



SideBAR

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OPENING STATEMENTS

Message from the Editor

John F. "Joe" Perry

It has been some time since *Sidebar* was last published, but it's back, with me as the new editor. I am not sure how I was selected or even why — maybe it was something I said to Jackie Goff about becoming involved. (I must be more careful about what I say). Anyway, this is my first foray into the newsletter business, so please be kind.

In any event, I hope that you enjoy this issue. An eclectic mass of material has been chosen that I hope will amuse and interest you. However, the Web can not be used forever, so please send me your ideas and articles for inclusion in future issues. War stories, humorous anecdotes from your practice, letters, even serious articles are welcome. This is your newsletter, so please give me any comments and suggestions to make it better and more useful to you. My address is Springer, Bush & Perry, 15th Floor, 2 Gateway Center, Pittsburgh, PA 15222. You can e-mail me at "joepa@sbandp.com."

Thank you and enjoy.

Message from the Section Chair

N. Patrick Flanagan

We are excited that Joe Perry is the new editor for the section newsletter. It has been quite some time since we have had a section newsletter and we hope it will continue to grow. As Joe says in his message, please send material to him to be included in the newsletter. This makes his job easier and the newsletter better.

You will note from this issue that, the Litigation Section is attempting to become even more responsive to the needs of the members. We have been producing the National Litigation Seminars for the past four years with excellent programs. We have an excellent program planned for New Orleans in April 2001. The New Orleans Chapter is going to cosponsor the event with us. The Fifth Circuit Conference of Chapters will be held during the same weekend. We hope all of you will take advantage of the opportunity to get CLE credits and attend this comprehensive program. Brochures will be distributed at the National Convention with an early bird price and mailed to members of the section in the near future. Sign up early and save!

In conjunction with this National Litigation seminar, the Federal Litigation Section will hold its annual meeting. We have not had one of those for quite a while either. We are asking the chapters to designate delegates: one older attorney and one younger attorney. The delegates will receive a further reduced rate for the CLE.

We have a lot of business for the Litigation Section annual meeting. We expect the National Council to mandate that the Litigation Section look into congressional funding of the 1998 ADR Act, putting more ADR in federal district courts. We hope to have several judges from around the country as well as representatives from the Administrative Office of the U.S. Courts and the Federal Judicial Center. We also need to discuss organization of the section. The annual meeting in April 2001 will definitely be a working meeting. But, stay until Sunday because that weekend is French Quarter Festival in New Orleans.

We are excited about the new possibilities that begin with communication through a new newsletter. Thank you to all who had a hand in it.

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FOOD FOR THOUGHT

First, Kill All the Experts

By Al Davies, MD*

I was really surprised to see this title for a presentation to an attorney group, but even more surprised when I saw the presenter was an attorney I knew and respected, and thought probably respected me. I felt laser sights upon my forehead, and even wondered if somehow I was individually responsible for some of the ire and frustration I was expecting to be presented. At the very least I hoped that I was slated to be spared when the world got its cleansing.

I contacted the presenting attorney, only to find that the title was intended to be provocative, and it hit its mark. The plan was actually to discuss common attitudes among attorneys regarding medical experts, and to suggest that perhaps defense and plaintiff attorneys view experts in vastly different lights. So different, in fact, that the role of the expert was being adversely altered. Indeed, the intention was the opposite of the tenor of the title — it was to suggest that there was much a medical expert could lend to properly understanding the clinical matters in a case at hand.

Seeing that advertisement was fortuitous since I have recently been deeply concerned about the issue of the position into which the expert is unwittingly put by the opposing views of expert testimony and some recent rulings, and I have seriously been contemplating suggesting that something be done about it. I have been working to enhance the ways physicians could provide better education for attorneys and juries on the basic medicine and medical issues in cases.

I note that some attorneys openly detest experts, surprisingly especially their own. Amazingly, I see little insight into the dual truths that doctors in no way created the process by which experts are used, and more importantly that doctors don't want it to be that way. Somehow, an expert is expected to both perform in the narrow constraints of a system made, and entirely controlled by others, yet hated for doing so. I know with deep conviction that doctors far prefer to be seen as champions of truth, honor, and humanitarianism, especially in the legal arena.

Physicians are typically dismayed to find the majority of time spent in testimony revolved more around casting aspersions upon the honor of witnesses instead of on issues of medical substance? Who does that help? How does that help the jury find real truth? I really doubt one could muster scientifically defensible evidence that the current system reliably detects truth and applies it fairly. Why is it that attorneys utilize a scientifically wholly untested method, yet malign experts for what they think are unscientific conclusions? A double standard, for sure. This is tragic, especially when a far more defensible system is possible utilizing methods already tried and true.

I don't believe that doctors serve best when in an adversarial role, yet it would be irresponsible to withdraw from the issues raised in personal injury cases. Doctors by their nature and training are nurturers, not adversaries. An ideal utilization of

their knowledge would place them in a nonadversarial role, one that is nurturing to society. I am concerned that there is such a sharp contrast between their fine professional conduct at the bedside and the way many attorneys lead juries to view doctors in the courtroom.

Few experts actually knowingly lie or are stupid. More are viewed as lying by attorneys who don't know the medicine, yet arrogantly believe they know it more than the doctors do. If you live by the sword, you die by the sword. If you expect to see the world full of greedy, lying doctors, that is precisely what you will observe, the truth notwithstanding. Worse, the system promotes this distortion.

I think the resolution to all this conflict lies in taking the experts out of the adversarial role in which they cannot possibly optimally perform. Doctors are capable of rendering opinions about fundamental issues like what the standards of care are, what the use and limits of studies are, what therapies are available and their proper use. We do that thousands of times every day, and in peer review and quality management quite definitely enforce these actions on a regular basis. Personal injury suits are a small portion of the situations in which by peer review a physician's behavior is examined, and where necessary, modified. Remember that physicians do routinely provide care and effectively treat the majority of their charges. Why not use that expertise rather than hobble it?

The first step is to reinvent the system so the medical expert is naturally viewed as a teacher. A teacher who is only on the side of truth. Let the physicians be assembled on odd-numbered panels, to render opinions for the jury to examine, and the jury can determine whether they believe the facts of the case match the standards promulgated. That puts the doctors in a neutral role with respect to the suit but not in a neutral role with respect to the truth. There would be no need for the doctors to be seen as either unfairly picking on a defendant or overlook glaring error in defense of the profession. Ultimately it becomes in the best interests of both plaintiff and defense to have excellent clinical and scientific data available to the jury.

No longer would there be some advantage in obfuscating the truth, putting up smoke screens or offering flimsy assertions of causation. The legal strategies and theories may become simpler and easier for the juror to understand and accept. What a concept!

To maintain neutrality the panels of experts could be either hired by both sides jointly or by the judge. Both plaintiff and defense could participate in selection of the panels, but neither side could control the outcome by selection of the panel. For example, plaintiff could have one nomination, defense another nomination, and the judge could make the final determination by appointing the third member, the chair of the panel.

Medical panels in the form of Louisiana's don't work very well because there is not a separation of roles of expert and decider of the outcome of the suit. The Louisiana medical panels, as I understand them, may both provide expert opinions about the case and come to some ultimate determination in the

matter. I believe I have seen situations in which the panel seems to have (*or are made to seem that they have*) skipped over the role of expert and proceeds to make a final determination. Doing so simply heightens the adversarial effect of the panels, since in effect the panels are viewed as participating as “The Medical Establishment” versus the world. It would be far better if the medical panels were entirely devoid of determination of final disposition of a case, and simply concentrated on formulating opinions on the technical details.

Putting this idea of a panel to work could be undertaken in the following manner: A plaintiff attorney would evaluate a case. Before the suit could be filed the attorney would have to have a written report by a practicing physician to support both negligence and causation. However, in contrast to the current situation, that physician subsequently would not be part of the presentation of evidence or opinion to the jury (*though perhaps simple education of the jury would be OK*).

Discovery would then ensue, but at some point the judge would appoint the medical panel who would review the evidence including all medical records and all discovery of any medical relevance. No woodshedding allowed. Nothing could be presented at trial not presented in full detail to the panel beforehand.

The panel would be allowed to ask for additional information even after depositions of the parties, perhaps by interrogatories, until the medical panel votes that it has collected enough information to render a penultimate opinion. If from a medical perspective additional expertise is needed, the panel could petition the judge to hire additional experts, thus eliminating the assertion that the testifying expert is not appropriate to the medical determination of negligence or causation. The panel could then use consultation of expertise in parallel to the pattern actually used in routine day-by-day exercise of prudent medical practice. Both the plaintiff and defense could ask questions of the panel prior to trial in the form of either deposition or informal pre-trial conference.

To ensure that the final opinion presented to the jury is fair and balanced, the panel could be present at trial to hear the fact witnesses in their final presentations. After both plaintiff and defense have presented, the panel would present its collective opinion as well as dissenting opinions from the majority, similar to the pronouncements by the U.S. Supreme Court. Presenting

the opinion in this manner favors an expression in medically and scientifically defensible and optimal terms, using the latest advances in evidence-based medicine. For example, instead of the current system in which an attorney asks an individual physician whether a standard of care was breached, in the proposed system the panel would indicate what the majority view was of the standard, and what is the medical and scientific basis for that standard associated with a rating scale of 0 to 5 of the confidence that the opinion is appropriate to this case. We will have to discuss evidence-based medicine more under separate cover.

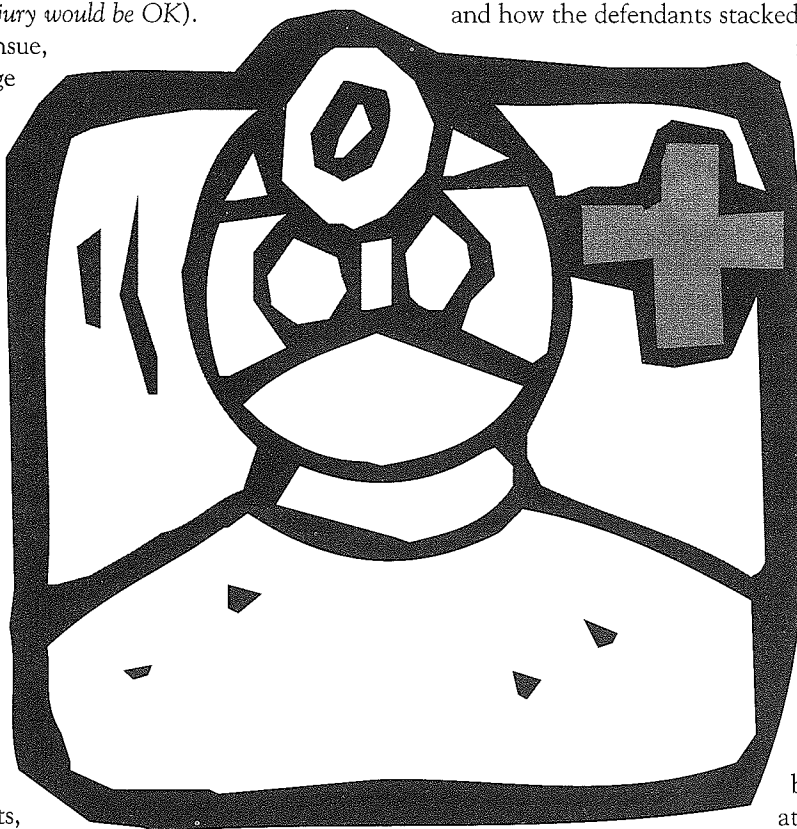
The point is that the jury could hear what the majority and possibly minority views are, why and to what degree of confidence that opinion is regarded by its bearers to be true. The jury would then decide whether the panel made sense (*i.e., was objective or simply self-serving*), whether the opinion is relevant, and how the defendants stacked up against the standards and

issues of causation. The doctors are then in their best roles — nurturers of those suffering (*be they plaintiff or defendant*), teachers of the judge and jury and proponents of truth rather than hapless apparent advocates in an adversarial system less guaranteeing the truth will come out than an outcome will occur. The jury is still the trier of fact and the panel is not. The jury could decide that the panel was off base and come to a different conclusion, or could agree that the panel’s position was appropriate. If we did something like this, attorneys would not need to kill any experts. Nor would they be inclined to. Doctors and attorneys could actually be

friendly to each other, and learn from what is honorable and desirable in each other’s professions. There is so much to be gained by improving communication and professional respect between doctors and attorneys. If nothing else, more insightful jury decisions.

**Dr. Davies is director of ICU at Houston’s Methodist Hosp. and Baylor Medical School’s Critical Care Training Program as well as president of MediScene. The above is copyright MediScene, Ltd. 1998.*

This article is from the ‘Lectric Law Library Web site at <http://www.lectlaw.com>



NEWS AND NOTES

Federal Magistrate Road Show

The Litigation Section is offering chapters the opportunity to bring a CLE to their chapters. This CLE centers on federal magistrates who teach other federal magistrates settlement and mediation on behalf of the Federal Judicial Center. This CLE is a day long program that includes not only information, but the opportunity to observe a mock mediation/settlement conference in a fish bowl type atmosphere with participants having the opportunity to discuss the topics as they are broached. In addition, there is a one-hour portion dedicated to ethics and professionalism. This is an outgrowth of the National Litigation Seminar in Las Vegas last year, and is being produced for the Montana Chapter as a pilot project in October. Any chapter interested in such a program should contact Alan Blakley (406) 543-0909 or Geoffrey Angel (406) 586-1926.

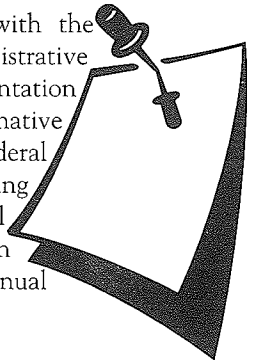
National Litigation Conference

Mark your calendars now. The next National Litigation Conference is set for April 19 through 21, 2001, at the Wyndham Canal Place in New Orleans. In addition, the Federal Litigation Section annual meeting will be held in conjunction with this seminar. Also the Federal Magistrate Road Show is going to be a part of the National Litigation Seminar in an abbreviated form. The complete schedule of events will be sent to you in the near future.

Implementing ADR in Federal Courts

The Federal Litigation Section will be presenting a resolution at the National Convention asking the National Council to instruct the Federal Litigation Section and the ADR

Committee to work on a proposal with the Federal Judicial Center and the Administrative Office of the U.S. Courts for implementation and congressional funding of the Alternative Dispute Resolution Act of 1998 in federal district courts with an eye toward providing more ADR opportunities at the trial court level. This will be one of the main focuses at the Litigation Section annual meeting.



Litigation Section Annual Meeting

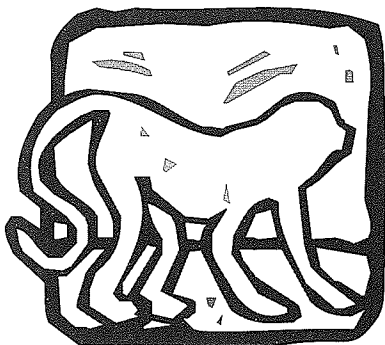
Each chapter is asked to designate two delegates to the Litigation Section annual meeting to be held in New Orleans. We envision this as a working session and intend to invite people from the Federal Judicial Center, the Administrative Office of the U.S. Courts, and some selected federal judges from around the country to work with us on ideas for implementing the ADR Act of 1998. It will be a working session set for Saturday morning. Contact your chapter president or a section officer if you would like to be a delegate from your chapter.

Hospitality Suite

The section has been approved to have a Hospitality Suite on Thursday and Friday during the national convention in Cleveland. At this suite, we will have the Litigation Section leaders available as well as the newsletter and brochures for the National Litigation Conference. Please stop by the suite and say hello and learn about becoming a chapter delegate. We want you to tell us what you want from the section.

FAMOUS TRIALS*

Scopes Monkey Trial



Seventy-five years ago, in the little town of Dayton, Tenn., the famous "Scopes Monkey Trial" captured the attention of the world. In honor of this anniversary, we are pleased to share with you portions of the examination of William Jennings Bryan by Clarence Darrow.

You have given considerable study to the Bible, haven't you, Mr. Bryan?

Yes, sir, I have tried to.

Then you have made a general study of it?

Yes, I have; I have studied the Bible for about fifty years, or sometime more than that, but, of course, I have studied it more as I have become older than when I was but a boy.

You claim that everything in the Bible should be literally interpreted?

I believe everything in the Bible should be accepted as it is given there: some of the Bible is given illustratively. For instance: "Ye are the salt of the earth." I would not insist that man was actually salt, or that he had flesh of salt, but it is used in the sense of salt as saving God's people.

But when you read that Jonah swallowed the whale: or that the whale swallowed Jonah—excuse me please—how do you literally interpret that?

When I read that a big fish swallowed Jonah—it does not say whale. That is my recollection of it. A big fish, and I believe it, and I believe in a God who can make a whale and can make a man and make both what He pleases.

Now, you say, the big fish swallowed Jonah, and he there remained how long—three days—and then he spewed him upon the land. You believe that the big fish was made to swallow Jonah?

I am not prepared to say that; the Bible merely says it was done.

You don't know whether it was the ordinary run of fish, or made for that purpose?

You may guess; you evolutionists guess ...
You are not prepared to say whether that fish was made especially to swallow a man or not?

The Bible doesn't say, so I am not prepared to say.
But do you believe He made them—that He made such a fish and that it was big enough to swallow Jonah?

Yes, sir. Let me add: One miracle is just as easy to believe as another.
Just as hard?

It is hard to believe for you, but easy for me. A miracle is a thing performed beyond what man can perform. When you get within the realm of miracles; and it is just as easy to believe the miracle of Jonah as any other miracle in the Bible.

Perfectly easy to believe that Jonah swallowed the whale?

If the Bible said so; the Bible doesn't make as extreme statements as evolutionists do ...

You believe the story of the flood to be a literal interpretation?

Yes, sir.

When was that Flood?

I would not attempt to fix the date. The date is fixed, as suggested this morning.

About 4004 B.C.?

That has been the estimate of a man that is accepted today.

I would not say it is accurate.

That estimate is printed in the Bible?

Everybody knows, at least, I think most of the people know, that was the estimate given.

But what do you think that the Bible, itself says? Don't you know how it was arrived at?

I never made a calculation.

A calculation from what?

I could not say.

From the generations of man?

I would not want to say that.

What do you think?

I do not think about things I don't think about.

Do you think about things you do think about?

Well, sometimes. (Laughter in the courtyard.)

Mr. Darrow:

Mr. Bryan, do you believe that the first woman was Eve?

Yes.

Do you believe she was literally made out of Adams's rib?

I do.

Did you ever discover where Cain got his wife?

No, sir; I leave the agnostics to hunt for her.

You have never found out?

I have never tried to find.

You have never tried to find?

No.

The Bible says he got one, doesn't it? Were there other people on the earth at that time?

I cannot say.

You cannot say. Did that ever enter your consideration?

Never bothered me.

There were no others recorded, but Cain got a wife.

That is what the Bible says.

Where she came from you do not know. All right. Does the statement, "The morning and the evening were the first day," and "The morning and the evening were the second day," mean anything to you?

I do not think it necessarily means a twenty-four-hour day.
You do not?

No.

What do you consider it to be?

I have not attempted to explain it. If you will take the second chapter: let me have the book. (Examining Bible.) The fourth verse of the second chapter says: "These are the generations of the heavens and of the earth, when they were created in the day that the Lord God made the earth and the heavens," the word "day" there in the very next chapter is used to describe a period. I do not see that there is any necessity for construing the words, "the evening and the morning," as meaning necessarily a twenty-four-hour day, "in the day when the Lord made the heaven and the earth."

Then, when the Bible said, for instance, "and God called the firmament heaven. And the evening and the morning were the second day," that does not necessarily mean twenty-four hours?

I do not think it necessarily does.

Do you think it does or does not?

I know a great many think so.

What do you think?

I do not think it does.

You think those were not literal days?

I do not think they were twenty-four-hour days.

What do you think about it?

That is my opinion—I do not know that my opinion is better on that subject than those who think it does.

You do not think that?

No. But I think it would be just as easy for the kind of God we believe in to make the earth in six days as in six years or in 6,000,000 years or in 600,000,000 years. I do not think it important whether we believe one or the other.

Do you think those were literal days?

My impression is they were periods, but I would not attempt to argue as against anybody who wanted to believe in literal days.

I will read it to you from the Bible: "And the Lord God said unto the serpent, because thou hast done this, thou art cursed above all cattle, and above every beast of the field; upon thy belly shalt thou go and dust shalt thou eat all the days of thy life." Do you think that is why the serpent is compelled to crawl upon its belly?

I believe that.

Have you any idea how the snake went before that time?

No, sir.

Do you know whether he walked on his tail or not?

No, sir. I have no way to know. (Laughter in audience.)

Famous Trials continued on next page

Lizzie Borden

In August 1892 the town of Fall River, Mass. became famous and one of its residents became the topic of the day's hottest headlines. Lizzie Borden, a 33-year-old spinster, made national headlines when she became the defendant in a trial for the murder of her father and stepmother.

On Aug. 4, 1892, the bodies of her stepmother and her father were found in their house at 92 Second St. Mrs. Borden was found in the upstairs guest bedroom, dead from many hatchet blows to the face and head area. Mr. Borden lay dead on the couch where he had been napping. He too was killed with a hatchet.

Did Lizzie kill these people? The jury returned a verdict of not guilty. Reprinted here for your enjoyment and edification is the closing argument of the defense. It contains some of the classic features of a good closing argument.

Defense Cloising

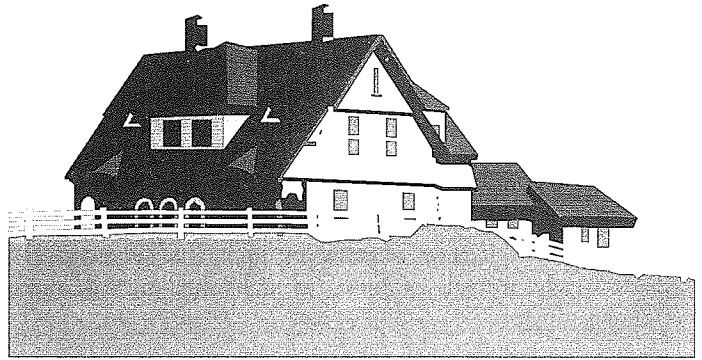
George D. Robinson delivered the defense's closing argument:

By now you must realize that it is impossible for this young woman to have committed this terrible crime. It is not your business to figure out who did it. You are here to decide: Is she guilty? And though the real criminal may never be found, better a million times than finding this woman guilty on insufficient evidence. Remember that the law says if a defendant chooses not to testify, you cannot draw an inference of guilt from that choice. You must also leave out of your mind every rumor and report that you heard before the trial began. You must leave out of your mind everything that the prosecutor said he would prove unless he has actually proved it. For example, he said he would prove that the defendant prepared a dangerous weapon—poison—the day before the murders. You have not heard any such evidence. It is not proved because the court did not allow it to be proved.

There is absolutely no direct evidence against Miss Borden. There is no weapon. There was not a spot of blood on her clothes. Yes, there was one drop of blood on the white skirt, as big as the head of a small pin. Miss Borden had her monthly illness at that time. Professor Wood said he did not know whether the blood on the slip was or was not menstrual blood. There was no blood on her hair. How could she have murdered them without getting blood on her hair? Dr. Draper testified that it is almost impossible to get blood out of the hair. And if she had tried, her hair would have been wet. And the ladies fanning her face would certainly have seen that.

It is said that on a certain step of the staircase, if you look into the guest room, you can see any object on the floor. They say that when Miss Lizzie went downstairs, she must have seen Mrs. Borden lying behind the bed. Now, what if we marched you up and down the stairs and didn't tell you what we wanted you to look at? Do you think that you would squint under that bed as you walked down? Of course not.

We agree that Miss Lizzie went up and down the stairs about 9 a.m., when Mrs. Borden was making the bed. But there is not the slightest bit of evidence that the guest-room door was open then. We know the door was open later, but there is not evidence that it was open then.



They say Miss Lizzie lied about Mrs. Borden's getting a note. But you heard Mrs. Churchill say that Bridget told her that Mrs. Borden had a note from someone who was sick. Both Bridget and Lizzie had learned from Mrs. Borden that she had received a note.

So where is the note? Why hasn't its author come forward? Believe it or not, there are people living in this country who do not know this trial is going on. Often after a trial is over, someone steps forward and says, "Well, if I had really known that question was in dispute, I could have told you all about it." So why didn't this person come forward sooner? Well, sometimes, people, especially women, dread coming into a courtroom. And maybe the note was part of an assassin's scheme. We don't know. All we now is that a note arrived.

Mr. Lubinsky saw Miss Lizzie at the barn. Miss Lizzie said she was in the barn for twenty or thirty minutes. She told Bridget she was in the backyard at the time of the murder. She told Dr. Bowen she was in the barn looking for some iron for sinkers. She told Miss Russell she went to the barn for a piece of tin or iron to fix her screen. Can't all these things be true?

Remember—she couldn't get to the barn without going through the yard. Is it unreasonable that she stopped there by the pear trees for five or ten minutes? Haven't you ever lingered in your yard on the way to doing a chore?

If she was the arch criminal they claim, her story would be so perfect that she could tell it line for line the same every time. We all know that witnesses who tell the truth often slightly vary their stories. The ones who recite their testimony like parrots are the suspicious ones.

Miss Lizzie said she thought she heard Mrs. Borden come in. The idea that Mrs. Borden had come in was the most natural thought in the world. She probably heard some noise in the house, maybe the shutting of a door - - and thought that Mrs. Borden had come in.

They say she showed no feeling when her stepmother was lying dead on the guest-room floor, that she laughed on the stairs. Why shouldn't she laugh? She didn't know Mrs. Borden was dead. She hadn't murdered her. If she had murdered her father, do you think she would have called so quickly for Bridget? They say she didn't show any signs of fear. But she said to Bridget, "You must go and get somebody, for I can't stay in this house alone." Isn't that a cry of distress?

They say Lizzie murdered Mr. Borden for his money, or possibly to hide her crime. Have they proved that? They have proved that five or six years ago, Lizzie stopped calling Mrs. Borden "Mother." Is there anything criminal about that? Does the statement "She is not my mother; she is my stepmother" smack of murder?

But what about Lizzie's statement to Mrs. Gifford: "Don't say 'Mother' to me. She is a mean good-for-nothing thing." I agree that that is not a good way to talk. I agree that Lizzie Borden is not a saint. I also know you are not saints, and doubt that you never speak hurriedly or impatiently.

Bridget Sullivan lived with that family almost three years and was nearer to them than anybody else. She never heard arguing.

On Thursday morning when they say Miss Lizzie was planning the murders, Bridget heard her talking calmly with her stepmother. And Mrs. Raymond testified that all four of them sat together, at a regular dressmaking party, just a few months ago. Was that a murderous group?

They have said that Emma Borden's sisterly affection carried her away from the truth. But what was untrue about her testimony? She admitted that they had trouble six years ago. She said as far as Lizzie was concerned it was all settled.

In his opening the district attorney said that there was an impassable wall between the occupants of the house. But we learned that the doors to everyone's rooms were regularly locked because of a burglary. The impassable was not against the two girls. It was simply protection against strangers.

The government says she burned a dress and lied about the dress she wore that morning. But people who saw Lizzie that day disagree about what she wore. Some say she wore a dark blue dress. Mrs. Churchill speaks of it as lighter blue.

The witnesses may disagree about what Lizzie wore, but every single person testified that there was not a spot of blood on her dress, or hands, or face, or hair. So the idea that this dress was burned to hide something is ridiculous. So where was the dress that the police didn't find it? In the closet. Miss Emma saw it there on Saturday night. She told her sister to get rid of it. Was there grease or paint on it? Yes, Lizzie got paint on it in May. On Sunday, she followed Emma's suggestion. She burned the dress in the kitchen. She did not hide what she was doing. The windows were all open. The police were in the yard. In fact, when Mrs. Russell said, "I think you have done the worst thing you could in burning that dress," Lizzie said, "Why did you let me do it, then?"

I ask the prosecutors this: If Lizzie Borden killed her stepmother at 9:45 a.m. And then came down to greet her father, why was she not covered with blood? Of course the government will say she changed her dress, and then when she killed her father, she either put that dress back on or she put on another. If she put it on again over her clothes and her body, wouldn't her underclothing get soiled? If she put on another dress, then there were two dresses to burn and get rid of, instead of one. The whole matter is physically impossible.

The prosecutor says she murdered these two people because Mrs. Reagan said the sisters quarreled. Supposedly Lizzie said,

"Emma, You have given me away." If there is anybody given away in this case, it is Mrs. Reagan. Lizzie did not try to get Bridget out of the house. She told her about the sale at Sargeant's because it was a good sale. If she wanted her out of the way, she would have sent her on an errand. But instead, everything in the house went on as usual.

Now, back to the weapons. Dr. Draper says the cutting edge of the murder instrument was three and a half inches, but he also says it could have been done by an instrument three inches wide or two and three quarter inches. You see why we do not usually hang people upon the testimony of experts. It isn't safe.

So now we have this broken hatchet. One policeman tells us it has been dropped in ashes and tossed in the box and had fine dust on it. I am sure it did. I am also sure that you have in your bars and shops and cellars some old things that you haven't thrown away, and that they have dirt and dust and ashes on them.

The prosecutor says that this hatchet was washed thoroughly to get all the blood off. Then the handle was deliberately broken off. Professor Wood could not find the slightest trace of blood. The government says that the broken hatchet may have been the weapon. Can you convict this defendant on a theory it may have been?

They say Lizzie was shut up in that house with the two victims and that everybody else was absolutely shut out. But Bridget told us that the side screen door was unfastened from about 9 a.m. to 10:45 while she was outside.

So what was Lizzie doing during this time? Doing what any decent woman does. Doing what your wives are doing now—ironing handkerchiefs, going up and down the stairs, going down into the cellar, doing the ordinary work around the house.

Now suppose the assassin came in. Lizzie was upstairs or downstairs in the cellar. Where did he go? Upstairs to the spare room, or into the hall closet or the sitting-room closet, or into the pantry. It was easy enough for him to go up into the bedroom and secret himself there until he was ready to murder Mr. Borden. Yes, he came there to murder Mr. Borden. But he found Mrs. Borden, so he killed her.

The prosecution says nobody saw the assassin go in. But nobody saw Mr. Borden leave the house either. And there was somebody about the house. Dr. Handy, Mr. Chase, and Mrs. Hart saw a stranger on the sidewalk just before the murder. This murder was not done by one man alone; there was somebody else in it. The idea of sole opportunity does not hold.

Thomas Barlow and Everett Brown have testified that they were out in that barn before Officer Medley. Medley is wrong when he says there were no tracks in the barn.

Look at Miss Lizzie. To find her guilty you must believe she is a fiend. Does she look it? As she has sat here all these long weary days have you seen anything that shows the lack of human feelings? Please give us your verdict of "not guilty" so that the defendant may go home and be Lizzie Andrew Borden of Fall River in that bloodstained and wrecked home where she has passed her life for so many years.

*From Professor Doug Linder's Web site at www.law.umkc.edu.



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SideBAR

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