MEDICO-LEGAL EVIDENCE

Medical expert evidence has exposed doctors to criticism and misunderstanding. Medical examination is not an exact science, and medical opinion is nothing more nor less than opinion based upon the individual's knowledge of what he believes to be the facts as obtained from the history and examination of the case and his personal interpretation of their relation to the medical problem. That the medical evidence is frequently diametrically opposed and appears biased may well be due to the system under which it is given. The present system of examination and cross-examination in court tends to drive the witness to a certain side and attempts at the same time to uncover those features favourable to the interrogator's side. The witness may not have the opportunity to inform the court of all he knows that is relevant in the medical history of the case. If it be not asked of him in the examination in chief it is most unlikely to be brought out on cross-examination. Cross-examination too frequently converts a witness who is trying to be impartial into one who is partisan or apparently so. He finds himself attacked and challenged to make statements that he can honestly make but would rather not make as he does not wish to appear dogmatic. The present system is one of the fundamentals of court usage, but it is a woefully poor method of arriving at a clear statement of a medical condition.

The duty of the medical expert witness would appear to be to assist the court to an understanding of the medical problem, and the medical problem is a physical one. For this purpose there should be no restrictions in the examination of the patient nor in his medical history allied to his physical condition. The examiner should be allowed to ask what questions he may desire. Otherwise he is in the position of a veterinarian who can get no information from his patient as to its subjective symptoms. He should be examined with no relative or friend with him so that he can give a clear, true description of his condition without suggestions and priming. The examining doctor can obtain from the relatives and friends, outside the patient's hearing, any relevant facts, and these sometimes are a real assistance in the examination and in the formation of his opinion. In giving his medical history of the event the patient may say that in the accident he was knocked unconscious and could not remember anything until a certain time subsequently. He may then give a detailed account of the incidents preceeding the accident, incidents right

up to the instant of the accident. A history such as this is not correct, and the person giving it is therefore unreliable and will probably be equally so in stating his symptoms. If he were unconscious he could have no personal memory of the incidents immediately prior to the accident; if he had memory of the details of the accident he was not rendered unconscious by it.

There are different types of patients one is called upon to examine. There is the individual who has received severe physical injuries, and he will be found to have the minimal nervous change or disturbance. It may be said truly that the nervous manifestation is in inverse ratio to the physical injury. Severe war wounds and shell shock were not seen in the same patient. The person who was in a potentially dangerous accident may, as soon as he finds himself without physical injury, allow himself to collapse and act as if he were incapable of any action. He is the emotional type. If a person be outraged at the danger to which he was exposed but which passed him by without physical injury he may claim compensation as though he had had the physical injury. The apprehensive type do not want to make the effort to do an act that in any way reminds them of, or is associated with, the accident. They are the reverse of the young flying officer who crashed his plane. He was brought into hospital. He had minor cuts and bruises. He escaped from hospital early the next morning and returned in the afternoon. He explained his absence by saying he had gone out to the flying field and taken a plane up in flight to see if he had lost his nerve!

Malingerers are not difficult to identify. Their physical examination does not reveal any abnormality, or if it does the abnormality is such as can be ruled out as having been the result of the incident in question. Malingerers are not sufficiently versed in medicine or surgery to be able to impose upon well trained and experienced examiners.

Medical examiners should be able, and are able, to arrive at a uniform physical examination of a patient. They have the assistance of Roentgengrams, but unless these are well taken they may be useless. There is also a multitude of laboratory examinations that are available for assistance in diagnosis. Physical examination has nothing to do with subjective symptoms except that it should confirm such symptoms. If a man complains of pain in his hip he should have limitation in movement of that hip. If he has no limitation of the joint one could not believe that his complaint has a physical basis. A man may limp badly and say he has a sore knee and that he has not been

able to use his leg properly for months. If on examination his calves are equal in measurement, it is proof that he has used his leg as much as its fellow. Atrophy—the wasting of tissue—occurs just as soon as there is a subnormal use of a part. The parable of the talents illustrates a fundamental law in the maintenance of our tissues. To paraphrase it: what we use we have, what we save we lose. No one should succeed in a claim for a disability which he says he has had in a knee for months unless he has atrophy of the thigh and calf. Patients will when undressing themselves go through joint movements they will not permit on passive examination of the joint. This is because they have not realized that the movements are identical. A person such as this may not be a malingerer. He may be just subconsciously anxious to put his worst foot forward. There is a most insidious and powerful motive potentially present in claimants for damages as the results of accidents.

True hysteria is rarely seen in litigants. There is too much need for the complete use of the faculties when in court for litigants to relax their interest sufficiently to manifest hysterical attacks. On the other hand, there is the grossest exaggeration to be seen in the complaints and disabilities of some people claiming damages.

Age is a most important factor in convalescence and recovery. A child recovers physically very quickly. Emotionally he is almost never disturbed. Having very little idea of responsibility, and seldom any responsibility, he does not worry about loss of time and the outlook for the future. Injuries are so much more important in adults and particularly in those of mature years. Young people are rugged and convalesce quickly, old people fragile and convalesce very slowly.

The medical witness should be able to give the court a clear idea of the physical condition of the patient, having regard to injury and the resultant physical disability considering the age of the patient. The emotional or nervous effect is not due to physical injury, and the court needs no help in forming an opinion as to its origin or importance. It will know that emotions and motives actuate the nervous manifestation and that there is great improvement after the end of the litigation is reached. It will know also that the nervous manifestation arose from the syndrome of the accident. One wonders if lawyers and judges realize what a dreadful experience it is for an ordinary individual to go into court. It is really easier to go to an operating room. The surgeon at least provides an anaesthetic before he begins operating.

Persons who are involved in accidents and claim damages for injuries suffered are, or should be, more concerned about their medical condition than their position in law. To effect a speedy and complete recovery in a patient there should be nothing of a litigious nature to act as a deterrent to his rapid recovery from his physical injury. There should be no motive to project his infirmities to the time of the settlement of the case in a court of law. The preparation of a case is an emotional strain upon a patient that impresses upon his subconscious mind a fixed idea that he has a disability, and there should not be a searching for and a recital of disability in his presence in court. It makes it very difficult for him in the future to forget the experience, and more than likely he will make use of it as an excuse for all sorts of failures and odd actions.

From considerable experience in medico-legal work it would appear that the plaintiffs do not receive the best possible medical care. If the defendant is responsible for the injury he should be able to ensure the plaintiff the best obtainable treatment. First class treatment is to the interest of both parties. It so happens that motor car accidents produce physical injuries that are major surgical problems. While the Ontario Medical Council license doctors to practise medicine and surgery, some of these are especially trained in certain types of surgery, and all are not competent to undertake such surgery. Yet a doctor who is only slightly familiar with traumatic surgery may have the care of one of these cases, and the patient tolerate such a doctor. A patient has a right to select his own surgeon or doctor. Yet he is frequently not aware of the highly technical and specialized procedure that is necessary for his successful treatment, and he is likely to assume that any licensed doctor is competent to care for him. Too late he may have reason to realize that he should have insisted upon further advice from a recognized authority. Patients frequently do not take the trouble to notify their regular physician or surgeon when they have had an accident, and they appear most casual in permitting a surgeon unknown to them to undertake operative procedures in a place not properly equipped or familiar with such procedures. If the individual is fortunate enough to be taken into a large general hospital he will find there men who are trained in traumatic surgery, and while he may not get a good result yet he will have the benefit of the equipment and a surgeon who has had a large experience in the type of surgery. A bad result is most expensive for both the patient and the defendant. It is more

than expensive to the patient. If he has not had skilled and special care, the time in hospital and the multiplicity of operative procedures will prolong the case an unnecessary time. It is to the interest of the injured more than anyone else to have first class attention, and he is very frequently not in a position to get it. Were he an indigent or unable to pay for his care in hospital, he would be fortunate as he would find himself sent to a large general hospital where he would be admitted to a public ward and have expert attention from trained surgeons and nurses. The hospital under these circumstances would see that he was treated by the appropriate service.

The patient, being unable to pay, would receive gratuitously, as all public ward patients do, the services of a surgeon and a contribution toward his upkeep from the hospital. To maintain him in hospital would cost in the neighbourhood of $3.00 a day, toward which the hospital would collect $1.75 a day from the city or municipality and 60 cents a day from the Provincial Government. This would leave a sum of 50 to 75 cents a day to be provided from the funds of the hospital, a direct charge upon their funds. The patient is therefore accepting charity from the charitable funds given to the hospital. It may so happen that the patient can claim, and be successful in securing from the party who injured him, compensation for his injury, and in this compensation is included his hospital and medical expenses. It would seem fair, therefore, that the hospital should receive compensation at a rate which would allow them to meet all his cost while in hospital. In other words, this patient should be a private patient, and as such the surgeon in charge of the case should be entitled to a reasonable fee. A man who receives compensation including expenses should not be a charge upon the public and ought not to expect gratutious services of the physicians and surgeons.

A defendant who is held responsible for an accident has a prime interest in seeing that the plaintiff gets the best treatment possible, and if he is to pay for this treatment and to pay for a disability the man may eventually have, he should have some right in insisting on recognized and specialized treatment. The medical representative of the defendant should have access to all the facts relating to the case and should have the opportunity of consulting with the doctor in charge of the case, and if he believes that the doctor in charge of the case has not the proper qualifications to look after the case, then on his request further consultations should be granted. There is no reason

why, from a medical standpoint, the defendant's medical agent should not have as frequent access to the patient and his history as is considered desirable by him, and in no instance should a case be allowed to come to trial without medical examination that has been conducted immediately prior to the trial. The defense, especially where it concerns insurance companies, can be trusted to employ as their medical agents men who have qualifications making them suitable for the treatment or examination of traumatic cases.

The fees charged by doctors in medico-legal cases require some discussion. One is surprised in some cases at the large bills put in by doctors for services rendered plaintiffs, and one often wonders if these bills, which are accepted by the plaintiff and put in as part of his expenses, are paid to the doctors. Having regard for that case which comes to the individual doctor, perhaps by virtue of his being a member of the staff of the hospital to which the patient is brought, or to his being in the neighbourhood in which the accident happened, one would think it might be of advantage to have the court adopt a schedule of fees. The schedule of the Ontario Medical Association would be a suitable schedule to have bills taxed against, if either the plaintiff or the defendant wished so to do. This would meet with the approval of practically all the parties concerned and would tend to keep bills to a more reasonable level or to the level of ordinary medical and surgical fees. Moreover, when such fees are allowed by the court as part of the expenses of the plaintiff, those fees should be paid to the party rendering the account. It happens, and not infrequently, that hospitals and doctors have accounts put in as part of the expenses of plaintiffs, the money is paid over to the plaintiff, and the hospital and the doctor do not receive it. It has also happened that fees have been put in by a doctor, and after the plaintiff has the money he complains to the doctor that the bill was too large and wants the bill reduced.

It might be to the advantage of the community, in view of the large number of motor car injuries, if there were a Board set up somewhat along the lines of the Workmen's Compensation Board which would have authority in the caring for injuries. At the present time it would be to the advantage of both the plaintiff and the defendant if an accident case were handled in the following way. The patient receiving an injury has his doctor who is in charge of his case. The injured man holds someone responsible for his injuries, and so notifies him.

There is no reason why this complaint cannot be put in and made known to the defendant within the first forty-eight hours or earlier. If this were done the defendant would most certainly be interested in having the injured man examined by his medical representative. The defendant's doctor should be authorized to consult with the plaintiff's doctor, and the two should agree upon the treatment necessary and as to who is to render this treatment. If these two could not agree then they could agree upon a third doctor who would be especially trained and have a favourable reputation for the type of work required. These three doctors could agree upon the treatment of the patient and so advise him. During the course of the treatment the patient could be seen from time to time as the necessity arose by the doctors, and when the case came to trial an examination of the plaintiff should be undertaken by the two or three doctors. If they agree upon his surgical condition and the amount of residual disability if any, it should be put in the form of a report and handed to the court. If the court wanted any further clarification it could call one of the members of the Board. If there were a minority report it could also be put in. The medical fees would be paid by the parties concerned and the fees of the plaintiff should be taxed according to the schedule of the Ontario Medical Association as laid down December 1936. Fees that are allowed by the court as part of the expenses of the plaintiff should be paid by the defendant direct to the individual or institution rendering the account.

Medico-legal evidence in cases of malpractice brings up a point of the greatest importance. A fair number of actions for medical malpractice are brought on account of a misunderstanding, an ignorance of the medical problem concerned. There is undoubtedly a feeling amongst lawyers that doctors are keen in the defense of one of their number when that one is being sued for malpractice. This is true, but only true where doctors feel there has been no malpractice. Again it may be stated that medicine and surgery is not a definite science. In every treatment and operation there is a different set of conditions and circumstances. A doctor has to use reasonable care and skill and his own judgment. His judgment may have been wrong, as is eventually proved. Yet he did the best he could, and more he could not do. Someone else might have done better, but the patient was content to submit to his administrations. Simple procedures may have the direst consequences, and patients should realize this before they permit any treatment.

There are cases of malpractice which go to trial where the case could have been disposed of if a correct diagnosis had been made. The plaintiff and the defendant had not been able to co-operate to the extent of solving the medical problem. Many a defendant has stood trial for malpractice for a condition for which he was not responsible and probably did not understand, a natural result deemed a poor result through lack of understanding of the case. A man with a painful foot has the foot manipulated by a chiropractor; the foot develops gangrene, a natural consequence in a painful foot where a condition known as thromboangiitis obliterans exists. One young doctor knew the real diagnosis but he was outweighed in court, and the drugless healer was held responsible; a case where the medical evidence could have been of more use if the doctors had met previously and had studied the case from the question of diagnosis together with characteristics of the course of the disease.

Conditions in the practice of medicine are changing, and it is common knowledge that certain doctors are especially trained in certain types of work. If a patient, therefore, selects for a special form of treatment a medical attendant who is not especially trained, he surely must have a reason for so doing, and he should not be surprised if he expected more than he found he received. The Americans are now setting up examining boards in specialities and give to those who pass the examinations certificates as specialists in the particular field. The purpose is to protect the public against men who undertake special and intricate procedures but who have not taken training in their application.

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