

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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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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dures have widened the horizon of factual information which the trained observer can uncover and which may not be revealed to his untrained colleague. Data obtained by these special techniques can be evaluated accurately only by those with suitable training. The findings must be interpreted by a qualified expert. Thus, a line in an x-ray may mean a fracture to one physician, an artefact to a second, and a normal structure to a third. Similar difficulties obtain with the other techniques mentioned.

Controversy over the facts in a case is frequently compounded by controversy over the relation to a given accident or illness, and the symptoms and disability which they produce. Since no two physicians have had identical training and experience, their conclusions may differ significantly even when there is agreement concerning the factual data.

Up to this point we have considered injuries and disease with objective findings, demonstrable easily or with difficulty. However, the victim of an accident may sustain serious injury without such objective evidence. The psyche and the soma are inseparable. Pain cannot be accurately measured. Emotional disturbance, sleeplessness, fatigue, loss of libido, weakness, consciousness of the heart or other viscus can all follow injury and be difficult and frequently impossible to prove. This problem presented by subjective symptoms is aggravated by the temptation to exaggerate, conscious or subconscious, on the part of the plaintiff. An important consideration in this regard concerns the normal patient-doctor relationship. The patient expects his physician to be sympathetic, and the physician, anxious to help, accepts the complaints and does his best to support them with the objective findings present, and when objective findings are lacking, he does his best to explain them by assuming pathology to be present which is not demonstrable.

The foregoing remarks give some idea of the complexity of the problem undertaken by the special committee of The Association of the Bar of the City of New York. The report of this committee, comments by its medical consultant, the forms used to provide information to attorneys and physicians, the range of specialists' fees, brief summaries of cases, and evaluation of the method by the judges involved are included in the book. During a two-year period from 1952 to 1954 the services of an independent medical expert were used in 238 cases. The cases referred were generally those in which the medical experts of the plaintiff and defendant held widely divergent and completely irreconcilable views on the nature and extent of the plaintiff's injuries. Of the 238, 129 were settled without complete trial in the Supreme Court. From the number of cases tried to completion during the same period it is estimated that the project eliminated about twenty per cent with a saving of about ten times the amount spent for the fees of the impartial witnesses.

The conclusions, which deal with the economic factor and increased efficiency in the courts, important as they are, must be con-

sidered of secondary importance. The prime question concerns the justice of the verdicts. If impartial medical testimony is indeed possible it would seem a priori that it is desirable. The impartial medical witness has no material interest in the verdict, he is under no obligation to the plaintiff or the defendant, and, to this extent, his analysis of the facts is, theoretically, unbiased. It seems evident, however, that impartiality at best can be only relative. Furthermore, the project has combined impartiality and outstanding ability in the same individual. The medical experts were selected by the New York Academy of Medicine and the County Medical Societies and constituted a small group of senior physicians who were distinguished in their fields. Should the system be expanded, a much larger panel would be required. Ideally such a panel would consist of physicians with a maximum of experience and integrity. From a practical point of view the cause of justice would seem adequately served if all physicians recognized by the specialty boards were considered qualified to serve as impartial witnesses: to be chosen by lot in a manner similar to the selection of a jury. The project does not and cannot guarantee that the impartial witness will be better qualified than the expert called by one of the interested parties. It should suffice to remove an interest in the outcome as a source of bias, conscious or unconscious. In any event, the medical witness will be influenced in his conclusions by his own experience, always limited, and by his personal acquaintance with and respect or lack of respect for the particular expert whose data and conclusions he has been called upon to review. The book calls attention to differences of interpretation of x-ray findings by the impartial witness and the plaintiff's doctor and assumes that the impartial witness is correct. This assumption is open to question. It would be of interest to submit the same data to a number of panelists and to study statistically their differences and unanimity. These differences percentagewise could be compared with the differences of the "partial" witnesses and with those of experts selected less carefully on criteria established by the American Specialty Boards.

The committee report gives the impression that an impartial witness can distinguish with relative ease between neurosis which follows an injury and conscious malingering. Such is far from the case and continues to present a serious problem in litigation. Nor can the impartial witness more accurately predict life expectancy. For example, in case numbers 87¹ and 169,² motion to move up the trial date in patients with coronary disease was denied on the basis of the expert's report. These decisions are open to serious question. When organic disease and anxiety are combined in the same individual it can be extremely difficult to determine the role of each and the general tendency of the impartial witnesses in the project seemed to be in

¹ P. 159.

² P. 183.

favor of the defendant, with emphasis on the plaintiff's tendency to exaggerate rather than on the defendant's tendency to minimize the symptoms. Throughout the volume objective data is stressed—more x-rays, more spinal taps, more tests of one variety or another. The value of such data cannot be disputed. However, one gains the impression that too little attention has been given to the possibility of serious injury without demonstrable x-ray evidence. A not uncommon example of this is found in disc injuries of the spine which may be severely disabling and, at times, impossible to prove.

Since every patient is a potential litigant, every physician should be concerned with the problems raised in *Impartial Medical Testimony*. The doctor can no longer limit his interest to the cure of the patient. He must keep accurate records and consider the possibility of court appearance every time he attends an injured or ill person. The experiment, conducted jointly by the legal and medical professions, is a step forward toward solution of the important issues discussed. There is no doubt in the mind of the reviewer that the medical profession as a whole will welcome the independent medical witness and, recognizing the limitations inherent in the method, will regard him as a consultant who can contribute significantly to the interests of justice. Partisan medical experts cannot be displaced, however, any more than can partisan attorneys.

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An Attorney's View

This report on the use of independent medical experts in personal injury actions, in the New York Supreme Courts, is the account of a pilot project under which the services of independent and impartial medical experts have been solicited to aid the court in the better and quicker disposition of personal injury cases.

In substance, the committee's experiment was a response to the inadequate way in which the courts deal with medical facts in personal injury cases—and such cases constitute some eighty per cent of all the cases in the trial courts of the country. Customarily, the plaintiff hires a doctor to testify as an expert witness about the plaintiff's injuries and the defendant does the same. The conditions prompting the project were the statements that uncertainty, confusion and waste of time resulted from the presentation of widely conflicting medical opinion evidence by partisan doctors retained by the parties.

A reading of this small but important book points the way to the establishment of an effective way of dealing with the disputed

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