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Viewpoint of Trial Counsel

Robert E. Coughlan Jr.

VIEWPOINT OF TRIAL COUNSEL

By ROBERT E. COUGHLAN, JR.*

The subject which I have been asked to discuss from the viewpoint of the Bar will be dealt with mainly from the standpoint of damage suits and Workmen's Compensation cases.

For the purpose of clarity, this topic has been divided into three phases:

1. From the standpoint of the Plaintiff.
2. From the standpoint of the Defendant.
3. From what could be considered the ideal standpoint.

The doctor's testimony in a suit for damages is the heart of the case. While it is true that there must first be liability before the Defendant can be required to respond in damages, the doctor is still the most important witness. When a doctor testifies on behalf of the Plaintiff, he should endeavor to testify not in accordance with his feelings, but in accordance with his findings. The Plaintiff's attorney, in seeking a doctor to examine his client so he may be apprised of the extent of the injuries, many times will try to obtain the services of not the best doctor from a medical standpoint, but the doctor who will make the best witness. The Plaintiff's attorney often times regards it his duty to his client to obtain the largest verdict possible. He is not interested in recovering what his case is worth, but how much he can get. He, therefore, seeks a doctor who will be possessed of knowledge, but whose conscience does not bother him. Such a doctor will testify not in accordance with his findings, but in accordance with what he believes he can get away with.

Two of the most serious types of injuries are back injuries, which the late Judge Rowland Adams referred to, particularly in reference to sacro-iliac injuries, as "The Courthouse Joint", and head injuries. When a patient complains of pain in his back, many doctors will find no objective symptoms, but nevertheless will accept in toto the word

* Of the Bar of Maryland; A.B., 1920, St. John's College; LL.B., 1924, University of Maryland.

of the Plaintiff and base their findings of his disability accordingly. In fact, some doctors have gone so far as to state that when a patient moves his legs or his back and complains of pain, that the movement of the back or leg and the complaint of pain constitute an objective symptom.

In head injuries, which are now rapidly becoming the most popular of all injuries, the unconscientious doctors will testify that the patient is suffering from a post-concussional syndrome,[1] that he should avoid heavy work, fatigue, climbing to high places, exposure to extreme heat or cold. When asked if, in his opinion, he thinks the complaint of pain is justified, the standard answer is "I believe so and it is not unusual for these symptoms to persist as often as a year and many times they become permanent." The doctor will then continue and state that in view of the fact that the patient did not have any complaints of pain in his head prior to the injury and complains of pain since the injury, he must necessarily attribute the pain to the injury.

In recent years, the operation for a ruptured intervertebral disc has opened a new field as far as doctors are concerned. If the x-rays show any narrowing of the intervertebral spaces or in many instances, where they do not, the unconscientious doctor will interpret the x-rays, though not an expert in that field, as tending to show a narrowing of the spaces and will state that there is the possibility of a ruptured disc.

In head injuries, electroencephalograms[2] are made and interpreted by the unconscientious doctor to indicate a disturbance of the brain. While I am not in a position to discuss the interpretation of either x-rays or electroencephalograms, experience has shown, over a period of years, that in cases in which the doctor had testified that the patient had a possible rupture of an intervertebral disc, or a dis-

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[1] "A group of symptoms and signs, which, when considered together, characterize a disease or lesion." BLACKISTON'S NEW GOULD MEDICAL DICTIONARY (1949).

Thus, a post-concussional syndrome might include headache, head noises, dizziness, insomnia, irritability, etc.

[2] "A graphic record of the minute changes in electric potential associated with the activity of the cerebral cortex, as detected by electrodes applied to the surface of the scalp." BLACKISTON, *ibid.*

turbance of the brain, that after the case was settled, the complaints disappeared.

A real danger exists when medical testimony of this kind is given. Juries, like the public in general, sympathize with the underdog, the injured person. They reason, particularly if there is liability on the part of the Defendant, that as the injured person did not have such complaints before the accident, and as he has ostensibly a reputable doctor testifying on his behalf, the conclusion follows that the person must have those complaints or injuries of which he complains. They further reason that the doctor who testified for the Defendant is employed by the Defendant for the purpose of discounting the claims of the Plaintiff, and therefore they are not, in many instances, impressed by such testimony, even though it is given by excellent medical men. Such testimony creates a hazard which Defendants and insurance companies should not be exposed to. Insurance companies and self-insurers expect accidents and expect to have to pay for them. For the most part, at the present time, they expect to pay reasonable amounts and are willing to pay reasonable amounts. But they do not expect to have to pay exorbitant verdicts which are not justified by the injuries. The Bar attempts to police its members and keep them in line. Something should be done by the doctors to try to accomplish the same purpose.

Discussing this from the standpoint of the Defendant, the doctor for the Defendant should likewise be perfectly honest in his testimony. He should not underestimate the claim and he should not underestimate the percentage of disability. Unfortunately, in some instances, this is done. The reason for it, which is not a good one or a sound one, is that some doctors who have had a great deal of experience in damage suit cases, knowing that the Plaintiff's doctor will exaggerate the injuries, have a tendency to minimize the injury and underestimate the percentage of disability. This kind of testimony is almost as bad as that of the unscrupulous doctor for the Plaintiff.

A law suit should not be a battle of wits. It should be an honest determination on the part of the litigants on both

sides to present their case fairly and honestly in order that a Jury may determine the issue. There are many cases in which perfectly honest lay witnesses will view the accident and testify almost in direct opposition to each other. This can be explained and accounted for in some instances on account of the fact that no two people will see the accident from precisely the same angle. It is perfectly possible and reasonable to expect honest differences of opinion as far as the medical profession is concerned. When, however, one doctor will testify that the man has a 50% loss of use of his back and a doctor for the opposing side will say that he does not have any disability or perhaps a 5% disability, then something is wrong. One of the doctors is either badly mistaken or deliberately not telling the truth.

When the new rules of Practice and Procedure were adopted, the element of surprise, to a considerable degree, was taken out of a case. The names of witnesses can be obtained and their testimony taken so that each side will know, to a degree at least, what the testimony of their opponent will be. This goes a long way toward solving the question of liability. When, however, the testimony of the various doctors is taken, many times their opinions are so completely at variance that it is utterly impossible to reconcile the difference. If the doctors are honest in their divergent views, then the lawyers for the respective parties, if honest, could accomplish a great deal if they approach the problem by getting one or two totally disinterested doctors to examine the Plaintiff and give a report. This would be a long step toward correcting the abuses that exist at the present time.

Most any member of the Bar who has been actively engaged in the trial of damage suits can cite, from his own experience, numerous instances of false and incorrect medical testimony. To refer to one such case, while appearing for the Plaintiff, the question was whether the Plaintiff, who had developed epilepsy as a result of the accident, was permanently totally disabled. The case was investigated from a medical standpoint and it was learned that the initial injury was a fractured skull with displacement of

the fragments. The immediate problem for the attending physician, who first saw and treated the Plaintiff, was whether to operate and take a chance on adhesions or not to operate and take a chance on what might happen. The doctor decided not to operate. When epilepsy developed, the insurance company produced the attending physician who testified that an operation at this time would relieve the present condition and the man would be all right. The doctors who had examined the Plaintiff on his own behalf were of the opinion that an operation at the present time was dangerous and that things had better remain as they were. The attending physician, who saw the man originally and treated him as a result of the accident testified that an operation would cure him, even though some two years had elapsed since the initial injury. After explaining what was necessarily involved, and when pressed on cross-examination as to the dangers involved in such an operation, he testified that it was as simple as a tonsilectomy. This testimony was obviously not true, but an attempt to cover up.

It is urged that the doctors themselves do something about those members of their profession who give basically false and untrue testimony. It is further urged that steps be taken, if not to discipline, to educate the doctors so that they will not give misleading testimony. The difficulty lies with the doctors. The men of high standing are tremendously busy and take the position, and there is some force in it, that it is their duty to treat the sick and not become professional witnesses. They are, however, horrified when classic examples of distorted testimony are brought to their attention, but they become squeamish about taking any steps to correct it. They do not wish to become involved in such unpleasant matters. It is a breach of professional etiquette to testify against another doctor or in any way take him to task. Thus the unscrupulous doctor continues to give false testimony, juries are misled, defendants pay much more than they should and the evil continues.

Steps can be taken by the doctors that would be corrective and salutary. Doctors, when asked to appear in Court, complain about the loss of time in waiting before

they testify. To a very great extent, this has been eliminated and can be improved even further if counsel are competent and the Judges cooperate, as they invariably do. Sometimes, however, a doctor is asked to be present in order to hear the opposing doctor testify in order to keep the latter in line by his very presence in court. This should not be necessary and if the unscrupulous doctor knew that his testimony would be reviewed by a board of competent doctors and that he would be disciplined or educated, as the case may be, the evil to a great extent could be corrected.

If the doctors could agree on a method to evaluate disability and if the doctors would cooperate with the Bar, and the top flight men in their profession give a portion of their time to examine and testify in cases in which there is an honest divergence of opinion, great headway would be made toward correcting the present conditions.

A doctor should not be an advocate for the side that he represents, so to speak, nor should he be fearful of an unfair cross-examination. The Judges in the respective courts, for the most part, will see that the doctor is not harshly treated.

Some doctors, who are familiar, to a certain degree, with the rules of evidence, will blurt out a statement which they know from their experience in testifying is not admissible, but do so for the sole purpose of assisting their side of the case. A conscientious doctor will not adopt such tactics nor will he be a party to any scheme concocted by the attorney to bring out evidence that is not admissible. While it is true that technically such evidence is stricken from the record by the Judge, it is obvious that the Jury has heard it and many times is influenced by such statements, arguing among themselves that while such statements are legally inadmissible, they are, none-the-less, true and should therefore be given consideration.

A word should be said with regard to claims under the jurisdiction of the Workmens' Compensation Act. Fortunately, a considerable number of highly competent doctors are specializing in this field. The members of the State Industrial Accident Commission usually, in the course of time,

become acquainted with the doctors who appear frequently before them and are able to determine the ones that they can rely on. In a case where the doctor for the Claimant estimates the disability to the man's back at 75% and the employer and insurer's doctor estimates the disability at 5%, the Commissioner ordinarily will ask the attorney for the employer and insurer if he will agree to the Commissioner sending the man to another doctor and if he will pay the bill. In the vast majority of the cases, the attorney for the employer and insurer will readily agree to this and if a competent man is selected by the Commissioner, a fair award will ordinarily be passed. Therefore, in the cases before the State Industrial Accident Commission, there is a greater chance for a fair award, but unfortunately, what usually happens is that, if the Claimant does not get what his attorney thinks he *can* get him, the Claimant's attorney takes an appeal. When the case is tried before a Jury, the Defendant's attorney is faced with the same situation as he is faced with in a damage suit. For this reason, strenuous efforts should be made by the doctors to keep the medical testimony before the State Industrial Accident Commission within bounds, and the doctors appearing before the Commission should be made to realize that their testimony will be just as carefully scrutinized as if it were given in the law courts.

Cooperation between the doctors and joint examinations under the supervision of a third non-partisan doctor would be a tremendous step forward in the direction of stamping out the practice which now exists. Not so long ago, one of the most reputable orthopedic surgeons examined an injured man and reached the conclusion that he had a large percentage of permanent disability. The insurer's doctor was very much of the opposite opinion. Another doctor was selected by the insurer and an examination was made of the man and this third doctor agreed wholeheartedly with the doctor for the insurer. This third doctor, so to speak, unknown to the attorneys in the case, arranged for an examination between the orthopedic sur-

geon who had seen the man at the request of his lawyer, the insurer's doctor and himself. This doctor was able to convince and to demonstrate to the Claimant's doctor, so called, that he had been misled and fooled by the Claimant so that he completely revised his previous opinion and the result was a settlement of the case for a very small percentage of disability. This illustrates what can be done if the doctors cooperate.

In giving testimony, the doctor should be careful to discuss the injuries in such a way that a Jury can understand him and not stick to technical terms. Many times a Jury becomes utterly lost in the terms used and when they discuss the case in the Jury Room, they are hopelessly confused.

A rather classical illustration was a little case in which the lawyer for one side said, "Doctor, in language as nearly popular as the subject will permit, will you please tell the Jury what the cause of this man's death was?" And the Doctor said, "Do you mean the *proximate causus mortis?*" The lawyer said, "I don't know, Doctor, I will have to leave that to you." And the doctor said, "Well, in plain language, he died of an oedema of the brain that followed a cerebral thrombosis, or possibly embolism, that followed in turn an arteriosclerosis, combined with the effect of a gangrenous cholecystitis." And a juror said, "Well, I will be God damned." The Court said, "Ordinarily I would fine you for that, sir, but I won't this time, because that is just exactly what I was thinking."

As far as the Bar is concerned, the Bar can help themselves a lot with their questions, as may be shown by this illustration: A lawyer said to the witness, "Now, sir, did you or did you not, on the date in question, or at any time previously or subsequently, say or even intimate to the defendant or anyone else, whether friend or mere acquaintance, or in fact a stranger, that the statement imputed to you, whether just or unjust, and denied by the plaintiff, was a matter of no moment or otherwise? Answer, did you or did you not?"

And the witness said, "Did I or did I not what?"