

## ITS MEDICO-LEGAL ASPECTS

Miguel G. Zarraga\*

The employment of narcotic and anesthetic drugs in anesthesiology has led to researches which have resulted in their utilization in psychology and psychiatry for therapeutic purposes, and eventually in their application to criminal investigation.

Aside from the employment of these sleep-inducing drugs in anesthesiology, their use as a form of treatment for psycho-neuroses, especially in what are known as war neuroses, to produce stupor and arrested activity in order to bring forth an *emotionally charged conversation* in which the patient unburdens his mind, followed by discussion, is recognized and referred to as *narco-synthesis or narco-therapy*. There can be no question that whatever information the physician has acquired under these circumstances would be governed by the rule on privileged communications or professional secrecy.<sup>1</sup>

The phrase "truth serum" was coined by news reporters as a result of the aroused interest in the scopolamine tests conducted by Dr. R. E. House, an obstetrician of Ferris, Texas, who observed that the apparently unconscious woman in labor under "twilight sleep", correctly answered questions directed at her husband.<sup>2</sup> Upon recovery, she had no recollection at all of the episode. The term however, is a misnomer, for by it, many are led to believe that we have a powerful and miraculous *biological substance* that will cause a person to "tell the truth". Actually it is neither a "serum" nor a fool-proof determination of the truth, but for lack of a better term, the phrase has been continuously used instead of the more accurate and descriptive phrase "narcoanalysis for detection of deception". Of course, these so-called "truth sera" have many other uses, but from the medico-legal point of view, our main interest in it is as an aid to scientific interrogation.

As physicians, we should not remain misinformed about the capabilities of the test. We are obliged to be well-informed about it only to be able to advise intelligently the courts and investigators who may be concerned with the procedure on how the test is conducted and what may be expected from it.

\* M.D., LL.B., LL.M.

<sup>1</sup> Sec. 21 (c), Rule 130, RULES OF COURT.

<sup>2</sup> House, *The Use of Scopolamine in Criminology*, 18 TEXAS STATE J. MED. 259-263 (1922).

There has been a continuing interest since time immemorial in the search for an ideal test for the detection of deception, particularly in the field of criminology.

Greek and Roman literature have referred to the employment of various drugs to produce an exalted mental state, hallucinations, and amnesia as early as 1200 B.C.<sup>3</sup> Jews and Chinese have used various drug preparations to obtain confessions from criminals or to dull the pain of tortures. The Aztecs of Mexico have extracted peyotl from the cactus plant and drank the liquor to evoke intoxication and hallucinations for religious or other purposes.<sup>4</sup>

The most popular drug for extracting truth, however, and which until now has pervaded our midst, is alcohol. "It has become quite a common proverb that *in wine there is truth*", so wrote Pliny in the beginning of the Christian era.<sup>5</sup>

At the turn of the century, a former police officer feigned insanity for 18 months while awaiting trial, but was convicted for the first degree murder of his wife and confined in Sing Sing Prison. It was Dr. C. G. Wagner who, on December 8, 1903, first made use of ether anesthesia to discover that an accused person was *malingering*. He developed the idea that "the fact would become patent when all voluntary and purposeful action should be in obedience". He gave ether in three separate anesthetizations, each to a greater depth of unconsciousness than the previous test, after which the patient discarded his symptoms and walked normally from the room.<sup>6</sup>

However, the first scientific means to detect deception was the polygraph or "lie detector", which is a mechanical aid to scientific interrogation. This stimulus brought investigators and doctors together and led to the development of narco-analysis for criminal investigation, but it was not until February 13, 1922 that the first examination of a suspect was conducted by Dr. House who confirmed Wagner's original ether test by observing that "the ideal period of interrogation was among the lower planes of the second stage of scopolamine-chloroform analgesia in which he expected a response to loud questioning."<sup>7</sup>

His continued experiments on prisoner-volunteers from Texas jails resulted in findings of innocence among several of them. As a consequence, he was even called to conduct tests in other states. He may therefore be considered the "pioneer of our modern interest in narcoanalysis for criminal interrogation."

<sup>3</sup> GWATHMEY, *ANESTHESIA* (1914).

<sup>4</sup> Wood and La. Wall, *THE DISPENSARY OF THE U.S.A.* (1940).

<sup>5</sup> Muehlberger, *Interrogation Under Drug Influence: The So-Called Truth Serum Technique*, 42 J. CRIM. LAW, CRIM. AND POL. SCI. 513-528 (1951).

<sup>6</sup> Wagner, *Feigned Insanity: Malingering Revealed by the Use of Ether*, 61 AM.J. OF INSANITY 193-198 (1904).

<sup>7</sup> See *supra*, note 2.

The most common drugs which have seemed to produce the best results are scopolamine, sodium amytal, and sodium pentothal, either alone or in combination with other drugs.

#### TECHNIQUE AND PROCEDURE

The test is not a routine one and cannot be managed as safely and efficiently by a single examiner as by a team of one or more interrogators and an anesthesiologist. Interrogation is best directed and supervised through one member of the team.

Scientific objectivity is as essential for forensic investigation during narcosis as it is to investigations of persons who are awake. The examiner must have a detached position, must conduct himself in an ethical manner, and be familiar with the many methods of detecting deception.

The first step is to acquaint the subject to be examined with his constitutional rights and with the exact nature of the process which will deprive him of volition. A notarized document should be prepared in which he signifies this awareness and gives his voluntary consent to the examination. Representatives of the subject and the interested police or judicial authority may jointly assist in preparing the data and, under the stipulations, the conclusions of the team may be released to both parties.

The next step is to review the brief of the entire case, taking notes about the statements and actions of the subject, witnesses, officers, and others having information pertinent to it, together with location maps, pictures and sketches which may be indispensable during the narcoanalysis when conversation with everyone but the subject is at a minimum.

After this thorough working knowledge has been acquired, the *principal interrogator* interviews the subject privately with a friendly unbiased attitude to establish confidence and gain cooperation.

At this juncture, one or more polygraph tests may be done. The value of these preliminary "lie detector tests" is pointed out by Le Moyne Snyder, who compared it to the search for buried treasure. The polygraph is used to locate the treasure and the drugs are employed to aid in the removal of the treasure or at least to make the digging easier. Without the preliminary tests, it would be like promiscuous digging and failure to find the treasure does not prove that it is not there.<sup>9</sup>

It is only after the investigators have gathered as much preparatory data as possible that the subject is taken to the hospital for anesthetization. This is done in strict confidence in a private room or

<sup>8</sup> Lorenz, *Criminal Confessions Under Narcosis*, 31 WISCONSIN M.J. 245-250 (1932).

operating suite with bright light darkened to reduce apprehension created by the atmosphere.

The anesthesiologist should emphasize to the subject that the test will produce drowsiness, euphoria, and a desire to communicate all "forgotten" memories and avoid lengthy discussion of the interrogative problems. He should first perform a complete physical examination to determine the anesthetic agent of choice and the subject must be warned not to eat or drink 4 hours before the anesthesia and avoid urine just before the injections.

#### A. Scopolamine technique<sup>9</sup> —

Initial subcutaneous injection of 1/100 grain freshly prepared scopolamine hydrobromide followed by 1/200 grain every 20 minutes for 3 to 6 times are given until the subject reaches the proper stage for interrogation. Should any rash appear, or nausea or vomiting, or blood pressure rise, or delirium or mania develop, the injections are immediately stopped and proper measures done to counteract these effects.

#### B. Sodium Amytal or Sodium Pentothal Methods<sup>10</sup>—

Mixtures of 2 1/2 to 5% are injected intravenously at a rate not exceeding 1 cc per minute until the proper stage is induced. Dangers to watch include cardiac arrest, laryngospasm and respiratory and circulatory collapse. These may be avoided by slow induction. Anapnetic drugs (picro-toxin, caffeine sodium benzoate, coramine, methadione, etc) must be on hand.

Pre-anesthetic medication<sup>11</sup> with sodium soconal (1 1/2 grains) 1 1/2 hours before the test followed by morphine (1/4 grain) and scopolamine (1/100 gr.) subcutaneously is recommended, as this renders the patient more amenable to the atmosphere and the injections. It also protects against dangerous parasympathetic reflexes, and reduces the quantity of the major anesthetic solutions required.

The questions prepared must be brief, concise, and easily understood. They are repeated and emphasized with loud-enough voice, and reworded and coordinated with the stimuli. Interrogators are warned against suggestive questions as persons under a state of narcosis have increased suggestibility. *Brief, repeated, and immediate answers to the correctly expressed questions are the most reliable.*

Questioning continues as the patient awakens when he may assume from its intentional nature that he had confessed during the examinations. He may then acknowledge his guilt defiantly, or re-

<sup>9</sup> See *supra*, note 2.

<sup>10</sup> See *supra*, note 8.

<sup>11</sup> ADRIANI, TECHNIQUES AND PROCEDURES OF ANESTHESIA (1947).

vert to his previous alibi, depending upon his personality structure and his rapport with the interrogator. The questioning should, however, stop short the moment he can distinguish inaccuracies in the investigator's knowledge of the crime.

#### LEGALITY OF THE PROCEDURE

Should the request to perform the test originate from the defendant, there could be no question as to its legality. It is where the drug is injected upon the request of the prosecution or police authorities without the permission of the prisoner where the question of violation of the fundamental constitutional right against self-incrimination becomes involved.

Sec. 1 (18) Art II of the Philippine Constitution states:

"No person shall be compelled to be a witness against himself." Sec. 3 Rule 132 (formerly Sec. 79, Rule 123) of the Rules of Court prescribes that "... unless otherwise provided by law, he (witness) need not give an answer which will have a tendency to subject him to punishment for an offense ...." Finally, under Sec. 1 (e), Rule 115 (formerly Sec. 1 (d), Rule III): "... The defendant shall be entitled .... to be exempt from being a witness against himself in all criminal prosecutions."

Thus, should a physician administer the drug at the request of the prosecuting authorities without the proper consent of the subject for the purpose of obtaining confession involuntarily, he becomes a participant in the act and shares legal responsibility.

In addition to the other consequences of the act, both criminal and civil, an administrative action for revocation of the medical license may be instituted against him.

To protect himself, the physician must demand that the subject execute a separate written consent that: (a) he acknowledges his understanding of the proposed test; and (b) he consents to the administration of anesthesia and the performance of such operations and other procedures as the medical authorities may consider necessary for the medical portion of the examination.

Since these drug-influenced statements are testimonial in nature, the examination is covered by the above quoted basic references regarding the constitutional privilege against self-incrimination. Confessions and admissions are of secondary importance to the ideal investigation and prosecution of crime. What is paramount is to get the truth and facts of the case.

There has been much controversy between those who propose that narcoanalysis for criminal interrogation be made *compulsory* and those who object on ground of firm principles guaranteed under the Constitution.

In 1925, Dr. House, in justifying the employment of his scopolamine tests, made the following pertinent remarks, and demonstrated plainly the altruistic motive and the ethical purpose of the physician in *voluntary narcoanalysis* for criminal interrogation:

.... There can be no gainsaying the fact that a suspect is either innocent or guilty, and no one knows the truth better than does the suspect himself. It therefore stands to reason, that where there is a safe and human measure to evoke the truth from the consciousness of the suspect, that society is entitled to have the truth.... I believe in society being mightily fortified with a vast reservoir of direct and collateral information, and at the same time to manifest the spirit of fairness and impartiality, and to always portray justice and mercy .... If society has a right to take property, liberty, and life for its protection, then society has the right to make, by trained men, the use of the truth serum legal. The framers of the Bill of Rights believed the rights of society were paramount to the rights of the criminal. It was an instrument for the protection of the innocent and not for the acquittal of the guilty.<sup>12</sup>

And as Justice Brandeis said in his famous brief<sup>13</sup>: "... If we would guide by the light of reason, we must let our minds be bold."

A.W. Herzog<sup>14</sup> went even further by declaring that "to discover the truth by forcing those who would pervert justice by telling falsehoods under oath to submit to a scientific 'third degree' cannot be wrong, *if it be made legal*, and would go a great way in helping the honest and those falsely accused of wrongdoing to obtain justice. While the methods of the Inquisition, which consisted of torture, and caused not only the guilty to confess to crimes committed, but also the innocent to confess to crimes they were not guilty of should never be countenanced, the hypodermic injection of scopolamine is harmless, painless, and can only lead to the revelation of the truth."

But others (L.M. Despres and C.P. Mundy)<sup>15</sup> object to this stand on the ground that "the use of drugs to obtain statements open tremendous opportunities for oppression", as any person may be arrested and subjected to interrogation, "and many secrets and private details, better left hidden, could be used to embarrass or destroy the subject.... While physical torture is not employed, the result in ruined lives might even far exceed the discomforts of the conventional third degree."

Criminal confessions made under the influence of a drug would be *inadmissible* in evidence because of the rule against involuntary confessions. Mundy went even further by stating that "the use of

<sup>12</sup> ADRIANI, *TECHNIQUES AND PROCEDURES OF ANESTHESIA* (1947).

<sup>14</sup> HERZOG, *MEDICAL JURISPRUDENCE* (1931).

<sup>13</sup> *Muller v. Oregon*, 208 U.S. 412.

<sup>15</sup> Despres, *Legal Aspects of Drug-Induced Statements*, 14 UNIV. CHICAGO L.REV. 601-616 (1947).

any *leads* obtained from a suspect while under the influence of a drug should be barred."

The majority of the objections may be overcome by establishing certain ethical standards. In criminal cases, the prosecuting fiscal and his investigator, and the counsel or friend of the accused may be present as witnesses. For then in their presence, nothing which simulates what is alleged to be "third degree" methods would have been tolerated. In the words of W.F. Lorenz,<sup>16</sup> what is especially valuable is the "absolute conviction and satisfaction on the part of the prosecutors when the subject is found innocent of the charge . . . . It appears best that the physician act only as a medical man who induces a mental state and then stands by to protect the patient's mental and physical welfare. . . . The investigation is best left to those charged with such responsibility—those who are most skilled at criminological interrogation."

To overcome whatever objections may still remain, it has been suggested that on the day subsequent to complete recovery from the anesthetic effects, the team discuss the drug-influenced statements with the subject so that he may volunteer an admissible confession and reduce it into a properly witnessed document. The subject may be: (a) informed that the conditions of the narcoanalysis and previous investigation no longer exists should they constitute threat or mistreatment; (b) notified that any earlier promises of leniency are revoked; (c) reminded of his privilege against self-incrimination; and (c) promised safe and proper treatment, in the presence of reliable witnesses.

In so far as the physician is concerned, whatever information he may have acquired remains confidential under the Hippocratic Oath which requires that:

"All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal."

Privileged Communications do not, however, protect the criminal. In our jurisdiction, it is only in a civil case where a physician, or surgeon, or obstetrician can not be compelled to reveal such information acquired from the patient while attending to him in a professional capacity without the latter's consent, and which will blacken his character.<sup>17</sup> Moreover, the relationship of physician and patient does not exist when a physician examines a patient at the request of the prosecution, and the examination of a patient held in custody is not privileged. Thus, when the constitutional privilege against self-incrimination has been waived, the physician is free to

<sup>16</sup> See *supra*, note 8.

<sup>17</sup> Sec. 21(c), Rule 1:30, RULES OF COURT.

testify on statements heard and observations made during narcoanalysis for criminal interrogation.

Refusal to testify based on ethical considerations may subject him to liability for contempt of court and punishment accordingly. A problem arises however when a physician accidentally obtains in the course of his treatment of a patient, an admission of guilt or confession to a crime. Here, the psychiatrist and the psychoanalyst are exposed to a serious dilemma, especially if the physician discovers that an innocent man has been punished for an offense done by his patient. Should the doctor try to screen the assailant by making no report in connection therewith? Mundy says: "While the physician owes a high obligation to his patient, his obligation to society is paramount."

As a solution, the adoption of the "North Carolina rule", which allows the Court to decide whether or not a physician should be required to disclose information given to him by the patient, has been recommended.<sup>18</sup>

Narcoanalysis for criminal investigation lacks the scientific approval ordinarily required for the admission of the examiner's final conclusion. On the other hand, the courts have indirectly recognized the results of forensic psychiatric examination for *malingering*, *amnesia*, and *insanity*, for they accept the conclusion on their presence or absence, although they have not yet admitted the evidence obtained during such examination.

Neither does it possess a reasonable measure of precision in its indications, as statistics show detection of deception only in over 50% of cases and the total number of examinations is still small.

It is important therefore, in determining the degree of its accuracy, that the examiner corroborate his evidence with facts. Thus, the courts should continue to refuse admission of drug-influenced statements unless they are substantiated by factual evidence.

<sup>18</sup> Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?* 52 YALE L.J. 607-617 (1943).