

Courts and Doctors

During the last few years several organizations devoted to the common concerns of the medical man and the lawyer have been formed in Canada. Evidence of the service they can render is given by the two papers that follow. The two were prepared independently, so far as we know, and they reached the editor's desk by different channels, but we thought readers might be interested to have them presented together. The first paper is by a lawyer, Mr. Edson L. Haines, Q.C., of Toronto, and it was delivered to the Medico-Legal Society there on February 27th last; the second, which was given to the Manitoba Medico-Legal Society the day before, February 26th, is by a medical man, Dr. Alexander Gibson, of Winnipeg. Although both speakers addressed themselves primarily to the doctors in their audiences, much of what both had to say is significant for lawyers as well. Perhaps we should add that Dr. Gibson's paper originally carried the title, *The Medical Witness*, but it seemed convenient to print it under the general heading of *Courts and Doctors*.

Mr. Haines' paper follows:*

Why is a doctor who gives evidence against another doctor in a malpractice action a social pariah among his fellow practitioners? Why should a man who has been injured by a doctor's neglect be without redress because he cannot find competent medical evidence to establish his case in court? Many lawyers have had a client come to them with serious injuries suffered at the hands of some medical man and say in effect: "A doctor, who will not let me use his name, tells me my injuries are due to the attending physician's negligence, but in no circumstances may he be brought into the case. He suggested I might find an American doctor to testify." Or, how often have medical friends told us in confidence that the treatment our client complains of was improper, but they have to live with the other doctor and are horrified at the suggestion they might help. Or, take the case that on the surface is so bad that the court is prepared to say that the injury itself bespeaks negligence — *res ipsa loquitur* — and where judgment will go against

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the defendant unless a reasonable explanation is forthcoming to show how the injury could have occurred without negligence. How often do we then see eminent doctors go into the witness box and testify in such a way that one gets the impression they are only trying to rescue their unfortunate confrere?

Admittedly, a bad result does not establish negligence, but surely all bad results are not inevitable. The broken teeth during a tonsillectomy, the severed nerves during an operation, the anaesthetic deaths, the X-ray and diathermy burns, the failure to discover fractures, the sponges left in wounds or abdomens, the broken needles, and countless other mishaps must be due to negligence in a fair percentage of cases. Yet the sufferer finds himself without redress because no member of one of our honoured professions will come to his assistance. The patient and his friends are resentful and frustrated, and the whole profession suffers as a result. Judges are obliged to dismiss actions because the plaintiff cannot find a doctor who will assist the court. And when he does dismiss the action, the judge often wonders at the "bond of silence" that cloaks the mistakes of medical men.

Many doctors believe that the careless practitioner should not be allowed to hide behind this wall of professional silence. Not only does it allow the incompetent to continue making mistakes, but it brings disrespect to those who practise carefully and conscientiously. I believe that the medical profession in Canada has no need for a conspiracy of silence in alleged malpractice cases and that the time has come for the profession to assume corporate responsibility for providing an injured claimant with the necessary medical evidence to enable him to place before the courts the appropriate standards of care, so that justice can be done between the parties.

What would medical men think if all the professional engineers combined and refused to give evidence against each other in any case of incompetence? A defective bridge could collapse with great loss of life; a poorly designed piece of equipment could cause a plane to crash, brakes to fail, or a fire door to jam. Yet the courts would be unable to find that the bridge was defective or the equipment poorly designed because no one would testify about proper and suitable standards. That result would be intolerable. And, yet, is not the situation in the medical profession exactly comparable?

In some measure medical men surround themselves with this wall of professional silence because they misunderstand what happens in the courts. They are just as frightened, I suppose, of our

courts as we are of their operating rooms. Only the other day I heard a doctor compare the operating room with the courtroom, but he added, "We surgeons treat our patients more kindly; we give them a general anaesthetic before we operate". Undoubtedly a lawsuit is a harrowing experience for the uninitiated, and it is easy to see why doctors have concluded that the best way to keep out of court is to keep quiet about each other's mistakes. The purpose of this paper is to enlighten doctors about what really happens in courts and to show them how the law protects them from improper claims. The doctor's rights are jealously guarded and protected. Although I am going to go further afield and make some general observations about malpractice suits and the doctor's rôle as a witness in other cases, I will return to my main theme from time to time.

The Medical Man's Standard of Care

The essential obligations the law imposes upon the physician or surgeon in general practice who takes charge of a case are simply stated. They are: (1) He must possess and use that *reasonable* degree of learning and skill *ordinarily* possessed by physicians and surgeons in the locality where he practises. The key words in this statement are "reasonable" and "ordinarily". The degree of learning and knowledge is the degree that might reasonably be expected from the average doctor in the district. Few men have rare and extra endowments, but a doctor is not judged by the standards of the paragon. He need only display the skill and learning of the average physician. Furthermore, a country practitioner, for example, may not have the same opportunities to confer with fellow practitioners as the practitioner in larger centres and one must take into consideration, therefore, the locality where the doctor practises.

(2) The doctor must use his best judgment. Judgment is the faculty of deciding wisely. The law will not be satisfied with anything less than the use of "his best judgment" in exercising his skill and applying his knowledge. He must make the best and wisest decision within his power. It does not of course require him to have or use the best judgment some other man might use. It is not the best *possible* judgment, but *his* best judgment, he must bring to bear.

(3) He must keep abreast of the times and follow the approved methods in general use. He must know what is going on in medicine, what new discoveries have been made, what old opinions or conclusions have been discarded. He should take advantage of

medical and scientific journals and if possible attend conferences where he may exchange information with other physicians. Doctors are singularly fortunate in the wealth of scientific literature which is available to them and they fail to take advantage of it at their peril.

The Specialist's Standard of Care

I have already pointed out that the standard of care of the average general practitioner is referable to the locality in which he practises. Conceivably, it might vary in different districts. There is no such local standard for the specialist. He holds himself out as possessing special skills and knowledge, and it is his duty to have and apply the degree of skill possessed by the average specialist in his field. The same degree is expected of him whether he is practising in a large city or a small centre.

The Patient's Duty to his Doctor

The patient's duty may be summed up as the duty to (1) make honest disclosure; (2) follow orders and directions; and (3) return for treatment. Too frequently, we overlook the duties devolving upon the patient. He must make honest and full disclosure, and he withholds information at his peril. He cannot disregard the doctor's orders and directions. If he refuses to submit to a test or an operation, or to follow treatment he considers distasteful, the patient cannot complain when the results are unfortunate. A patient may fail to return for treatment for a multitude of reasons and a wise doctor will explain to him the necessity of treatment and the consequences of his failure to submit to it. In cases where the patient claims that he did not know he was to come back, I think the onus is on the doctor to satisfy the court that he told the patient what was expected of him. All of us have a tendency to forget our doctors as soon as we think we are well. It is the doctor who knows whether it is important to continue treatment, and my advice to doctors, in cases where the continuation of the treatment is vital to recovery, is to make the fact very plain to the patient and even look him up when he fails to return.

Elements of an Action for Malpractice

In order to succeed in an action for malpractice, the plaintiff must establish, or he fails, that (1) the relationship of physician and patient existed; (2) the doctor departed from some duty he owed his patient; and (3) the departure from duty was the competent

producing cause of the injury. No doctor can be found liable unless he has taken charge of the case. In this connection I should like to comment upon a misunderstanding among many laymen. A doctor is not like an innkeeper or common carrier. He need not accept every case that offers: he is entitled to accept or reject a patient. When he does accept a patient, no particular form of words is necessary; actually, nothing may be said at all. It is sufficient if reasonable men would say that the doctor has taken over the patient's care. No fee is necessary: the obligation of a doctor is exactly the same to a charity patient as it is to one whom he expects to charge a substantial amount.

A doctor does not guarantee a cure or a good result. And a bad result does not in itself establish negligence. He is not liable for a mere error of judgment, provided he does what he thinks is best after careful examination. Where there is a choice of approved methods, one method may be preferable to another. The doctor must decide which he will follow. If he errs in his choice, he is not liable, provided, as I say, he has done what he thinks best after careful examination. But a doctor may not adopt a procedure that has been universally condemned or one that has not yet received the approval of scientific men, and then assert that doing what he did involved a mere "error of judgment".

Generally speaking the allegations that succeed against a doctor in a malpractice suit are (a) his failure to use reasonable care and diligence; or (b) that he departed from approved methods in general use. Rarely is it established that he did not possess the requisite skill. I suspect that, if the doctor did not have the requisite skill at the time of treatment, he has it almost invariably by the time of trial. Let me illustrate how far the courts will go in protecting a man who has made a wrong diagnosis but displayed reasonable care and diligence, and followed approved methods in general use. In 1950 the House of Lords decided the case of *Whiteford v. Hunter*.¹ What had happened was that in March 1942 the defendant surgeon examined the plaintiff, diagnosed the condition as an enlarged prostate and recommended removal. On opening the bladder, he found a large mass at its base and, after examination by eye and hand, wrongly concluded that it was an inoperable cancer. He told the plaintiff's wife of the diagnosis and indicated that the plaintiff would only live a matter of a few months.

In the belief that he had not long to live, the plaintiff abandoned his position as a consulting engineer, sold his belongings, gave up his home in England and returned to the United States.

¹ *Whiteford v. Hunter*, [1950] W.N. 553, 94 S.J. 758 (H.L.).

In September another operation was performed by American doctors, and it was found that the doubtful areas showed a chronic cystitis and a small fibrotic prostate, but no cancer.

The main complaints were that: (a) no cystoscope was used before the opening of the bladder; and (b) no specimen of the growth was taken in order to test microscopically whether it was cancerous or not. Lord Porter pointed out that "a defendant charged with negligence can clear himself if he shows that he acted in accord with general and approved practice". The defendant surgeon gave evidence that his action conformed to the skilled practice of the profession and two eminent surgeons came forward in support of his assertion. The evidence also showed that no specimen could have been taken by means of a cystoscope unless it was fitted with a rongeur attachment, and in 1942 that instrument was rare in England and not possessed by the defendant surgeon. The court found there was no negligence because the defendant surgeon had followed the general and approved practice.

The essential requirement that the departure from duty must be the producing cause of the injury is frequently overlooked by all of us. It is useless for a plaintiff to establish that the doctor assumed the responsibilities of treatment and failed to treat carefully, unless he can also establish that the injury or illness followed as a result of the careless treatment. Frequently, the result would have been the same irrespective of the treatment; the disease would have run its course even if some other treatment had been given. It is imperative that the plaintiff establish by a preponderance of evidence that the bad result would not have arisen except for his doctor's malpractice.

Unless, then, an injured plaintiff can establish the three foregoing elements, he cannot hope to succeed in a malpractice action.

How an Action for Malpractice is Tried

The plaintiff commences his proceedings by having his lawyer issue a writ, which is served on the doctor. The lawyer acting for the doctor, or the doctor's insurer, enters an appearance. Next, the plaintiff must serve a statement of claim, in which he sets forth clearly the alleged acts of malpractice, so that the doctor will know exactly what he is charged with. A statement of defence is filed on behalf of the doctor, to which the plaintiff may file a further document known as the "reply". These three documents are called the pleadings, and they constitute the written record upon which the action will be tried.

Before trial there may be an examination for discovery, which is a proceeding under oath before an officer of the court. Each party is entitled to ask the other about the facts on which he relies in establishing his cause of action or defence. In my opinion, this proceeding is invaluable in malpractice actions. It enables each party to know exactly what is being said about him, and the element of surprise at the trial is materially reduced.

In the province of Ontario, malpractice actions are tried by a judge alone. A doctor may be confident that our judges will try the case dispassionately and are not apt to be swayed by sympathy or prejudice. In some jurisdictions these types of case may be tried by jury and, not unnaturally, a doctor may fear what will happen before such a tribunal. It has been my experience that juries are exceedingly capable when the plaintiff and defendant are of equal status in their community. When the status is unequal, as in the action of a widow or poor person against a large corporation, we are apt to get some surprising results. And the same thing is true in the case of a horribly injured patient who is suing a prominent doctor; juries may not be able to see beyond the injury. Doctors with professional friends in the United States who have misgivings about the fairness of civil trials might remind them that malpractice cases are generally tried in the United States by juries, where the citizen has the constitutional right to trial by jury.

The Need for Expert Testimony

When a judge comes to try a malpractice action he will probably have no personal knowledge of the standard of care that should have been shown by the doctor. Before the judge can reach a decision, competent witnesses must appear before him and testify what ought to have been done in diagnosing the case and what treatment should have been given. With this evidence before him, the judge can inquire what was actually done by the defendant physician and decide whether he has lived up to the required standard; he is able to make findings of fact on the diagnosis and treatment, and upon these findings he will reach a decision.

Without this evidence the judge is powerless to decide the case and must dismiss it. Faced with this possibility, a lawyer who cannot for one reason or another produce expert witnesses might attempt to make out his case upon the examination for discovery of the defendant doctor and by the use of textbooks. Anyone who has attempted to follow this road knows that it is very rough; the layman cannot grapple with the intricacies of medical science. Aristotle said, "As the physician ought to be judged by the physi-

cian, so ought men to be judged by their peers". This is particularly true in malpractice actions, and the courts are looking to the doctors to provide the necessary evidence to enable actions against doctors to be tried on the same footing as against any other professional man.

Before leaving this phase of malpractice actions, I should mention a small group of cases in which the plaintiff can usually make out his case without expert witnesses, although he may very well need them once the defence is developed before the court. Lawyers refer to this type of case as involving the doctrine of *res ipsa loquitur*. It is really a doctrine of common sense. It applies where the thing causing the damage is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care; it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care. Illustrations that suggest themselves are an operation on the wrong part of the body or the wrong patient, breaking teeth during a throat operation, a sponge left in the trachea without explanation, a patient going into the operating room for an appendectomy and coming out with a broken leg.

The Physician's Responsibility for Others

Generally speaking, unless the physician is the master of a nurse, interne or other doctor, or has directed the actual negligent act, he has no liability for them. With respect to internes, the pre-operative and post-operative care is usually left to them, and they undertake it in the course of their duties in the hospital. They do it as independent actors, but, of course, if the surgeon himself has undertaken to give the pre-operative or post-operative care and does it through the internes, directing them as to the manner of doing it, there will be liability. There is no liability for the negligence of nurses unless the nurse happens to be the employee of the doctor. This is not the relationship in hospitals and usually liability is confined to those cases where the accident happened in the doctor's office or the doctor took his own nurse into the hospital.

The anaesthetist is not responsible for the surgeon's negligence; each is performing his professional duty towards the patient; they are collaborating; but each is not liable for the acts of the other. There is an exception to this rule in the case of obvious misconduct. For example, I should think that an anaesthetist who proceeded to give an anaesthetic and permitted an intoxicated surg-

eon to operate would be responsible along with the surgeon for the injury resulting to the patient. The same rule would apply if a surgeon permitted an anaesthetist who was intoxicated to give an anaesthetic. I mention these only as illustrations of the type of obvious case that would have to arise before one doctor attending an operation would be responsible for the malpractice of another.

What is the situation of a doctor who goes away on his holidays and leaves a substitute in his place? Unless the substitute is his partner or an employee, he will not be liable. What he is really doing is sending another professional man to continue the treatment in his absence. The relationship of physician and patient immediately arises between the substitute and the patient, and the substitute alone is liable for his malpractice.

Then there is the question of the physician who recommends a surgeon to perform an operation, and the patient complains of malpractice by the surgeon. The physician is not responsible for the negligence of the surgeon, unless he participates in the very act that caused the injury. There might be responsibility where the physician assists the surgeon at the operation, but if he does not participate in the operation the physician will not be liable.

Operations Without Consent

Subject to what I am going to say in a moment, every person has a right to determine what shall be done with his body and, if a surgeon performs an operation without his patient's consent, it is an assault for which he is liable in damages. That is why most hospitals require the completion of a form authorizing the operation so as to remove any doubt about consent. Where a dispute arises between the doctor and patient over whether there was consent to the operation, our courts look to the doctor to establish his defence. He may do so in a variety of ways. But I think every surgeon would be wise to obtain written authorization beforehand.

Where children are involved, consent should be obtained from the parent or guardian. In some cases this may not be possible, but the advice is good, because something often goes wrong with a child and parents are quite likely to take exception to what was done. There is an American case on record where a child was suffering from diseased tonsils and adenoids and, with the older sister's consent, the surgeon performed the operation. The consent of the parents was not obtained. The child died under the anaesthetic. The parents sued the doctor and the court held that he was guilty of a technical assault, inasmuch as no emergency ex-

isted to justify the operation without the consent of the parents.

There is another type of operation where because of the nature of his ailment the patient can give only a general authority. Here the courts hold that consent may be implied. They have said:

When a patient describes to a surgeon the symptoms of an ailment from which she is suffering and consents to an operation for the relief of her condition, she will be presumed to have authorized the surgeon to perform such operation as may be required by the conditions which he finds. And when during the course of the operation it appears to the surgeon to be necessary to extend its scope beyond what was originally contemplated, consent to such extension will be implied.

To all the foregoing there is, of course, the exception of emergencies. Here the surgeon is justified in operating even without the patient's consent. The patient may be unconscious and his life or health seriously in danger. A doctor is called in; he must exercise his best judgment and then do what he considers appropriate. He would be remiss in his duties if he did otherwise. But in such cases I think it is always wise for the surgeon to confer with one of his confreres before operating, for it is well to share the responsibility and have the assistance of a brother doctor should something unexpected happen.

Abandonment: Termination of Doctor-Patient Relationship

Having accepted a case, a doctor cannot summarily quit without first giving the patient sufficient notice to enable him to procure another physician. There is a continuing duty upon the doctor to look after the patient's health, it being an implied term of his contract to treat the patient during his illness. The length of the warning, and the nature of it, depends upon the circumstances and the availability of other doctors. If I were a doctor, I would not be inclined to retire from a case unless I was morally certain that a court would say, should the question ever come before it, that I had given ample notice and that other doctors were available.

On the other hand, a patient may dismiss a doctor peremptorily. It is his privilege. He need give no particular notice so long as he makes it understood that the services are terminated. Generally speaking, the retaining of a second doctor without the consent of the first will be construed as a discharge of the first doctor.

Finally, a consultant is usually under no duty to treat the patient. He advises what should be done and gives the benefit of his experience. It is for the physician to implement the advice.

Ten Suggestions on How to Avoid Being Sued

(1) The doctor should make use of every diagnostic aid. X-rays, urine and blood tests, pathological and microscopical examinations are all available to the modern practitioner. If he has an honest doubt about the correctness of his diagnosis after he has done his best, he should call in another doctor to confirm it.

(2) If he has any doubt about his ability to treat or operate, the doctor should call in a consultant.

(3) In operations particular attention should be paid to sponge counts and an appropriate note made on the hospital chart.

(4) Care should be taken in the choice of anaesthetics, with regard for a patient's idiosyncracies to a particular anaesthetic. If the anaesthetic is a general one, it should not be administered to a patient with food in the stomach.

(5) Careful records should always be kept.

(6) If a patient insists on leaving the hospital against his doctor's advice, he should be required to sign a statement acknowledging the position.

(7) X-ray therapy and diathermy are a most productive source of litigation. They should not be used except by those who fully understand them, after making certain that the equipment is in good working order. The patient's susceptibility to X-ray burns should be carefully checked.

(8) A doctor should keep up to date by reading medical journals and the new textbooks and, if at all possible, attending clinics frequently.

(9) Conservatism in prognosis and scrupulous honesty in advice and treatment will bring their reward. Unjustifiable promises often lead to disappointment and, sometimes, to malpractice actions.

(10) A doctor should not indulge in criticism of fellow practitioners, unless he really knows all the facts. Behind many law suits are the careless remarks of some physician.

Limitation of Actions

An action must be commenced against a doctor within one year from the date when in the matter complained of the professional services terminated. For example, the act of malpractice occurred in January but the doctor continued to treat until October. Under the Medical Act, the period of limitation does not start until October.²

² R.S.O., 1950, c. 228, s. 41.

A dentist, on the other hand, must be sued within six months.³ An action against public hospitals must be commenced within six months after discharge⁴ and against private hospitals, within six years after discharge. In the case of mental hospitals a fiat is required from the Attorney-General and an action must be commenced within twelve months after the release of the person who has been detained.⁵ An action against a nurse must be commenced within six months of the alleged malpractice.⁶

The Doctor as a Witness

We lawyers are responsible for much of the trouble doctors get into in the witness box. The Canadian system of trying a case is an adversary system. Consequently, any doctor giving testimony finds himself cast in the rôle of either a plaintiff's or a defendant's witness. Try as he may to be independent, he finds himself constantly pulled into one or other of the contending camps. Furthermore, lawyers are inclined toward the doctor who is willing to be an advocate in the witness box. If we act for an injured plaintiff, we like someone who will describe the injuries in such vivid terms that the jurymen will wince; if we are acting for defendants, we feel partial towards those doctors whose natural inclination is to minimize pain and suffering. You must pardon the lawyer for feeling this way because, in the adversary system, his first duty, though not his only duty, is to win his client's case. He recognizes that in damage actions the medical side of his case must be established through the medium of the doctors. Quite naturally, he is going to emphasize and play up those aspects of his client's case that will best serve his purpose and tend towards the verdict he seeks. Indeed, if he failed to do so, he would be remiss in his duties.

My advice to doctors is to resist the temptation to become advocates. That temptation arises not only because of the prodding of lawyers but also because of the doctor's association with the patient-client. The doctor's sympathies are often aroused; sometimes his opinions are challenged and he is inclined to overstate in order to achieve a point. The witness who becomes an advocate invariably finds himself subject to attack under cross-examination and, as his rôle of advocate becomes more apparent, the court loses confidence in his testimony. I think doctors would be well advised to leave advocacy to the lawyers.

³ The Dentistry Act, R.S.O., 1950, c. 92, s. 30.

⁴ The Public Hospital Act, R.S.O., 1950, c. 307, s. 33.

⁵ Private Sanitaria Act, R.S.O., 1950, c. 290, s. 60.

⁶ The Public Hospital Act, R.S.O., 1950, c. 307, s. 33.

When called as a witness, the doctor's evidence will naturally fall into two parts: first, there is the description of the factual situation, the injuries and their course from day to day through convalescence to recovery. What was seen and heard are all matters of fact to which the court will pay close attention. The second part of the evidence will consist of opinions: that is, the doctor's diagnosis and prognosis. Here he may find that his opinions are contested, particularly over a prognosis of long disability. It goes without saying that he should be prepared to support his conclusions.

When called as a witness, a doctor will often be asked to speak as to what occurred a year or more previously. He is a well advised man who comes to court prepared. He should examine his diaries, the hospital histories and other clinical records. It is so easy to become confused in the witness box and give a poor impression. I recommend that doctors bring their records to court with them, for frequently questions will arise that were not contemplated even an hour before trial, and it is well for the doctor if those records are on hand to assist the court.

It should be remembered that a witness is not called to make a speech. He can testify only in response to questions. For most of us, that is a very unusual way of expressing ourselves, yet lawyers and judges will tell you that it is the only way by which evidence may be introduced in court. To prepare for it I think that doctors should take advantage of the opportunity for a brief interview with counsel before testifying. It is entirely fitting and proper that they should do so. The successful presentation of evidence is dependent upon close co-operation between counsel and witness. It is much better if the doctor has an acquaintance with counsel, however brief, and knows something of the points in issue in the case and how the evidence is going to be brought out. Once you are in the box, your patient's counsel cannot suggest your answers. That would be leading. He can only bring you up to the subject matter and then ask you for your findings and opinions. It is very useful if you have had the preliminary interview and know what counsel has in mind.

What Makes a Good Witness?

No complete description of the good witness can be given, but, generally speaking, the forthright individual who speaks clearly and answers only the questions asked of him makes by far the best impression. Be attentive to questions, particularly in cross-examination. Answer them briefly and where possible without us-

ing medical terms. I have seen juries sit up expectantly when a doctor is called to the witness box and then gradually lose interest as he proceeds to describe the case in technical language. He might as well have been speaking in a foreign language. Not only is the attention of the jury lost, but jurymen, and sometimes even judges, are irritated by being asked to listen to what they cannot understand.

It is never wise to volunteer information. A volunteered answer usually leads to trouble, and sometimes to disaster.

Do not lose your temper. I have often seen a witness make a good impression through a long examination only to destroy it in the last few minutes by losing his temper at what he considers to be some inane question or personal affront. Usually, he retires from the witness box having injured the case.

Privileged Communications

Privileged communications can be made only by a client to a lawyer. Privilege does not extend to doctor and patient or to priest and penitent. In Ontario there is a partial exception to this in the Venereal Disease Act, and a doctor cannot disclose communications respecting venereal disease except in limited circumstances. In Ontario he must give evidence concerning venereal disease in judicial proceedings where the facts are relevant to the issue. But, speaking generally, if you feel that your patient is about to impart something to you that might embarrass him later, it is wise to warn him that anything said to you is not privileged and that you may be obliged to disclose it in court. It will save trouble for both of you.

Certificates of Lunacy

There is one more point I should like to mention to you for your further thought and study. Doctors are frequently called upon to give a certificate of lunacy, and there is always the fear that the alleged lunatic may later on sue the doctor for negligence. I suppose a man who has been committed to a mental institution upon the certificate of doctors feels just as strongly against those doctors as a man who has been sent to jail for burglary feels about the convicting magistrate. The magistrate has the protection of our statutes, but anyone who thinks himself aggrieved can sue a doctor for negligently certifying him. In England this problem has been met by statute:⁷

⁷ The Mental Treatment Act, 1930, s. 16 (2).

Before an action can be brought against a medical practitioner for negligently certifying a person to be a lunatic, leave must be obtained from the High Court, and leave shall not be given unless the Court is satisfied that there is substantial ground for the contention that the person against whom it is sought to bring the proceedings has acted in bad faith or without reasonable care.

I am told that there are similar statutes in British Columbia and Alberta. It may well be that protection ought to be given medical men in the other provinces.

Conclusion

Returning now to the problem of corporate responsibility in malpractice cases, my proposal is that the organized medical profession should assume responsibility for providing competent experts to assist any plaintiff who asks for them. The scheme would work something like this. Counsel for the injured claimant would communicate with the College of Physicians and Surgeons or the governing body of the profession in the province. The appropriate authority would in turn nominate one or more of their members who are competent to deal with the problem in question. The doctor designated would hold himself available to confer with counsel and, if required, would appear in court and give evidence on the approved methods in general use and the nature of the care and diligence required. Although called as a witness by the plaintiff, it would be made plain that he is in court at the request of the organized profession so that the court can ascertain the nature of the duty devolving on the defendant. I should think that such a witness would be scrupulously fair and that his very fairness would bring credit to his profession. In a case where the defendant is not at fault, his evidence would receive great weight, and the case would come to an early end. The plaintiff would know why the defendant is not liable and would have had his day in court. In a case where the defendant is at fault, the scheme would probably result in a settlement without trial.

Instead of being accused of maintaining a wall of silence, the medical profession could say that in the interests of good public relations they are prepared to assist everyone who thinks he has a just claim in the investigation and presentation of his claim. Criticism would give way to praise. And the doctors who were nominated by the governing body to make themselves available to injured claimants could not be criticized by their confreres, since they would be acting at their request.

Dr. Gibson's paper follows:*

It is probable that a doctor rarely enjoys appearing as a witness in court. There are several reasons for this. The experience is a reminder of the *viva voce* tests of which he ran the gauntlet during his years of pupillage, and these were rarely occasions for rejoicing. Not seldom, indeed, they were linked with sombre tidings. Again, every doctor worth his salt is an individualist, accustomed to accept responsibility. He intimates his findings and prescribes the future conduct of his patient with only occasional argument or contradiction, and, quite unreasonably but humanly enough, he is apt to resent a challenge to his pronouncements. Put this into legal phraseology and it means that every doctor acts as judge and jury in every case that comes under his care. As jury he determines the particular transgression of the laws of health of which his patient has, consciously or unconsciously, been guilty, and he prescribes the penalty, the nauseous potion or the surgical ordeal by which the offender may expiate his misdemeanour and rejoin the ranks of the hygienically sinless.

The specialty of medicine is not an exact science like mathematics or physics. It is based on observed facts and established physiological and pathological laws, but these have to be interpreted in each instance. Inferences have to be drawn, and every conclusion arrived at is an expression of opinion, not an ineluctable consequence. Further, presuming that the inferences drawn and the opinion arrived at are correct, there remains the question of procedure. Which is the right one to follow? Here again opinions are manifold. That is not necessarily a disadvantage, for the same objective may be reached by different paths. Each man, however, is prone to think his own way the best and all others less worthy of acceptance.

Nolens, volens, every doctor is likely to appear in court as a witness at some period of his career and it is desirable that he should have some guiding principles. These are few and simple:

- (1) he must have a clear conception of what constitutes "evidence";
- (2) he must observe as many facts as possible, and base his conclusions on these facts;
- (3) he must offer no opinions which he cannot support by observed facts or by accepted theory;
- (4) he must always be ready to admit, "I do not know".

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The Medical Report

I think the majority of doctors feel that the most exacting phase of medical testimony is the battery of cross-examination they may have to undergo at the hands of the opposing counsel. With this opinion I cannot agree. The key to the situation is the medical report. If this is accurate in its recording of facts, logical, objective and moderate in its conclusions, the witness will find his position unassailable. On the other hand, if he mingles the patient's story with his own observations, or in his summing-up permits himself to be influenced by sympathy for or hostility towards the patient, the skilful cross-examiner will speedily unveil the truth, to the discomfiture and, at times, humiliation of the witness.

The experienced medical reporter knows how to draw up such a report. The inexperienced doctor may bungle the task. I would suggest that the young practitioner, cited to appear in court, perhaps for the first time, should set down in writing the essentials of his testimony, whether he has been asked for a written report or not. This exercise will clarify his thoughts; he may detect weaknesses or inconsistencies in the position he has taken up, and he may discover that it is expedient to refresh his mind about technical matters on which his knowledge may be sketchy or his recollection cloudy. He will learn to separate what he has observed for himself from the things that have been told to him by others, and he will cast about to anticipate the line of attack that a cross-examiner may take. In all this his wisest mentor is not another doctor but an experienced and understanding counsel.

The medical report consists of three parts: (1) the patient's story; (2) the examiner's findings; (3) the comment.

The Patient's Story

This should be listened to with unwearying patience. Let him tell it himself, however prolix he—or she—may be. It may be necessary to ask questions; if so, the questions should always be direct; leading questions are inadmissible. Much of the history given will be irrelevant, but listen to it all and write most of it down. As you write it down, read your notes aloud so that the patient can hear, and stop every few minutes to say, "Is that correct?" If an accident has occurred, try to get as many details as possible. This may have a bearing on whether concussion of the brain has occurred; it frequently has the effect of shedding light on the credibility of the patient. One's aim should be to form as clear a

mental picture of the episode as possible. In a recent case, an elderly lady claimed to have been injured by catching the heel of her shoe on a loose strip of brass attached to the front of the second step from the bottom of a flight of stairs. According to her story, she was thrown backwards, injuring her spine, and was then projected violently forward to the landing at the bottom of the flight of stairs, thus injuring her arms and face. I was unable to form a satisfactory mental picture of the occurrence, and asked her how it happened that she was first thrown backwards and then immediately forwards. She looked at me almost coquettishly and remarked, "Ah, that's the sixty-four dollar question".

Lay special stress upon the complaints the patient still has and find out whether they are unchanged, improving, or getting worse. There are only three things of which a patient complains: (a) pain; (b) deformity, using the term in its widest sense; (c) disability — he cannot now do things he could do before his accident. Inquire in detail about each of these, and when the whole history has been taken, never omit to ask, "Now is there anything else troubling you"?

The Physical Examination

Complete physical examination of a patient would take hours or days and is not expected of the examiner. A doctor who is reasonably competent will select the outstanding features of the case and try to concentrate on them. Indeed a complete examination would only lead to confusion; it is the duty of the examiner to select what is relevant and omit the non-essentials. Make the examination of the relevant features as thorough, precise and detailed as possible. If shortening of a limb is present, measure the amount; if there is wasting, note the circumference of the two limbs at corresponding levels. Every doctor should carry a tape-measure. Never omit examination of the central nervous system. A patient seen recently, who complained only of pain in the back, turned out to be an early case of multiple sclerosis. Always carry a safety-pin. Apart from its plebeian virtues as a potential friend in need, it enables you to mark out areas corresponding to sharp and blunt stimuli which may unmask a purely subjective psychic loss of sensation or a hysterical paralysis. Needless to say, never hesitate to have radiographic examination. That introduces you to a realm of surprises.

Having obtained the history and made the physical examination, go through these carefully and write down a consecutive narrative, including the patient's complaints in full. This process

enables you to sift the wheat from the chaff. Your physical examination should have been systematic and should need no rearrangement. Next comes the most important part of the report to you in your appearance as a witness.

The Comment

The physical findings and the history are collated and where possible correlated so that, if you can, you give an explanation of all of the patient's complaints. These should be evaluated, especially in relation to his accident; a prognosis is given as to the time necessary for recovery and the prospect of complete recovery. It is obligatory to record and estimate every permanent disability and deformity, and to bring to notice those that are likely to develop, such as osteo-arthritic changes in a damaged hip-joint, even though the change may not have appeared at the time of your examination.

It is thus clear that a medical report is a strictly impartial document. The lawyer who has employed you may not find your report to his taste. I once said to an insurance adjuster, "Well, I don't suppose you liked that report I sent you". He replied, "I'd rather find it out now than in court". Remember, too, that the counsel who has employed you has a right to feel that you have let him down if you have omitted to bring forward unfavourable facts which the opposing counsel may force you to admit.

Psychological Considerations

There is a realm of inquiry about which I am not certain in my own mind. More and more, we doctors are realizing that the patient is an individual with hopes and fears, ambitions, resentments and a variety of other emotions, which can affect profoundly his outlook on life and even his physical well-being. The influence of these emotional factors depends partly on his physical constitution, partly on his mental make-up, and partly on his education and training. It is exceedingly difficult if not impossible to weigh these intangibles in the balance. In the words of Robert Burns,

"What's done we partly may compute,
We know not what's resisted."

Fear of the economic future may be almost overmastering to a man whose education has gone no further than grade IV, whose sole métier is that of a labourer. On the other hand, there are individuals who have made the discovery that it is the creaking

wheel that gets the grease. Such persons, whether they obtain the desired lubrication or not, usually do their best to qualify for it. As doctors we find out a good deal about the economic position and mental outlook of our patients. Should that information be embodied in a report or not? Up to the present I have not done so but have noted it as a help in estimating the validity of the patient's complaints of pain, particularly if, as in a recent case, the physical signs steadily approximate the normal while the subjective tale of suffering shows no diminution.

It may be, too, that I am trespassing on the domain that the psychiatrists have pre-empted as their own, and yet there are some elementary psychological considerations which they are apt to obscure in a welter of polyglot verbiage and which are nevertheless so simple that no medical man dare ignore them if he is to understand his patient. I should be glad to know what is the attitude of the law to considerations such as these. Medical practitioners, at least, dare not treat their patients as mere physical mechanisms. Many unfortunate patients are keyed up to a state of suspense that puts a brake on their recovery to normal. That is why the opinion is so often expressed that most or all of the patient's complaints will vanish when the lawsuit is settled, and not until then. If the outcome of the litigation is favourable, the swiftness of the recovery may be quite impressive.

Relation to Judge and Jury

The medical witness must keep in mind at all times the first reason for his being in court at all. It is to enlighten the judge and the jury on the facts of the case. His prime duty therefore is to make use of the simplest possible language to express his thoughts. We all have a technical vocabulary we use as a means of communication among ourselves. The judge may lack this equipment and the jury certainly will. The witness must therefore see to it that judge and jury both hear clearly what he has to say; he must enunciate distinctly. Further, he must use terms a layman can understand. "The thigh bone" or the "arm bone" is better than "femur" or "humerus"; "wrist" is better than "carpus" and "spine" than "vertebral column". This choice of words is apt to go against the grain, for there is a loss of precision. Some loss, however, is preferable to a state of things where, though precision may have its place in your mind, the judge or jury may be in a condition of hopeless confusion. It is important to recollect that one is not presenting a scientific protocol, but trying to convey the truth to someone else, who is desperately anxious to learn

the truth. Sometimes the judge may call for amplification of some statement you have made. The interruption should be welcomed, and, even to a learned judge, the simplest possible phrases should be used.

There is one other point in your relation to the judge. He is present as the umpire to see fair play. If you feel you are being treated unfairly, the judge will promptly come to your rescue. Unfair treatment is an extremely rare occurrence, but it has happened.

Relation to Your Own Counsel

In your examination in chief, you float with the stream. Sometimes your report will be the basis of a series of questions, but more often you are invited to tell your own story. For this you may refer to your notes. If anything your counsel thinks important or deserving of special emphasis has been omitted, he may ask one or two supplementary questions. If he is wise he will have asked them at a private consultation beforehand. He will probably stress the conclusions you have reached and the train of thought by which you reached them. He will then turn you over to his forensic opponent.

Relation to Cross-Examining Counsel

Your evidence may carry conviction to such a degree that the cross-examining counsel asks no questions at all. Very often this shows sound judgment. As a rule, however, he may attempt several things.

1. He may try to discredit the value of your testimony as an expert. You may have examined thousands of X-rays but that does not qualify you as a specialist on X-ray work. Your opinion may differ from that of the writer of a textbook. All textbooks are out of date by the time they are published, but there is an aura of authority surrounding the writer of a manual of instruction. Never hesitate to differ if you can give good reasons for your opinion. If you have anticipated the question, you may even be prepared with another textbook to support your view.

2. He may present a series of opinions differing from your own, generally with the qualification, "Might not this be so?" This is a difficult situation, for if you say, "Yes, it might be", the immediate corollary is, "Then, you're not sure; you may be quite mistaken". Sometimes you will be faced with the general statement that it is only human to make mistakes, and, after all, you are not superhuman. If you get the chance, your one reply

is that you have considered the various possibilities, rejected them, and chosen the one you have put forward. To do this successfully means that you must be prepared to give reasons for your belief, and that implies careful preparation.

3. He may seize on one part of your evidence and emphasize it, while excluding other parts which modify the whole, and thus tend to misrepresent your real opinion. When he finds himself in this position the medical witness is apt to feel himself aggrieved. He has sworn to tell the truth, the whole truth and nothing but the truth, and he feels that he has been manoeuvred into giving his endorsement to a half-truth. He cannot always expand his statement; his duty is to answer questions. There are two consoling thoughts: (a) his own counsel will probably note the perversion and, recalling him after the cross-examination, give him the opportunity to make his real opinion clear; (b) the judge is as conscious of the half-truth as the witness is. He is not likely to be deceived. You do not have to struggle to save him from the wiles of a specious pleader.

4. Some cross-examiners habitually bring up the subject of pain, alleging that you have no means of estimating it or even telling whether it actually exists. They will enter into semi-metaphysical speculations on the seat of pain, its mechanism, and other recondite aspects of the problem. Never try to follow them. From your own experience and that of others you have a pretty fair idea of whether a pain is severe, moderate or trifling, and that is about as far as you dare to go.

The cross-examining counsel must never be looked on by the doctor as an opponent with whom to match wits. You are not permitted to argue with him; you can only answer his questions. Always do this as definitely as you can. Shun the temptation of hypothetical possibilities. You have formed your opinion; stick to it and give reasons for the faith that is in you. Never get flustered or angry. If the cross-examiner attempts to throw you off balance, that is his method of doing his best for his client.

Relation to Other Doctors

When one is giving evidence about a case one has treated personally, the position is relatively simple. The facts of the case are presented along with the considerations that guided the procedure adopted. Where the case under dispute has been cared for by another practitioner, the way is not always so easy.

One generally rings up the doctor in charge and says, "I have been asked to examine a patient of yours, Mr. So-and-So; have

you any objection?" The answer is invariably "No". The next question is, "Is there anything you'd care to tell me about him?" One generally gets his point of view. That very often avoids a difference of opinion that, aired in open court, is in the main unfortunate. Hesitate long, very long, before criticising another doctor's work. Remember that he has, in practically every case, done his very best, and that he can usually support his procedure by authorities which, though they may differ with you, are nevertheless accepted standards. Sometimes in court you will be told, "This morning, Dr. X.Y. said such and such a thing; do you think he is wrong?" In reply to this, one can only accept responsibility for one's own opinions and beg to be excused from commenting on those of others. This demurrer will generally be accepted.

Malpractice Suits

It is not my intention to discuss this matter at length. I fully expect that it will be the subject of a whole evening's programme. There is, however, one aspect of the matter all should know. No suit for malpractice can proceed unless a medical man will testify for the plaintiff against the doctor who is being sued. It is a sobering thought that the majority of malpractice suits are brought because of criticism by a doctor of the work of one of his colleagues. This should emphasise once again the need for reticence in passing judgment on another practitioner, even in, perhaps especially in, the privacy of our own homes. With the establishment of large clinics, and the development of medical practice along the lines of business organizations, the intimate personal touch tends to be submerged. In mediaeval days it was a frequent practice in Scotland to carve mottoes above the doorways of houses. I commend to your notice one which still stands in the City of Dunfermline:

"Sen vord is thrall, and thoct is fre,
Keep well thy tongue, I counsel the."

In the not too distant past there was a subject known as Formal Logic. One of the feats accomplished by its aid was to reduce every statement to the form of a syllogism consisting of a major premise, a minor premise and a conclusion. Transgression of the rules of the syllogism inevitably led to fallacies, of which there were many. Formal logic has I believe vanished from the curriculum; syllogisms are out of fashion, but fallacies are as popular as ever. Of these fallacies, perhaps the most widely patronised

is the one summed up in the tag, *post hoc ergo propter hoc*. Plaintiffs in actions for damages are peculiarly susceptible to it, and counsel for the plaintiff is now and then not guiltless. To distinguish the real from the seeming, to unfold in proper sequence the tale of physical happenings, and to place them in correct relationship, so as to assist the judge in arriving at a verdict as nearly as possible in accord with the actual facts, this is the duty and the privilege of the medical witness.

Judicial Conduct of Cases

Lord Justice Birkett said that the transcript of the shorthand note of the evidence showed quite plainly that all the witnesses were questioned by the learned Judge in such a manner and to such an extent that the conduct of the case was virtually taken out of the hands of counsel altogether. The duty of the Judge to keep complete control of the proceedings before him was an essential part of the administration of justice in all our Courts. He had a duty to intervene by way of question or otherwise at any time that he deemed it necessary to do so. He might wish to make obscurities in the evidence clear and intelligible; he might wish to probe a little further into matters that he deemed important; and in a score of ways his interventions might be both desirable and beneficial. But it was safe to say that all his interventions must be governed by the supreme duty to see that a fair trial was enjoyed by the parties. His interventions must be interventions and not a complete usurpation of the functions of counsel.

The task of eliciting the truth [his Lordship continued] was assigned to counsel by the method of examination in chief, and perhaps particularly by cross-examination. In performing this task counsel might be gentle or stern, hostile or friendly, as the occasion and the circumstances warranted. But the Judge best served the administration of justice by preserving the judicial calm and the judicial demeanour, aloof and detached from the arena of contention. In the present case, the parties came from comparatively humble walks of life. They had received legal aid in order to come to the Courts at all. Such people were unaccustomed to the procedure of the Courts, and they were likely to be overawed or frightened, or confused, or distressed when under the ordeal of prolonged questioning from the presiding Judge. Moreover, when the questioning took on a sarcastic or ironic note, as it was apt to do, or when it took on a hostile note, as was sometimes almost inevitable, the danger was not only that witnesses would be unable to present the evidence as they would wish, but the parties might begin to think, quite wrongly it might be, that the Judge was not holding the scales of justice quite evenly. (From an unnamed case reported in *The Times* for April 9th, 1952)