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CROSS-EXAMINATION OF MEDICAL EXPERTS

LESLIE H. VOGEL

IN THE PAST quarter century we have experienced marked and in some respects revolutionary changes in most of the things that affect human relationships. The change in the economy of the country and the impact upon it of governmental authority is striking. We have passed from a government, to a large extent, in the hands of the "home folks" to a centralized government upon which local subdivisions have little effect. Great changes in most of the endeavors by which our people earn their daily bread have been accomplished. It is only necessary to point to the authority of the central government which, in large measure, controls the daily life of the farmer to establish this transition.

The "liberal" thinking on these economic and social questions has had its effect upon the practice of the law. This is particularly true with respect to common law claims for personal injuries and wrongful death. Rules that once were considered to be the positive and unchanging declarations of human rights and obligations have been so changed as to amount almost to destruction. The rule of stare decisis no longer commands its former respect and adherence. Today it is a practical impossibility for a lawyer to advise a client on his rights and liabilities under a given state of facts with assurance that tomorrow the rules upon which reliance was placed will not be changed. In many respects the law today is what some judge says it is. Tomorrow we may find it to be the contrary by pronouncement of the same or some other court of equal authority.

In substantial part, this uncertainty and lack of confidence in the stability of the law has resulted in settlements of the vast majority of

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common law personal injury claims. Insurance companies and large entities constantly faced with numerous claims for injury have come to the belief that in the courts of most of the jurisdictions "liability follows injury." Another way of putting the same thing is that "the preponderance of evidence is with the empty pant's leg." That small percentage of personal injury claims that eventually reach the stage of trial present in most, if not all, cases the principal issue of the character and extent of the injury.

In this posture of personal injury litigation, it is evident that medical testimony assumes more and more an important, if not controlling, position in the cases tried. It therefore behooves counsel who devote a substantial part of their time to this type of the practice to become fully conversant with all phases of medical science relating to injuries. A rule of cross-examination which admits of no exception is exemplified by the old "saw" which tells us that to train a dog we must know more than the dog.

Upon the foundation of a general education in and knowledge of the elements of medical science relating to trauma, there must be thorough and unrelenting preparation on the particular medical questions presented by each individual case. This special preparation may profitably begin with the selection of a specialist in the field of medicine involved. An effective method of acquiring and utilizing the necessary knowledge should begin with the preparation of a careful summary of the available information relating to the precise injury and the claims made by the injured party. This summary should then be submitted to the expert for study, following which conferences should be held covering each item which is validly subject to dispute. Careful lawyers supplement such conferences with a close study of all of the available texts recognized by the profession and articles by qualified specialists in the field in question. Given this character of preparation after an intelligent analysis of the medical question, any expert who appears for the opposition must be an expert indeed to approach the courtroom with a broader understanding of the immediate subject than the cross-examiner.

The summary of the medical questions and the suggested conferences with the specialist must be founded upon facts obtained in a proper, careful investigation. Too often such an investigation is left wholly to subordinates or investigators for the client. Hospital records, nurses' notes, doctors' notations of diagnosis, and even the direc-

tions for medication, should have the closest scrutiny. It has become a general practice to delegate the obtaining of the hospital records to agencies who furnish photostatic copies of the same. This practice has its values, but it is a poor substitute for an examination of the original by the counsel who shall be the cross-examiner of the opposing experts. Frequently photostatic copies are indistinct. It is a notorious fact that doctors generally are unable to write legibly. Abbreviations sometimes are peculiar to the individual physician. It is only by a close inspection of the original documents, with an insistence upon an interpretation of entries not fully understood, that the entire medical picture as presented by hospital records can be made clear.

In what respects are hospital records of importance in the preparation for cross examination? Countless illustrations of the exceptional value of a complete knowledge and understanding of such records are available. Take, for example, the hypothetical case of a middle-aged woman who has suffered a head injury in an accident. Assume a brief period of unconsciousness and a claim to post-concussional syndrome. In the posed illustration, the patient complained of nervousness, headaches, and associated subjecitve symptoms, which an expert, called to give hypothetical testimony, can well testify are consistent with a diagnosis of residual disability which could be caused by the head injury. Now assume the hospital record shows the regular administration by the attending physician of estrogen or some related medication for menopausal syndrome. The history shows that prior to the occurrence, there was an irregular and interrupted menses. With such a picture and with an understanding that most of the post-concussional symptoms are likewise symptoms of menopausal syndrome, the expert can then with safety be cross-examined with an assurance that the very least which can be exacted from him is an admission that it is just as likely that the plaintiff is suffering from menopausal syndrome as it is that she is suffering from the results of a head injury and concussion.[1]

To illustrate further, in a case in which the attending physician not only furnished the factual foundation but also testified hypothetically, it was claimed that the plaintiff, an elderly lady, had sustained a permanent disabling injury to a hip. An examination of the hospital

[1] No cross examination should include a statement to a witness of assumed facts unless the cross-examiner is able fully to prove such facts. Gordon v. Checker Taxi Co., 334 Ill. App. 313, 316–18, 320–21, 79 N.E. 2d 632 (1948).

record showed from the x-rays, the clinical charts, and the diagnoses that the original injury had in fact occurred. There was little in a careful examination of the principal records, either to support or refute the claim of permanency or of disability. As was invariably true in the hospital in question, the attending physician was required to indicate the time of discharge of the patient and such patient's condition at that time. This physician was a careless writer, and on the last page of the hospital record appeared a writing in his hand. The investigator was unable to decipher the term with any assurance of accuracy. One of the supervisory nurses was called upon to interpret the writing and it developed to be "Discharged June 26, 1948, cured." Upon the trial the attending physician was cross examined with reference to his opinion, given hypothetically, that the plaintiff had sustained the permanent disability.

When questioned on cross-examination, the doctor was asked whether or not in the course of his practice he used the term "cured." He conceded that it was a common word that he frequently used in connection with his treatment of patients. He was then asked what was his definition of the term. He defined the term as "made well," "no longer suffering from the disease or injury which laid the patient low," and "without symptoms." His attention was then drawn to his notation on the hospital record. He conceded that he had written it and attempted to explain. It will be evident that no explanation of such a record could salvage the plaintiff's claim to extensive, permanent injury.

A further example of the certain benefit to result from a careful review of all hospital data is found in the case of the roentgenologist, who testified from innumerable x-ray films in a case involving an alleged fracture of the cuboid bone in the ankle of a lady plaintiff. It was claimed that serious permanent disability resulted from the original injury, including an osteoporosis of the bones in and adjacent to the ankle. In the course of the treatment, comparative films were taken, several of the left ankle, which was the injured one, and several of the right ankle. On two or three of the films the marking identifying the particular ankle portrayed was exceedingly dim. The cross-examiner believed that the expert had made an impression on the jury favorable to his contention. Just before the adjournment for the noon recess, the witness was handed two films of the right ankle which required close scrutiny to determine whether they were marked with the "R" indi-

cating the right, or the "L" indicating the left. Probably because the expert believed that he had made a favorable impression upon the jury, or that he had found the cross-examiner was stupid, or merely from sheer hunger, he became careless and began a dissertation to the jury from the two films, pointing out the points of alleged injury, the thinness of the bone structure typical of porosis, and other evidence supporting his opinion. When this learned discussion ended, his attention was called to the fact that he had been reading from films showing the uninjured ankle. Adjournment immediately followed, and there was no further examination, direct or cross, following the noon recess.

An example of the failure intimately to know the hospital records in detail is found in the case recently tried in which the plaintiff on cross-examination with regard to his injuries made numerous conflicting and contradictory statements. The clear inference and implication was that he was a person unworthy of credit and belief. In an effort to rehabilitate his client, plaintiff's counsel asked him on re-direct examination the improper question, "Mr. X, do you attend church?" The obvious purpose was to establish that the plaintiff was a church-goer, therefore in fear of the Lord and one not likely, by reason thereof, to commit perjury. Because of a lack of detailed study of the hospital records, the cross-examining counsel objected to this clearly improper question and the objection was sustained. Subsequently, on studying the hospital records for another purpose, it was discovered that on seven separate occasions, to different internes or house physicians in hospitals, the plaintiff in answer to the question "Religion?" had stated: "Atheist." It is obvious that had the cross-examiner been conversant with the hospital record in detail the objection would not have been made, and on re-cross examination the plaintiff could have been further destroyed had he attempted to pose as a churchgoer.

At this point a word of caution seems to be indicated. In the foregoing paragraphs, it has been emphasized that records of the treatment, diagnosis, and other pertinent data with relation to the plaintiff's injury are important in determining the character and the extent of the plaintiff's alleged injury. Sometimes, upon the trial of a cause, an attending physician will be asked to produce his personal clinical records. Unless, by prior discovery proceedings in those jurisdictions where such practice is authorized, the cross-examiner has obtained copies of such records and had an opportunity to examine the same, this is a dangerous practice. Laymen generally consider the family

doctor, with all of his lack of precise learning in the several specialties of medicine, to be more reliable than the vaunted experts and specialists. If the personal records of the family physician disclose a discrepancy from the hospital record, a jury is much more likely to credit such testimony based upon the recollection of the witness refreshed from his personal record than that of the hospital. Moreover, having called for the record on cross-examination, the same is available to opposing counsel, and, generally, opposing counsel may go all through the record on re-direct examination to establish that complaints or symptoms or objective findings claimed for the plaintiff but otherwise unsupported were in fact recorded by the family doctor.[2]

A further word of caution seems to be appropriate. Many years ago laymen, from whose ranks jurors are selected, had little knowledge or understanding of medical terms or procedures. In those days, frequently a cross-examiner endeared himself to the twelve talesmen by professing, either truthfully or untruthfully, a complete lack of knowledge or understanding of the "mysteries" of the testimony of the "blood letters" who had pontificated upon the trial. Sometimes, in the olden days, the greater the ignorance professed the more favorable was the impression created. Not so today. We have become a medically conscious people, and it is only the most illiterate of our citizens who have not heard of the "wonder" drugs either by name or by their announced efficacy in the treatment of disease. Few people subject to jury service are today in doubt of the meaning of "anesthetic," "anesthesia," "fracture," "concussion" and other more complex medical expressions. From this, it seems clear that the cross-examiner who does no more than profess an ignorance of medical terms receives and, indeed, is entitled to, no sympathy from reasonably intelligent jurors. It is not intended by this suggestion to imply that the cross-examiner should use phrases unlikely to be known to a juror. It is vastly better that all terms used by a physician who may be testifying be explained

[2] The use of hospital records in the cross-examination of medical witnesses is in many cases substantially limited. In some cases it has been held that before the record may be used for cross-examination it must appear that the medical witness himself prepared and signed the record page. It is thought, however, that where the witness admits his approval of the record and has knowledge of it, the ambit of cross-examination includes such portions, despite the fact that the record was not prepared or signed by the witness. Smith v. Johnson, 2 Ill. App. 2d 315, 319, 320, 120 N.E. 2d 58 (1954); Wiedow v. Alden Carpenter, 310 Ill. App. 342, 347, 34 N.E. 2d 83 (1941); Flynn v. Troesch, 373 Ill. 275, 282, 26 N.E. 2d 91 (1940); Branch v. Woulfe, 300 Ill. App. 472, 477, 21 N.E. 2d 148 (1939); Wright v. Upson, 303 Ill. 120, 143–45, 135 N.E. 209 (1922).

in laymen's language, except those which it is expected will have common understanding among laymen. Quite certainly, an effort to use unfamiliar and highly technical terms without explanation by a cross-examiner is likely to result disastrously if for no other reason than that it appears he is attempting to "talk down" to his peers.

It has truthfully been said of the right of cross-examination that it furnishes the most certain defense against perjury and chicanery upon the trial of a cause. There are some in past years and presently who advocate the abolition of the jury system and thus the abandonment of those guarantees against injustice which are inherent in the adversary proceeding which we today know as the jury trial. These individuals conceive that there is some type or method by which the stories of all persons concerned in a legal dispute may be dropped in a hopper, a crank turned, and the God-given truth of the issue will result. No more fallacious, untutored and inexperienced view of the just settlement of questions between citizens could be advanced.

Intelligent cross-examination cannot fail to develop truth. Jury verdicts are responsive to a clear understanding of that truth. He who advocates a bureaucratic commission to deal with *any* dispute between citizens has had no experience in the struggle to establish truth under law and has little more to support him than a thesis unsupported by fact and demonstrated to be impractical by history, let alone its implications toward the surrender of free man's last bulwark against misuse of governmental power and authority.

Thus far we have seen that a painstaking preparation for the cross-examination of medical experts is an absolute necessity for one who intends to litigate a medical question. It is also clear that a complete understanding of medical terms, procedure, and the general relationship between trauma and disease is an essential tool of the advocate. Illustrations of the value of preparation to minute detail have been given. Is there, then, more to effective cross-examination than this?

It has been said with reference to cross-examination generally that it has but one of two objects: first, to destroy the witness, or, second, to destroy his story. It must be conceded that with professional men appearing as experts in their specialties, the opportunities of the destruction of the witness is exceedingly limited. It is not suggested that an effort to destroy the witness, even where he is a physician, ought not to be undertaken if the facts justify such procedure. However, the cross-examiner must be certain that a strong case of impeachment or

other means of destruction of the individual is available and may be cogently produced before he embarks upon such an adventure. The examples of the destruction of the witness when dealing with laymen are legion. Some of them might be here stated without impropriety as illustrative of the problem.

The ordinary mode of destroying a witness is by direct impeachment—obtaining admissions or introducing other evidence to show the witness has given prior contradictory and conflicting statements or was a person whose reputation, habits and the like render him unworthy of belief. Sometimes the same effect may be accomplished by calling attention to his undesirable or disreputable traits or characteristics. This latter method is aptly illustrated by a criminal case in which the late Clarence Darrow was associated in the defense with a young and overzealous attorney who represented a co-defendant. The principal witness for the prosecution was an obvious alcoholic. He appeared on the stand with matted hair, disheveled clothing, and bloodshot eyes. The tremor of his hands was evident. As the direct examination progressed, it seemed clear that the witness was making a favorable impression upon the jury by what he said, and his manner of saying it. Mr. Darrow's young colleague, grasping at the opportunity to hear himself talk, laboriously took the witness back over his story item by item and as a net result cemented firmly in the minds of all twelve of the jurors the probable truth of the witness' story. Darrow, sensing that the jury had either forgotten or had fully discounted the disreputable appearance of the witness conducted his cross-examination as follows:

"Mr. Witness, stand up."

The witness stood at the witness stand and his appearance was striking. The tremor was plainly seen, he looked through the tangled mat of hair hanging over his bloodshot eyes with some fear. Darrow then said, "Mr. Witness, turn to the right." This the witness did with further trepidation. Darrow then said, "Mr. Witness, turn to the left." The witness complied. With that, Mr. Darrow said, "That is all, Mr. Witness. I just wanted this jury to get a good look at you."[3]

Many years ago in Chicago a Dr. H was a frequent witness for defendants in common law personal injury suits. Col. W was by nature and inclination consistently an attorney for injured plaintiffs.

[3] The writer is indebted to the distinguished Francis X. Busch for this anecdote.

Both Col. W and Dr. H had been convivial friends for more than 30 years, and it was common knowledge that quantities of alcoholic beverages had been consumed by each, most of which had occurred during joint bouts. Col. W presented a case to a jury in the Circuit Court of Cook County, in which his client had been slightly injured by a street car. It was contended that as a result of the original injury, the plaintiff had developed diabetes. One of the able lawyers of that day at the Chicago Bar, Charles Cunningham, represented the defendant. Col. W developed his facts and called an expert, who, by hypothesis, testified that upon the given assumed facts it was his opinion that the injury might or could have caused or lighted up a latent case of diabetes. In cross-examination, Mr. Cunningham established that the plaintiff had been addicted to the use of alcoholic liquors over several years. His cross-examination of the plaintiff's expert produced little of interest, and on defense he called Dr. H. The hypothetical question propounded by Col. W to his expert was repeated by Mr. Cunningham to Dr. H; his opinion was sought upon the assumed state of facts. Dr. H gave it as his opinion that the original injury could not and did not cause or light up the latent case of diabetes. Mr. Cunningham then added to the hypothesis in the original question the additional fact that the hypothetical individual had been addicted for some years to the consumption of quantities of acoholic liquors and inquired whether or not Dr. H had an opinion within the limit of reasonable medical certainty if the consumption of alcoholic liquors could have produced or lighted up the diabetes of which complaint was made. Dr. H gave it as his opinion that the consumption of liquors might, could, and probably did cause or light up the condition of diabetes.

When turned over to Col. W, the cross-examination progressed about as follows:

Q: "Dr. H, how long have you known me?"

A: "Why, Col., I think about 30 years."

Q: "Do I have diabetes?"

A: "Why no, Col., I believe not."

Q: "Now, Doc, do you have diabetes?"

A: "Certainly not, Col."

The cross-examiner, then turning to the jury, at that time composed entirely of men, asked the doctor the following question: "Doctor, if you do not have diabetes and I do not have diabetes, I should like you

to tell these twelve intelligent citizens of this community how it is that whiskey could ever cause diabetes."[4]

The distinguished Francis X. Busch, in some of his enlightening writings and speeches, has referred to his cross-examination of a doctor who long had appeared as an expert witness in the courts of Chicago. The witness was well qualified and cross-examination upon the subject matter of his evidence usually was productive of disaster to the opposition. He was a physician widely known to have treated prominent citizens of the community. In cross-examination, it is said that Mr. Busch limited his questions to about the following:

Q: "Did you, Doctor, treat the elder Pullman?"

A: "Yes, I did."

Q: "Where is George Pullman now?"

A: "Dead."

Q: "Did you treat Cyrus McCormick?"

A: "Yes, Sir, I did."

Q: "Where is he now?"

A: "He is dead."

After three or four similar questions, with similar answers, the cross examination was closed. Reputedly, the expert witness ceased his activity in the courts of Chicago from that time on.

Occasionally the cross-examiner meets an adverse medical witness who, though fully qualified, exhibits or can be made to exhibit a pompous attitude. Even though the testimony of such a witness cannot successfully be attacked by cross examination, substantial damage may be done to his evidence by highlighting his pomposity. Such a witness is likely to spend considerable time in making it clear that he is a person of outstanding accomplishment, deep learning and occupies a position of great authority in his profession. The cross-examination of such a witness might well be designed to draw from him extravagant statements of his attainments with the obvious result that a jury will discount much of his opinion evidence as being tainted with a similar egotism.

An example of the cross-examination of such a witness, which is a part of the legend of the courts of Chicago, is found in the experience of the late John Bloomingston in a trial in one of the divisions of the United States District Court many years ago. A distinguished physi-

[4] The writer is indebted to Mr. Kenneth B. Hawkins, as an eminent member of the Chicago Trial bar, for this anecdote.

cian was called by the opposition to testify hypothetically with reference to a claim to serious disability resulting from injury. The witness' testimony was devastating to Mr. Bloomingston's position. The witness was such a man as would not concede the slightest possibility of error in his judgment. Obviously, an effort to cross examine the witness on his opinions and the subject mater of his evidence would, in all probability, not only be fruitless, but would make his testimony more emphatic. In the introduction of the witness on direct examination, he quite willingly, and in some detail, related his vast learning, his preparation for his specialty, his contribution to the literature of his profession, and his many professional connections with institutions of learning and with various hospitals and clinics. In an effort to impress the jury with the importance of the witness this testimony consumed about fifteen minutes. When the witness was turned over to Mr. Bloomingston for cross-examination, because of his acute understanding of the psychology of the courtroom and of those things which influence jurors, his questioning was limited to the following: "Doctor, I did not hear fully your recitation of your qualifications. Would you please repeat them?" The doctor then, with a great show of dignity, covered the same ground as was developed in the direct examination. After a period of ten or fifteen minutes, which was required for this repetition of the distinguished attainments of the witness, Mr. Bloomingston closed the cross-examination with the following question: "Doctor, are you also an Elk?"

The impression may be gained from this illustration that it is advocated that "smart" remarks are helpful, or that a "smart alec" attitude is approved. Nothing could be further from the intent of the writer. The purpose of the illustration is to demonstrate that in the occasional case the obvious conceit and dogmatic attitude of the witness may of itself bring about his destruction.

While not germane to the cross-examination of experts, it is not amiss here to consider the demeanor and attitude of the cross-examiner. It is axiomatic that an abusive and discourteous cross-examination usually destroys the examiner rather than the witness. It is not suggested that the cross-examiner should adopt a deferential approach. Quite the contrary. It should appear that counsel has a firm belief in his position and that there can be "no compromise with wrong." It must also be borne in mind that each lawyer must develop that method

and demeanor which is natural to himself. It is usually unwise to attempt to copy the conduct of another.

The testimony of an expert given as opinion evidence must rest upon the assumption of the truth of the several hypotheses in the hypothetical question propounded to him. These hypotheses must find their support in the factual evidence given before the appearance of the expert. It is frequently true that one or more of the principal assumptions of fact in the hypothetical question can be attacked. Thus, in such an instance, the cross-examiner may find a fertile field of inquiry in drawing from the witness concessions that if such hypotheses were stated otherwise, or were absent from the question, or were shown to be untrue, the opinion of the expert might be different from that given in his direct examination. The benefit of such cross-examination derives from one of two circumstances or both. First, if in the cross-examination of the fact witness, doubt has been cast upon some of the testimony of such witnesses regarding that evidence which forms the basis of the hypotheses, it will become evident that a jury, having discarded as untrue the fact testimony, will, likewise, discard the conclusion of the expert. Secondly, if the cross-examiner has available substantial evidence disputing the factual basis for some of the hypotheses, it is clear that if such evidence is believed by a jury, the opinion of the expert fails. The competent handling of the cross-examination of an opinion witness in this particular is made most effective when the court, as it must, instructs or charges the jury that in the consideration of the opinion evidence the jury must find that the necessary hypotheses have been established by the factual proof.

Lest it be considered that the foregoing is a criticism of all members of the medical profession who appear in court as expert witnesses, the writer hastens to say that such criticism is, in large measure, unjustified. It is suggested that the medical profesison has a duty to furnish to the courts the benefit of the training, learning, and experience of its members in the furtherance of, and as an aid to, the administration of justice. The frequently heard complaint that expert witnesses from the medical field testify falsely, dependent upon the party who hires them, is without foundation. It is not contended that doctors do not occasionally testify to facts or opinions not generally accepted by their profession. It is insisted, however, that their number is extremely small. In almost 40 years of experience in the trial courts, the writer has met no more than three doctors whose testimony was false.

The trouble lies in the lack of understanding by lawyers of the questions involved in the particular cases in which medical experts appear. Given an understanding of the medical question at issue and the ability to ask the right question, the right answer invariably will be forthcoming. The ineptitude and pique of counsel is too frequently the basis of such unfounded complaints.

The shortcomings of expert medical testimony in those jurisdictions where the opinion of the expert is limited to that which "might or could" have caused the particular result are not the fault of the medical profession; but, rather, are chargeable to the rules of evidence in the jurisdictions which require such unsatisfactory testimony.[5] It has been said that expert testimony is the most undesirable character of evidence produced in the courts.[6] Until the courts demand, and the rules of evidence require, positive testimony rather than "might or could" opinion from experts, The Bar may not be heard to complain of medical expert proof. The objection to direct evidence of causal connection, that it invades the province of the jury, is, to the writer, completely untenable.

Finally, where there is available to the cross-examiner respectable medical testimony by several experts of imposing qualifications to dispute some one or more of the opinions expressed, the cross-examiner can well plant the seed of doubt by his cross-examination. Given a successful cross-examination, which either indicates a lack of confidence on the part of the witness in his testimony, or an apparent exaggeration, the opposing witnesses may be called in direct examination and, if properly prepared, overpower the opinion evidence of the adversary.

So long as our system of jurisprudence includes the trial of disputes by jury, just so long will the heart of advocacy continue to be the art of cross-examination.

[5] See Kimbrough v. Chicago City Ry. Co., 272 Ill. 71, 77, 111 N.E. 499 (1916).

[6] See Opp v. Pryor, 294 Ill. 538, 545, 128 N.E. 580 (1920).