DOCTORS AND THE LAW

By D. Murray Morton, M.D.

A Meeting of the Medico-Legal Society was held at the Medical Society Hall, East Melbourne, on September 12, 1936. The President, Dr. Ernest Jones, occupied the chair, and Dr. Murray Morton delivered an address, "Doctors and the Law."

Dr. Murray Morton said: In September, 1930, I took to the then Editor of *The Argus* the manuscript of an article entitled "Doctors and the Law." The Editor expressed the opinion that the article was opportune; he accepted it and it was published under my initials on September 27—a Saturday's issue. On the following Saturday I was honoured by the publication of two letters in reply to my article—one signed "Solicitor," whom I have since sat with amicably at one of the annual dinners of this Society, when we identified each other; and another signed "Chancery Lane" and therefore presumably from a barrister, both, of course, controverting some of my statements. To portions of these letters I shall refer later. On the following Saturday I was allowed space for a letter in reply to "Chancery Lane" and "Solicitor," and the newspaper controversy ended.

The subject, of course, was the airing of certain grave disabilities of medical practitioners under the law as it exists and also as it is practised.

I had flattered myself that this article and the ensuing correspondence had had something to do with the genesis of this Society, and in that belief, when the last annual meeting approached, I thought that, after the lapse of five years, a reconsideration of the subject before this Society would be opportune. A conversation with my friend, Dr. Mark Gardner, has enlightened me that *he* is the actual father of this promising offspring of the two professions, but I still have a lingering thought that, by having put the subject on the air, so to speak, I had at least some small share in preparing the marriage bed.

When I volunteered this paper, it was also part of my belief that the Medico-Legal Society had amongst its aims and objects the cultivation of good fellowship between the two professions and of a better understanding of their respective difficulties. I therefore suggested a review as to how far five years' association in this Society has carried us towards this ideal. In this belief, it seems that I was again mistaken. In the Foreword to the first volume of the published *Transactions* of this Society, its object is set out as "the discharge of service to the community more intelligently and efficiently for the public good."

However, the Committee has been good enough to accept my paper, and I hope it will not diverge too far from this noble object.

The main burden of my article of 1930 was that claims at law for damages against members of the medical profession were painfully frequent and outrageously high; that the doctor by the nature of his calling was peculiarly open to such claims by dissatisfied patients, and that at that epoch, generally speaking, the medical profession was receiving a "Raw Deal" at the hands of the sister legal profession. I have come here to-night to reiterate those statements and to state that during the past five years the position is no better and is probably worse. In addition to numerous lesser claims over that period, two claims of five thousand pounds each have been made during the current year.

Why are these enormous damages claimed in actions against medical men? Is there a general belief that every medical man is wealthy, even the struggling general practitioner (and it is usually against such a doctor that the claim is made); or is there a belief that there is an enormous fund at the back of every medical man, from which a disgruntled patient—with the assistance of course of legal practitioners—can draw enough money not only to compensate him for his loss of earnings and for the cost of his illness, but also to endow him with an income for the rest of his life?

Five thousand pounds! The average practitioner is a fortunate man indeed who can accumulate such an amount as a provision for his old age, after a lifetime of hard work.

To any struggling professional man, a serious illness is a misfortune. To the medical practitioner there is an evil infinitely greater than this, the nightmare of an action for damages by a disgruntled patient. In an illness recovery can be hoped for at the expense of a temporary loss of income; an action for damages (even if successfully defended) may mean financial ruin, for we must not forget that "Damages" has a big brother named "Costs."

One class of case is now particularly dreaded by the general practitioner—bodily injuries, which, with the growth of fast traffic, as you know, are on the increase. Can you wonder that, if the doctor is fortunate enough to see such a case entering his front gate, he seizes his hat and escapes by the back? How many of my listeners who are at the Bar would be willing for a prospective fee of five or ten or twenty guineas (*prospective*, I said—which rather interferes with the analogy), to undertake the conduct of a case in court at the risk of being sued for five thousand pounds in the event of non-success?

The medical man often has no option. In a suburb of Melbourne a doctor is established near a dangerous intersection, and is frequently called upon to attend motor accidents—and just as frequently receives no payment whatever for much unpleasant work, mess in his surgery and cost of his materials. One evening an excited crowd carried in two bleeding youths who had collided on their motor-cycles. The doctor being tired, as well as fed up with these unremunerative cases, enquired who was going to pay him his fees. He was curtly ordered by the mob to get on with his job, otherwise they would wreck his house. He got on with the job. I understand that should one of these youths have been dissatisfied with the result of the treatment, the circumstances of the doctor's introduction to the case would be quite irrelevant to the defence.

In some cases he may be the only doctor in a remote dis-

trict, when he is faced with the alternatives of either sending a severely injured person on a long and dangerous journey, or doing his best under the circumstances. If the patient should be dissatisfied with the result, no matter how self-denying and diligent the doctor may have been in his attendance, he need expect no mercy. He may be considerate to the last degree in fixing the charges for his services, but when an aggrieved patient opens his mouth into the legal amplifier, he talks in thousands.

What is the usual sequence of events? A person incurs an injury (whether due to his own carelessness or not is irrelevant—one claim was made by a man who fell off his own haystack), he has a long period of disability, he has hospital, nursing and medical expenses (the latter usually unpaid) and is perhaps left with a permanent disability. He is not insured, and naturally feeling that his misfortunes are undeserved he looks around for some means of compensation. The only person within sight is the unfortunate doctor who has attended him. He cherishes his grievance, he discusses it with his friends, finally one suggests a solicitor. He consults a solicitor and says he wants that doctor's blood. "Sue him for five hundred pounds," says the client. "Make it five thousand," says the solicitor, "and we shall have a jury." If the doctor does not submit to a more or less blackmailing settlement of the action in order to save time and publicity (and it is remarkable the readiness of the plaintiff to come down rapidly from five thousand to two or three hundred pounds under these circumstances), the process starts. After days of argument on abstruse points the jury gets weary and fed up. They are convinced in their own minds that it is not that worried, overworked doctor that is the actual defendant, but some wealthy corporation. They are bewildered by the scientific evidence—they say, "Well, look at the poor blighter crawling about like that for the rest of his life—we'll split the difference and give him two thousand five hundred pounds." And they do. Costs—probably at least another thousand pounds; result—a sentence on the doctor of *penal servitude for life.*

Yes, gentleman—penal servitude—certainly not within four walls but nevertheless a life sentence—the severest sentence for a crime short of the death sentence. What I mean by penal servitude may be illustrated by the story of the hard-worked lodge doctor who reached home very late after a long and anxious midwifery case on a wet, freezing night. He had just fallen into the sleep of exhaustion when he was awakened by his telephone and called to see the child of a lodge patient, who had met with an accident. It was only a few blocks away but out again had to come his old "tin lizzie." On arrival at the house the doctor found the injury was trivial and mildly asked why, instead of dragging him out of bed, the child had not been brought to his surgery. "What!" cried the indignant father, "take my child out on a night like this! Why, I wouldn't take my dog out!"

That is what I mean by penal servitude. Gone are all the doctor's ambitions to educate himself for a specialty and escape such drudgery; gone are his and his wife's hopes for a higher education for their children; their home paid for by much self-denial is now mortgaged, and he spends his life in servitude to another man. And all this for what, if there be any fault at all, is rarely worse than an error of judgment. Remember that the doctor is called upon to deal with a situation not of his own creating, and he does his best. When his treatment comes under criticism in court, counsel for the plaintiff makes every effort to prove him at fault if his methods fall short of those of the most skilled specialists. Admit the element of human error—shared by even our legal colleagues—so why should such severe punishment fall solely on medical practitioners?

As a means of obtaining a standard, the only one available, let me quote some of the larger items from the Schedule of the Workers' Compensation Act, 1935:

For total loss of the sight of both eyes	£750
For loss of both hands	750
For loss of both feet	750
For loss of a hand and foot	750

For total and incurable paralysis of the limbs or of mental powers	750
For total loss of the right arm or of the greater part of the arm	600
For total loss of the left arm or of the greater part of the arm	562
For total loss of a leg	562
For total loss of the foot or the lower part of the leg	450
On death, if a worker leaves dependants, a maximum of	750

Under the Victorian Railways Act, £2,000 is the maximum amount that can be recovered for damages, including loss of life.

Now let me quote some claims against medical men in this State during recent years:

For alleged maltreatment of a broken arm ..	£2,000
For alleged maltreatment of a broken arm ..	5,000
For alleged unauthorized operation	1,000
For not removing a tension stitch after operation	500
For alleged unskilful treatment	1,000
For X-ray burns of both forearms	10,000
For alleged overdosage of a hypnotic drug ..	3,000
For rash following antisyphilitic injections ..	3,000
For alleged wrongly signing lunacy certificate	3,000
For alleged maltreatment of a fractured thigh	5,000
For ulceration following hæmorrhoid injection treatment	5,000
For allegedly leaving in a pack at operation ..	2,400
For an X-ray burn	2,000

This is not a complete list, but it already totals over £40,000. Surely here is abundant evidence of the commercialization of grievances against medical men. Damages are inflated to the point of dishonesty, and some of the claims are so disproportionate to the grievances that they are obviously blackmail. We find it impossible to believe that

all these extravagant figures originated in the minds of the claimants. We agree that it is the plain duty of a solicitor to fire these missiles for his clients, but it is surely not part of his duty as a member of an honourable profession to violate the rules of civilized warfare and convert them into expanding bullets.

It is much less costly to inflict grave injury and even loss of life than to attempt its remedy. Recently a medical man was sued for damages as having been legally responsible when a friend was killed in a smash while a passenger in the doctor's care—and for how much? A modest twelve hundred and fifty pounds.

Some of you may have been thinking that I have been talking with my tongue in my cheek, for is there not an Association called the Medical Defence Association? There is, and I might mention that in the minds of some of the younger members of the medical profession it is confused with the Medico-Legal Society, and there is an idea that if any member is attacked, all the members of the Medico-Legal Society spring to his rescue as one man! As they get older they will find there is a difference.

This is not an annual meeting of the Medical Defence Association and it is not necessary for me to lay its report and balance-sheet before you, but as a matter of fact it has recently appeared in court and was produced by hostile counsel. Suffice it to say that this Association until five years ago was run on a subscription, half the subscription to this purely social Society, and for the past five years on a subscription just double your subscription. It gives to its members a limited and qualified protection—limited by the necessarily small accumulated funds—and qualified because the degree of assistance, if any, is determined by the Council of the Association on the merits of the case. In the State of Victoria as ascertained from the Secretary of the Medical Board, there are approximately eighteen hundred registered medical practitioners, of whom only seven hundred and forty are members of the Medical Defence Association.

But, you may think, there is the British Medical Associa-

tion, which has been described as "the strongest trades union in the world." To begin with, the British Medical Association is a purely voluntary association primarily for the advance and diffusion of medical knowledge to the benefit of the community at large, and secondarily, for the conservation and advancement of the ethical, social and political standing of the profession. Through this charge of trades unionism, the popular prejudice against the medical profession *as a body*, which undoubtedly exists, is increased, because people of anti-labour feelings dislike trades unions and people of true labour tendencies dislike it because they know that, not coming under their banner, it is not really a trades union at all.

A few years ago, a doctor was sued for ten thousand pounds damages for negligence. A colleague of mine was informed by a patient who was on the jury, that in the jury-room a juror said, "Let us give him five thousand pounds, the bloody B.M.A. will pay it!" And they gave him five thousand pounds, but the bloody B.M.A. did not pay it.

The British Medical Association has not anything whatever to do with medical defence. So I hope that my legal hearers will realize that I have not been misleading them when treating this as a problem between an individual dissatisfied patient and an individual doctor; and I hope that this knowledge will be diffused amongst the legal profession.

Apart from damages, the costs of even a successfully defended action verge on the ruinous to a medical man. It is but a slight over-emphasis for me to state that in no successfully defended case has a doctor ever recovered even a fraction of his costs within living memory. This is a cause of bewilderment to the medical profession. Actions are initiated in the Supreme Court, expensive counsel are retained, the trial drags on, and when the plaintiff fails he is found to be penniless. In a successfully defended action a few years ago the cost to the victorious doctor was over one thousand pounds; the plaintiff was a minor who sued

through her father, who depended for his living on his wife's earnings as a charwoman. Consequently the unlucky doctor did not receive a penny towards his costs.

How are such cases financed? They certainly have a bad smell to the possibly overtrained senses of the medical profession, but no legal friend of mine can detect any odour because everything is done in strict accordance with legal procedure.

In the concluding paragraph of my article in 1930 I wrote: "It is difficult to see how and whence any redress can be obtained from these serious and unfair disabilities from which the medical profession is so acutely suffering; but surely some preliminary investigation into the financial position of the plaintiff might be made and reasonable explanation of the financing of the action demanded by some superior legal authority."

Of course, no relief has been given, and before I conclude I think the reason will be plain to all. Added knowledge acquired during six years, much of it from the proceedings of this Society, has caused me to be so presumptuous as to advance from my position of despairing criticism of 1930 to one of constructive criticism in 1936. Above all, I have made the acquaintance of the "Rules of the Supreme Court of the State of Victoria" and have found it a very interesting publication.

For the benefit of the less-informed medical members of my audience I might explain that lawyers do not make the laws (so many of which we find irksome); we have been told so in this Society over and over again; the Legislature makes the laws. In other words Parliament specifies the diseases of the social body; the legal profession is entrusted with the treatment of these diseases, and the technique of treatment is prescribed by the Rules of the Supreme Court, *now uphappily twenty years old*! Can my medical hearers imagine the horrible impression on a court of a medical witness admitting that his technique was twenty years old, when the painful admission is extracted by counsel practising a technique of the same vintage?

The Rules of the Supreme Court which guide legal procedure at the present day are dated 1916 and bear at their end the honoured names of John Madden, Thomas A'Beckett, Henry Hodges, J. H. Hood and Leo. F. Cussen—all long since gathered to their fathers.

In May, 1932, we listened to a delightful address by Mr. Justice C. Gavan Duffy on "The Doctor in the Witness-box," in the course of which he thus pleasantly chaffed the medical section of this Society:

"Now there is nothing conservative about your profession. That great 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 who 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."

A perusal of the rules of the Supreme Court of Victoria will convince any unprejudiced reader that the legal profession of this State is still in the state of wearing a potato in its trousers pocket. Might we suggest that it is time to throw away the potato and awake to the fact that legal therapeutics are due for a move forward.

Bear in mind that these Rules are made by the legal profession itself. Our legal colleagues cannot sidestep for shelter behind the legislature and plead helplessness in this instance. Does the legal profession make any claims to progress or is its conservatism still its greatest pride? Can

anyone be unaware that conditions have changed within the past twenty years, which have seen Workers' Compensation Acts, the almost universal spread of insurance, the development of fast motor traffic and of machinery, and the consequent increase of physical injuries and litigation arising therefrom?

Is there any jury nowadays which does not believe that an insurance company is in the background of any action for bodily damage, and that is not prejudiced from the outset by its sympathy for an injured person? I am told by some of my legal friends that some of the best legal minds are of opinion that on the whole better justice is obtained by a jury with a judge than by a judge sitting alone. This opinion is not shared by members of the medical profession of medico-legal experience for this class of case, nor apparently by some jurists. Mr. Justice C. Gavan Duffy, in his address already quoted, said also: "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. . . . 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. 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 him." After briefly mentioning other methods—all dependent on the sinister words, *if the Court so pleases*, His Honour left the matter very much in the air with the following paragraph: "So it is not for 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."

His Honour did not discuss the question of a judge sitting without either jury or assessors.

In the discussion that followed, His Honour Judge

Macindoe said that "he did not think judges had much difficulty in making up their minds on questions of medical 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. . . . 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."

My correspondent in 1930, "Chancery Lane," wrote in *The Argus*: "D.M.M. protests against the enormous cost of litigation. If the plaintiff is impecunious the defendant can have the case remitted to the County Court where the expense is lighter. If it remains in the Supreme Court he can invoke a judge's discretion to refuse a jury trial on the ground that it is a matter of scientific investigation."

Since that date all attempts to invoke that discretion on behalf of medical defendants have invariably been unsuccessful, so definitely so that relief is absolutely hopeless. It is a matter of regret to me personally that such an amiable and helpful controversialist as "Chancery Lane" apparently has not yet attained the Supreme Court Bench; if he has, we have not yet had the pleasure of meeting him in Court.

A survey of actions for damages against medical men in English courts as reported in the *British Medical Journal* during the past five years, shows that the majority of these cases are tried by a judge alone; and jury cases, with rare exceptions, are heard before special juries. It is exceptional for the amount of damages to be stated, but when stated the claims are much more moderate than in our courts. One lady in whose abdomen a forceps had been left, claimed a modest thirteen hundred and seventy pounds, and yet she was unsuccessful. Perhaps some of our legal friends will explain these points of difference.

Keenly conscious that I am now rushing in where angels fear to tread, I venture to expound a little law. Actions for damages against medical men for wrongful or negligent

treatment come under the Common Law which entitles the plaintiff to a jury if he so desires. This right of a plaintiff to a jury under Common Law is qualified by the following rule of the Supreme Court of Victoria:

> "Order XXXVI.—*Rule 5*: Nothwithstanding anything contained in Rule 2, the court or a judge may direct the trial without a jury of any cause, matter or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot in their or his opinion conveniently be made with a jury."

The mere fact that as long as twenty years ago the legal profession recognized that cases requiring scientific investigation deserved a special rule, is an admission that these cases stand in a different category from the ordinary Common Law cases.

The practical difficulty, amounting to impossibility, seems to be to obtain the application of this Rule to cases involving medical problems. The involved discussions inseparable from actions against medical men upon diagnosis, pathology and treatment, make these actions essentially problems requiring scientific investigation; and God knows, in court it is prolonged enough.

I cannot presume to suggest how the Rule can be altered, but if the Rule prescribed that cases involving scientific or medical investigation should be tried by a judge without a jury—leaving it to the parties for either to make application for a jury if so desired, it would go far towards satisfying every requirement. In other words, a sort of reversal of the present procedure under the Rule.

Even these antiquated Rules, as you see, have provided a gateway, but it is so heavily chained and padlocked by precedent that only some such variation of the Rule as I have indicated will open the avenue to relief.

In a recent judgment on an application by a medical defendant for his case to be tried without a jury, Mr. Justice Gavan Duffy, in dismissing the summons, concluded his

judgment with these words: "If juries are not to try questions such as this, I think it must be under rules different from ours as they stand at present." The Chief Justice, in dismissing an appeal to the Full Court against Mr. Justice Gavan Duffy's decision, said, *inter alia*: "We find no fault to be found with these statements"; the above being one of the statements referred to.

If I have made out any case calling for relief, in our ignorance we can only invoke the goodwill of our legal colleagues to help us. I am informed that revision of the Rules has been under consideration for some years. Is it possible to expedite this very necessary revision?

The medical profession does not ask or expect immunity from the consequences of its blunders. Doctors frequently do pay compensation for claims out of court, sometimes because they are conscious of being at fault, but more often claims are compromised in order to avoid unpleasant and damaging publicity, even when it is obvious that the threatened action is a "pounds, shillings and pence action" —to use the phrase of an English judge in dismissing a recent action against a medical man—but some of these claims must be fought. As my much-quoted friend, Mr. Justice Duffy, said: "The medical man, like other professional men, occasionally has to defend actions which are nothing better than blackmail." We ask for no more than a competent and impartial tribunal. A medical defendant realizes only too well that once his case reaches a jury, the cards are stacked against him and it is already half lost. Counsel for an aggrieved patient know still better that, once a case reaches a jury, it is already half won.

We share the general regard for our judiciary, which follows the English tradition of justice, and from a closer association with several judges in this Society we have derived only increased respect and admiration for their character and ability. We are willing to leave our causes in their hands with every confidence that justice will be done; but we do yearn to be delivered from ignorant and prejudiced juries and counsel who have a great reputation

in jury cases. The result would be fewer vexatious claims, more reasonable damages, a speeding up of trials with consequent saving in costs, a verdict unaffected by popular prejudices and sympathies, and, where the plaintiff succeeds —adequate but not ruinous compensation.

The best minds in the medical profession work unceasingly towards the elimination of disease to its own material loss. Cannot the legal profession fall into line, revise the rules of its technique and, even at the price of some material loss in litigation, contribute to the sum of human happiness?