THE DOCTOR IN THE WITNESS-BOX

By C. Gavan Duffy, Barrister-at-Law

A Meeting of the Society was held at the B.M.A. Hall, East Melbourne, on 21st May, 1932. Owing to the absence through illness of the President, Mr. Justice McArthur, Dr. Mark Gardiner occupied the chair. Dr. Gardiner introduced Mr. Charles Gavan Duffy as the Speaker of the evening. Mr. Duffy addressed the Society upon "The Doctor in the Witness-box."

Mr. Duffy said: Mr. Chairman and Gentlemen, to-night we are met to observe the doctor in the witness-box. There he is, just climbing up the steps. He has passed through the crowded Court, and is now taking his place in the witness-box with that air of conscious superiority, not too much, but so much as is proper for a professor of the more exact sciences. We will be rude enough to leave the doctor in the box for a moment while we consider matters that are relevant to his appearance as a witness. First of all, we ask ourselves the question: Why is he climbing into that box? Perhaps he is just an ordinary witness. He has seen a motor-car accident or had some of his precious silver stolen and the thief is being tried. Perhaps he is a defendant or a plaintiff in an action which has nothing to do with his profession. If so, we simply wish him a happy exit from his troubles, and pass on. Perhaps, however, he is in that box in another capacity. Perhaps he is a defendant in an action brought by some disappointed patient.

Now there is no doubt that the medical man, like other professional men, occasionally has to defend actions which are nothing better than blackmail. Very often in these cases the medical man feels a certain amount of bitterness against the members of our profession who are concerned for the plaintiff in the action. The first thing I want to say to you to-night is, that to have any feelings of that kind shows a want of understanding of what the legal profession's duty is. When a person comes along to consult a

lawyer about his rights, he asks, perhaps, whether he has a good cause of action against the doctor. So far, of course, the lawyer's course is plain. He has a duty, and a very clear duty, simply to the best of his ability to tell the client whether he is likely to succeed in his action or not, and we hope he fulfils that duty with honesty and skill; but when he has given that advice, perhaps against his advice the client determines to fight his case. Lots of people think that a lawyer ought to turn himself into a court when a client comes to him, and to decide for himself whether his client has a just cause before he appears for him. That is a position that no lawyer has any right to take up. The lawyer's duty is perfectly plain when he appears in Court, or conducts an action for his client. He is simply taking the place of the client, and presenting the case as the client would do if he were able to do it. Of course, there are bounds to what even a lawyer may do. You may be surprised to hear it, but the profession does understand that there are bounds, and they are, I think, these: First of all, when a lawyer goes into Court, it is his bounden duty not to misstate facts; that is to say, if facts have been proved in evidence, he must not try to deceive the tribunal by misstating what has been given in evidence. Secondly, he must be very careful how he attacks anybody's character—whether that person is a litigant or a witness. He should only make attacks on character when they are absolutely justified by the facts in his brief, and, in my opinion, he should not too easily accept these facts as true.

In other words, a lawyer must fight as hard as he can for his client, but he must fight like a gentleman, and if he does that, that is all you can ask from him. Remember this, that if you insisted on a lawyer turning himself into a court and deciding whether his client was right or not before he brought his action, you would, as a matter of fact, do away with any real value to the public that the profession might have. As long as you have trials in public, that is to say, as long as you are having contested cases

where the clients come in and put their views to the Court, each trying to make out the best view he can for his own case, and giving such evidence as he thinks will assist his own case, so long an advantage, and a great advantage too, will be with the litigant who has the skill and experience to put the facts and the arguments before the Court well.

There is no doubt at all that if the litigants were left to their own resources some would be very unfairly handicapped. You might find some litigants very well prepared to make out a good case before the Court, thoroughly understanding either from their experience of business or their natural skill what evidence to call or what arguments to put. On the other hand, you would find others who had probably better cases quite incapable of doing that. The lawyer simply supplies the means whereby every man can put the best case he has before the Court. Anyone can come to the Bar and retain a capable advocate, so no man need lose his case because it is impossible for him to put it clearly before the Court.

But perhaps, Gentlemen, our medical witness, whom we just left in the box, has not gone there as a defendant at all; perhaps he has gone there to give the Court the benefit of his experience and knowledge in his profession in regard to technical questions which may arise. If so, he has joined that band of expert witnesses that has been so much the butt of legal jokes. You have heard, of course, of the division of witnesses into liars, damned liars, and expert witnesses. (Laughter.)

There was at one time in our Courts a judge who was famous both for his knowledge of law and his strong natural intellect, and also for the delight that he always experienced in saying what he thought of other people. I want to read to you something he said about expert witnesses in general, but, of course, I am not to be taken as at all adopting Sir George Jessell's views on this matter. Far from it. Nothing astonishes and delights me more than to contemplate the grandeur of the medical profession. I am always inclined to attribute some of it to the constant adulation

the doctor gets from those surrounding him. You know it is a delightful thing, if you do not happen to be the subject, to attend an operation, to see the way the nurses and all the other attendants are floating in an adoring manner around the surgeon. I am not a great surgeon, but oh! how I would like to be one! You will understand, of course, that these remarks, therefore, which I am about to quote are to be taken as the remarks of the learned Judge, and not as mine.

He said, in the course of his judgment—by the way, he was talking of some experts who were not medical experts:

"As to this, I may say what I think I have often said before, that in matters of opinion I very much distrust expert evidence, for several reasons. In the first place, although the evidence is given upon oath, in point of fact the person knows he cannot be indicted for perjury, because it is only evidence as to a matter of opinion. So that you have not the authority of legal sanction. A dishonest man, knowing he could not be punished, might be inclined to indulge in extravagant assertions on an occasion that required it. But that is not all. Expert evidence of this kind is evidence of persons who sometimes live by their business, but in all cases are remunerated for their evidence. An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by the person who calls him.

"Now it is natural that his mind, however honest he may be, should be biassed in favour of the person employing him, and accordingly we do find such bias. I have known the same thing apply to other professional men, and have warned young counsel against that bias, in advising on an ordinary case. Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them.

"Accordingly, we find, in doubtful cases, the most

remarkable results. Take this case: There are two questions; one, whether sufficient ventilation exists for three mines; the other, whether the Cannel Mine ought or ought not to be worked in advance of the Black Mine. Well, we have the witnesses giving evidence for the Plaintiffs' view of the matter, or the Defendants' view, according as they are sought out and paid by each. It is very natural, and just what one would expect, but it leads one to distrust their evidence. There is also this to be said against them, namely that their evidence is not the evidence of fair, professional opinion. The men are selected according as their opinion is known to incline.

"Suppose a person wants to sell a house, and as he wants a very high value put upon it, he sends to ten valuers, and out of these he selects the three who have put the highest value on the house. The purchaser wants a very low value, and selects out of a number of valuers three of the lowest. Each set of valuers values high or low, according to the requirements of the person who employs them. I have known the same sort of thing done even as regards medical evidence. The consequence is, you do not get fair professional opinion, but an exceptional opinion by evidence selected in this way.

"That being so, when I have expert evidence I am, as I said before, very distrustful *a priori*; and I am anxious to ascertain the character of the experts, and to see the position they occupy."

That, I think, may be taken as a fair example of what may be said, and is said, occasionally, against the expert witness.

Now, let us see what the expert witness says for himself if he is allowed to broadcast his private griefs. Probably he would say: "Here am I called to help with my opinion on a subject of technical difficulty. I have to give my evidence, and have it tested by a jury who knows nothing, and a judge who knows very little more. I am not allowed to tell my tale in my own way, it is dragged out of me piecemeal by a man who has a few rags and tags of technical

information stuffed into him, none of which he understands. When I have given my evidence-in-chief, then I am cross-examined. Every effort is made to discredit my professional attainments, to so confuse what I have said that it will lose its value with the tribunal. When my cross-examination is over and counsel addresses the jury, he seeks to draw, and sometimes successfully draws, from my evidence inferences that no man with the slightest technical training would entertain for a moment." There you have what I suppose is the view of every expert who is dissatisfied with proceedings in Court. That is what he would be inclined to say.

Before considering how far the expert himself is to blame for unsatisfactory results following upon his evidence, and how far the blame lies elsewhere, we might perhaps just consider what an expert is. The ordinary rule in the Law Courts is, that a man can only give evidence about what he has first-hand knowledge of, that is to say, he can only give evidence about facts that he himself has direct knowledge of. But in those cases in which some matter is in issue which is not understandable except after a certain amount of training or experience in the subject, then those who are skilled in the matter are allowed to be called to give opinion evidence; that is to say, to give their opinion as to what is the deduction to be drawn in regard to the technical matter in issue from the admitted facts, or from a set of hypothetical facts which it is hoped to establish by evidence.

Understand, Gentlemen, that it is not every subject that requires so skilled a knowledge that an expert may give evidence on it. The Courts have held that the knowledge of right and wrong is a matter that the jury is just as capable of understanding as any expert, though I do not know that this view would be approved of by those at the University who are concerned with the study of ethics. Then who can give evidence as an expert? Well, the test of whether a man is competent to give evidence is whether he has had the experience and training that would qualify him to give evidence. Here I have a very sad fact to communicate to

you. The Courts, altogether forgetting the early training of the judges themselves, and that they belong to what is sometimes alleged to be a skilled profession, have held that it is not necessary that the expert should have got his qualification through the ordinary professional channel, and a man may be an expert if he can satisfy the Court that he has the information and knowledge, no matter how he got it.

Therefore, hospital students, dressers, and unqualified practitioners have at various times been allowed to give evidence as experts. Still, I need hardly tell you that it is one thing to be qualified in the strict sense to give evidence as an expert, and it is another for one's opinion to have the slightest value, and even in the courts, even with the most obtuse jury, the standard and experience of a man in his profession will determine the amount of weight to be given to his opinion when he does express it.

That being the sort of person an expert is, we may turn to consider the question of whether an expert himself is ever to blame if his evidence does not produce a satisfactory result. You must understand, of course, and every man after the least consideration would immediately recognize the fact, that skill in one's profession is not sufficient to qualify one as an expert. Remember what an expert has to do when he is called on to give evidence—he must not only know what he is talking upon, but, in addition, be capable of putting it over the footlights, so to speak. He has not only to know it, but he has to make the tribunal, whatever it is, understand it.

Of course you hear people say that it is always possible to make things simple. I think that is an overstatement of something that really is a truth—there are certain ideas, of course, that cannot be made simple. It is absolutely impossible in some matters, mathematical and otherwise, to transfer any ideas to a man who has not sufficient training to understand them, but I do think that in most cases where medical evidence is used in the courts it is possible to so simplify it as to make ordinary intelligent laymen under-

stand what is meant by it. I am fortified in that belief by my experience that the abler the man, the bigger the man in his profession, the more completely he is able to simplify his ideas.

If a young member of some learned profession chooses to take the witness-stand and to give evidence without having first thoroughly considered how far he is justified in giving an opinion which he is going to pronounce *ex cathedra,* then, if he finds himself in an uncomfortable position, my only comment is that he has no one to blame but himself.

There is a difference undoubtedly between opinion evidence and evidence of fact. Of course evidence of fact, as it is called, can sometimes be untrustworthy, but for very much simpler reasons than evidence of opinion. Suppose I got into the witness-box and I said that last night as I was passing the street corner I saw Bill Jones come out of a tobacconist's shop with his hands full of cigars. Perhaps my statement might not be worthy of credence. It might not be worthy of credence because I am a bad observer. I may not have looked carefully enough, and it may be really Tom Smith and not Bill Jones that came out of the shop, or he may have had bars of chocolate and not cigars in his hand. There is the possibility, too, that I am simply lying, but putting aside those rather obvious difficulties, the question of whether evidence of fact is or is not to be believed is a fairly simple one. The question of whether evidence of opinion is to be believed is far from simple. I need hardly remind you that there is scarcely a scientific opinion existing at any time that has not suffered change. It is the nature of scientific enquiry to be continually pushing onwards and opening new fields and changing views which were generally regarded at one time as static.

It is a very simple matter with which anyone could get the whole medical profession, or indeed any scientific profession, to agree. That being so, whether evidence of opinion should be accepted depends on what good reasons there are for it. A man who goes into the box should be

prepared to show reasons for his opinion, and what is more, should not show any chagrin at being pressed very closely for his reasons. He should not expect his statement to be accepted without question. Again, I may say that the bigger the man, as a rule, the less irritation he feels on being pressed for fuller explanation of his opinion—of course there may be cases in which an opinion is so generally held in the profession that it ought to be regarded for all practical purposes as fact. But opinions of that kind are seldom contested, and if they are, the fault lies not with the legal practitioner, but with the medical.

If a man of sufficient standing to look like a competent expert comes into the Court and is ready to swear that an opinion is erroneous, you can hardly blame the layman for considering that the matter requires very close attention.

Having considered then the matters that most immediately present themselves as difficulties in the case of expert testimony, perhaps I might read to you a few words that were written by the surgeon, John Hunter, himself a very famous expert. He says this: "To make a show, and appear learned and ingenious in natural knowledge, may flatter vanity; to know facts, to separate them from suppositions, to arrange and connect them, to make them plain to ordinary capacity, and, above all, to point out their useful application, should be the chief object of ambition."

He who wishes to give expert evidence could have no better advice.

As a matter of fact, it is surprising when a medical witness meets with anything but the greatest respect for his evidence in Court. The truth is that we laymen are almost subservient to experts. You have only to mention the word "science" for the common man to fall almost to his knees in awe.

If the expert witness will only take the trouble to fortify himself as far as he can, and, as I said, that means something more than having an ordinary knowledge of his profession, he will be safe. One thing that John Hunter points out has impressed itself deeply upon me, and that is, that a

witness must be ready to separate facts from supposition. Of course, in theory the scientist is looking for the truth, and nothing more. When I say in theory, with great sincerity I say it, for no one has more respect for the man engaged in scientific research than I. He is doing the most valuable and interesting work a man can do, but I do think this comment can fairly be made—that while the scientist ought not to care for anything but the truth, when his opinions are checked or slighted, he often acts like an indignant parent. They are his children. Such a pose is out of place in the witness-box. When a man goes there he must remember when he is giving an opinion that it is an opinion, and he ought to be very careful about giving it on insufficient data.

It is only too common, especially among young men giving scientific technical evidence, to find that they will express an opinion in the most emphatic terms, and then when asked what their experience is, how many cases they have seen, the material they will be able to produce will seem a very poor support for the opinion they have expressed so definitely.

Let us leave the expert for a moment, and ask how much blame for failure may be due to other people who are connected with the proceedings in Court. First of all, there is the judge. I cannot say anything about a judge—it would not do. I will only say this—that sometimes witnesses complain that judges are impatient, unreasonable, and that they make derogatory remarks which are not justified. That, I think, does not happen very often, although I know it sometimes does. All one can say about it is this, that if it does happen it is a great pity, because a judge, above all other people, owes a very clear duty to the community and to everyone appearing before him to be patient, reasonable, and courteous, and, if he is not, it reflects no credit upon his position.

As to counsel, I can speak about him perfectly frankly, but of course with the natural reservation that you cannot expect me to take too severe a view. (Laughter.) I believe

that at one time in England, and also in Australia, the licence enjoyed by counsel was very much abused, and that some members of the Bar were particularly careless of the feelings and reputations of those they were cross-examining. Conduct of that kind deservedly brings reproach upon the profession. I do not know what you gentlemen think, but my experience is that there is very little of it now, which is partly due to the influence of the judges, and partly because of the different tone prevailing in the profession to-day. Very seldom will you find anything like the abuse of this licence that there used to be.

Of course, it is no good expecting counsel to be mealy-mouthed in the way they fight their cases. The barrister is employed to fight his client's case. He owes a duty to his client. His whole reputation and income depend on the courage and enthusiasm with which he contests his cases, and you cannot expect him to fight them mildly. All you can expect is that he will fight them like a gentleman, and if counsel refrains from either misstating facts, or casting any imputation by questions or otherwise that are not apparently fully justified from his instructions, if he treats the witnesses he examines with courtesy, no matter how hard he may press them, you have everything you have a right to—at any rate, everything you will ever get from him.

The next thing we might consider is supposing the present system is not all that it ought to be, what practical alterations are possible? You will understand I say practical. It is no good in this world, whether you are dealing with politics, law, business, or any other human activity, trying to live in a Utopia. We should all strive towards the highest, but we must remember we can only get what human nature is capable of. Among the changes I have heard suggested by medical men are, first of all, that it might be a good thing to have matters that were technical in their nature, tried and decided by experts. That is one suggestion.

The next is, that the judge or jury, as the case might be,

should not try the question alone, but that the judge should sit with assessors as they are called, experts who would advise them.

Another method suggested is, that the experts engaged on either side might have an informal conference with the judge where everybody can sit in their shirtsleeves and have a talk together in private, and get things more or less cleaned up, and some order produced out of chaos. The machinery for some such methods already exists. The law has provided means of doing these things if it is desired that they should be done. In all civil cases the Court may, if it so pleases, or a judge sitting in chambers may, send a matter to be tried by an expert or by some suitable person sitting with experts. It may order experts to sit with it. All these things are provided for in our machinery, but they are seldom used, and of course there is another provision: in all civil matters, people who prefer it to going to Court may name an arbitrator. They may pick a medical man if the matter in dispute is a medical matter; they may name an arbitrator, or two or three arbitrators, and an umpire, and so on, and when they have tried the matter and come to a conclusion, their conclusion can have the effect of a judgment.

So it is not for the want of machinery that these things are not done. Why they are not done more often probably the members of the Bar who practise more in the jurisdiction, where evidence of this kind is constantly taken, than I have had the opportunity of doing, would perhaps be able to tell you.

The late Lord Macnaughton, a famous judge, in 1904 when delivering his opinion in the House of Lords, expressed wonder that these provisions were not more generally availed of. But there are one or two considerations that I think ought to be kept in mind before suddenly deciding that this machinery is capable of being constantly put in requisition.

I might have said, too, that even in criminal cases, where the case goes to the Criminal Court of Appeal, that is to

say, after a man has been found guilty by a jury and appeals to the Criminal Court of Appeal, that Court has the power to send a question to an expert, and act upon the report it receives if it so pleases on any matter involving technical knowledge.

In considering the possible use that might be made of the existing machinery, the first thing that must be kept in mind is this: that publicity is the thing that keeps justice sweet and clean. There is no doubt about that at all, and the more one has experience the more certain one feels about it. Any system of trial that would do away with publicity would be a mistake. Certainly I should never be inclined to support it.

I suppose the Star Chamber was, in its way, as good a court as could have possibly been constituted, but it never was popular. It never was believed to administer justice impartially, and a large part of its unpopularity was due to the fact that its proceedings were secret.

If we are to have anything done in public, of course, that immediately cuts out any of these easy-going, armchair conferences, as you would naturally have to repeat it all in public, because the tribunal would have to decide only on the evidence publicly given.

In regard to turning things over to an expert to treat, there are very few matters which are entirely matters of expert knowledge, they are generally matters of expert knowledge and facts combined, and your expert will have to be an expert in two things. It is no use having a man with technical knowledge as arbitrator unless he has experience and skill in weighing and dealing with evidence—and that does not come by nature, I can assure you. Secondly, if you are going to have special tribunals of this kind to try technical matters, they need to be of very high standing. It would be an absurdity to hand over matters of disputed opinion to tribunals which the profession itself would not recognize as adequate. They would have to be men of very high standing in their profession whose decisions would always be respected.

Would it be possible to secure such men? You must remember that in the course of a year there are scattered cases in which medical matters arise, but they are not very numerous, and only occur at intervals. Public business cannot be hung up for the convenience of any experts, so if they were to be taken from the practising part of the profession we would have to have a collection of experts of such a size that you could always get whatever number was required to sit and try the cases. Men of that standing would want, and deserve, a high remuneration for their services, and I think it would be beyond the capacity of the country to employ a man at considerably more than a judge's salary for the whole year, in order that at infrequent intervals he might be called in to sit and try cases. I need hardly point out that if it were done in medical cases the accountants, the valuers, the surveyors, the architects would all require to try their own cases.

In regard to assessors, that is to say, men who do not do any part of the judging but sit with the judge to try the case, of course a somewhat similar position would arise. A man of the highest standing I have mentioned may not be absolutely necessary, but to be of any real use would have to have real capacity and experience.

In the Admiralty Court that is the system followed. The Judge sits with the assessors, who are retired naval captains. No expert evidence is allowed to be called. The facts are simply given, and the assessors, when any question involving expert knowledge arises, advise the Judge. If they agree on a point, I understand, he takes their advice on it. I think that is a good thing, and in cases where technical knowledge is required, it ought to be very useful, and the Judges might well be expected to exercise their power to call assessors more often than they do, but I suppose the reason why this is not more generally done than it is, is the difficulty of getting the men. You cannot expect a man in private practice to spend two or three days sitting in the Court helping a Judge. That is a difficulty the medical

profession might be able to get over, but it is a difficulty that certainly exists at present.

Of course there is one thing about having assessors rather than allowing expert evidence, and that is that it will get over any suggestion of bias. Undoubtedly, if men are employed and paid to help a litigant, it is in the nature of things that they should become more or less partisan. My belief is contrary to what I have read from Sir George Jessell's judgment, and what I have heard on numerous occasions. I am of opinion that the great majority of experts who are worthy of any credence at all are quite capable of keeping their position of witnesses and of advisers separate. An honest expert will give you the most useful advice he can in conference, but if he goes into the box he will not say a word that he does not honestly believe.

Of course, as in every profession, you have black sheep—men who do not keep the honour of the profession in view in their dealings. We would all like to get rid of the men from our various professions if we could, but I am afraid there will always remain some of them, and as long as medical men are called as witnesses you will always have trouble from them, but I hope and believe that in both our professions such men are in a small minority.

I think the tribunal as a rule recognizes solid worth when it sees it in the witness-box, has a proper respect for the position of such witnesses in their profession, and on the whole I think they are inclined, both judges and juries, to pin their faith to the right man.

Of course, having assessors would get over one difficulty, that undoubtedly there is a temptation when there is a jury to talk nonsense to them. Counsel have to do the best they can for their clients, and they are very much inclined to try to so confuse medical testimony that it will cease to do them any harm. There is a famous story of what is supposed to have happened in a Western American court. A man was being tried for some criminal offence. There was no real defence, but his counsel did not despair, and sat there waiting for a chance. A medical man was called; it was necessary to call him, not that his evidence was very valu-

able, but he happened to have been on the scene. In the course of his evidence he said the defendant was hysterical. Opposing counsel got up, and the following cross-examination ensued:—

"Now, doctor, you have told us the defendant was hysterical when you saw him. Is that so?"—"Yes, that is so."

"What is the derivation of the word 'hysterical'? Is it not a fact that it comes from the Greek word for 'womb'?" —"Yes."

"Will you swear that this man has a womb? Answer my question."—"Well, of course he has not a womb."

"That will do, doctor."

Then he turned to the jury and said: "Now, gentlemen, liberty is the birthright of every American. Our grand old flag flies over free men. And it lies in our hands to keep them free. This is a vile conspiracy. You heard that man calling himself a member of an honourable profession come here and swear that my client was suffering from a trouble that could only occur to a person with a womb. You heard me ask whether my client had a womb, and you saw him crumple up in the box. Gentlemen, you do your duty, you know it, and you will do it." And the jury did.

Perhaps the whole trouble in this matter of expert evidence is that it is no good asking me or any member of our profession to indicate a remedy. You know we are terribly conservative. We spend all our lives in a rut, trying to do things according to precedent, looking for spots on the sun, for the canker in the rose, and the worst of it is we always find it, which does make us pessimistic. Now there is nothing conservative about your profession. That great medical writer, Professor Leacock, of Canada, has told us an astonishing story of the forward looking aspect of your profession; the splendid way that it advances. He says that it is only a hundred years ago since the doctors believed that they could cure a man of fever by blood-letting. Now they know they can't. It is only seventy years ago since they believed they could cure a fever by sedative drugs. Now there is not a doctor that does not know that

is not so. It is only thirty years ago that they believed that they could cure a fever by ice bandages; to-day they know that is not so.

It is exactly the same with regard to rheumatism. Only a few generations ago the doctor used to tell the patient to go around with potatoes in his pockets. No doctor tells him to do that now—he allows him to go round with anything he likes in his pockets except his fee—with watermelons, if he so desires.

Therefore, you gentlemen who belong to a profession without the taint of conservatism, which is the bane of ours, will no doubt be able to suggest to us a method of getting over all the difficulties that have been raised in regard to expert evidence.

There is only one more matter I want to touch on very lightly, and that is the question of professional privilege. A doctor, like a priest and a lawyer, is constantly the recipient of confidential communications from his patients. It is a foremost part of the ethics of the profession that these communications, and with them the knowledge received by a doctor, in his capacity of doctor, should be sacred. When the doctor gets into the witness-box, he may be asked a question which will necessitate the exposure of these secrets perhaps to the world. At one time his patient had no protection. Now in Victoria he is protected to a certain extent. In criminal cases he must answer questions that are put to him; in civil cases he may refuse to divulge information that came into his possession for the purpose of advising or treating his patient.

The priest, who for long had no privilege at all, has by his efforts and by his defiance of the court, now achieved a very much larger privilege than the doctor. The lawyer's, also, is greater. It is a question of policy as to whether the doctor's privilege should be extended, as to whether it is wide enough.

Of course, in considering the question, I need hardly say that no man has a right to look at it from the point of view of his pride in his profession; no one has the right to say "I am a doctor" or "I am a lawyer, and it is a matter of

professional etiquette that I should not be called on to disclose secrets."

The whole question depends on what is best for the community. It is obviously to the advantage of the community that in all trials the truth shall come out, but there are countervailing advantages, too; and it is certainly a very great advantage to the community that a man who requires medical attention or advice should be able safely to go and get it.

As I say, whether the doctor's privilege should be extended or not, is a question of weighing all these public advantages and disadvantages. For myself, I have always thought that the doctor's privilege should be extended so as to cover a much wider field than it does at present. That, however, is a matter of opinion in regard to which there is a good deal to be said on both sides. However, I can tell you members of the medical profession that it is quite easy; there is no difficulty about it. If you think your privilege is not wide enough you have only to supply a few martyrs. If forty or fifty of the best known inhabitants of Collins Street were in gaol at the same time for contempt of court in refusing to answer questions, the thing would be done. (Applause.)

Discussion

Dr. Sewell said that an unfortunate feature of expert witnesses was that they frequently became advocates for the side on which they were called, and the value of their expert testimony was discounted because of their partisanship. That attitude was not infrequently provoked by cross-examining counsel. He thought that the difficulties attendant upon the calling of expert medical witnesses could be got over by the appointment of unpaid medical assessors, who would sit with the judge and advise him on technical matters. He expressed the opinion that another source of difficulty in cases involving expert medical testimony was the reluctance of Courts to embark upon the investigation necessary to familiarize them with the medical problems which had arisen.

Dr. Felix Meyer said that an expert witness went through three phases. Firstly, the uncomfortable anticipation of an

unpleasant experience when giving evidence; secondly, the still more uncomfortable experience of being cross-examined; and, thirdly, the dissatisfaction which arose from a feeling that by reason of procedural limitations he had been prevented from getting properly before the court just what his opinion was. It was inevitable, in a contest such as a law suit was, that a witness, expert or otherwise, should be affected with some bias. It seemed to him that the greater the number of expert witnesses, the less chance there was of the truth emerging. He was not impressed with the suggestion for the appointment of assessors, because he did not believe that any assessor could possess the all-round knowledge which would be required to enable him to consider properly the myriad problems that arose. He mentioned that much difficulty arose from medical men giving evidence, which was received as expert evidence, upon subjects which they were really not qualified to express an opinion. He directed attention to the fact that the position of a medical witness was complicated sometimes by the client's privilege. Sometimes a doctor could, by divulging a fact which had come to him in the course of treatment or attendance, establish beyond doubt the opinion he was expressing. He understood there were legal difficulties in the way of the witness introducing facts that he had so ascertained.

Mr. Dean said that the reason why barristers often came into court without having mastered the medical details of a case was that usually it was impossible to get the medical witness into conference before the case. Doctors seemed to have a distinct aversion to attending conferences, and regarded them as an unnecessary waste of time.

He felt that much difficulty arose from the unnecessary and avoidable use by doctors, in the course of their evidence, of technical terms. The use of terms known only to the witness and not to the judge and jury tended to cause confusion and misunderstanding.

He suggested that the true function of the medical witness was to see that the facts favourable to the client who called him should be before the court. He must answer honestly any questions put in cross-examination, but his duty is to emphasize those facts which are favourable to the party calling him.

Dr. Murray Morton said that the responsibility for conflicting medical witnesses lay upon the lawyers, who were concerned not with a scientific examination of the question

involved, but with the placing before the court of evidence which supported the side they happened to be representing. He felt an expert medical witness should not be exposed to the attacks sometimes made upon him by cross-examining counsel. Those attacks sometimes involved the raking-up of matters which did not relate to his skill and ability, but to his private affairs, and seemed to him to be unfair, even if technically admissible as going to the witnesses' credit.

Dr. Mollison said that the main requirements of an expert witness were an unruffled temper and thorough knowledge of the matters to which his evidence related. If he had those requirements, he had little to fear from cross-examination.

Dr. Kennedy said that he felt that the restraints placed upon an expert witness by reason of the rules governing the admissibility of evidence, frequently resulted in the medical expert being unable to place his views properly before the court.

His Honor, Judge Macindoe, said that in Workers' Compensation cases there was power for the judge to avail himself of the services of assessors, but the power was rarely used. He did not think judges had much difficulty in making up their minds on questions of medical evidence. They weighed it just as they did other evidence. The real difficulty arose when the decision on the evidence was for a jury, and not for the judge sitting alone. That difficulty probably arose from the fact that many jurors were not competent to occupy that position. For the present, property qualification for jurors was fixed in the 1850's, and in the light of the development of the community is now quite inadequate. He did not think that a medical assessor would be of much use in jury cases; juries would not take any more notice of him than they did of the judge, and often they took very little notice of the judge. He found, on his experience, that it was rare, in civil cases, to get a medical witness called on one side admitting there was any merit whatever on the other side's case. He said that without intending a censure, for he realized that the manner in which a doctor is called in a case is such as to imbue him with a belief in the side which calls him. One thing he did deplore, however, was that doctors sometimes for a fee gave evidence upon which they must know that they were not competent to express an opinion. The only way of checking

that was by the inculcation of the ethics which should and do govern the medical profession as a body.

Mr. Duffy replied upon the discussion, and in the course of his remarks expressed the belief that offensive cross-examination of the kind mentioned by Dr. Murray Morton was now becoming very rare, and that members of the Bar realized that the honour of their calling demanded that they should exercise the right of cross-examination in a fair and proper spirit.

Dr. Clarence Godfrey moved, and Mr. Arthur Phillips seconded, a vote of thanks to Mr. Duffy. The vote was carried by acclamation.