehensive picture of the mass of personal injury cases in New York City as they move from lawyers' offices to ultimate disposition. The results permit the first estimate of the total volume of personal injury claims, suits, and trials in that city. They also permit a realistic assay of the magnitude of delay in disposing of these cases.

We estimate that each year in New York City about 193,000 claimants seek compensation for injuries ascribed to someone else's negligence.²⁶ About 162,000 of these ultimately recover something.²⁷ How long must they wait for payment; or, more precisely, how many must wait how long for payment? The first point to notice is that the picture is not all black. Claimants need not line up in single file behind all those still waiting from prior years and move forward only when all before them have been dealt with. A majority reach settlements promptly, if by that is meant within about a year after the accident.²⁸ More than four-fifths close within about two years.²⁹ But so vast

26. Appendix C sets out the computations upon which this estimate is based. We do not claim pinpoint accuracy or eternal immutability for this figure or for the others reported in Appendix C. We claim only that they are reasonably close reflections of recent experience in New York City and, presumably accurate forecasts of the short-run future as well.

27. Data received from the *M* Insurance Company, the Insurance Group, the New York City Corporation Counsel and the New York City Transit Authority indicate that defendants win approximately 16% of all personal injury cases. Applying this finding to the 193,000 claimants who seek compensation each year, we obtained the figure reported in the text.

28. From the claimant's point of view, delay is the time that elapses between the day of his accident and the day his damages are paid. Although the closing statements do not pinpoint the date of either of those events, they do pinpoint the dates of two other events, one of which occurs shortly after accident, the other shortly after payment. The closing statements themselves are required to be filed within fifteen days after compensation is received by counsel, N. Y. SUP. CT., APP. DIV., FIRST DEP'T R., *Special Rules Regulating Conduct of Attorneys and Counselors-At-Law in the First Judicial Department*, Rule 4(e), and so the date on each of these documents is probably quite close to the date the client was compensated. At the other end, attorneys must file a statement of retainer within thirty days after being retained on a contingent basis. N. Y. SUP. CT., APP. DIV., FIRST DEP'T R., *Special Rules Regulating the Conduct of Attorneys and Counselors-At-Law in the First Judicial Department*, Rule 4-A. It seems likely that if brought in at all, the attorney is retained shortly after the accident. The close correspondence between statistics which measure delay from accident to payment and those which measure it from retainer filing to closing statement filing corroborates this assumption.

Measuring from retainer to closing statement, we found that one year was enough time to dispose of 64% of the cases: 38% closed in the first 6 months and 26% in the next 6 months. It should be emphasized that these figures take no account of the quickly closed no-attorney cases, for which, obviously, no retainers or closing statements are filed. Were these included, the percentage of closings within a year would rise to 71%. This percentage was derived by the following steps: 1 case out of every 5 does not involve the services of an attorney, see Appendix C; data supplied by insurance companies demonstrate that few no-attorney cases take more than one year to close; we have, then, 64 out of 100 attorney-handled cases closing within one year to which

is the volume that, even so, a very considerable number of victims—we estimate 23,000 annually—are still waiting for reparation more than two years after being injured.³⁰ And the stark fact is that the more serious a plaintiff's injuries and hence the greater his need for prompt payment, the longer his wait is likely to be. This is apparent from Chart I, which shows that big-recovery cases—those in which plaintiff was seriously injured—close at a much slower pace than relatively trivial cases.³¹

must be added 25 no-attorney cases (virtually all of which close within one year); in sum, approximately 89 out of 125 cases, or about 71% close within one year.

This estimate is corroborated by abundant data from other sources. A sample of 3,242 First Department personal injury cases obtained from *M* Insurance Company contained 64% closed within 6 months and 80% closed within a year of the date the accident was first reported to the company. Another sample of 183 First Department personal injury cases provided by *M* contained 59% closed within 6 months, 76% closed within a year of the date of the accident. In a sample of 294 Second Department personal injury cases, also received from *M*, 61% closed within 6 months, 79% within a year of the accident. The most extensive study yet undertaken, which measured delay from accident to closing, reported the following figures for New York City automobile bodily injury suits closed during the month of June 1952: 50.8% were no more than 6 months old; 77.1% no more than a year old. This finding was made in a survey of personal injury cases in New York City, conducted by the All-Industry Committee Representing Insurance Companies. Most liability insurers underwriting in New York City participated. The report, which has not been published, was submitted in 1952 to the Court's Committee on Calendar Congestion, appointed by David W. Peck, then Presiding Justice of the Appellate Division of the Supreme Court, First Department, with Justice William C. Hecht as chairman. At the Project's request, a similar survey was conducted for the month of June 1957: 44.2% were no more than 6 months old; 67.6% were no more than a year old. The two surveys will hereinafter be referred to as the PECK-HECHT INSURANCE INDUSTRY STUDY.

Only one sample studied yielded a figure on closings within a year that might be considered significantly different from the one we have derived. A sample of 181 cases obtained from the Insurance Group included 38% closed within 6 months and only 57% closed within a year of the date of the accident. Even this figure leaves no doubt that most personal injury cases are closed within a year of the accident.

29. In the closing statement sample, 82% of the cases closed within two years. When this figure is adjusted to take account of the quickly closed no-attorney cases, as in note 28 *supra*, the percentage of closings within 2 years rises to 86%. The figures from the sources identified in note 28 *supra* are not significantly different. Ninety-six per cent of the 3,242 cases closed by *M* in the First Department were less than two years old. In the other two samples obtained from *M*, the 183 First Department cases included 90% closed within two years, and the 294 Second Department cases included 91% closed within that period. The PECK-HECHT INSURANCE INDUSTRY STUDY reports 91% of its June 1952 cases and 85% of its June 1957 cases closed within two years. Seventy-six per cent of the 181 cases obtained from the Insurance Group were less than two years old at closing.

30. This figure is limited to those victims who eventually recover something for their injuries. It was obtained by applying to the annual total of such victims—162,000—the finding that approximately 14% of all recoveries occur after 2 years.

31. Chart I depicts the approximate accident-to-payment interval for the estimated 162,000 cases per year in which plaintiffs in New York recover some damages. The number of cases in each size category was obtained by applying the percentage of closing statements in each size category to the 162,000 projection. The percentages shown in each bar are derived from the closing statements. Available data did not permit adjustment for the quickly closed no-attorney cases. As a result, in the lower size brackets, where these cases typically fall, the rate of closing depicted is slightly slower than the true rate.

CHART I

DELAY OF PERSONAL INJURY CASES IN NEW YORK CITY, ACCORDING
TO AMOUNT RECOVERED

Focusing particularly upon the solid black areas of Chart I, we can see that 1 in 3 of the largest cases experiences extended delay (over 36 months); but this is true of only about 1 in 20 of the smallest cases.

There being no agreed definition of "serious" delay on the one hand, or "insignificant" delay on the other,³² there is no purpose in contriving epithets for the facts revealed in Chart I. It is enough to note that delay of two or more years is common and that many thousands of people are implicated.³³ No fair-minded observer could shrug off these figures as showing

32. A court has a delay problem, according to the ABA, SPECIAL COMMITTEE ON COURT CONGESTION, *op. cit. supra* note 4, at 8, when the time lapse between the filing of suit and judgment exceeds 12 months. Other groups differ in their standards. Six months from filing to trial is the standard used by the Judicial Conference of the United States in recommending additional judgeships. *Ibid.* Delay for statistical purposes has been considered by the New York Judicial Conference as a lag of over 6 months in the disposition of tort cases and over 2 months in commercial and equity cases, as computed from the time the case is first placed upon the trial calendar until the case is reached for trial. 4 N. Y. JUDICIAL CONFERENCE ANN. REP. 46 (1959). And see the report by the STAFF OF THE SENATE APPROPRIATIONS COMM., *op. cit. supra* note 2, at 14:

A majority of the [federal] judges interviewed respecting the ideal time between filing and trial of the standard case . . . gave opinions ranging from 10 to 15 months, and pointed out that in certain types of actions it takes nearly 6 months to get the case at issue; and in serious personal injury cases (which constitute a substantial percentage of the caseload of many of the courts) where suit is filed shortly after the injury, an injustice could be done by disposing of the case in too short a time.

33. And no one knows how many plaintiffs settle for less in order to shorten the time they must wait for payment.

model conditions in the administration of justice in New York City. Neither, considering the brighter segments of Chart I, is hysteria or handwringing in order. To us, Chart I signifies that there is much room for improvement.

IV. AN APPROACH TO THE PROBLEM: THE CRUCIAL 7,000

In devising improved methods the courts fortunately need not spread their efforts across all the 193,000 personal injury claims made each year. Almost two-thirds of these are settled or abandoned without suit³⁴—roughly 77,000 with, and 39,000 without the aid of counsel.³⁵ Even the remaining group of 77,000 sued cases contains a large proportion that never actually burdens the courts. About 29,000 close without the parties signifying they want a trial by filing a note of issue.³⁶ Of the 48,000 suits left, roughly 7,000 reach trial,³⁷ of which only about 2,500 go all the way to verdict.³⁸ It is these 7,000 or so suits which reach trial that are the heart of the delay problem.

34. See Appendix C.

35. *Ibid.*

36. A note of issue is used to inform the court that a case is ready to be placed on the trial calendar. N.Y. CIV. PRAC. ACT § 433. The 29,000 figure was obtained by subtracting the number of personal injury suits noticed by the courts each year (approximately 48,000) from the estimated total of 77,000 commenced. Since there is no centralized body of data that would reveal the number of personal injury suits noticed annually in all the courts in New York City, the information had to be gathered from several sources and certain adjustments made. The 48,000 total was derived as follows:

Court	No. of personal injury suits noticed for trial	Source
Supreme Court	11,953	4 N.Y. JUDICIAL CONFERENCE ANN. REP. 179 (1959). 20,094 negligence cases were noticed for trial in the City Court in 1958. 4 N.Y. JUDICIAL CONFERENCE ANN. REP. 200-201 (1959). We rounded off at 20,000 to eliminate the small number of property damage cases included in the totals for negligence cases.
City Court	20,000	
Municipal Court	12,000	60,988 cases were noticed for trial in the Municipal Court in 1958. 4 N.Y. JUDICIAL CONFERENCE ANN. REP. 214 (1959). In each of the years 1937, 1939 and 1952, slightly more than 20% of the notes of issue filed in the Municipal Court were for personal injury cases. 5 N.Y. JUDICIAL COUNCIL ANN. REP. 132-33 (1939); 6 <i>id.</i> at 136-37 (1940); 19 <i>id.</i> at 138-39 (1953). The experience of the Court for other than the noted years is unavailable. However, the fact that this percentage remained constant for so long suggests that it reflects a constant ratio. Accordingly, after rounding off, we took as the Municipal Court figure 20% of 60,000.
S.D.N.Y.	3,690	1958 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 164-65.
E.D.N.Y.	555	
Total	48,198	<i>Ibid.</i>

37. See Appendix C.

38. *Ibid.* No distinctions are drawn in this article between jury verdicts and bench awards. Consequently, we have used the word "verdict" simply to signify the completion of a trial without regard to whether the trier of fact was judge or jury.

The 7,000 are crucial because they almost certainly consume more judge time and energy than the 70,000-odd suits that close before trial.³⁹ The overload caused by these bottleneck cases—or, as we call them, the “durable” cases—delays trial day for the others; and the remoteness of trial tends in turn to slow settlements,⁴⁰ since a large percentage of ultimately settled suits do not close until the eve of trial.⁴¹

The 7,000 tried suits are therefore the hard core of the problem. If a fair number of them were disposed of without trial, or by shorter trials, the bottleneck would be uncorked. Not only would there be less delay for trial-reaching suits; there would also be less delay for many of the settled suits.

With the problem narrowed to a mere 7,000 durable suits, the question becomes: what is special or distinctive about these 7,000 cases? What features differentiate them from the multitude of cases that do not reach trial? If there are distinguishing characteristics, and if they can be isolated, might not the courts be in a position to identify in advance the durable suits and to deal with them in a systematic way? For example, special procedures might be devised to condense the amount of trial proof, to clarify the issues, and to promote related ends in connection with durable suits. Conversely, trial preparation procedures would not have to be squandered on cases not likely to reach trial.

On quite a different level, knowledge of the distinctive characteristics of trial-reaching cases would permit more realistic evaluation of the ever-lengthening list of purported remedies for delay.⁴² Without that knowledge, it may be impossible to tell whether a particular remedy has any effect on the true workload—the cases reaching trial—or merely spends itself on the other cases without effect. With that knowledge, lawmakers could sharpen

39. ZEISEL, KALVEN & BUCHHOLZ, *op. cit. supra* note 1, at 39, report that a personal injury case in the New York County Supreme Court requires an average of about 13 hours of judge time for a complete trial as against about 8 hours if it is closed during trial and only .7 of an hour if it is closed between note of issue and assignment to trial. Although we have no independent data on the point, it seems reasonable to assume that other courts as well as the New York County Supreme Court devote far more time to cases that reach trial than to those that do not.

40. See text following note 90 *infra*.

41. ZEISEL, KALVEN & BUCHHOLZ, *op. cit. supra* note 1, at 35, report that some 20% of the cases reaching assignment for trial on the personal injury calendar in New York County Supreme Court are settled before the start of trial. In Allegheny County (Pittsburgh), Pennsylvania, “there is evidence that a significantly large number of cases . . . are settled only after a jury is sworn, in order to allow the attorney to collect his fee for a day in court.” LEVIN & WOOLLEY, *DISPATCH AND DELAY: A FIELD STUDY OF JUDICIAL ADMINISTRATION IN PENNSYLVANIA*, quoted in ZEISEL, KALVEN & BUCHHOLZ, *op. cit. supra* note 1, at 107 n. 3.

42. In addition to preference and readiness rules, see notes 9-10 *supra*, the following procedures have been brought to bear on the problem: compulsory arbitration, PA. STAT. ANN. tit. 5, § 30 (Purdon Supp. 1959); auditors, MASS. ANN. LAWS ch. 221, § 56 (1955); pretrial examiners, United States District Court for the District of Columbia, Local Civ. R. 12; abolition of the jury, Juries Act, 1949, 12 & 13 Geo. 6, c. 27, § 18. See also, ABA, SPECIAL COMMITTEE ON COURT CONGESTION, *op. cit. supra* note 4, at 9; Hofstadter, *Alternative Proposal to the Compensation Plan*, 42 CORNELL L.Q. 59 (1956); Miner, *A New Approach to Court Congestion*, 45 A.B.A.J. 1265 (1959).

the focus of remedial legislation and design it especially for the durable suits instead of reckoning with the mass of cases that on the average demand far less court attention.

These potential applications of the findings helped, as work proceeded, to give direction to this study. The Project turned to the task of learning from the data what it is about the small percentage of trial-reaching cases that differentiates them from the mass of others.

V. CHARACTERISTICS OF TRIAL-BOUND CASES

Ask a lawyer for an injured plaintiff why he chose to bring suit instead of continuing negotiations with the defendant and his answer will often be: "The insurance company wouldn't make a realistic offer." Press him to explain why, after commencing suit and waiting for months or years, he recommended (and his client accepted) substantially the same offer that had been previously rejected, and he might reply: "We had a serious problem of liability and might not have gotten to the jury"; "A key witness moved to California"; "My client needed the money too much to wait"; or any of countless other reasons.

That the considerations that motivate a litigant to start suit or insist upon trial are manifold and may be intensely subjective we, as lawyers, never doubted. Nevertheless, the intriguing question was whether there are any objective factors that are commonly present in sued cases but not in unsued cases; or commonly present in tried cases but not in cases settled short of trial.

We first hypothesized that such factors do exist and then examined the closing statements to see whether, under close analysis, any would emerge with enough frequency and clarity to be significant. The results left no doubt that many sued cases have identifiable features that differentiate them from the mass of cases settled without suit; and that these same features tend to distinguish cases reaching trial from those settled without trial. The factors of greatest consequence were: (a) the dollar value of the case; (b) the presence or absence of an "extra" attorney for the plaintiff;⁴³ and (c) the presence or absence of a lien on plaintiff's potential recovery. The findings have been grouped around these factors.

A fourth factor—whether the case was handled by a "specialist" in personal injury work⁴⁴—did not turn out to be consequential. The reasons for expecting a contrary result and the findings on this subject are reported in Appendix D.

43. By "extra" attorney we mean an attorney or firm not retained initially by the client, but subsequently called in to assume responsibility for the case.

44. By "specialist" we mean a lawyer or law firm that handled 9 or more cases in the 3,000-case closing statement sample. Such a "specialist" will handle approximately 100 personal injury cases annually. See Appendix D, note 4.

A. *Size*⁴⁵

Of the significant factors, size of recovery is the most potent, for it correlates strongly and consistently with three critical matters: whether the case ends as a claim⁴⁶ or goes to suit; if a suit, its durability (did it reach trial?); and the length of delay before closing.

1. *Suits and size.* The claim or suit status of a case is critical because sued cases tend to involve both longer delay and larger recoveries. As for delay, Chart II shows the overall extent to which suits lag behind claims in closing.⁴⁷

CHART II
DIFFERENCE IN AGE AT CLOSING—CLAIMS AND SUITS

45. Although recoveries ran as high as \$132,500, modest size was characteristic of the overwhelming majority of cases in the 3,000-case closing statement sample. Only

It can be seen that at the end of six months approximately two-thirds of the claims have closed, as compared with less than 20 per cent of the suits. At the end of a year 90 per cent of the claims but only about 40 per cent of the suits have been disposed of. And at the end of two years while only 3 per cent of the claims remain, fully 30 per cent of the suits are still waiting.

The second correlation—between suit status and large recoveries—stands out sharply when a few figures are compared. Among the suits surveyed, the median recovery was \$725; for claims the median was \$575. Expressed as an average, the recovery figure for suits was \$2,058; for claims \$912.⁴⁸ When all recoveries were aggregated, suits accounted for three-fourths of the grand total of reported damages,⁴⁹ even though the number of suits exceeded the number of claims only slightly.⁵⁰

The connection between suit status and large size is seen from another vantage point in Table 1, which shows that as the recovery size went up, the percentage of suits rose.⁵¹

TABLE 1⁵²
PERCENTAGE OF CASES SUED AND UNSUED, ACCORDING
TO AMOUNT RECOVERED

Amount recovered	Suits	Claims	Total	
			Per cent	Number
\$ 1 - \$ 1,000.....	52%	48	100%	(2,110)
\$1,001 - \$ 3,000.....	60%	40	100%	(624)
\$3,001 - \$ 6,000.....	77%	23	100%	(141)
\$6,001 - \$10,000.....	88%	12	100%	(61)
Over \$10,000.....	94%	6	100%	(64)
All cases.....	56%	44	100%	(3,000)

The same tendency⁵³ was even more strikingly seen when we totalled all the recoveries within each size bracket, computed the percentage of each total that was recovered by suits and the percentage recovered by claims, and

9% of the cases recovered more than \$3,000, and only 30% more than \$1,000. Nearly half (47%) recovered \$600 or less and about one-quarter (23%) \$300 or less.

46. The term "claim" is used hereinafter to mean an unsued case.

47. A random sample of 97 suits and 118 claims provided by the Insurance Group yielded a similar pattern. For example, 86% of the claims and only 29% of the suits closed within 1 year of the accident.

48. The pattern of larger recoveries for suits than for claims is repeated in a sample of 136 lawyer-handled cases provided by the Insurance Group. For suits the median recovery was \$550; for claims the median recovery was \$312. The averages were: for suits \$1,464; for claims \$675.

49. Of the total \$4,662,426 recovered, suits accounted for \$3,459,498.

50. The distribution was 1,681 suits and 1,319 claims, or 56% suits and 44% claims.

51. One qualification must be noted. Size does not tend to relate to the claim or suit status of cases within the group recovering \$1,000 or less. For example, a case recovering \$600 is no more likely to be sued than one recovering \$300.

52. Unless otherwise indicated, all tables are based on the closing statement data.

53. A similar pattern appears in the random sample of 136 cases provided by the Insurance Group, see note 48 *supra*. In the lowest size bracket (\$1-\$1,000), 62% of the cases were sued, as compared with 83% in the over-\$3,000 group.

compared each of these with the corresponding figures in other size categories. In the lowest bracket, suits accounted for 52 per cent of the total recoveries; in the highest, for 95 per cent. This trend is unbroken, as Table 2 shows.

TABLE 2

PERCENTAGE OF TOTAL DAMAGES IN EACH SIZE CATEGORY RECOVERED BY SUIT

Size category	Percentage of total damages recovered by suit
\$ 1-\$ 1,000	52%
\$1,001-\$ 3,000	61%
\$3,001-\$25,000	87%
Over \$25,000	95%
All cases	74% ⁵⁴

Thus, the data point to size as a factor that differentiates suits from unsued cases at the *closing* stage.

Does size also differentiate at the *beginning* stage, or does the correlation between large recoveries and suits merely mean that cases become more valuable when they are sued? In a sense the question answers itself, for it is unthinkable that simply putting a case into suit could raise its value enough to account for the enormous differences reflected in Tables 1 and 2. If it could, plaintiffs' attorneys in New York would long ago have ceased to settle cases in the claim stage, for no significant labor or expense is involved in starting a suit.⁵⁵

54. This trend, too, is strongly echoed by the 136 cases provided by the Insurance Group, see note 48 *supra*, with suits taking a steadily increasing proportion of the damages as size increases. In the \$1-\$1,000 recovery bracket, suits accounted for 68% of the total damages recovered; in the \$1,001-\$3,000 bracket, for 79%; and in the over-\$3,000 group, for 89%.

55. Under New York practice neither the summons nor any other document need be filed with the court in order for suit to be commenced. All that is necessary is the service of the summons (which may be issued by the plaintiff's attorney) upon the defendant. N. Y. CIV. PRAC. ACT § 218. *But cf.* note 84 *infra*.

The fact that suits are easier to begin in New York City than in most other cities does not seem to make their settlement rate unusually high. The following table, based on the experience of M Insurance Company, shows that among 11 cities sampled, New York ranked sixth—exactly median—in the percentage of suits reaching trial.

PERCENTAGE OF SUITS THAT REACHED TRIAL, ACCORDING TO JURISDICTION
(SUITS AGAINST M INSURANCE COMPANY'S ASSURED)

Jurisdiction	Percentage that reached trial	No. of suits in sample
Los Angeles	54%	(61)
Springfield	43%	(40)
Pittsburgh	39%	(48)
Buffalo	28%	(79)
Boston	27%	(73)
NEW YORK CITY	26%	(66)
San Francisco	21%	(51)
Baltimore	20%	(46)
Chicago	18%	(39)
Philadelphia	18%	(83)
Worcester	11%	(136)
All jurisdictions	24%	(722)

To visualize this point in terms of specific figures, assume that a plaintiff has insisted upon \$800 to settle a claim that defendant has valued at \$200. If the mere bringing of suit could push the value substantially upward, we would expect the tendency to be reflected in the closing figures. For example, in the up-to-\$1,000 bracket we would expect the average suit recovery to be markedly higher than the average claim recovery. Yet the fact is that in a sample of over 2,000 closing statements reporting recoveries in that bracket the average recovery for suits was not appreciably higher than for claims.⁵⁶

Accordingly, we conclude that in the run of cases, the mere act of suing does not add greatly to the value of a case. Thus, the observed correlation between suits and large size must mean that the more a case is worth, the more likely it is to be sued.

2. *Trials and size.* Size continues to influence the movement of personal injury cases even after suit is brought. A meager 1 out of 20 suits in which there was a recovery of \$3,000 or less reached trial, compared with

CHART III*
PERCENTAGE OF SUITS THAT REACHED TRIAL,
ACCORDING TO AMOUNT RECOVERED

* The 2,056 cases upon which this chart is based were obtained by merging the 1,681 suits in the basic 3,000-case closing statement sample with the 375 suits contained in the special sample of 500 statements for cases recovering more than \$3,000.

** In this and in all subsequent charts, this figure represents the total number of cases in the size category and not merely that portion depicted in the bar.

56. In the up-to-\$1,000 bracket the average recovery for suits was \$500, for claims, \$489.

1 in 5 of the suits recovering more than \$3,000. Chart III shows in detail the relationship between amount recovered and trials commenced.⁵⁷

The size-durability pattern observed in the closing statements was repeated in data obtained from the *M* Insurance Company on its litigation

CHART IV
PERCENTAGE OF SUITS THAT REACHED TRIAL,
ACCORDING TO AMOUNT RECOVERED
(SUITS AGAINST *M* INSURANCE COMPANY'S ASSURED)

57. The strong relationship between trials and size can be expressed in other terms. The following table shows what proportion of the total damages recovered in each size category was taken by the suits that reached trial. It can be seen that the higher the recovery bracket, the greater the proportion recovered after trial was commenced.

PERCENTAGE OF TOTAL DAMAGES IN EACH SIZE CATEGORY RECOVERED AFTER
TRIAL WAS REACHED

Size category	Percentage of total damages recovered after trial was reached
\$ 1-\$ 1,000	6%
\$1,001-\$ 3,000	9%
\$3,001-\$25,000	23%
Over \$25,000	46%
All Cases	21%

Whether expressed in the terms employed in the above table or in those employed in Chart III, the conclusion remains the same: the larger the recovery the more likely that it occurred after trial was begun.

experience in Manhattan and the Bronx.⁵⁸ As Chart IV shows, large recoveries correlated strongly with tried suits.⁵⁹

Additional data from *M* demonstrated that the size-durability trend is not confined to Manhattan and the Bronx, but exists throughout New York City.⁶⁰ As with the closing statements, the trend did not emerge significantly until the \$3,000 level was passed.

All this plainly points to the conclusion that whenever samples of closed suits are analyzed, it will be found that a relatively high proportion of the large recoveries occurred after trial began. But it leaves open the question whether that happens because trials inflate recoveries or because pre-existing large value impels cases toward trial. To answer this question, it became necessary to learn whether personal injury cases have an ascertainable size or value early in their careers; and, if they do, whether those with high values go to trial with greater frequency than those with low values.

The great difficulty was in obtaining figures on early "value." Upon first consideration, it might seem useful to array the cases according to the value placed upon them by the plaintiff—that is, to group them by amount demanded. But this would in fact be useless because a demand figure rarely reflects an objective appraisal of the case's value. A comparison of demands and awards in Los Angeles Superior Court during 1955 makes this point sharply:

Of the 415 jury cases in 1955 in which plaintiff was awarded damages, the median award was \$4,000 and the median demand was \$39,000. Of the 326 non-jury cases in which plaintiff had judgment, the median award was \$3,250 and the median demand was \$26,000.⁶¹

After ruling out the plaintiff's demand as an unreliable indicator of value, we turned to the defendant's side—in particular, to the insurance industry. This time the inquiry was highly productive because by happy coincidence insurers make studied efforts to estimate realistically the value of personal injury cases. *X* Insurance Company supplied us with a confi-

58. The data consist of 961 cases representing all of the First Department personal injury suits closed by *M* Insurance Company in 1957 in which there was a payment to the plaintiff.

59. The slight inversion of the size-durability trend in the first two groups we regard as insignificant. In practical effect it means only that the trend does not set in until the \$3,000 level is passed. This is not materially different from the closing statement picture.

60. An analysis of a 197-suit sample representing the entire universe of New York City personal injury suits in which a plaintiff recovered yielded the following results: of the 109 suits recovering \$3,000 or less only 9% reached trial; of the 88 suits recovering more than \$3,000, 26% reached trial. Although only 8 of these cases recovered more than \$25,000, the fact that 50% of them reached trial is suggestive.

61. RICHARDS, *SUPERIOR COURT CONGESTION, CAUSES AND CONTROLS* 8 (1955). A Project study, on a case-by-case basis, of 527 New Jersey automobile bodily injury suits brought in 1957 also demonstrated the nearly total absence of correlation between the amount of damages claimed and the amount recovered.

dential reserve estimate for each of 200 New York City suits closed since 1954 and told us which ones reached trial. The reserve estimates were established in accordance with standard insurance industry practice. That is to say, when a policyholder reported an accident, *X* estimated how much it might have to pay as a result of the accident and set up a reserve fund in that amount. As *X* learned more about the case, it periodically made reserve changes to take account of the new information.⁶² Table 3 summarizes the relationship between reserve estimates and durability among *X*'s cases.

TABLE 3

PERCENTAGE OF SUITS THAT REACHED TRIAL, ACCORDING TO RESERVE VALUE
(SUITS AGAINST *X* INSURANCE COMPANY'S ASSURED)

<u>Reserve value</u>	<u>Percentage of suits that reached trial</u>	<u>Number of suits in sample</u>
\$ 1-\$1,000.....	32%	(50)
\$1,001-\$3,000.....	26%	(50)
\$3,001-\$6,000.....	42%	(50)
Over \$6,000.....	44%	(50)
All suits.....	36%	(200)

As can be seen from Table 3, suits with large reserve values went to trial with greater frequency than suits with low reserve values. Although the pattern is hardly marked enough to constitute conclusive proof of a connection between early value and durability, it is strongly suggestive. It points to two conclusions: (1) the observed relationship between recovery size and durability is primarily the result of large size impelling cases toward trial rather than of trials inflating recovery size; and (2) the value of suits can be assessed well before trial and the results used to help estimate which ones are likely to reach trial.

To explore these points further, we turned again to the *M* Insurance Company. *M* provided us with the following information for each of 197 New York City suits closed by a payment to the plaintiff since January 1958: the reserve values as of December 1956 and December 1957; whether trial was begun or not; and the amount recovered. Of the two, the 1956 reserves provided the more exacting test of whether there is an advance relationship between value or size and durability because every one of them antedated ultimate disposition by at least a year.⁶³ Chart V shows how the 1956 reserves correlated with durability.

62. In estimating how much it might have to pay, *X* started with its assessment of the damages suffered by the potential plaintiff. It then discounted that figure if there was a dispute over liability, but in no event did it reduce the damages figure by more than 25%. Nevertheless, the total amount reserved for the 200 cases exceeded the total ultimately recovered by only 20%.

63. No case in this sample was closed within 13 months of the establishment of the 1956 reserves, and it was not until 29 months after the establishment of these reserves that the last case was closed.

Although we do not reproduce all the data here, it is worth noting that tabulation of the 1957 reserves yielded essentially the same results as shown for the 1956 reserves in Chart V.⁶⁴

What of the relationship between the durability of *M*'s cases and the amounts actually recovered? This is the subject of Chart VI. With the minor eccentricity in the lower size ranges already noted,⁶⁵ Chart VI, like Chart V, repeats the familiar refrain that the more money involved the more durable the case. The *M* data thus permitted us to see that the size-durability pattern retains its basic configuration whether size is defined according to "opening value" (amount reserved) or closing value (amount recovered).

Neither Chart VI nor any of the other data presented here is intended to suggest that the amount ultimately paid in an individual case can accurately be forecast long in advance of the case's disposition. Although many experienced personal injury attorneys affirm that such predictions are indeed possible,⁶⁶ the question is not an essential one in this study. The important point for present purposes is that advance estimates of case value can serve as a basis for predicting whether groups of cases will reach trial in high rather than in low proportions.

This remains true whether or not the actual recovery falls within the predicted size range. Consider, for example, the cases involving serious injury and disputed liability that are assigned a high potential value but ultimately end in a total victory for the defendant. If valued after they closed, these cases would appear as "zero" size. On a size-durability scale they would rank at the bottom. But that would not accurately reflect their relative durability, for it is potential size, not actual recovery, that is the crucial factor. This appeared quite clearly from an analysis of a sample of no-recovery cases for which we had reserve values.

64. Ten per cent of the suits reserved at \$1,000 or less in 1957 reached trial, as did 6% of the suits in the \$1,001-\$3,000 reserve category, 19% of the suits in the \$3,001-\$10,000 reserve category, and 29% of the suits reserved at over \$10,000.

65. See note 59 *supra*.

66. See, e.g., 1 BELLI, *MODERN TRIALS* 749-53 (1954); GAIR & CUTLER, *NEGLIGENCE CASES—WINNING STRATEGY* 334-35 (1957); LOW, *HOW TO PREPARE AND TRY A NEGLIGENCE CASE* 218-27 (1957). Insurance company data confirm that it is at least possible to predict in most cases on which side of a dollar dividing line a suit's ultimate recovery will fall. For example, in a group of suits provided by the *M* Insurance Company, reserves established less than a year after accident were highly accurate predictions of whether those suits would recover more or less than \$3,000. A meager 9 out of 113 suits recovering \$3,000 or less had reserves above that figure; only 3 of 19 suits recovering more than \$3,000 had reserves below that figure. Raising the dividing line does not seem to diminish accuracy. Consider the 200 cases from the *X* Insurance Company upon which Table 3 is based. Of 158 suits recovering \$0-\$6,000, 144 had reserves of less than \$6,000; of 42 suits recovering \$6,000 or more, 36 had reserve estimates above that figure. A similar pattern emerges from a comparison of reserves and recoveries for the 197 suits from *M* upon which Charts V and VI are based. Of 168 suits recovering \$10,000 or less in 1958, 159 had reserves of \$10,000 or less in 1956; 18 of the 29 recoveries over \$10,000 had 1956 reserves over that amount.

CHART V
PERCENTAGE OF SUITS THAT REACHED TRIAL,
ACCORDING TO 1956 RESERVE VALUE
(SUITS AGAINST *M* INSURANCE COMPANY'S ASSUREDS)

CHART VI
PERCENTAGE OF SUITS THAT REACHED TRIAL,
ACCORDING TO AMOUNT RECOVERED
(SUITS AGAINST *M* INSURANCE COMPANY'S ASSUREDS)

The 200 cases from X Company already referred to included 38 cases closed without recovery by plaintiff, and it can be seen by referring back to Table 3 that the presence of those cases in the sample did not blur the size-durability pattern. Indeed, the rule that the higher the reserve, the greater the probability of trial seems to hold whether plaintiff ultimately recovers or not. Though based on fewer cases than one could wish, Table 4, which deals separately with X's no-recovery cases, repeats the familiar pattern:

TABLE 4
PERCENTAGE OF SUITS THAT REACHED TRIAL,
ACCORDING TO RESERVE VALUE
(NO-RECOVERY SUITS AGAINST X INSURANCE COMPANY'S ASSURED)

<u>Reserve value</u>	<u>Percentage of suits that reached trial</u>	<u>Number of suits in sample</u>
\$ 1-\$3,000.....	38%	(29)
\$3,001-\$6,000.....	57%	(7)
Over \$6,000.....	100%	(2)
All suits.....	45%	(38)

In sum, we think it fair to conclude that it is possible well before trial to evaluate the worth of suits by size ranges and so to estimate which ones are most likely to reach trial.

It is not hard to understand why the large potential value of a suit should predispose it to reach trial.⁶⁷ 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, however resolute their convictions that their valuations are fair. To be sure, on occasion the former case may be settled and the second may reach trial, but far more usually the reverse should be true. In the end, cases with large potential are better prospects for trial than others because as a matter of dollars and cents a courtroom trial is an economically feasible way to dispose of them.

3. *Verdicts and size.* Up to this point we have seen that large size correlates to a high degree with whether cases go to suit and reach trial. Since not all trials go to adjudication, the next question is whether large size is a characteristic of those that do. Table 5 might at first glance suggest an affirmative answer.

67. The correlation between large reserves and trials would seem to eliminate the possibility that the size-durability linkage is primarily the result of trials pushing recovery size upwards. Appendix E offers another demonstration of the same point.

TABLE 5
PERCENTAGE OF SUITS THAT WENT TO VERDICT,
ACCORDING TO AMOUNT RECOVERED

<u>Amount recovered</u>	<u>Percentage of suits that went to verdict</u>	<u>Number of suits in sample</u>
\$ 1 - \$ 1,000.....	1.6%	(1,087)
\$1,001 - \$ 3,000.....	2.1%	(371)
\$3,001 - \$ 6,000.....	5.0%	(302)
\$6,001 - \$10,000.....	5.3%	(168)
Over \$10,000.....	8.6%	(128)
All suits.....	2.9%	(2,056) ⁶⁸

However, on closer analysis the size-verdict linkage turns out to be the result of the fact that large suits begin trial with greater frequency than small suits. In other words, once inside the trial courtroom large suits seem no more likely than small to finish trial. This can readily be seen from Table 6.

TABLE 6
PERCENTAGE OF TRIALS THAT WERE COMPLETED,
ACCORDING TO AMOUNT RECOVERED

<u>Amount recovered</u>	<u>Percentage of trials that were completed</u>	<u>Number of suits in sample</u>
\$ 1 - \$3,000.....	28%	(91)
\$3,001 - \$6,000.....	36%	(42)
Over \$6,000.....	27%	(75)
All suits.....	29%	(208) ⁶⁹

We are thus brought to the question why the factor of large size, so potent in impelling cases to trial, fails to impel them to verdict. To put that question another way, what happens at the trial to induce settlements in many of the big cases in which settlement was resisted all the way into the trial courtroom? Data were not available to answer this question, and in speculating we can do no more than survey the manifold aspects of the trial process and provide guesses as to which made the difference. Whatever the unknown factors may be, they apparently erase the economic differences between large and small cases, as Table 6 shows. A thorough analysis of a representative group of cases that reach trial and part of which persist to verdict would surely throw light on this subject. The Project has planned such a study.

4. *Delay and size.* In a sense, delay and durability are sides of the same coin. By definition, durable suits must wait for trial and so will show a

68. The 2,056 cases were obtained by merging the 1,681 suits contained in the basic 3,000-case closing statement sample with the 375 suits contained in the special sample of 500 statements for cases recovering more than \$3,000.

69. The 208 cases were obtained by merging the 135 trials contained in the basic 3,000-case closing statement sample with the 73 trials contained in the special sample of 500 statements for cases recovering more than \$3,000.

higher average age than suits that close before trial. This means that any factor that correlates with high durability can also be expected to correlate with long delay.

Large size meets that expectation. As we saw in Chart I above, about 1 in 3 of the largest cases was delayed more than three years, whereas a mere 1 in 20 of the smallest cases stayed open that long.

Does the correlation between large size and long delay hold when cases reaching trial are excluded from consideration? The question is important because if the answer is yes, large size makes for delay not only indirectly, by contributing to much of the trial load, but directly as well, by postponing settlements. The answer is emphatically yes. Chart VII, which is based solely on suits that did not reach trial, shows that large settlements tend to occur later than small ones.

CHART VII*
RELATION BETWEEN SIZE AND AGE AT CLOSING—UNTRIED
SUITS, ACCORDING TO AMOUNT RECOVERED

* The 1,848 cases upon which this chart is based were obtained by merging 1,546 suits from the basic 3,000-case closing statement sample with 302 suits from the special sample of 500 statements for cases recovering more than \$3,000. These cases constitute all of the suits in the two samples that were closed before trial.

It can be seen that at the end of a year, almost half of the smallest suits, but less than 20 per cent of the biggest, have closed. Even after three

years, when all but about 10 per cent of the little cases have been settled, more than 30 per cent of the big ones are still waiting.

As in the preceding discussions of this factor, here, too, we infer that size is antecedent rather than sequential; that large size promotes delay and does not merely reflect the award to patient plaintiffs of a bonus for waiting for payment. This inference rests upon familiar grounds. First, a large case often requires a lengthy wait for the plaintiff's serious injuries to assume their permanent form. Small cases are unlikely to involve such injuries. Second, when only a small amount is involved the case will not stand the cost of massive investigation, and there is no time loss for that purpose. Finally, lengthier delays in the disposition of large cases would seem to be but another manifestation of the settlement-inhibiting effect of large size. When large sums are at stake, each side may prefer the hazards of extended waiting and further negotiations to certain surrender of large sums for the sake of immediate settlement. When only small amounts are at stake, the pressures for ending the matter by compromise may find both sides more amenable, for in the small cases each party must bear in mind that if trial eventuates, even total victory may be Pyrrhic when the expenses have been counted.

B. *Involvement of an "Extra" Attorney or Firm*

An attorney retained in a personal injury case may not wish to handle it directly through his own firm. While remaining as attorney of record, he may call in an outside or "extra" firm to assume responsibility for prosecution of the case. Such a case is more likely to be sued, tried, and delayed than a case in which no extra attorney is retained.

1. *Suits and extra attorneys.* Among 478 closing statements reporting the retention of an extra attorney, there were almost twice as many suits as claims, the breakdown being 66 per cent suits and 34 per cent claims. In the entire 3,000-case sample, such a lawyer appeared in 19 per cent of the suits, but in only 12 per cent of the claims. Part of the relationship between extra attorneys and suits is attributable to the fact that large cases have an affinity for both.⁷⁰ But even when the size factor is taken into account, extra attorneys tend to close a higher percentage of their cases as suits than do unassisted firms.⁷¹

70. Extra attorneys appeared in 13% of the suits recovering \$1-\$1,000. They appeared more frequently in the higher brackets: \$1,001-\$3,000, 21%; \$3,001-\$6,000, 23%; over \$6,000, 32%.

71. In the \$1-\$1,000 recovery bracket 60% of the cases involving extras were sued, as compared with 50% for cases without extras. In the \$1,001-\$3,000 bracket the respective percentages were 66% and 58%. The tendency vanished in the \$3,001-\$6,000 bracket, reappeared in the \$6,001-\$10,000 bracket—94% of the extra cases and only 87% of the "solo" cases were sued—and disappeared again with respect to cases recovering more than \$10,000.

However, it would be unwarranted to conclude that extra attorneys promote litigation unless it were first established that they normally enter a case before suit is brought. Indeed, even if that can be established, it does not necessarily follow that they are suit-promoters. It may be that they are merely called in to carry out someone else's decision to sue.

2. *Trials and extra attorneys.* Extra attorneys also tend to try more of their cases than do unassisted firms. In fact, when like-size cases are considered, it can be seen that the extras' suits go to trial with almost twice the frequency of suits handled by a single firm. Table 7 shows this in detail.

TABLE 7

PERCENTAGE OF SUITS THAT REACHED TRIAL, ACCORDING TO
WHETHER AN EXTRA ATTORNEY WAS PRESENT

	Amount recovered				
	\$ 1- \$1,000	\$1,001- \$3,000	\$3,001- \$6,000	Over \$6,000	All Suits
Percentage of single attorney suits that reached trial.....	5%	7%	9%	26%	7%
Number of suits in sample.....	(923)	(284)	(85)	(77)	(1,369)
Percentage of extra attorney suits that reached trial.....	10%	10%	20%	30%	13%
Number of suits in sample.....	(164)	(87)	(24)	(37)	(312)

Again it would be unwarranted to assume that the extras are necessarily the cause of the relationship.⁷² But whether extras promote trials or trials create a demand for extras, the knowledge that the correlation exists may be useful. Referral to an extra attorney often occurs long in advance of trial.⁷³ When that happens the presence of an extra attorney could be utilized by the courts as an indicator of trial-proneness. But once at trial, cases handled by extra attorneys seem to have no greater tendency than the others to proceed to verdict.⁷⁴

3. *Delay and extra attorneys.* Extra attorneys are not only associated with more trials; they are also associated with retarded before-trial settle-

72. Indeed, the most likely conclusion is that durability is the cause of the relationship, since an extra attorney is often a trial specialist retained specifically because a suit appears destined for trial.

73. Of the 478 cases involving extra attorneys, 34% closed in the claim stage, which suggests that extras are often called in early. Extras must also have been engaged well before trial in a substantial portion of the remaining 66% of the cases because one-third of those were less than a year old when they closed. The results of a Project survey provide another bit of evidence that extras are retained early in litigation. Questionnaires were sent to attorneys who had appeared as extras in a random sample of fully-tried Supreme, City and Municipal Court suits. Of 24 responses, 14 reported that they came in before the note of issue was filed. Only one was called in after assignment to trial.

74. In the 3,000-case sample, 41 cases involving extras reached trial, of which 27% proceeded all the way to verdict; 94 solo cases reached trial, of which 30% were fully tried.

ments. Chart VIII shows that untried suits handled by extras generally settle later than those handled by a single firm.

CHART VIII*
RELATION BETWEEN EXTRA ATTORNEYS AND AGE AT CLOSING —
UNTRIED SUITS, ACCORDING TO AMOUNT RECOVERED

* The 1,848 cases upon which this chart is based were obtained by merging 1,546 suits from the basic 3,000-case closing statement sample with 302 suits from the special sample of 500 statements for cases recovering more than \$3,000. These cases constitute all of the suits in the two samples that were closed before trial.

The relationship is not surprising. For one thing, merely involving another lawyer in a case takes time and is apt to defer the closing date. For another, it seems likely that extra attorneys are usually called in to handle settlement-resistant cases rather than those that can be disposed of swiftly.

C. Presence of a Lien

The common attribute of lienors is that they have advanced services or money to the plaintiff and are legally entitled, either by agreement or statute, to a priority in payment from the proceeds of his personal injury case against a third party.⁷⁵ Hospitals seem to be the most frequent lienors,

75. The term "lien" is used herein to encompass both statutory liens (see N.Y. LIEN LAW §189) and so-called equitable liens conferred by assignment contracts. A study of statutory liens alone would not give a full picture of the extent to which doctors, hospitals and others have legally enforceable interests in personal injury recoveries.

but liens also secure debts owing to such diverse creditors as workmen's compensation insurers, doctors, and funeral directors.

Liens were reported in 585 (or 20 per cent) of the closing statements, but their occurrence was notably more frequent in the larger cases. For example, at the over-\$6,000 level, liens were present 61 per cent of the time; at the under-\$300 level, they appeared only 8 per cent of the time.⁷⁶

The size of liens varied widely, ranging from a few dollars to \$13,532; 43 per cent of the liens reached \$100 or more. Of the total damages recovered in the 585 lien cases, 10 per cent was absorbed by the liens.

1. *Suits and liens.* Although there is no across-the-board relationship between suits and liens, there is a definite connection in cases recovering \$1,001-\$3,000. In this category, suit was instituted in 71 per cent of the lien-burdened but in only 55 per cent of the non-lien cases. Below the \$1,000 recovery level, suits and liens correlated slightly; above the \$3,000 level, no correlation appeared.

These findings are susceptible of rational explanation. In cases worth less than \$3,000, a lien of any significant size can be a substantial deterrent to settlement. To take an emphatic example, assume a case reasonably worth about \$2,000 and burdened with a \$700 lien. Since the lienor is probably in no great need of immediate payment and has a secured claim on the proceeds, he is well situated to insist on full payment of his claim. But if he collects in full, and plaintiff's attorney, with a contingent retainer entitling him to \$900, takes his full share, the plaintiff is left with a paltry \$400 out of his \$2,000 recovery. In order to satisfy his client, plaintiff's attorney may either have to reduce his fee or insist upon a settlement above \$2,000. Obviously, the latter course will diminish the chances of compromise; yet the plaintiff and his attorney may prefer taking a chance on an abnormally generous verdict to settling for an amount that will either leave the client with a trifling recovery or result in trimming the lawyer's fee.⁷⁷ This sort of stale-

76. The detailed findings on this point are shown in the following table:

PERCENTAGE OF CASES INVOLVING LIENS, ACCORDING TO
AMOUNT RECOVERED

Amount recovered	Percentage of cases involving liens	Number of cases in sample
\$ 1-\$ 1,000	13%	(2,110)
\$1,001-\$ 3,000	27%	(624)
\$3,001-\$ 6,000	46%	(141)
\$6,001-\$25,000	59%	(110)
Over \$25,000	80%	(15)
All Cases	20%	(3,000)

77. It may be asked why a plaintiff should be willing to gamble on leaving the debt underlying the lien unsatisfied. Why should not plaintiff regard satisfaction of the underlying debt as equivalent to money in hand? The answer is that in many cases, as a practical matter, the debt does not survive non-recovery by the plaintiff. For example, the hospital bill of an impecunious plaintiff will often be paid at charity rates by the City or some welfare organization. The difference between those rates and the charges to a

mate would be less likely to occur in a case worth \$5,000 or \$10,000, for even if the lien took as much as \$1,000, plaintiff and his counsel would have a substantial sum to divide and would be risking much more by going to trial.

If this explanation is correct, one would expect that in the \$1,001-\$3,000 bracket, where the lien-suit correlation is strongest, large liens would generate suits more often than small liens. The expectation is borne out by the data, as Table 8 shows:

TABLE 8
PERCENTAGE OF CASES SUED AS LIEN SHARE VARIES
(IN CASES RECOVERING \$1,001 - \$3,000)

<u>Share of recovery absorbed by lien</u>	<u>Percentage of cases sued</u>	<u>Number of cases in sample</u>
Less than 10%	68%	(111)
10% - 20%	74%	(38)
Over 20%	89%	(18)

It can be seen that of the cases in which liens consumed up to 10 per cent of the recovery, only two-thirds were sued, whereas suit was brought in almost 90 per cent of the cases in which the lien share exceeded 20 per cent. The implication is clear that large liens have a tendency to promote suits, but the tendency is selective, affecting small cases only.⁷⁸

2. *Trials and liens.* If liens do in fact have an anti-settlement effect on cases recovering \$1,001 - \$3,000, that effect should persist beyond the mere bringing of suit. Such cases should also reach trial at a heightened rate. As Table 9 shows, they do.

TABLE 9
PERCENTAGE OF SUITS THAT REACHED TRIAL,
ACCORDING TO WHETHER A LIEN WAS PRESENT
(IN SUITS RECOVERING \$1,001 - \$3,000)

<u>Lien was:</u>	<u>Percentage of suits that reached trial</u>	<u>Number of suits in sample</u>
Present	13%	(120)
Not present	5%	(251)

paying patient can be recouped by the hospital only if plaintiff recovers on his negligence claim.

Many close observers of the New York courts, including the late Temporary Commission on the Courts, have expressed the conviction that liens often retard the settlement of personal injury cases. The Commission felt strongly enough on the subject to suggest that legislation might prove necessary to prevent certain lienors from impeding settlements by standing too firmly on their strong legal and psychological positions. [1957] 4 TEMPORARY COMM'N ON THE COURTS REP. 42 (N.Y. Legis. Doc. 6(c), 1957). The Greater New York Hospital Association has also recognized the problem and has devised special procedures to facilitate settlements of law suits in which hospital liens are involved. 13 RECORD OF N.Y.C.B.A. 49 (Supp. 1958).

78. We must take account of the possibility that the lien-suit correlation in the \$1,001-\$3,000 bracket is attributable simply to liens being filed most frequently after suit is brought. We have been informed by attorneys specializing in this area that this is not the case. The general practice is to secure a lien as soon as possible after services are rendered, whether or not suit is contemplated. This confirms what can readily be inferred from the fact that the lien-suit correlation is limited to the \$1,001-\$3,000 bracket. If the practice were to file liens after the institution of suit, a lien-suit correlation would appear in all size brackets.

The greater durability of lien cases is also evidenced by the fact that a random sample of 71 trials recovering \$1,001 - \$3,000 included 39 per cent lien-burdened cases,⁷⁹ whereas a random sample of 343 before-trial closings in the same size bracket included only 30 per cent lien-burdened cases.⁸⁰

Echoing the pattern with respect to claim or suit status, durability rose in the \$1,001 - \$3,000 range when the lien share increased. Although the change was not dramatic, it was distinct, climbing from a trial rate of 11 per cent to a rate of 18 per cent as the lien share went from below to above 10 per cent.

3. *Verdicts and liens.* Once at trial, lien and non-lien cases seem to have about the same tendency to go to verdict, but since a much higher percentage of lien suits begin trial, a higher percentage finish.

A qualification may be in order with respect to the tendency of lien and non-lien trials to persist to completion. The sample of lien cases reaching trial in the \$1,001-\$3,000 bracket was too small to attempt a breakdown according to size of liens and trial completion. It may be that if enough such cases were assembled, a special tendency to go to verdict would be observed in cases in which liens took more than 20 per cent of the recovery. The hypothesis to be tested is that if the lien has prevented the parties from settling before trial, 20 per cent or more is a big enough slice of an under-\$3,000 recovery to reduce substantially the chances of a compromise during the course of the trial.

4. *Delay and liens.* A minor paradox appears here. Unexpectedly, there is no tendency toward abnormal delay in lien-burdened cases of \$1,001-\$3,000 that are settled before trial. One would have thought that since liens enhance durability in this size range they would slow closing whether trial eventuated or not. But the data showed no such correlation.

We must conclude, then, that any remedy aimed at mitigating the settlement-retarding effect of liens will have a statistically insignificant impact on delay. Although, by bearing down on large liens in cases involving probable recoveries of a few thousand dollars, such a remedy might eliminate a handful of trials and hasten recovery in the small group of cases directly affected, it apparently would not significantly affect the speed of disposition of the great mass of lien suits that are settled before trial.

79. Twenty-eight of the cases in this sample constitute all of the suits in the 3,000-case sample that reached trial and recovered \$1,001-\$3,000. The other 43 cases come from a separate sample of 137 closing statements reporting full trials. The 137 were randomly selected from statements filed in the first quarter of 1959; the 43 constitute all of the cases in this sample that recovered \$1,001-\$3,000.

80. The 343 cases come from the 3,000-case sample; they consist of all of the suits in the \$1,001-\$3,000 bracket that closed before trial.

VI. VARIATIONS AMONG COURTS

The most active personal injury forums in New York City and their monetary jurisdictional ceilings are: the Municipal Court, \$3,000;⁸¹ the City Court, \$6,000,⁸² and the Supreme Court, unlimited.⁸³ This three-tiered structure was designed so that the smallest cases would be processed in the Municipal Court, medium size cases in the City Court and large cases in the Supreme Court. But in the personal injury field nothing of the sort results. For example, less than 1 per cent of the City Court suits (4 of 656) recovered more than \$3,000, and all the others in the City Court closed at a figure within the Municipal Court's \$3,000 jurisdiction.

The inquiry here is whether—if we control size and other important factors—the career of a suit will vary according to the court in which it is brought.⁸⁴ The possible variations examined are delay, durability, and tendency to go to verdict.

A. Comparative Delay

Although the City Court is the forum for many more personal injury suits than either of the other two courts,⁸⁵ Supreme Court suits must abide the longest delay.⁸⁶ Only 11 per cent of this court's suits closed within six

81. N.Y.C. MUNIC. CT. CODE § 6(1).

82. N.Y. CONST. art. VI, § 15. A proposed constitutional amendment would, among other things, replace the present City and Municipal Courts with a new civil court having a jurisdictional limit of \$10,000. The first step toward adoption was taken in 1959, when the proposal was approved by a concurrent resolution, N.Y. Sess. Laws 1959 at LXX-LXXXI (McKinney). The proposal must be passed again by the 1961-1962 legislature and then approved by the voters before it can become a part of the constitution. N.Y. CONST. art. XIX, § 1.

83. N.Y. CONST. art. VI, § 1. The remaining courts handling personal injury suits in New York City are the United States District Courts for the Southern and Eastern Districts of New York. Together they account for less than 6% of the total number of personal injury cases commenced in New York City. Of the estimated 77,000 suits commenced in the City each year, see Appendix C, 3,690 are brought in the Southern District and 555 in the Eastern District. 1958 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 164-65.

84. Since under New York practice no documents need be filed with any court in order to commence a suit, see note 55 *supra*, a suit is "brought" in a particular court merely by naming that court in the caption of the summons and complaint. This means that many suits are settled without ever having come to the attention of the courts in which they were "brought." The Municipal Court, though, is probably informed of virtually all suits commenced there because the Municipal Court Code requires the filing of a summons within five days after service. N.Y.C. MUNIC. CT. CODE § 22(3).

85. More specifically, for the 1,495 closing statement suits commenced in these three courts, the distribution was: City Court, 44%; Supreme Court, 31%; Municipal Court, 25%. (A number of closing statements in the basic 3,000-case sample were for suits brought in courts other than the three just mentioned: 62 were filed in federal courts; 14 in other state courts. In 110 instances the forum was not identifiable.) The closing statement breakdown for the Supreme, City, and Municipal Courts corresponds almost perfectly with a breakdown of personal injury notes of issue filed in those courts: City Court, 46%; Supreme Court, 27%; Municipal Court, 27%. See note 36 *supra*.

86. The Supreme Court is most delayed, the City Court next, and the Municipal Court least delayed, whether we include all suits, as in Chart IX *infra*, or confine the

months after the filing of a retainer statement, as compared with 21 per cent for the City Court and 24 per cent for the Municipal Court. At the end of the third year after retention of an attorney, the cumulative figures on closed cases were 76 per cent, 89 per cent and 92 per cent for the Supreme, City, and Municipal Courts respectively.⁸⁷ In part, these figures merely reflect the fact that the Supreme Court deals with larger—hence, more delayed—cases. But even when this factor is largely neutralized by comparing suits that recovered like amounts, the closing rate remains slowest in the Supreme Court, as Chart IX shows.⁸⁸

analysis to suits closing before trial, as in Chart X *infra*, or to suits reaching trial, as in the following table based on statistics reported by the New York State Judicial Conference. The Conference reports the interval in months from the time a case is placed on the trial calendar to the time it is reached for trial in regular order. The table shows this information for tort jury cases for the years 1955 through 1958 for the four major New York City counties. A dash indicates that the interval was 6 months or less.

NUMBER OF MONTHS TO REACH TRIAL AFTER PLACEMENT ON TRIAL CALENDAR
FOR TORT JURY CASES, ACCORDING TO COURT AND COUNTY

Court	County															
	New York (Manhattan)				Bronx				Kings				Queens			
	'55	'56	'57	'58	'55	'56	'57	'58	'55	'56	'57	'58	'55	'56	'57	'58
Supreme.....	40	42	21	15	39	41	33	20	39	29	22	18	45	45	40	41
City.....	18	20	15	19	—	—	—	—	20	26	26	21	15	16	15	15
Municipal....	—	7	—	—	—	8	—	—	15	19	15	8	8	19	10	14

1 N.Y. JUDICIAL CONFERENCE ANN. REP. 81 (1956); 2 *id.* 220, 223 (1957); 4 *id.* 53, 66, 197 (1959).

87. The relationship between court and age at closing is presented in fuller detail in the following table.

DIFFERENCES IN AGE AT CLOSING—MUNICIPAL, CITY AND SUPREME
COURT SUITS, BY CUMULATIVE PERCENTAGES

Court	Closed within			
	6 months	1 year	2 years	3 years
Municipal.....	24%	50%	75%	92%
City.....	21%	46%	75%	89%
Supreme.....	11%	32%	61%	76%

Data obtained from *M* Insurance Company are in substantial accord, showing the following percentages of First Department suits closed after one year: Municipal Court, 71%; City Court, 60%; Supreme Court, 27%. In a sample of Second Department suits the corresponding figures are: Municipal Court, 54%; City Court, 49%; Supreme Court, 23%.

88. Because of the jurisdictional differences among the three courts such a comparison does not completely eliminate the effect of size. A Supreme Court suit can reach trial only after a judicial screening which establishes that it could conceivably recover more than \$6,000. See note 9 *supra*. Accordingly, even within a group of Supreme Court suits that actually recover no more than \$1,000, there will be some that had an over-\$6,000 potential. Since no such "large" cases are to be found in any group of City or Municipal Court suits, these groups should be less durable than the Supreme Court group. For similar reasons, City Court suits recovering \$1,000 or less should be more durable than seemingly comparable Municipal Court suits. However, these modest effects of size are probably not sufficient to account for the differences observed in Chart IX.

CHART IX

DIFFERENCES IN AGE AT CLOSING—MUNICIPAL, CITY, AND SUPREME COURT SUITS, ACCORDING TO AMOUNT RECOVERED

Since no case characteristic we have studied satisfactorily accounts for the variations recorded in Chart IX,⁸⁹ it seems likely that they are attributable to differences among the courts and not to differences among the cases they process. There might, for example, be differences in procedures to encourage early settlement, or in the manner of their utilization.

Whatever the explanation, the consequence seems clear enough from Chart IX. Since more than 90 per cent of the suits upon which this chart

89. In both the \$1-\$1,000 and \$1,001-\$3,000 brackets, the percentage of suits involving extra attorneys was highest in the Supreme Court, next highest in the City Court and lowest in the Municipal Court. The figures in the \$1-\$1,000 bracket were: Supreme Court, 22%; City Court, 19%; Municipal Court, 8%; in the \$1,001-\$3,000 bracket they were: Supreme Court, 30%; City Court, 23%; Municipal Court, 13%. The consistent pattern is presumably attributable to the fact that the incidence of extra attorneys increases as size increases, see note 70 *supra*, and to the fact that a random sample of low-recovery Supreme Court cases will contain "large" cases that could not possibly be present in comparable groups of suits from the other two courts, see note 88 *supra*. Whatever the cause of the pattern, it is not marked enough to account for the longer delay experienced by the Supreme Court suits pictured in Chart IX. For example, in the \$1-\$1,000 bracket, the percentage of Supreme Court suits delayed more than three years exceeds the comparable percentage for the City Court by 10%, whereas the percentage of Supreme Court suits in that bracket involving extras exceeds the comparable percentage for the City Court by only 3%. Consequently, even if it were assumed that every one of the suits in that 3% were delayed more than three years—an assumption, of course, for which there is no warrant, see Chart VIII *supra*—the suits involving extras would still not account for all of the difference in delay between the Supreme and City Courts.

is based terminated before trial,⁹⁰ it appears that an attorney's choice of a court affected how long his client would have to wait for payment, even if the case never reached trial. This confirms an observation earlier made, namely, that a delayed court implies not only a longer wait for trial, but a longer wait for settlement as well. Chart X emphasizes the point by showing the extent of the delay differential in like-size cases in which no trial was had.

CHART X

DIFFERENCES IN AGE AT CLOSING—UNTRIED MUNICIPAL, CITY, AND SUPREME COURT SUITS, ACCORDING TO AMOUNT RECOVERED

We have before us, then, the fact that similar suits, all closed by a before-trial settlement, terminate at a more rapid rate in the Municipal and City Courts than in the Supreme Court. We know also that trial delay is greatest in the Supreme Court. Taken together, these facts tend to confirm the widespread belief that many settlements occur on the eve of trial.⁹¹

90. To be precise, of the 1,291 suits upon which Chart IX is based, 1,208, or 94%, closed before trial. Taking each court separately, we found the following percentages of before-trial closings: 92% of the 283 Supreme Court suits; 95% of the 652 City Court suits; and 92% of the 356 Municipal Court suits.

91. See note 41 *supra*.

B. Comparative Percentages of Trials

Approximately one-fourth of all Supreme Court personal injury suits noticed for trial actually reach trial,⁹² whereas the comparable rates for the City and Municipal Courts are 11 per cent and 10 per cent respectively.⁹³ This is not surprising, since the Supreme Court has all the over-\$6,000 suits and is therefore the sole forum for the most durable cases. But when like-size suits are compared, the pattern changes. Not Supreme Court suits, but Municipal Court actions appear to be most durable. As Table 10 shows, suits recovering \$1,000 or less went to trial 8 per cent of the time in the Municipal Court, as against only 5 per cent in the Supreme Court and 4 per cent in the City Court.⁹⁴

TABLE 10

PERCENTAGE OF SUITS IN EACH COURT THAT REACHED TRIAL—
SUPREME, CITY, AND MUNICIPAL COURTS
(SUITS RECOVERING \$1 - \$1,000)

<u>Court</u>	<u>Percentage of suits that reached trial</u>	<u>Number of suits in sample</u>
Supreme	5%	(120)
City	4%	(506)
Municipal	8%	(356)
All courts	6%	(982)

Although the differences are too small to be more than suggestive, it might be worthwhile to compare Municipal Court procedures with those of the Supreme and City Courts to see whether there is any reason for differences to exist. A major procedural difference that may prove important is that pretrial conferences are used far less extensively in the Municipal Court

92. ZEISEL, KALVEN & BUCHHOLZ, *op. cit. supra* note 1, at 32-33, reports that 26% of all personal injury suits noticed for trial in the Supreme Court, New York County reach trial. The figure reported in the text is based on the assumption that the other divisions of the Supreme Court in New York City have similar trial rates.

93. Approximately 20,000 personal injury suits are noticed for trial in the City Court each year, see note 36 *supra*, of which 2,234 reach trial, see Appendix C. In the Municipal Court, approximately 12,000 personal injury suits are noticed for trial, see note 36 *supra*, and 1,202 reach trial, see Appendix C.

94. In the \$1,001-\$3,000 bracket, 10% of 163 Supreme Court suits and 6% of 146 City Court suits reached trial. Our sample of Municipal Court suits in this category is too small to permit us to determine whether suits in that court continue to be most durable when the \$1,000 mark is passed. Nevertheless, since Municipal Court suits seem to grow more durable as their size approaches the court's jurisdictional limit, see text at Table 11 *infra*, and since Municipal Court suits recovering \$1-\$1,000 are almost as durable as Supreme Court suits recovering \$1,001-\$3,000, the Municipal Court is probably the forum for the most durable suits up to the \$3,000 mark.

than in the other courts.⁹⁵ This could be significant in light of the widespread reports that such conferences promote before-trial settlements.⁹⁶ Another difference is that the summons in a Municipal Court action must be filed and a fee paid within five days after service of the summons,⁹⁷ whereas no such requirement exists in the Supreme and City Courts.⁹⁸ Since Municipal Court suits thus involve more immediate effort than suits in the other two courts, it may be that Municipal Court suits are a little "harder" than the others.

C. Comparative Percentages of Complete Trials

Are settlements during trial promoted or impeded by special attributes of any of the courts under study? Table 11 suggests that settlements during trial grow sparse in the Municipal and City Courts as the amount recovered approaches the jurisdictional ceiling of the court.

TABLE 11

PERCENTAGE OF <i>Uncompleted</i> CITY AND MUNICIPAL COURT TRIALS IN VARIOUS SIZE CATEGORIES		PERCENTAGE OF <i>Completed</i> CITY AND MUNICIPAL COURT TRIALS IN VARIOUS SIZE CATEGORIES	
Size category	Percentage of uncompleted trials	Size category	Percentage of completed trials
\$ 1 - \$1,000	91%	\$ 1 - \$1,000	54%
\$1,001 - \$3,000	9	\$1,001 - \$3,000	37
\$3,001 - \$6,000	—	\$3,001 - \$6,000	9
<u>Total</u>		<u>Total</u>	
Per cent	100%	Per cent	100%
Number in sample.....	(44) ⁹⁹	Number in sample.....	(78) ¹⁰⁰

It may be that this curious pattern is produced by the jurisdictional limits themselves. The defendant must grow increasingly reluctant to

95. The pretrial conference is not presently employed at all in the Municipal Court in Bronx County, although it once was used extensively in suits against the City of New York. The Municipal Courts in Kings and Richmond have no official pretrial conference procedure, but do have informal conferences. The Municipal Court in Manhattan instituted pretrial conferences at its October 1959 term. The Municipal Court in Queens has a busy pretrial calendar, scheduling about 180 cases for conference each week.

96. See, e.g., HOLBROOK, *op. cit. supra* note 2, at 261; NIMS, PRE-TRIAL 64-65, 76-77 (1950); Brennan, *Remarks on Pre-Trial*, 17 F.R.D. 479, 485 (1955); Caplan, *Pre-Trial System in the Municipal Court of Chicago*, Case & Com., Feb. 1941, pp. 17, 18-19; Maulitz, *Pre-Trial Proceedings—A Plea*, 6 ALA. L. REV. 19-20 (1953); Note, *Pre-Trial Conferences in the District Court for Salt Lake County*, 6 UTAH L. REV. 259, 264-66 (1958).

97. See note 84 *supra*.

98. See note 55 *supra*.

99. This is a subsample from the 3,000-case sample; it consists of all of the City and Municipal Court cases that terminated during trial.

100. This sample consists of all fully-tried City and Municipal Court suits in the 3,000-case sample plus all fully-tried City and Municipal Court suits in the 137-case sample described in note 79 *supra*.

compromise as the plaintiff's claim nears the court's monetary ceiling, for he risks little by continuing with the trial. This is borne out by the fact that most settlements in the City Court fall in the lower recovery brackets, whether the settlement occurs during or before trial.¹⁰¹ A plaintiff in that court who wants to recover an amount near \$6,000 must go to the end of trial to get it.

By the same token, Municipal Court settlements tend to fall well shy of \$3,000. Indeed, in the sample upon which Table 11 is based, no Municipal Court settlement produced more than \$1,000.

If rigid monetary ceilings do in fact inhibit settlements, they obviously add to the burdens of the courts. They should, therefore, be avoided unless some compelling policy dictates their use. We are not aware of any such policy.

VII. SUMMARY AND CONCLUSION

The immediate aim of this research was to win a bit of ground from the ignorance blanketing the subject of delayed disposition of personal injury cases. With that rather tedious job of fact-finding done, the prospect of devising more effective procedures to deal with the problem beckoned. But there is no attempt in this article to go that far. Instead of offering specific court procedures we undertake, in a general way, to suggest a few promising lines for application of the findings. Before doing so, we briefly recapitulate some of those findings.

Delay is selective. Most personal injury cases end within a year after counsel is retained, but it is not unusual for others to wait several years. The more a case is worth, the more likely it is to suffer extended delay. In those worth many thousands of dollars, where need for prompt payment is presumably most urgent, delay of several years is a commonplace.

Long waiting is not confined to cases that reach trial. Even those that are not sued often take more than two years to settle; and literally thousands of untried suits must wait for several years before settling.

Among suits, the length of the wait bears a relation to the court in which the lawyer chose to sue. Supreme Court suits lag behind those in the City and Municipal Courts. This is true even of suits that never reach trial, and even when size is controlled. This strongly suggests that a delayed court

101. The 3,000-case sample contains 645 City Court suits that closed during or before trial. Of these, 500 recovered \$1-\$1,000, 143 were in the \$1,001-\$3,000 category, and only 2 were in the \$3,001-\$6,000 category.

The hypothesis that the jurisdictional limits of the City and Municipal Courts are responsible for the trend discussed in this subsection gains further support from the fact that in the Supreme Court, which has no jurisdictional limit, suits reaching trial that recover \$3,001-\$6,000 exhibit no greater tendency to go to verdict than those that recover \$1,001-\$3,000; nor do those that recover \$1,001-\$3,000 exhibit any greater tendency to go to verdict than those that recover \$1-\$1,000.

means not only longer waits for trial, but longer waits for settlement as well.

A case in which an extra firm is involved is likely to take slightly longer to close than a like-size case handled by a single firm. Cases do not seem to be slowed materially by the existence of a lien on plaintiff's recovery or by the involvement of an attorney who specializes in personal injury cases.

A minute proportion of all personal injury cases actually reaches trial, there to become the core of the court's workload. Size is the most important characteristic tending to distinguish the trial-reaching from the other cases. The more a case is worth the more likely is it to go to suit and trial—though once in the courtroom, a large case is no more likely than a small case to persist to verdict. Large-size cases are more likely to go to suit and trial whether size is defined in terms of amount recovered or according to the potential value of the case as determined at some earlier point in its career. Potential value emerges as a factor for identifying with a significant measure of reliability the cases most likely to reach trial courtrooms.

Cases involving extra attorneys show a higher percentage of suits and trials than those involving only a single firm. Liens exert a selective influence. In the \$1,001-\$3,000 range, cases burdened by liens are sued and tried in greater proportion than others; the correlation becomes particularly marked as the lien proportion increases beyond 10 per cent.

Suits in the Supreme Court are substantially more durable than those in the City and Municipal Courts. But this is entirely attributable to the fact that the Supreme Court is the forum for large cases. When like-size suits are compared, Municipal Court suits seem to be most durable. It also appears that in the Municipal Court (and in the City Court as well), when the amount recovered approaches the jurisdictional ceiling, settlements become sparse.

Contrary to prevalent opinion, specialists in the handling of these cases do not seem to sue or try their cases in higher percentages than do "occasional" negligence lawyers. Nor does presence of a specialist or any other discerned factor explain why some trials do, and why others do not, go to verdict.

Before examining possible applications of these findings, we add a cautionary note. The heavy emphasis throughout this article on the quest for and the identification of a few critical factors that tend to differentiate the trial-reaching cases from the others should not be misunderstood. We have not attempted to compile a full catalog of all the features that may mark cases for trial instead of settlement. As to many of these features the available data were totally silent—such as, whether the case was in the hands of a slow-footed lawyer; rested on strong proof; encountered a "reasonable" defendant; required the presence of far-flung witnesses; or involved any of

a host of subtle circumstances that could have affected its course. But the hopeful point is that the statistically measurable factors that emerged were common, potent, and distinctive enough to be useful.

The first use of these findings is in making it feasible to apply court procedures *selectively* so that the work demands made by personal injury cases may be reduced. Today courts try to promote settlements and shorten trials by a variety of before-trial procedural devices, but these procedures are wasted in most suits because settlements would usually result even without them. If instead of applying such procedures willy-nilly to all personal injury cases, courts limited them to suits likely to reach trial, obvious economy of judicial effort would result.

Since large size is the most important discernible feature of trial-bound cases, courts that could identify beforehand the suits with large recovery potential could focus on them and thereby conserve their energies. Assume, for example, that the annual volume of personal injury suits in a court is 2,500 cases and that about 500 of these reach trial. By identifying in advance the suits with an over-\$3,000 potential, a court could locate more than one-third of its anticipated trial burden.¹⁰² These large suits could then be exposed to special procedures, with considerable assurance that the labor would be useful in a significant percentage of them. As to the smaller cases the evaluation process would not be wasted, for the suits with substantial liens (say \$500 or more) might also be exposed to similar procedures. In the same way, where an extra attorney is involved, the case might be marked for the special pretrial procedure.

Specialized treatment for burdensome cases is not a new idea in judicial administration. In many courts it is a widely accepted practice to single out so-called "protracted" commercial suits for intensive pretrial treatment.¹⁰³ In a sense "heavy" personal injury suits are "protracted" tort actions and, in our view, likewise amenable to special procedures. Moreover, many pretrial judges, even without formal authorization, give certain suits full-dress

102. A court's trial burden is a function of the number of cases reaching trial and the length of time they take to try. The closing statements suggest that cases worth more than \$3,000 comprise about one-third of the total number of cases reaching trial. Of the 135 suits in the 3,000-case sample that reached trial, 44, or 33%, recovered more than \$3,000. The 961-suit sample obtained from *M Insurance Company*, upon which Chart IV *supra* is based, points to a similar proportion. Of the 95 suits in this sample that reached trial, 36, or 38%, recovered more than \$3,000. In the 197-suit sample from *M Insurance Company*, upon which Charts V and VI *supra* are based, 33 suits reached trial. Of these, 23, or 70%, recovered in excess of \$3,000. Whatever the precise proportion, it understates the percentage of the trial burden represented by the over-\$3,000 cases because, on the average, they undoubtedly take longer to try than small cases.

103. See generally Holtzoff, *Trial of Protracted Cases*, 24 F.R.D. 235 (1959); Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452 (1958); Yankwich, "Short Cuts" in Long Cases, 13 F.R.D. 41 (1953) (includes a reprint of the "Prettyman Report" on procedure in antitrust and other protracted cases); *Proceedings of the Seminar on Protracted Cases*, 23 F.R.D. 319-634 (1959).

hearings while limiting others to perfunctory discussions on settlement.¹⁰⁴ What is new is the triggering of special procedures by prediction techniques that rest upon the findings reported here. While it has yet to be established that court personnel can accurately predict accident case durability,¹⁰⁵ many judges and court administrators have expressed interest in the type of test that would be necessary to determine whether the technique is feasible. A current Project experiment in judicial administration in New Jersey is expected to shed light on this question.¹⁰⁶

Another, and more modest, way to utilize the findings is to distribute durable cases evenly throughout the trial lists. Thus, a court that is able to identify trial-bound cases will be in a position to reduce wasteful gaps and overloads that now develop because some lists are too "soft" and others too "hard."

The findings reported here can also help in the evaluation of current and proposed "remedies" for delay.¹⁰⁷ Typically, these proposals are supposed to reduce the demands personal injury cases make on the time budget of major courts, either by forcing a great many cases into other tribunals or by promoting settlements.¹⁰⁸ To evaluate the effectiveness of any of these devices one must know whether it affects the trial-prone cases or spends its main force on those that would settle anyway. A device that achieves only the latter result may nevertheless create an illusion of improvement by causing

104. See, e.g., STAFF OF THE SENATE APPROPRIATIONS COMMITTEE, *op. cit. supra* note 2, at 20. Compare Schedule of the Uniform Policy for the Superior Court of Los Angeles County § XIII (adopted September 22, 1959). If both parties are willing, the Superior Court of Los Angeles will substitute a settlement conference for the ordinarily required full-scale pretrial conference held for the purpose of limiting issues and otherwise streamlining the trial.

105. Court personnel would, of course, be using different data from that available to the insurance companies. Moreover, court estimates would be detached and clinical compared to those of an insurance company, which, as a party to the settlement negotiations, helps mold the outcome. But the importance of these differences should not be exaggerated. The purpose of court estimating would not be to see how nearly the court can predict the actual recovery, but simply to separate cases for processing purposes into groups with large and small recovery potentials.

106. For a general description of the experiment, see N.Y. Times, Jan. 3, 1960, p. 71, col. 3.

107. See note 42 *supra*.

108. A much discussed current instance is the Pennsylvania Compulsory Arbitration Act. In *Application of Smith*, 381 Pa. 223, 229, 112 A.2d 625, 629 (1955), the objectives of this procedure were thus summarized:

It is clearly designed to meet the situation which prevails in some communities of jury lists being clogged to a point where trials can be had only after long periods of delay—a condition resulting largely from the modern influx of negligence cases arising from automobile accidents in a great number of which no serious personal injuries are involved. Removing the smaller claims from the lists not only paves the way for the speedier trial of actions involving larger amounts, but, what is of equal or perhaps even greater importance, makes it possible for the immediate disposition of the smaller claims themselves, thus satisfying the need for prompt relief in such cases. By the same token, and working to the same end, the use of the Act will free courts for the speedier performance of other judicial functions.

court statistics to reveal dramatic drops in the volume of incoming or pending caseloads, while leaving the core of the problem untouched.

A good example of this application is in measuring the impact of the "general preference" procedures used by the Supreme Court in New York City.¹⁰⁹ Instituted in 1949, the preference rule was designed to compel personal injury suitors to bring smaller cases (*i.e.*, those having a potential recovery below \$6,000) into the lesser courts instead of into the Supreme Court. By 1954 this device had screened so many small cases out of the Supreme Court that its pending caseload had shrunk from about 32,000 to 16,000 suits and its annual intake from about 17,000 to 10,000.¹¹⁰ Yet delay continued to grow more serious.¹¹¹ The seeming paradox of reduced caseloads in company with increased delay may find its explanation in the size-durability principle we have discussed. It may be that the eliminated cases—small ones—would not have contributed substantially to the court's overload, and their removal would not significantly reduce delay. Conversely, other procedures that at first glance seem uneconomical may prove on closer analysis to be quite efficient. Whatever the superficial impact, it is only when the figures are adjusted to take account of the special features of the cases involved that an accurate evaluation can be made. By this technique the Project staff has analyzed the effect of various contemporary delay remedies, such as impartial medical panels in New York City,¹¹² the Pennsylvania system of compulsory arbitration of small claims,¹¹³ and the

109. See note 9 *supra*.

110. COLUMBIA UNIVERSITY PROJECT FOR EFFECTIVE JUSTICE, DIRECTING TRAFFIC IN PERSONAL INJURY SUITS IN NEW YORK CITY: CHANNELING "SMALLER" CASES TO "SMALLER" COURTS AND GRANTING EARLY TRIAL IN HARDSHIP CASES 32 (unpublished report 1959). However, many "small" cases are still brought in the Supreme Court. The extent to which they slip by the general preference procedures is considered at length in the foregoing report at 21-25.

111. In 1956, by which time the shrinkage in backlog and intake must have made its full impression, delay was near its peak in every county but Kings. See *id.* at 33.

112. In brief, the impartial medical panel plan operates as follows. A trial or pre-trial judge may order that the plaintiff be examined by a physician who is selected from a panel of medical specialists set up for this purpose. The findings of the court-appointed physician are made available to the court and the parties. Either party or the trial judge may call the impartial physician as a witness, but the parties remain free to call any experts of their choice. This plan, conceived primarily for the purpose of improving the presentation of medical evidence, is important to students of delay because it has had the effect of stimulating before-trial settlements. For a full account of the background and workings of the plan, see ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON THE MEDICAL EXPERT TESTIMONY PROJECT, IMPARTIAL MEDICAL TESTIMONY (1956).

113. The adoption of this system is optional on a county basis. In each county in which it is adopted all civil actions with *ad damnum*s of \$2,000 or less, except those involving real estate, are referred to three-man arbitration panels drawn from a list of volunteer attorneys. PA. STAT. ANN. tit. 5, § 30 (Purdon Supp. 1959). To preserve the right of trial by jury, either party, if dissatisfied with the decision of the arbitrators, may obtain a trial *de novo* upon payment of the costs of arbitration or one-half the amount in controversy, whichever is less. PA. STAT. ANN. tit. 5, § 71 (Purdon Supp. 1959).

Massachusetts auditor system.¹¹⁴ The results will be reported in separate studies.

By the same approach it is possible to forecast the efficiency of many proposed or contemplated remedies. The data on liens, for example, suggest that any technique aimed at ameliorating their tendency to inhibit settlements should focus on lien cases with a recovery potential of no more than \$3,000; and in those cases, only if the lien share is substantial.

It should not be assumed from the preoccupation of this report with questions of time and efficiency that we regard these as the primary values of judicial administration. The quality of a court's work, not its efficiency, is the ultimate value. But efficient procedures permit the courts to devote themselves more effectively to improving the quality of their dispositions.

114. Auditors are attorneys designated by the courts to hear evidence and make written findings of fact in civil cases. They have been called upon most frequently in motor vehicle tort cases. Parties are not bound to accept an auditor's findings and any case will proceed to trial in the usual fashion upon the insistence of either of the parties. However, the auditor's findings are admissible at trial and constitute *prima facie* evidence of the facts found. MASS. ANN. LAWS ch. 221, § 56 (1955); MASS. SUPER. CT. (Civ.) R. 86-90.

APPENDIX A

CLOSING STATEMENT AS TO RETAINER

Plaintiff

—against—

Defendant

To:.....

TO THE CLERK OF THE APPELLATE DIVISION:
 FIRST JUDICIAL DEPARTMENT.

1. The Statement of Retainer required by Rule 4A of the Special Rules regulating the conduct of attorneys and counsellors at Law in the First Judicial Department was duly filed in the office of the Clerk of the Appellate Division on the day of

19 .
 The above entitled* claim-action was disposed of on the day of
 19 by** ;† trial.

2. The gross amount of the recovery was \$.

3. The taxable costs and disbursements included in the amount set forth in item 2 amounted to \$.

4. (a) An itemized statement of the liens, assignments, claims and expense charged against the client is as follows:

(b) An itemized statement of all amounts paid by the attorney showing the names and addresses to whom paid is as follows:

5. The net amount of the recovery actually received by the client is \$.

6. The amount of compensation actually received or retained by the undersigned is \$.

7. The amount of compensation actually received or retained by the undersigned
 ***has been fixed under the schedule of subdivision b of Rule 4 of the Special Rules regulating the conduct of attorneys and counsellors at law in the First Judicial Department

***is thirty-three and one-third percent of the sum recovered, as provided by subdivision b(2) of said Rule 4

***has been fixed by an order, a copy of which is hereto annexed and made part of this statement, made by Mr. Justice dated, 19 ,
 and filed in the office of the clerk of this Court on the day of
 19 .

Dated: New York, N. Y. 19 .

.....
 Signature

.....
 Attorney

.....
 Address and Post Office Address

.....

* Strike out CLAIM or ACTION

** Insert SETTLEMENT or JUDGMENT

*** Strike out two of the three alternatives

† Insert DURING, BEFORE or AFTER

APPENDIX B

ACCOUNTING FOR "MISSING CASES" — WOULD TOTAL COMPLIANCE WITH
THE CLOSING STATEMENT RULE ALTER THE FINDINGS?

This appendix sets forth the results of a supplementary survey designed to measure the impact on our findings of widespread noncompliance with the closing statement rule. Although attorneys fail to file closing statements in thousands of cases covered by rule 4,¹ analysis shows that the characteristics of a group of cases from a source not dependent on compliance—defense files—do not differ materially from those of the closing statement cases. We conclude that delinquency in filing has not distorted any basic findings reported in the body of the article.

The Project collected a sample of cases in which noncompliance was not a statistical hazard and compared the characteristics of this sample with those of the closing statement sample. The sample used for comparison consisted of 238 personal injury cases obtained from the files of representative insurance companies and self-insurers in New York City.² There were no significant differences between the two groups as to any of the six essential characteristics compared: (1) recovery size; (2) age at closing; (3) presence of extra attorneys; (4) presence of liens; (5) for suits, stage of disposition; and (6) distribution of suits among courts. Accordingly, noncompliance was ruled out as a source of distortion.

In the following tables summarizing the results of the survey, "CSS" signifies the closing statement sample and "ICS" the insurance company sample. It will be seen that in no instance did significant differences appear; in several instances the samples yield identical or virtually identical results.

TABLE B-1

RECOVERY SIZE

<u>Amount recovered</u>	<u>CSS</u>	<u>ICS</u>
\$ 1-\$1,000.....	70%	74%
\$1,001-\$3,000.....	21	18
\$3,001-\$6,000.....	5	6
Over \$6,000.....	4	2
<u>Total</u>		
Percent	100%	100%
Number.....	(3,000)	(238)

1. See Appendix C, note 16.

2. The sample is more fully described at note 24 to the main text.

TABLE B-2
AGE AT CLOSING

<u>Age at closing</u>	<u>CSS</u>	<u>ICS</u>
1-6 months.....	38%	33%
6-12 months.....	25	24
12-24 months.....	19	23
24-36 months.....	9	10
Over 36 months.....	9	10
<u>Total</u>		
Percent	100%	100%
Number	(3,000)	(238)

TABLE B-3
PRESENCE OF A LIEN

<u>Lien was :</u>	<u>CSS</u>	<u>ICS</u>
Present.....	20%	19%
Not present.....	80	81
<u>Total</u>		
Percent	100%	100%
Number.....	(3,000)	(226) ³

TABLE B-4
PRESENCE OF AN EXTRA ATTORNEY

<u>Extra attorney was :</u>	<u>CSS</u>	<u>ICS</u>
Present.....	16%	11%
Not present.....	84	89
<u>Total</u>		
Percent	100%	100%
Number.....	(3,000)	(238)

TABLE B-5
STAGE OF DISPOSITION (SUITS)

<u>Stage of disposition</u>	<u>CSS</u>	<u>ICS</u>
Before trial	92%	92%
During trial	6	6
Fully tried	2	2
<u>Total</u>		
Percent	100%	100%
Number.....	(1,681)	(133)

TABLE B-6
DISTRIBUTION AMONG COURTS

<u>Court</u>	<u>CSS</u>	<u>ICS</u>
Supreme.....	31%	39%
City.....	44	44
Municipal.....	25	17
<u>Total</u>		
Percent	100%	100%
Number.....	(1,681)	(133)

3. With respect to 12 of the cases in the sample it could not be determined whether a lien was present.

APPENDIX C

SOURCES AND METHODS IN ESTIMATING THE VOLUME OF PERSONAL INJURY CLAIMS AND SUITS IN NEW YORK CITY

This appendix explains how we arrived at certain estimates reported in the text, namely: that 193,000 claimants seek compensation for bodily injuries each year in New York City; that 39,000 of these settle or abandon their claims without consulting counsel; that another 77,000 settle or abandon their claims after consulting counsel but without instituting suit; that the remaining 77,000 sue, and of these, 7,000 reach trial, 2,500 going all the way to verdict.¹

The larger aspects of the estimating process are simple. To start with, there are the reasonably solid facts that each year in New York City 3,120 personal injury suits reach trial in the Supreme Court;² 2,234 reach trial in the City Court;³ 1,202 reach trial in the Municipal Court;⁴ 187 reach trial in the United States District Court for the Southern District of New York;⁵ and 68 reach trial in the United States District Court for the Eastern District of New York.⁶ This gives us a total of approximately 7,000 (6,811 to be precise). Applying an independently derived finding that only 1 in every 11 lawsuits reaches trial, we estimate that 77,000 suits are begun annually. Interpolating another finding—that only 1 of every 2 personal injury cases

1. In the appendices, as in the body of the article, no distinction is made between jury verdicts and bench awards. Consequently, we have used the word "verdict" simply to signify the completion of a trial, without regard to whether the trier of fact was judge or jury.

2. Each year in the Supreme Court divisions in New York City approximately 12,000 notes of issue are filed for personal injury suits. 4 N.Y. JUDICIAL CONFERENCE ANN. REP. 179 (1959). ZEISEL, KALVEN & BUCHHOLZ, *DELAY IN THE COURT* 32-33 (1959), reports that 26% of all personal injury suits noticed in the Supreme Court, New York County, reach trial. On the assumption that the other divisions of the Supreme Court in New York City have similar trial rates, we multiplied 12,000 by 26% and obtained the figure reported in the text.

3. The total number of City Court trials begun in 1958 was 2,351. 4 N.Y. JUDICIAL CONFERENCE ANN. REP. 198 (1959). Slightly more than 95% of the notes of issue filed in the City Court were for negligence cases. *Id.* at 200-01. We assumed that the proportion of negligence cases remains roughly constant from note of issue to trial, and after rounding off to eliminate the small number of property damage suits included in the negligence totals, we took as our figure 95% of 2,351, or 2,234.

4. The total number of Municipal Court trials begun in 1958 was 6,008. 4 N.Y. JUDICIAL CONFERENCE ANN. REP. 218 (1959). In the only years for which figures are available—1937, 1939, and 1952—slightly more than 20% of the notes of issue filed in the Municipal Court were for personal injury cases. 5 N.Y. JUDICIAL COUNCIL ANN. REP. 132-33 (1939); 6 *id.* at 136-37 (1940); 19 *id.* at 138-39 (1953). The persistence of this percentage in the known years is the basis for the assumption that it accurately reflects the present situation. Accordingly, after assuming that the proportion of negligence cases remains roughly constant from note of issue to trial, and rounding off, we computed the total of personal injury trials in the Municipal Court at 1,202 (20% of 6,008).

5. This figure is derived from data supplied to the Project by the Administrative Office of the United States Courts. It represents the average number of personal injury suits that reached trial each year during the period 1957-1959.

6. *Ibid.*

handled by lawyers goes to suit—we calculate that the annual total of lawyer-handled personal injury cases is about 154,000. When the 77,000 unsued cases are increased by 50% to take account of victims who press claims without the aid of a lawyer, the total of unsued claims rises to 116,000 and the grand total to 193,000 cases. Finally, having found that among personal injury cases that begin trial, 36% go to an adjudication, we compute that there are 2,500 (36% of 7,000) completed trials a year.

Deriving the ratios employed in the preceding paragraph involved a number of rather complex steps. The process began with the closing statement files of the New York Supreme Court, Appellate Division, First Department. A rule of that court requires counsel to file a closing statement in every personal injury case in which he was retained on a contingent fee basis and recovered money for his client if he either has an office in Manhattan or the Bronx or instituted suit in a court located in one of those boroughs.⁷ Each statement discloses, among other things, whether suit was brought, trial begun, and verdict reached.⁸

1. *The Proportion of Suits Reaching Trial*

The basic sample of 3,000 closing statements included 1,681 suits, of which 135, or about 1 in 12, reached trial. But that finding could not be accepted as accurately reflecting the whole picture in New York City because of inherent limitations in the source of the data. Account had to be taken of these omissions: suits in which plaintiff failed to recover; suits in which no attorney was retained; suits in which the retainer was not on a contingent basis; and suits brought outside of Manhattan and the Bronx by attorneys having offices outside these boroughs. Finally, we had to determine whether the trial rate that we derived was distorted by the fact that not all attorneys who are supposed to file closing statements actually do so.

To adjust for the no-recovery cases it was necessary to perform four steps. First, we divided the basic sample of 1,681 suits according to the three stages at which they closed: before trial (1,546); during trial (96); after trial (39). Second, we determined for each stage the percentage of no-recovery terminations: among suits that close before trial, 15% fall into this category;⁹ for those that close during trial, the figure is 20%;¹⁰ and for

7. N.Y. SUP. CT., APP. DIV., FIRST DEPT. R., *Special Rules Regulating the Conduct of Attorneys and Counselors-at-Law in the First Judicial Department*, Rule 4.

8. A closing statement form appears as Appendix A.

9. This figure is based upon information obtained from the following sources: *M* Insurance Company; the New York City Transit Authority; the New York City Corporation Counsel.

10. This figure is based upon information obtained from the sources mentioned in note 9 *supra*.

those reaching verdict, 40%.¹¹ Third, we augmented the subgroups of the sample cases by the appropriate percentages: to the 1,546 before-trial closings in which plaintiffs prevailed were added the 273 such closings in which defendants prevailed ($1,546 + 273 = 1,819$, of which 273 is 15%); by the same process the 96 during-trial closings became 120; and the 39 verdicts became 65. Finally, totalling the figures yielded an adjusted sample of 2,004 suits, of which 120 closed during trial and 65 went to verdict. Overall, trial was begun in 185 out of 2,004 suits, or in approximately 1 in 11.

We also considered whether any adjustment was needed because of the other potentially distorting gaps in the closing statement data. None, it developed, necessitated further adjustment of the trial rate. The omission of no-attorney suits proved to be a *de minimis* matter. In a random sample of 233 recently closed cases in New York City provided by the Insurance Group,¹² there were 133 unsued claims and 100 suits. Of the unsued claims, 78 were pressed without aid of an attorney, but counsel was involved in every one of the 100 sued cases. This finding is but confirmatory of the common experience that plaintiffs almost never prosecute their personal injury suits *pro se*.

As to the cases in which the retainer was on a fixed fee instead of a contingent basis, a spot check of experienced attorneys disclosed that the latter arrangement is almost universal in personal injury cases.¹³ Accordingly, the absence of the noncontingent retainers from the closing statement sample was deemed another *de minimis* omission.

Also insignificant is the absence from the closing statement sample of suits brought outside Manhattan and the Bronx by attorneys with offices outside those boroughs. Since about five-sixths of all New York City attorneys have their offices in Manhattan or the Bronx,¹⁴ and since this five-sixths institute approximately four-fifths of all suits started in the City,¹⁵

11. This percentage is based upon information gathered from the following sources: *M* Insurance Company; the New York City Transit Authority; the New York City Corporation Counsel; ZEISEL, KALVEN & BUCHHOLZ, *op. cit. supra* note 2, at 99; and a sample of 206 fully tried cases drawn by the Project staff from the records of the New York County Supreme Court in 1957.

12. The source of this sample is more fully described at note 19 to the body of this article.

13. Of the 29 attorneys questioned, 26 had not accepted any noncontingent fee retainers in personal injury cases in 1958, and the remaining 3 handled cases on this basis only rarely. Of all the retainers accepted by the 29 attorneys in personal injury cases in 1958, 98.5% were on a contingent fee basis.

14. See AMERICAN BAR FOUNDATION, *THE 1958 DISTRIBUTION OF LAWYERS IN THE UNITED STATES* 48-49 (1959), which reports that of 30,511 lawyers admitted to practice in New York City, 25,359 have their offices in Manhattan and the Bronx, and 5,152 in Brooklyn, Queens, and Richmond.

15. This estimate is based upon an analysis of the 100 suits in the random sample of cases obtained from the Insurance Group, of which 78 were brought by First Department attorneys.

this possible source of distortion involves at the maximum one-sixth of the attorneys and one-fifth of the suits. And even those fractions overstate the potential distortion because some of the suits handled by outside attorneys will be brought in courts in Manhattan or the Bronx and thereby fall subject to the closing statement rule. Quite apart from these statistical matters, it seems unlikely that suits handled by these outside attorneys would differ from the sampled cases in their propensity to reach trial.

The last matter to be checked for its possible distorting effect on the proportion of suits reaching trial was the fact that not all attorneys who are supposed to file closing statements do so. Although the number of non-compliers is substantial,¹⁶ it turned out that a sample of cases in which non-compliance was not a problem exhibited exactly the same trial rate as the closing statement sample.¹⁷

On the basis of all available data, our best estimate is that 1 out of every 11 personal injury suits begins trial.

2. *The Proportion of Cases That Are Sued*

The basic closing statement sample revealed a suit: claim ratio of 56:44. But when the data were supplemented and adjusted to take account of potentially distorting omissions, it turned out that overall in New York City there are 40 sued for every 60 unsued personal injury cases. Among lawyer-handled cases the ratio is about 50 suits to 50 claims.

The first adjustment necessary was to neutralize an imbalance in the filings by attorneys with offices outside Manhattan and the Bronx. Under the closing statement rule, these outside attorneys must file closing statements for suits brought in Manhattan or the Bronx, but not for unsued claims, even though both the injured party and the potential defendant (and his insurer) reside in the First Department. To neutralize this imbalance, we eliminated all closing statements filed by outside attorneys, with the result that the percentage of suits dropped from 56% to a little less than 55%. We diminished that figure still further in the light of a recent study's finding that cases are

16. Of the 193,000 personal injury cases arising in New York City annually, approximately 39,000, it will be recalled, do not involve the services of a lawyer. Of the remaining 154,000 cases, approximately 16%, or about 25,000, are not subject to the closing statement rule because won by defendants. As we have just seen, somewhat less than 20% of the remaining 129,000 cases are unaffected by the rule because of its geographical limitations. If we allow 20%, the number of closing statements required turns out to be about 100,000 per year. The annual number of filings, however, is considerably less. The Clerk of the Appellate Division, First Department, reports that in 1957, the first year the rule was in effect, approximately 44,000 closing statements were filed. In the calendar year 1958 the number of filings increased to about 59,000. In 1959, closing statements have been filed at a rate of 66,000 per year.

17. See Appendix B, table B-5.

sued about 4% more frequently in Manhattan and the Bronx than in New York City as a whole.¹⁸ We then rounded off at 50%.

No additional adjustments are called for in order to arrive at the percentage of cases in the hands of attorneys that go to suit. No-recovery cases present no problem because available data indicate that defendants win approximately the same proportion of unsued cases as suits.¹⁹ It appears that noncomplying attorneys are not selective in their delinquency and omit closing statements as frequently in unsued cases as in suits. While this point could not be checked directly, the circumstantial evidence is highly persuasive. First, a side-by-side comparison of the closing statement sample with a sample of cases uncontaminated by noncompliance revealed the two samples to be virtually identical with respect to a number of major factors.²⁰ And second, as will appear below, a number of independent sources that are not subject to distortion by the noncompliance factor yielded overall suit: claim ratios virtually identical to ours. We conclude that attorneys bring suit in about half the cases that reach them.

To obtain an overall suit: claim ratio, we had to make a major adjustment to take account of no-attorney cases. Many claims are made without the aid of an attorney, but virtually none are sued *pro se*. To be specific, the data suggested that only about two-thirds of all unsued claims in New York City are handled by attorneys.²¹ This led us to diminish the overall ratio of suits to unsued claims to 40:60.²²

This ratio is confirmed by a number of other sources. In the *Peck-Hecht Insurance Industry Study*, of 12,212 automobile personal injury case closings in New York City in June 1957, 61% were claims and 39% suits; these

18. This finding was made in a survey of personal injury cases in New York City conducted by the All-Industry Committee Representing Insurance Companies. Most liability insurers underwriting in New York City participated. The report, which has not been published, was submitted in 1952 to the Court's Committee on Calendar Congestion, appointed by David W. Peck, then Presiding Justice of the Appellate Division of the Supreme Court, First Department, with Justice William C. Hecht as chairman. At the Project's request, a similar survey was conducted for the month of June 1957. The two surveys will hereinafter be referred to as the PECK-HECHT INSURANCE INDUSTRY STUDY. Strictly speaking, it would be an overadjustment to diminish by the full 4% because the closing statement sample contains many cases from outside Manhattan and the Bronx. But since pinpoint accuracy is not attainable here, no effort was made to find the precise adjustment called for.

19. This conclusion is based upon data obtained from *M* Insurance Company and the Insurance Group.

20. See Appendix B.

21. This estimate is based on the experience of *M* Insurance Company over many years. A somewhat higher percentage of no-attorney claims was found in a 233-case sample from the Insurance Group. Of the 133 claims in that sample, 78 did not involve the services of an attorney. But the margin of difference was not deemed material, in view of the relatively small size of the sample.

22. Since for cases in lawyers' hands the ratio of suits to unsued claims is 50:50, and since lawyers handle only two-thirds of all unsued claims, whereas they handle virtually every suit, the adjusted ratio of all suits to all unsued claims must be 50:75; in percentage terms, suits constitute 40% of the cases.

figures duplicated almost exactly the percentages reported for the period from January 1950 to March 1952. Again, a random sample of 233 cases obtained from the Insurance Group was composed of 57% claims and 43% suits. Finally, Zeisel, *et al.* estimate that 40% of all cases are sued.²³

In sum, our estimate is that the overall ratio of suits to claims is 40:60. This means that to the 77,000 suits begun annually must be added an equal number of unsued claims handled by lawyers, and 39,000 unsued claims pressed without lawyers. These calculations yield the total of 193,000 cases.

3. *The Proportion of Trials Going to Verdict*

The basic closing statement sample contained 135 suits that reached trial, of which 39 went all the way to verdict. As indicated previously, the only adjustment called for is to take account of the absence of no-payment closings. That adjustment yielded, as we have shown above, a sample of 185 suits reaching trial, of which 65, or 1 in every 2.8, reached verdict. This figure stands up well when checked against data from other sources.²⁴ Applying this ratio to the 7,000 trials begun, we derived a figure of 2,500.

23. ZEISEL, KALVEN & BUCHHOLZ, *op. cit. supra* note 2, at 40.

24. The 2.8 figure seems plausible in the light of data obtained from *M* Insurance Company, the New York City Corporation Counsel, and the Insurance Group. ZEISEL, KALVEN & BUCHHOLZ, *op. cit. supra* note 2, at 33-34 report that about 40%, or 1 in 2.5, of all personal injury trials begun in the Supreme Court, New York County, go to verdict.

APPENDIX D

THE EXTENT AND EFFECT OF CONCENTRATION OF PERSONAL INJURY
CASES IN THE HANDS OF "SPECIALIST" ATTORNEYS AND FIRMS

Charges are frequently made that personal injury cases are monopolized by a small circle of negligence "specialists." The narrowness of the so-called plaintiffs' bar plus alleged overconcentration of cases in the hands of defense counsel (collectively denominated the "insurance bar") is said to be an important cause of delay.¹

There is no doubt that trial calendars experience scheduling problems because of pleas by trial attorneys of other court engagements. The more suits are concentrated in a small segment of a trial bar the more likely are these problems to recur. The New York Temporary Commission on the Courts has said: "The small size of the negligence trial bar, particularly on the plaintiff's side and in the metropolitan area, is disturbing. One result is that calendar judges vie for the services of the few trial lawyers in negligence cases."²

A study of personal injury cases reaching assignment to trial in the Supreme Court, New York County, from March through September 1957, has disclosed that the busiest 1% of plaintiff lawyers had 6.4% of the trials and appeared for trial an average of 2.1 times per month in that court. The busiest 5% had 22.5% of the trials and appeared an average of 1.6 times per month. Among defendant lawyers the busiest 5% tried 24.8% of the cases and appeared an average of 2.8 times per month.³

These figures confirm what one would expect, namely, that notable concentration exists in the trial of personal injury actions in the Supreme Court in Manhattan. While the load being carried by the attorneys most active in that court does not by itself seem a serious impediment to efficient calendar management, that court is not, of course, their only locus of activity. Whether the concentration of personal injury trials is sufficient to slow down trial calendars by requiring frequent adjournments while the busiest lawyers engage in other trials can not be determined without making similar studies of other courts in which these same busiest lawyers also try cases.

1. See, e.g., ABA, SPECIAL COMMITTEE ON COURT CONGESTION, TEN CURES FOR COURT CONGESTION 14-15 (1959); Miner, *Court Congestion: A New Approach*, 45 A.B.A.J. 1265 (1959); Reardon, *Civil Docket Congestion: A Massachusetts Answer*, 39 B.U.L. REV. 297, 304-05 (1959); Zeisel, Kalven & Buchholz, *Is the Trial Bar a Cause of Delay?*, 43 J. AM. JUD. Soc'y 17 (1959). Compare *Gray v. Gray*, 6 Ill. App. 2d 571, 575-76, 128 N.E.2d 602, 604-05 (1955) (dictum); Baldwin, *How Can We Expedite the Business of the Courts?*, 27 CONN. B.J. 1, 3-5 (1953).

2. [1957] 4 TEMPORARY COMM'N ON THE COURTS REP. 42 (N.Y. Legis. Doc. No. 6(c), 1957).

3. See ZEISEL, KALVEN & BUCHHOLZ, *DELAY IN THE COURT* 194-95 (1959).

Although the closing statements do not supply data directly bearing on the degree of concentration at the ready-for-trial stage, they do contain important information on the overall extent of case concentration among plaintiffs' attorneys. A tight monopoly in the before-trial handling of cases could raise serious problems. For example, sheer overload of the busiest firms might retard disposition of cases in their hands. This would be especially troublesome if the specialists were more prone than the nonspecialists to take cases to suit and trial.

Therefore, we sought to learn: (1) to what extent personal injury cases are monopolized by specialists on plaintiffs' side; and (2) whether these specialists tend to sue and try more of their cases than occasional negligence lawyers. The term "specialist" is here used to refer to lawyers or law firms that handled nine or more cases in the 3,000-case closing statement sample. Such attorneys will handle approximately 100 personal injury cases annually.⁴

The first noteworthy point is that 1,775 law firms represented the plaintiffs in the 3,000 cases, the great majority handling but a few cases each. There were, however, 33 specialists (1.8% of the total number of firms involved), and they handled 383, or 12.8%, of the cases. In tabular form the degree of concentration or dispersion appears as follows:

TABLE D-1
CONCENTRATION OF PERSONAL INJURY CASES AMONG LAW FIRMS

	Law Firms			
	Busiest 1.8% ("Specialists")	Busiest 5%	Busiest 10%	All Law Firms
	(33)	(89)	(178)	(1,775)
Percentage of sample handled...	12.8%	24%	37%	100%
Average number of sample cases handled by each law firm.....	11.6	8.2	6.3	1.7

Although there is appreciable concentration in the handling of personal injury cases, it turns out that specialists do not sue or try their cases with any greater frequency than "occasional" negligence lawyers; nor are cases handled by specialists longer delayed. Whereas the 33 specialists brought suit in 52% of their 383 cases, the 1,742 other attorneys in the sample brought

4. On a simple projection, an attorney who handled 9 out of 3,000 cases would handle 132 out of the 44,000 closing statements filed during all of 1957. However, a special check of the busiest attorneys found in the original sample of 2,000 closing statements examined under the order of March 7, 1957, see note 20 to the main text, suggests that a simple projection tends to overestimate the volume of cases handled by specialists. In that original sample of 2,000 closing statements there were 22 attorneys whose annual projected caseload equalled 100 cases or more. All of the closing statements filed by these 22 attorneys during the first half of 1957 were culled and counted, and it was discovered that they had filed an average of 44 closing statements apiece; in other words, they had filed at an average annual rate of 88 per man. Taking both the simple projection and the special check into account, we think it safe to conclude that a 9-case man in the 3,000-case sample handles about 100 cases per year.

suit in 58% of their 2,617 cases. Only 5% of the suits in the hands of specialists reached trial, whereas the trial rate for the entire sample of suits was 8%. Thus, as a group specialists are, if anything, less prone to sue and try their cases than the ordinary run of attorneys.

It must be remembered that these observations do not necessarily apply to attorneys who specialize in the *trial* of negligence suits, for there is apparently little correspondence between the attorneys who handle large volumes of these cases and those who are well known as busy trial specialists. This fact is suggested by an analysis of court records for 209 trials in the New York County Supreme Court. It developed that none of the 5 busiest trial lawyers in this random sample (each of whom tried 3 or more of the sampled cases) were case-handling specialists according to the closing statement records. This would suggest the not unreasonable conclusion that the busiest trial lawyers in the personal injury field do not handle a large volume of these suits. It is also possible that—because of doubts as to the validity of the closing statement rule⁵ or for other reasons—some of the busiest trial lawyers did not file closing statements in all appropriate cases.⁶

5. For the history of the litigation in which the rule was attacked, see note 12 to the main text.

6. The problem of noncompliance is discussed in note 24 to the main text and in Appendix B.

APPENDIX E

A DEMONSTRATION THAT CASES DO NOT APPRECIATE SUBSTANTIALLY
IN VALUE AS A RESULT OF GOING TO TRIAL

In the body of this article we called attention to the marked correlation between recovery size and durability in the cases surveyed, and explored its implications. The interpretation was advanced that the greater durability of cases with large recoveries signifies that large size is a factor that impels personal injury cases to trial. We rejected the converse interpretation—that the size of cases increases markedly by reason of their going through trial. This appendix details our reasoning.

Ideally, the way to treat this question would be to analyze a randomly chosen group of newly begun suits, estimate the probable recovery value of each and follow up to learn whether those that persist to trial show greater increases in value than those that do not. If it were to turn out that trial-reaching cases close at inflated values compared to the others, this would be evidence that size is increased by exposure to the trial process. But if the tried cases should show no more growth in value than the other cases, we could conclude that the value of a suit is not generally enhanced by entering the courtroom. It was not possible to perform precisely the foregoing experiment, but a satisfactory substitute test was possible, in cooperation with *M* Insurance Company. Using the sample of cases upon which Charts V and VI are based, we separated the suits into those that reached trial and those that did not; determined for each group the median reserve value as of December 1956 and the median amount recovered in 1958; computed the percentage difference between these two figures for each group, and then compared the results. The median reserve value in the 164 cases that closed before trial was \$1,500; the median recovery was \$2,363, an increase of 58%. The median reserve value in the 33 cases that reached trial was \$6,924; the median recovery was \$7,456, an increase of 8%. Thus, the median value of the untried cases increased more than that of the cases that began trial, suggesting that the effect of taking a case to trial might be, if anything, to depress its value.

A slightly different picture emerged when averages were compared. Untried cases had an average reserve value of \$5,205 and an average recovery of \$4,800, a decrease of 8%. Cases reaching trial showed an average reserve value of \$9,473 and an average recovery of \$9,910, an overall increase of 5%. However, the latter increase is entirely attributable to an egregious underestimation in one case: it was assigned a reserve value of only \$1,500 and recovered \$25,190.50. If that case is eliminated from consideration, the 32 remaining cases that reached trial had an average reserve value of \$9,725, and an average recovery of \$9,433, or a decrease of 3%. This is not out of line with the 8% decrease in the untried cases.

We understand this evidence to mean that entry into the trial courtroom does not significantly enhance the value of personal injury suits. It would seem to follow that the correlation between high durability and large recovery size must be attributable to large size impelling cases to trial.