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# Medical Arsenal of a Personal Injury Lawyer

Albert Averbach\*

IT HAS BEEN ESTIMATED that about 4 billion dollars annually is expended in compensating personal injury damage claimants, and that this sum is equivalent to the amount spent for all highway construction by local, state and federal governments combined, and twice the amount received by farmers for the value of their food grain production.<sup>1</sup>

The computed annual economic cost of accidents in the United States exceeds 15 billion dollars.

Accidents now cause more injuries and deaths in a single year than all infectious and communicable diseases combined. It has been estimated that 49 million people will suffer non-fatal injuries and an additional 90 thousand will die as the result of accidents in a single year. Based upon surveys of the National Safety Council, it has been concluded that 400 thousand people annually will be permanently disabled and about 10 million more will be disabled for a day or more due to accidental injuries.

Put more graphically, it has been stated that the toll will be "one dead every 15 minutes. One injured every 22 seconds. Every year the injured and dead equal the population of St. Louis."<sup>2</sup>

The extent of personal injury litigation annually being filed in the courts country-wide is absolutely staggering.

No valid statistics exist as to the total annual crop of cases filed in state and federal courts across the country as a result of the annual crop of accidents that involve the nation's 90,000,000 motorists, but we do know that the total is gigantic.<sup>3</sup>

The impact of this enormously high accident rate has made tort litigation of great current interest to lawyers, doctors and the courts. As a result, teaching seminars by law schools, bar

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<sup>1</sup> Note, 28 Ins. Counsel J. 4 (1961).

<sup>2</sup> Green, *Traffic Victims* 85 (1958).

<sup>3</sup> 4 Averbach, *Handling Accident Cases* 4 (1958).

associations and medical societies are becoming increasingly popular, and law school journals are devoting more and more space to the problems arising from tort litigation. The *Cleveland-Marshall Law Review* has become the recognized authority among America's law reviews in the tort field and it is especially appropriate that the current May issue be devoted to a symposium on "Traumatic Medico-Legal Problems."

Trial lawyers handling personal injury cases are "salesmen." They are salesmen of pain, sorrow, agony and suffering. Like any merchandise, it is important that the salesman be thoroughly familiar with the product that he is handling. It is vitally important that the trial lawyer understand anatomy and physiology, for 70 to 80% of all litigated cases in state and federal courts in the United States are in the personal injury field, and seven out of ten of all personal injury cases are decided upon *medical* rather than *legal* issues.

It is an absolute truism that a tort lawyer's trial proficiency is directly measured by his ability to understand and *express* medical-legal facts. His knowledge must include not only anatomy but also physiology. Jurors have an extreme interest in their bodies, and the subject of health awakens and holds their interests. This statement is proved by the fact that most newspapers as well as popular magazines carry syndicated articles on medical subjects. *Life Magazine* was convinced of the importance of a better understanding of anatomy and physiology. Its editors are featuring a magnificent set of medical drawings with explanatory text in a seven issue series entitled "The Human Body." *Readers Digest* has collated all of its previous articles in one book entitled *Our Human Body—Its Wonders and Its Care*, published by E. P. Dutton & Company, New York, New York. The American Medical Association published a superb booklet entitled *The Wonderful Human Machine* (\$1.00).

Newsstands have paper back editions on this intriguing and interesting subject matter. T.V. programs are impressing upon millions of viewers the importance of anatomy and surgery through the "Ben Casey," "Dr. Kildare," "The Nurses," and "Dr. Hennessey" programs. These programs vie for popularity with the courtroom programs such as "Perry Mason," "The Defenders," "Sam Benedict," etc. It is, therefore, apparent that today the general public has become keenly aware of the impact of traumatic injuries upon the human body and its systems.

Unfortunately, one segment of the population has seemingly remained aloof from this current interest, and that segment is the one that should know the subject best of all,—the trial lawyer. It is amazing how little attention is paid by the trial lawyer to the enormous impact of traumatic injuries upon the human body. Generally, the trial lawyer is content with a woefully inadequate knowledge about the body, and the meaning of but a few medical terms. Yet, the knowledgeable lawyer entrusted with such cases is constantly alert to the importance of a fuller understanding of medicine, anatomy, surgery, physiology and the related sciences. The proficient trial lawyer is in attendance at frequent seminars being held everywhere. The careful trial lawyer possesses and reads the available aids to a full understanding of medical issues.

It is the purpose of this article to arouse the interest of those previously immune to the suggestions of the importance of a fuller knowledge of this subject and to point the way toward those wonderful repositories of information that should be known by all. [Appended to these remarks is a bibliography of recommended books, pamphlets, paper backs, law reviews and medical journal articles.]

### Transparencies or Overlays

With proper foundation laid as herein indicated, it is possible in some of the jurisdictions to introduce into evidence the highly dramatic transparencies, or overlays, of the human body. These are full color plates printed on clear plastic, in colors approximating those in the living body, except for the blood and lymphatic vessels. These illustrate the human body on successive plates from skin through viscera to skin. Distributed free with Volume 1 of *Handling Accident Cases* is such a publication of Row, Peterson & Company of Evanston, Illinois entitled *The Human*. (The Lawyers Co-Operative Publishing Company, Rochester, New York, distributes it for \$3.20.) Some of the pharmaceutical houses like Charles Pfizer and Company, 11 Bartlett St., Brooklyn, New York, and Abbott Laboratories, 14th & Sheridan Road, North Chicago, Illinois, publish and distribute, to the medical profession, graphic transparencies of various systems of the human body.

Parke Davis and Company, Detroit 32, Michigan, publishes and distributes to the medical profession graphic transparency illustrations of the male and female body.

### Skeletons and Anatomical Models

One of the finest models of the human body on the market today is distributed by the Johns Hopkins Press, Baltimore 18, Maryland, \$20.00, it is 18" tall and comes with a stand.

Clay-Adams, 141 East 25th Street, New York City, distributes skeletons, skulls and various parts of the anatomy including the vertebral column and plastic reproductions of the pelvis, herniated disc, etc. Plastic parts of the anatomy are also obtainable from the Medical Plastic Laboratory at Gatesville, Texas. Imported models may be secured from Faust Scientific Supply, Ltd., Madison 4, Wisconsin.

Superior Plastics Inc., of Chicago, Illinois, distributes many models such as "The Seeing Eye," "The Listening Ear," "The Thinking Man." A very worthwhile kit, "The Visible Man," is distributed by the Renewal Company, Mineola, New York.

### Anatomical Drawings and Charts

Strongly recommended are anatomical charts distributed by Clay-Adams Company, 141 East 25th Street, New York City. Especially useful are the four charts known as the *Dr. Michel Medical Charts*. They are: Chart of the Arterial, Venous and Nervous Systems; Chart of the Muscular System with its Arterial and Nervous Relation; Chart of Osteology—Showing the Skeleton in the Flesh and Internal Organs with Their Relation to the Skeletons; and Chart of the Spine and Spinal Nerves. These can be secured from Lawyers Aids Company, 1302 Ontario Street, Cleveland, Ohio.

The Michel Charts are printed in color and are 32" by 44" in size, with or without chart stands, chart case or holders. Clay-Adams also distributes the *Schick* Lithograph charts in color and the *Frohse* Lithograph charts in color. The *Frohse* charts are 42" by 62" in size. Clay-Adams also distributes the *Bachin* charts in color; some are 36" by 67" in size and some 20" by 26" in size.

The *Anatomical Drawings* published and distributed by Denoyer-Geppert Company, 5235 North Ravenswood Street, Chicago 40, Illinois, are very graphic, as are the *Frohse Anatomical Charts* of Central Book Company, 850 DeKalb Avenue, Brooklyn 21, New York.

The Lederle Laboratories Division of the American Cyanamid Company, Pearl River, New York, publishes a series of

anatomical illustrations by the famed medical illustrator, Paul Peck. There are 48 plates, in magnificent color, covering sub-headings of "Bones, Joints and Muscles," "Head," "Chest," "Abdomen." This *Atlas of Normal Anatomy* is distributed free to the medical profession, and to accredited law libraries, upon request.

Also suggested are the *Amer-Frohse* charts put out by A. J. Nystrom & Company publishers, Chicago, Illinois; Bender's *Anatomy Charts for Courtroom Use*; and the *Medical Atlas for Attorneys*, with courtroom diagrams, distributed by the Berkeley Press, 3020 Ashby Avenue, Berkeley 5, California; and *A Stereoscopic Atlas of Human Anatomy*, distributed by Williams & Wilkins Co., Baltimore, Maryland.

### Consulting Services

As a subscriber to Tice-Sloan's *Practice of Medicine* or the *Lewis Practice of Surgery*, an attorney may request of the consulting bureau of the W. F. Prior Company, Hagerstown, Maryland, photocopies of medical journal articles on any subject. This is an invaluable service frequently used by experienced attorneys to prepare the medical features of important litigation.

### Medical Illustrations and Medical Photography

There are many qualified medical illustrators in this country, many of whom belong to an organization known as the *Medical Illustrators of America*. Miss Rose M. Reynolds is the Corresponding Secretary, University of Nebraska, College of Medicine, Omaha 5, Nebraska. A current list of the members is obtainable from her. There are about 1500 medical photographers in the country, and 350 teaching hospitals that have fully equipped medical photography departments. The organization of medical photographers is called *Biological Photographic Association*, Box 1668, Grand Central P. O., New York 17, N. Y.

Medical illustrations prepared from x-rays give life size, three dimensional, full color views which are dramatic and attention arresting to a jury. They are especially recommended in cases involving multiple injuries to the body. Three dimensional, color photographs in cases involving scars or burns or plastic surgery repair, and motion pictures of gait abnormalities or restriction in motions, are especially useful demonstrative aids and

frequently convey to the court and jury dramatic impact of injuries with an accuracy not permissible in spoken words.<sup>4</sup>

There are many currently used medical photographic techniques. One of the current new uses is "positive" photograph reproductions of x-ray films.<sup>5</sup>

### Surgical Hardware

It is possible to purchase from surgical supply houses, replicas of many of the prosthetic devices and other surgical hardware used by the orthopedists. We have frequently introduced into evidence an Austin-Moore prothesis (femoral head), a Rush nail, a McLaughlin plate, pieces of Kirschner wire, cervical collars, Foley catheters, surgical corsets and braces.<sup>6</sup>

### Foundation For Courtroom Use Of Anatomical Drawings, Charts, Transparencies, Medical Illustrations, Surgical Hardware, Skeletons, etc.

The proper foundation for the use of demonstrative evidence, properly depicting traumatic injuries, can be in the following form:

Q. Doctor, are you able to *adequately* describe, without the use of medical charts or illustrations, the injuries suffered by your patient, or the operative procedure performed upon him (where you have operative procedure)?

A. No.

Q. I show you a Dr. Michel medical chart marked Exhibit No. --- for identification. Have I previously showed you this chart?

A. Yes.

Q. Is that chart anatomically correct?

A. Yes.

Q. Would the use of such a chart aid you in describing the injuries?

A. Yes.

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<sup>4</sup> For admissibility of photographs, diagrams, models and casts, see 20 Am. Jur., Evidence § 727.

<sup>5</sup> See cases collected in: 53 Am. Jur., Trials § 924, § 925; 10 A. L. R. 2d 918 (1950); 53 A. L. R. 2d 1102 (1957) 83 A. L. R. 1315 (1933); and 129 A. L. R. 361 (1940).

<sup>6</sup> Authority for the utilization of such demonstrative evidence can be found in: Annot., 58 A. L. R. 2d 181 (1958); 20 Am. Jur., Evidence, § 716 et seq.; 4 Wigmore, Evidence § 1150 (3rd ed. 1940); 12 A. L. R. 2d 606 (1950); 16 A. L. R. 2d 306 (1951); 66 A. L. R. 2d 1382 (1959); and 83 A. L. R. 2d 1271 (1962).

The medical chart or illustration is then offered into evidence as an aid to a fuller understanding of the injuries involved. Research is required in the various jurisdictions for authorities supporting the use of medical charts, anatomical drawings, transparencies, surgical hardware, etc. There are many such authorities. Such demonstrative evidence, however, should be reserved for use in *major* trauma cases, and not to illustrative *trivial* injuries. It is important, of course, that the doctor be prepared for these preliminary substantial questions by a discussion prior to trial.

### Medical Journals

The *Journal of the American Medical Association* is a weekly publication, the subscription cost is \$15.00 per year, and many of the alert trial lawyers of America are subscribers to the *Journal*. It is invaluable for leads to new concepts of medicine and to "round out" the medical knowledge of the attorney.

*Index Medicus*, a publication of the United States Government Printing Office, is available for \$20.00 per year (a monthly publication), and is a tremendous source of information as to the writings of the various doctors in the medical journals (foreign and domestic).

The A. N. Marquis Company, who publish *Who's Who In America*, also publish the *Directory of Medical Specialties*. This directory is invaluable in tracing the qualifications and the backgrounds of the medical witnesses.

### Courtroom Use of Medical Authorities

Many lawyers wheel into the courtroom a library cart loaded with medical books, and attempt to confront the doctor-witness with selected quotations from the various books taken from the cart. This is a technique frequently seen in courtrooms and generally results in wasted effort.

Don't try to come into the courtroom with a library cart loaded with medical books and confront the doctor with a score of them one after the other, asking, "Do you agree with Wechsler at page 982?" "Do you agree with this, and do you agree with that?" Most of these doctors are becoming courtroom wise, and alert to this technique. One doctor, now deceased, used to have a very neat way of getting rid of that cart fast. He would see a lawyer coming in with a cart full of medical books, and he would



say, "*Young man—*," it was always young man with him, it was never anything else but *young man* with him—, "*Young man, there is only one book that I consider an authority and that book is the Bible. If you have the Bible on that cart I will recognize that book as an authority.*"

What are you going to do in cross-examining a man that knocks you out of the box that way before you even get started? He used to do it in another manner by saying, "All these books are fine—but *I* am the authority in this case. I examined the patient. These books can't help me."

Or, take the other kind of a doctor. You ask him about exertion causing coronary occlusion, and you bring out Dr. Paul Dudley White's book and you go through all the motions. The doctor says he recognizes Dr. White as an authority. Who doesn't? And he will say to you, before you get off the ground, "Well, that may be what he said in the third edition, but do you have the fourth edition with you?" Well, you don't happen to have the fourth edition and you are done. Why get into the position of being "cooked" before you even get started?

Here is a neater and more effective way of doing it. Go through the medical authorities, and whenever you find a particular sentence or paragraph that is useful, place it on a 3" by 5" card with the book and page of the authority on one side and the desired quote on the other. Use the card with prefatory remarks couched in the following formula. "Doctor, is it not an established medical fact that . . .," or, "Doctor, isn't it medically true that . . . ." <sup>7</sup>

It should be pointed out, however, as a caveat, that medical books are not admissible into evidence as proof of the facts stated therein, but may be used in most jurisdictions on cross examination if the doctor acknowledges that the author is an authority on the subject. In this event he may be confronted with passages which conflict with his previously expressed opinions. When so used, medical books would not be admitted into evidence, but only for the purpose of discrediting or weakening the expert's testimony.<sup>8</sup>

It is also suggested that these worthwhile quotes be incorporated for future use in a loose leaf notebook with tabs reading

<sup>7</sup> For other examples of medical quotes see, 1 Averbach, *op. cit. supra* n. 3 at 351-532.

<sup>8</sup> *People v. Feldman*, 229 N. Y. 153, 85 N. E. 2d 913 (1949); Note, 29 U. Cinc. L. Rev. 255 (1960).

"Arthritis, Back and Disc, Brain, Cancer, Heart, Gall-Bladder, Kidney, Limbs, Medical Charts and the use of them, Multiple Sclerosis, Shoulder, Whiplash Injury, Traumatic Neuroses, X-rays, etc." These medical quotations should be committed to memory and used without reference to either the card or the loose leaf notebook. If the doctor disagrees with the statement, then he can be confronted in most jurisdictions with the exact quotations from the book.

### Medical Trial Briefs

One of the most neglected fields of trial preparation is the adequate briefing of the medical features of the case for ready courtroom use. Very few lawyers take the time or painstaking care of handling this feature of the case properly.<sup>9</sup> A properly prepared medical brief will contain the exact quotations from specific medical authorities, to support the contentions, buttressed by medical and legal citations and quotations.

In briefing, utilize the references herein contained. Refer your inquiries for material to the Consulting Services of the W. F. Prior Company, Hagerstown, Maryland, and the National Library of Medicine, Washington, D. C., the latter comprising the greatest collection of medical literature in the world, exceeding one million titles.

### Conclusion

This article cannot be all-inclusive of the many sources available to the energetic and painstaking trial lawyer for the proper preparation of the medical-legal problems involved in personal injury cases. It is hoped, however, that the suggestions herein made will point the way to a fuller realization that trying today's personal injury lawsuit is a painstaking search in preparation of the medical facts as well as the legal principles involved. Proper preparation of a personal injury case and proper presentation of the issues of damages, pain and suffering are absolute essentials of success of a trial lawyer. The use of some of the media, bibliography, or materials herein suggested should prove rewarding instrumentalities for the effective development of a trauma case, as well as aids to successful advocacy in such cases. The anatomy of a lawsuit today is truly the proper presentation

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<sup>9</sup> My views about the preparation and content of the medical trial brief are stated fully in, 1 Averbach, *op. cit. supra* n. 3 at 533-602.

to court and jury of the impact of trauma and injury upon the human body.

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- HANDLING ACCIDENT CASES, by Albert Averbach, Volumes 1-6, published by Lawyers Co-Operative Publishing Co., Rochester, New York.
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- ATLAS OF SURGICAL OPERATIONS, 3rd Edition, by Robert M. Zollinger and Elliott C. Cutler, The MacMillan Company, New York, \$18.00.
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