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Harry V. Booth

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Forum Juridicum

How to Win Lawsuits Before Juries*

A Book Review

Harry V. Booth†

Mr. Lake's book calls our attention to a similar work, recently released, Lloyd Paul Stryker's "The Art of Advocacy," as both books are easy and entertaining reading, with ample ex-

* HOW TO WIN LAWSUITS BEFORE JURIES, by Lewis W. Lake. Prentice-Hall, Inc., New York, 1954. Pp. xii, 303. \$5.65.

† Member of the firm of Booth, Lockard, Jack & Pleasant of Shreveport, La.

amples, illustrating the fundamentals of trial advocacy, taken from real cases, with live actors, direct from the drama of the courtroom. This arena has frequently been compared to the stage, on which each participant has a role to play, some major, some minor. But it is much more than a theatrical stage, since you are dealing with real people, involving the live and vital issues of life itself. Yet, many people are inclined to the belief that the most thrilled-packed life is that of the professional actor. The truth of the matter is that a theatrical performance, supported by topflight actors, fades into the background when compared to a major civil or criminal jury case, headed by a skilled trial advocate and presided over by a seasoned and competent trial judge. The difference might be likened to mock battle as against the employment of mammoth armies in real war. It is the advantage of the real over mimicry. The advocate does; the actor imitates.

A fair analysis of Mr. Lake's book indicates that the "priceless ingredients" of successful trial advocacy consist of an active curiosity, which creates in an individual a desire to work for more than work's sake; a workable knowledge of the English language; salesmanship; imagination. And as to the latter ingredient, Stryker says, "Imagination for the trial lawyer is as essential as for the novelist, the artist, or the poet."¹

These qualities are to some extent inherent in all of us, but if they are not mobilized to a mental plane where results can be accomplished, they may as well not exist. Talent in cold storage is futile and useless, both to the individual and to the public. These essentials of the trial advocate may well be stimulated by the reading of this author's book, and many others dealing with similar subjects. But the reading of such books is not sufficient to accomplish the art, since no book has been written that lays down a formula guiding a trial lawyer or giving all, or any, of the answers in any given case. The famous phrase, "Every case must stand on its own bottom," strikes with atomic force in the field of trial art. There is no "white mule case" as our Missourian brothers would say, since, even in a specialized field such as personal injury litigation, the facts of every cause of action present a new challenge, a new experience and a situation that calls on its principal actors for the application of trial techniques peculiarly suited to the facts at hand. Yet, in the quest for justice,

1. STRYKER, *THE ART OF ADVOCACY* 128 (1954).

the fundamentals that are so vividly detailed by this author remain the same: to reason logically; to express the thoughts of your logic with precision and in pungent, yet simple, language; to feel a deep sense of sincerity in the justice of your cause, coupled with the will to win and endowed with the fortitude to move with boldness, when boldness is indicated; and to work with a never-ending appetite and curiosity. When taken together, they are another way of expressing the basic and overall fundamentals of the trial art.

In the selection of petit jurors, the author makes the statement that the manner in which jurors are drawn, "in the first instance, is of no moment to the trial lawyer." (p. 16) This may be true in some jurisdictions; in others, it is not necessarily true. For instance, in one federal district in Louisiana, it is a well-known fact that for many years, and until recently, the federal jury commission selected the majority of its petit and grand jurors from what is commonly referred to as the "silk stocking" segment of the district, while the American jury system presupposes that a panel of jurors in civil or criminal cases should represent a fair cross section of the community in which they live. There should be equitable representation on a jury panel from organized labor; the middle class, comprised mainly of the "white collar" workers, professionals, farmers and small business men; and business executives and representatives of the corporate interests. Where a state or federal jury commission consistently drafts its grand or petit jurors from one segment of society, their action can be successfully challenged.²

In metropolitan areas where panels of jurors are selected in numbers ranging from three hundred to one thousand (p. 17) and where there is no way of a lawyer knowing in advance the names of those jurors which may be dispatched to his court room until the day of the trial, the job of screening so many jurors becomes insurmountable. However, we are not plagued in Louisiana or most of our Southern states with such a situation and the author's comments in this chapter on "How to Select Jurors" are not appropriate to what we might call the "country areas" of our nation. The exercise of the peremptory challenge is the most valuable weapon, where it is handled intelligently. As a matter of fact, any lawyer who, after receiving a list of the petit jurors to be summoned for state or federal service, gen-

2. See *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946); *Glasser v. United States*, 315 U.S. 60 (1942).

erally thirty to fifty in number, two or three weeks in advance of his trial, fails to screen the panel by ascertaining something about each individual juror, his habits, prejudices, family, social and religious life, is not doing his client justice. If Mr. Bernard Carter (p. 20) should turn to the clerk in many courts I have had the privilege of practicing before in our Southern states and say, "Any twelve gentlemen will suit us, Mr. Clerk," he would probably lose his case, whether he is for the plaintiff or defendant. The example cited by Mr. Lake (p. 21) of the father of a crippled child accepted as a juror by defendants in a case involving damages for personal injury is sufficient to show the reason why prospective jurors should be carefully culled by obtaining information as to whether or not they could and would accept jury service with complete impartiality. If a trial lawyer comes into the courtroom cold, without detailed information of the jurors who are about to be selected to try his case, then I agree with Mr. Lake that the exercise of the strike or challenge is, indeed, of little or no benefit. Just as the quotation indicates: "A man's judgment is not better than his information." (p. 24)

It is true that an obese person is generally jovial and as a rule makes a good plaintiff's juror in personal injury suits, as well as a good juror for the defendant in a criminal case. As Mr. Lake says, beware of the sharp, thin faces usually referred to as "hatchet face" type, the kind that makes a lawyer's blood run cold. These jurors may be cynical or egomaniacs. They enjoy the suffering of others and want no one to prosper. Those suffering from physical deformities are also to be feared.

The author shows us how to ingratiate ourselves with jurors by discussing various avocations in which it may be believed the jurors have an interest. (p. 33) This is all well and good if not overdone, and as long as the conversation occurs in the courtroom, preferably in the presence of opposing counsel. It is a dangerous practice if the attorney becomes obsequious or overplays the part. It is a bad, if not unethical, practice if pursued outside the courtroom and could result in a mistrial, even though the discussion be wholly unrelated to the subject matter of the trial. A lawyer should studiously avoid coming into contact with jurors who have accepted service in the case; sometimes this is difficult, since no one desires to appear unfriendly. However, it is necessary to "avoid the appearance of evil as well as the evil itself."

Infrequently, loquacious jurors will mention some matter in connection with the lawsuit on trial outside the confines of the courtroom when a chance meeting occurs, and about all a lawyer can do is smile, walk on and say nothing. Undue fraternization with jurors outside the courtroom has led to mistrials.³

Mr. Lake's attention to detail in preparing witnesses for trial should prove very helpful, especially to the beginning trial attorney. He recognizes how little things can affect a jury, such as the gum-chewing client or witness. It might also be added that a lawyer should always admonish a woman client never to smoke in the presence of jurors. Many male jurors are still prejudiced against women smokers. Female clients should also be advised not to overdo the makeup. Too much rouge may adversely affect the verdict. In a case involving serious injuries to a client, under no circumstance should the client or members of his or her family display undue levity in the presence of the panel. One-half the battle is won if witnesses are properly conditioned to withstand the ordeal of the witness chair. However, they should not be over-prepared, and by that I mean that a point of no return can be reached. In discussing demeanor with the witness, it should never be over-emphasized, causing the witness to affect an attitude which is not natural. The witness should never be out of character, for no matter how much they know or how impartial they may be, such an attitude destroys their effectiveness jury-wise. (pp. 47 - 60)

In bringing witnesses "to the finish line" (p. 60) it is sometimes better procedure to cover the main points on direct examination, and then tender the witness for cross-examination to your opponent, hoping that he will develop the details or elaborations, especially where you know your opponent usually drags his cross-examination. In this way, one can eliminate the bore-some effect of direct examination where too much detail is indulged in. On the other hand, should the opponent fail to cover the finer points in the detailed picture, you can do so on re-direct. Special treatment should be given the witness who is garrulous or tends to exaggeration. This type of person is very dangerous and unless you are satisfied you have his weakness under control, dismiss him.

The hesitant and stalling witness (p. 63) is discussed by the

3. See *Ryan v. United States*, 191 F.2d 779 (D.C. Cir. 1951); *Palmer v. Miller*, 60 F. Supp. 710 (W.D. Mo. 1945); *Balavich v. Yarnish*, 97 A.2d 540 (Me. 1953); *Derosby v. Mathieu*, 136 Me. 91, 2 A.2d 170 (1938).

author and his suggestions are probably adequate. However, many lawyers handling this type of individual have found it very effective to take out their watch, hold it in position where the jury can see the seconds tick by, then a knowing glance or two in the direction of the jury should accomplish the purpose.

As the author well states, there is no substitute for the trial lawyer doing his own leg work, interviewing his witnesses and preparing his case for trial. (p. 72) Lawyers who find themselves overburdened in litigation to the point where they must delegate the preparation of their cases to other lawyers become less potent in winning lawsuits as time goes on. It would be much the better practice to relieve their docket of the less important cases so that all their time could be spent on fewer trials and where all the work could be done from the first interview to the conclusion of the trial. It is almost an axiom that the lawyer who outworks his opponent will prevail.

Demonstrative or visual evidence cannot be over-emphasized in preparing a case for trial. (p. 83) Not only do psychologists tell us that eighty-five percent of what we learn is conveyed through the visual organs, but what is retained in one's memory depends largely upon this same sense.

The use of anatomical charts of the human body where a case involves physical injury should always be employed in all trials of personal injury actions. Charts, diagrams, photographs, motion pictures, as well as the constant use of the blackboard, provide the principal key that opens the door to the trial art, both in civil and criminal cases. One word of caution in the use of demonstrative evidence—be certain that it cannot be used against you.

Recently, in the Monroe Division of the United States District Court for the Western District of Louisiana, a case was tried before a jury which involved serious injury to one or more persons and the death of several persons in a railway crossing accident. One of the litigants produced a replica of the train involved in the collision, with all the tracks, and in fact every physical building and object at the *locus in quo*, drawn according to scale, the exhibit weighing over twelve hundred pounds. The effect on the jury was electric. Physical exhibits create interest in a jury and interest must be maintained at all times during the progress of the trial to insure maximum results. Once a trial starts lagging and the jurors lose interest, the ul-

timate verdict could go either way, with little regard to law or the evidence.

"Therefore, the foundation of litigation is facts." (p. 88) This should be a truism, for the facts make the law in civil and criminal causes. The skilled advocate, knowing this, spends ninety percent of his time in preparing a case for trial by acquiring an intimate knowledge of the facts both pro and con and by devising a demonstrative plan of presenting the pro facts to the court or jury.

The author comments on the mistakes defendants make contesting major lawsuits. (p. 99) This applies to damage suits, where liability is beyond reasonable controversy. It has been my observation, with few exceptions, that where a defendant draws out a lawsuit over an extended period, contesting the question of liability, merely for the exercise, that juries inevitably bring in larger verdicts, particularly in a case involving gross negligence. By admitting liability in this type of case, the defendant cuts the plaintiff down to a skeleton of performance. There is not enough time for plaintiff to engender the sympathy for his client which comes about by observation, day in and day out, through a long trial. Moreover, by this candid approach, much can be said by defendant's counsel in his summation to the jury looking toward a reasonable award.

The so-called breaks in a trial (p. 100) come about in a way similar to athletic contests. It has often been said that a good football team makes its own breaks. So do lawyers. And breaks do have their impact on the final verdict. Appreciating the flair of a witness for spontaneity and wit, a factual picture may be created in the proper case on direct examination, which would call for an obvious question from the opponent when he takes over for his examination. Yet, the direct examiner knows the witness has a ready and effective answer. If your opponent strikes at the lure, the response of your witness is often startling and effective.

Melvin M. Belli, in his book *Modern Trials*,⁴ cites an apt illustration in a case where as an incident to liability, it became important for plaintiff to prove with certainty at what rate of speed defendant's vehicle could have been thrown into low gear. Plaintiff's attorney was able to trace title to defendant's truck and discovered it in a salvage yard. The truck was acquired and

4. 1 BELLI, *MODERN TRIALS* 105 (1954).

an expert driver was hired to take it out on a highway to test the gears, shifting from a higher to a lower gear while travelling at 35/40 MPH. It had been the testimony of the defendant truck driver, taken by deposition, that he was not exceeding 15/20 MPH because he had shifted to low gear and that he could not have shifted to this gear travelling at a speed from 35/40 MPH. The speed of the truck was a very important factual issue in the case. After the defendant driver had repeated his testimony in the trial, the expert driver was called to the stand by the plaintiff and asked if he had ever driven this type of truck, not divulging that it was this particular truck he had driven. The expert testified that the type of truck could be driven at 35/40 MPH and at that speed shifted into a lower gear quite easily. Plaintiff's counsel tendered the witness for cross-examination and the defendant's lawyer, after a few preliminary questions, pressed the witness by asking him whether he had ever driven this particular truck thinking, of course, that his answer would have to be in the negative. To the amazement of the attorney and the jury, the witness testified that in the tests referred to, he had driven the offending truck.

The author stresses in his chapter "How to Make an Opening Statement" the use of the blackboard under certain conditions in the opening statement. (p. 127) The blackboard should be used at every available opportunity, particularly by plaintiff's attorney, not only where figures or distances are involved but to show the *locus* of an accident and to orient the jury generally on all physical aspects of plaintiff's case. One picture is worth a thousand words. In many jurisdictions, the courts will not permit an opening statement by counsel, but only allow reading of the petition or complaint and the defendant's answer. This, of course, is not impressive and every effort should be made to induce these courts to follow the general practice.

A large majority of the witnesses a lawyer is called upon to use in a trial are in court for the first time. Most of their knowledge of our judicial system comes from a distorted view gleaned from the press, periodicals, radio and television. As the author indicates, the lawyer should do everything to make his witnesses feel at ease once they are in the courtroom. In the event they are sequestered, make an effort at every available opportunity to go to the witness room and reassure them of their importance in the outcome of your client's case. Likewise, assure them that they will be protected against any undue cross

examination. It is also in order to let your witnesses know that the judge who presides and directs the trial is one who has a kindly and lenient attitude toward all witnesses who are in court for their first experience.

Comment is also made by the author with reference to nervous witnesses. I believe it is the observation of most experienced trial lawyers that the witness who constantly complains of fear and who voices the apprehension that he will become confused as the zero hour approaches, generally makes an excellent witness. The "smart Alec" or garrulous witness is the one to fear.

In major litigation, the lawyer should never go to trial without an index to all his exhibits in order that he may turn to any document at a moment's notice. A "rummaging" or fumbling lawyer, who is constantly fingering through files and briefcase, seriously annoys a jury.

It is always well to warn your witnesses before they take the stand to lift their voices, especially in a courtroom where the acoustics are below par, as is generally the case. Even then, you have witnesses who will talk in a low, mumbled tone. Accordingly, it has been my custom to question such witnesses from the farthest point of the jury box, as this has a tendency to improve the situation as well as assuring you that the witness is being heard by those jurors who are most distant.

The author says "only good cases should be brought to trial." (p. 134) This brings to my attention one of the most important phases in the practice of personal injury litigation, to-wit: the ability of a claimant's attorney to evaluate properly his client's case, both from the standpoint of liability and quantum. Nothing will get a young lawyer off to a worse start than to permit his client to fool him, either by outright deception or gross exaggeration of injuries claimed to have been sustained. If the lawyer is the least suspicious that his client is exaggerating, his case should be delayed until such time as the medical evidence, together with the lawyer's observation of the client over a period of months, convinces him one way or the other as to the validity of his claim. And where you are convinced that your client's injuries are of a nominal character, settle the case for the best offer you can obtain from the defendant or his insurer. Should your client refuse to accept and follow your recommendation, gracefully withdraw from the case, return your file, and

offer your assistance to any other attorney that may be employed. This procedure will pay big dividends in the long run. When the author says that only good cases should be brought to trial, it does not mean that a lawyer should turn down a case where liability is doubtful, since the greater part of litigation in the personal injury field presents a two-sided situation. I would much rather have a case that was weak on liability but strong on damages than one where liability is good but damages nominal.

The art of cross-examination varies from case to case, depending on the background, the litigants, the judge, the lawyers, and finally the witness under examination. No fixed rule can be laid down. And like most other aspects in preparing and trying a lawsuit, you can only glean from the experiences and writings of others the fundamentals of this great weapon in the arsenal of a good trial lawyer.

Mr. Lake, at the beginning of his chapter "The Use of Judgment on Cross-Examination" (p. 182) believes it unwise where you catch a witness in a contradiction to focus immediately the contradiction by a question. "You said such and such; now you say so and so." (p. 183) This assumes close attention by all jurors during the progress of the trial, which is not always the case. On the other hand, if the contradiction is on a vital point and unequivocal, a recapitulation of the contradiction is generally in order. The course of action you pursue should to some extent depend on your appraisal of the witness and his ability to explain away the contradiction. I repeat, if it is unequivocal and on a vital point in the case, a chance thrust should be made to alert the jury that the witness is unworthy of belief.

Questions should never be indulged in unless the examiner is sure that the witness said "such and such," which points up the vital part memory plays in the art of cross-examination. Its importance cannot be discounted. And to charge a witness with a contradiction where you are not sure of your ground may prove fatal. I had occasion to observe the trial of a criminal case a number of years ago involving a homicide which resulted in the conviction of the defendant, even though the court attachés and lawyers who were listening in had serious doubts as to his guilt. The witness for the state was questioned by defendant's lawyer along the following lines:

- Q. Didn't you state on direct examination that you were in Longview, Texas the night preceding the homicide?

- A. No, I did not. I testified I intended to go to Longview that night but delayed the trip on account of the illness of my mother.

Time after time, the defendant lawyer asked questions of a similar import, indicating a faulty memory, and in each case was promptly rebuffed by the witness. Some days after the verdict, the foreman of the jury told me that the defendant was bound to be guilty, since his lawyer spent all his time trying to confuse and mislead the witnesses.

Where the signature of a witness is involved, it sometimes proves beneficial, before the questioned document is presented to him, to have him write his name just as it is written in the document. This accomplishes two purposes. First, the witness is less apt to deny his signature, which if denied might present a problem of proof, and second, it generally confuses and throws the witness off balance making him easy prey for the cross-examiner should the written statement signed by him be in contradiction of his sworn testimony. (p. 184)

The author's advice to caution your witnesses not to give unresponsive answers or volunteer information is one of the "musts" in preparing your case for trial. It has been my experience that the most ineffective witnesses are those who on direct examination continue to give unresponsive answers and make every effort to "throw off" on your client. These witnesses are either outright dishonest or so partisan that a correct approach on cross-examination generally results in their utter destruction. A very disarming manner of handling such a witness is to have the court reporter read back your question without the witness' answer and then ask the witness if he understood the question. If he answers, "yes," then have the court reporter read his answer, then:

- Q. Mr. X, if you understood my question, why did you answer it by injecting a matter which was not called for by my question?

or

- Q. Mr. X, what interest do you have in this case that causes you to continually make unresponsive answers to my questions?

Witnesses who by their exaggerations and partisanship carry

their testimony to an absurdity are easy target for a skillful cross-examiner. (p. 193) In a recent case where a plaintiff sued for the recovery of compensation, a number of defendant's employees *voluntarily* came to court to establish the fact that a person with two or more fingers missing from the right or left hand could operate the machine on which plaintiff was injured, as efficiently as one with normal hands and fingers. The following cross-examination indicates how such witnesses, who are partisan, can be utterly discredited, where they allow their partiality to carry them into absurdities.

Plaintiff had the first phalange of her right index finger and almost two phalanges of the middle finger amputated while operating a machine in a munition plant. Her work required her, while in a sitting position, to separate all metal caps with her left hand, taking the caps from her left hand with her right hand and inserting the cap in a small orifice, the cap fitting snugly but not tight. Then the operator pressed two air valves to complete the operation. Eight to ten thousand maneuvers were required for a full eight hour tour of duty. One witness testified on direct examination that he had conducted tests on handicapped persons, some with two or three fingers missing on the right hand and others with all fingers missing on the right hand and one or more fingers missing on the left hand. Two were able to operate the machine as efficiently as a person with both hands and all fingers. He was then questioned:

- Q. Well, now, if I went on that machine and the fingers on my right hand were gone, all of them gone, and all the fingers on my left hand gone except the little finger, the ring finger and the thumb, I could operate that machine, couldn't I?
- A. Yes, sir.
- Q. As a matter of fact, I could operate it with all the fingers on my right hand gone and all the fingers on my left hand gone, except my index finger and thumb, couldn't I?
- A. Yes, sir.
- Q. As a matter of fact, you could cut off my left hand at the wrist, and if I was right handed, and had the ring finger, the middle finger and the thumb of my right hand, I could operate it just as efficiently as a ten fingered person, couldn't I?

A. On this particular machine, I think you could.

This line of cross-examination continued until the trial judge became impatient and with a note of sarcasm in his voice directed this question to the witness:

The Court: In other words, you are not attempting to testify what Mrs. M. could do, if she was out there in the condition she is now, are you?

The Witness: No.

The exaggerations were so obvious and blatant that any hope defendant may have had of prevailing in its theory of the case was lost.

The examination of medical experts constitutes the most important segment of a personal injury action. Even though a plaintiff's case may be subject to considerable question on liability, if he has sustained major injuries and proper attention is given in the preparation and presentation of the medical evidence, juries are often inclined to place emphasis on the medical issues, as contradistinguished from liability.

The medical evidence in a major personal injury action is so important that no lawyer should essay this type of action without a minimum of two or three recognized medical authorities in his library.⁵ Another valuable aid to a claimant's lawyer is charts showing the anatomy of the human body, which can be used as demonstrative evidence during the trial and which can be obtained at a very nominal cost.

Long before trial, a lawyer knows with reasonable certainty where the lines of dispute exist among the medical experts who will participate in the trial, by reading the medical reports, which are generally exchanged between the opposing attorneys. If not, they can be obtained through the offices of discovery. It then behooves counsel to make a careful study through all available books, journals and treatises of the particular injuries or pathological condition affecting his client. After this is done, counsel should interview the medical experts he intends to use and discuss with them the proper approach and technique in developing plaintiff's injuries, especially the use of demonstrative evidence, to the end that the jury, when the medical case is completed, will thoroughly understand the nature, extent and

5. In addition to the books cited by the author (p. 184), I suggest KAHN, *MAN IN STRUCTURE AND FUNCTION* (Rosen's transl., 1943); MORITZ, *PATHOLOGY OF TRAUMA* (2d ed. 1954).

duration of the disabilities claimed. It is also mandatory that you, likewise, discuss and plan your cross-examination of defendant's experts with at least one of your medical witnesses, preferably one who is best qualified on the subject at hand. Recognized textbooks furnish an excellent weapon to accomplish this purpose, especially where you have reason to believe that the opposing experts will be inclined to get out on a limb, so to speak. This situation is well illustrated in a case recently tried in the Federal Court for the Western District of Louisiana, involving malpractice.⁶ Plaintiff alleged that her esophagus was punctured by a member of the insured clinic. A research of all authentic medical journals, books and treatises failed to reveal the abstract of a single case where a normal esophagus had been perforated by a skilled operator and where modern techniques were employed. Many experts were consulted, including chest surgeons, ear, nose and throat specialists and others, and although they all agreed (confidentially) that this particular operator was guilty of gross negligence, not one could be persuaded to expose his views to a court or jury. Accordingly, plaintiff's attorneys found themselves facing a serious dilemma, i.e., proving negligence *vel non* by the cross-examination of defendant's experts. Long prior to trial, it was realized that if any progress was to be made in the future cross-examination of defendant's experts, a most intimate knowledge must be acquired on the medical phases of the case. So, by months of study, together with consultations with many experts, we conditioned ourselves for the ordeal. Early in the medical investigation, we ascertained that Jackson and Jackson's book on the ear, nose and throat was a universally recognized work in this field. After a thorough study was made of the esophagus and its related organs, Jackson and Jackson's book was read and re-read, after which our experts were again interviewed and, finally, a definite plan and procedure was developed for the cross-examination about to be undertaken.

First, we elicited from the defendant's experts that Chevalier Jackson, Sr. and Jr., were not only recognized authorities in this field but that all of the experts had traveled long distances to hear one or both lecture at various times and places. One witness admitted that a picture of Chevalier Jackson, Sr., hung on the wall of his office. After the foundation was laid, we were able to quote directly from this medical authority

6. *Shehee v. Aetna Casualty & Surety Co.*, 122 F. Supp. 1 (W.D. La. 1954).

wherein the unequivocal statement appeared time after time that in no event where a perforation had occurred should a patient be fed unsterile foods or liquids. After evasion and hedging, three of the four defendant's experts finally conceded this to be true. With these admissions, the medical defense of the surety company collapsed and a substantial verdict was rendered.

The pitfalls that await the lazy and inert lawyer when it comes to medical evidence were well illustrated some years ago where a plaintiff was suing for injuries sustained in an automobile-truck accident.⁷ Plaintiff claimed he received serious back injuries in the collision. Four medical experts opposed his contention, and their testimony was to the effect that the cause of plaintiff's disability was infected tonsils, pyorrhea and diseased teeth. One doctor had rendered a written report to the defendant, which was in the hands of counsel for many months prior to trial, in which the physician stated that he observed many fillings in the plaintiff's teeth, which together with the pyorrhea, indicated that plaintiff had diseased teeth. The plaintiff was placed on the stand in rebuttal and the following examination by his counsel occurred:

Q. Mr. Roach, you heard Dr. A testify that the X-rays made by him did not show a fracture of your spine, and that what your doctor interpreted as a fracture was merely a shadow, did you not?

A. Yes, sir.

Q. You heard Dr. B testify that he examined you when you arrived at the sanitarium, and you heard him say that he made out a written report and history of your case, did you not?

A. Yes, sir.

Q. You heard him read from this written report in which he said that, from his examination, he found that your teeth were in very bad condition, with a number of fillings, and that you had pyorrhea in your gums and pus in your tonsils, did you not?

A. Yes, sir.

Q. You heard Drs. C, D and E, and each of them, in sub-

7. *Roach v. Schuster's Wholesale Produce Co.*, No. 1788, W.D. La., Nov. 27, 1929.

stance, testify that there was nothing really wrong with you at all, except that you may have a little rheumatism or neuritis caused from bad teeth and bad tonsils? You heard them say that on the witness stand?

A. Yes, sir.

Q. Now, Mr. Roach, what is the condition of your teeth?

A. Mr. Bolin, I ain't got no teeth.

Q. Do you mean to tell the Court and this Jury you have false teeth?

A. Yes, sir. Here they is. (The plaintiff pulls out both plates and exhibits them to the Jury and the Court).

Q. How long have you had false teeth?

A. Ten years.

Like the quiet before the storm, consternation blanketed the courtroom. Suddenly, a jovial juror in the front row gave full vent to his emotions and pandemonium ensued. Even the trial judge, a martinet for discipline, briskly whirled in his chair with his back toward the jury, spontaneously impelled to join in. Even though Roach's case was weak on liability, the jury returned a substantial award in a few minutes after they were given the case. Defense counsel had the written report of the medical expert many months prior to trial, yet it developed he had not interviewed his witness nor had he required that plaintiff submit to an x-ray examination of his teeth, which if done would have avoided the fiasco.

Many other examples could be given, if the length of this review permitted, where lawsuits involving personal injuries have been lost and justice thwarted due to the lack of preparation, without which no adverse medical witness can be successfully cross-examined, no matter how brilliant or learned or experienced an advocate may be. A Choate—a Darrow—a Prentiss would be utterly helpless in this field of specialized knowledge without adequate preparation.

Never poke fun at a medical witness nor employ sarcasm unless you have a talent in that direction and unless you are sure the judge or jury will not resent it. This calls for an intimate knowledge of the trial judge's temperament as well as the proper evaluation of the jury hearing the case. (p. 241)

In his chapter "How to Use Prayers in Your Conduct of a

Case" (charges) (p. 242) the author comments on the doctrine of last clear chance as it applies to a plaintiff. The doctrine of contributory negligence is well embodied in Louisiana law and prevents recovery on the part of a plaintiff whose negligence has entered into the proximate cause or one of the proximate causes of the accident, so the last clear chance doctrine actually becomes a part of the law of contributory negligence.

Summation, or concluding argument, is well treated by the author in Chapter 16 (p. 251) by a discussion of the various approaches of lawyers to this problem. Since we all differ in our dispositions and personalities, in summing up a case a lawyer should use the tact that comes to him most naturally without affectation and without trying to ape the style or pattern of some other lawyer. I have observed lawyers who proceeded in their concluding argument in a quiet, logical vein and I have seen others whose forte was in their ability to inspire through their emotions, yet both types generally meet with equal success, depending on their mastery of the many factors that have been discussed in Mr. Lake's book. Be yourself. Develop to the fullest extent your latent talent and then follow the technique best suited to your own personality.

Yes, it is true, in all phases of the trial art, an effective summation is the one that meets the exigencies of the case at hand. Irrespective of the time allotted by the court, when you have passed the climax of your argument and have discerned the "mystic sign," Stop. The shortest summation on record was by Mr. C. J. Bolin, an able trial attorney, in the *Roach* case. He said, "Gentleman of the Jury, Mr. Roach had false teeth" (holding the dentures in his hands), and sat down. In rebuttal, he said, "Mr. Roach still has false teeth," and sat down.

The author alludes to discussing the law during the concluding argument. (p. 254) This is dangerous unless you are familiar with the charges or instructions the court will give the jury. Generally, most trial judges discuss their general charge and the special instructions he will give the jury in conference with respective counsel following the completion of the trial. I reiterate, if you have a strong case on facts, forget the law, for after all, that is the product and duty of the judge. Sometimes, a brief reference to the law is helpful, but be sure that what you say follows the instructions soon to be given, otherwise, you are laying yourself open for criticism by opposing

counsel and even by the judge if you go too far astray. And this could be fatal.

In conclusion, with reference to the selective reading recommended by the author in Chapter 17, I recommend *The Art of Advocacy* by Lloyd Paul Stryker, referred to at the beginning of this review, and *Modern Trials* in three volumes, by Melvin M. Belli of the California Bar, the nation's outstanding plaintiff's attorney in personal injury actions.

