1891

Expert Testimony with Special Reference to its Use in the Medical Profession

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The admission of expert testimony as evidence is of very ancient origin, it having been used at an early period by the Romans,--the judex being vested with authority to call experts, when not called by the litigants themselves, who had the privilege of so doing, for the purpose of familiarizing himself with"physical laws of phenomena" of which he was not conversant.

The Canon law also allowed the testimony of experts to be introduced for the purpose of informing the court on those subjects with which it was not familiar. How did it find its way into our jurisprudence? Was it derived from the Roman and Canon laws, as many other sound principles of justice have become a part of our system, which originated with these marvelous law makers? It is not certain whether we derived it directly from the Roman law, or whether it is a system built up independently and distinct from their methods: it is known, however, to have existed in Rome at a very early period.

Its development and use in this country and in England has not been without serious opposition and many eminent text book writers and not a few prominent judges wholly disregard it or attach but little importance to its use.

Lord Campbell says of experts, that, "they come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to the evidence." (1 Taylor Ev. 74) The supreme court of the United States in the case of McCormick v. Talcott (20 How. 402) term the opinions of experts as "reveries" and said to be "as often skillful and effective in producing obscurity and error as in the elucidation of the truth".

This is further illustrated by the case of Templeton v. The People (3 Hun 568: Affirmed 60 N.Y.R. 643) in which the court instructed the jury that he "placed no reliance whatever on the medical expert's testimony, except what is due to the testimony of a sensible and honest gentleman", and he further states that he has equal respect for the opinion of the jury, who as men of the world, having attained a mature age, and seen life in many of its phases, are quite as competent perhaps, to pass upon the testimony as experts, as the one called as such. This part of the charge was held good, the court saying: "A mere expression as to the weight or effect of the evidence, which still allows the jury to be guided and governed by their own convictions, forms no proper ground for exception". That may be proper

and even necessary, under certain circumstances to enable the jury to give appropriate consideration to evidence requiring their judgment. The evidence of witnesses who are brought upon the stand to support a theory by their opinions, is justly exposed to a reasonable degree of suspicion. They are produced, not to swear to facts observed by them, but to express their judgment as to the effects of those detailed by others, and they are selected on account of their ability to express a favorable opinion which there is a great reason to believe is, in many circumstances, the result alone of employment and the bias arising out of it. Such evidence should be cautiously accepted as the foundation of a verdict and it forms a very proper subject for the expression of a reasonable guarded opinion by the court. That is often necessary to prevent the jury from being led astray by giving too much weight to evidence really requiring to be suspiciously watched and which, in many instances, has induced unwarranted results, discreditable to the administration of justice as well as exceedingly detrimental to the public interest .

The cases above cited are sufficient to show to

what extent it has been opposed in the United States court and the courts of the state of New York. The states are not uniform on this subject as it is largely discretionary with the courts as to whether such testimony shall be admitted, or as to the weight being given to it, the discretion being used so differntly by the different courts. It is extremely doubtful, however, in this remarkable age of invention and vast medical discoveries and developments whether courts can dispense with expert testimony in cases involving a high degree of medical skill and inventive science. As science is simply a higher development of common knowledge, it would be difficult to say where science begun and likewise difficult to say what degree of knowledge, science, or skill is necessary to rank a man as an expert. Perhaps it would be safe to say that those matters which people of ordinary intelligence fail to readily and properly understand, and which would require special study in order that they should comprehend it thoroughly, and one who has made this special study and is allowed to give an opinion as to the results of certain acknowledged or hypothetical facts should be an expert upon the subject.

Ten years ago what an electrician would have been required to know in order to testify as an expert, an ordinary electric street car engineer of today could be an expert on probably the same subject. This tends to show that the law of expert testimony is being widely diffused in this great age of invention, and what today may require an expert, may in the near future, from direct contact or education, be a matter of average intelligence.

Bell defines expert testimony as follows: Expert testimony comprises the statements and opinions, with the reasoning upon which such opinions are based, given in evidence by those, who by reason of their knowledge, skill or experience, in a particular science, art or trade, are considered by the law to be fitting exponents of questions relating thereto. With this definition in mind, which is perhaps as correct a one as can be framed, it will be necessary to consider its advantages and uses (1) In the medical profession, and (2) in [illegible]. First as to the medical profession. The use of expert testimony in connection with the medical profession is of great importance,

as the profession itself is one which requires a vast amount of special study and knowledge coupled with years of experience. Health and self-preservation induces people of prudence to guard against that which will impair or destroy that priceless boon, and as this profession is one which requires an extensive amount of learning in order to be able to practice, and one which the lay mind is unfamiliar with, it follows that this would be an important profession from which experts should be selected. Expert witnesses from this profession were allowed to testify as early as 1532 by Charles V. emperor of Germany, and was incorporated into the Caroline Diet, and later on appeared under the writ de lunatico inquirendo which was a commission for inquiring whether a party be a lunatic or not.

Medical men have been much opposed as experts on the ground that there is much danger of deception and fraud, but this argument will not stand, as these representations will not be admitted except when made to a scientific or medical man who has the means of knowing and the opportunities of asserting whether the statements made by a patient correspond with his condition at or about the

time of his making them, also the symptoms as they exist, which an experienced physician or surgeon may discover. Can we look with as much suspicion upon medical men as we would upon an electrician, a locomotive engineer or a man who is an expert raftsman? Is not his profession one which generally speaking, must require a certain degree of proficiency, and are not statements which are made to him by patients made with a view to be acted upon in the matter of sincere personal concernment, and has the party not an interest which must, from the very love of self-preservation, impel a person to adhere strictly to the truth? It does not stand to reason that such evidence should be excluded on such grounds, even though expert testimony in general should be inadmissable for those reasons, and this appears to be the doctrine as laid down by most of our courts. It is held by the New Hampshire courts that "the opinion of a witness is admissable where its propriety is apparent from the nature of the case, and hence the representations of a sick or injured person, as to the nature, symptoms and effect of the disease malady or injury, under which he is suffering at the time, are received as original

evidence. If made to a physician or surgeon or other medical attendant, they are of greater weight as evidence; but if made to any other person, they are not rejected on that account. They are received as indications or concomitants of the disease, malady or injury, in some sort, as going to elucidate and explain the conditions of the person making them", Howe v. Plainfield (41 N.H. 135).

If the mental or bodily feelings of a person at a particular time, or his condition is material to be proved, the ordinary expressions of such feelings or conditions made at the time in question, are admissable as evidence of such feelings and conditions. This is called natural, as distinguished from personal evidence, and as to whether they are real or feigned is a question for the jury to determine.

Evidence of the statement and representations of a patient to a physician or surgeon, would perhaps, come under the head of hearsay evidence, and are objected, or is liable to the objections raised to such evidence. But it seems no more than just to make expert testimony an exception to the general rule, as it is usually admitted from

the necessities arising out of the case.

The only means of determining the existence of many bodily sensations and ailments which go to make up the symptoms of a disease or injury can be only known to the person who experiences them. It is the statement and description of these which enter into and form part of the facts on which the opinion of an expert as to the condition of health or disease is founded. Such facts can only be proved by the declarations and complaints of the party whose bodily condition is the subject of the inquiry. Such declarations must be admitted, or the proof of them would fail altogether.

Experts in this profession are given a broad scope, and it must of necessity be so, else in many cases of Homicide, the guilty would go unpunished by covering himself with the cloak of insanity or mental incapacity. The courts of today recognize this necessity, and accordingly extend the practice to almost every branch of the medical science.

A physician who attends a patient that has been formerly under the care of another medical man may be called

upon to testify, what in his opinion had been the treatment, effect etc. of the former physician, and how the two modes of treatment differed, and whether in his opinion he had been injured by his medical adviser. It is conceded that this is giving them greater scope as experts than most any other class of men, but when we see the necessity for this, our prejudice gives way to sound reason. Some courts object to its use on the grounds that it usurps the functions of the judge and jury, and therefore takes away from our system the necessary element in our law of which Englishmen and Americans are so proud,--right of trial by jury.

But it is difficult to see in what manner they would be allowed to exert so potent an influence in our courts. While it is true that the jury are to give their opinions on direct questions and facts deduced from those questions, yet in how many instances, where medical skill, or science of any kind is necessary in order to make a fair and impartial decision, would a jury be wholly in the dark as to what their verdict should be, were it not allowed to be introduced. It is difficult to see where the rights or powers of the jury are interfered with, but

on the other hand, difficult to see how, in many cases where science or medical skill is involved, how a jury could dispense with the aid of experts. Juries, as a rule, are made up of men from the ordinary walks of life who are familiar only with those subjects with which they are dealing in a most general way. If, for example, a jury on a murder case is made up of medical men, where a murder has been perpetrated by means of poison, or by violence; they have the testimony of the witnesses in which a wound is described, its location or position on the body; it length, depth and breadth; also the sufferings, symptoms and decline of the victim and the approach of death and many other facts and circumstances relative to the case. Would anyone then doubt for a moment, the question as to whether their skill as physicians could not be made use of in deciding the case? Why then object to that same instruction being imparted to the jury through experts on the subject? It is simply furnishing knowledge unknown to the jury, which enables them to better comprehend the matters under consideration, and facilitate their judgement in arriving at proper conclusions. What are the qualifications of

experts, and who shall determine their competency?

Mr. Justice Doe says in Jones v. Tucker (50 N. H. 452) that "when a witness is offered as an expert, three questions necessarily arise. First, is the subject concerning which he is to testify one upon which the testimony of an expert can be received. Second, What are the qualifications necessary to entitle a witness to testify as an expert. Third. Has the witness those qualifications. The questions of qualifications above, are to be determined solely by the court, as our tribunals are not uniform, some courts may be limited by strict rules, while others may be allowed much freedom in this respect. It is not necessary that physicians or surgeons shall belong to the same school or practice in the same line in order that they may be competent. It is not necessary that a physician, in order to give an opinion as to the diseases of animals, that he be a vetrinary. Nor is one not an oculist restrained from giving his opinion on matters relating to the eye.

Questions of insanity, especially in criminal cases where the inquiry involved is, whether the person

accused knew at the time the nature and consequences of his acts. The testimony of experts in this connection is of very great importance. What must a physician know about the human mind or the symptoms of the disease to make him competent? Perhaps the three rules laid down by Bell in his work on expert testimony will come as near the requirements as possible. It declares that "forensic psychological medicine is the specialty and an expert in this specialty must be skilled in three departments of science: (1) "Laws sufficient to determine what is the responsibility which is to be the object of the contested capacity. (2) psychology so as to be able to speak analytically as to the properties of the human mind. (3) Medicine so far as concerns the treatment of the insane so as to speak instructively on the same subject". If either of these elements are lacking, a witness cannot, according to the rule, be an expert.

It is not contested that professional men who are acquainted with the disease and who have examined the patient personally to whom insanity is attributed, that they may give their opinion upon the direct question of sanity

or insanity. Evidence of this nature comes strictly within the well established principles of law, allowing the opinions of experts to go directly to the jury. But it is not confined to cases where personal examinations have been made, as in some of the leading cases it is quite thoroughly laid down and sustained, that persons conversant with insanity and its symptoms, may after having heard the testimony brought out at the trial, but who had never examined the party in question and in fact had no personal knowledge of him whatever, except as imparted at the trial, may give their opinion as to the sanity or insanity of such person, supposing the facts adduced at the trial to be true. The questions in cases of this kind should be carefully put to the jury. The first question to receive consideration would be whether the symptoms and indications are truly genuine or feigned, and if they are satisfied as to their truth, whether in their opinion the party was insane, and what was the nature of, and what character did the insanity assume; what state of mental weakness did such symptoms indicate? But they are precluded from giving opinions directly on the case, but only upon admitted or hypothetical

state of facts; they are not allowed to draw inferences of fact from the evidence; and if the jury do not find the hypothetical facts upon which the opinion can only be based, then it is impossible to apply it to the case, and should not have any influence upon the jury.

They are allowed to give their opinions in cases of alleged insanity, because, owing to their peculiar means of studying human nature, and their ready knowledge of its symptoms, they are of great assistance to the jury, who in many and perhaps the majority of cases, would be unable to decide the question properly. These witnesses, should however, be watched closely lest they should usurp the functions of the jury by stating opinions which come properly in the line of that body. As to how far they may go in giving their opinions is well laid down in the questions propounded to the judges in the famous McNaughton Case which are as follows:- "Can a medical man, conversant with the disease of insanity, who never saw the person previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the person's mind at the time of

the commission of the alleged crime, or his opinion whether the person was conscious at the time of doing the act, that he was acting contrary to the law, or whether he was laboring under any and what delusions at the time". They answered in the following language:- "We think the medical man under the circumstances supposed, cannot in strictness, be asked his opinion in the terms above stated, because each of those questions involved the determination of the truth of the facts deposed to, which is for the jury to decide, and the questions are not mere questions upon a matter of science in which case such evidence is admissible. But where facts are admitted, or not disputed, and the question becomes one of science only, it may be convenient for the question to be put in that general form, though the same cannot be insisted on as a matter of right". If the question could not be put as a matter of right, it could not be admitted if objected to by other party. Our courts appear to be drifting towards this view of the question, although it is the general rule to state a hypothetical case and ask the witness what would be the result if such a state of facts existed. The tribunals in this

country differ greatly on this question, and expert testimony in some of the states is given but little weight even where insanity is involved.

In the state of New Hampshire, testimony regarding insanity is not confined to the profession of medicine, as witnesses, not experts have been allowed to testify that from their observations of the conduct and appearance of the party, whether they deemed him sane or insane. This practice, however, cannot be used except in extreme cases, where it would be the best evidence that could be produced, and where the means of observation, on which their opinions are based, have been of the most suceptible nature. Leaving this very important branch of the subject where our courts have left it (in a very unsatisfactory state), it may not be out of place to refer to another important part of our jurisprudence where familiar instances of its application often occur, and where, were it not for the surgeon who determines whether certain blows would produce death, and the effects of certain wounds and injuries upon different parts of the body, and where, were it not for the skill of the toxicologist, hundreds might find

their way to a premature grave by virulent doses administered by living fiends.

Were it not for allowing experts, to give their opinions, upon certain facts being testified to by other witnesses, justice would very often be thwarted and the perpetrators of crime would go unpunished, as the lay mind would be unable to understand the effects of certain poisons, or the result of blows or injuries on particular portions of the body. Such questions are commonly asked experts without objection, but of course the judicial proof in such cases rests upon other witnesses, where homicide has been committed. It often demonstrates the manner of death, or the causes which would lead to death, the effects of a dose of poison upon the human system and its ultimate result,--the manner of injuries and their effects upon the one receiving them.

They are not only allowed to testify as to the nature of wounds and the probable results, but as to the kind and shape of the instrument producing such wound,--the position of the victim when the fatal blow was struck,--and as to whether the blow would be likely to produce im-

mediate death. Its almost absolute necessity in determining by what means death was caused, in many mysterious cases of homicide where no clue can be found except by employing these valuable witnesses, has led the courts to adopt uniformity on this point, and if a witness is qualified to testify, his evidence is admitted without much objection.

It has been a mooted question in this country as to whether a medical man can be held liable for refusing to testify as an expert, in a criminal case without being paid for his testimony as for a professional opinion. There is no doubt that a physician or surgeon when called upon, must attend and testify to facts within his knowledge, in the same manner and for the same compensation as other witnesses. As regards facts within his knowledge, regardless of his profession, he stands upon an equal basis with other witnesses in reference to his compensation. The real question presented is, can he be compelled to give a professional opinion without compensation other than the ordinary fees of other witnesses?

In Taylor's Medical Jurisprudence, page 19, it is said: "Before being sworn to deliver his evidence, a medical or scientific witness may claim the payment of his customary fees, unless an arrangement has already been made between him and the solicitors who have sent him a subpoena. These fees are generally made a matter of private arrangement between the witness and the attorney". This claim for extra remuneration is one that should be sustained, because when a physician is put upon the stand as a scientific witness, his obligation to the public ceases, and he occupies the same position as any other professional man as regards the subject on which his opinion is sought. If it were possible for the court to compel him to bestow his services gratuitously, it is evident that if he should happen to be the only expert in the jurisdiction, he might be compelled to attend court as regularly as the judge himself, and receive very small compensation for his services. Can the public, in the face of these facts, extort services from him in the line of his profession without adequate compensation? If so any private person, by appealing to the court, might also demand his services for the small com-

pensation of the ordinary witness. It would seem on principles of justice, that he should have the same rights as to giving his professional opinion, on the witness stand, as giving advice or opinion in his office, as a skilled witness cannot be compelled to give his opinion. It has been adjudged that the professional services of a lawyer cannot be required in a civil or criminal action without compensation, and if this is true, why compel the medical man, whose means of livelihood depend upon his profession the same as with the lawyer? His professional services should not be at the mercy of the public any more than the services of a lawyer.

When a physician testifies as an expert by giving his opinion, he is undoubtedly performing professional services, and the fact that he performs them under oath should in no manner deprive him of his just compensation. The position of a madical witness testifying as an expert, resembles that of a lawyer, much more than that of the ordinary witness testifying to facts. His evidence is not instituted to prove facts in the case, but to assist the court or jury in arriving at the proper conclusions from

facts otherwise proved. This is also the duty and business of an attorney. It would be impossible to draw much of a distinction between the two professions in this particular, as the two cases above mentioned are almost similar in their objects.

In conclusion of this subject it might be said that if physicians and surgeons can be compelled to render professional services by giving their opinion on the trial of the criminal cases without compensation, then an eminent physician or surgeon may be compelled to go to any part of the State, at any and all times, to render such service without other compensation than such as he may ordinarily receive as witness fees from the defendant in the prosecution depending upon his conviction and ability to pay. This, under the general rules and principles of law, he cannot be compelled to do. If he knows facts pertinent to the case, he must attend and testify as any other witness.

As regards facts within his knowledge, his qualifications as a medical man are entirely unimportant, as he stands upon the same basis with other witnesses, and receives the same remuneration. But it is different in

regard to his professional opinions, for in giving them he is performing a special service, which cannot be demanded of him without compensation.

While some of the courts hold that a physician is punishable for contempt for refusing to testify as an expert in criminal cases, without extra compensation, yet the more just rule would seem to be to allow him for his professional services the same as though he was giving an opinion or advice to a patient. His means of livelihood depend upon his advice and opinions and if a tribunal can compel him to give it without just compensation, he could be kept in court during the entire session if it seemed necessary to have him testify in the capacity of an expert, thus depriving him of what in the main would be a lucrative practice. What rule the courts will ultimately adopt in reference to the admission of expert testimony, and to the remuneration of those testifying as scientific witnesses, remains to be seen.

Redfield, in his work on Wills, expresses himself as follows on this subject: "It is clear that experts are not obliged to give testimony on mere speculative grounds,

and where they have no personal knowledge of the facts in the case. If they have had personal knowledge of the testator, it may be fairly regarded as amounting to the knowledge of the fact. But unless that is the case, a medical witness is not obliged to obey the ordinary witness-subpoena, and will not be held in contempt for disobeying it. This has been so ruled at nisi prius in England within the last few years". It is only recently in this country that experts have claimed to be exempt from testifying as to subjects within their special line of study, without extra compensation, for the reason that their professional skill and experience is their individual capital and property, and they cannot be compelled to give it gratuitously to any party.

Best states in his work on Evidence that, "The law allows no excuse for withholding evidence which is relevant to the matter in question before its tribunals, and is not protected from disclosure except by some principles of legal policy. A person therefore, who without just cause, absents himself from a trial at which he has been duly summoned as a witness, or a witness who refuses to give evidence, or to answer questions which the court rules

proper to be answered, is liable to punishment for contempt". Many of our state courts take this view of the question, but to say the most they are in hopeless conflict over the subject, owing undoubtedly to the large discretion given them in this matter. There appears to be no well-defined boundary lines within which to confine their authority, and precedents have had but little weight with some of the courts. The quotation from Best does not come out squarely against the position that a professional man is exempt from testifying as an expert on the ground that his special skill and knowledge are his own property. If they are, why should they not be protected "by some principles of legal policy" of which Best speaks,--the policy that no man shall be deprived of his property without adequate compensation.

He is not testifying to facts like ordinary witnesses, but gives his opinion, and in a sense, takes the place of the jury and draws conclusions. He aids the court and jury the same as a lawyer who takes part in the trial. And in rendering this assistance he must make use of his store of knowledge which he has so laboriously acquired.

A question of some difficulty may arise in decid-

ing what class of persons will come within the principles of exemption from testifying as scientific witnesses and what class will not. But the principle would seem to be clear that exempts physicians, surgeons and other scientific men of this class.

In concluding this subject, it might be said that if our courts or the State must have the services of professional men, especially the medical class, in order to facilitate justice, it should recognize their ability and skillful training as their own property and capital, and make just provisions for their compensation as well as for testing their qualifications, as this is the only method of obtaining the best results from their advanced knowledge.

Our present system is abominable, and is constantly meeting with sarcastic reproaches and disapproval from our courts and judges.

Learned writers have observed that the evil would correct itself in a great measure, if just and reasonable methods for obtaining the opinion of experts could be adopted and carried out. Counsel would no longer be on the alert at every point and turn to prevent being entrapped

by garble or colored statements. They would no longer have a right to treat these witnesses as if they had been retained to testify for the party in whose favor they appear. They would listen to the statements of men of science, if disinterested, as jurors do, for information and knowledge to guide in their investigations before the court. The place of an expert, instead of being as it sometimes seems to be, that of a prize-fighter in a ring, would be elevated to one of dignity and importance, as that of a minister of equal and impartial justice, and would command the respect with which true science, even in the common affairs of life. Science and learning, as the handmaids of knowledge, would thereby become honored and inseperable auxilliaries of truth, in the development and application of law to multifarious interests and rights of society. To attain this end, science and skill must not be disregarded to the common accidental facts of existence and dragged into courts as you would the knowledge of a boot-black who had witnessed a street fight, but raised and elevated to the respectability of a high position. But who, it may be asked, are to undertake this difficulty? Is it in the province of our

State tribunals, or does it devolve upon our legislatures to enact remedial provisions? Perhaps it is for the courts to recommend, and the states to enact certain provisions which might largely elevate and make more useful this branch of our law, which at present is in a very unsettled condition.