

*This address is dedicated to John Lommen and his wife Betty. Mr. Lommen, an excellent trial lawyer and a former director of the Academy, passed away February 11, 1988 while trying a case in court.*

## **I See A Cloud - Revisited**

**By G. Alan Cunnighman**

About twenty-eight years ago and at a location on the Atlantic seaboard a considerable distance north of here, a federal court judge gave a speech which obviously made a lasting impression on me. For about twenty-five minutes, he was an outstanding humorist. Laughter hardly subsided before he had generated a new wave of laughter. But for about the last five minutes you could have heard a pin drop. He was serious and he held everyone's attention.

The judge expressed concern about a cloud which he saw on the horizon. As I later remembered the speech, his cloud was that of Federalism in the court system. A recent rereading of his speech made me realize my memory had altered the cloud he saw -instead it was the overcrowding of civil cases in federal courts, a fear of resulting problems and a plea that the lawyers ease the burden by earlier, realistic settlements.

As I said, his speech made an impression on me. It must have; to my knowledge I have never had any contact with him either before or since. Yet, last year when the deanship of this Academy befell me, it did not take long for me to conclude that the title for this speech would be "I See A Cloud -Revisited."

The cloud which I now see is not the same one the federal judge saw on the horizon twenty-eight years ago. His cloud has not entirely disappeared. It still needs new and innovative attention.

But I believe the cloud which I see is much closer than merely being on the horizon. In addition, I perceive that it may be much more ominous and, unless we do something to cause it to break up or disappear, it may turn into a very destructive, possible hurricane-like storm which may dramatically, maybe tragically, alter our legal system.

What is this storm cloud? I am not sure by what name a meteorologist would identify it. Possibly he would call it a killer storm. Let me describe for you only a few of the various features which have helped to spawn and intensify this cloud.

They include a gross overcrowding of our present judicial system, caused by many different factors, including a tendency to try to provide a remedy, sometimes multiple and even sequential remedies, for every perceived or imagined wrong, a growth in the judiciary which is only a fraction of the explosion which has occurred in civil litigation, not to mention the dramatic increase in criminal trials and procedures.

It also includes an attitude, a greed, which I am sure you have heard expressed by some lawyers to the effect:

*"If I can just keep it coming in  
for another five (some might use  
the number ten) more years, I could  
care less what happens to our legal  
system after that."*

Lest there be some misunderstanding, such comments are not confined to one side or to one segment of the legal community.

Another lawyer in a different vein expressed his view, a view which unfortunately is not unique only to him, that the purpose of the legal system is to provide a fully adequate recovery for his client. Somehow, it seemed to me that the purpose was to provide equal justice under law to all parties that might come before the court.

Expense of pretrial discovery and preparation and long delays in the progress of litigation resolution and a growing belief that piecemeal or wholesale alternatives must replace the current system also are parts of this ominous cloud formation. Our press, including the non-radical Wall Street Journal, and recently again, the AMA and others, have expressed or echoed dissatisfaction with or, in some instances, have called for radical overhaul of our system of litigation and dispute resolution. These may have

caused, or may reflect the result of, a lessening of respect for our current legal system and its structure by some in various segments of the public. There even are a few who might agree with Shakespeare's one liner:

*"The first thing we do,  
let's kill all the lawyers.*

The list might go on. The fact is for a number of reasons there are complaints leveled at our current system for delivery of justice. Even though some of those complaints may be unfounded, some are valid. The number and intensity of those complaints, both valid and invalid, are likely to grow.

So what?

At one of the Inns of Court during the 1971 American Bar Association convention in London, several Minnesota lawyers happened to have the good fortune of being seated across the dinner table from an English Lord High Justice. He asked us what we thought of the jury system in America. We thought it was an idle question, but to the Lord High Justice it was not. Our reply was, as might be expected, one of enthusiastic support. He then related how England went into World War II with the jury system firmly in place. The dire circumstances of the War required that jury trials be abandoned during the War. With sadness he said one of the many English casualties of World War II was its jury system.

The extent of that casualty can be put in sharp perspective. Some of you may have had the good fortune of being able to accept Judge Fricker's 1985 invitation to observe the courts in York, England, and there saw a jury selected in a criminal case. In England, a jury is still available in criminal cases. But not in civil cases. If you were there, you saw the jury selection in a case involving negligent homicide charges against one of eleven recovering, but temporarily fallen, alcoholics. The intoxicated defendant wrestled with the van driver which resulted in the van leaving the road, overturning and causing a death and numerous injuries. If you were there, you witnessed the fact that the twelve person jury that would decide this criminal case, was selected in less than five minutes, consuming just the time it took to read twelve names and have them find their way to the jury box.

In 1971 the Lord High Justice concluded his remarks regarding the demise of the jury system in England with the sober advice that if we wanted to preserve our jury system, we should defend it, fight for it, and find ways to improve it.

That advice was sound when given. It remains pertinent now, not only as to our jury system but as to our entire litigation system.

What will happen to this cloud which I see? If nothing is done, it may well be very destructive to our legal system. If we take action in a well reasoned, positive manner, what may now be perceived as an ominous cloud may have a silver lining. What happens is up to us.

Who is that "us"? It includes lawyers, judges, scholars plus those many others who are interested in doing what is necessary, in the words of the Lord High Justice, to defend, fight for and improve our litigation delivery system.

Is it suggested that we try to preserve the present legal system without change? No.

One of the great features of the common law has been its ability to change with time and circumstances. Changes should and will occur. But what those changes ought to be should be carefully considered, not for the benefit of the attorney, but as to how it may benefit those who will call upon or will be exposed to the litigation system in resolving their disputes.

Am I suggesting some specific quick fix or a specific long-term change or program? Again, no. Innovations and solutions should emerge from ongoing groups of and dialogues among lawyers, judges, scholars, users of the legal system, legislators and any others who are interested in considering and seeking to implement those improvements and changes which may improve the legal system and benefit its users. Anything which might be an improvement should be proper for consideration. No immune, sacred cows should exist.

Undoubtedly, each of us could come up with a laundry list for consideration. Many items on such a list probably would be duplicated on the lists of many others, but there probably would be different items appearing on other lists. Some temporary

fixes might be appropriate, but to be truly effective this exercise should look to long lasting improvements and the process itself should be permanent.

The time to start is now rather than waiting until it may be too late.

If all of us become more sensitive to consideration and reconsideration of what is good about and what may merit change or improvement in our litigation delivery system or systems, useful changes should be easier to implement, the system should work better, respect for and adherence to the system will increase and hopefully a system of justice which has survived and grown in the United States for over 200 years will continue to be nourished by the gentle rain which might flow from the cloud which I see and, to continue the weather analogy, we may find a rewarding rainbow develop from the reflection of an enhanced litigation delivery system.

In my office I have a copy of a 1942 painting by John Rogers. The sky is filled with towering gray clouds. The field below is a golden color of wheat ready for harvest. To someone who has never lived on a farm, it is at most a stiff life painting.

To the farmer, the wheat will provide a bountiful crop if those powerful storm clouds do not generate the wind and rain that will beat the wheat to the ground and ruin his harvest.

The farmer is helpless and can only wait out the storm. We are much more fortunate. We have the ability to divert the storm cloud which may overshadow our legal delivery system. We can do so if we commit ourselves to the task for the benefit of our future clients and for the benefit of the legal delivery system which has been so good to us.

Thank You.

G. Alan Cunningham, Dean  
International Academy of Trial Lawyers