

Medico-Legal Issues in Occupational Lung Disease Litigation

By Nathan A. Schachtman and Cynthia J. Rhodes

DURING Alger Hiss's second perjury trial, the defense called a psychiatrist, Dr. Carl Binger, to give an expert opinion on the credibility of the prosecution's chief witness, Wittaker Chambers. After reading Chambers' extant writings and watching him testify at both trials, Dr. Binger found himself able to testify, within "reasonably certainty," that Chambers was suffering from a psychopathic personality. Dr. Binger opined that in Chambers' case, his disorder manifested itself in the asocial behavior of chronic lying. The prosecutor, Thomas Murphy, crossexamined Dr. Binger relentlessly over the course of several days. Murphy elicited omitted facts about weaknesses in Dr. Binger's credentials and about his friendship with Alger Hiss. Murphy's dissection and destruction of the substance of Dr. Binger's opinion has come to be considered a classic of medical cross-examination.¹ In 1950, Alger Hiss was convicted; Thomas Murphy later became a federal court judge; and Dr. Binger reportedly lectured his young medical students never go to court.

Today, many physicians gladly would avoid the courtroom confrontations that Dr. Binger found so discomfoting. Despite these feelings, physicians have an ethical obligation, by virtue of their special training and experience, to assist in the administration of justice.²⁻⁵ Indeed, the Board of Trustees of the American Medical Association has recommended that the presentation of expert testimony should be considered part of the practice of medicine and thus subject to peer review.⁶

The need for truly qualified physicians to fulfill their civic obligations is nowhere greater than in the litigation of the thousands of currently pending cases in which plaintiffs claim they have an asbestos-related lung disease or disorder. The mass filing of these claims began in the 1970s and has today reached crisis proportions. Compromising traditional notions of due

process, courts have begun to consolidate unrelated claims for submission to one jury. Even at accelerated rates of disposition, asbestos claims will remain a serious burden on court dockets for many more years. Expert testimony on chest radiology is usually essential to the accurate resolution of these claims. However, the trip to the courthouse is not without its perils. Ethical, legal, and scientific traps await the unwary.

The recent case of *Raymark Industries, Inc. v Stemple* illustrates some of the hazards of becoming involved in the medico-legal aspects of asbestos litigation.⁷ The plaintiff, Raymark Industries, sued Gordon Stemple and other plaintiffs' counsel, as well as three physicians, for fraudulently "manufacturing" and presenting claims in the course of a large class action settlement. The plaintiff, a manufacturer of asbestos products, alleged that the lawyer and the physician defendants had formed an organization, The National Tire Workers' Litigation Project.⁸ The Project purchased vans equipped with x-ray machines, with which it conducted medical screenings of tire workers around the country. According to the plaintiff's complaint, the defendant physicians had questionable qualifications and had joined with the defendant lawyers in processing and presenting false claims for settlement in the class action.⁹

The physician defendants in the *Stemple* case attempted to avoid judgment on several grounds. One physician defendant claimed a form of witness immunity. However, the trial court held that this defense does not apply when the witness was sued not for her testimony on the witness stand, but rather for "false and fraudulent acts in diagnosing the tire workers."¹⁰ The physician defendants also sought summary judgment in their favor on grounds that the plaintiff could not point to legally sufficient evidence of fraud. The trial court found that there were sufficient inferences of fraud from the defendants' failure to follow standard criteria in making their diagnoses and from the defendants' assigning impairment ratings to claimants with totally normal pulmonary function.¹¹ No doubt the trial court was heavily influenced by a National Institute of Occupational Safety and

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Health report, which found a prevalence of parenchymal abnormalities of less than one half of 1%. The defendants, with their exam-mobiles, claimed to have found a prevalence of over 90% in similar tire worker groups.¹² Upon reviewing the evidence of solicitation and of the medical defendants' willingness to compromise their professional duty to use reliable standards of diagnosis, the court denounced the process as making "a mockery of the practice of law and medicine."¹³ In July 1991, the lawyer and physician defendants settled the case. The terms of the settlement were confidential.¹⁴

Some cynics might cite the *Stemple* case in support of Dr. Binger's dictum about avoiding the judicial process. Fortunately, the unethical solicitations and fraudulent diagnoses alleged in the *Stemple* case are exceptional occurrences in the litigation of asbestos personal injury cases. Even without the apparent excesses at issue in the *Stemple* case, the physician in court confronts other serious difficulties, which result from the lack of communication and understanding between the disciplines of law and medicine.

Some of the consulting physician's difficulties result from stepping outside the usual physician-patient relationship. Although the physician may still feel bound by ethical obligations to a patient, he must view the consulting relationship as creating obligations primarily to the party who requested the evaluation. By agreeing to interpret radiographs in this setting, the physician has essentially become an agent of the party. As an agent for a litigant, the physician usually may not disclose the opinion formed for litigation without the approval of the requesting attorney. This confidentiality is designed to encourage litigants to obtain candid opinions to help in the preparation of their cases for trial or settlement. Because court rules strictly prohibit direct communication with an opposing party, the physician may not discuss his diagnosis directly with the patient or any other party; rather, he must communicate his findings to the attorney who retained him.

In some jurisdictions, a party must disclose his medical expert's findings only if the expert physically examined the claimant. Medical opinions by a radiologist, whose opinion is usually reached without a physical examination, thus need not be disclosed. Radiologists may be

troubled by such nondisclosure and may wish to make it a condition of their agreement to testify that extraordinary findings such as lung nodules be disclosed. Attorneys should comply with such a request, and physicians should not feel reluctant to testify as experts because of such concerns, which can be easily handled.

Once a physician enters into a contractual relationship with an attorney to examine a claimant or radiographs, he owes a duty of care not to the patient, but to the attorney. In this medico-legal context, physicians are generally not subject to any later action for medical malpractice in the event of a misdiagnosis.¹⁵ However, there may be other forms of potential liability for the expert witness. To date, there are very few court decisions that permit cases to be maintained against physicians for "expert witness malpractice." Such litigation is generally disfavored because of its potential for chilling participation in legal proceedings and because it requires relitigation of the case in which the alleged malpractice occurred. Allegations of fraud in preparing an expert opinion, as were at issue in the *Stemple* case, are a rare exception to the general rule.

The doctrine of witness immunity has shielded expert witnesses from liability for their testimony criticizing other physicians' conduct or testimony. In one case, the court dismissed a claim for defamation and intentional infliction of emotional distress brought by a treating physician who had been a defendant in an earlier medical malpractice action. The defamation suit was filed against the physician who had testified as the expert witness in the malpractice case.¹⁶ The expert witness had given the opinion that the treating physician had deviated from the required standard of care. The doctrine of witness immunity shielded this expert witness's opinions, which clearly had been within the scope of a judicial proceeding. Another court has ruled that a physician was improperly expelled from a medical association for writing a report criticizing the treatment administered to a patient by another doctor.¹⁷ The court found that the association's ethical canons were silent on the propriety of criticism of medical care when such opinions are prepared for use in litigation. These protective legal decisions should encourage physicians, in the appropriate forum,

to speak out against "junk medicine" in the courtroom.

The physician who serves as an expert witness should appreciate his obligation to handle forensic materials, such as radiographs, carefully. These materials will inevitably be important evidence at trial. If a party or his attorney or a physician acting as an expert witness loses or accidentally destroys such materials, he may be precluded from discussing any observations based on the lost materials.¹⁸ Worse yet, the opposing party may receive an "adverse inference" instruction at trial. This instruction may encourage the jury to believe that the missing evidence would have been detrimental to the party losing the evidence.

The American legal system adjudicates disputed factual issues by dividing responsibility between the trier of fact, usually a jury, and the trial court. The trial court does exercise some control over the resolution of the jury's findings by deciding whether the proofs on a certain issue are sufficient to permit a reasonable conclusion. For example, the trial court must rule, as an initial matter, whether an expert witness possesses sufficient education, training, and experience to provide an opinion. If the court determines that the expert witness meets the rather minimal legal requirements, then the expert's opinion will be heard by the jury. What weight, if any, should the opinion receive is generally within the jury's sole province. Trial lawyers usually have a dual purpose in attacking an expert witness's qualifications: first, to show the trial court that the witness is not sufficiently expert to be allowed to advance an opinion; second, to show the jury that the witness's opinion should be rejected in favor of the opinion of a better qualified expert witness. Of course, in furthering the second purpose, a trial lawyer may also explore the amount of compensation an expert witness has received, the frequency with which he testifies, and whether his consulting is limited to one side or another in litigation. No doubt many expert witnesses feel that such cross-examination is unsavory.¹⁹ However, this feeling is unjustified. The trial process of exploring for weaknesses in qualifications or for bias is not much different from how physicians themselves often evaluate scientific issues

in the often extremely adversarial context of scientific disputes. Furthermore, the physicians who recoil from this full exploration of qualifications and of bias fail to realize that the demeanor of the expert witness in answering these questions is often more important to the jury than the answers themselves.

The qualified expert witness must give an opinion to a legally required level of certitude. This requirement is designed to avoid having the jury hear unduly speculative opinion testimony. The required level of certainty may vary significantly from jurisdiction to jurisdiction. The consulting physician must know what the applicable legal standard is before supplying an opinion.

Another, perhaps more significant threshold legal standard is the requirement that an expert witness use only scientific devices that are based on generally accepted medical or scientific principles. This test is sometimes referred to as the *Frye* test after a leading case in which the standard was articulated and applied to exclude the use of polygraph test results.¹⁹ The *Frye* test of general acceptance, like the requirement of reasonable certainty, is designed to avoid verdicts based on guesswork.

In personal injury litigation over claims of asbestosis, the *Frye* test has been raised as an objection to the use of gallium scans and high-resolution computed tomography as diagnostic aids. Courts have decided this threshold issue for these tests both ways, sometimes finding the requisite general acceptance, sometimes not. The radiologist who has relied on these tests thus needs to be prepared to defend their general acceptance by reference to standard textbooks, treatises, articles, position papers, and the opinions of colleagues. Of course, even when a novel diagnostic technique has gained general acceptance, the litigants may be unwilling to advance such evidence. For example, plaintiffs in asbestos personal injury cases may be reluctant to undergo thoracic high-resolution computed tomography. Their hopes that the technique, if accepted by the court, would show what otherwise would be radiographically inapparent pulmonary asbestosis might be more than offset by their fears that the technique will show emphysema that also was not apparent on

plain films. If relevant diagnostic tests are not performed, then the adversarial system requires the attorneys for the litigants to argue the negative inference from the failure to conduct the tests.

In ruling on the admissibility of expert witness's testimony, some courts have applied the general acceptance requirement to opinions not based on scientific devices. In such cases, it is the expert witness's method of reasoning that must be generally accepted, not the opinion itself. Recently, some courts have lowered this standard to permit expert opinion, as long as it was reached by a sound, reliable method of reasoning.²⁰ Whatever the applicable standard is, the expert witness must be prepared to show that he or she has reached sound conclusions by valid methods of reasoning.

Much of the embarrassment to the medical

and legal professions from cases such as *Stemple* can readily be avoided by simple compliance with these minimal standards. In some areas, the standards need to be raised to ensure greater accuracy in jury verdicts. In the context of litigation over quality of care, physicians have been outspoken about the low level of qualification of physician expert witnesses, the lack of adequate bases for expert witness testimony, and the lack of peer review of physicians' medico-legal opinions. These problems also exist in other areas of tort litigation. In asbestos personal injury litigation, in which radiology is often the dispositive evidence for or against the claim, radiologists have a special civic obligation to participate in the legal process, as well as to speak out about the quality of the medical profession's role in the process.

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