

COMMENTARY

The Absurdity of 'Exquisite' Pain

By Michael Brooke Fisher

The pain was exquisite." So said the doctor in his medical report in court and when he testified.

That is just one example, among many, I observed as a civil trial judge, in which doctors often fail to explain their opinions in a way that is understandable to the average juror.

From having spoken with them after trial, I can assure you that some jurors have no idea of what the word means. Moreover, those who do would hardly think of pain as exquisite.

A basic dictionary refers to definitions of the word in descending order. The first is something of special beauty, charm or excellence. The second defines it as something extraordinarily fine or admirable. Not until the third does the word fit into the doctor's usage, being defined as "intense, acute or keen, as pleasure or pain." Even in this third definition, the word pleasure preceded the word pain.

Not until I was a judge did I hear people call pain exquisite unless they were referring to the predilections of the Marquis de Sade. A face, a flower, a painting, or a piece of fine crystal or jewelry are all traditional examples of something exquisite.

In the courtroom, the doctor parroted his report declaring the pain "exquisite." He made no effort to explain he meant that the pains were acute or severe, nor did the

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lawyer ask him to clarify what he meant.

Even the word "acute" may be a poor choice, but certainly the average juror knows what severe means, so why when the doctor wrote his report did he eschew using such an understandable word for one so potentially meaningless or, worse, confusing?

To illustrate my point, if I were a lawyer speaking to a jury, I would eschew the word "eschew."

The doctor's refusal to use more commonplace words is, perhaps, an act of elitism on the doctor's part. To an extent it is not surprising because he is usually the most credentialed person in the room, who, before testifying is led through his curriculum vitae in excruciating detail by the attorney, and then asked to explain arcane medical terms and findings to the jury.

The doctor compounds the problem by passing over easily understood words while testifying. In a very professorial manner, the doctor tries to impress the jurors with his knowledge to get them to accept his opinion over the opposing expert's. Unfortunately, someone can impress others without truly informing or persuading them.

Even the commonplace, simple words "positive" and "negative" have different meanings in the world of medicine. In the rest of the universe, "positive" is good and "negative" is bad, but to a doctor, a "positive" test result shows the presence of disease and a "negative" one denotes the absence of one.

At trial, doctors point to murky images on film, use difficult, Latin-based terminology to describe medical conditions

or injuries and then render diametrically opposed conclusions, each to that legally required reasonable degree of medical certainty.

Consequently, jurors are desperate to grasp anything to unravel the medical jargon. Sometimes, a 10-cent word is more helpful to them than a fancier one.

While one medical expert may, for example, opine in a report that the "ptosis" of the eyelid was the result of a trauma, it would be better to tell the jurors that the blow to the head caused a drooping of the eyelid.

If a word such as "ptosis" only exists in *Taber's Medical Dictionary* or one such as "exquisite" appears in a Merriam-Webster dictionary but has a different meaning in the medical world, doctors should take the effort to explain medical terms in everyday language and understand that everyday words have different meanings in their medical world. Language should not be a barrier to understanding; it should be a portal.

Unfortunately some medical experts take the stand as if they were doing the court and the jury a favor by simply being there. Their very body language tells the jurors, "I don't expect you to understand what I say, but I am so brilliant you should take my word for it."

Others, the good ones, are veritable ambassadors for their profession as they talk to jurors using, and also explaining, medical terms intermingled with some 10-cent words to take the jury through that portal of understanding. The good ones recognize that their mere presence is not enough.

Persuasion is required, persuasion through true communication. That is what trial attorneys do. They should expect nothing less from their experts. ■