CHAPTER XXIX

CONTRIBUTION OF DISCOVERY TO THE GENERAL ADMINISTRATION OF JUSTICE

The description and evaluation of any particular mechanism of the legal machinery is incomplete unless it takes into account the relation of the part to the whole, for none of the interrelated processes can exist unto themselves. Innovations in pre-trial practice are to be judged by their contribution to the general administration of justice, and by their functional relationship to the other incidents of legal procedure. They are also to be judged by their contribution to the practical needs of the lawyer and the court.

Many have been the complaints in recent years in regard to the unscientific and unbusinesslike approach of legal procedure toward its various problems. Judges and lawyers in the states which allow a full and mutual discovery before trial say that it has had a salutary effect upon the whole tenor of the litigious process. Perhaps their views can best be summarized by quoting two terse sentences which are representative of the views encountered in field investigations in the various states:

"Litigation is no longer regarded as a game."

"The lawyer who does not use discovery procedure is in the position of a physician who treats a serious case without first using the X-ray."

Lawyers in states in which a full and equal discovery before trial is allowed say that it is a great aid in ascertaining the truth and a great preventative of perjury. Only where a limited or unequal discovery obtains has it been found that perjury, manufactured testimony and
kindred evils are fostered. Where a full and equal discovery is allowed lawyers say that they come much nearer to obtaining the truth because:

1. The witness is examined while his memory is fresh;
2. The witness usually is not coached in preparation for the trial, and consequently his testimony is more spontaneous;
3. A party who has been pinned down to a definite and detailed story early in the litigation can ill afford to manufacture testimony contrary to this story, for he is already bound.

Sometimes a lawyer does not know the truth of his own client’s story until after the opposing lawyer has examined him for discovery. A lawyer is often deceived as to the merit of his case, by the mere recital of the facts by the client. For instance, at the end of an examination for discovery in a certain case the attorney arose and addressed his client thus: “Why—you did not tell me any such story in the office. I am sorry but I will have to withdraw from the case.” Numerous incidents of a similar character were related in the various jurisdictions which were visited.

Discovery is a help in the ascertainment of truth in the conduct of litigation by reason of the further fact that it furnishes a means of preserving testimony. All too often injustice has been done because of the unavailability of necessary witnesses. A liberal provision for the discovery and preservation of evidence gives greater assurance that the facts of the case may be presented in full upon the trial.

Settlements have been greatly increased by liberal allowance of discovery before trial. The Wisconsin experience in this regard is especially significant both as to the extent of settlements and the manner of arriving at settlements. Similar, though less pointed, testimony
was given by lawyers in other jurisdictions. The following statement from a Milwaukee attorney is representative of the views which were encountered generally during the investigation in Wisconsin: "It is fair to say that a very large proportion of the controversies in which lawyers are consulted are disposed of without the commencement of any action. In the larger cities, at least, it is also true that only a relatively small portion of the actions which are commenced are brought to trial. They are disposed of by the attorneys in settlements which, in the majority of cases, are very carefully and deliberately worked out. These settlements have been made possible in a great many cases through the use of the discovery examination. The lawyers of Wisconsin have become quite skillful in the use of this examination. Many of them use it either solely or partly for the purpose of reducing the issues, much after the manner in which that is sought to be done elsewhere by a bill of particulars. After examinations have been had on both sides, it is a very common thing for the opposing attorneys to sit down and discuss the case anew with the issues for trial more clearly defined in the minds of the attorneys on each side and with all of them better able to judge of the probable result of a trial. The better trained the opposing attorneys are in the sifting of evidence and in the application of rules of law, the more reason is there to expect that the litigation will terminate in a fair and just settlement."¹ General counsel for some insurance companies require that local counsel send up copies of the examination for settlement recommendations. Nor is there any considerable complaint on the part of plaintiffs' lawyers, for they say the more skillful insurance lawyers have tried enough automobile accident cases to

be able to predict rather accurately what the case would bring if tried, after all the facts and the condition of the injured party have been fully disclosed upon an adverse examination, supplemented by a physical examination if necessary. Some lawyers say that they welcome the examination of their own client by the adversary, that often they have not obtained a true picture of the case until after such examination. One circuit judge says that he has maintained a record for several years of effecting settlements in four out of five cases docketed for trial. He calls the lawyers into his office before time for the trial and asks what the prospects of settlement are. After a short discussion one of the lawyers suggests that the parties be called in. The judge explains in an informal way to the parties the uncertainties of litigation. Often the result is a settlement. In such a case the adverse examination is either expressly or tacitly used as the basis for the agreement.

But more often than otherwise the case does not get this far after discovery is had. Sometimes a settlement is effected in the presence of the commissioner before the examination is finished. In most cases the discovery results in a re-evaluation of the case by both sides and a consequent weighing of the probabilities of further litigation.

The following statement from a lawyer in a large city in the middle west indicates the use of the procedure by representatives of liability insurance companies and similar interests in the large cities: "When a case is filed against us we often find that we know almost nothing of either the plaintiff or the defendant. We call the defendant, whom we represent, to the office. It develops that his story is decidedly different from that related in the plaintiff's petition. What is the truth? It is worth a good deal to us just to be able to force the plaintiff to come in and give his story. Our chief purposes in exam-
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ining him are: To see what he looks like, whether he seems to be honest, and especially, how he stands up under questioning, and to question him in detail as to the extent of his injuries. If we find that the party has a good case and will make a good witness at the trial, we make every effort to effect a settlement.’’

One attorney made the following statement which gives a very trenchant comparison of discovery and separate procedures for arbitration or conciliation: ‘‘The lawyers, after an adverse examination, really constitute themselves a board of arbitration in the case. And it is much more effective than regular arbitration and conciliation practice, because it is not artificial. I do not care for the type of arbitration which forces an award on the party, but in this way the lawyers and parties strike their own agreement.’’ There is afforded the judge the materials with which to foster the kind of conciliation which, after all, is most feasible, namely, conciliation handled by the established courts. The other type of conciliation procedure, by special conciliation tribunals, has been described as operating thus: ‘‘The conciliator points out the uncertainty of litigation, the burdensome expense of it, the danger of personal estrangement between neighbors and friends, and that, by slight concession on the part of each, the differences may be adjusted.’’ It has been pointed out that the judge of the established court can bring about such conciliation as well as a special conciliator. Discovery provides a means whereby the judge can do so upon an intelligent basis. Moreover the parties are in a position which is more conducive to their acceptance of the suggestion of the judge if they have already ascertained the testimony which can be expected at the trial. Or, to put the same

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2 Cf. Randall, Conciliation as a Function of the Judge, 18 Ky. L. Jour. 330.
2 John A. Cline, in an address before the Ohio State Bar Association in 1925, Reports, vol. XLVI, p. 63.
idea in a slightly different manner, may not the "very soul of conciliation procedure, that before a person shall involve his neighbors and himself in legal warfare there shall be made an effort to secure a legal peace" be more readily attained "if a party, long before his legal battle is staged in the trial court, can go into his adversary's camp and inspect his battle array, * * * learn how strong his adversary is, and enter negotiations for peace or prepare for battle intelligently"?

Automobile accident litigation occupies as much time as all other types of litigation in courts generally at the present time. In many of the larger cities the ratio in the trial dockets is approximately two to one. In no type of litigation can plaintiffs, as a general rule, less afford to wait a long time for compensation, and in no type of litigation are defendants more often subjected to non-meritorious claims. The signs of the times indicate that unless the judicial system can speedily devise some way of remedying the situation, measures akin to the industrial accident compensation plan will be introduced. Discovery procedure offers a way of improving the handling of negligence cases. In every state in which an investigation was conducted, except New York, the greatest use of discovery procedure is in connection with personal injury litigation. The explanation for the New York exception is the arbitrary limitation which the courts have placed upon use of discovery in such litigation. Especially do lawyers for insurance companies favor the procedure. It enables them to arrive at settlements on an intelligent basis. Consequently in several states the main instruction in the use of discovery procedure has come from the head counsel for the insurance companies, who have sent instructions to counsel in outlying districts to take discovery examinations in every

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4 Id. page 67.
5 Max W. Nohl, Discovery Proceedings, 2 Marquette L. Rev. 137.
case involving their interests and to send the same to them for settlement recommendations. Plaintiffs’ lawyers generally are as well satisfied with discovery as are the defendants’ lawyers. The procedure provides them with a means of investigation which allows them to compete with the larger firms which have at their disposal independent means of investigation. To the firm which already has more cases than it can conveniently try, it affords a way to dispose of some of them and to collect fees, without needlessly protracted litigation. The lawyer who is prosecuting what he regards as a good case is glad to have his client examined with a view to obtaining a favorable settlement.

An oral examination for discovery affords as simple a way of arriving at the truth in automobile accident cases as could be had under any administrative tribunal. It has all of the elements of informality, avoidance of the ultra-technical rules of evidence, and general conciliation features, which any of the existing workmen’s compensation plans affords. And it has the advantage that it is more easily adapted to, and supervised by, the existing judicial organization. It is integrated with the regular structural plan of the courts, and the business of lawyers, rather than being a separate system in itself. While possessing many of the advantages of extra-judicial procedure, it has less disadvantages.

The report of the Massachusetts Special Commission to Study Compulsory Motor Vehicle Insurance is of significance in this regard. Its recommendation is the more interesting in view of the fact that a majority of the commission were laymen. As an item in its discussion of the relation of court procedure to the compulsory automobile insurance situation, the commission stated: "Having thus suggested a prompt, informal and fair method of settling honest claims of those who wish them thus settled, with or without the assistance of lawyers, we now
turn to the matter of procedure for dealing with claims of parties who are not willing to submit to such judicial arbitration. These claims may be honest, or they may be false or exaggerated. How shall they be sifted out so that each may receive such, and only such, consideration as the facts merit? It is a commonplace, in the discussion of the administration of the criminal law, to say that a prompt hearing and disposition of a case while the evidence is fresh, and before the whole story is stale, is the most important object to be attained as a deterrent to crime. In our opinion this same promptness of investigation, hearing and disposition is essential in dealing with automobile accidents and unwarranted claims arising out of them.

"As pointed out by the Judicature Commission in its final report of 1920, Bentham a century ago criticized the orthodox methods of inquiry in many legal proceedings as 'epistolary' as distinguished from the stronger and more direct 'confrontatory' method which he advocated. Now, after a suit is brought, we have had for many years an 'epistolary' method by which each party may examine the other by written interrogatories to be answered in writing. While this system is useful and has been much used, it is cumbersome, it takes up a large amount of time and effort upon the part of the judges in passing upon objection to certain interrogatories before they are answered, and it has the weakness of an astute, and sometimes evasive, question and answer writing contest between the lawyers over the signatures of their clients, with a view to getting as much and giving as little information as their respective consciences will allow. In some other states they have more direct methods, and the Judicature Commission called attention particularly to the statute of New Hampshire which allows each party to take the oral deposition of the other party and of witnesses at any time after suit is brought. These deposi-
tions are taken, like the deposition of any witness under our own practice, upon notice to the other party, and may be used at the trial unless the other party produces the witness. Our practice allows such examination only of witnesses who are more than thirty miles from the place of trial, or who are so ill as to be unlikely to be able to attend the trial, and they cannot be used at the trial unless the illness or other reason for taking them still continues. We have no provision for an oral examination of the parties to the case until the actual trial is reached, which, as already pointed out, may be several years after the accident, when the memory of everybody may have been dulled, or unduly stimulated, to such an extent as to create more controversy than would arise if the story could be obtained under oath at an earlier period.

"Now we believe that the apparent frequency of unwarranted or exaggerated claims in connection with automobile accidents in Massachusetts today under our law is such as to demand the experiment, in that branch of litigation, of machinery for the prompt oral examination of parties and witnesses to the suit similar to the machinery which they have in New Hampshire. * * * It seems to us that the opportunity given to either party to examine the other and witnesses orally after suit is brought is the first necessary method of sifting the character of claims sued upon." 6

It is important from the standpoint of substantive law to improve the fact-sifting process by adoption of discovery procedure. Of course any device which will simplify legal procedure and help it to assume its proper relation of handmaid rather than mistress to the work of justice,7 will, to that extent, effect an improvement of substantive law. This is poignantly true of the fact-

selecting process. The exact form in which the facts of a controversy are presented for decision has an important bearing both upon the determination of the rights of the parties in the particular case and also upon the determination of the scope of the authority of the decision under the doctrine of stare decisis. If all of the factual details of a controversy are presented, without any discriminating selection of the important facts, the judging function is handicapped by the very multiplicity of data. Not only is it necessary that there be an efficient fact-sifting process, but it is equally necessary that it be indulged prior to the time set for application of the law to the facts, the trial. Otherwise there is danger that the relative importance of particular facts be obscured in the riot of facts.

Discovery has a salutary effect upon the various mechanisms of legal procedure. Especially does it have a vital interrelation to pleadings, both in purpose and in function. The two together effect a division of labor toward a common end, namely, the formulation of the dispute into a justiciable form by disclosing the material controverted facts and eliminating the uncontroverted and unessential facts in each case prior to its final presentation for decision. Discovery procedure and pleading approach the problem from the same basic standpoint: both are equally in harmony with the traditional Anglo-American doctrine of party-formulation of issues. An oral examination for discovery is even more largely extra-judicial in its practical operation than are pleadings. Whatever are the theoretical arguments for the con-


9 Dean Green has shown convincingly that "the net-work of theory increases in complexity with the multiplicity of data" and that there is accordingly more room for an improper grouping of facts to bolster up a particular theory which has happened to catch judicial fancy. Green, Judge and Jury, p. 25 ff.
trary principle of judicial control of pre-trial practice, the fact remains that under our present court structure the judges already have more than they can do. The practical necessities of the situation make the conservation of judicial energy a more important consideration at present than judicial formulation of issues.

The difficult problem under our present practice of pleading has been to determine just where to draw the distinction between facts, law and evidence.\textsuperscript{10} The distinction, it has been pointed out, is one of degree only, the "real problem" being "how specific must the pleader be?"\textsuperscript{11} With an adequate system of compelling discovery this problem vanishes, for when a party can obtain notice of all the facts by discovery he is not likely to complain that too small a percentage of the disclosure is effected by the pleadings. Likewise the issue-forming function of pleading can more conveniently be made secondary to the notice-giving function, as it should be, when some auxiliary is provided to eliminate unessential facts. Indeed, discovery has been recognized in England as a necessary complement of simplified pleading.\textsuperscript{12} \textit{A fortiori} it has been recognized as an absolute necessity by the advocates of what is known as notice pleading.\textsuperscript{13} Not only in Anglo-American procedure but in the Continental systems as well there has been a recognition of the need for some such auxiliary to pleadings. The words of a prominent student of comparative procedure and of continental procedure in particular, Judge Gustaf Fahlcrantz, of Stockholm, Sweden, before the Universal Congress of Lawyers and Jurists in 1904 are significant in this regard: "But in order to avoid useless controversy and to keep the whole case most closely to the

\textsuperscript{10} Cf. Cook, Statements of Fact in Pleading under the Codes, 21 Col. L. Rev. 416.
\textsuperscript{11} Clark on Code Pleading, 155.
\textsuperscript{12} Rosenbaum, Rule-Making Authority, 72.
\textsuperscript{13} Whittier, Notice Pleading, 31 Harv. L. Rev. 501.
actual issues, there is need at the very outset of the lawsuit to require the parties to state the true facts. In addition to the pleadings it is necessary to give the right to the parties to make interrogatories to be answered by the opponent under oath or under legal responsibility along with discovery and inspection of documents. And I take the liberty to consider such a right of the parties, or the exercise of that right of theirs, as a very part of the pleadings or a necessary appendix to them, because without that the pleadings must frequently be void of their proper effect and illusory.''

Pleading alone has never furnished an adequate basis of preparation for trial. Any formal process like written pleading has a natural tendency to become formalistic and even ritualistic. The natural tendency of lawyers, as of human beings generally, is to adopt the easiest course, and this accentuates the ineffectiveness of pleadings as a fact-sifting device. Why not, therefore, let pleadings assume the very character which it is their tendency to assume, namely, a mere preliminary forecast of the issues, and supplement them by a more workable fact-sifting device? There is abundant evidence that discovery aids in reducing and clarifying the issues. New Hampshire lawyers said that the simple pleadings in use in the state were made possible largely by the discovery practice. Ontario trial judges say the same is true under their practice. They say that they are able to come to the trial of many cases without ever having read the pleadings; that by the use of discovery the issues are so narrowed down that it will suffice to simply ask the lawyers at the opening of the trial: "Well, what's the dispute about?" While Wisconsin lawyers are rather indefinite about this particular contribution of discovery to the administration of justice it is a noticeable fact that pleadings are less technical than in many other states.

Under the Massachusetts written interrogatory practice it is possible to point to one way by which discovery affects the pleadings. Under the prevalent practice in Boston of having printed forms for the defendant to use, containing a general denial and pleas that the plaintiff was contributorily negligent and that the automobile was operated by a person without authority from the defendant, it sometimes happens that the defendant files such a form without really intending to press all of these matters. Cases of record were found in which interrogatories had brought to light exactly which of these items the defendant did intend to rely upon. In this connection the words of the Massachusetts Judicature Commission are significant: "The discussion of pleading naturally leads to the consideration of methods of defining issues before trial which the earlier technical system of pleading was intended to accomplish, and which the present looser system does not accomplish." 15

While there is this salutary effect on the pleading stage when a full discovery before trial is allowed, exactly the reverse may be true under a partial discovery before trial. Since the defendant can have no discovery except on his affirmative defenses in New York he often puts in fictitious defenses for the sole purpose of securing an examination of his adversary. Indeed, several New York lawyers pointed to this as one of the chief defects of the present New York system of discovery.

Discovery relieves the trial machinery in at least two distinct ways. It furnishes a means of eliminating a large number of non-meritorious cases and of settling others so that they are not allowed to reach the already overcrowded trial dockets. By eliminating such cases greater guaranty is given that meritorious cases will be accorded an expeditious trial. Discovery serves to pre-

pare the form of the controversy, in the cases which merit a trial, so that the trial proper can be expedited. The trial is expedited in proportion to the measure of clarity in the definition of the issues and freedom from all elements of surprise. As the element of surprise, which is the psychological child of trial by battle, is eliminated, the expectation of trials becoming more nearly business-like meetings is realized. There is no better way to prevent such surprise than by allowing a dress-rehearsal before the trial. The commissioners who drew up the first New York Code of Procedure set forth still another way in which discovery aids in the trial of cases: "One of the great benefits to be expected from the examination of the parties is the relief it will afford to the rest of the community in exempting them, to a considerable degree, from attendance as witnesses, to prove facts, which the parties respectively know, and ought never to dispute, and would not dispute if they were put to their oaths. To effect their object, it should seem necessary to permit the examination beforehand, that the admission of the party may save the necessity of a witness." 16

The practical operation of discovery procedure is rather interesting in light of the widespread demand for liberalization of the rules of evidence. One of the attractions of procedure before administrative tribunals is the relative freedom from the more technical rules of evidence. Discovery examinations and examinations before administrative tribunals exhibit similar conditions in this respect. In both instances the norm which lawyers keep in mind is the general law of evidence, but in both instances there is a practical disregard of the more technical rules. Yet there is this difference in the case of discovery: while there is freedom in finding the truth, there may be limitation upon use of the truth found, for it may subsequently be non-usable at the trial if it fails

16 Report of Commissioners on Practice and Pleading (1848) p. 244.
to comply with the various rules of evidence. In this way a happy compromise is effected between the two schools of thought to which, respectively, the rules of evidence are either nonsense or the height of wisdom.

A noticeable tendency in the reform of appellate procedure is to allow a broader scope of review of the controverted facts by the appellate court. Can this not prove more practicable when some way has been found to forever dispose of the uncontroverted and unessential facts at the beginning of the litigation so that they may not later be resurrected to confuse the issues on appeal? Cannot our appellate courts afford to spare the time necessary to review more thoroughly a few contested questions of fact? Is not the present limitation upon the scope of review maintained partly because the fact-range in the cases which are appealed is unnecessarily broad? Discovery also offers a means of reducing the size of the record on appeal. When the issues are not clarified and reduced before trial the transcript of testimony becomes unnecessarily large and the expense incident thereto becomes unnecessarily great. Dress-rehearsals before trial in the form of discovery examinations should make it possible to eliminate unnecessary circuity and prolixity in interrogation at the trial. To this extent the size of the transcript of testimony is reduced.

Not only has discovery procedure improved the general administration of justice, but it has also contributed to the practical needs of the lawyer and the court. Lawyers in jurisdictions in which the device has been thoroughly tested say that it has been advantageous to their personal interests as well as to the larger interests of justice. Interviews with several hundred lawyers in thirteen representative jurisdictions as well as correspondence with lawyers in fifteen other jurisdictions indicate that the bar favors allowance of an oral examination for discovery before trial, co-extensive in scope
with an examination at the trial, and available to both parties equally. In states where a partial discovery only is allowed [partial because: (a) not an equal discovery, (b) not a discovery as to all of the issues of the controversy, or (c) written interrogatories are the means of obtaining the discovery] there is a sharp division of opinion among the lawyers as to the merits of the procedure. The basic reasons why a full and equal discovery is acceptable to lawyers are that it furnishes a means of thorough preparation for trial, and that it makes possible the disposal of many cases without protracted litigation, the collection of fees earlier, and the handling of a greater volume of litigation.

The work of the judge is simplified in the states which employ an oral examination before trial. A considerable part of the pre-trial machinery for the formulation of the terms of the controversy becomes extra-judicial in practical operation. A great many cases are eliminated before they ever reach the trial dockets. The greater clarity in the definition of the issues and the elimination of elements of surprise expedites the actual trial in cases which must be tried. In many respects, therefore, discovery has made a vital contribution to the general administration of justice.