

Impartial Medical Testimony. A Report by a Special Committee of the Association of the Bar of the City of New York on The Medical Expert Testimony Project (Book Review)

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BOOK REVIEWS

IMPARTIAL MEDICAL TESTIMONY. A Report by a Special Committee of The Association of the Bar of the City of New York on The Medical Expert Testimony Project. New York: The Macmillan Company, 1956. Pp. IX, 188. \$3.95.

A Judge's View

This book is a report by a special committee of the Association of the Bar of the City of New York on what it calls the Medical Expert Testimony Project but what is generally referred to by the interested bar as the "medical panel." The report briefly explains the conditions which the project was designed to improve, the steps taken and the results obtained to date. As to all of these it is factual in its treatment, outlining the procedures adopted with the forms used, and giving a number of verbatim transcripts of the reports filed in the cases where panel physicians acted. The net result is a text giving all the data needed to enable a court to appraise the experiment and if so inclined, to set up a similar bureau.

A book so purely functional can not be reviewed in the true sense. What it presents of interest are the questions and problems which lurk between the lines and peep out shyly from the protective coloring of case histories. When one has participated actively in the operation of the plan described from its inception, neither great scholarship nor sharp perception are required to recognize them.

The book does not deal with these aspects of the project. Of them the most significant is the tacit admission that our method of resolving questions of fact is inadequate. Obviously, necessity for the panel arises from this deficiency. Our system can not cope with glib chicanery and is unable to distinguish between opinions prompted by ability and those only to be excused by ignorance. Of course the admission is limited to questions in the field of medicine. But factually and logically it could be extended to many others.

From this situation many problems have their origin. How far are the effects of the panel findings to extend? When the court seeks an expert opinion of its own volition and from its own selection it is a necessary corollary that the court is prepared to act on the opinion given. At least this must be true in the absence of unforeseen and extraordinary circumstances. Else the invocation of the expert is without purpose. At present, as this book makes clear, the widest use of the panel expert's opinions is in pre-trial conferences where the object is to reach a common ground for settlement. Experience will show that few settlements result from a desire to see justice done,

as opposed to a realization of what the outcome will probably be. To put it bluntly insurance companies pay off not because they believe the plaintiff has been injured but because they believe he can prove he was injured. And the same motives govern plaintiffs. So the influencing factor is not the impartial doctor's opinion but the probable effect of his testimony. So that if the doctor is not to be a witness the results of the experiment would be negligible.

As pointed out in the report the plan envisages testimony by the impartial doctor in the event the case goes to trial. In this connection it is very important to consider what the impartial doctor's status as a witness should be. Assuming, as in most instances it would be, that the trial is by jury, should the jury be told that the doctor made his examination as an adjunct of the court and not at the behest of either party? If not, he is just another doctor and the original vice of inability to make a fair appraisal of his testimony in comparison with the other medical witnesses will remain. If he receives the aura of court approval, at the least, it is to be expected that his testimony will be given great weight and in most cases unquestioning acceptance. In effect the court says to the jury—"You don't know which doctor to believe. This is the man." The practical effect is to transfer the power of decision in at least a branch of the case from the jury to the doctor.

Theoretically this is highly undesirable. But, as in the familiar quotation, the administration of justice is faced with a condition, not a theory. The evidence of the panel doctor is not irrefutable though very difficult to overcome. And granting that the doctor is an expert and impartial it *should* be difficult to overcome. Where there is no panel expert, an advocate often faces a difficult task in breaking down the testimony of a conniving charlatan or an impressive ignoramus, especially if either is telling the jury what it would like to hear. Is it not preferable that the difficulties should exist in favor of truth and impartiality instead of in aid of error and venality? The broad question is whether the rules of law should be designed to reveal the facts or should constitute a stylized game whose outcome is only incidentally affected by the true facts.

Sadly enough there can not be much doubt that there are a considerable number of lawyers who prefer the concept of a game. Some of these are quite innocent, their preference arising from their pride in the mysteries of their profession, which they share to the exclusion of the lay public. To them the law is a collection of arcana rather than the spirit which giveth life. But to others the concept takes on the form of a vested interest and the right to fool the jury by any means short of the unethical is as legitimate as the "honest graft" which was both the pride and the support of the nineteenth century politician. Their voices in opposition to this and every other plan to adapt the trial system to meet conditions will be both long and loud.

It is not to be expected that this plan is without fault or without danger. The whole plan depends, of course, on the examining physi-

cian being what he purports to be—expert and impartial. The strength of the scheme lies in the method of selecting the panel physicians, amply described in the report. The panel is appointed jointly by the Academy of Medicine and the New York County Medical Society. The selections made by the executives of these organizations represent their opinion of the members of the profession best qualified to examine and report in the specialities associated with accidental injuries. The fees are approved by the court, and while more than nominal, do not reflect what men at the head of the profession can command. Selection for, and service on the panel therefore constitutes an honor and entails a sacrifice. As long as these conditions continue there is a reasonable guaranty that the physicians of the panel will meet the standards, both in ability and disinterest, necessary to its functioning. Should the method of selection be altered to place appointment in lay, and especially in political hands, or let the fees become attractive, the worst predictions of the most captious critic will be instantly realized.

Such a development is not to be expected and is certainly by no means inevitable. Unless and until it comes the project outlined and described in this small volume represents one of the few great forward steps taken in trial practice and procedure in our day.

ARON STEUER.*

A Doctor's View

The medical witness serves in a dual capacity. He may testify to the facts as he has observed them, or he may render an opinion which interprets their significance in the case at hand. In the latter instance factual data is not controversial but is granted for the purpose of determination of a cause and effect relationship, or of estimation of degree of disability, based on the special experience of the expert in a special field of medical practice.

Medical testimony with regard to the facts in a given case differs from that of a layman only to the extent that the doctor is a more experienced observer of injuries and disease and should be able to report his observations with greater detail and accuracy. Like the layman he makes use of his five senses—sight, hearing, touch, smell and taste—to note and record the lesions present. This type of data is likely to be obvious. Thus, a laceration six inches long and an inch deep, severing specific structures, will be described similarly by different observers. Modern science, however, has introduced apparatus which extends the scope of the human faculties. The microscope, the x-ray machine, the electrocardiograph, the electroencephalograph, sound recording devices, chemical tests and other laboratory proce-

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