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Citation Information

Haines, E. L.. "The Medical Profession and the Adversary Process." *Osgoode Hall Law Journal* 11.1 (1973) : 41-53.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol11/iss1/3>

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THE MEDICAL PROFESSION AND THE ADVERSARY PROCESS

BY E. L. HAINES* **

Before we accuse the medical profession of maintaining a wall of silence in order to avoid testifying in our courts, it may be worthwhile to enquire as to the attitude of other citizens. Then we might go on to consider doctors and their special reasons for non-involvement. If there is substance in their reluctance, perhaps we might examine the adversary system; its possible defects and solutions. And lest we are blind to what other systems of jurisprudence offer, we might consider how litigation is conducted in a modern western European country operating under what is commonly called the Inquisitorial System. This examination of one of the world's oldest systems, under which by far the largest number of its citizens resolve their differences, might even give rise to a slight glimmer of misgiving about our own Anglo-American adversary process. Finally, it might be worthwhile to explore a few innovations in medical and hospital malpractice cases that may make for better public acceptance.

Let us turn now to the average citizen and his attitude toward our system of justice. That great jurist Learned Hand once remarked "Short of sickness and death, I would avoid a law suit above all else." He was speaking of parties. What of the witnesses? How often do witnesses volunteer in automobile accident cases where their evidence might be vital to one side or another? Since they are motorists, one would expect a certain degree of sympathy, but the investigating officer often enquires in a loud voice for witnesses amongst the bystanders, who remain silent. And if the matter has criminal connotations, silence is becoming the rule. Perhaps the nadir was reached in the knife murder of Ruth Genovese in New York City, when twenty-six people heard her scream for help and none responded or called the police. Why is there this public attitude of non-involvement? Why should our courts be compelled to try issues on only partial evidence? Without witnesses, justice under our adversary system is impaired.

There are many reasons why responsible citizens do not come forward. There is the loss of time caused by endless adjournments, the loss of income, and the pitifully small witness fee. Then there is the unlimited right of a lawyer to cause a subpoena to be issued in the Queen's name requiring the putting aside of all personal matters and attendance in court to await the convenience of the tribunal and the lawyers. Refusal to comply is enforced by contempt proceedings — truly a remarkable power to command testimony at a place and time convenient to the court and litigants. Once in court, a strange and unusual place for the witness, he finds himself cast in a partisan

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**The author desires to express his appreciation to his research assistant Miss Jennifer Bankier, of the Osgoode Hall Law Journal. Without her untiring efforts much of the source material would not have been collected and made available.

role. He is put forward because his testimony supports the cause of one of the warring parties.¹ Immediately he is attacked by the other side on what he has heard, seen, and remembered, and then for good measure, he may find his credibility questioned. At no time is he the court's witness. His main function is popularly understood to be not so much that of establishing the truth as supporting the allegations of the party who offered his testimony.² He is sworn to tell the truth, the whole truth and nothing but the truth, but then is compelled to answer only the specific questions of the lawyers. He cannot have counsel appear for him. I am waiting for the day when some frustrated witness who has answered counsel's questions will turn to me and ask, "Now may I tell the whole truth?" Viewed in the perspective of what happens daily to thousands of witnesses in Canadian and American courts, it is not difficult to understand their reluctance, and discover that they learn through their own experience, or that of their friends, that the ordeal may be avoided by the simple expedient of remaining silent.

Let us now consider the position of a doctor involved in a malpractice action. Doctors do not take kindly to the adversary system. It is entirely foreign to their way of settling disputes. When they disagree on a diagnosis or a treatment technique, they attempt to resolve it by obtaining the assistance of more experienced scientists and each joins in an objective search for the truth. It would be unthinkable for them to refer the matter to an independent layman, whether he be a judge or jury. Even if they did, there are no specialist judges in malpractice matters and the majority have no training in basic anatomy and physiology. The courts seem to dislike calling an expert assistant to sit with the judge and assist him in understanding the evidence. Leaving aside those few cases of such obvious error that the law implies negligence from the event (*res ipsa loquitur*), the great bulk of bad results from medical care arise in a terribly grey area where the law may see negligence but medicine sees merely an unexpected occurrence in a very inexact art. Here we must recognize the difference in thinking between lawyers and doctors. The lawyer is armed with the most accurate diagnostic instrument, the "retroscope". With twenty-twenty vision he seizes on the unfortunate result, second-guesses the doctor and charges him with fault, although at the time of treatment the symptoms and the various tests presented a very foggy picture and resulted in a complex, differential diagnosis.

However, the major objection of the doctor to a malpractice action is the confirmed belief of the medical profession that the suit is a reflection on his professional abilities and standing. The very name "malpractice" repels him, and in the minds of some denotes quasi-criminal or unethical conduct, a loss of standing with his colleagues in the medical profession, degradation in the eyes of his patients and the community in which he practices, or loss of possible promotion and staff privileges in local hospitals. And, indeed, there is some basis for these fears. What obstetrician found liable for mis-managing an obstetrical case, or an anaesthetist for an untimely death would

¹ See Laidlaw, J.A., in *De Jussel v. Hajzer*, [1948] O.W.N. 468.

² S. Greenleaf, *Evidence* (16th ed. Boston: Little Brown & Company. 1892)/sec. 442.

be proffered a senior appointment in his hospital? In addition, is it not likely that unfortunate publicity might seriously impair income?

Here the doctor encounters what he considers an anomaly. When a lawyer is sued for malpractice (and there are many errors and omissions as evidenced by the very high lawyers' insurance premiums in Ontario) the case is relatively short. Usually it is settled without action or before trial. Never does the court require evidence of the lawyer's standard of care. Why? The Judge himself is a lawyer and he knows the standards. But in the medical malpractice action the judge does not know the standards. He must hear evidence from those who will testify to the standard and wherein the defendant departed from it. That evidence can only be supplied by other doctors and here the trouble arises. Seeing only the bad result, and assuming it could only be caused by neglect, the plaintiff's feelings run high. The defendant considers it happened as an unfortunate occurrence or through a justifiable error in judgment.

It has been the practice of the Ontario Medical Association to designate an accredited specialist to be available to advise plaintiff's counsel and appear as a witness at the trial. It has helped a great deal, but quite naturally any doctor is reluctant to point an accusing finger at another colleague in the grey area in which most malpractice cases seem to fall. Mistaking sincerity for sympathy for a fellow practitioner, the plaintiff is too ready to believe in a wall of medical silence.

Canadian doctors shudder at the chaos south of the border where malpractice actions have reached epidemic proportions and insurance premiums are astronomical. They fail to recognize the difference in Canada. First we have no contingent fees, with the corresponding lawyers' enthusiasm generated by the expectation of a generous proportion of the verdict. Secondly, rarely are medical malpractice cases tried by a jury, something which in the United States is a constitutional right.³ Thirdly, in all but seven of the United States,

³ See *Kempffer v. Conerty* (1901), 2 O.L.R. 658 n. (C.A.); *McNulty v. Morris* (1901), 2 O.L.R. 656 (C.A.); *Town v. Archer* (1902), 4 O.L.R. 383; *Hodgins v. Banting* (1906), 12 O.L.R. 117; *Gerbracht v. Bingham* (1912), 7 D.L.R. 259, 23 O.W.R. 82, 4 O.W.N. 117; *Wilkinson v. Hayes* (1915), 9 O.W.N. 124; *Smith v. Rae* (1920), 51 D.L.R. 323 (C.A.), (1919), 46 O.L.R. 518, (Use of jury criticized); *Sweetman v. Law* (1923), 23 O.W.N. 502; *Mercer v. Gray*, [1941] O.R. 127 at 131 (C.A.); *Jaffray v. Sisters of St. Joseph of Sault Ste. Marie et al.*, [1966] 2 O.R. 304 (Jury denied in suit against hospital and nurse).

The position in the other provinces is similar. British Columbia: *Plowright v. Seldon*, [1933] 2 D.L.R. 804, (1932), 45 B.C.R. 481, affirming [1932] 1 W.W.R. 792; *Taylor v. Vancouver General Hospital (No. 1)*, [1945] 4 D.L.R. 737, 3 W.W.R. 510, 62 B.C.R. 42; leave to appeal to the Privy Council refused 62 B.C.R. 79 (C.A.); *Steele v. Walker*, [1953] 4 D.L.R. 147 (C.A.), (1953), 9 W.W.R. (N.S.) 413; *York v. Lapp* (1967), 65 D.L.R. (2d) 351. Alberta: The Jury Act, R.S.A. 1970, c. 194, s. 32(2); *Duxbury v. Calgary*, [1940] 1 D.L.R. 684 (C.A.), 1 W.W.R. 174. Manitoba: *Kingsbury v. Washington*, [1925] 4 D.L.R. 632 (C.A.), 3 W.W.R. 436, 35 Man. R. 246, affirming judgment of Curran J. (unreported) which reversed [1925] 3 D.L.R. 326, 2 W.W.R. 430, (C.A. refused to follow Ontario cases, jury trial allowed); *Durkin v. Sisters of Charity of St. Boniface General Hospital* (1938), 46 Man. R. 158, affirmed [1938] 3 D.L.R. 802, (Jury trial refused). Quebec: Art. 332 C.C.P.; Art. 337 C.C.P.; *Bernard v. C.*, [1969] C.S. 343 (Jury trial refused in malpractice action under authority of Art. 337). Nova Scotia: *Marshall v. Curry (No. 2)*, [1933] 3 D.L.R. 198, 6 M.P.R. 267.

contributory negligence in a plaintiff is a complete bar to recovery, so insurers are encouraged to defend. In Canada the plaintiff's claim is merely reduced by the degree that his fault contributed to his loss.

Perhaps more important is a factor not readily apparent. Most Canadian doctors are members of a strong medical protective association which has made it a practice never to settle on the basis of economy. If a doctor is proven at fault, they pay. If he is not at fault then they will spend a fortune in defence. They may not always succeed, but they have rid the Canadian courts of nuisance malpractice claims and their members of the harrassment of being sued without cause or on flimsy grounds.

When malpractice cases do go to trial, the court must hear at length evidence as to the standard of care and often very complex evidence as to facts giving rise to the misfortune, some of which are flatly contradictory. It must do its best in an adversary atmosphere operating under rules of shifting burdens of proof and presumptions. Often these cases end up in appeals and the costs are very heavy.

Fortunately not many malpractice cases come to court in Canada. When they do they follow the same course as other civil actions: writs, pleadings, motions prior to trial, production of documents, examination for discovery, extensive interviews with witnesses, research of the law by the lawyers and extensive study in all relevant medical matters so that the lawyers may be informed of the science in question. From the commencement of the law suit until the trial it may take months or years and is usually very expensive. From the victim's standpoint he may have trouble finding a competent lawyer knowledgeable in malpractice matters, and, if he succeeds, in raising the funds sufficient to pay his fees and those of medical consultants who are prepared to act and perhaps to testify.

The trial is usually lengthy and medical practitioners are reluctant to testify since they abhor the courtroom procedure through which their professional competence is questioned and their wits and self-control badgered and tested by what must seem to them counsel's continual harrassment. It is not unusual for several partisan experts to be called and contradict each other. The judge sorts it out as best he can. If the plaintiff succeeds, the defendant insurer pays the judgment and the defendant doctor suffers the embarrassment of a judicial finding reflecting on his conduct. If the plaintiff loses, the defendant has undergone one to three years of having his professional competence under question, and that alone might constitute a substantial loss.

Under the adversary system a medical malpractice case is one of the most difficult, expensive, and unsatisfactory, to all involved. Is there a better way of resolving these matters?

The Inquisitorial System

There are many excellent models in western Europe. Perhaps one of the best is in Germany.⁴ In the interest of conciseness, let us follow the average German civil case briefly. As strangers we are going to encounter many

⁴ B. Kapan, A. Von Mehren, and The Honourable R. Schaefer, *Phases of German Civil Procedure* (1958), 71 Harv. L. Rev. 1193.

surprises. First there are no juries. The higher courts function as Collegial Courts, that is, a trial is conducted by three judges who, having obtained their degrees as lawyers, have then gone on to post-graduate work and obtained a degree in judicial administration. If appointed to the bench they have thereafter confined themselves to the judicial role. So at the very threshold we have the courts run by expert career judges who have arrived at their positions by long training and experience. Nowhere in the Anglo-American system have we a comparable system of training for the bench. Furthermore, it is taken for granted that the judges know the law and will apply the appropriate legal principles in the resolution of the dispute. Proceedings are commenced by the claimant filing a document of demand in which he sets forth the facts, his proof, and the names of his witnesses. The defendant files his answer, setting out his facts, proof, and witnesses. The parties' declarations regarding the factual circumstances must be complete in accordance with the truth, and a party must reckon that the rules of court provide that in coming to a judgment the court is to take into account, along with the formal proof, the behaviour of the parties throughout the litigation. The court resents technicality and struggles for substantial justice.

When the complaint and answer are delivered, the president judge of the College examines the documents and decides whether the next step will be taken by the full court or by one of its members. Usually it is the latter and the judge designated will remain seized of what we would consider a series of pre-trial conferences which are designed to give the court a better understanding of the issues so as to enable it to direct the course of the litigation. Basic in the rules is that all measures must be taken at every stage by the court to settle litigation, and often this is achieved in the first conference. Early settlement means a large saving of litigation expense. At these conferences the parties must be present with their counsel. There is free and complete discussion. Issues are clarified. Admissions are made. Directions are given of what is to be done and what witnesses are to be called. The court arranges for the attendance of the witnesses and examines them. Counsel for the parties may also examine. Contrary to the intensive pre-trial interviewing of witnesses by their Canadian confreres under the adversary system, the German lawyer refrains from such interviews or is very cautious about them simply because it is the court that is seeking the truth and the parties with their lawyers assume the role of assisting the court. There is no such thing as a defendant waiting to see if the plaintiff can make out a *prima facie* case and then calling his defence. In the pre-trial conferences, each party will be asked his position in respect of each issue and will disclose his witnesses. If the subject matter is admitted by the opponent, the calling of the witnesses is unnecessary. It must be emphasized again that these conferences are conducted by experienced jurists expert in discovering the truth, and that they go about it unencumbered by rules of procedure and evidence designed to limit the enquiry or exclude evidence. The judges are in charge. Everything that may be of help is investigated.

A very substantial number of the exclusionary rules considered by Wigmore have no counterpart in the German Law of Evidence. For example, hearsay evidence is freely received — and then freely evaluated. Therefore that distracting obligato of American trials, counsels' objections to questions

and rulings by the Court, is almost entirely absent. Especially are these quarrels at a minimum because it is the Court that puts most of the questions. The evidence is sifted and examined in these pre-trial conferences with all interested parties being required to make disclosure. A careful record of the evidence of each party is taken. Where it is necessary to call witnesses the court gives the appropriate direction for their attendance at the next conference. If witnesses appear they are examined, and if a matter of credibility arises they are held over for hearing by the full court. These repeated discussions or conferences are devoted to the progressive shaping of the issues and the content of the case by a process of clarification, either to the pacification of the parties, or failing that, to the propulsion of the litigation. They are more of a collaborative investigation than an adversary presentation. Settlements are common in the process. The intensity and candour of the courts' drive toward settlement will astonish the Canadian observer. The rules direct that the first order of business at the first conference is to attempt an amicable settlement, and the rules authorize the full court to do so at all stages. Lawyers do not complain of strong official impulsion towards settlement, nor is there a feeling that a judge's impartiality is to be questioned because he has pressed for settlement.

The court has power to obtain an expert's written opinion, or call an expert; and it has power to take a view. The parties may put forth other experts if they so desire.

A Canadian lawyer will be conscious of a questing attitude on the part of German judges and of the cooperation of the German lawyer in aiding that quest. If the case is not settled in the conference stage, then an order is made as to what witnesses are to be called and the issues to be argued. These pre-trial conferences may be considered as a process of ripening the case for trial by the full court. At trial only the witnesses nominated by the parties or court are examined and usually their summons indicates the areas on which they are expected to testify. The presiding judge asks most of the questions. Counsel often suggest other questions or they may be permitted to examine the witness directly. There are no surprise witnesses, because of the obligation of complete disclosure. It would be hard to find in German courts anything resembling the Canadian-style clashes between experts paid to be partial, fiercely and interminably examined by lawyers with smatterings of contrived learning on the expert's specialty. Basically it is the court's responsibility to determine whether an expert opinion is needed. Even though a party may propose a particular expert, the court is entitled to reject him and select another.

In essence, the German Inquisitorial System in civil cases may be summarized as being a tribunal of trained judges engaged in a quest for truth supported by rules requiring the parties to make complete disclosure at all times. There is an obligation on the court to protect both parties and reach a right result regardless of the faults of advocacy. Connected with what might be called their doctrine that all relevant evidence is admissible, is the principle of pre-evaluation . . . the court is to give such weight to the evidence, including the happenings in the courtroom, as it deserves in reason. Pre-evaluation is dominant and pervasive in German law. Finally the standards

of proof on a proponent are a little higher than in Anglo-American civil cases where we act upon the balance of probabilities. Perhaps if our courts had the pre-judicial training of the German judges together with the Inquisitorial System at our disposal, we could require the same high standard of proof. As it is we must get along on the mere balance of probabilities to accommodate ourselves to the gamesmanship of the adversary process.⁵

Improvements in the Adversary System

Before he was made Chief Justice of the United States, Warren E. Burger was one of a panel of one hundred and fifty experts invited to contribute ideas toward a more perfect constitution for the United States. One of his suggestions was "Put an end to the adversary trial."⁶ He was of the opinion that it did not necessarily produce justice. It is unlikely the Anglo-American adversary system will be abandoned in the near future. It has been with us for centuries and its greatest strength lies in the freedom of control each litigant has in presenting his cause before an independent tribunal. It makes for a greater acceptance of the result; in fact it may be said that the Anglo-American system survives because of this manner of dispute resolution. Jurists and lawyers repeat fondly the words of Lord Hewart in *Rex v. Sussex Justices*⁷ "That justice must not only be done but manifestly appear to be done." Now almost fifty years later, when our system of justice is under severe attack, should we not add to that ethic that "those who have justice done to them must recognize it as justice"? The personal equation now enters every process, and in my respectful opinion, the seventies will, I hope, be known as the decade in which our courts will declare the great rights of the people. The one fault of the adversary system of justice is that it only works well when the parties are of equal strength. Since this process is conceived as the resolution of a contest between two warring parties before an objective tribunal, it follows that somehow each party must have the resources to present his cause adequately. This of course is not so. Today in a civil case only the poor, assisted by legal aid, or the very rich, can afford to litigate. The middle man who pays his way, his taxes, and perhaps owns a piece of property, cannot possibly afford to risk his hard-earned assets in litigation where the loser must pay the legal fees of the winner. It could be ruinous. Add to this the heavy fees of retaining able counsel and the expenses of preparation, and it is obvious that he cannot afford justice. Ontario Legal Aid has done much, and is doing more, but we are still a very long way from satisfying our citizens' sense of justice. A man will put up with sickness and death, but a sense of injustice makes him want to tear things down. We can expound upon the essentials of justice and the appearance of justice in the trial process. But what of the man who cannot cross the court's threshold? If he is to have a sense of justice, he must know that somewhere, somehow, in the system is a judge or jury accessible to him who will "put things right".

⁵ For an interesting discussion of the basic features of civil procedure in Italy see Professor Angelo Piero Sereni, *Basic Features of Civil Procedure in Italy* (1952), 1 *American Journal of Comparative Law* 373.

⁶ C. Morris, *A View of Malpractice in the 1970's* (1971), *Insurance Council Journal* 521.

⁷ [1924] 1 K.B. 256 at 259.

And that belief must include his fellow man, because it is unthinkable that some should enjoy their privilege while it is denied to others. So it would seem the first great hurdle we must overcome is the equal and ready accessibility of our citizens to our courts. That will not be easy.

Secondly, the adversary system tends to lend itself to so much delay and expense. The courts in an effort to preserve their objectivity tend to assume a passive role. A law suit proceeds at the pace achieved by the opposing litigants, and time usually works in favour of a defendant and against a plaintiff. Some courts have backlogs that are really quite lengthy. Delay is not difficult for a clever lawyer to achieve. As we know, unlike the courts under the Inquisitorial System in Germany, our courts take no active part in resolving the dispute by early conciliation conferences, nor do they actively participate in propelling the case by getting into the very middle of the dispute, discovering the real issues and moving the case to trial. I have heard it said that under the adversary system a judge who participates too closely in dispute resolution is apt to have his eyes beclouded by the dust of the arena. Analogies limp. A lawsuit is not a bullfight nor a gladiatorial combat. It is two citizens trying to settle their differences under a system that compels them to take adversary positions. They may not be showing themselves to advantage because they are quarreling with each other, but usually each really wants peaceable resolution. It seems to me that our next great step is effective, inexpensive and early conciliation. Perhaps we will have to sacrifice a few sacred cows in the adversary corral. That step lies in the partial adoption of a concept inherent in the Inquisitorial System.

The court must be prepared to take an active role in the resolution of the dispute from its initiation, either by bringing about early settlement or by expediting the trial. We must take the gamesmanship out of litigation and make a lawsuit an objective inquiry after truth. In a businesslike manner our judges could bring together the parties and their counsel, and requiring full disclosure, discover the true issues and areas of dispute, give instructions for their resolution, and fix a provisional date for trial. Is it too much to adopt the concept that once a lawsuit is commenced it will be heard within a stipulated time unless otherwise ordered? The public is entitled to this efficiency. (In Scotland a criminal case must be brought to trial within 110 days, subject to a further extension in the discretion of the court)⁸ Is not civil litigation equally important? The law's delays must be overcome.

Thirdly, we could improve the adversary system by having accredited specialists within the legal profession, and special courts. In the Ontario Supreme Court we have a bankruptcy court presided over by an expert in bankruptcy matters who proceeds most expeditiously. There are no others, yet one would think that criminal, negligence, matrimonial, corporate and several other areas could be the subject of specialties in the interest of more

⁸ Criminal Procedure (Scotland) Act 1887, s. 37 and s. 43. For England, the Royal Commission on Assize and Quarter Sessions, 1966-69, (Beeching Commission), Cmnd. 4153, para. 200, recommended a goal of disposition of cases within four weeks of committal.

New York adopted effective May 1, 1972 a goal of a trial date within six months of the date of arrest or summons. Similar measures ranging from 50 to 180 days have been adopted in California, Illinois, New Mexico, Florida, and the District of Columbia.

efficient administration of justice. It is rather quaint that we should expect our judges to be expert in everything. Lawyers will testify that when a dispute is brought before a judge who has specialized in a matter being heard, the trial takes a fraction of the time, the result is better, and best of all, settlements often result. While it is unlikely we will ever have a judge who is qualified both as a doctor and a lawyer and who will be permitted to exercise his knowledge as a doctor during the trial, I think there are a few areas where we can make improvements.

First, there is specialization within the bar itself. Unlike the medical profession with its great number of accredited specialists, the bar has only self-accredited specialists, or perhaps more correctly, the lawyer may do very well in a certain branch of the law and be known amongst his clients as a specialist. All attempts so far in the American and Canadian legal profession to create accredited specialists by post-graduate training and experience have failed.⁹ The law schools can readily parallel the post-graduate courses available in medicine, and there are leaders in the legal profession quite able to give the same specialized instruction that their medical counterparts give to medical students. Why has there not been the same development toward specialization in the legal profession that we have found in the medical profession? The answer seems to be that lawyers have not wanted it, since as generalists they feel adequate to any task, and there are few who would want to accept the stricture of limiting practice to a specialty and being obliged to refer the client to another lawyer.

With our remarkable proliferation of new law and legal concepts, this is one of the challenges facing the organized bar today. To serve adequately we must have legal specialists duly accredited by appropriate university studies and kept up to date by experience and continuing educational programmes. It is probable that it will occur in the future. If it does, then specialist courts will soon follow. More importantly, in the hands of specialists there will be fewer law suits and more settlements. A medical malpractice case would be a good illustration. A specialist trained in medical malpractice would have the essential basic knowledge of anatomy and physiology and the resources to discover quickly whether there was a departure from standard medical practice; thus he or she could promptly advise the client whether there is a good cause of action. Many of those lawsuits arising in the grey area of medical practice would never be brought because the lawyer would know the unfortunate result was a mere error of judgment in circumstances that do not attract negligence. At the same time he would recognize and pursue the real cases of fault, and these would probably be settled. In the result the public, the medical profession, and the bench and bar, would all profit by this new degree of excellence.

Another improvement could be in the use of experts to assist the court in interpreting the evidence. This practice is very ancient, but lately has fallen into disuse in tort cases. Holdsworth cites several examples of the courts in the fourteenth and fifteenth centuries calling for an opinion from experts to

⁹ See Haines, *Specialists Within the Profession* (1968), 2 Law Society Gazette 11.

assist them in coming to a conclusion on factual matters.¹⁰ He quotes a judge as saying, in 1554, that —

If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science of faculty which it concerns, which is an honourable and commendable thing in our law. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation.¹¹

In Admiralty cases the courts have almost invariably sat with two expert naval captains, and no other expert evidence is allowed.¹²

Most Canadian provinces have rules for the use of experts to assist the trial courts.¹³ The Ontario rule is as follows:¹⁴

267. (1) The court may obtain the assistance of merchants, engineers, accountants, actuaries, or scientific persons, in such way as it thinks fit, the better to enable it to determine any matter of fact in question in any cause or proceeding, and may act on the certificate of such persons
(2) The court may fix the remuneration of any such person and may direct payment thereof by any of the parties.

¹⁰ 9 Holdsworth, *History of English Law* (London: Methuen & Co., 1903-66) at 212.

¹¹ Saunders J. in *Buckley v. Rice Thomas*, 1 Plowden, 118 at 124.

¹² In England: "Admiralty", 1 Halsbury (3rd ed.), Para. Nos. 212, 272 and 322; "Admiralty", 1 Supplement to Halsbury (3rd ed.), para. 212; 1970 Supreme Court Practice, Vol. 1, O. 29, R. 3, n. 3; O. 33, R. 6, n. 1; O. 59, R. 10, n. 2 & 3; O. 75, R. 25(2), n. 2; O. 75, R. 28, n. 1; O. 75, R. 41, nn. 1 & 6. *Id.*, Vol. 2, Judicature Act, s. 98; Sixth Cumulative Supplement to 1970 Supreme Court Practice, Vol. 1, Paras. 29/2-3/3; 29/2-3/4; 59/10/2; 75/25, 3418; Williams, *Admiralty Practice* (3rd ed. London: Sweet & Maxwell, 1902) at 440-47; McGuffie, "Admiralty Practice" in 1 *British Shipping Laws* (London: Stevens & Sons, 1964) ss. 1037, 1212-16, 1261-63, 1331, 1373-75; F. L. Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge: Cambridge University Press, 1970) at 17-18.

In Canada: Supreme Court Act, R.S.C. 1970, c.S-19, s. 31; Admiralty Act, R.S.C. 1970, c. A-1, s. 30; Federal Court Rule 492 (Assessors); "Admiralty", 5A Halsbury (3rd ed., Can. Converter) para. 212; "Admiralty" 1 *C.E.D. (Ont.)*, s. 101; E. C. Mayers, *Admiralty Law and Practice* (Toronto: Carswell Co. Ltd., 1916) at 261-62, 268.

¹³ Provisions in rules and statutes concerning the use of experts in the provinces outside Ontario and England are as follows:

Newfoundland: Judicature Act, Revised Statutes of Newfoundland 1952, c. 114, s. 205 (arbitrator).

Nova Scotia: Judicature Act, s. 43 (assessors); Rules of the Supreme Court, O. 34, r. 6 (assessors); O. 34, r. 35 (assessors); O. 55, r. 12 (equivalent to Ont. R. 267).

New Brunswick: Rules of the Supreme Court, O. 35, r. 5 (equivalent to Ont. R. 267); O. 36, r. 4 (assessors); O. 36, r. 43 (assessors); O. 55, r. 19 (equivalent to Ont. R. 267).

Manitoba: Queen's Bench Rule 351 (2) (equivalent to Ont. R. 267).

Alberta: Rules of Court, R. 218 (Independent Court Expert); R. 235 (assessors).

British Columbia: Supreme Court Rules, O. 36, r. 2 (assessors); O. 36, r. 43 (assessors); O. 55, r. 19 (equivalent to Ont. R. 267).

Quebec: Articles 46, 399, and 414 to 424 of the Quebec Civil Code of Procedure seem to resemble the inquisitorial systems. In *Dame Boivin v. Remillard*, [1969] C.S. 203 these provisions were used to justify the examination of a man by an impartial psychiatrist to determine if he was fit to manage his own affairs, on the initiative of the judge in the face of conflicting medical testimony.

England: Supreme Court Practice, 1970 O. 32, 4. 16 (equivalent to Ont. R. 267); O. 33, r. 6 (assessors); O. 40, rr. 1-5 (court expert).

¹⁴ Holmstead & Gale, *Ontario Practice Year Book 1972*, ed. W. J. Hemmerick, (Toronto: Carswells Co. Ltd.).

In tort litigation little use is made of experts on the bench. Recently some doubt was thrown on the constitutionality of the Ontario rule (see *Phillips v. Ford Motor Company*)¹⁵ but a subsequent court took occasion to reaffirm the right of a trial judge to rely on the assistance of experts.¹⁶

Much can be said concerning the use of experts who assist the trial judge. The court owes a duty to be scientifically correct as well as legally correct, and the judge in an adversary system is apt to encounter each side presenting skilled experts who present quite persuasively, opposite views. He may find himself somewhat bewildered. However, if he has beside him on the bench experts whom the parties agree are impartial, he will have the benefit of their guidance in the understanding of the evidence, and no less important, the restraint of their presence will serve to dampen the enthusiasm of the adversary expert witness.

Concurrently the trial judge may encounter a disturbing influence. The impartial experts sitting beside him will not take kindly to the adversary system. They think little of it as a means of discovering objective truths. They make their influence felt as they direct attention to the half-truths of the contending scientist, and appear aghast when the judge replies that "a lawsuit is not a scientific investigation for the discovery of truth, but a proceeding to determine the basis for, and to arrive at a settlement of, a dispute between litigants."¹⁷ If the impartial experts accept these strictures all may be well. Unfortunately their reaction is apt to be in the opposite direction. The impartial expert is usually a very experienced and dedicated man who holds an honourable place in his profession. His thrust will be to shake off the shackles of the adversary system, seek the true facts and respond to what he considers his public duty as a scientist, rather than adopt a limited role of assisting an arbitrator. Perhaps this is the reason why few judges use experts to assist them. Perhaps this is also a hidden persuader in the doctors' decisions to avoid courts. When accused of malpractice, he may feel entitled to at least a trial by his peers.

Personally, in a complicated malpractice action or technical case of any kind, I welcome the presence on the bench of an impartial expert to assist me in understanding the evidence. There is an additional dividend. Upon the appointment of the impartial expert to advise the court, the parties very frequently settle. I suppose a trial before a lay judge may be one thing; a trial before a lay judge assisted by impartial experts may be quite another.

Some form of such dispute resolution may come, and if it does, I hope that the public and the bar will not oppose it on the grounds that if doctors sit as impartial advisers to judges they will be apt to favour doctors. Such a view would overlook the fact that judges lean over backwards against their friends, and further, most professions recognize it as a public duty to rid their ranks of the incompetent.¹⁸

¹⁵ [1970] 2 O.R. 714 (C.A.).

¹⁶ *Featherstone v. Grunsven et al.*, [1972] 1 O.R. 490 (C.A.).

¹⁷ E. M. Morgan, *Basic Problems of Evidence*, American Law Institute (Washington, 1969) at 8.

¹⁸ But see, *Hay v. Bain*, [1924] 1 D.L.R. 1165 (Alta.).

*The Alternative — Loss Insurance*¹⁰

Whether or not any of the foregoing solutions are adopted, the present system of liability of doctors and hospitals remains based on fault. The victim encounters the law, its expense and uncertainty. The defendant must devote valuable time and money in the defence as well as suffer possible loss of reputation. The trend in this century has been to replace the concept of fault and negligence with loss insurance. Workmens' Compensation statutes are an excellent example. Many jurisdictions have adopted or are adopting no-fault automobile insurance, or at the least accident benefits recoverable by the victim without proof of fault.

As medical practice moves from the doctor's office to the hospital or clinic, the old patient-doctor relationship will be replaced by practitioners directing teams of para-medical personnel. Anonymity will become the rule. The stage is thus set for more accidents, and the victim becomes more claim-conscious as he reacts to the indifference of mass medical practice. Claims against doctors and hospitals are almost certain to increase. This will cause insurance premiums to rise, such increase, of course, being passed on to the public. Perhaps of all forms of insurance, public liability insurance is the most expensive. It never returns to the beneficiaries more than 60 cents on the dollar, the remainder having been spent on overhead and the investigation of tort claims. On the other hand, no-fault accident insurance is inexpensive and permits the insurer to pay back a very large part of the premium dollar. Therefore, I propose a system of loss insurance payable without fault, indemnifying patients for injuries resulting from untoward results of medical or hospital care, or "medical accidents". It could be absorbed by adding a few cents to each patient's fee or hospital account. The effects of loss insurance would be extensive. In particular: (1) Victims of medical accidents would be assured recovery without undergoing the burden of hiring lawyers and proving fault, or in the alternative, suffering their losses, and (2) Doctors and hospitals would be relieved of the threat and stigma of malpractice claims. Doctors and staff would be released to engage in progressive diagnosis and therapy.

Some will object that loss insurance will encourage doctors and hospital staff to be careless. The same argument was advanced against compulsory automobile insurance and solicitors' indemnity funds. Actually the restraining influence of tort liability has been found of little consequence. Discipline committees and the loss of privileges and accreditation are much more powerful. In addition, the objection loses much of its force when we observe that traditional methods have not met the problems of modern medical technology in our complex delivery system of medical services. Those who still advocate the retention of the fault method may be able to reconcile themselves by

¹⁰ Articles dealing with the subject of loss insurance include: C. Morris, *Malpractice Crisis — A View of Malpractice in the 1970's* (1971), 38 Insurance Counsel Journal 521; D. K. Deitrich, *Medical Malpractice Litigation: Some Suggested Improvements and a Possible Alternative* (1965-66), 18 University of Florida L. Rev. 623; A.A. Ehrenzweig, *Compulsory 'Hospital-Accident' Insurance: A Needed First Step Toward the Displacement of Liability for 'Medical Malpractice'* (1963-64), 31 University of Chicago L. Rev. 279.

going along part way and instituting a loss policy without fault for stipulated accident benefits, to be accepted by the victim on account of his loss in the same manner as the Ontario automobile compensation scheme, thus enabling the victim to sue for the excess and the doctor or hospital to resist on the basis of fault.

Loss Insurance without fault would thus appear to represent the best solution to the problems encountered in this area.

