LAW AND MEDICINE*

By MR. JUSTICE W. HARDING

THE learned Association made an indulgent concession in prescribing that the lecture be delivered by one who does not belong to the medical profession. I assume this role with some trepidation. I am saying this not to be merely vocal, but, really and truly, and for a twofold reason. First of all, because I am very much afraid that if I do say anything good it will not be new, and if I say anything new it will not be good. In the second place, there has been a tendency amongst humorous writers to place medicine and law at loggerheads with one another. One Italian epitaph writer went even further, and coupled both medicine and law in a stinging quatrain which ran thus:

Qui giace un povero disgraziato
Che diede il suo patrimonio ad un Avvocato
E la pelle, che sola gli rimaneva
Anche questa un medico gliela prendeva

After I had written out this lecture I confess that I immediately set to pruning it, in order to make it shorter, because I have always been scared by reading that Sydney Smith, the famous English writer and divine, once met a farmer and asked him where he was going. The farmer replied 'I did not sleep much last night, but I hear that so-and-so is giving a lecture and I am sure I will have a good sleep if I go to hear it'.

Mr. Abraham Flexner said that 'medicine and law are professions essentially intellectual and learned in character, and requiring for their cultivation the traditions, resources, facilities and contacts which exist within a university and nowhere else'. So medicine and law have these features in common. There was one other feature which apparently was more stressed in days gone by than it appears to be the case to-day. I mean gravity. As there are scientific people amongst you, I hasten to say that I do not mean by that word the fall of a body to the ground, nor am I referring to the tendency of the cost of living to defy that law by going up, instead of down – I am referring to a state of demeanour or behaviour. According to the Statute of Henry VIII, confirming the Letters Patent

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which established the Royal College of Physicians in 1518, none were 'to be suffered to exercise and practise physic but only those persons that be profound, sad and discreet, groundedly learned and deeply studied in physic'. And in our old Municipal Codes the members of the legal profession were expected to behave *con politezza e gravità*. Speaking for myself – and I must confess that in these matters my feet are firmly planted *super vias antiquas* – a certain amount of personal decorum is expected from a professional man – in dress, behaviour, and professional integrity.

I propose now to deal with the doctor as a professional expert in the Courts of Justice.

Undoubtedly, the witness-box is a difficult place for a medical man to occupy. The contentious atmosphere of the courts is not always conducive to the calm and dispassionate exposition of truth. The advocate is at home in the surroundings of the court, but the medical man is not, and in a forensic duel he may feel ill at ease and embarassed. Fortunately, however, Maltese Law does not allow medical experts to be called in by the parties in support of their respective contentions. An expert opinion *ex parte* is not admissible under the provisions of Maltese Law. This is as it should be, I am sure you will agree. The Rt. Hon. Lord Macmillan very properly said *à propos* of this point:

> Of one thing I am certain, and that is that no scientific man ought ever to become the partisan of one side; he may be the partisan of an opinion in his own science, if he honestly entertains it, but he ought never to accept a retainer to support in evidence a particular view merely because it is the view which it is in the interests of the party to maintain. To do so is to prostitute science and to practise a fraud on the administration of justice.

As I said, under our Law it is very properly and wisely laid down that the expert – including of course the medical expert – is chosen by the Court. Indeed, the Maltese legislator has been so anxious to ensure the absolute impartiality of the expert that the parties may object to his appointment in case there be any reasons which may engender a suspicion of bias, – reasons which are specified by law. In this way, under our Law the partisan element is properly excluded. Thus the functions of a doctor called in as an expert become those of a judge. Although in terms of the law itself, the Court is not bound to accept his opinion, however you will readily appreciate that no Judge would discard the opinion of a doctor lightly, but only for weighty reasons. You will also appreciate that the fact that the doctor is not acting in a partisan capacity gives added

strength to his opinion, which is thus grounded solely on a sense of individual responsibility and the consciousness of the exercise of a public function.

I should like to warn young practitioners, who have not had as yet any experience in the Courts of Justice that cross-examination may at times be rigorous, gruelling and trying. I would very much advise them not to attempt to counter the searching questions of a skilful cross-examiner by a show of temper or excessive dignity or both, or by over-confident and dogmatic assertions, because they might easily come to grief. The proper attitude is, obviously, that of keeping a cool head and giving, without any trace of resentment or irritation but with the utmost clarity, any explanation which may have been solicited.

I have said that under our Law a doctor may not be called as an expert by one of the parties, but he is chosen by the Court. But, of course, a doctor may be called as a witness, in cases where, for example, he has been attending professionally a particular person, or when he has made out some medical certificate at the request of a particular person or in cases liable to criminal prosecution by the police. In all these cases, too, I should stress that, although called as a simple witness, and not an expert, still he is giving technical evidence and evidence that might carry great weight in the decision of the case. I need not say that the fact that he is called as witness by one party rather than another, or by the Prosecution rather than the Defence, should not influence him in any way – he should still be a model of unshakeable impartiality. All this does not in any way mean that a medical practitioner would be doing anything improper if he were to act *extra curiam* in a consultative capacity to a lawyer who is briefed in a criminal case in which medical questions arise. As you all know, numerous cases come before the Courts in which important questions of a medical nature are involved. There are often cases of bodily injury in which an important issue may well be whether the injury is to be considered slight or grievous. The provisions of law may not be sufficient to determine the issue without establishing certain data from the medical aspect. The doctor may quite properly advise the lawyer outside Court proceedings on technical points so as to assist him in dealing with the case.

Provided the correct advice, and not partisan advice be given, honestly and conscientiously, not only is there nothing wrong, but the fact that the lawyer will be better equipped to deal with the case as Counsel for the Defence will, indirectly, also contribute to the proper administration of justice. Provided, I repeat, fair and not partisan advice be given. The proper attitude for a doctor to take in any such case would be to make it

clear that he is prepared to give the best assistance he can in arriving at the truth – not in supporting the case, right or wrong, but in giving the lawyer concerned such advice as he can, so as to assist him in presenting a fair and honest defence. If the doctor bears this in mind, I do not think he can go far wrong. It is interesting to note that this responsible role of a doctor has been recognised since the most ancient times – thus in the old Roman Law it was stated *medici proprie non sunt testes sed judices* – properly speaking, doctors are not witnesses, but judges. The acid test therefore is 'not to act in a partisan spirit'.

There is one other point I should like to touch upon. Whenever a doctor is to appear in Court, and whenever he reasonably anticipates that he will be examined and cross-examined on some medical issue, he should prepare himself so as to be in a position to help the Court as much as he can, and as reliably as possible. The Italian text-writer Ziino expressed himself admirably on this point when he said:

> *Alla giustizia bisogna presentarsi con un corredo di conoscenze sode, metodicamente acquistate, e profondamente pensate, accolte dai più autorevoli e competenti scrittori, lasciando da parte tutto ciò che è fantastico e vaporosamente dubbio...*

This is particularly true in the case of a medical practitioner who is at the opening stages of his career and it is to those that I am particularly addressing myself. We all know what John Radcliffe, the well-known physician in the reigns of Wm. III and Anne, had to say about the beginnings of his career – 'When I was a young practitioner', – he said, – 'I had twenty remedies for one disease, as I grew older I found twenty diseases for which I had not a single remedy'.

Now as to medical certificates you would, perhaps, expect me to touch on the legal aspect thereof, but I will not do so, because the law is there for all to know. Instead, I will mention two little matters in connexion with these certificates which may appear trifling, but which I assure you have their own especial importance, the first one being linked up with that most necessary attribute of Courts of Justice – dignity and decorum – some people might scoff at that in these ultra-democratic days, but, going by my now over forty years' experience, I should like to express my firm and unshakeable conviction that if decorum and dignity were ever to depart from the Halls of Justice the administration of justice itself would suffer very substantially, – the other matter is linked up with the desirability of avoiding unnecessary adjournments of cases.

Point number one is this – Lately I have had occasions – fortunately in the minority – of coming across medical certificates which the doctor

issuing them knew very well were meant to be presented to a Court of Justice, in which the certificate was written on a scrap of paper torn anyhow from some where, or other, which one would not dream of using in writing to anyone, let alone putting it before a Court of Justice. The professional dignity of the medical man himself, as well as the respect due to the Court requires, I am sure you will all agree, otherwise.

The second point is a matter of forgetfulness or unawareness of past practice. I always remember doctors in the past, when certifying that such a person was unable to attend in Court owing to illness, invariably added a statement saying that as far as was foreseeable, of course, he would be well enough to appear in Court approximately on such and such a date. You will appreciate that this is of assistance to the Court in fixing the date of adjournment. Otherwise, it may well happen that the case is adjourned uselessly to some other date on which the patient, whether a party in the case or a witness, would still be unwell. Lately I have been seeing certificates in which this was omitted, but I am sure you will bear it in mind in future.

Another close link between Law and Medicine is professional secrecy, with which I propose to deal. I am not sure whether at present there is any specific law in England on this matter. William Brend in his text-book on Medical Jurisprudence (1928) says this:

> Although there is no law on the subject, it is an honourable rule of the ethical code which govems the relations between practitioners and their patients that all knowledge gained at the bedside, the imparting of which to others might be detrimental to the patient's reputation or material interests, should be treated with inviolate secrecy.

You are all aware, of course, of the Hippocratic Oath, which is still as fine an ideal of professional conduct as can be found. May I remind you that, *inter alia*, it refers to professional secrecy in these terms:

> Whatever in connection with my professional practice or not in connection with it, I see or hear in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret.

Under Maltese Law, one might be misled by sec. 587 of the Laws of Civil Procedure which refers only to the privileged communications of Advocates, Legal Procurators and Clergymen and omits the mention of doctors. However, the apparent *lacuna* may be explained in this way. The Laws of Civil Procedure were promulgated in 1855, that is, at a time when the Criminal Code had already been brought into operation a year

before. Now sec. 638 of the Criminal Code which deals with witnesses, starts by referring to the professional secret of Advocates and Legal Procurators only but then goes on to apply the same rule to, as it states, 'all those who are by law bound to secrecy', and in section 270 the law prohibits, under certain penalties, the disclosing of a professional secret by a doctor. All this is tantamount to saying that the exemption from giving evidence on matters confided to a professional man by reason of his profession also applies to a doctor – except, of course, whenever he is compelled by law to give information to the public authority. In fact, there are certain occasions on which a medical man is by law required to depart from the rule, such as in cases of grievous bodily harm or of poisoning or violent death, or in the notification of any facts or circumstances touching the public health, ex. gr. infectious diseases or in the certification of the cause of death or in the reporting of births in certain cases. There may be cases although I would not like to express any opinion thereon in which it is the doctor's moral duty to break the rule of professional secrecy where he would be justified in doing so, for his own protection, or for the protection of other persons. In any such case, the communication, which the doctor makes despite the rule of professional secrecy, is what is called a privileged communication, provided, of course, that the communication be made not to anybody and anywhere and anyhow, but to a person who has an interest or a duty to know, and in the appropriate circumstances, and with due precautions, in order to avoid unnecessary publicity.

I shall now pass on to deal with another medico-legal topic – dying declarations.

It is common knowledge that, as a rule, no declaration is admissible as evidence unless it be made *viva voce* in the witness box and under oath. There are, however, exceptions to this rule, and the one that concerns both lawyers and doctors alike is that referred to in our Criminal Code wherein it is so laid down:

> 'Any declaration shall be admissible as evidence whenever the same is made by any person who is about to die and who is conscious of the nearness of death...'

These are what in law are termed dying declarations. They are not depositions – they are not made on oath.

I am including them in my talk because one of the persons most likely to be there at such a moment, apart from relatives and a clergyman, is a doctor attending the dying man, especially in cases of violent death.

The words to which I would draw your attention as being the condition

sine qua non of the admissibility of these declarations are the words 'who is conscious of the nearness of death'. These words are so important as to mean and bring about the inadmissibility of any such declaration if there was any hope of recovery, even slight, in the mind of the declarant. I would ask you to note that, whatever the doctor attending the dying man thought about his chances of recovery, whether he entertained such hopes or not, even if the doctor considered those chances good, it is the mind of the declarant, of the dying man that must be considered. There must be – in the words used in an English judgment – a 'settled hopeless expectation of death in the declarant's mind'.

It is the Judge who has to decide, before admitting any such declaration as evidence, whether the patient believed that he was about to die. And it is here where the medical man, who is present when the declaration is made, can give great assistance to the Court in deciding that point. The practitioner should be very careful to note, and remember, as far as possible, the exact words of the person making the declaration. He should particularly note any word or words which tend to express either a hope of recovery, or an expectation of death, as the case may be. He should also fix in his mind, for the purposes of the evidence which he will be called upon to give, all the surrounding circumstances of the case. Our Courts, in fact, have ruled that, in order to ascertain the state of the declarant's mind, it was not necessary that the consciousness of impending death be made to appear from the declaration itself, but all the circumstances of the case may be resorted to for the purpose. You will readily appreciate how essential it can be, for the proper administration of justice in criminal cases, where the declaration of the dying man may have a decisive importance in identifying the murderer, that a proper decision be taken with regard to the admissibility of these declarations, and how essential, therefore, it is that any medical practitioner, who happens to be present, should be very careful to note and remember with all the precision possible every word and every circumstance.

As an example of a consciousness of impending death arising from the declaration itself I will quote to you the case of Rex vs Micallef 18th March 1941 in which the accused had grievously wounded his father who died in consequence. In his dying declaration the father had said *huwa qatilni* – 'he has killed me' – The Court held that the use of the word *qatilni* implied such a consciousness of impending death that the declarant was actually thinking of himself as already killed by his son. Another instance is to be found in the case Rex vs Meilak 13th June 1939 in which a Magistrate had been called in and the two dying men – who had been shot at – stated that they were aware of being *fi stat gravi*. The

Court held that the declarations were admissible because in Maltese the words *fi stat gravi* – 'in a grave condition' implied a sense of impending dissolution, an unqualified belief in the nearness of death. An example of surrounding circumstances may be found in the case Regina vs Demarque which came before our Courts now more than a hundred years ago on the 7th June 1856 in which the then Chief Justice Sir Antonio Micallef considered the circumstance that Extreme Unction had been administered as a sufficient indication of the consciousness of impending death. This decision seems reasonable because the patient who receives Extreme Unction cannot but think and realise that his life is irrevocably at an end, even though, in point of fact, a recovery is made. But, in his mind, the administration of that last Sacrament cannot but induce the belief in the nearness of death.

I have said that the medical practitioner who happens to be present should be very careful to remember every word. A single word in fact might make all the difference. Let me quote to you, *à propos*, a case which came not before our, but before the English Courts. The declarant had said that 'at present I have no hope of my recovery' – The declaration made in such circumstances was held to be inadmissible because the words 'at present' were not consistent with an unqualified settled belief in the nearness of death, – indeed those words appeared to imply that, in his mind, the patient entertained the hope that at some other time he might believe in his recovery. Two little words made all the difference, and of course the inadmissibility of the declaration might have had conceivably a bearing on the whole issue of the trial.

It would be legitimate on your part to ask me why it is that the Law and the Courts are so rigorous in insisting on the fulfilment of this condition. The explanation is simple. We have here a declaration without oath and it is the belief in the nearness of death that alone can substitute the binding force of an oath. Allow me to quote to you the impressive words of an English Chief Justice in this matter:

> The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice.

The upshot of all this is, therefore, that any medical man, who may be

attending a person who has been in any way injured by someone else and is at the point of death, should be all eyes and ears to observe the attendant conditions and to be able to reproduce, if called upon, in a Court of Law the exact words which the dying man may have uttered in relation to the crime.

I will not trespass any longer on your valuable time. If I have spoken at length, it is partly your fault for asking a legal man to speak. Habit is hard to break. In England it is said that a man, who had been a very good and applauded actor, gave up acting and became a surgeon. His first operation was the removal of an appendix. He did it so skilfully that the doctors, who were watching him in critical expectation, instead started to applaud him. On hearing the applause his old stage memories came back, – he bowed deeply and cut the man's gall-bladder by way of an encore.

As I said your work may be waiting to be done, and you may be free to go, although I was reading that Sir Samuel Garth, the seventeenth century physician who first started free dispensaries, was once with friends, amongst them Sir Richard Steele. He had said that he had to leave early to see some patients, and yet he stayed on. When Sir Richard Steele reminded him, he replied that nine of the patients had such bad constitutions that all the doctors in the world would not cure them, and the other six had such good constitutions that not all the doctors in the world would kill them.

I thank you very much for having listened to me with so much patience and attention.