Edinburgh Medical Journal

October 1948

THE MEDICAL MAN IN THE WITNESS BOX

By SHERIFF T. B. SIMPSON, K.C.

ALTHOUGH the officials of the Medico-Chirurgical Society had no possible means of knowing it when they arranged this meeting, to-day is an anniversary of considerable importance in my life. Thirty-nine years ago to-day Mr H. J. Stiles, in an emergency operation, removed my appendix, thereby giving me a life-span far beyond anything which I could reasonably have expected, having regard to the previous medical history both of my family and of myself. Mr Stiles and I were both gainers; I got thirty-nine years plus; he got a fee which measured in terms of to-day's spending power and taxation represented roughly one year's salary under the National Health Act *and* an appendix of roughly (I gather) the size and shape of a banana, about which he lectured to the day of his retirement. After the operation I had a tube in my side for purposes of drainage, and lying on a bed the head end of which was raised above the floor on wooden blocks, I was three or four times knocked off these blocks during the first week, and from that experience no doubt dates that whole-hearted devotion to the medical and nursing professions which alas! I have had only too ample opportunities of displaying during all the subsequent years. About ten years ago I gave the Harveian Society the full catalogue of my medical and surgical past; indeed at their special request my heart is to be made available to them for their first annual dinner occurring after my decease; and I have no intention of repeating that long and melancholy list now. I only say that to that list there falls to be added an illness three years ago which, after keeping me in bed for five months has since kept me out of active practice at the Bar. Looking to these facts, I feel that I am in a peculiarly strong, cross-bench sort of position to open a discussion of the kind we are to have to-night.

In starting to consider what was to be said about the relationship of the court lawyer to the doctor I was reminded of the opening of the new Law Courts in London in the 1870's. The Queen was to attend the opening in person and Her Majesty's judges were to present her with a loyal address. They assembled to consider its terms and a draft was read which contained the expression, "conscious as we are of our imperfections." Some of those present objected to the phrase as being unduly humble and self-depreciatory (judges had a

Paper given to Medico-Chirurgical Society, 2nd June 1948.

robust self-confidence in those spacious days wholly lacking in their successors), and Lord Justice Bowen, who was present, said that their objections might be met, and the truth adequately presented, by a trifling amendment. Let the phrase be altered to " conscious as we are of one another's imperfections." That phrase floated, unbidden, into my mind as representing the mutual relation of doctor and lawyer. Is it true ? It has never been my own attitude. I certainly entertain no strong feeling that doctors are not good witnesses, nor can I work up any sense of professional indignation against them in the witness box, or even out of it. Indeed my first reaction on hearing the subject of to-night's discussion was to think that " doctors are no worse in the witness box than any other kind of witnesses," and my own debt to doctors is far too great for me to be able to generalise against them.

Still, the implications of that Bowen story remain, and I suppose that generally speaking it is true to say that doctors look on lawyers as hide-bound pedants, with a snuffy adherence to old-fashioned rules, people who before they come to any conclusion have to ask themselves " what did Lord Mansfield say in 1779 ? " To which the poor lawyer can only reply that while what Lord Mansfield said in 1779 may still be *true*, the only *certainty* about medicine is that in fifty or a hundred years the doctors will be casting just as much ridicule on *everything* done by the practitioners of to-day as we do on the prescribers of snails' broth and puppies' urine, with as much justice and for much the same reasons.

So, I do not propose to look on this meeting as a debate, in which I am to sustain the thesis that all doctors are fools, while Dr Slater is to reply in an angry philippic designed to show that all lawyers are knaves. My task is really to start some topics for discussion, and I have been instructed to keep the discussion on lines as broad as possible. This suits me, since like the Declaration of Independence I have a weakness for the " glittering generality." What I propose to do is to mention one or two cases where my own practice has impinged on medicine, and to touch on some of the lessons which may be derived from them. Being no longer in practice I cannot be suspected of self-advertisement, and I think it is perhaps a more interesting line of approach than an attempt to construct *a priori* a theoretical conspectus of the subject, with reference to (or largely extracted from) the textbooks. Incidentally, when looking in the legal medical textbooks I was interested to discover one which was almost entirely devoted to the subject of our discussion to-night. Called *Law and Medical Men*, it was published in Canada in 1884. You will perhaps be disposed to think that it is unworthy of serious consideration by a Society such as this when I tell you that the subject of chapter I was, not the Hippocratic oath, not a Doctor's Duty, but " Fees," and chapter II " Who Should Pay the Doctor ? " Chapter III went on, naturally enough, to " Negligence and Malpractice," followed in chapter IV by " Criminal Malpractice." Subsequent chapters in

this remarkable book dealt with " Defamation " and (oddly enough) " Dissection and Resurrection."

I begin with what is generally supposed to be the great battle-ground between the medical and legal professions, viz. the question of criminal responsibility in those who are suffering from one form or another of mental abnormality. " Would he have done it if a policeman had been watching him ? " asks the lawyer ; " If not, drag him to the scaffold." " Did he have bad dreams when he was a child ? " asks the doctor ; " Or, even worse, did his grandmother have bad dreams when she was one ? If so, give him a rest cure in the Broadmoor Nursing Home." These are the extremes, and in between some working rules have been devised, under which rough justice has upon the whole been done. What is called the rule in McNaghten's case has been incorporated in the law of Scotland, but it has been followed in a commonsense sort of way, with a lack of the rigidity into which rules seem so readily to harden south of the Tweed. Modern refinements do not seem, to me at least, to have improved our law in this regard and there is a real danger (perhaps some of you do not consider it a danger) that all crimes of violence should go altogether unpunished. For an example of such refinement one of our more eminent modern judges, shortly before going on the bench, spatch-cocked into our law that a man charged with killing another on the road is entitled to a verdict of not guilty if he can establish that " by the incidence of temporary mental dissociation due to toxic exhaustive factors he was unaware of the presence of the deceased on the highway and of his injuries and death, and was incapable of appreciating his immediately previous and subsequent actions." Looking at the report I note that the toxic exhaustive factors in that case included food, tea, whisky and soda, sherry, coffee and " a young lady with whom [the accused] was on terms of friendship." It is true that the same judge, when confronted on the bench with this little piece of nonsense, would leap three feet in the air and detonate in every direction ; but his legacy remained.

Where law and medicine, acting in concert, seem to me to have gone furthest wrong in this respect is in the manufacture of an intermediate class of abnormal criminal who is presumed capable of forming the intent to commit culpable homicide but incapable, by reason of his criminal abnormality, of forming the intent to commit murder ! Incidentally, I wonder if this distinction would ever have come into existence at all if we had not had a death penalty for murder. " Our law [always under pressure, be it observed, by the medical specialists] has come to recognise *in murder cases* [a class of] those who, while they may not merit the description of being insane, are nevertheless in such a condition as to reduce the quality of their act from murder to culpable homicide." (L. J.-C. Alness in *H.M. Adv.* v. *Savage* 1923 J.C. 49.) That this provision has worked its way into our law is undoubted. Its illogicality is so obvious that over and over again the judges have emphasised that the rule " must be applied

with care." Especially do they emphasise that, in order to have the benefit of the rule a man must suffer from actual or "objective" weakness of intellect, aberration of mind, mental unsoundness, partial insanity, great peculiarity of mind, and the like. (L. J.-C. Cooper in *H.M. Adv.* v. *Braithwaite* 1945 J.C. 55.) The warning was sounded a generation ago by Lord Johnston, but his words have been disregarded, and I daresay that some mental specialists at least will say that his rule was narrow-minded and wrong. What he said, in rejecting the rule which is now part of our criminal law, was *inter alia* this: "To say that that man is mentally capable of murder and this man only mentally capable of culpable homicide, that that man is capable of a capital offence, but this one only of an offence not capital, is a proposition which would, I think, unsettle the administration of criminal law. [That, under the lead of the psychologists, is just what it is doing.] I can understand limited liability in the case of civil obligation, but I cannot understand limited responsibility for a criminal act. I can understand irresponsibility, but I cannot understand limited responsibility—responsibility which is yet an inferior grade of responsibility." (*H.M. Adv.* v. *Higgins* 1914 J.C. 1.)

Let me give you a concrete illustration, from my own experience, of the way in which this rule works and then leave it to those more expert than I am to suggest what the remedy should be. In 1944, acting in accordance with the practice whereby any person charged with murder in Scotland is provided gratis with the services of a King's Counsel, I went through to Glasgow to defend a man so charged. To defend a person on a capital offence is always a heavy responsibility (I have known only one counsel who *liked* taking such cases and needless to say he didn't do them very well), but in this case I had the comfort of knowing that the facts were really indisputable and that no one could put the noose more firmly about my client's neck than he had already done himself. He was a married man who had conceived an infatuation for a young, unmarried woman. He met her one afternoon, by arrangement, in a railway goods station about which his duties took him, and they were seen laughing and talking on the platform. A few minutes later, they were found in a van, with the girl lying strangled on the floor. The accused made no bones about having strangled her. Indeed, his first words were "I have done her in." A special defence of insanity had been lodged. Its slender foundations were that anyone who chose to commit murder in a station swarming with detectives, as this one was, and as he knew, "must have been mad"; also it appeared that the accused was unduly sensitive to ridicule, and that the girl had been laughing at him. Several doctors were prepared to state for the defence that a man who lost his temper on such an occasion to the extent of "seeing red" was in fact insane. (The logical result of that of course would be that no one could ever be tried for a crime of violence.) But it proved unnecessary to call them, since to my satisfaction the Crown doctors

admitted to me that the man "must have been mad," except for the stout-hearted Dr Ivy Mackenzie who said, in spite of all that I could do to persuade him otherwise, that the accused was as sane as a man could be. My satisfaction was not shared by the judge, who was none other than the inventor of "toxic exhaustive factors," and was palpably eager to hang my client. At the end of the Crown's case, the Advocate-Depute offered to accept a plea of culpable homicide under the rule I have been discussing. I asked for an adjournment to interview the accused, and plainly stated to him the alternatives. We could either run the case to an end, in which case he would undergo the risk, not a very great one I thought, of a capital sentence; or his defence of insanity would succeed, in which case he would be detained for an indefinite period in Perth Criminal Lunatic Asylum; or we could close with the Depute's offer, and he would get a very substantial sentence of penal servitude—I mentioned twenty years. He chose the last without hesitation, and amused me by commenting on the second alternative "would they send me to an asylum? it would be enough to drive me potty." He was lucky enough to get away with ten years penal servitude. I only remark in parting from him, as I now do, that, although he was unable to provide any fee for his poor counsel, he had been able to wash down his mid-day meal, on the day of what I must call, I suppose, the "culpable homicide," with two pints of beer and two glasses of whisky. But is that a satisfactory rule, and if not what should be done about it?

Another murder case in which I was engaged, now a good many years ago, was concerned with a number of medical questions, and may suggest some useful reflections on the medical man in the witness box. Judges have, or used to have, a habit, perhaps more prevalent in England than here, of referring to crimes of which they disapprove as "un-British." On this, "what *is* a British crime?" an enquirer asked of an experienced English judge, who without hesitation answered "kicking one's wife to death." That, more or less, was the subject of a murder trial in Inverness when I assisted the Crown to prosecute what in a contemporary record I described as "an amiable looking elderly gentleman [he was fifty-five] with a white moustache and gold-rimmed glasses, like a respectable edition of . . ." [here I gave the name of a then well-known advocate], who was charged with the murder of his wife. Post-mortem examination disclosed that besides having a black eye, bruises on her forehead, and a wound in her neck the deceased woman had apparently been kicked all over. She had thirty injuries. I now quote again from my record: "The defence put forward was that the woman died, not of bruises, etc., but of an obscure disease called Pachymeningitis hæmorrhagica interna. One of the hired assassins from Aberdeen, asked by the judge to explain this disease "in popular terms," replied: 'In popular terms I should say it meant simply a hæmorrhagic inflammation of the dura mater!'" As an example of bad medical jargon this would

take some beating, and the judge, who had professed to ask his question for the assistance of the jury, was visibly perplexed. Medical men, when in the witness box, should be prepared to state their views in English intelligible not only to jurors but even to judges. That appears to be one medical lesson from this case. Another is this. When I was in the class of forensic medicine, Professor Littlejohn amused me by instructing his medical pupils not only as to the manner in which they should deliver their evidence but even as to the clothes they ought to wear in the witness box. The local surgeon in the case which I have been describing cannot have been a Littlejohn graduate, since I find I have described him in my record as " a most remarkable figure. Dressed in a knickerbocker suit, brown shoes, a deer-stalker, a white shirt, white collar, *and* white tie, he looked like a cross between an English non-conformist divine and a professional bicyclist." Here again, the jury took a merciful view and found a verdict of culpable homicide. The amiable-looking elderly gentleman got eight years penal servitude. Although I would not myself venture to give sartorial hints to doctors preparing to enter the witness box, it was brought home to me quite recently that a becoming appearance is still an essential ingredient in successful evidence. One of our judges told me, in enthusiastic terms, that a doctor who had just appeared before him had been (I quote his actual words) " the best witness I ever heard in a court of law." It happened that I too had heard the witness, at least in part, and had been suitably impressed myself with the fact that the doctor in question had well-turned ankles and was sensibly wearing a brand-new pair of nylons for the occasion.

It has been suggested to me that some medical men are reluctant to figure in the witness box because they are thereby exposed to being bullied in cross-examination. This is not in my view a valid objection, since no cross-examiner, however formidable, should have any terrors for a witness who is speaking I don't say the truth but what he genuinely believes to be the truth. Sometimes witnesses bring trouble on themselves by arguing with counsel, or trying to be " clever "—always a mistake—or by answering the wrong question; but proper cross-examination (and improper cross-examination will soon be stopped by counsel on the other side or by the judge) still remains the most satisfactory check yet devised on a witness's truthfulness. The point which I want to make now is that, contrary to the popular impression, examination-in-chief is certainly much more important than cross-examination, and almost certainly demands a higher standard of technique, both in counsel and witness. This was told me many years ago by Condie Sandeman, himself a great master of both arts; whether I should by now have discovered it for myself by the inductive method I am not in a position to say. A witness of course is first examined in what he has to say by the counsel on his own side—this is called examination-in-chief; and is then cross-examined by counsel on the other side. In examination-in-chief the

examiner should elicit the evidence without asking "leading questions." (A leading question is one which suggests its own answer.) If he is driven into asking one, counsel on the other side will insist on its being noted as "Q. and A." and the value of the evidence is seriously discounted. In examination-in-chief the examiner is painting the picture which he will afterwards have to exhibit to the judge, or the jury, and later still to the court of appeal, civil or criminal. The true artist will be able to point to a logical, connected narrative, unbroken by the "question and answer" which would indicate that he has been forced to ask a "leading question." Now it is here, obviously, that a medical witness who knows his business can be of enormous assistance. Without being discursive, he should never hesitate to give reasons for his views as he goes along, and so obviate the necessity for the examiner to suggest his reasons to him. I still recall with admiration the evidence given in a long and troublesome nullity case in which I was one of the counsel. Like all such enquiries it was of a delicate and difficult nature, and the period to which it related was so remote that much of the evidence seemed archæological rather than gynæcological. This doctor seemed to know by instinct what the examiner wanted to elicit next, and with almost no prompting presented a connected and convincing piece of testimony which went far to ensure the success of his side.

"Never volunteer evidence" says Taylor's textbook, but that rule is stated far too widely and must be applied with caution. Always be sure to see that everything comes out in chief which you have got to say. Never "save" anything for cross-examination. An amusing example of the neglect of this rule occurred in the New York courts, and also serves to illustrate, what I have already mentioned, the fatality of being "clever." In a murder case the defence of insanity was tabled, and Dr Allan McLane Hamilton, the most eminent alienist in New York State, was called to support it. The defence lawyer thought that Dr Hamilton's evidence would emerge more tellingly in cross than in chief and contented himself simply with asking the witness if he had examined the prisoner, and if so what he considered to be his mental condition. "Insane," said the doctor. The next passage I take from Wellman's *Art of Cross-Examination*. "'You may cross-examine,' thundered Howe, with one of his characteristic gestures. There was a hurried consultation between [the district attorney] and his associates. 'We have no questions,' remarked Mr Nicoll quietly. 'What!' exclaimed Howe, 'not ask the famous Dr Hamilton a question? Well, *I* will' and turning to the witness began to ask him how close a study he had made of the prisoner's symptoms, etc.; when, upon objection, Chief Justice Van Brunt directed the witness to leave the witness box, as his testimony was concluded, and ruled that in as much as the direct examination had been finished, and there had been no cross-examination, there was no course open to Mr Howe but to call his next witness!" Wellman

says that "it has always been supposed that it was preconceived plan of action between the learned doctor and the advocate." The prisoner was convicted of murder in the second degree and sentenced to life imprisonment. If he had got out and killed both doctor and lawyer, any well-instructed jury would have brought in a verdict of justifiable homicide.

Although evidence should not be over-loaded with detail it is as well to be sure of your details in case somebody asked you an unexpected question. In a case about a testator's capacity in the Scots courts, the family doctor came to give evidence that the deceased was unfit to make a will. *Inter alia* the deceased's memory had been progressively failing, and as a culminating example the doctor told how he was standing talking to the deceased when a man well-known to both of them passed by. "What *is* his name?" asked the testator "I *cannot* remember it." This was pathetic and impressive. The late Charles Scott Dickson stood up to cross-examine. "And what was your friend's name?" he asked. The doctor was unable to say!

My time is up, and I can only hope that in my inductive method of approach to the question I have succeeded in starting some hares for you to chase. I should like to conclude by reading some words of Sir Edward Fry, once a Lord Justice in the English Court of Appeal, because they seem to me to summarise so admirably the duties not only of counsel, about whom they were primarily written, but of witnesses too, and indeed of all engaged in the law courts, whether as witnesses or not. Although they provide in the first place guidance for judge and counsel, you will perceive as you listen to them that every word, *mutatis mutandis*, is relevant and applicable to the medical man in the witness box. "The object of the Courts is the discovery of truth in the cases which come before it, truth in two matters: truth as regards the facts in question, truth as regards the law to be applied to these facts; and in this quest three persons at least are concerned—the advocate for the plaintiff or prosecutor, the advocate for the defendant, and the judge; and if each advocate sets before the judge the case which he represents so that the strength of that case can be best apprehended by the judge, if he scrupulously refrains from mis-stating or over-stating a fact, he performs a most useful office in the search after truth, and that is all that the duty of the advocate requires of him. If sometimes the ability of the counsel on the one side wins a case which has been lost by the stupidity of the counsel on the other side (an event, which I think, is not very common though no doubt it does occur), this is only a result of the diversity of the human intelligence, and is not more a reason for putting a stop to the discussion in the Courts than to the discussion of political questions when the like result is, I believe, infinitely more common, or to a debate in a scientific meeting when the same result may, and no doubt does, occur." Following some such criterion as that, the medical man need never fear an appearance in the witness box.