THE MEDICAL WITNESS. 16 mm black and white sound film. 34 minutes. Produced by the William S. Merrill Co., sponsored by the American Bar Association and the American Medical Association. 1956. $2.00 handling charge.*

In reviewing the sixth American edition of Taylor's *Medical Jurisprudence,*[1] Justice Holmes, then just entering law practice, was troubled by the efforts of the author to inform physicians on legal principles regarding court room appearances. He asserted:

> "You cannot make a physician look at a question in a legal way by such a short hand process, even if it were of much importance to do so. . . . There is, moreover, this objection to the course pursued, that, by such a union of law with medicine, the physician is very apt to be misled as to his duties in the court room."[2]

The Holmes review was written ninety years ago, but the problem still exists today.[3] It is actually more important at present considering the fact that over seventy percent of our litigated cases involve controlling or significant issues dependent on medical proof.

The present film adopts a novel approach in attempting to familiarize the physician with his duties as an expert witness. It is the first in a series of six films to be sponsored by the American Medical Association in cooperation with the American Bar Association.[4]

The idea for this film and those to follow grew out of the excellent series of medico-legal symposiums held in different cities by the

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* The film can be obtained for law schools from the National Legal Audio-Visual Center, Indiana University School of Law, Bloomington, Indiana; for other legal groups from the Committee on Public Relations, American Bar Association, 1155 East 60th St., Chicago, Illinois; and for medical groups from The Wm. S. Merrill Co., Cincinnati 15, Ohio.

1. TAYLOR, MEDICAL JURISPRUDENCE (6th Am. ed., 1867).

2. 1 AM. L. REV. 377 (1867). I am indebted to Professor Mark DeWolfe Howe in the first volume of his biography of Holmes for the reference to this review which was published anonymously. HOWE, 1 JUSTICE OLIVER WENDELL HOLMES, THE SHAPING YEARS 270 (1957).

3. It is a problem on both sides of the coin, in informing physicians on legal issues and in training lawyers and law students in medical matters. For some differing views on the subject, see: Curran and Hamlin, *The Medico-Legal Problems Seminar at Harvard Law School,* 8 J. LEGAL ED. 499 (1956); Schroeder, *Teaching Medico-Legal Materials: The Experience at Western Reserve University,* 8 J. LEGAL ED. 503 (1956); Farinholt, *The Teaching of Medico-Legal Materials at the University of Maryland School of Law,* 8 J. LEGAL ED. 508 (1956); Small, *Personal Injury Law: Law Schools Need to Give a Shot of Medicine,* 41 A.B.A.J. 693 (1955).

4. The A.M.A. has since indicated that the second film in the series is entitled THE DOCTOR DEFENDANT, a film on malpractice. The title is a further indication that the series is beamed primarily at physicians. The other titles in the series have not yet been announced. The film is the same price and can be obtained by the same procedure as that outlined above for THE MEDICAL WITNESS.

Law Department of the American Medical Association during 1955 and 1956. One of the best received portions of these meetings was a demonstration trial (by experienced trial attorneys and medical witnesses) of a personal injury case showing the "wrong way" and then the "right way" to prepare and present expert medical testimony. The type of injury involved was among those most frequently litigated, a ruptured intervertebral disk in the lumbar region of the spine (the lower back).

The Medical Witness is based on this demonstration trial. It is a much-shortened version and it uses professional actors rather than experienced attorneys and physicians in the various roles. On the whole, it is an excellent production. The technical quality of the film is far above the average "audio-visual aid" used in the universities.

The reviewer had the opportunity of showing the film before four groups, two legal and two medical. They were (1) a third-year law student seminar group at my own school; (2) a third-year law student seminar group at Harvard; (3) a varied group of graduate students in medicine, nursing, dentistry, psychology, etc. at the Harvard School of Public Health, and (4) the staff of one of the Massachusetts State Hospitals.

Having exhibited the film before these groups, I will attempt to evaluate its effectiveness for use before various legal and medical audiences.

As indicated above, the film concerns expert medical testimony (by an orthopedic surgeon) in a personal injury action where the plaintiff is claiming to have sustained a ruptured intervertebral disk. The judge acts as a narrator and presents the "right" and "wrong" way for a physician to appear and give testimony. The judge emphasizes "preparation" on the part of the witness as the key to a proper presentation.

The trial then proceeds and we first see the "wrong way" to present the witness and his testimony. A physician is called to the stand and is qualified in a cursory manner. The witness is then questioned in regard to his examination of the plaintiff to which he gives a very brief, highly technical, explanation of his findings, all in a monotone and with a bored expression. He has no notes and does not specify the date of examination any more closely than "November or December of last year."

The witness is then allowed to show x-rays of the plaintiff's lower dorsal and lumbar spine. He explains his findings on the x-rays, again very briefly and in highly technical language, illustrating them by merely holding the negatives up before him. To make matters worse, the plaintiff's attorney stands directly in front of the doctor about two feet from the witness box, completely blocking off the view of the jurors. Just

in case some viewers of the film do not get the point, the camera is then panned in on a juror who is shown shaking his head and remarking to himself, "I don't understand a word that man is saying. I wish he would talk so that we could understand him."

At the end of his testimony, after he has given his opinion that the injury "might or could" be the result of a ruptured disk, the witness is turned over to the defense for cross-examination. This is the heart of the film.

The cross-examination is broken into its usual parts, the collateral attack on the physician's qualifications and objectivity and the direct attack on the substance of his testimony. In the collateral attack, the defense counsel concentrates on determining how many conferences the witness had with the plaintiff's attorney and his fee for the examination and his testimony. On both of these points the witness is bellicose and hesitant to reveal anything. When asked about his fee he answers, "One hundred dollars . . . for the physical examination." With prodding, he admits to two other fees, each $100, for assistance in preparation of the case and for appearing as a witness.

On the direct attack, the witness is unable to recall the date of his examination of the plaintiff or many of the details of the examination. He has not taken his notes to court. The brunt of the attack is based, however, on a testing of the physician's differential diagnosis in the case. The defense counsel challenges the witness on the necessary medical tests to determine the cause of the defect shown on the x-rays and the witness is unable to testify that these tests were performed, let alone indicate their results. The counsel takes him through all sorts of other possible causes for the plaintiff's condition and the physician is begrudgingly forced to admit that these are all possibilities. The witness becomes disturbed, excited, then almost hysterical in his efforts to combat the questions. Counsel then asks, "Isn't it true, doctor, that surgery is the only definite and final test to determine the existence of a ruptured intervertebral disk?" The witness murmurs in the affirmative. Of course, needless to say, in this case surgical procedures were not performed.

To close his examination, the defense counsel asks the physician to repeat the hypothetical question "to which you gave such a positive answer." The witness, with head now bowed in complete and utter defeat, is unable to repeat the question and is dismissed from the stand.

We then see the "right way" to do all this with the performance by what the judge calls a "well prepared" medical witness. This physician has notes and he speaks in an audible, firm, and authoritative voice. He asks permission to use a "chart of the human body" to illustrate his testi-

mony.[5] Receiving this permission, he begins testifying in regard to his examination of the plaintiff by relating the fact that he first observed the plaintiff as he walked into the physician's office.

> "He appeared to limp, favoring his right leg. I had him disrobe completely in order to examine his back carefully. In the normal subject, the spinal column here (pointing to the chart) forms a straight line down the center at the back. On examining this patient's thoracic or dorsal spinae, that is, these vertebrae, these individual bones of the spine that go to make up the spinal column, (pointing to the chart) . . ."

In such manner, the "good" witness testifies. He indicates all of the necessary tests and their results, covering himself very well on the differential diagnoses, though he, too, had not resorted to surgery. He shows x-rays, but uses a shadow box.

The judge-narrator interrupts at this point and points out the fine job being done by this witness and the fact that he is using "words the jury can understand."

The witness' testimony ends with firm answers to a very long and complicated hypothetical question wherein the entire case for the plaintiff is summarized. The witness is dismissed and no cross-examination is shown.

The judge then concludes the film by pointing out again the virtues of preparedness on the part of medical witnesses.

For Medical Group Audiences

I address myself first to the use of the film before medical group audiences because: (1) the film seems rather clearly to have been aimed at the medical groups, and (2) all of the groups before whom I presented the film agreed it would be more effective before such audiences.

Medical groups are often lectured about the techniques and practices of appearing as witnesses—much more than lawyers in general are exposed to lectures on medicine. I say "lectured" because that is what it usually is. It begins in medical school with a few dull sessions on expert testimony and malpractice tacked on a forensic pathology course and continues later in post graduate programs where the doctors may be bored to death by an earnest lesson in the horrors of the hearsay rule. After showing the film to the medical groups, all participants agreed that the film was more interesting and had taught them more than all the lectures they had had in the past.

5. This is an example of the "good witness" using understandable language just in case some of the jury would not comprehend the term anatomical chart!

There was much they did not understand in the film. The film attempts a great deal in one half hour. It is recommended that any medical group using it have an attorney present to discuss the film and answer questions at its conclusion. Judging from my own experience, I would say a one hour discussion period is not at all too long.

The medical audiences were able to see most of the faults of the "wrong way" witness. They resented his evasiveness about his fee and his combativeness with the cross-examiner. In fact, a number thought him "rather unethical . . . perhaps dishonest." Even with my prodding, and frankly leading questions, I was unable to get any person to assert that they felt the defense counsel was unfair in his questions or was badgering the witness.

After a discussion of the reasoning behind some of the questions of the cross-examiner, a few persons began to wonder if some of the questions weren't a bit unfair, particularly the queries concerning pre-trial conferences and repeating the hypothetical question. Some thought that perhaps the judge ought to have taken a firmer hand in the case to prevent this sort of thing.

There were three major questions concerning the trial procedure which both groups wanted explained. First, they asked why the witness was restricted to objective findings and could not also relate subjective findings, or symptoms. This involved explaining the difference between a treating physician and a physician who merely examines the plaintiff for the purposes of giving his opinion in court. Avoiding too much elaboration on hearsay, the audiences seemed to grasp the distinction. Secondly, the groups wondered why the witness was required to give his opinion only in terms of "might or could." This involved explaining the old chestnut about invading the province of the jury. An effort was made to explain that this rule, which all (including myself) agreed was rather unsound, is not followed in all jurisdictions. Lastly, the audiences asked about the hypothetical question, its purpose, and, particularly, why it was so long in the "right way" demonstration. The first part of the question was dispensed with quickly enough, but the second was more difficult. The hypothetical *was* a bit long in the second case.

I made a distinct effort to indicate that all is not lost with a witness even after a cross examination as devastating as the one illustrated in the film. The plaintiff's attorney can accomplish at least a partial rehabilitation of the witness in re-direct examination. I pointed out some of the ways in which it might be done in this case.

Lastly, I asked whether those present might feel they would be more willing to act as expert witnesses now than before they had seen the film.

The graduate students seemed to agree that they more fully understood what was involved and would be more willing to testify. The medical staff was more hesitant but I would say that the majority were more favorably inclined than before the film was shown.

For Legal Group Audiences

As previously indicated, the film is directed more toward physicians than lawyers. Any bar association group or other audience of experienced attorneys[6] would quickly sense this as the over-simplification of the legal issues became apparent. Being used to meatier fare, the bar groups might not receive the film well, though in all truth I'm sure that all but the most experienced personal injury specialists could learn something from it.

The film has a more definite utility in the law schools. It is among the best films I have seen for this purpose. It is of excellent technical quality, has some fine material for classroom discussion, and has a lesser amount of platitudinous preaching than do most films issued for student consumption.

The film was well received by the two medico-legal seminar groups that saw it. Of course, this is neither a good sample nor a representative one. Both groups were nearing completion of the seminar and had had a good amount of material in medico-legal trial technique plus some special sessions in the pathology of back injuries. Nevertheless, being a graphic presentation of court room practice, the film was a useful vehicle for discussion in the remainder of the two-hour session.

The film should also be useful in evidence courses and courses in trial practice. We are all aware of the fact that our law students are sadly deficient in matters of trial-level practice. The film provides an exposure to trial techniques and a vehicle for discussion and analysis in the traditional law school manner based on something other than an already decided—and often edited—appellate decision.

In the seminars, much time was spent on things that were not covered in the film. We attempted to analyze a possible cross examination of the "good witness." We also constructed a re-direct examination of the "bad witness" as a means of rehabilitation. Since the line of questions used to qualify the second witness were not shown, we were also able to explore this area freely. Some might consider the failure to

6. For example, I have been told by a member of NACCA (National Association of Claimants' Compensation Attorneys) that the film would probably be too elementary to be shown at a NACCA meeting. The NACCA group is composed mainly of specialists in personal injury litigation.

show these portions of the trial a weakness in the demonstration. On the contrary, their absence adds greatly to the film's value as a teaching tool.

A Conclusion

Only one troublesome point remains. Perhaps it goes back to the query of Justice Holmes. Just what is it that we are trying to teach our medical witnesses? The judge-narrator in this film stresses preparation as the touchstone, the difference, between these witnesses. Just what does he mean by this? Is it the fact that the good witness came to court with his notes and with his memory refreshed about the case? This type of preparation we should expect from any expert witness. Is it that he should have brought a shadow box to court to show the x-rays? Or, that he should have used an anatomical chart? On the first, the shadow box, it is difficult to imagine a self-respecting orthopedic surgeon showing x-rays to anyone without a shadow box. The use of the chart is a more significant question. This begins to get into the realm of demonstrative evidence techniques. Successful attorneys and physicians today are using much more than simple anatomical charts. For example, they have models of the area of the vertebral column and can quite dramatically show just what a ruptured disk looks like. Other medical witnesses may use color slides, moving pictures or other complicated and ingenious demonstrations.

How does one go about preparing medical witnesses for this type of "very best" testimony? The "good witness" in this film obviously knew the court room procedures quite well. In addition to his mastery of demonstrative techniques, he spoke distinctly and audibly and, above all, directly to the jury (something few witnesses ever learn to do) and in what the judge called "language the jury could understand."

Lawyers value this type of witness most highly. But all of this prowess takes training and experience, experience in being a witness and not merely in being prepared on the medical issues involved in the particular case. This puts a premium on the physician who goes to court often.

The issue of the professional witness was not touched on in the film, but it is a serious one. There is no doubt but that the bulk of the physicians who do appear in court quite frequently are both qualified experts and unbiased in their opinions. However, there is a tendency in some areas for a few physicians to be used very heavily, or almost exclusively, either by defense counsels (insurance company representatives) or by plaintiff's counsels.

There are many factors militating toward this practice. One is

pointed out above. When an attorney finds a physician skilled in these techniques of testifying, he tends to try to use him again and again.

The problem for the legal system in this trend, however, lies in the fact that this highly-prized type of medical witness may not be the most expert on the medical issues involved. In particular, he may not be among the more advanced and progressive clinicians who have the most to offer.

Another very important factor in the tendency toward professional witnesses is the reluctance of many clinical physicians to appear in court. If it is agreed that we need to expand the lists of medical witnesses available for use in legal matters, then films such as this one and others like it will serve an excellent purpose if they can help to persuade qualified physicians to give some of their time to the courts.

It is up to counsel and the bench to help in this effort to attract more physician witnesses. They must ease the way, making it more convenient and less traumatic to appear in court. And perhaps we could do something about requiring a bit less in the way of "preparation" for the medical witness than might have been indicated in this film.

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NATIONAL COMMUNISM AND SOVIET STRATEGY. By Dinko A. Tomasic. Washington, D. C.: Public Affairs Press, 1957. Pp. viii, 222. $4.50.

Europeans residing in this country frequently express their bewilderment at American political life. Understanding the differences between the two political parties is particularly difficult for them. Their European experiences and concepts just do not fit in, and the pattern present in the European dilemma between conservative and liberal, right and left, Christian and Socialist, democratic and authoritarian offers little help. The nature of political disagreement, or the essence of political conflict between the two parties in America, eludes a foreigner's understanding. Persons in this country experience similar problems in understanding the political culture and conflicts that inhere in political systems differing from their own, particularly those of the Communist society. These difficulties are accelerated when a political conflict arises within the Communist society—such as the one between the Communist power-center in Moscow and the Communist regional power-center in

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