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Book Review

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BOOK REVIEW

Modern Trials. By Melvin M. Belli. Indianapolis: The Bobbs-Merrill Company, Inc., 1954. 2763 pp. $50.00

If the field of taxation has any rival for the title of being most written about, it must be that of procedure and trial practice. The art of persuasion is so all-pervasive in the law, and at the same time so subtle and elusive, that lawyers of all generations have been drawn to write about it as the flies are drawn to honey. The urge is no respecter of age—young and old have sought to solve the mysteries, and they remain unsolved. And these mysteries seem likely to remain so until our scientific brethren, the psychologists, have succeeded in delving much deeper into the problems of motivation and the reasons for human behavior.

It is therefore true that a new book in this field usually is approached with a good deal of skepticism, as something to be skimmed through without much hope of acquiring anything new beyond an anecdote or so for the next bar meeting. Such anecdotes you will find aplenty in Mr. Belli's *Modern Trials,* but you will also find a great deal more. Not long ago one of my former students came to me and said that one of the real needs he felt was for new ways to prove various propositions. It is precisely in this area that Mr. Belli has the most to offer. He is, of course, primarily interested in showing how this can be done through the use of demonstrative techniques: pictures, maps, charts, models, illustrative drawings and real evidence. He gives literally hundreds of examples, themselves amply illustrated by photographs, of how these techniques can be used to explain the propositions which counsel is called upon to get across to the jury; and in particular he shows much that is new in photography and medicine.

In large measure his examples are drawn from the field of personal injury litigation but there is no reason why the same techniques cannot be used in many other kinds of litigation. I doubt if any lawyer engaged in trial work can read this book without getting many new ideas which will help him in his trial work by suggesting more effective ways of descriptive proof. These ideas alone will be worth much more than the price of the book.

Examples in the book cover problems both of liability and damages. They describe methods of demonstration through the witnesses—usually experts—who can thus bring home and explain their conclusions more clearly and therefore more persuasively.

These may be conclusions as to the manner in which an injury occurred or the nature and probable future course of the injury. It is in one sense a strong defense of the jury system that success in trial persuasion is predicated upon the assumption that the best persuasive device is the one which tries to explain as clearly as possible the basis for the party's claims.

The author's examples also describe methods of using visual techniques to bolster the closing argument, where the primary emphasis is on the measure of damages—both special and general. These particular techniques involve the use of a blackboard on which suggested damage figures are written during the course of the argument or the use of charts which have been prepared in advance with similar suggested dollar figures. The items are separated for the various elements of the damages and then totalled. The underlying thought is to get the jury away from thinking in terms of a round figure for all damages lumped together; a totalling of several different items will presumably come to more than the lump sum.

All of this material has been discussed, though nowhere else so completely or with such a wealth of illustration, in the innumerable trial clinics during the past ten years. It has been generally agreed that the damages granted by a jury in which such techniques have been used by the plaintiff's lawyer are substantially higher than in past years. But it does not follow at all, as some would argue, that they are the sole cause for high verdicts, or that the means used are per se improper, or that the verdicts themselves are improper. If these techniques are used so as to persuade the jury toward a conclusion of liability based upon a clearer and better understood factual basis for the decision of what actually happened and how it should be evaluated within the proper legal framework, and if they are used to suggest to the jury those elements of damage which are properly and legally compensable, then there should be no complaint. This has been the trial attorney's proper business ever since the Anglo-American system of adversary jury trials was crystallized in its present form. Nor do I suppose that the mere appealing to the sympathies and passions of the jury on the issue of damages is improper. After all, pain, suffering and humiliation are not dispassionate things. Impropriety does lie, however, on two fairly well understood points: (1) the jury should not decide the issue of liability because of the excessive sympathy they may feel for the plaintiff, nor out of prejudice against the defendant; and (2) the jury should not give an amount as damages which does not fairly represent the real financial injury—at least in a state which does not

recognize punitive damages. Nor is it proper for counsel to urge the jury to do so.

It is therefore a matter of very real concern that judges should be careful to see that matters which are not specifically relevant are kept from the trial both in the evidence and in the argument stages. No less is it the duty of the lawyer to use an honest restraint, and I take it that this is the burden of Mr. DeLacy's speech before the Section on Insurance Law of the Nebraska State Bar Association in October, 1955.[1] But it does not seem to me that a picture which illustrates pain is in any way irrelevant. It is perhaps unfortunate that the examples which Mr. Belli uses in his excellent book are almost invariably those in which a plaintiff has won. There is no reason why the same demonstrative techniques may not be used as effectively by the defense, as of course they have. The many examples in the literature of exposing malingering plaintiffs by moving pictures suggest that the demonstrative device actually was pioneered by defendants. It should also be emphasized that Mr. Belli makes a special point of warning plaintiff's counsel against making claims which cannot be demonstrated to be accurate both as to liability and as to damage. If the damage figure in the petition is more than can be persuasively supported by evidence and argument, then it should be cut down before trial. Recent Nebraska cases[2] permitting the damage clause to be amended upward on proper motion after tiral has commenced should go far toward keeping these figures at a reasonable level at the outset. And this in turn should facilitate intelligent settlements.

The book also contains a long section discussing various theories of liability which may be of great help. Only the insurance companies can guess the number of accident cases which have gone uncompensated or which have been settled for relatively small amounts because the victim's lawyer utterly failed to realize the true basis of possible fault and liability. A rereading of this section from time to time will save many a lawyer, and will give him new ideas which the standard works on tort law make no pretense of covering adequately.

There is another long section devoted to the explanation of a large number of medical problems. Although this does not take the place of a standard legal-medical text, it shows in much

1 35 Neb. L. Rev. 389 (1956).

2 Gable v. Pathfinder Irrigation Dist., 159 Neb. 778, 68 N.W.2d 500 (1955); see Kroeger v. Safranek, 161 Neb. 182, 72 N.W.2d 831 (1955); Dixon v. Coffey, 161 Neb. 487, 73 N.W.2d 660 (1955).

greater detail than those texts how a good many specific injuries and diseases should be handled by the lawyer-doctor team. A number of medical reports are shown and discussed and a separate chapter considers the special techniques which can be used to help the medical expert do his job as a witness.

The chapters dealing with the examination and cross-examination of ordinary witnesses and the jury voir dire are very similar to those found in such standard works as Goldstein,[3] Busch,[4] and Keeton,[5] though not as extensive. Though adequate they add nothing to the usually accepted folklore on the subjects. The chapter devoted to jury instructions gives a number of useful examples taken largely from the California Standard Instructions —an excellent compilation but one that of course must be used with a good deal of circumspection in any other state. On the other hand, this book contains one of the best discussions of the problems of settlement that I have found anywhere. The author's explanation of those problems which arise before trial are particularly helpful to the young lawyer who usually has had no warning of the pitfalls that await him.

The treatment of the special verdict or special issue technique is hardly impressive. It consists of a short indictment of what he assumes is the general practice in Texas—though it is fashionable to ridicule the Texas practice of special issue submission it has its supporters even there.[6] There is no mention of the other states and federal courts where it is used with apparent success in many types of cases, or of the various special situations where certain purposes can be best accomplished only through this device.[7] There seems to be a strange feeling among many practitioners that a procedural tool such as the federal special verdict, the summary judgment, or the pre-trial conference is either always good or always bad—as if a carpenter must throw away his cross-cut saw because it wouldn't do the job that only a coping saw could do. Such devices do have their special purposes and are a great aid to the efficient administration of justice when used intelligently and with those purposes in mind.

It should be pointed out that the burden of Mr. Belli's book, in fact that of any modern book on trial practice, where the

[3] Goldstein, Trial Technique (1938).
[4] Busch, Law and Tactics in Jury Trals, (1949).
[5] Keeton, Trial Tactics and Methods, (1954).
[6] See Gray, A Rejoinder, 34 Tex. L. Rev. 514 (1956).
[7] See Matzke, Special Findings and Special Verdicts in Nebraska, 35 Neb. L. Rev. 523 (1956).

emphasis is properly placed on adequate investigation and preparation, involves an assumption that, unfortunately, is not generally true. It assumes that somewhere there is the financial ability on behalf of the plaintiff to make the adequate investigation and preparation necessary to an intelligent and understanding settlement or jury trial. Not only is this preparation expensive in terms of out-of-pocket expense and time of the attorney and his staff, but all too often the plaintiff can ill afford the delay necessitated by such preparation even in a state where trial delay due to court congestion is not a problem. Mr. Belli believes that this problem is met by the use of the contingent fee (he recommends a flat one-third fee except for very unusual cases) and the consequent financing of the preparation and delay by the attorney. There can be little doubt that such a method of financing litigation may run foul of many of the traditional notions of champerty and maintenance. It also may be doubted that this device is really helpful in the majority of cases, though in death cases I understand that social security benefits have taken up some of the slack. Certainly the problem is worth the continued serious consideration of the Bar if our present theories of liability and methods of enforcing them are to be continued.[8]

At the risk of seeming to overemphasize the trivial faults of a truly helpful work, I cannot refrain from expressing shock and amazement at a publisher who would key the index to section numbers and use no section numbers on the pages. But this is a small, though irritating, price to pay for a good book which must surely pay for itself many times over.

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[8] See Conrad, The Impact of Expense on Injury Claims, Annals Am. Acad. Pol. and Soc. Sci. 110 (May 1953).

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