

REPORT OF THE COMMITTEE ON MEDICAL EXPERT
TESTIMONY OF THE AMERICAN MEDICO-
PSYCHOLOGICAL ASSOCIATION.*

In the torrent of comment and contention which has long been raging about medical expert testimony, there has been thus far no concerted expression of opinion from the alienists of this country who are the chief targets for the adverse and widespread criticism that prevails on this subject. It is time, therefore, that the position of this Association on this question in its various aspects and particularly as it relates to the insanity defence in criminal cases should be clearly defined, and the difficulties under which the alienist labors and the injustice done him made plain.

This is the tenor of the resolution which led to the appointment of your committee and in this report and the accompanying resolutions we have undertaken the very difficult task of so presenting the issue that it shall represent the united opinion of this Association in so far as it bears on the attitude and position of its members.

The number of alienists who figure in homicide trials or for that matter in medico-legal cases of any description is insignificant when compared with the cloud of medical witnesses giving expert testimony in cases arising from personal injury which are largely responsible for the flood of litigation which is overwhelming our courts. Many of these witnesses also are general physicians whose opinions are not based on special accomplishment in any single branch of medicine. Therefore, there necessarily must be far more opportunity for defective medical testimony to be offered in such cases than during criminal trials in which the question of insanity is involved.

Nevertheless it is the physician in mental diseases whose evidence has to bear the brunt of public criticism and abuse because of the importance of the issue and the wide publicity given to

* Presented at the sixty-sixth annual meeting of the American Medico-Psychological Association, Washington, D. C., May 3-6, 1910.

details of murder trials of which his testimony is a conspicuous feature. The physician who is called to testify on purely medical or surgical questions is brought into no such prominence. On the other hand, all eyes are on the alienist and so great is the indignation and desire for retaliation on the murderer that except in the most obvious cases of insanity any medical testimony which favors irresponsibility is sure of hostile scrutiny from the start no matter how sound and unbiassed it may be.

The alienist on the witness stand faces, therefore, a great responsibility and a single dishonest physician may bring more discredit upon himself and his medical brethren because of this prominence than a dozen unscrupulous medical witnesses in accident cases. That this Association is fully alive to this responsibility is plainly shown by the number of its members who have long taken active part in directing attention to the "evils" of medical testimony in court and in seeking their remedy.

The dangers to the cause of justice that are supposed to lie in the insanity defence for crime are without question greatly exaggerated. Too much has been taken for granted and little or no inquiry made as to the actual results of its operation. There is no way by which we can approach a more accurate estimate of the number of homicidal criminals who have escaped their just deserts by this means than by ascertaining how many sane criminals of this class have been committed as insane to hospitals for the insane in a given period. In reply to inquiry on this point the superintendents of 75 out of 108 hospitals in this country and Canada, with a population of over 83,230 inmates, report but seven criminals who had been charged with homicide who had been improperly adjudged insane and sent to hospitals for the insane during the past two years. Superintendents of special institutions for the criminal insane report that very few criminals of any kind are wrongly adjudged insane and committed to their institutions—not a dozen in twenty years according to Dr. Lamb of the Matteawan institution for this class—while the period of hospital residence of discharged cases shows that they underwent a longer confinement as insane patients than would have followed had the same men been convicted and sent to prison.

The real injustice in this matter is that the insanity defence is not by any means employed as often as it should be. In other

words, much more harm results from *lack* of expert testimony than from its defects. There are far more instances of the commitment of insane persons to prison for want of preliminary examination and recognition of their mental condition than there are of the commitment of sane criminals to hospitals for the insane. Many so-called criminals are convicted and sent to prison only to be found insane and transferred to the asylum for criminal insane. Such patients are wholly out of place in prisons where they are not only stigmatized as felons and deprived of the proper and humane care that is their due, but are made worse by prison discipline, while the difficulty of enforcing prison rules in their cases greatly interferes with proper administration. Dr. Allison has reported that 53 per cent of 179 insane persons under his charge at the asylum for the criminal insane at Matteawan who had committed murder were received from prisons to which they had been sentenced for life. Their histories and the character and course of the disease showed that at least 40 per cent of such convicted cases were insane at the time the crime was committed. In many instances the fact of their insanity was not recognized at the time of their trial, but in others the plea was set up and failed. Wherever this matter has been made the subject of inquiry this has been the story in all large prisons and institutions in which the criminal insane are received both in this and in foreign countries. The lowest estimate from authoritative sources, and a most conservative one, is that ten insane persons are made convicts to one malefactor who escapes punishment on the plea of insanity.¹

In the important matter of the responsibility of the insane for criminal acts we hold that it is not the province of the alienist in the medico-legal cases to pass upon the legal or criminal responsibility of insane persons. That is a question for the judge or jury to decide. A medical man giving expert testimony has only to say whether or not in his opinion insanity is shown by the evidence. It is admissible, however, to call attention to the fact that insanity in the medical sense does not imply total irresponsibility.

The capacity of an individual to distinguish between right and

¹ MacPherson, a Scotch authority, believes that "hitherto the law has certainly erred on the side of severity and has hanged ninety-nine irresponsible persons for one responsible person who has escaped on the plea of insanity" ("Mental Affections," p. 374).

wrong as a test of legal responsibility is in direct conflict with the laws of nature and hence unscientific and false in its application to the mentally unsound. The real questions for the jury to determine in cases of alleged insanity in criminal trials are:

1. Did the defendant at the time of the alleged crime have sufficient mental capacity to rationally appreciate the nature and consequence of the act he was committing and if so had he sufficient power of will to enable him to choose between doing and not doing it?

2. If he had lost the power of choosing with reference to the particular act was the loss due to disease, and not to "heat of passion" intoxication or other self-induced temporary mental disturbance?

The chief obstacle to accurate expert testimony encountered by the physician is the difficulty—often the impossibility—of obtaining all the important evidence that is procurable on both sides of the case. Without this an unqualified opinion of real value cannot be given except where the insanity (for example) of the accused person is plainly apparent. We shall of course be told that on the contrary even the medical man who only forms his opinion after he has examined the accused person and has heard all the evidence submitted in court will still be biased in favor of the side which employs him, and that there lies the whole trouble. To this we can only oppose our conviction that with the majority of physicians the professional instinct outweighs partisan and mercenary considerations and that when they have all the data for a diagnosis at hand they will give as accurate and impartial an opinion on the witness stand as they would in any case occurring in their daily practice. Were this not so, we should be forced to conclude either that medical men yield more readily to pecuniary temptation than members of the other professions or that most men whatever their calling and standing in the community are not radically honest where a fee is concerned.

True reform in medical testimony does not in our opinion lie in a radical change in present methods of legal procedure. It is in the hands of the medical profession, and if physicians would cooperate in refusing to testify unless free access to all obtainable evidence on both sides should be forthcoming we should hear little of the shortcomings of the medical expert.

It frequently happens that the medical witness is debarred from making any examination whatever of the person accused or questioned. Counsel for the defendant may decline to have his client examined and will be sustained by the court. Not only this, but the medical man on one side may examine the person while the same privilege is denied the physicians called on the other.

Sometimes we are allowed neither a personal examination or the evidence on which to base our opinion, but are obliged to answer only a hypothetical question, a procedure which can bear no comparison with either as a means of ascertaining the truth. In spite of the utility and justice of the hypothetical question in the opinion of the legal profession, it can never find favor with medical witnesses. As a rule it is not at all what it represents to be, for to quote Ray—that master of medical jurisprudence—if the case put to the jury is precisely what appeared in evidence it is quibbling to call it a hypothetical case. If, on the other hand, a genuinely supposititious case is put to the expert the less it resembles the actual case the less will it enlighten the jury. However, nobody supposes that the hypothetical cases stated by counsel always represent cases that have actually occurred, for it is well understood that they may be merely a collection of such particulars as best suit the counsel's purpose. A true reform would be to confine the expert to the case in hand as revealed by the evidence and debar him entirely from giving opinions on hypothetical cases. But although there are signs that the hypothetical question is less generally utilized than was formerly the case we have little expectation that it will disappear from court practice. With persistence however we may reasonably expect that in its presentation to the medical witness the essential evidence on both sides will be included and a source of much humiliation to the testifying physician and deception of the jury be removed.

The advantages to come of consultation by the medical witnesses on both sides of a case are admittedly great, because directly in line with medical methods where a careful diagnosis is to be made and the real condition of the patient ascertained. We are therefore in hearty sympathy with the familiar sentiments of Sir James Stephen who says:

“If medical men laid down for themselves a positive rule that they would not give evidence unless before doing so they met in

consultation the medical men to be called on the other side and exchanged their views fully, so that the medical witnesses on the one side might know what was to be said by the medical witnesses on the other, they would be able to give a full and impartial account of the case that would not provoke cross-examination. For many years this course has been invariably pursued by all the most eminent physicians and surgeons in Leeds, and the result is that in trials at Leeds (where actions for injuries in railway accidents and the like are very common) the medical witnesses are hardly ever cross-examined at all, and it is by no means uncommon for them to be called on one side only. Such a practice, of course, implies a high standard of honor and professional knowledge on the part of medical witnesses, but this is a matter for medical men. If they steadily refuse to act as counsel and insist on knowing what is to be said on both sides before they testify, they need not fear cross-examination."

The bar has its duty as well and should oftener take the initiative in securing such consultations. The prosecution and defence should oftener come together and agree upon the experts to be appointed, who should then conjointly examine the prisoner, collect all obtainable evidence, and submit their report to counsel on both sides. Mercier in his work on criminal responsibility cites a famous case recently tried in Massachusetts³ in which this method was pursued with most satisfactory results, the counsel on both sides agreeing to abide by the decision of the commission. "This," he says, "seems an eminently satisfactory way of determining this difficult question. The case is not withdrawn from the consideration of a court of justice, but is tried in the ordinary way, the only difference being that the jury have not to estimate the value of conflicting opinions but are guided to a direct conclusion by a unanimous medical report. . . . The consultation of experts could scarcely fail to approximate their opinions even if they eventually differed and I think the practice is well worthy of a trial."

We also strongly favor the appointment of commissions wherever possible. Cases of crime of minor degrees in which the question of

³ Reported by Stedman in the American Journal of Insanity, Vol. LXI, No. 2, 1904.

insanity is raised have long been passed upon and their proper disposal effected by commissions appointed by courts and the practice is increasing. There is ample evidence to show that capital cases in which the plea of insanity is raised may also be passed upon by commission with equally good results and with full recognition of their graver aspects. It is a frequent practice in Massachusetts to refer such questions to a commission of alienists and the results have been most satisfactory. The chief objection to the commission is that no body of physicians is able to elicit from witnesses testimony that in amount and importance will equal that which can be brought out by direct and cross examination on the witness stand by able lawyers. There is much truth in this, but it is equally certain that the counsel's unfamiliarity with mental disease often leads him to miss or neglect vital points evidencing insanity or its absence which quickly occur to the alienist, and which are far more accessible in private than in the publicity of the court room. A commission, moreover, often saves the expense and other disadvantages of a trial, and should the case come to trial the testimony of the members of the commission would carry especial weight.

But even if the foregoing methods could always be employed the important requisite of a thorough examination of the prisoner might still be wanting. This is not unfrequently the case where the physician's opportunity for observing him is confined to occasional visits to the jail and would be wholly obviated if a period of constant medical observation could be substituted for it. We are therefore strongly in favor of hospital observation in such cases pending the determination of the subject's mental condition. This method has long been in very satisfactory operation in Maine, New Hampshire and Vermont, and is taking root in Massachusetts under recent enactments. It has many advantages. The daily and hourly habits and conduct of the person are under the close and constant observation of trained physicians and nurses. This is invaluable in cases having concealed delusions who may refrain for weeks and months from unburdening their minds to the examiners. Persistent feigning also can be far more easily and quickly detected under these conditions owing chiefly to the difficulty the offender experiences in keeping up the pretence of insanity uninterruptedly and consistently when he is closely

watched night and day. But it is especially advantageous in notorious capital cases. Here removal of the person from public notice to a hospital for observation is quite certain to be effective in silencing the popular clamor and sensational reports that usually attend such cases. The delay it involves also tempers public opinion as does the evident intent of thorough investigation that is shown in a term of hospital observation. There can be moreover no suspicion of bias attaching to the unpaid opinion of State medical officers and the State is also saved considerable expense. Moreover the testimony of a hospital physician when based on such abundant opportunity for study of the case usually carries more weight with court and jury than that of other medical witnesses. Finally, under this method shorter trials are the rule.

Much, we believe, would be gained by the restoration of the common law practice wherever it has been abolished which allows the judge to advise the jury in the decision of complicated questions of fact and to aid them in weighing and sifting evidence that is of a scientific or technical nature. Such a provision would be especially applicable to questions of insanity.

There are also more purely ethical questions which are of decided importance to the medical witness and the repute of the profession. It is, for example, a questionable practice for the physicians to take active part in a medico-legal case by advising with counsel in open court. By so doing he exposes himself to the charge of undue bias, his testimony is regarded as partisan by court and jury, and his attitude is out of keeping with professional dignity.

The acceptance of a fee contingent upon the outcome of a case is a most objectionable and indefensible practice. An unbiassed, independent opinion is practically impossible under these circumstances and the physician becomes an active partisan at once. His testimony is also valueless if he is forced to admit that his compensation depends upon the result of the case.

It is very desirable to establish some standard of qualification for the medical expert especially in cases involving the question of insanity. In no other branch of expert work is special training and experience more necessary in forming opinions of real value and yet it is a common occurrence in most states for physicians with little or no special knowledge of, or practice in, mental dis-

ease to qualify as experts. A step in this direction might we believe be made by the establishment in the various states of bodies of official experts designated by the higher courts any of whom could be called on to testify as experts by either party to a civil or criminal action without however limiting the right of parties to call other expert witnesses as heretofore. This plan, although falling far short of the desired end, should at least tend in the long run to lessen the number of incompetent medical experts.

In conclusion we offer for adoption the following resolutions which shall represent the attitude of the American Medico-Psychological Association on the question of medical testimony as it affects the alienists of this country:

Resolved: 1. That the proved rarity of wrong acquittals on the ground of insanity is the strongest evidence that the abuse of the insanity plea in criminal cases has been unwarrantably exaggerated.

2. That the insanity plea is not by any means raised as often as it should be, to prevent the frequent miscarriage of justice arising from the conviction and imprisonment of insane persons whose true mental condition has not been recognized.

3. That the abuses which have crept into the method of presenting medical expert testimony have been largely the result of established legal tests and procedures, although their correction does not require radical change in the laws.

4. That inaccessibility of the evidence on both sides of the case is the chief cause of defective medical testimony.

5. That whenever possible the medical witness should not testify unless he has had an opportunity to make both a mental and a physical examination of the person in whose behalf the plea of insanity is raised.

6. That we consider the hypothetical question as ordinarily presented to be unscientific, misleading and dangerous to medical repute and that the evidence on both sides should always be included in its presentation to medical witnesses.

7. That in all criminal cases absolutely equal rights should be accorded the medical witnesses for both the prosecution and the defence for the examination of the person alleged to be insane.

8. That in our judgment the judiciary should by legal enactment be allowed more latitude in enlightening the jury and enabling it to comprehend the nature and meaning of the medical testimony laid before it.

9. That we recommend as advisable the adoption wherever possible of the so-called Leed's method of preliminary consultation by medical witnesses on both sides of the case as to its status.

10. That we advocate a freer use of appointments of commissions by the court.

11. That a period of hospital observation of all persons committing crimes in whose defence the plea of insanity has been raised is by far the best method yet devised for securing impartial and accurate opinions, silencing popular clamor, avoiding prolonged and sensational trials and saving expense to the State; also that we advocate the enactment in every State of laws similar to those of Maine, New Hampshire, Vermont and Massachusetts, providing that such persons may be committed by the court to a State hospital for the insane there to remain for such time as the court may direct pending the determination of their insanity.

12. That it is the sense of the Association that it is subversive of the dignity of the medical profession for any of its members to occupy the position of medical advisory counsel in open court and at the same time to act as expert witness in a medico-legal case.

13. That we regard the acceptance by a physician of a fee that is contingent upon the result of a medico-legal case as not in accordance with medical ethics and derogatory to the good repute of the profession, and advocate the regulation of the practice by legislation.

14. That we are in favor of any legislation that will secure a definite standard of qualification for medical men giving expert testimony.

HENRY R. STEDMAN, M. D.
CARLOS F. MACDONALD, M. D.,
CHARLES K. MILLS, M. D.,
CHARLES P. BANCROFT, M. D.
H. A. TOMLINSON, M. D.