

Eskridge (J. T.)

EXPERT WITNESSES.

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EXPERT WITNESSES.*

BY J. T. ESKRIDGE, M. D.

Mr. President, Members of the Bar Association and the Medico-Legal Society:

At the joint meeting of our societies to-night it has been left for me to raise some practical points for discussion in connection with the subject, "Expert Witnesses."

The signs of the times are propitious when the legal and medical professions meet together and try to devise some means to guide and govern the expert witness.

When two or more experts are employed in a given case, what should be the manner of their procedure, and by whom and to what amount should they be compensated for their services?

We will suppose that our medical and legal friends have satisfactorily settled the questions, "Who is an expert, his value and his manner of appointment." That if, from the different departments of the arts and sciences, or from the various vocations of routine life, an expert is needed, they have defined what his special qualifications shall be before he can pose as an expert, and by what manner only he must be appointed before he can testify as such.

It is evident that when the opinion of only one expert is desired by both sides in a case, that no controversy from conflict of testimony can arise, but when the lawyers on each side desire to fortify their positions by numerous experts, and this, unfortunately, is often the case, the court and jury are often more confused by the contradictory testimony of those ostensibly brought into the case to clear up some obscure point than they would have been, had no experts been called upon to testify.

* Read before a joint meeting of the Denver Bar Association and the Denver Medico-Legal Society, March 3, 1892.



If this be the case, and I do not believe any fair-minded lawyer or physician will deny it, there must be something radically wrong with the present method of using expert witnesses, if not with such witnesses themselves.

Where is the wrong, and where is the remedy, if it is remediable?

The function of an expert is to give an unbiased opinion on those subjects upon which the public is not especially informed. The questions generally submitted to him are of a scientific nature, and to be able to answer them properly, it requires special training. It will be admitted then, if I have stated his duty correctly, that he has nothing to do with the merits or demerits of the case at law. For the sake of argument, we may suppose that an unbiased answer to a question in a case may aid some criminal to escape, tend to condemn the innocent, or give rise to injustice in various directions, yet the true expert must be as cold and devoid of all partisan feeling as the proverbial ice-berg. His opinion should only be formed after a careful and scientific consideration of the questions submitted to him, and his conclusions should be conscientiously stated regardless of any personal feelings he may have for any of the parties engaged in the suit, or of the effect his testimony may have upon the minds of the jurors.

Without fear of refutation I may assert that experts under the present system of employing and using them do not meet the high requirements for which such witnesses were first called into courts of law. They are, for the most part, in cases of considerable importance, where several experts on each side are arrayed against each other, a failure, and sometimes a farce.

They are a failure; first because they are engaged, influenced and paid as partisans; and secondly, because their method of examination and procedure is faulty.

When an attorney wishes to engage experts he naturally

seeks those who are willing to testify favorably to his client's interest. He would be a fool to do otherwise. After he has secured the services of his experts he goes over with them, from time to time, every point favorable to his client, and at the same time, he tries to impress upon them the weaknesses, and probably the unjustness of the strong points of his opponent. The experts may have, at first, engaged in the case with the best intentions of viewing the subjects submitted to them from an unbiased standpoint, and of giving impartial testimony, and of acting entirely fairly to both sides when called on the witness stand; but gradually and almost imperceptibly to themselves, they become interested in that side of the case on which they are called upon to testify, and finally, if they are not constantly on their guard, they have allowed themselves to be wrought up to such fever heat of interest that they are no longer impartial witnesses, but partisans in the case, noting every point scored by the attorneys with almost as much interest as the parties at law, whose lives or properties may depend upon the verdict of the jury. Again and again, I have heard experts in discussing matters to be submitted to them, speak of "*our side of the case.*" Finally there is in the present method of employing experts another feature that has a tendency to bias their minds and pervert their testimony. They are paid by the party for whom they testify. It is radically wrong to make the expert's fee depend upon his testimony. In a former communication on this subject, I have said: "He is but human and should not be subjected to the slightest mercenary temptation that might in any way bias his judgment. If the expert witness should be as impartial as the judge or jury, and I think no one will deny this assertion, he should not be subjected to temptations from which they are free. How ridiculous it would seem to allow plaintiff and defendant each to choose and pay his jurors and judge. Yet, the expert witness, who is thus employed, is re-

quired to testify to, and in a certain sense, sit in judgment upon, facts which neither the learned judge nor the jury, "just and true" claim to be able to understand.

It is one of the instincts of our nature to feel a certain amount of interest in the party who employs and pays us. The reciprocal relations of capital and labor depend upon the mutual interests of employer and employee. Let the expert try to avoid getting interested on that side of the case on which he is employed, and he will find just in proportion to the importance of the case will his sympathies be enlisted.

Now, with an expert upon the witness stand who has been subjected to the biasing influences which I have mentioned, it is expecting a great deal of him to look for equally impartial answers from him to the questions propounded to him on direct and cross-examination. He may try to be fair, and he may not. He may be fair, and he may not. He may scientifically adhere strictly to the truth, and so answer the questions on direct examination, and evade those on cross-examination, as to make his testimony most unjust. How often do we find the expert witness answering every question put to him on direct examination, and modifying, trimming and hedging in his answers on cross-examination? In this, and in numerous other ways, the expert has an opportunity of showing the biased condition of his mind.

Secondly, the present system of expert testimony is a failure, because the method of examination into the questions submitted to the experts is faulty, and fails often because witnesses for each side do not come in possession of the whole truth. To illustrate, let us suppose that a damage suit is brought against a corporation for a real or supposititious injury, and that medical experts of equal ability and honesty are employed on each side. Now it would seem at first thought that the experts on both sides must reach one and the same conclusion, and so the result would be if

partisan feeling could be entirely ignored, and nothing but cold scientific facts considered by both sides in the case.

We have seen, however, the active influences that tend to bias the mind of the experts on both sides. In the majority of instances the experts employed by the plaintiff, and those employed by the defendant, make their examinations separately. The former, true to the plaintiff's interest, note the slightest deviation from health, and if they are not very careful, conscientious and thorough, slight abnormalities are exaggerated in their minds. The latter, true to the interest of the defendant, note carefully every indication of health, often attribute abnormal conditions to trivial causes, and in this way underrate the magnitude of actual injuries. If the jury accept the testimony of the experts on either side as being true, injustice is done to the other party in the suit. It is probable that they often try to draw a happy medium between the testimony of the experts for either side. An approach to justice would be reached in this manner if the experts on each side were always equally skillful, thorough, and honest. But, in fact, we know that this infrequently happens to be the case.

Let us suppose that an expert by skilled and patient training has learned to be impartial in investigating all medico-legal subjects, and is able to be, and is, absolutely fair in giving his testimony on the witness stand, answering with equal freedom from restraint and hesitation all questions propounded to him either by the attorney for the plaintiff or defense. Will such testimony, under the present method of employing experts result in justice? Not always. Fortunately the jury soon learn to distinguish the expert who is trying to be fair, but they are liable to be misled. An expert may so frame questions for his attorney to ask him on the witness stand, as to give him an opportunity to exclude a number of minor and irrelevant points before answering, so as to make the impression on the jury that he is using every means to

be absolutely fair, when in reality he is playing the part of a thief and scoundrel.

How can all this medley and confusion caused by expert testimony be prevented? It is much easier to ask this question than to answer it. Until the present method of employing experts is changed it is impossible in the vast majority of instances to prevent their becoming partisans, and so long as this is the fact impartial testimony must not be expected from them. As the learned member of the bar association has been assigned "The method of employing experts," I shall leave this difficult task to one much more able than I am to find a solution of it. But I wish to add that until this problem is solved, we need not expect much improvement in the general character of expert testimony. The newer the country the greater the need of a change in the present system of employing experts.

When two or more experts are employed in a case, much confusion could be prevented if all the experts for both sides would jointly examine into the subjects submitted to them, and consult together as a board.

In the *British Medical Journal* for March 1st, 1890, appears the following editorial comment: "In Leeds, the custom has, we believe, long obtained among the leaders of the profession to refuse to give expert evidence on any case until after a meeting of the experts on both sides; and this practice has worked so well that the Leeds Assizes are notable for the absence of the conflicts of scientific testimony which elsewhere have done so much to discredit such testimony in courts of law.

If the custom which obtains in Leeds was always insisted upon by the experts for both sides in this country the truth would be more nearly reached by such examinations and consultations, and much would be accomplished to prevent their minds becoming biased in favor of either side of the case.

All the examinations upon which testimony is based should be made at appointed times when all the experts for both sides should be present. In cases of insanity or damage suits, the experts should select the best qualified of their number to make certain parts of the examination, while the others carefully watch, and criticise, if necessary, his methods. To make my meaning clearer, we will suppose that a scientific electrical test is necessary to determine the condition of the nerves and muscles. The one who is most familiar with electro-diagnosis should be selected to make this examination, while the others should make the necessary notes, watch his method of procedure, jot down points for discussion and do everything in their power to make the examination exhaustive and complete. If the case have aspects of a surgical nature, a surgeon should be selected to make this part of the examination while the others should render every assistance possible in taking notes, making suggestions, etc. If during the examination any point arises, upon which all present are not agreed, this should be examined into personally by each, and an agreement reached if possible, before further progress is made in the examination. After the examination, all should consult together, and each point should be separately discussed until a unanimous opinion is reached, if possible. If some difference of opinion occurs in regard to some part of the examination, this should be immediately settled by a re-examination on this point, or if this is not feasible, it should be noted for a second examination at a more convenient time, when all should be present. It seems to me that if the examinations were made and consultations held as here suggested, a conflict of expert testimony, such as we often witness, would be impossible.

In a paper read before the Medico-Legal Society of Denver, about eighteen months ago, I had occasion to say: "It is remarkable how unfrequently physicians disagree in consultation,

either in hospital or private practice, and equally remarkable, how frequently physicians employed by opposing counsel disagree in their testimony on the witness-stand. Much of this difference of testimony occurs from the one-sidedness of the physician's information of the case. Were examinations made jointly and consultations held afterward, this source of error would be excluded."

The Compensation of the Expert. Is it just that special information of which he is the possessor, and which he has obtained by many long years of study and observation, should be extorted from him whether he will or not, at the rate of one dollar and a half a day? Some courts have held that an expert's knowledge is his stock in trade, and to this he has the sole right, and should not be compelled to make it public without receiving due compensation. Some people seem to think that all witnesses should be paid at the rate of the ordinary witness. The county or state has so many witnesses, whose testimony she has a right to demand at the same rate of compensation. Now, suppose a grocer or a dry-goods merchant were compelled to sell every article in his store at the price set upon the poorest, simply because all his goods are groceries or dry-goods, would there be any justice in this? How long would attorneys submit to having their professional knowledge in regard to important cases extorted from them for a mere pittance?

It seems to me that no one should be compelled to testify as an expert without receiving a fair compensation for his services, but that any witness, be he an attorney, physician, or an expert in any other line, should be compelled to testify in regard to facts, of which he happens to be in possession, at the rate per day fixed for the general witness. In the absence of any state law in regard to the compensation of experts, it seems to me that our county commissioners should fix a definite rate for examinations made

under order of court, and for attendance per day for anyone who is required to attend court as an expert.

The rate should not be less than twenty-five dollars for the examination, and twenty-five dollars for each day that a witness is compelled to attend court as an expert. If a lower rate is fixed upon for certain cases, no witness should be compelled to examine, or testify in regard to these special cases, as an expert, who feels that he is unable to do so at the low rate fixed by the county commissioners. The rates for expert testimony, (twenty-five dollars per day), here suggested for Arapahoe County, is about one-half of what obtains in Philadelphia, New York and Boston.

In October of 1890, I submitted the following report on "The Medical Expert," to the Medico-Legal Society of Denver:

1. "That it is the sense of this Society that its Committee on Legislation should endeavor to have a law enacted at the approaching session of the State Legislature, empowering and requiring the judge, before whom a case necessitating medical expert testimony is to be tried, to select one or more medical experts, the number depending upon the importance of the case, the wishes of the attorneys on both sides, and upon the approval of the presiding judge.

2. "That the Board of Physicians so selected by the court be required to examine the claimant or defendant jointly as a board, and that other physicians selected by the attorneys for either side be permitted to be present and participate in the examinations and discussions of the board.

3. "That the physician selected by the court be required to testify in court concerning their examination and submit to cross-examination as is now the custom.

4. "That a definite expert fee be allowed by the court and paid by the county for each of the physicians selected by the judge."

In accordance with this report Mr. C. E. Herrington drafted a bill, which was submitted to the legislature at its last session. The bill passed both houses without opposition, but was vetoed by Gov. Rountt, because he thought it gave too great power into the hands of the judges of our courts.

