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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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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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medical aspects of litigation. Discussing medical experts and medical testimony, a critical observer has said that some testify with an amazing intellectual virtuosity, giving descriptions of the conditions in all their aspects. Sometimes this description is over ingenious, one-sided, dialectically clever, at the expense of fact, but everywhere we find some beam of illumination.

Experience of upwards of a quarter of a century constrains me to observe that this critique is not representative of the major percentage of the litigated medical issues in our courts. It is the use of independent and impartial medical experts in those personal injury cases in which there is a substantial difference between the parties as to the nature and extent of the injuries to which this book is directed. The use of the impartial medical panel, it is urged, serves the two-fold purpose of expediting dispositions and making justice more certain. The proponents of the plan state that the actual trial is not conducted on an objective and scientific plane, and that the burden of decision without adequate information is left to laymen who are, under present conditions, not in a position to make the decision as to the medical facts.

The experiment establishes that its services are effective in producing the medical facts and contributing to a settlement of the case before trial. It is not urged that the panel should be used in all or even most cases, but should be employed only where there is a substantial divergence of medical opinions.

The modern trend of the practice in personal injury cases is to attempt to narrow down the areas of medical dispute, and the aim is, ultimately, with the assistance of the medical profession, to eliminate most of the controversy on the medical side of personal injury cases.

The trial bar, while welcoming the impartial medical panel plan for possible settlement purposes, is less cordial in specific cases where court testimony is to be given by the members of the medical panel. The view is held by some that present knowledge of causal relationship between trauma and certain pathological processes in the nervous system is incomplete, and opinions based on this inadequate knowledge are too often speculative and conjectural.

In some of these cases, the inability of physicians to give sworn opinions with a reasonable degree of certainty, or even probability, as to causal relationship has led the courts to make determinations which, though they may satisfy the law, are not always acceptable to physicians. Doctors less frequently disagree clinically than they do in court. Some of these legal determinations do not conform to the generally accepted principles of anatomy, physiology and pathology.

It will be necessary for medical science to furnish more definite formulations as to the causal connection between trauma and certain disabilities. This also applies to the extent of aggravation or acceleration of a pre-existing disease following trauma.

The controversies that are brought to the courthouse are not brought by lawyers. Medical literature is abundant with prevailing

views of various schools of thought in medicine, particularly those fields that deal with the back and those fields which deal with the head. Which schools will the particular member of the impartial medical panel belong to in a given case? This would seem to present a real issue with reference to testimony by impartial medical witnesses.

It has been urged by those who are opposed to the plan that the jury would give greater credence to the impartial medical witness than it would to an expert called by either of the parties. The report replies by stating that where the impartial medical witness is called upon to testify he may be questioned as to his conclusions and the certainties thereof, as to his doubts and differences of medical opinion in the area of the injuries involved, and he may be cross-examined as any other witness. The concern expressed might better be resolved upon the theory that a trial is a search for truth and not a game of chance.

The report concludes that the use of impartial medical experts in those cases in which there is a substantial controversy between the parties as to the medical aspects of the case is sound both in principle and in practice, and that it makes a valued contribution to the correct disposition of those controversies, and helps immeasurably toward the fair settlement of cases. Moreover, it states that men of high professional competence and standing in the medical profession are agreeable to serve as panel members, whereas heretofore they had shied away from contact with any situation which might require their appearance in court as a witness.

This book will be useful for the general practitioner and is recommended as a possible source of assistance in evaluating comparable injuries for settlement purposes.

CHARLES MARGETT.*

VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION. By Thomas Reed Powell. New York: Columbia University Press, 1956. Pp. XV, 229. $3.50.

It certainly was "a happy inspiration," as Mr. Freund says in his foreword, that led to the choice of T. R. Powell as Carpentier Lecturer at Columbia in 1955, and thus to the publication of this book. For Powell was pre-eminent in the history of the Republic among logical critics of the work of the Supreme Court. This volume, moreover, is typical of all his work—scattered in more than 200 articles in

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