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ALJs IN 2050: CONSEQUENCES OF MERGING TORT AND ADMINISTRATIVE REMEDIES

Professor James T. O'Reilly*

Please consider suspending our conventional linear ways of seeing the present, and let's examine in fictional form some of the ways in which Administrative Law Judge roles may evolve in the future. What will be our likely roles in a future America?

We welcome you to the 2050 Annual Virtual Conference of Certified Federal Adjudicators. Looking back, we praise the memory of those far-sighted folks, formerly called Administrative Law Judges in the old days before the turn of the century, who courageously set the foundation for the work of the Federal Remedial Agency, under the Uniform Federal Remedial Act (UFRA) that is the hallmark of justice in the present, more enlightened era.

We live in an enlightened age. Benefits decisions and injury compensation decisions are the most rational and most efficient that they have ever been. The merger of what was once called "tort" with the field of administrative law was an evolution that elevated and transformed the roles of administrative adjudicators. We enjoy the benefits of that merger as we celebrate today with our colleagues.

By all measures, 2049-50 has been an excellent year, earning very positive praise for the work of you, the 4,500 Certified Federal Adjudicators (CFAs). In this year you resolved 2.5 million filings and substantially eliminated the 5-month backlogs that had perplexed us as recently as 2045. Reversal rates by the Court of Virtual Appeals and the Supreme Court have been reduced to 7% of all CFA decisions appealed. I want to cover the reasons for the success we have enjoyed, and why the foresight of the pioneers in 1999-2000 blazed the trail for today's success.

Looking back just 50 years, it seems incomprehensible that so many types of adjudicative officials with so many titles were used for

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so many parallel programs. The fragmentation across federal agencies was remarkable, and states used numerous models and some ad hoc arrangements to provide something close to the due process of a neutral adjudicator. A mixed, messy collection of different systems had been created, each with its controlling constituency of interest groups. The quality levels of adjudicator and of support systems varied, but in at least one respect, the professional standards of the federal Administrative Law Judges, the federal system set the pace for all states to follow. Much as the federal system needed improvements in selection and oversight, it had by 2000 matured well compared to the patchwork of part-time hearing officers in several major states.

The confusing system of 2000 for administrative benefits adjudication was matched by a quilt of differing patterns in tort adjudication. States had an incomprehensible maze of court jurisdictional limits and anomalous requirements for the tort determinations of accidental injury compensation. The United States tort system was hardly a "system" at all, and was ripe for a reform that could reduce costs and improve consumer and beneficiary satisfaction. The challenge was to win this satisfaction, within reasonable bounds of taxpayer tolerance for benefit expenditures. Combining workers compensation, federal employee, longshore, veterans and miners' transfer payments with the social security disability determination system was absolutely essential to drive out the huge redundant overhead costs of the system.

The change of compensation vehicles was occurring in the legal system just as the medical system's quantum improvements in health measurement were being felt. Applying body-scan medical examination technology and holographic medical records verification allowed the system to eliminate many of the old style physical screening exams and the back-room paperwork processors who had encumbered the system. We can laugh at how naïve their paper files system seems compared to today's medical history chips. For back then in 2000, at the adjudication stages of these programs, the variability of adjudicators and their sometimes diminished "judging" powers worsened the respect needed for the system, reduced the appearance of objectivity, and lessened the quality of the decisional apparatus.

Today's success really began when Congress moved to the Certified Federal Adjudicator model in 2022. The melding of functional roles

was a long and arduous process but it was worth the struggle. This progress was so well received that by 2027, the claims files of the remaining group, the military veterans, were included with the support of their constituency groups. That success taught us all about efficient delivery of adjudicative benefit outcomes – so much so that by 2035, the "big bang" year, consensus was achieved. and the classic tort law recovery systems were also merged into the compensation determination system.

Fears that the big bang of merging systems would harm individuals' rights fizzled as the investment in well-trained Certified Federal Adjudicators paid off. Plaintiff and defendant groups and individuals alike enjoyed the post-transition efficiency, and satisfaction index surveys showed strong support. That was a landmark step in the procedural reform of injury compensation systems and it has made a huge, positive contribution to user satisfaction with the systems of injury compensation. For example, last night's most recent on-line tracking poll of real-time opinions showed that 86% of Americans are "well satisfied" or "extremely satisfied" with the accident compensation systems.

---ENDING TORT'S WASTEFUL WAYS

For those CFAs new to our profession, let me remind you how important the merger of tort and administrative benefits has been. The opponents of the "big bang" of streamlining conventional tort decisions feared capture of the adjudicators by one or the other side's advocates. The foreclosing of classical tort litigation as a separate form of accident compensation had been decried at the time, by economically advantaged forces of the tort law system, as a "hostile takeover of private law by public law" and "theft of the rights of the citizen to gain fair compensation".

But the reality was that the end of private/public tort distinctions was forced by developments that began with the tobacco settlements of the late 1990s, which effectively subsumed tort recoveries of individuals within the public actions of state officials. The state officials who took over the tort recovery for millions of ex-smokers, in the name of state insurance systems, then allocated the money for highway construction, school deficits, social welfare programs and a

variety of health related causes. This foreshadowed the merging of tort and benefit programs in several areas in the 2020s.

In today's climate of governmental responsibility for individual health needs, the direct forms of compensation management which the Certified Federal Adjudicator provides can trace its roots to these long-ago decisions to merge recovery for private injury with public risk allocation. After the tobacco case, increased governmental involvement with tort-like issues came to evolve in ways that not even political contributions from tort-based plaintiff attorneys could have counteracted. What would our system have looked like if every asbestos case, or every person affected by problems of laser eye surgery, had been forced into single-individual trials?

The "death of tort" that was decried by legal scholars of the time seems quaintly irrelevant today. What matters is satisfaction results among users of the system and taxpayers, and both soundly support the compensation system that uses our CFA systems. You as CFAs live with the system, understand it and explain it on a daily basis -- and you see the deep positive satisfaction that your efforts produce, compared to lawyer-bashing and judge-bashing of the Turn of the Century media reports.

TODAY'S IMPROVED SYSTEM

The 2022 legislation as amended in 2035 replaced a very odd quilt of mismatched pieces of adjudicative decision-making. In the old days, multiple agencies made inefficient decisions, with inconsistent results, at a huge transaction cost. In tort law, as it was once known, the federal and state judicial systems ran redundant tort law adjudicatory functions, with much inefficiency. The arrival of the mass tort settlements for tobacco cases, eye laser damage, video game wrist injury and other mass cases overwhelmed the tort system's ability to handle the volume of claims and claimants. So the 2035 consolidation of U.S. personal injury torts into public compensation systems --six decades after New Zealand adopted its pioneering public compensation of injuries system in the 1970s -- brought about today's high level of public satisfaction and efficiency.

The Certified Federal Adjudicator decides claims for benefits that fall within two systems, one that had been the "entitlement" system of

federal or state compensation, and one that had been the tort system of injury recovery. These were merged by Congress in the 2035 legislation and the results have been exceptionally productive with a 70% cost savings over prior methods.

The allocation and liability-attribution process of deciding amounts of compensation increased their costs during the early years of this century, so by 2022 the centralization of damages compensation grew too "top-heavy" with administrative costs. It was this overhead cost and press attention to the small actual payout to claimants that made the swing of public opinion possible. As the public attention focused on inefficiencies in compensation, the movement into replacing tort with governmental remedial programs began in earnest. California's voters adopted their system by virtual ballot initiative in 2022 and its constitutionality was upheld in that state's court, the Court of Virtual Appeals and the Supreme Court.

The Uniform Federal Remedial Act (UFRA) in 2035 capped a decade of debate between lawyer organizations, claimants, the powerful retired persons' lobby, and private insurance companies. Even as recently as 15 years ago there were doubts that we could operate this massive adjudicative system as efficiently as we have shown it to be operated. Information technology has been the breakthrough mechanism. The 2035 UFRA forms the charter for most of the work that we do as Certified Federal Adjudicators today.

CFA ROLES IN COMPENSATION CASES

The CFA is first and foremost a fact-finder using today's tools to find the bases for health problems for affected persons. The CFA applies national presumptive norms for the evaluation of injury, with body-scan outcome reports, then applying the DNA-based causation tools and other forms of physical evidence to determine the legal attribution of a connection between the claimed injury and the claimed causative effect. Before the wrist-watch diagnostic miniaturization that we enjoy today, this might have been impossibly subjective. The commonality among the benefit laws derives from the concept that eligibility for government benefits should be based on medical or psychological need and less on the happenstance of employment status or history. We've come a long way from the "grid" system of onetime

benefits adjudicators, to today's fact-driven algorithmic approaches.

Those harms that are attributable to products are in turn processed under UFRA's liability norms for the handling of "product-related transfer payments" (PRTP). The Certified Federal Adjudicator decides the issue of eligibility for compensation and the amount of damages. A PRTP is then transferred from the compensation fund to the master financial account for the named individuals, with automatic retransfers to the accounts of those who provided medical services (those transfers occur automatically without the cumbersome "subrogation" and "lien" processes of prior decades). The compensation fund bills the person responsible for that product and the CFA's finding is upheld unless clearly erroneous.

EVIDENCE AND THE CFA

Using the medical evaluation data and the causation tools, a CFA should be able to create a presumptive framework for decision that sets the stage for the human interactive portion of the determination. The virtual presence of the applicant is necessary, as well as the virtual presence of witnesses such as the health assessment specialist, eyewitnesses to the injury event, and technical assessors who have examined the scene or the product. Individual wrist-device diagnostic downloads provide an excellent factual basis for the decisional facts.

The CFA may encounter a "personal advocate", a law-trained person competent to advise the injured claimant. But the sophisticated matrix evaluation tools and the artificial intelligence scoring systems have reduced the number of personal advocates who participate in these virtual hearings, so no more than 5-10% of these hearings involve interaction with such a personal advocate. (This decline in demand for law graduates was bad news for law school planners, who at the Turn of the Century were shocked by the idea that distance learning, the archaic term for today's Virtual Learning Modality, would threaten their geographic and institutionally anchored market.)

THE PLAINTIFF'S LAWYER OF OLD

Very little remains in compensation systems for old-fashioned plaintiff's lawyers, as the technologically integrated society did away

with concepts of adversarial jurisprudence by 2040 or so. As a result of the very significant transaction costs of litigation in the old traditional tort system, pursuing tort cases simply became too expensive for many elders and lower-income workers. So the state legislatures and later Congress responded to the transaction cost imbalance and substituted a public system for the private system. The legislative bodies replaced the solo and small practitioners who formerly handled compensation tort claims and benefit claims with a more sophisticated algorithm-based computer program, with submodels for such categories as the product-related transfer payments, formerly known as product injury cases. No need for the hiring of personal advocates exists where the person's injury fits conventional modeling software assumptions. The CFA, with his or her technological "smart bench" of decisional software, serves the former purposes of lawyer for both plaintiff and the compensation fund. The personal advocate still can be used as a guide to the process, but he or she acts more like the classic solicitor in British law had done.

THE FATE OF DEFENSE COUNSEL

The last phase of the old tort system to convert into compensation was the product-related transfer payment (PRTP), which formerly had been known as "products liability". There, some manufacturers or premises owners who choose to do so can still bring their "institutional advocate" to argue against compensation. The CFA serves to test the validity of their arguments, especially pressing back against those who seek to cross-transfer liability on to the general compensation fund and away from that particular manufacturer or premises operator. In the 2039 Supreme Court case of *Time-Warner-AOL-IBM-Ford Inc. v. Fund Administrator*, the role of the defense as to issues of fact was subordinated to the use of presumptive screens and matrix determinations, during the fact-finding and allocative functions of the CFA. As a result, the CFA retains great discretion to reject the defense arguments.

In turn, much of the "action" has shifted to the legislative arena, and product-related transfer payments have been subjected to considerable amendment pressures in the last several years, especially with the Laser Eye Surgery Compensation Act of 2046. Much as one

would like to systematically improve the evaluative determination of facts, the political strength of competing interest group politics has fixed the terms of some disputes in ways that had moved these specific controversies more to the favor of defendants. Large medical device companies whose lasers left unpredicted eye damage in patients threatened that they would go into bankruptcy; they won legislated restrictions on product-related transfer payment liabilities. It is the Congress and its virtual committee interactions that provide the forums within which many of the controversial aspects of the matrix system are decided.

ANCIENT DISPUTES; ADMISSIBILITY

According to historians who have studied recordings from a system once called "Court TV," the tort system adjudicators of the previous century spent a huge portion of time on admissibility disputes for evidence, including such now-laughable disputes as whether DNA could be used to show that a criminal was at the scene of a murder. *People v. O.J. Simpson*, a late 1990s case, was one of the last few times that DNA was seriously questioned; such physical evidence as gloves and shoes were asserted to be a basis for criminal acquittal. By today's standards, "If it won't fit you must acquit" would never be heard in a court that can technologically match body scans and wrist-diagnostic readouts with exceptional accuracy. Fortunately, after the Supreme Court's 2008 decision in *Boulder v. Patsy Ramsey*, DNA linkage is now conclusive in all civil disputes when the *Boulder* criteria are applied. The whole premise of the archaic rules of evidence, to shield an unsophisticated lay juror from drawing incorrect factual conclusions, faded away as we became much more aware of the truth-finding benefits of today's CFA system.

Many of our predecessors, then known as Administrative Law Judges, struggled with evidentiary disputes as well. The ancient Administrative Procedure Act excused those predecessors from strict adherence to the Federal Rules of Evidence but their agencies had in many cases adopted internal rules of evidence that were as strict as the federal judiciary's constraints on evidence. Efforts to impose an evidentiary code on the administrative judiciary were attempted from time to time but the diverse settings for agency adjudications, many of

them with unrepresented applicants, made the relaxed approach to evidence more appropriate. Flexibility in what is to be proven remains a hallmark of sound decisions about the rules of evidence.

ROLE OF STATE OF THE ART PRINCIPLES

Among the principles that would-be personal advocates must learn in today's law training modules is the historical basis for compensation in product-related transfer payments. The tort law had in old times asked six-member lay juries to decide what the "state of the art" is. Jurors lacked the technological sophistication to make this determination, and the gap between juror capability and product responsibility widened as the products became more sophisticated in their engineering and design.

The CFA's factual determination as a replacement of the product liability jury was most readily accepted in the drug field. The greatest divergence between jury capability and legal principles arose in claims that "tailored pharmaceuticals" had caused personal injuries. The amazing evolution from mass-produced drugs to individually tailored medications to address particular patients has been a wonderful boon to health. Tort law's old traditional "strict liability" had been premised on jury ability to decide that a product did not have a utility justifying its risks.

As the tailoring of pharmaceuticals became a very individualized matter, the concept of comparing risk and benefit shifted from a manufacturer-centered analysis to a clinical judgment made for each patient by their respective health maintenance unit (HMU) which had provided the tailored drug. Wrist-diagnostic data linkages facilitated the tailored delivery of just the right doses and amounts of therapeutic substances. Juries simply could no longer evaluate the manufacturer's design for a mass audience, but now had to determine whether to do any compensatory loss-spreading among the HMU funding entities and the government. Where one might have seen tort law allocate risks across all purchasers by imposing strict liability on a multinational drug maker, now the HMU controls both the choice of tailored medications and the losses incurred from misdirection of medical care. The CFA's determination of benefits is a prudent substitution for the

old way of trying to find fault.

CONSTITUTIONAL RIGHTS CONTROVERSIES

At one time there was a scholarly debate about the retention of civil tort remedies for product related injuries. But inefficient cost patterns consumed so much of the money intended to benefit the injured person that legislators ultimately balked at this waste. The advocates of jury truth-finding had premised their arguments on now-obsolete notions of detecting truth by weighing conflicts in human oral expression. The extreme apogee of that curve was the *Goldberg v. Kelly* decision in 1970. The more administrative benefits depended on truth-finding, the more expensive and cumbersome the mechanisms for truth determination became. The spiral of process rights led cynics to speculate that costs of administering the system exceeded their real value to the disappointed applicants.

Detectability of falsehoods by technology has replaced that core premise with an efficiency model that gives more benefits to more people at lower transaction costs than had been available in the old days. Today, the "social safety net" that governmental benefit transfer payments represent is administered centrally by the Certified Federal Adjudicators, and jury use is very rare in civil matters. That replacement of the inefficient jury system was upheld by the Supreme Court in *Letterman v. Leno*, in which the Court gave the top ten reasons why adjudicative disposition of compensation payments was superior to costly trials on multiple issues of fact. The top reason, as we know today, is that technological means of determining truth about medical causation and medical conditions have supplanted the need, previously felt by triers of fact, to account for variables of deception, concealment and false statements.

The Court also held that the right to a jury trial was not necessarily applicable to a social policy transfer of funds attributable to the delivery of a benefits payment; this carried through a long-recognized exception to jury dominance of civil litigation. Placing the Certified Federal Adjudicator in charge of the tools for truth detection also resolved the long-standing difficulty that citizens did not want to perform jury duty, even with the rise of virtual-presence technology for remote service that produced virtual courtroom settings.

THE FUTURE OF BENEFITS ADJUDICATION

Determining a benefits figure for any claimant should be as efficient and transparent as possible. The transfer payments that are attributable to product or premises related injuries should continue to be resolved through CFA application of the relevant statutory algorithms for recovery. And, as product design changes have been tailored to the individual user with “just in time” deliveries, fewer product mismatches and user accidents will result. We have come a long way, and we, the CFAs of 2050, owe a great deal of thanks to those long-departed friends we used to know as the best administrative adjudicators on this planet, the federal Administrative Law Judges.

