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The Frightened Medical Witness; or "Globus Hystericus" Must Go

David I. Sindell*

THIS ARTICLE IS WRITTEN on behalf of the many trauma patients and their trial attorneys who discover, to their horror, that their important medical witness—the "attending" doctor,—suffers from "Globus Hystericus."¹

It is hoped that this paper may prove to be the elusive Rx to cure some difficulties raised by those few physicians (and yet there are too many) who hide their fear of the witness chair behind lame excuses, or even behind flat refusals to testify.

Such doctors are indeed a small minority of the great medical profession, and fast becoming less in number. But the few who do refuse to take part in the judicial process present grave problems to the lawyer who is duty bound to present medical facts to the jury. Doctors are subject to subpoena. But obviously an angered doctor will make a poor witness, and the medical facts may be distorted. This is why subpoenas are almost never issued for medical witnesses.

What causes some members of the healing art to be thus difficult? The primary reason for their unwillingness to testify is *fear*—fear based on rumor and on "tall" stories.

C. Joseph Stetler, Director of the Law Department of the American Medical Association, said:²

"In my work with the medical profession I have come to the realization that practically all doctors have an aversion to appearing in court and testifying in a law suit. Although a few have had unpleasant experiences as witnesses, most have been frightened by the exaggerated reports by a colleague of 'murderous cross-examination' by an opposing counsel. . . ."

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¹ *Globus Hystericus*. A choking sensation, as of a lump in the throat, to which hysterical persons are subject. Oxford Universal Dictionary. Third Edition, 1955. Rand McNally & Co., Publ.

² Speech, May 10, 1956. 5th Annual Public Relations Session of the Medical Society of the State of New York. 12 New York Med. 801 (September 20, 1956).

This fear has too many undesirable consequences to allow it to be tolerated by either profession. The doctor today has become inextricably involved in the judicial process. The great professions of law and medicine have been forced into closer contact than ever before, as a result of our injury-producing and death-dealing technological society. Chief Judge John Biggs, Jr. of the United States Court of Appeals for the Third Circuit stated of this, while speaking at the 1956 Delaware Medical-Legal Symposium:³

“Statistics are rarely exciting things, but on occasion they can be more than startling. They can be terrifying! . . . The demographers insist that there are at present about 163,000,000 people in the United States. The demographers insist that by 1975 the population of the United States, at a minimum estimate—I repeat, a minimum estimate—will consist of at least 227,000,000 souls. The problems created by an exploding technological development are indeed tremendous. And in solving them the doctor and the lawyer must play a great part—cooperatively.”

There are over 9,000,000 persons injured each year in the United States, 320,000 of them permanently; and 90,000 persons are annually killed by accident.⁴ Add Judge Biggs' demography to these statistics, and tragedy resulting from accident looms ever larger in the years ahead.

Vast sums of money have been made available by the insurance industry to replace the resulting, staggering personal financial losses, and to compensate injured persons for pain and disability. Unfortunately, these claims are not self-executing. Lawyers must contest many of them, because of honest differences of opinion as to liability, the extent of injury, the amount of money that ought to be awarded, or for other reasons not related to the subject of this paper.

Frank discussion of some of the facets of the physician-attorney relation may lead to greater understanding, and to a better working arrangement between the professions in the years to come. Certainly the problem will not “go away” if it is ignored.

Medical Reports

Today a lawsuit is largely a race for disclosure.⁵ The plaintiff's lawyer cannot expect reasonably early and adequate settle-

³ April 8, 1956 Speech, 28 Delaware State Medical Journal, 122 (June, 1956).

⁴ Roscoe Pound, 12 NACCA Law Journal, 197 (1953).

⁵ 1 Belli, Modern Trials, 695 (1954).

ment unless he reveals to the insurer the contents of the hospital records and medical reports. The wise lawyer readily submits his client to examination by the defendant's medical experts. Hospital records are usually secured early, by agreed court orders, or by depositions pursuant to subpoena. The patient's attorney *could* exercise the right to refuse disclosure, but generally waives the privilege, in order to assist the insurance company to discover the true condition of his client. Insurance companies often exchange their medical reports with plaintiff's counsel, in an effort to come to an agreement as to the extent of the injury.

The medical report is of the greatest importance. It should include the following points: (1) a good history, (2) first aid treatment, (3) dates of examination and treatment, (4) treatment rendered, (5) complaints, (6) symptoms, (7) objective signs, (8) a summary of findings on examination, (9) x-ray findings, (10) a diagnosis, (11) recommendation for examination by other medical specialists, if indicated, (12) opinion on whether or not the accident produced the injuries, and if it is not too early, (13) a prognosis, and (14) a statement of the cost of the medical treatment and report.

A prognosis which is the result of a snap judgment often subjects the doctor to embarrassing cross-examination, particularly when he writes "eight weeks" under "extent or duration of injury" and two years later, before trial, the patient still exhibits residuals. It is therefore suggested that prognosis remain "guarded" until the patient has obviously reached a condition of complete recovery, or of permanent disability, on a partial or total basis.

Our office recently handled a whiplash injury case involving a dentist. X-rays were negative. His neck pain progressed slowly. An early prognosis would have misled the lawyer into accepting an inadequate settlement. Six months later, x-rays revealed a calcification of an interspinous ligament. Since the extravasated blood from the ligamentous tear had not calcified at the time of the first x-ray, it was negative. Instead of the minor whiplash valuation first placed on the case, the settlement two years later was in closer conformity with the true condition.

Reports to persons other than his patient or his patient's attorney should be rendered by a doctor only on written authority from the patient, in accordance with the law of Ohio

and other states. The "Confidential Communication" statute⁶ of Ohio, for example, forbids a doctor to reveal medical information about a patient without written permission.

Once authorization is given, the doctor should advise the lawyer from time to time of the progress of the patient. The lawyer, in turn, should advise the client as to his responsibilities toward his doctor. A doctor should not be compelled to wait for his medical fees until the case comes to trial, except under special circumstances. The doctor is entitled to separate payment for reports, conferences with counsel, and time spent for court appearance. The lawyer should obtain permission from his client to pay the doctor for all unpaid medical services, out of the proceeds of the settlement of the claim.

A general practitioner often refers the patient to a specialist for evaluation or treatment. But the patient should keep in contact with the "family" doctor, and specialist's reports should go to the "family" physician routinely, with copies to counsel.

Histories of about 90% of all personal injury lawsuits are as uneventful as the course of healing of any well known and controllable disease. If the lawsuit does not die an early death because of some legal technicality, it is usually settled somewhere along the line before it gets to a jury. But as has been noted, many lawsuits develop into disputes on law, medical matters or monetary evaluation, and the case must be prepared for trial.

The Pre-Trial Medical Conference

Experienced trial lawyers on both sides of the case have, by this stage of the case, disclosed most of the legal and medical facts to each other. Depositions have been taken of opposing parties, and perhaps of the witnesses. Photographs and exhibits are ready for trial. The lawyer now approaches the pre-trial conference with his medical witness.

If the doctor has never before testified, the lawyer may face a hesitant and fearful witness. In this, the doctor is not at fault, and the lawyer must exercise patience.

Unfortunately the medical schools have, until lately, done little to help the physician to learn how to conduct himself as a witness.

⁶ Ohio Revised Code, Sec. 2317.02 (a).

Dr. Bernard Steinberg of Toledo⁷ said, in October of 1954:

"There are 3 reasons for this ineptitude of the doctor as an expert witness. In most medical schools the crowded curriculum does not allow for training in this field. There are no satisfactory organized post-graduate courses. Thirdly, very few doctors consider the subject sufficiently important to devote any time for study. Yet, the expert medical witness is a part of our social-economic scene. The occupancy of that uncomfortable chair in the courtroom is an obligation of the medical profession to the patient, to industry and to our courts of law."

The sometimes paralyzing fear that plagues the uninitiated medical witness often stems from this lack of instruction and experience.

The term "Globus Hystericus" which I mentioned at the outset of this paper was taught to me by a frightened doctor. He told me that he was horrified at the thought of testifying, and that on his one previous court appearance, he had become all choked up. After our pre-trial conference he decided to try again. He was a clear, concise and effective witness. He told me afterwards that he felt quite comfortable, and rather looked forward again to the next experience. Fear of cross-examination had completely disappeared after his first experience.

If the medical facts are reviewed with counsel before trial, and anticipated questions are discussed, there will be no fear. One case that we had well illustrated this point.

An attending doctor had failed to order an x-ray in a case where a woman had sustained fractures of the transverse processes of two dorsal vertebrae. Months later, when the client presented herself at my office, I suggested that we telephone this doctor and get his consent to send her to an orthopedist, who in turn would send her to a radiologist. Her doctor readily agreed. X-rays revealed the fractures.

Before the trial was held, the attending doctor said to me:

"I am embarrassed to testify, because the opposing lawyer is bound to ask me why I didn't order x-rays of this woman at once. Now what should I say if he asks me that?"

I answered him this way:

"Doctor, tell the facts. The jury will admire you because you are honest; and they will forgive you, because as it turned out the woman *was* sent to an orthopedist, and an X-ray specialist *did* discover the facts."

⁷ Dr. Bernard Steinberg, M. D. Laboratories and the Institute of Medical Research. The Toledo Hospital, Toledo, Ohio. 10 American Journal of Pathology, 1149 (October, 1954).

He was indeed cross-examined by opposing counsel as to why he had failed to order an x-ray earlier, and he readily admitted that he had made a mistake. In the final argument, the defendant's attorney argued that these were "lawyer-found" fractures, and said:

"I look with a jaundiced eye on a lawyer-found fracture."

We had only to gently remind the jury that *we* had not found the fractures; that the X-ray specialist had found them, and that we had merely done our duty. We had seen to it that our client obtained excellent medical care, so that as her counsel we could determine and evaluate the injuries. We told the jurymen that if they were injured and came into our office, we would send them to just as many specialists and radiologists as we felt they required in order to make them well, and also in order to thoroughly understand their injuries. The jury appreciated the honesty of the doctor, and expressed their opinion in their verdict for our client.

Essentially, the pre-trial medical conference is a review of what the doctor has already expressed in his reports. The client should be re-examined just prior to trial, so that the doctor's opinion is up to date. The facts about the doctor's education and other qualifications are reviewed, for the purpose of adding weight to his testimony.

How should the doctor be prepared for cross-examination? Cross-examination is one of the greatest weapons known to man for searching out the truth. Here is where legal advocacy and the scientific method merge, to produce the new concepts of law which are daily being forged by our tribunals. An understanding of the purposes, approaches, and *compromises* of the two professions must be understood by the inexperienced medical witness, so that he can face cross-examination in the spirit of the true man of science, and yet be able to meet the pragmatic demands of the law.

Advocacy and the Scientific Method

It is usually said, in articles seeking to define the physician-attorney relation, that the doctor and the lawyer search for truth in fundamentally different ways. For instance, Dr. Stetler⁸ says, "that the lawyer argues and contends with opposing counsel; that he is the advocate of causes; that his object is to mag-

⁸ *Supra*, note 2.

nify his own arguments, and belittle that of his opponents. Whereas, the physician does not live by contention. His training is in the free and open atmosphere of the laboratory, hospital, sick room or private office. He demands full and frank discussion and disclosure. All factors pertaining to the case are brought to light and evaluated . . ." etc., etc.

On the other hand, Professor Samuel Polsky, Director of the Philadelphia Medico-Legal Institute⁹ says that, "neither medicine nor law uses the adversary process or scientific method alone." He points out that after medical men make findings in laboratories and publish their findings, doctors from other cities or countries *attack* those findings. "The theory may not be overthrown for a generation or it may die in the next issue of the next scientific journal. The decision is then reached by the adversary process."

Dr. Polsky suggests that the adversary process can be called a part of the scientific process.

"Lawyers on the other hand," he continues, "have begun to recognize law itself as one of the social sciences, and at the University of Chicago they are trying to apply the scientific method to social research into law.

"The scientific method is not confined to the laboratory . . . The practising physicians have to do what the legal process does every day, come to conclusions on insufficient evidence. The doctor's clinical judgments in a given case, may of necessity be based on very little information. To save a life he has to act quickly on the evidence he has. And so law must make its clinical judgments in the courtroom on evidence that is often appallingly imperfect."

Dr. Polsky concludes, "the ideals, goals and methods of the doctor and lawyer are not so antithetical. And, therefore, we should reasonably anticipate a satisfactory mutuality and success in the solution of our joint problems."

Doctors ask this question: Why must a jury of 12 non-experts decide medical issues by the application of "common-sense?" The answer is that law struggles in the same area as medicine. Actually, neither is an exact science. The law's inability to achieve exact justice on medical issues may be said to result directly from medicine's failure to discover the cause and cure of certain devastating diseases.

⁹ 28 Delaware State Medical Journal, 131 (June, 1956).

We recently tried a lawsuit which illustrated the fact that advocacy and contention *must* continue in the law, as long as medical minds contend for different theories on subjects of causation and aggravation of diseases (of known or unknown origin), such as cancer.

A 68-year old man had been struck by a car. He had suffered various injuries. Among other things, his head had struck the pavement. His artificial dentures had broken into pieces small enough to lodge in his throat. Fortunately a passerby had been quick witted enough to put her fingers in the man's throat, and to pull these pieces out. There was testimony that debris and dirt had become lodged in his throat. He had suffered steadily increasing irritation and hoarseness, and about a year later, biopsy had revealed cancer of the larynx. His voice box then had been excised, and a tube had been inserted in his throat.

We contended that the trauma had caused the cancer. A professor of pathology was introduced by the defense. His opinion was that the cancer had no causal connection with the trauma.

It is common knowledge that there is sharp conflict on this issue, among medical men. We brought in a doctor who testified to exactly the contrary of what the defense's physician had said. The verdict was for the injured man, in a sum which indicated that the jury accepted the minority view.¹⁰

A lawyer is under a duty, as in this case, to support his client's cause by bringing in all available medical testimony, even if it represents a minority view. It does not matter how small the minority view may be. The lawyer is not the one to judge his client, or his client's case. There is a parallel in criminal law, which generally is not clearly understood by the public. A lawyer who defends a man whom he knows to be guilty nevertheless must defend him with his greatest effort. Quentin Reynolds, in the preface to his book "Courtroom,"¹¹ defines the role of the lawyer by citing from the play of Sidney Kingsley, "Detective Story":

McLeod (the detective, to *Sims*, the lawyer): "He's guilty! You know it as well as I do."

¹⁰ *Mahfood v. Lombardo*, Common Pleas Court, Cuyahoga County, Ohio, Case No. 612144.

¹¹ Quentin Reynolds, *Courtroom*, Preface IX-X, Farrar Straus and Co. (1950).

Sims: "I don't know it. I don't even permit myself to speculate on his innocence or guilt. The moment I do that I'm judging—and it is not my job to judge. My job is to defend my client, not to judge him. That remains with the courts."

As personal injury lawyers, for the plaintiff or defendant as the case may be, our task is to advocate that side which we represent. Until medicine provides the exact answer, the law merely requires that causal relationships between trauma and diseases of known or unknown etiology be established only by "reasonable probability,"¹² and that the prognosis be stated with "reasonable medical certainty."¹³

Actually, a doctor who disagrees with the majority opinion about causation usually must put out of his mind the expectation of any *ideal*, laboratory technician's 100% proof. Instead he must adopt the law's definition of proof, which is on a much lower scale. If the doctor believes that there is a probable causal relation, the law is satisfied. The doctor may still have doubts about his opinion, but his honest opinion is sufficient, as long as it meets that test.

Law cannot wait for absolute scientific and medical certainty. Doctors therefore can honestly disagree, within the present framework of law and medicine. Their testimony can differ on essential issues, and yet measure up to the highest professional standards of honesty and dignity. Actually, laymen serving on a jury will have greater respect for the members of the medical profession for admitting honest differences of opinion.

Until the cause of multiple sclerosis, cystic fibrosis, cancer, and other such diseases are discovered; and until the relation of trauma to heart conditions, diabetes and other known diseases can be more scientifically appraised, there will remain great differences of medical opinion, and therefore large areas in which medical specialists will continue to disagree.

Doctors, and lawyers for the defense, often have no patience with this thesis. But if for this reason they attack, as unsound, jury verdicts based on minority medical views, then our answer must be as Justice Wolfe of the Supreme Court of Utah said in a cancer case:¹⁴

¹² *Brandt v. Mansfield Rapid Transit, Inc.*, 153 Ohio S. 429; 41 Ohio O. 428 (1950).

¹³ *The Pennsylvania Co. v. Files*, 65 Ohio S. 403 (1901); *Leopold v. Williams*, 54 Ohio Appeals 540 (1936); *Paule v. Koblenzer*, 28 Ohio L. A. 664 (1939).

¹⁴ *Utah Fuel Co. v. Industrial Commission*, 102 Utah 26, 126 P. 2d 1070 (1942); 4 *NACCA Law Journal*, 70, n. 325 (Nov., 1949).

"Even doctors have no television of the pathological history of the inside of man."

Or, as Chief Justice Neil of the Tennessee Supreme Court said in sustaining a verdict for cancer caused by traumatizing a tumor:¹⁵

"Since we, as judges, lay no claim to expertness in these matters, we can add nothing to the discussion, nor can we be expected to resolve those conflicts which the medical profession itself has been unable to resolve. . . . Notwithstanding this uncertainty, we think that we are bound to treat the opinion of these doctors as something more than speculation and conjecture, which are polite terms for unscientific guesswork."

Whether the doctor has never been to court, or whether he is a frequent witness, there can be great teamwork for justice if the two great public service professions will try to understand their different, yet not-conflicting functions.

Lawyers are working hard to understand the medical profession and the principles of medicine. Lawyers study medicine at law schools, bar association seminars, conventions, and even in medical schools. They often meet today with distinguished medical men, in efforts to better understand medicine, especially as it applies to trauma.

Many doctors as a result do have an enlightened attitude towards the personal injury lawyer. Many doctors now realize that the lawyer wants a *true* medical picture of his client's condition and future. The lawyer, for his part, must seek to obtain for his client the necessary funds to pay for medical care. It is the duty of the lawyer to try to obtain for his client the money award which is the only remedy known to law, for the great tragedy of death or serious injury from accident.

We lawyers ask only this of the medical profession, to assist us in playing our appointed role. That role is to obtain from those liable therefor, the necessary financial means for the injured person, so that he can pay for medical care, for the support of his family, and for his rehabilitation in society.

A physician should remember, from the moment he undertakes to treat a patient, that his patient has basic legal rights. At the same time as it is the physician's duty to practice the best of medicine, it is also his duty to assist the injured party to obtain adequate compensation. The physician's function is not

¹⁵ *Boyd v. Young*, 246 S. W. 2d 10 (Tenn., December 14, 1951), Petition to Rehear denied February 9, 1952, per Neil, Chief Justice.

to advocate, of course, but to furnish the reports, information and testimony for, and in, the courts, if necessary.

Professional Authorities Urge Doctors to Testify

In 1953 the American Medical Association added to its "Principles of Medical Ethics" a new chapter, the first portion of which contains the following principles:

"Physicians, as good citizens, and because their professional training specially qualifies them to tender this service, should give advice concerning the public health of the community. *They should bear their full part in enforcing its laws* and sustaining the institutions that advance the interests of humanity. They should cooperate especially with the proper authorities in the administration of sanitary laws and regulations. They should be ready to counsel the public on subjects relating to sanitary problems, public hygiene and *legal medicine.*"

An editorial in the A. M. A. Journal on April 21, 1956, read as follows:¹⁶

"The solution of these problems is imperative since, in many cases, the testimony of a physician is absolutely essential to an attorney in the presentation of his client's case. If the attorney is unable to obtain medical testimony, the suit may never reach a jury. Similarly, the physician's records are very important to the attorney. It is generally considered that they have a decided effect on a jury and may be the most telling evidence an attorney has to offer. It is, therefore, of great importance that the physician-lawyer relationship be harmonious and that a physician be readily available with complete and accurate records when called upon to testify."

Bar Associations and Medical Academies are hammering out working agreements in many areas of the country.

In Cleveland, Ohio the Cleveland and Cuyahoga Bar Associations and the Cleveland Academy of Medicine have prepared a "Standard of Practice Governing Lawyers and Doctors." It is an exemplary document.¹⁷ For example, Clause 3 therein reads as follows:

"3. It is recognized that the duty of the doctor includes not only the treatment of the physiological and mental difficulties of the patient, but also making available for the patient or for his benefit the past and present facts of his situation to the end that justice may be served. Accordingly,

¹⁶ 152 Journal American Medical Association, No. 18 (August 29, 1953).

¹⁷ Cuyahoga County Bar Association Bulletin, December, 1956, p. 4.

the doctor, when properly requested by the patient, either directly or through his attorney, shall appear in court and there testify with full, fair and candid answers to the questions propounded to him concerning such facts and his opinions relative thereto. . . .”

Conclusion

There is no valid excuse for a physician failing to furnish reports and to act as a witness if necessary. He will find the lawyer co-operative and helpful in every way. Together, the physician and the lawyer perform a great public service.

I would like to close with the words of Justice Benjamin Cardozo, who once said, when speaking to a group of doctors and lawyers:

“The more I think it over, the more I think of the closeness of the tie that binds our guilds together.”