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Physician as an Expert Witness-Some Psychological Aspects

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THE PHYSICIAN AS AN EXPERT WITNESS — SOME PSYCHOLOGICAL ASPECTS

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Introduction

By way of introduction it may be well to state the modus operandi. First, an examination of the deficiencies and defects in the use of medical expert testimony generally, and the psychological reasons underlying these inadequacies, will be made. This will be followed by an examination of the steps taken to ameliorate these defects as elaborated in a report by a special committee of the bar of New York City entitled *Impartial Medical Testimony*, dealing with the use of independent and impartial medical experts to secure a better and more expeditious disposition of personal injury cases. Finally, the conclusions to be drawn from the report will be discussed as well as the possibility and feasibility of adopting the plan on a national basis.

I. The Problems Involved In Improving Medical Testimony

Dr. J. W. Courtney, addressing the Harvard Medical School graduating class of 1915, stated:

> The present mode of procedure in our courts, in so far as medical testimony is concerned, is not a particularly edifying one. To illustrate this point, let us take, for example, a case of the type which is most commonly met with in everyday work of the courts — an action of tort for personal injuries. In such a case, the plaintiff is practically always of the proletariat class; the defendant, a public service corporation, or an insurance company. The army of witnesses on either side is generally appalling. Of these the medical ones alone concern us. They are of two hostile camps, and prepared to attempt, under solemn oath, to uphold opinions diametrically opposed, yet supposedly derived from a single series of facts and observations.
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> The situation is a deplorable one, and nobody discerns the glaring wrong of it all with clearer vision than certain high-minded men from our ranks, who have long striven to procure legislative enactment looking toward the abolition of this evil.
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> To me, for many reasons, which I cannot here enumerate, it seems hopeless to expect that legislative appeal on the part of such men will ever be fruitful of the desired results. Hence, it is the bounden duty of every man in the profession so to shape his conduct toward cases which promise to eventuate into court proceedings, that due respect will be given his opinion, that he will not merit the biting sarcasm, the sneers,

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> the raillery and general brow-beating of opposing counsel. And most of all, that through his efforts the ends of justice will really be accomplished.[1]

That there is some validity to Dr. Courtney's criticism, is evidenced by the fact that in 1934 a distinguished New York attorney spoke of having defended a physician "in the face of the leers and jeers of opposing counsel."[2] Today, many physicians seem reluctant to examine or treat cases of injury or disease, which are likely later to become the basis of a controvertible claim or a matter of litigation in the courts or before an administrative body. The successful physician who stands high in his profession and whose opinion and impartiality is often of great value particularly shuns this important responsibility.

Why do many physicians attempt to avoid the trial process? If the physician knows he may be called as a witness in a court or compensation proceeding, he immediately envisions the situations that are likely to confront him. He sees himself forced to cancel a full schedule of office and hospital appointments because of a call to appear in court or at a hearing. He hurries down to court and then spends hours standing around waiting to be put on the stand. He enters upon the ordeal of giving testimony before a group of laymen who lack the background necessary to understand his scientific explanations. He is the innocent pawn between contesting forces. One side, attempting to elicit his most favorable opinion, expects him to stretch his ethical and personal judgment to the breaking point in order to establish all of its medical allegations, whether warranted or not. The other side, on cross-examination, in an attempt to refute the statements he has just made, questions his professional qualifications, his motive for appearing as a witness, his findings and his opinions.[3]

Another reason for the physician's reluctance is that some patients, without the slightest qualm of moral conscience, expect their family physician to prolong unduly the period of treatment and disability as well as to exaggerate the prognosis and extent of permanent disability. Naturally, when confronted with this situation, most physicians resent the position in which they are placed by their patient and immediately reject the implied or open suggestion and report the medical facts in accordance with their actual and scientific belief. However, many physicians may allow their better judgment to be swayed by a misguided sense of loyalty to the patient or his family, in assisting him to establish or exaggerate an unjustified claim against the defendant. Again, Dr. Manfred S. Guttmacher, referring to psychiatrists, points out that while lawyers are accustomed to the trial process, they fail to realize how alien and even repulsive the ordinary trial is to the average physician:

> The physician is accustomed to being listened to deferentially when his opinion is sought by a colleague or a patient. He is by nature an inde-

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1 Elliot and Spillman, *Medical Testimony in Personal Injury Cases*, 2 LAW & CONTEMP. PROB. 466-67 (1935). For a comprehensive discussion see 2 WIGMORE, EVIDENCE § 563 (3d ed. 1940); *Expert Testimony*, 2 LAW & CONTEMP. PROB. 401-524 (1935); LADD, CASES ON EVIDENCE 648-55 (2d ed. 1955).

2 Elliot and Spillman, *supra* note 1, at 474.

3 Lindenbaum, *The Enigmas of Medical Evidence*, 52 CASE & COM. 20, 21 (May-June 1947).

> pendent individual. Under our American system, he is his own boss; he takes orders from no man. He is accustomed to making his investigations and pursuing the truth by his own methods. In the courtroom everything is changed. He is not permitted to ask pertinent questions or to express an opinion freely and in his own way so as to assure accuracy, even though he has sworn to "tell the truth, the whole truth, and nothing but the truth." He is told when to speak and when to stop speaking. He may be asked to express an opinion on a hypothetical statement of facts which he is convinced gives a wholly distorted picture of the actual case at issue, and he will not be allowed to object that he does not consider the stated facts to be true. Instead of having his views received with the deference and respect to which he is accustomed, he is likely to be disconcerted — if this be his first experience — on cross-examination to hear his professional competence and even his intelligence impugned and his pronouncements ridiculed, misstated, and twisted into absurdities (or perhaps exposed as *being* absurdities by a lawyer displaying a surprising familiarity with the scientific learning and literature on the subject). Is there any wonder that the medical expert often dislikes and even resents the role he is forced to play?[4]

To determine the attitude of psychiatrists on this problem, Dr. Guttmacher in 1953 as Chairman of the Legal Aspects Committee of the American Psychiatric Association, sent out a questionnaire. The replies revealed that about twenty per cent of the psychiatrists were unwilling to go into court in a criminal case, and another fifteen per cent were only willing to serve as an expert in a criminal case when they were employed by the court. Eighty per cent of the psychiatrists found that the commonly accepted legal tests were unsatisfactory. Less than half of these felt that they could accurately present their findings and opinions under the present method of court procedure. The greatest number based this on the partisan role that they had to play in the trial process. The next largest number felt that the restrictions inherent in the inquisitorial method, as contrasted to the expository method, were the greatest handicap; that they were required to reply to the questions which were given them by answering yes, or no, rather than being permitted to express freely their knowledge and opinions, even though they had sworn to tell the whole truth.[5]

Dr. Guttmacher drew upon his own experience by relating the story of the first case in which he was privately employed to serve as a witness before a state industrial accident commission. The complainant was unloading a beer truck and had inexpertly allowed a full barrell to roll down upon his head, with disastrous results. Dr. Guttmacher was sitting at the hearing, biding his time, as he often did in court proceedings, when he became engaged in conversation with another physician. He learned that they were to testify in the same case, but on opposite sides. They talked it over, and Dr. Guttmacher said to him, "you know, we are in such agreement, that we ought to toss up a

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4 GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW 206-07 (1952).

5 Guttmacher, *Viewpoint of the Psychiatrist*, 13 MD. L. REV. 307 (1953). See GUTTMACHER AND WEIHOFEN, *supra* note 4, at 248-68; Goldsmith, *The Medical Witness Gets a Break*, 60 CASE & COM. 14 (July-Aug. 1955); Averbach, *Aids for the Improvement of the Doctor-Lawyer Relationship*, 1956 INS. L. J. 237.

quarter and see which one has to testify." To this his opponent replied: "I am afraid you are young and naive; by the time your lawyer gets you to stretch the truth as far as it can be stretched, and my lawyer gets through stretching the truth as far as he can, nobody will feel that we were in agreement about anything."[6]

While this statement may define the attitudes of some physicians, one lawyer, on the other hand, questions the motives of some doctors and feels that the partisan, as distinct from the impartial medical witness does not aid the lawyer's search for truth, because the doctor, like the party litigants, is thinking in terms of the verdict and not a dispassionate evaluation of medical facts. The medical witness is, essentially, a paid partisan witness, the extent of his partisanship depending upon the elasticity of his conscience. The reason for his employment is his value as a witness, not his skill as a physician. In this attorney's opinion, this leads to incompatible and contradictory testimony:

> The difference of opinion between expert witnesses cannot be explained in terms of objective medical findings. It is a mistake to approach the problem in such terms. It must be remembered that expert witnesses are employed to testify, not to treat. If a case is largely dependent upon subjective findings, the plaintiff's expert accepts all such findings and utilizes them for the maximum benefit of the plaintiff. The defendant's expert rejects all such findings, and since there is [*sic*] no objective findings, finds no disability. The difference between the enthusiastic belief in the subjective findings, and the equally enthusiastic disbelief in the findings, represents the difference in the opinions. But even such so-called objective evidence, such as X-rays, can be interpreted to serve diametrically opposite points of view. There always seems to be some evidence, or some piece of evidence, which can be exploited, or interpreted to prove the case of each expert, no matter how irreconcilable their ultimate conclusions may be.
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> The plaintiff's expert evaluates his findings in favor of the plaintiff; the defendant's expert evaluates his findings in favor of the defendant. The case thus becomes a trial by partisan witnesses. Somewhere in between such partisan evidence lies the truth. The jury has no means of ascertaining this truth. The jury, at best, can believe the plaintiff's experts, or the defendant's experts, or none of the experts, and guess at the injury suffered by the plaintiff.[7]

In rebuttal to the argument that doctors themselves are responsible for the extreme views taken by opposing parties, Dr. Shabat, as a physician, finds it difficult to understand why lawyers make bitter and scathing statements about doctors who disagree with other doctors in a given medical problem in a lawsuit. "No one," he says, "can argue about a fracture line that is visible even to the lay jury, but not infrequently, certain lines on X-rays may be interpreted differently by plaintiff and defense witnesses." Nevertheless, he does admit that:

> It is my own conviction that a doctor, particularly an excellent, well-qualified one who continuously examines and issues reports for the

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6 Guttmacher, *Viewpoint of the Psychiatrist*, 13 MD. L. REV. 307-08. (1953).

7 Anderson, *Unbiased Medical Testimony—An Actuality*, AMERICAN MEDICAL ASSOCIATION, MEDICOLEGAL SYMPOSIUMS 102, 104-05 (Oct. 9, 1955).

> plaintiff's side becomes obtuse, and the same is true for the doctor who constantly remains on the defense side. It is my belief that any doctor, no matter what his wonderful qualifications are, will lose his original fine diognostic acumen and begin to follow a persistently peculiar path, developing a tubular vision, never being able to note the periphy or the lateral aspects of a medical problem. He can see only one thing, he must find, when he is on the plaintiff's side, a definite causal relationship between the injury and the patient's complaint even with a paucity of objective evidence. He must create a diagnosis at all costs. On the other hand, the same fixed idea sequence is followed by the defense doctor who sees most cases as frauds, fakers, malingerers or psychotics. When the case occurs, wherein actual fracture has been sustained, he cannot bring himself to the realization or the resignation that residual partial loss of function can and has actually occurred. As far as he is concerned, all cases recover completely and without any residual loss. I feel that primarily for the defense, a complete and thorough examination of the plaintiff, when attainable, should be made and reported fully and impartially. I believe that the defense cannot be adequately prepared when it's examining doctor deletes positive findings from his report. This doctor usually makes a poor witness for the defense in court when the plaintiff's lawyer directs a proper cross-examination.[8]

Any doctor by reason of his education and training is presumed competent to advise the trier of fact. He need not be a specialist in any particular branch of his profession nor have any experience of his own on the particular question involved in the case.[9] This leads to the difficulty encountered by Dr. T. Conrad Wolff, a member of the Occupational Disease Board of the State of Maryland which is made up entirely of doctors. Commenting upon the calibre of experts appearing before the Board to contest workman's compensation claims, he pointed out that:

> These doctors [members of the Board] cross question the "Expert Witness" and learn almost at once that his knowledge is fundamentally lacking. He reasons falsely from ignorance of basic science. His conclusions are untenable. However, he is glib and has picked up enough pseudo-professional jargon so that in the hands of a sharp lawyer he could probably impress a jury. However, he is heard by Physicians, not by jurymen and the value of his testimony is zero.
>
> Why has the Attorney brought such a man to the witness stand as his Expert Witness? Why has such a Doctor connived at being rated as an Expert Witness in a matter in which his knowledge was so palpably deficient?[10]

However, Dr. Wolff then cited a case where a doctor with little or no knowledge of lead poisoning testified that the texts he had read on the subject favored the hypothesis that lead poisoning produced arteriosclerosis. An eminent specialist testified to the contrary, basing his opinion on the recent findings of a research organization of high repute. Although the Board agreed

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8 Shabat, *Medical Expert Testimony*, AMERICAN MEDICAL ASSOCIATION *supra* note 7, at 137.

9 MCCORMICK, EVIDENCE § 13 (1954); TRACY, THE DOCTOR AS A WITNESS 36 (1957); Weihofen, *An Alternative to the Battle of the Experts: Hospital Examination of Criminal Defendants Before Trial*, 2 LAW & CONTEMP. PROB. 419, 420 (1935); GUTTMACHER AND WEIHOFEN, *op cit. supra* note 4, at 210-15. See SCHROEDER, MEDICINE AND THE LAW: A NEW FRONTIER OPENS 246 (1957), where the author states that this problem of misunderstanding between physicians and attorneys does not exist in Latin American countries.

10 Wolff, *Viewpoint of Industrial Medicine*, 13 MD. L. REV. 293, 294 (1953).

with the eminent expert, the court, on appeal, upheld the outdated opinions of the text books, scientific research of the highest type to the contrary notwithstanding.[11]

Another doctor was of the same point of view concerning the competency of experts. In his opinion, one of the outstanding weaknesses of expert testimony was the carelessness of the courts in admitting the testimony of so-called "experts" who were as a matter of fact unqualified. He felt that most trial judges in exercising their discretion as to the qualifications of the expert looked upon the possession of the degree of Doctor of Medicine, and a license to practice, as sufficient to qualify a physician as an expert in any field. He pointed out that as far back as 1878, the Supreme Court of Michigan said apropros of this matter: "Unfortunately for the administration of justice persons are sometimes found who with small experience and large conceit have succeeded in formulating theories under which, if properly applied, there would be hardly enough sane persons found to sit upon juries or attend to business."[12]

There are two other difficulties, which deter the doctor from appearing in court as an expert witness. One is the fear of cross-examination. The opposing counsel may deliberately attempt to confuse the witness or attempt to show the jury that he is really not an expert after all. This point is vividly illustrated by Dr. Overholser, when he states:

> The story is related that during the Thaw trial in New York thirty years ago an eminent psychiatrist who had given a lengthy and cogent bit of testimony, was asked on cross-examination, "Doctor, are you familiar with the Argyll-Robertson pupil?" He answered in the affirmative, whereupon he was asked, "Was Argyll Robertson one man or two?" Upon replying that he did not know, the cross-examiner said, "That is all, Doctor, thank you." The impression was thus left in the minds of the jury that if he did not know the answer to an elementary question of this sort it was highly improbable that his opinion on complicated questions of mentality would be worth anything, not considering the fact that it made no difference whatever whether Argyll Robertson was one man or two![13]

The second is the hypothetical question.[14] It is used when the expert has no first-hand knowledge of the situation at issue and has made no investigation of the facts for himself, the most convenient way of securing the benefit of his scientific skill is to ask him to assume certain facts and then to give his opinions or inferences in view of such assumptions. The hypothetical question has been vigorously criticized. Wigmore says, "It is a strange irony that the hypothetical question, which is one of the few truly scientific features of the rules of Evidence, should have become that feature which does most to disgust men of science with the law of Evidence."[15] One physician states that the

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11 *Id.* at 294-96.

12 Overholser, *The Psychiatrist in Court*, 7 GEO. WASH. L. REV. 31, 43 (1938). See GUTTMACHER AND WEIHOFEN, *op. cit. supra* note 4, at 230-47.

13 Overholser, *supra* note 12, at 41-42.

14 Rosenthal, *The Development of the Use of Expert Testimony*, 2 LAW & CONTEMP. PROB. 402, 414 (1935); MCCORMICK, EVIDENCE § 14 (1954); GUTTMACHER & WEIHOFEN, *op. cit. supra* note 4, at 205-29, 230-47; TRACY, *op. cit. supra* note 9, at 41-45.

15 2 WIGMORE, EVIDENCE § 686 (3d ed. 1940).

practice of misusing the hypothetical question as a restatement of the case to re-impress the jury is bad strategy because "it is so unfair and confusing and degrading that it does not clarify the issue nor help achieve justice."[16] His criticism seems well-founded when it is realized that in a California case, the court referred to a question "contained in some 83 pages of typewritten transcript, and an objection involved in 14 pages more of the record. . . ."[17] The same doctor recommended that the hypothetical questions be discussed and settled in the same manner as instructions, either at the pre-trial hearing or during the trial, with the jury excluded.[18] In his opinion, "either the judge should see to it that the hypothetical question contains only the truth from the witnesses and from the evidence, or the expert witness must see to it that from the hypothetical question he considers only what appears to him to be true."[19] He referred to a case in which he served as an expert:

> [F]ive witnesses stated that the testator weighted 160 to 180 pounds, and one witness testified that the testator weighed 100 pounds (before he died), one attending physician stated that his blood pressure was 200 (m.m. mercury systolic) and the hospital record was that his blood pressure was 100. On cross-examination, counsel asked: "Assume further, Doctor, that the hypothetical man weighed 160 to 180 pounds and assume he weighed 100 pounds, and assume his blood pressure was 200, and assume it was 100 . . . have you an opinion . . . etc. ?" The question was intended to be absurd and to make the expert and his answer silly. I interrupted and asked the judge what I was to assume. He replied, "You must assume it all, all as equally true, and delete nothing of the hypothetical question from your mind." I asked him if he could do that, and he replied, "No, but you must." How much better if the judge had ironed out the phraseology of the hypothetical question and had seen to it that it was a fair presentation.[20]

At the present time when a witness's competency is assailed on the grounds of lack of intelligence a poorly contrived *ad hoc* examination procedure conducted by the judge and the attorneys is utilized to determine the issue. It has been recommended that in this situation the examination of the witness be conducted not only by an impartial expert but, similar to the recommended procedure for hypothetical questions, outside of the court room.[21]

Based on his experience in the courts, Dr. Guttmacher feels that the way to bring the greatest possible degree of medical help to the courts is not by partisan testimony. He favors the procedure set out in the Model Code of Evidence of the American Law Institute wherein the parties agree on the experts who serve. If they cannot reach an agreement then the matter is taken before the court and the court picks the experts. These experts all have the right to examine the defendant personally. The experts meet together

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16 Hulbert, *Psychiatric Testimony in Probate Proceedings,* 2 LAW & CONTEMP. PROB. 448, 455 (1935). See Rosenthal, *supra* note 14, at 414-18.

17 Treadwell v. Nickel, 194 Cal. 243, 228 Pac. 25, 35 (1924).

18 Hulbert, *supra* note 16, at 454.

19 *Id.* at 455. See GUTTMACHER & WEIHOFEN, *op. cit. supra* note 4, at 224-26.

20 Hulbert, *supra* note 16, at 455-56 See GUTTMACHER & WEIHOFEN, *op. cit. supra* note 4, at 225.

21 Redmont, *The Psychological Bases of Evidence Practices: Intelligence,* 42 MINN. L. REV. 559, 591-92 (1958).

and frame a joint report, if possible. If not, there is a majority report and a minority report. The report is then filed with the court, and it is available to both parties. However, this does not deprive either side of the right to introduce its own experts, if they wish to controvert the evidence of this neutral group. In his opinion, juries are confused by medical testimony and would rather take the view of the neutral expert than the partisan expert because they feel, as he put it, that the neutral experts have "no axe to grind." He also favors the abolition of the hypothetical question.[22]

In 1937, the trial judge's common law power to call experts was implemented in the Model Expert Testimony Act which was approved by the National Conference of Commissioners on Uniform Laws[23] as a uniform act and was redesignated a Model Act in 1943. It was adopted in South Dakota in 1942,[24] and was later embodied in the Uniform Rules of Evidence formulated by the Conference on Uniform State Laws in 1953.[25] The Commissioners stated the reasons for the provisions as follows:

> Parties consistently employ experts upon the strength of their bias, which may range from a professional prejudice to naked perjury . . . .
>
> There can be no doubt of the need for expert testimony. The problem is how to eliminate the evils of bias and partisanship which shape it. The National Conference of Commissioners on Uniform State Laws has proposed an act which is aimed to remedy these evils.[26]

The act provides that the court upon request or upon its own motion may appoint an expert or experts to testify at the trial. If the parties can agree on an expert the court shall appoint him. His compensation in a civil action would be paid in equal portions by both parties and charged as costs in the case. However, the parties may call additional experts of their own selection but the expense of the private experts is not taxable as costs. The act dispenses with the requirement of the use of the hypothetical question.[27]

It has been pointed out that "the reasons for the Act are valid today but the Act itself seems antiquated. It belongs to the age before the new Rules, with their flexibility, discovery procedures, pre-trial conferences, and other procedures designed to remove a Court trial from a sporting event to an accurate appraisal of the facts involved in the controversy."[28] The Model Code of Evidence of the American Law Institute also provides generally for the utilization of the non-partisan expert.

However, in the above proposals for improving medical testimony, a weakness in the form of implementation is revealed because no provision is made for the selection and appointment of panels of experts. In 1953, Dr. Wolff, referred to earlier, posed a series of questions which in the light of subsequent developments have proved prophetic:

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22 GUTTMACHER & WEIHOFEN, *op. cit. supra* note 4, at 224-29.

23 9A U.L.A. 351-63 (1957).

24 S.D. CODE § 36.01 (Supp. 1952).

25 RULES 59, 60. HANDBOOK OF THE NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS 194-96 (1953).

26 9A U.L.A. 352 (1957).

27 *Id.* at 353-63.

28 Anderson, *supra* note 7, at 117.

> 1. Is it possible in a difficult and complicated medical litigation, that the presiding officer of the Court, Commission or Board of Inquiry should have the power to draw from the panel issued by the Medical Society the names of whatever Expert Witnesses may seem to him to be necessary? Or, alternatively, could the Medical Society make these nominations at his request?
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> 2. Would it be possible that these Expert Witnesses be furnished with Case Histories, Laboratory Reports and stenographic transcripts of the legal procedures that have already taken place?
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> 3. Would it be possible to accord these Expert Witnesses reasonably adequate time in which to review the medical evidence before them and reach reasonable conclusions?
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> 4. Would it be possible to arrange for the protection of these witnesses against the importunities of Counsel or other interested persons while reviewing the evidence, though subject to Cross Questioning in Court after they had reached their conclusions?
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> 5. Would it be possible to arrange that the emoluments of these Expert Witnesses be added to the Court Costs and defrayed ultimately according to the direction of the presiding officer of the Court?
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> 6. Would not such a system as this do away with the undesirable situation where each side to the dispute has its own "Expert Witness"?
>
> I would like very much to see these matters discussed, because, as I view it, constructive changes in some present techniques may very well be indicated.[29]

A final, but most important factor is the delay in obtaining trial, particularly in cases arising out of automobile accidents. As early as 1932, Judge Crane was aware of this situation and in a speech before the Bar Association of the City of New York stated:

> We find our calenders frightfully congested. In this county the trial of cases is at least two years behind, and in Kings County, Brooklyn, the calendars are four years behind, in Queens and Nassau counties, three. In the City Court of Brooklyn, which is about six years old, I am informed that it is over five years behind. The lawyers tell me that their clients are obliged to settle their cases at nominal figures because they are unable to wait for litigation. Financial reasons demand a sacrifice of their rights. As likely as not, after a verdict, a case is carried up on appeal and reversed either by the Appellate Division and the Court of Appeals, and the same procedure starts all over again . . . . The number of automobile accident cases has added materially to the number of cases upon our calendar . . . . What a speedy disposition there would then be of all these automobile accident cases when the court could appoint arbiters without limit — a lawyer, a doctor, a layman — who would dispose of the case as satisfactorily, yes more satisfactorily than most of the courts and juries.[30]

On the question of relieving congested court calendars in automobile cases, some have suggested comprehensive public compensation plans analagous to workman's compensation programs.[31] Alternative proposals suggest the creation of special automobile courts in which a three-man tribunal composed of a jurist, a layman, and a physician would administer the law under the principles of comparative negligence, the traditional rationale of con-

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29 Wolff, *supra* note 10, at 297.
30 Elliot & Spillman, *supra* note 1, at 468.
31 GREEN, TRAFFIC VICTIMS, TORT LAW AND INSURANCE (1958).

tributory negligence playing no part in the determination and award of damages.[32] In any event, the development of impartial medical testimony seems to be the first practical step that can be taken within the framework of the existing court system to achieve the expeditious determination of automobile accident cases.

II. The New York Experiment: A Solution

A study of the successful development of the New York project serves as an answer to the critics of impartial medical testimony and as the basis for executing similar plans for those already committed to the idea. In New York, the original impetus for such a plan came from the Justices of the Supreme Court of New York County who daily viewed the incompetence and bias spawned by independent experts, and saw in this system one of the basic causes for the congested court dockets. In their view, the long delays in bringing the personal injury suits to trial were a result of unnecessarily lengthy trials in which the battle of the experts was the central factor contributing to the delay. It had also been pointed out that the normal chances for settlement which could be depended upon to relieve congestion were diminished by each party's confidence in the views of his own expert.[33]

To remedy this situation the justices organized a conference of the medical societies and bar associations for the purpose of securing a source of reliable medical opinion in personal injury cases. As a result of this conference, the Medical Expert Testimony Project evolved.

The directors of the project, Professor Delmar Karlen of the Institute of Judicial Administration of the New York University Law Center and Dr. Irving S. Wright, professor of Clinical Medicine at the Cornell Medical College state that it was designed to test a remedy for the deficiencies and abuses prevailing in the presentation of proof in judicial proceedings.[34] The importance of the project is evidenced by the fact that 80 per cent of the cases in the trial courts are personal injury cases. The basic idea was to set up panels of neutral, outstanding physicians in various branches of specialized medicine who would be available at the call of the court to make medical examinations of plaintiffs in personal injury cases, report their findings, and if necessary testify in those cases in which the medical aspects were controversial and substantial. Their fees were to be paid not by the litigants, but by the project.[35] Thus the deficiency in the Model Expert Testimony Act was ameliorated by arming the judges with facilities as well as power to appoint competent experts.

The justices listed the areas of medicine in which expert testimony was most often needed and the estimated number of doctors required in each area. A joint committee of the New York Academy of Medicine and the New York County Medical Society was appointed to select panel members of the highest

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32 Hofstader, *Alternative Proposals to the Compensation Plan*, 42 Cornell L.Q. 59, 63 (1956).
33 Tracy, The Doctor as a Witness 212-13 (1957).
34 Special Committee of the New York City Bar, Impartial Medical Testimony 7-8 (1956).
35 The Alfred P. Sloan Foundation and the Ford Foundation each gave $20,000 to the project.

qualifications and standing solely on a professional basis. The panelists, chosen from the faculties of the leading medical colleges and the staffs of well-known hospitals, were acknowledged as the outstanding experts in their specialties. Further, none of them had been prominently identified with either the plaintiff's or defendant's side in personal injury litigation.

The justices entered a court rule[36] establishing Medical Report Office in the court and assigned a deputy clerk to administer it. His duties included the keeping of records, the maintenance of confidential medical panels and the arrangement of examination by the impartial expert. Under this rule, when, in a personal injury case, a justice was of the opinion that an examination of the injured person and a report thereon by an impartial expert would be of material aid to the just determination of the case, he could order such examination and report through the Medical Report Office. A member of the panel selected by the medical societies would make the examination, and if the case could not be settled and it proceeded to trial, the independent expert could be called as a witness by either party or the judge, without cost to either party. A procedure was formulated which provided for referral of the case to the expert, the conduct of the examination and the utilization of the expert's report.

In accordance with New York practice, soon after cases are brought, they are processed through a pre-trial conference during which the opposing counsel and the justice determine the issues and the possibility of settlement. The medical reports of the doctors for both sides are examined by the justice and if he finds that there is a sharp dispute as to the nature of the plaintiff's injuries and that an impartial expert's view would be helpful, he makes an order referring the case to the impartial expert. In the order, he sets forth the nature of the medical dispute, the type of specialist needed and the date when the conference will be continued. He does not list the name of a specialist since this is the function of the Medical Report Office. The attorneys for both parties go to the Medical Report Office where the deputy clerk consults a confidential list of doctors in the required specialty and assigns the examination to the next doctor on the list. The clerk schedules the examination and arranges for the submission of all medical reports and hospital records to the impartial expert in advance of the examination. The examination made by the panelist follows the general pattern of ordinary physical examination. When it is completed, the expert sends a copy of his report and his bill in triplicate to the Medical Report Office — one for each attorney and one for the justice. The pre-trial hearing is then resumed and settlement is again discussed in the light of the report of the impartial medical expert. If no settlement is reached, the case is set down for trial. As provided for by the court rule, either party or the justice may call the examining physician as a witness and his fees will be paid out of the project funds.[37]

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36 N.Y. App. Div., 1st Dist., Special Rule (Dec. 1, 1952; as amended Dec. 1, 1954; as amended Jan. 3, 1957), CAHILL & PARSONS, NEW YORK CIVIL PRACTICE ACT 213 (Supp. 1958).

37 IMPARTIAL MEDICAL TESTIMONY, *supra* note 34, at 13-19. See also TRACY, THE DOCTOR AS A WITNESS 213-216 (1957), and Peck, *Impartial Medical Testimony*, 22 F.R.D. 21 (1958).

III. Results of the Project

Between December 1, 1952, and December 1, 1954, 238 cases were referred to impartial medical experts. Of these, 102 were settled before trial and 18 more were settled during trial.[38] There are no statistics available as to the number of cases that were settled at the outset, because counsel did not dare have his case submitted to an impartial expert. In the cases presented, most of the judges reported that they were impressed not only by the impartiality of these experts but also by their competence.[39] It is a fair assumption that the project has accounted for the elimination of one-fifth of the number of trials which formerly took place in New York and Bronx Counties, and has saved a full year of time of several additional judges. Moreover, New York's four-year backlog of cases has now been reduced to eighteen months. To this extent, the project has helped to relieve calender congestion.

The following accomplishments were listed in the Committee report:

1. The project has improved the process of finding medical facts in litigated cases.
2. It has helped to relieve court congestion.
3. It has had a wholesome prophylactic effect upon the formulation and presentation of medical testimony in court.
4. It has proved that the modest expenditure involved effects a large saving and economy in court operations.
5. It has pointed the way to better diagnosis in the field of traumatic medicine.
6. It has alleviated the problem of the hypothetical question since the impartial expert testifies on the basis of his own knowledge obtained from a personal examination of the injured person.[40]
7. It has provided an excellent, but all too rare, example of successful interprofessional cooperation.[41]

Some criticisms have been levelled at the project, particularly the status of the impartial expert.[42] It is felt that by disclosing the fact that the impartial expert was appointed and summoned to appear as a witness by the court and that his compensation comes from court, the jury may give unwarranted weight to his testimony. The project committee answered this criticism by pointing out, first, that if the diagnosis of an injury is certain, that fact should be made known to the jury; if it is uncertain, due to limitations of medical knowledge, that fact is more likely to be admitted on the witness stand by a doctor who is truly expert and truly impartial than by a partisan doctor. Secondly, the impartial expert can be questioned as to the general state of medical knowledge about the injury, the techniques used by the expert in making his examination and as to the existence of techniques not used by

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38 Impartial Medical Testimony, *supra* note 34, at 28-30.

39 *Id.* at 34.

40 McCormick, *op cit. supra* note 9, at § 14; Richardson, Law of Evidence § 389 (8th ed. 1955); Annot., 82 A.L.R. 1338 (1933); Tracy, *supra* note 33, at 215.

41 Impartial Medical Testimony, *supra* note 34, at 5.

42 Anderson, *supra* note 7, at 113-16; Note, *The New York Medical Expert Project: An Experiment in Securing Impartial Testimony*, 63 Yale L.J. 1023 (1954).

him, and as to prior inconsistent statements made by him. Finally, the parties are still privileged to call their own experts.[43]

The New York project has prompted wide interest throughout the country. This is evidenced by the fact that there is now in operation a National Interprofessional Code for Physicians and Attorneys, drafted by a joint Committee on Co-operation between the American Bar Association and the American Medical Association. This code was formally adopted by the AMA at its annual meeting in June, 1958, and by the House of Delegates of the ABA at its convention in August, 1958.[44]

This code covers the furnishing of medical reports by physicians to lawyers; pre-trial conferences between physicians and attorneys; notification to doctors who are to be subpoened to testify; the lawyer-doctor relationship in the courtroom; fees for services of physicians relative to litigation. It contains further a recommendation that the code be implemented at state and local levels where similar measures have not been adopted.

Although this code does not have the force of law, it does set forth suggested rules of conduct for members of the two professions. As the preamble to the code points out, it constitutes the "recognition that, with the growing inter-relationship of medicine and law, it is inevitable that physicians and attorneys will be drawn into steadily increasing association. It will serve its purpose if it promotes the public welfare, improves the practical working relationships of the two professions, and facilitates the administration of justice."[45]

In Baltimore, Maryland, under the impetus of the suggestions made by Dr. Wolff, a plan containing the basic ideas of the New York project has been evolved, and is now in operation.[46] However, an unsuccessful campaign was inaugurated, primarily by plaintiff's attorneys in opposition to the plan. They felt that:

(a) The plan would be used frequently and unnecessarily in small damage suits, causing further unnecessary delays and complication in small cases;

(b) That the court would unduly restrict the cross-examination of the court-appointed expert; and

(c) That the evidence of the court-appointed expert would, as a practical matter, determine the case in the eyes of the jury, and that trials by adverse proceedings would give way to some kind of medical arbitration or medical legal proceeding.[47]

In May, 1958, the Cleveland Academy of Medicine's Joint Committee on Expert Medical Testimony submitted a plan for an Expert Medical

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43 IMPARTIAL MEDICAL TESTIMONY, *supra* note 34, at 33.

44 44 A.B.A.J. 1116 (1958). A similar measure was recently adopted in the District of Columbia. See 26 J.D.C. BAR 56 (1959).

45 See the full text set out in Hartshorne, *A Contribution to Public Welfare: The National Interprofessional Code*, 45 A.B.A.J. 31 (1959).

46 Anderson, *supra* note 7, at 107-16. Under the Baltimore plan the doctors are paid by the parties either by agreement, assessment of costs, or direction of the court, while under the New York plan they are paid from court funds. Peck, *supra* note 37, at 26.

47 Anderson, *supra* note 7, at 114.

Testimony Project similar to the New York project.[48] Although the plan received much favorable comment in the local papers, the Cuyahoga County Bar Association expressed disapproval. The major objection was that the litigants would not get a fair decision because juries would tend to accept without question the decision of a court-appointed medical expert and thus preclude court-room debate. They also felt that the expert would be bound to reflect the partiality of his own school of thought and thus put the litigants at the mercy of the expert's prejudices.

In 1952, Justice Peck expressed the hope that the plan would have a psychological and prophylactic effect in inducing medical experts for boths sides to moderate their claims, since they might be reviewed by an outstanding authority in their own field.[49] That Justice Peck's hope has been realized is evidenced by his statement in 1956 in the preface to the project report that "The plan detailed in the following pages has now advanced beyond the experimental stages and has been adopted as a regular part of the operations of the Supreme Court of the State of New York in the First Department."[50]

Conclusion

A major assertion of the Anglo-American legal system is that truth will best be achieved through the operation of the adversary system. However, when this assumption is rigidly applied in formulating the procedural and substantive law governing the presentation of medical evidence, the ascertainment of truth seems to be progressively submerged under doubtful techniques of conducting lawsuits and the inharmonious relations that develop between attorneys and physicians. The inadequacy of the law's treatment of medical testimony is revealed in the understandable reluctance of doctors toward testifying in court trials and in their views on the dubious motives of lawyers. The law fails to mold its methods into a form which allows the doctor the same high professional standing within the courtroom that he enjoys in his private practice. This deficiency stems from the law's rigid principles of adversary justice, and reflects its failure to utilize the talents of professional men most efficaciously by challenging them with roles of professional impartiality rather than casting them in unfamiliar character parts of biased witnesses.

The solution to both problems — the awkwardness of the law's method of handling medical testimony, and the hesitancy of doctors to lend their best efforts to the legal process — will be found in a system in which the law learns to rely on the professional competence and integrity of the physician. The beginnings of such plans have been observed. It is hoped that through them the modern evidentiary rules for eliciting medical testimony will enhance the doctor's professional stature in the courtroom while accomplishing the primary goal of an expeditious and just determination of the personal injury action.

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48 CLEVELAND ACADEMY OF MEDICINE BULLETIN, THE PHYSICIAN AS AN EXPERT WITNESS II (June, 1958).

49 36 J. AM. JUD. SOC'Y 120-21 (1952). See also Pope, *The Presentation of Scientific Evidence*, 31 TEXAS L. REV. 794, 807 (1953).

50 IMPARTIAL MEDICAL TESTIMONY, *supra* note 34, at v. See also Peck, *supra* note 37.