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Viewpoint of the Jurist

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By Hon. W. Conwell Smith*

Baltimore is both a great center of Medical learning and research, and likewise a City whose Doctors of Medicine are equal in knowledge and skill to those to be found any where in the world. It is, therefore, a real pleasure for me to have the opportunity to serve on a joint panel of doctors and men of my own profession — the law.

We have frequent occasion to employ the services of our Medical Officer, Dr. Manfred Guttmacher, in criminal cases, to give opinion as to mental responsibility of offenders in doubtful cases, and also to diagnose the mental and physical condition of offenders, and recommend treatment or disposition. We hopefully employ blood tests to exclude paternity in bastardy cases. Our procedural rules in civil cases provide for the opportunity to make mental or physical examinations of persons whose mental or physical condition is the subject of controversy, in advance of the trial — and for the production of medical evidence at the trial, unless there is by that time agreement on the condition. Without the scientific knowledge of medical men many obscure injuries and maladies would go unrecognized and uncompensated, while many other pretended sufferings would be undeservedly rewarded.

Yet the standard of medical evidence given in the courts is not always high, and there is among lawyers some distrust of medical evidence, while there is on the part of reputable doctors a distrust of courts and juries, and a reluctance to appear as a witness. Why? This distrust of courts may well be illustrated by the practice in vogue in the hospitals until a year or two since, of sending to court the hospital record in the custody of a girl from the hospital library, whose presence was not necessary to identify it, and who remained in the court room until the record might be given back to her, and so returned to the hospital. Hospital records are now summoned through the Police

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Department, are receipted for to the hospital by the Police, delivered to the Clerk of the Supreme Bench, receipted for by him, used in the court where required and thereafter returned through the same channels to the hospital. Meantime, the librarian remains in the hospital instead of wasting her time sitting around the court room. And the ease with which the production of these records may be obtained dispenses with the necessity of requiring the attendance and testimony of members of the hospital staff in many cases.

But before I mention the reasons which make reputable doctors shun the courts, let me suggest that lawyers have not too high regard for opinion evidence — summed up in the statement that there are "liars, damn liars, and experts." The reasons which underlie this distrust are:

First — The lack of any certain standard for the witness to measure up to — the standard may be met by any quack, and any quack may testify.

Second — The fee paid often influences the opinion expressed — that is to say, bias is clearly apparent.

Third — The production of opinion evidence results in the needless prolongation of trials, without producing a more satisfactory result.

Fourth — The opinions expressed are frequently so contrary to common sense and common experience as to provoke the suspicion that they are dishonest.

Fifth — Expert testimony is a purchasable quantity — available to the highest bidder.

Now the doctors, on their part, have reason to feel some dissatisfaction with their infrequent court appearances. On the day and hour on which they have planned to testify, the case has been postponed, for some reason, — and is finally reached on an awkward day, at an awkward time. Then they are treated with scant respect by the cross examiner, only to find that on some points it is difficult to demonstrate the falsity of conflicting claims. Sometimes the jury's verdict is unsatisfactory — at best it is uncertain. Sometimes the evidence is not accepted, not fully

believed, although well informed, and thoroughly honest, and this is distasteful; particularly when the evidence in opposition is merely crafty and dishonest.

Both doctors and lawyers are in agreement that it is deplorable to have dishonest testimony succeed, and go unrebuked and unpunished. But they are not in agreement as to the solution. They approach it from different view points.

The doctors say the solution lies in excluding the quacks from the witness stand. Let the Court call in a reputable trustworthy expert, tax the cost equally against the parties — and let his answer furnish the solution to the controversy. You will attain a more satisfactory, a more desirable result. I served some fifteen years ago on a Bar Association Committee in conjunction with a committee of the medical faculty. The Committee of Doctors furnished a panel of experts in all branches of medicine, subject to call, willing to give their services at the call of the court to promote the ends of justice. But they had few if any calls, while the quacks continued their practice and their practices.

The difficulty with this solution is that under existing conceptions of fair hearing and trial, the production of any competent evidence on either side, including opinion evidence, cannot be prevented altogether. In rare cases, the court may call in an impartial expert, but only by consent, and consent also must be had to abandon the right to call evidence in opposition.

A court trial is not a mere inquiry to determine the truth or falsity of conflicting claims. It is an adversary proceeding in which the written, and sometimes sworn statements and counter-statements of the parties are climaxed by a hearing before the Court and jury — where the parties, and the witnesses, and counsel, appear in person to be heard by both evidence and argument, and the case decided. The fairness of the hearing forbids that any evidence be excluded, except for good reason, even opinion evidence, where there is proven qualification to express

opinion. So the undesirable testimony can not be rejected. It must be overcome by other proof.

While medical men are eager to make use of the new drugs and the latest techniques, the men of law are slow to adopt new things. They tend to follow old precedents. This is particularly true of the courts. But while following the old procedures it is still possible to improve the result. One most important method is by selection, to improve the quality of the jury. A more intelligent jury is much more apt to accept well informed and honest medical opinion and to reject false claims. We have been able to enlarge and improve our jury lists in the last several years; the qualification of women for jury duty in itself has doubled the number of eligible persons.

Mental or physical examinations in advance of the trial, where the parties avail themselves of this privilege, prevent surprise at the hearing. The power of the Court to regulate and control these inquiries will usually prevent surprise — the opinions to be expressed by expert witnesses before the jury are often known in advance, so that they may be controverted. This has a strong tendency to repress the expression of palpably false opinion evidence and to prevent its acceptance by the jury.

Lastly, the Judge who presides at the trial has great power. I should perhaps express it this way, he has a great reservoir of power, which he may legitimately and properly exercise to control counsel, the parties and their witnesses. This power is not always exercised — not called upon — because in most cases, there is no occasion for its exercise. The judge must not only be impartial, but appear to be impartial — he must not take sides. But he may inject his influence into the trial when needed — on the side of truth and justice. And should any miscarriage of justice occur, he has the uncontrolled power to set aside the verdict, and grant a new trial.

A combination — or perhaps a compromise — of the medical and legal means for overcoming improper medical expert testimony is the Minnesota plan. That plan contem-

plates that judges, lawyers and doctors will be asked to call to the attention of appropriate committees of the medical and bar associations any conscious deviations from the truth that they may observe in the testimony of expert witnesses, and that the transcript of testimony will be submitted to an impartial group of doctors. The effort here is to hold the offender up to shame and ridicule in his own profession. It has had a fair degree of success in preventing a repetition of the offense. But it has the fault of failing to catch the culprit until his conduct becomes notorious.

My own opinion leans to the fuller exercise of the means that are now available to hold the offender up to scorn then and there, when the offense occurs — to prevention, rather than cure.

When I sat in the Common Pleas Court a few years ago, I heard two or three suits against the transit company, with the same lawyer for the plaintiff, same type of accident, and the same doctor, treating the same complaint. In each case, the plaintiff, while alighting from a car, was thrown off by a premature start and suffered a back injury. The doctor found a sacro-iliac injury and prescribed heat treatments. All the accidents were unreported. The cases tried before me resulted in verdicts for the defendant. I was told by the attorney for the Transit Company that the same lawyer had filed twenty-six such cases, all of which followed the same pattern, and all tried to that date resulted in verdicts for the company.

The doctor testified in each case as to the back injury, the prescribed heat treatments, and eventual recovery. But after cross examination, nobody believed him.

A great many years ago I was defending cases for the Yellow Cab Company. I appeared in a case before Judge Henry Duffy in which both the cab company and the United Railways were being sued. A street corner collision between a taxicab and a street car had knocked the car off the track and caused it to run down the street into a parked automobile in which the plaintiff sat. He was only slightly injured but could not resist the temptation to make his

injury appear more serious. He produced a doctor who testified that his patient had a gash in his head an inch and a half deep — "Without reaching the skull?" asked Judge Duffy, and turned his head aside in disgust.

It happened to be the last day of service for that particular jury, so when I addressed them I said something like this: "Gentlemen, in the course of your service here, I dare say you have had occasion to hear a good many injury cases, and you have heard some exaggerated claims of injury. Now, if you disapprove that kind of thing and want to put a stop to it, bring in a verdict here in favor of the defendants". That appeal to the jury won unanimous approval in very short order — and the jury's expression of approval was somewhat vehement, even boisterous — but Judge Duffy made no effort to subdue it.

The power of the court to set aside a verdict because of the amount of damages is much more frequently exercised on high verdicts rather than low ones. New trials are seldom granted because of inadequate damages. And verdicts in small cases are more apt to stand than verdicts in big cases. On the average I would say that plaintiffs in injury cases receive less than they ought to get. Cases in which the verdict is lower than the settlement offered are not at all uncommon.

There are still, and probably always will be, areas in which there is room for wide but honest difference of opinion. And in nervous and mental disease these areas are broader than in other parts of the medical field. (The story of the two psychiatrists has taken the place of the story about the two Irishmen.) In these areas simulated injury or suffering are difficult to detect; but on the other hand they are likewise difficult to demonstrate convincingly when they do in fact exist.

Flagrant abuses in medical evidence have been rare, in my experience — and more apt to occur in small rather than large cases. I believe we are fortunate, in that jury verdicts have been conservative rather than extravagant in the assessment of damages. We are also fortunate to

have available, at need, abundant medical knowledge and skill to call upon. Any plan for the elevation of the standard of medical evidence in the trial of cases, which may be accomplished within the rules of evidence, will have the sympathetic consideration of the courts.