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Carl E. Wasmuth

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The Conspiracy of Silence: Physician's View

*Carl E. Wasmuth**

TO MANY A PHYSICIAN, law suits, courts, and occasionally lawyers themselves are anathema. Schooled in the sciences, his life is dedicated to the practice of medicine. He is a man of conviction and of purpose. He is articulate and even at times loquacious. These qualities would lead one to believe that the physician would be well equipped, quite willing, and capable of appearing as an expert witness in a court of law. Quite to the contrary, the physician most generally is unwilling to be a legal witness. In fact, the entire subject of law suits often is repugnant to him.

Picture for a moment the physician who is forced to defend himself for many days or weeks in an alleged malpractice action. After what seems to be a nearly endless ordeal of wrangling over trivia and, to him, unscientific evidence, the case is directed out, dismissed, settled, or an enormous judgment rendered against him. Should he win the suit, in his own mind his professional reputation has suffered extremely; should he lose, his reputation has been damaged even more severely. In addition, he is subjected to the humiliation, the psychic trauma, and at times apparently vicious examination by the lawyers for the plaintiff. The physician in court is in strange surroundings. He is playing in a strange ball park under rules that are entirely foreign to him. Although the court is courteous and sympathetic toward him in his plight, the general atmosphere can be frightening. Defending an act that to him was correct seems ridiculous. When the case is concluded, his experiences are related in great detail to his colleagues who naturally are sympathetic with the doctor-defendant. They become alarmed. As a result other physicians refuse to become associated in any way with litigation. They reason that should they testify against a physician—would he not be justified in returning the disfavor in case their respective positions were reversed? The vicious circle is started! At length the lawyer, in need of a medical expert, begins a fruitless search and finally resorts to the professional expert witness to fill the void.

* M.D., LL.B.; of Cleveland Clinic; and Assoc. Prof., Cleveland-Marshall Law School of Baldwin-Wallace College.

It has become axiomatic that physicians refuse to testify against other physicians. This is termed the "conspiracy of silence." But this is a disease created by the lawyer—not the physician. The lawyer's insight into the relationship is limited. He also is a member of one of the learned professions. But, like men of the cloth, the lawyer is seldom beset with the same problems that face the physician. How often is a lawyer the defendant in a malpractice action? Yet every suit lost, or poor settlement, or poorly constructed will, should or could result in an action in malpractice. The court records are replete with just such illustrations. Probing the problem of a man's civil rights, or bankruptcy, or the character and quality of a man's soul, is far different from probing into a man's head for a tumor or sewing into a man's heart a replacement for a worn-out valve. Rendering a man unconscious during a surgical operation has many more hazardous facets than cross-examining a witness to an automobile accident. As one medical defense lawyer has stated, "The physician of today has a choice between the hazardous treatment and the still more hazardous treatment."

No one will deny that medicine has made outstanding progress in the last few decades. With the poliomyelitis vaccine man has conquered the last great infectious disease of the human, except the common cold, and from a gleaning of recent medical literature, it seems probable that it will not be too long until this medical problem too is eliminated.

With the advent of heart surgery, the physician has entered the last hollow organ in the human body to perform definitive procedures. It was not too long ago that medicine was precluded from entering the cranial vault and the chest. Dandy, Frazer, and Cushing led the forces invading this cranial no-man's land. True, the Egyptians trephined the skull to let out the evil spirits contained within the cranium, but this was based on primitive superstition and not on scientific endeavor. When Graham first entered the chest, thoracic surgery was born. Cardiac surgery was then only a matter of time. Effler had the temerity intentionally to stop the heart by injecting potassium in order to give him a quiet field in which to operate. (Incidentally, if the patient does not breathe and has no heart beat—Is that patient dead?) Yet, under these dangerous conditions, great advances in medicine have been made and man's life has been saved or prolonged.

No one will deny that the medical climate differs from that of the legal or the commercial world. Medicine deals not with rights or property but with the ultimate—life itself. And yet, the number of malpractice suits has grown to the point where one plaintiff lawyer has stated frankly that the possibility of the malpractice suit has become an occupational hazard for the physician. The cost of malpractice insurance coverage has skyrocketed. What was once considered quite adequate insurance is now woefully inadequate; if, in fact, the physician is able to obtain it.

No responsible member of the medical profession will contest or wish to deny the right of recovery of damages to a person who was negligently treated by a physician. But does this grant to the legal profession free license to bring against a physician every claim of malpractice uttered by a disgruntled patient? I think not. We in the legal profession owe a responsibility, yes, a duty, to the medical profession to cooperate in eliminating the untenable, or unmeritorious malpractice actions. For the most part, they are brought about by members of the legal profession for the purpose of settlement with the insurance carriers.

This is the present plight of the physician. Available to him are all the tools of the wonderful world of modern medicine, but should he attempt to use them and fail—*res ipsa loquitur*.

But the lawyer, agreeing with all these facts, argues that he is unable to obtain an expert to testify in a malpractice or other action. This is a fact of life. The physician dislikes appearing in court and unless forced to appear will refuse. What then are we as lawyers or as physicians to do about this most serious problem? If we do not tackle it soon and find an equitable solution, the courts or the legislature will settle the issue for us. The courts will not sit idly by and permit a plaintiff to be denied his day in court just because of the lack of expert testimony, and especially being cognizant of the so-called conspiracy of silence. A case in point is *Oleksiw v. Weidener*¹ wherein the Ohio Supreme Court held that, in a malpractice action, expert testimony may be elicited from a physician defendant called by a plaintiff "as if under cross-examination."

The situation has deteriorated so badly that it is evident that most physicians will not appear voluntarily to testify in any action, but especially in one against another physician. Indeed, as

¹ 2 Ohio St. 2d 147 (1965).

mentioned, many physicians dislike any participation in any legal matters. The thought of the ordeal of examination and cross-examination, coupled with the strange surroundings and peculiar rules, is deterrent enough in most instances. Those qualified by training and experience sometimes refuse to assist the lawyer—even if his case is meritorious. In many instances, it is difficult to get a simple written statement from the treating physician. This is the situation that must be corrected.

Many lawyers are skilled at presenting medical cases. Many treatises have been published in this area. Law schools sponsor seminars and formal courses in legal medicine to train ever more experts in this ever-growing field. Yet, we do not educate the jury, and it is expecting too much of these lay persons to comprehend in a relatively short time the full import of the medical testimony—which most often is conflicting. The answer then must rest elsewhere—if possible, in our system of jurisprudence.

Most resentment in the medical profession has arisen when unmeritorious cases have been filed against one of its members. It may be a case where untoward results have occurred, yet no negligence has been apparent. The action is brought in the expectation of a settlement's being negotiated with the insurance carrier. Should the case come to trial, plaintiff seeks *res ipsa loquitur* to overcome the deficiency of the expert medical witness. The deficiency, however, is the result of lack of merit in the plaintiff's case. Admittedly, there are instances in which the plaintiff must have an expert to make his case and to get it to the jury. It is to eliminate the former and to aid the latter that we as lawyers and physicians must join forces.

Many jurisdictions have attempted to solve this problem by the county medical societies and bar associations acting jointly to form a panel to hear these cases in malpractice. The Pima Plan is probably the most widely accepted; it is in operation in at least 23 states. The Pima Plan consists of a panel composed of equal numbers of physicians and lawyers selected by the medical society and the bar association. The function of this committee is to screen all malpractice claims against the physicians of that county.

The procedure of the Pima Plan is quite simple. The attorney for the plaintiff requests in writing, to the chairman of the panel, that his complaint be heard. He must grant to the panel the authority to review the medical records, and to agree that the

proceedings shall remain confidential and privileged. In addition, all agree that no member of the panel may be called to testify at the trial—should a trial follow these efforts.

The physician against whom the complaint is filed is notified by a copy of the letter from the patient's attorney and is invited to a hearing. The physician and his attorney may question the complainant, and the latter may present his case and call witnesses. After reviewing all the evidence before it, the panel votes on two issues: (1) Do the facts presented reveal any substantial evidence of negligence? (Not if there is negligence.) (2) Do the facts presented reveal any substantial evidence of injury due directly to the negligent act?

Should the panel vote "no substantial evidence" of negligence, the patient and his attorney are notified and advised not to file the action. Should the panel find evidence of negligence on the part of the physician, then the panel considers the second question. In the event the panel finds damage due directly to the negligent act, the county society then cooperates with the complainant's attorney to obtain for him expert medical assistance.

Complementing such a plan would be the establishment by the county medical society of a Panel of Expert Witnesses. This panel should be composed of specialists in the various fields of medicine. Probably the best qualified for such problems would be the physician-specialists who have reached the age of retirement. Our large clinics, medical schools, universities, and other medical institutions usually have a mandatory retirement age. Without discussing the relative merits of this plan, many of these teacher-clinical-specialists are not yet ready for complete retirement. In fact, many would be quite willing, if not anxious, to become active in this capacity. The cases would occupy their time and afford them financial remuneration. Likewise, the complainant would have the distinct advantage of an expert witness who is recognized as an authority by his colleagues and who possesses a wealth of experience in the field. Likewise, justice would be served inasmuch as this physician-expert would be serving voluntarily and offering an opinion that for no obvious reasons should be biased. This physician is retired from practice and can spend a great deal of time and effort in preparation for testimony.

Certainly there are drawbacks or limitations to this method.

The Pima Panel gives an obvious advantage to the plaintiff—if the panel votes to find evidence of malpractice the attorney for the plaintiff has a good evaluation of his case. His grounds for settlement are ideal. Should settlement prove unsuccessful, he files suit and has an expert as a medical witness in a meritorious case.

The physician, despite the advantage to the claimant, has the distinct advantage of being spared the experience of defending his action in court. It is true that the claimant does not have to abandon his action. He can still seek the advice of yet another lawyer who might elect to file the action. Then the physician will have to defend himself. The efforts of the panel will have been in vain.

However, this same panel of expert witnesses must be available for his defense.

Still another possible plan has been utilized elsewhere. This is a combination of the reviewing panel plan and the Panel of Experts. The reviewing panel would consist of experts in the various medical specialties. It differs from the previously described plan in that its activities are limited to the medical profession. In fact, the deficiency in the plan is that, in most instances, a malpractice action must be filed before the panel can act. The cornerstone of the plan is the close collaboration of the insurance carrier, the defendant-physician, and the panel. The activities of the system are coordinated by the attorney for the panel. He reviews all cases with the panel and advises them on matters of law. When the physician or his insurance carrier is informed of a possible claim or suit, the insurance carrier investigates the claim immediately. A copy of the claim is given to the panel for review. An effort is made to refer a given case to the member of the panel whose specialty deals with areas involved in the claim.

At a meeting of this panel of experts, an attempt is made to determine: (1) Whether or not the facts reveal evidence of deviation from the accepted standard of practice within the community by physicians in the same specialty; (a) If there is such evidence, is the case defensible? (b) Should the case be settled or defended? (2) Where *no* evidence of negligence is found, the panel: (a) determines whether or not the case is defensible, legally; (b) determines whether or not settlement should be considered—in certain situations where settlement would be for

the good of the profession as a whole or any party in particular.

(3) Where evidence of negligence is found, the panel, unless there are strong and overwhelming indications to the contrary, should recommend settlement.

In the latter situation, when settlement is recommended, the attorney for the panel, in cooperation with the insurance carrier, attempts to obtain a reasonable settlement. Should this be impossible, then the carrier may stipulate negligence and try the case on the issue of damages. Admittedly, this might be fraught with danger, but has merit enough for serious consideration.

Should one of these plans prove successful in any given community, it could be extended to the general field of personal injury. There, too, lawyers find it difficult to obtain a good evaluation of their cases and experts to testify.

The issue, therefore, is not whether physicians are entering into or continuing the conspiracy of silence. The issue is a problem that the legal profession recognizes but does little to solve or to overcome. The plaintiff's counsel is quite articulate and dramatic with clichés about "conspiracy of silence," and cannot or will not attempt to solve it except by threat of service by subpoena, or by antagonizing respected physicians with other threats.

Therefore, it is submitted that the bar and bench ought to sit down with the medical profession. At least to overcome the problem of conflicting medical testimony—have the expert selected by the court and permit him to testify in behalf of the court. To overcome the problem of lack of witnesses in malpractice suits, *adopt* and *utilize* one of the above-mentioned plans or other means to decrease or to eliminate these suits from the docket. This is the least to be expected of these two learned professions.