

A PIECE OF MY MIND

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The Moment of Truth

Court reporter: All rise. The Washtenaw County Trial Court is now in session.

Thus begins my trial as a defendant charged with medical malpractice.

I was named as the sole defendant in a lawsuit accusing me of causing a patient's death through professional negligence—an alleged lack of necessary testing and treatment prior to his sudden cardiac death. This is my first such experience after 35 years of practice and teaching. My few encounters as an expert witness with the legal system had always caused great anxiety. I am now learning how much more stressful it is to be the defendant.

It is one thing to spar with an opposing attorney who is challenging my testimony as an expert about another physician's judgment. It is a different thing altogether to be that other physician, to be the physician whose judgment is on trial.

There is a certain impersonality to being an expert witness. To be the defendant is very personal, and perhaps nothing but personal.

My defense attorney tells me that the outcome of the trial will ultimately come down to me, to whether the jury believes I am a good physician who tried to do my best and did what a reasonable and prudent physician would do. I think he intends this comment as reassuring and supportive, and that it will give me a sense of control over my fate.

It isn't, and it doesn't.

Judge: The attorneys have stated they are satisfied with the jury.

My fate now lies in the hands of eight of my peers. They may be as unhappy to be here as I am. Eight people, whose only real criterion for involvement is that they live in the same county where I practiced medicine, will be asked to understand a complex set of often conflicting medical facts and reconcile competing portrayals of my medical decision making. They will be asked to decide if my practice conformed to that of a board-certified family physician of ordinary learning, judgment, and skill, a definition of the "standard of care" that seems impossibly vague.

I become obsessed with watching them and their facial expressions as testimony and events unfold over the four-day trial. I am quite sure I will recognize them for the rest of my life.

Plaintiff's attorney: He got busy instead of thinking carefully and asking questions that needed to be asked.

The opening statement by the plaintiff's attorney is just the beginning of what I discover will be one of the most painful experiences of the next four days—listening repeatedly to my name linked to incompetent medical care.

"Dr Schwenk made decisions based on risks he didn't know and a weighing of the risks that just makes no sense." "There were clues that Dr Schwenk should have

seen. He was wrong. We know he was wrong. He knows he was wrong."

We physicians are, to some extent at least, comfortable having our care discussed, and even judged harshly, in the appropriate medical settings because we all understand the margins of uncertainty within which we function. We also have the opportunity to respond without having our explanations truncated and subject to objections.

In the courtroom, it is an entirely different experience. The plaintiff's attorney makes statements that cannot be challenged, makes scientific claims that are fundamentally false, and accuses me of failures to which I cannot respond. I become so phobic about hearing my name that I almost physically jump each time it is said by the plaintiff's attorney. Eventually, I simply cringe at the sound of his voice.

Defense attorney: Your Honor, the defense calls Dr Schwenk.

The courtroom is arranged with the jury box very close to where the witnesses sit, just to the right side. To look at the jury would require me to actively turn in my chair, bringing me within a few feet of the nearest juror—too close for my comfort. To overtly turn and stare feels too personal, perhaps even confrontational.

Expert witnesses can turn and look at the jury because they are basically teaching. But I am not teaching. I am persuading the jurors that I am a fundamentally good and prudent physician. I am trying to explain the very essence of who I am as a physician, and trying to do so in a way that is simple but not condescending, sophisticated but not obtuse, confident but not arrogant, concerned but not disingenuous, all in front of the plaintiff, family members, maybe the press, and random members of the public who may wander in. It is a lot to ask of me, as it is of any physician, when I am already angry and scared.

Plaintiff's attorney: So what you are saying to the members of the jury is that it is all right that he had coronary artery disease?

I try, not altogether successfully, to separate what I know to be normal courtroom behavior by a plaintiff's attorney from what I would expect in more civil conversation. But medical decision making looks easy in retrospect. It is simple to ask questions that make me look incompetent and foolish when I have failed to predict the unknowable future.

I learn to be particularly cautious when the plaintiff's attorney makes some seemingly complimentary comment about me, or adopts a more agreeable tone. A particularly harsh and accusatory statement is certain to follow.

Plaintiff's expert witness: I think the quality of care provided by Dr Schwenk was substandard and he failed to comply with the standard of care.

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I accept the fact that the legal system depends on the contributions of expert witnesses for both the defendant and the plaintiff. Their testimony is supposed to be the source of scientific fact and the basis on which the jurors make a decision. I do not accept the reality of how courts allow physicians of wide-ranging credibility to proclaim their expertise with little or no challenge. States vary in their criteria for the qualifications of expert witnesses. For a defendant the more relevant issue is the adversarial nature of conflicting scientific testimony, and the legal means by which statements that are fundamentally not true become "truth" because they are allowed to be entered into the legal record.

The difference in the definition of "truth" between the legal and scientific worlds is large and probably cannot be bridged. In the book *A Civil Action*, a veteran trial attorney notes that "the truth is at the bottom of a bottomless pit." The philosophical elegance of that statement is lost on me when an expert witness for the plaintiff is allowed to make statements about my medical care and decision making that are simply wrong (note: the plaintiff had two experts and I am not identifying to which expert I ascribe this assessment).

Defense attorney: Your Honor, I object. May we approach the bench, please?

The trial is frequently interrupted when one attorney or the other objects, as a way to try to influence what is said, what is entered into the record, and therefore what is "truth." The judge often rules quickly and the trial goes on, but sometimes the arguments escalate and the judge asks the attorneys to approach the bench. The court reporter turns on white noise that is transmitted through all the speakers in the courtroom, theoretically so the conversations are blocked from being overheard. I doubt that it really works, at least for the jurors who are very close to the bench. I watch the body cues and facial expressions of my attorney, trying to assess if we are "winning." I am confused when the discussion sometimes ends with the opposing attorneys laughing, seemingly the best of friends.

Defense attorney: It is not justice to make the defendant pay the plaintiff because of passion and sympathy.

I find that I am increasingly dependent on the support of my defense attorney. Like a tourist in a foreign land who has endless questions for the tour guide, I need my attorney to explain the strange customs and language of the courtroom. But the dependency goes beyond an understanding of the mechanics of the trial. I become acutely aware of his moods and emotional reactions to events and testimony, eventually reacting even to his nonverbal cues. I can tell

when he thinks my case has been hurt by some testimony. I can feel the energy when he is deciding whether to object, pushing on the table to rise slightly, sometimes settling back down, sometimes jumping up. He takes notes on his yellow legal pad, scratching things out, drawing lines and circles connecting comments. I try, unsuccessfully, to make sense out of his scribbles.

I watch what he is watching, but I am not sure what I am seeing. At one point, the testimony by one of the plaintiff's experts seems to have influenced the jury and my attorney says, "They [the plaintiff's side] have done some damage." I slump, but only internally—my attorney was very clear that I should always look confident and professional! Physicians are used to being in control; being a defendant in the courtroom means giving up control. I trust, or hope, that my attorney has what I have lost.

On the night before the final day of the trial, my attorney spends several hours preparing his closing argument. This is the moment for trial attorneys when they are most "on stage," when they need to be most persuasive, most eloquent, and most strategic. It is a powerful experience to watch a master professional perform on my behalf in front of a full courtroom, from the judge to the plaintiff to the summer law clerks.

As the jury is given final instructions, I try to let go of my anxiety about the verdict and my frustration at being unable to control the outcome. Whatever happens, I want to focus on my fundamental belief that I did the right thing, that I would make the same decisions again (which I would), and that, whatever the jury decides, my life as a physician will go on.

My attempts at putting this experience in some larger professional context are a good try, but I fail. We wait for only two hours for the verdict; it seems so much longer.

Judge: Ladies and gentlemen of the jury, have you reached a decision?

Jury foreman: We have, Your Honor.

We spend our lives as physicians trying to predict the future, accounting for all of the uncertainties, the contradictory evidence, and the missing data. The answer is rarely "never" and never "always." We work in shades of gray. The law works only in black and white. I am either all right or all wrong. There are no other choices.

I become almost physically ill as the scales of justice tip.

Jury foreman: In the question of whether Thomas Schwenk, MD, was professionally negligent in one or more of the ways claimed by the Plaintiff, our answer is No.

All eight jurors said I was all right. It must be the truth.

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