# THE DOCTOR AS AN EXPERT WITNESS

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## PROFESSOR E. S. J. KING

*"Believe an expert; believe one who has had experience."*
—St. Bernard of Clairvaux.

THAT the subject of to-night's discussion should have been chosen indicates that there are some differences of opinion regarding it. In medicine there are many subjects in which there is such a difference of opinion, but in the great majority this is found to be due to a diversity of viewpoint rather than to difference of fact and even more often to differences in the theoretical premises on which the opinion is based.

Differences of opinion about all sorts of things are easily understood when we consider the meanings of words. In their fascinating book *The Meaning of Meaning* Ogden and Richards show that most words have very many meanings, and taking the word "beauty", they show that it has sixteen meanings. Similarly the word "meaning" itself has sixteen meanings. This subject has been discussed on a more popular plane by Stuart Chase in his *The Tyranny of Words* and the point that it is essential that any two people who are to communicate with each other must clearly understand what each other means is well set out.

It is not intended to embark here on a discourse on semantics but to indicate the necessity for our being clear in our definitions. The Oxford Dictionary gives fifteen different ways in which the word "witness" may be used, and in the adjectival form there are three ways of using the term "expert".

The definitions that I propose to employ this evening are that a witness is "one who gives evidence in relation to matters of fact under inquiry" and that an expert is "one who is expert or who has gained skill by experience". If these definitions be accepted and if they be applied in many of the cases where

there is some doubt regarding appropriateness of a person or of his statements it will be found that the problem becomes clear.

Let us consider first of all the doctor as a witness. Doctors have had several years of intensive training in their undergraduate days and this has been continued after graduation. Much of this is in the direction of the accumulation and assessing of evidence, and they all know that if they fail to make the necessary observations, and if they treat these in any other than an unbiassed fashion, their patients and their own reputation will suffer. In other words, the training is largely (though as I shall mention later not entirely) one in scientific method. The doctor, therefore, should be an ideal witness.

That this is not always so is due of course to the fact that the doctor is human and has human frailties. In other words, there is a considerable discrepancy between the ideal and the actual state of affairs.

As far as reliability is concerned he is strictly comparable with the lay person, provided that we compare him with a person of similar background with regard to general training, education, responsibility and the various other factors which go to make up the dependable citizen. I have known occasions when there have been flagrant untruths, but these are rare. On the fairly numerous occasions where there are differences of opinion between doctors (and in the case of diametrically opposed opinions one of them obviously must be wrong) the error is due to some lack of information or misinterpretation of observations and the doctor really believes that what he says is true.

One important point is that interpretations of observations, and even the observations themselves, are sometimes likely to be coloured by sentiment. With his semi-scientific training this should not happen; but, on the other hand, the doctor spends the whole of his life dealing with people as people, and it is readily understandable how he will see the individual's point of view through, or above, other considerations. This overweighing of sentiment is one of the more important factors in some doctor's evidence and though we may approve his kindness of heart we cannot but deplore his assumptions that, in the first place, everyone else will put justice before mercy and, secondly, that it is his prerogative to decide some aspect of the case on grounds that appeal to him. Again, I do not believe that this applies to more than a small number of the profession.

Next we come to what is, in my view, a most important question: that is, the expression of an "opinion". This may be volunteered by the doctor but quite often I have heard a witness asked in court for his opinion about so-and-so.

Returning once more to the dictionary, amongst the various definitions which are not altogether appropriate to the present discussion I would suggest that an opinion is "what one thinks or how one thinks about something; judgment resting on grounds insufficient for complete demonstration; belief of something as probable, or as seeming to one's own mind to be true, though not certain or established". It is quite easy to understand why an opinion should be asked, especially when it is a matter of technical information. There may be so many intricately related facts and so many steps in the argument that it would take up an unreasonable time of the court to have all these accurately and precisely presented; hence the witness is asked to take a short cut.

This, I contend, is often asking too much of a witness. Let me put it this way: supposing an opinion depends on ten or fifteen different steps in an argument (and this is often the case) and that in any one step a very small error, say, of the order of five to six per cent, is made, this would be unrecognizable; and in the ordinary course of events there is usually some such degree of error, but in the various steps this is first in one direction and then in the other and these cancel out. However, if the witness has an interest (even though we regard this as being subconscious) the small error in each step will be in the same direction, so that ultimately we will find that the conclusion reached is so far away from the real state of affairs that two individuals who have been biased in different directions will give diametrically opposed opinions.

It is often stated that medical opinions are worthless in court because of this extraordinary difference of opinion. This does not mean that the individuals giving the opinion are necessarily dishonest, nor that they are poorly informed, but merely that they are asked to do more than is reasonable on the evidence supplied, or in the present state of our knowledge.

This question applies generally to all sorts of everyday events such as the speed of a car, or how far a car skidded, or how far away a man was, and so on. But it applies particularly to expert evidence and this we will consider now.

There are two points about the expert which should be considered specially: (i) his choice, and (ii) the interpretation of his information.

(i) The expert is usually chosen on three grounds: (a) possession of certain degrees and diplomas, (b) his having a capacity for "putting it across", and (c) his having had certain experience. In general, the possession of certain degrees or diplomas is a clear indication that the individual has covered a certain amount (and usually an extensive amount) of ground in his particular subject, but it must always be remembered that there is the individual who is able to do well in examinations and yet is unable to apply his knowledge to practical purposes. The demagogue (b) is also a potentially dangerous, and indeed often actually, a much more dangerous person. The possession of experience, however, is the most valuable criterion of the value of an expert, because this has been gained over a number of years and always in the view of a large number of people, and one "cannot fool all the people all the time".

One important point that is given inadequate attention is that a person may be an expert in a relatively small field. Just as in the legal world, there are experts in international, commercial, municipal, statute, banking or martial law and indeed many others, so in medicine there are the individuals who have specialized in some small part of anatomy, physiology, pathology, biochemistry, bacteriology or some particular part of clinical medicine. The important point is that these may really be very far apart.

What one observes to happen is that an expert is accepted as such because of knowledge in some particular field, but gradually, as the cross-examination proceeds, the subject matter being considered gradually changes until one finds that the ground is quite different from where the discussion began. By this time the expert is in foreign territory. I have seen one witness apparently discredited because he disclaimed knowledge of this new region and it was not made sufficiently clear that it did not really come within the purview of his own original claim as an expert; and on the other hand if, because he has some knowledge of the subject, he is foolish enough to make what he regards as a simple statement which can be shown to be wrong, his evidence in his main specialty may again be discredited. This brings us to the question which will be

discussed a little later that an expert witness has to be expert in more than just his own subject.

(ii) The second point is how the expert witness is to be interpreted. Some individuals seem to be unable to express themselves except in complex terms which, it must be admitted, are the ones that they are using every day. It seems to be a gift of relatively few to be able to transpose this information into basic English. I suspect that a certain number do not make the attempt to translate it because they are on perfectly safe ground as long as they keep to their technical terms; also cross-examination of them is thereby rendered much more difficult. Occasionally one of them seems to make the statements as complicated and as difficult to follow as possible. Any intentional obfuscation is, I am sure, like the intentional misleading mentioned earlier, an uncommon phenomenon.

Because so many of the experts find it difficult to use terms other than those which they are daily applying (and which they find that their colleagues comprehend quite well) the question arises whether it is not desirable to have some kind of interpreter for the court. I should say here that I am continually amazed at the ability of our legal colleagues to acquaint themselves with the niceties of meanings and distinctions in widely divergent fields. Nevertheless there are occasions (I think quite often) when further and special information, particularly of a thoroughly unbiased kind, is desirable. However, this may be again a matter of confusing the idealistic with the realistic approach.

One of the important points mentioned above is that the information that is necessary about a particular problem must be supplied within a reasonably short time. If it is necessary to supply all the information about particular physiological or pathological problems the work of the court would be held up very considerably. In addition to this, there is the question that many of the problems to be settled are ones depending on information which is at present incomplete. For these two reasons it is necessary to obtain the "opinion".

This question seems to me to be the crux of the problem of the doctor as an expert witness and doubtless it applies to many others. If we take first the assessment of the opinion, the essential point is that no opinion should be offered nor should one be accepted from any individual who is not thoroughly conversant with the particular problems. This seemed so obvious

that it is unnecessary to state, and yet I have frequently seen expert witnesses in court giving opinions on questions of which they had very little knowledge. If I might paraphrase the text from St. James that "Faith without works is dead" I would say that "Opinion without experience is useless." The whole problem is to determine to what extent such experience is present.

A further point is that any individual giving an opinion should not be allowed to jump too many of the intermediate steps which lead to the conclusion. This is where some sort of advisory panel on special scientific problems would be of great value. Of course I know that the witness who is able to interpolate more steps in his argument and make them lucid will be more likely to carry conviction and thus be accepted than the individual who clearly makes wild leaps and, for all any one knows, in the wrong direction.

As far as his reliability is concerned, an expert's opinion is likely to be influenced, and perhaps modified, by two factors: (i) he has been subpoenaed by one side of the case, and (ii) he now knows something of the personalities on one side. I think it is almost impossible for him not to be influenced to some degree. As was pointed out carlier, it is only necessary for him to be influenced in a very slight degree for this to have conceivably a very significant cumulative effect. It may be that at various stages in the development of the argument he leans slightly one way but, because it is always one way, the end result is, or can be, a long way from the truth.

It seems to follow from this, therefore, that if an expert witness is called by either one side or the other he, in some measure, must lose his unbiased and scientific approach to the problem. I would emphasize that this will apply even to the most honest individual and it seems imperative that this source of error should be removed.

Doubtless it has been suggested on many occasions, and presumably there are some difficulties of which I am not aware and which no doubt Mr. Nelson will discuss, but it would seem that the rational procedure would be to call an expert witness as a witness of the court, not as a witness for or against any individual or individuals. It seems to go without saying that the strength of the piece of steel, the chemical characteristics of a poison, the amount of a particular substance present in a solution, or in a human body, or the course and characters of a

particular disease of the body are all features which are completely independent of the individuals interested in the case, and indeed are independent of the case itself.

Before closing, there is a further point that I would like to raise which arises from what has just been considered. This is the relative importance that is likely to be placed on the facts presented by a witness and the manner in which those facts are presented. It is well known that, in ordinary day life, a demagogue often defeats a thoughtful and progressive politician (although recent events indicate that this is not always true). This is true also in court. It would seem that a spate of logorrhoea will always have some curious hypnotic effect on the jury, and though we may accept this as an inevitable phenomenon in everyday life, it seems a pity if it will influence appreciation of incontrovertible facts. At the same time we must be realistic and it is quite clear that the expert must be experienced in presenting his own material. This, of course, would not necessarily be so if there were not conflicting viewpoints, as I think there would not be if they were called by the court or if there were a panel of individuals chosen by the court.

Even if the expert does become expert as a witness it need not necessarily be an advantage to him. I remember an occasion when a well-known medical specialist in Melbourne was asked a question by a barrister. On his reply, the barrister said, "Doctor —— you amaze me!" and the doctor, turning to the judge, answered, "Your Honour, if I stood here all day I could still continue to amaze Mr. ——." He made his point but there were several of us, who were at that time quite junior, who always felt subsequently that perhaps he was as clever and facile in some of his purely medical opinions as he had been in court.

I don't propose to go into the matter of the dealings of the medical witness with his legal colleague. It is only necessary to say, what is easily demonstrable, that the doctor's attitude may be determined by the attitude of counsel. The doctor has special knowledge but the barrister is on his own ground. Thus there are times when we are inclined to feel that the important thing is that he has to be expert in giving evidence rather than being expert in his subject. This, as I have tried to point out, is thoroughly undesirable and I feel can be overcome by the expert being called only as an expert and not in any way as a partisan.

In conclusion:

1. The expert witness must be an expert; that is to say, he must have had experience in the particular field in which he is giving evidence.
2. His statements should be as simple and yet as complete as possible.
3. "Opinion" should be avoided or should be minimal. As far as possible, evidence should be provided.
4. The value of the witness would be greatly enhanced if he were, on technical matters at least, a witness of the court.

F. R. NELSON

THE primary task of the court in the administration of the common law is the determination of the relevant facts, to which the law is then applied. The facts are determined on the evidence before the court and consist of facts which are directly perceivable by the witnesses and which they purport to describe or which can be inferred from other facts so perceived. In determining what facts are relevant to the issue and what facts he should infer from the evidence, the judge uses his knowledge of common experience, and where all the material is available for him to make such a determination the views of other persons as to what is relevant and as to what inferences should be drawn are immaterial to the issues before him. In such cases the opinions of witnesses are rejected in evidence because they are mere surplusage. That does not mean that in all cases the opinion of a witness is rejected upon a matter which can be determined by general experience. An expression of opinion may often be a simple and innocuous way of expressing a number of perceived facts, or the perceived facts may not be capable of precise description so as to enable the tribunal to draw an inference from them. For example, a witness may say that an article was hot or cold, or that the night was dark, or that a man was old. All such statements are expressions of opinion, or in other words, inferences from other facts. In general, however, where the conclusion to be drawn depends upon the use of knowledge or experience which is common to all, opinion evidence is not admitted. Yet there are many matters which arise for determination in a court of law which cannot be decided by the application alone of general knowledge and experience, and our legal system must be adapted to meet all the demands of a highly complex society. On matters therefore

which require some special knowledge and experience, the courts need assistance to enable them to determine facts, both in ascertaining what the perceivable facts are and in deciding the proper inference to draw from them. The giving of that assistance is the role of the expert witness.

An expert is defined by Professor Wigmore as a person possessing that sort of capacity which involves, not the organic powers, moral and mental, requisite for all testimony, nor yet the emotional power of unbiassed observation and statement, but the skill to acquire accurate conceptions. In the field of medicine the expert is the person who by special study, training and experience has acquired not only accurate knowledge but accurate understanding of the structure and functions of the body, the signs and symptoms of disease, the nature of remedial treatment and the correlated matters which fall broadly within that field. He may and most likely will be a doctor; it is not necessary that he should. To be accepted as an expert, a witness must first be qualified as such, that is, he must be shown to have had the special study, training and experience which enables him to acquire accurate knowledge and understanding in his particular field. Such a qualification not only permits him to give evidence which would not be receivable from other witnesses but enables the tribunal to assess the weight which might properly be given to his evidence.

The assistance which the expert gives the court may be classified in three divisions—

(1) His experience enables him to observe phenomena, the significance of which is unknown to the layman and which he may overlook; and consequently to give in evidence further perceivable facts. "Nobody sees more than his activities have prepared him to see. We can observe nothing to which we have not already learned to respond."

(2) By explaining which of the perceived facts is significant for the purpose of drawing a scientific conclusion, he can assist the court in determining their relevance to the problem which it has to decide.

(3) By expressing his own opinions and inferences from perceived facts, he lays the foundation upon which the court may infer further facts which are the basis of its ultimate decision.

It must, however, be remembered that both in regard to the relevance of perceived facts and the inferences to be drawn from them, the expert is merely giving evidence. He is not deciding the issue; that is the function of the judge alone, and he will decide that issue not merely on the evidence of the expert but upon all the evidence before him. This fact is not always readily appreciated by the expert, and not infrequently leads to resentment on his part. In spite of the evidence of a number of leading gynaecologists that the birth of a child as the result of a marital act of intercourse 307 days earlier and after an intervening menstrual period is so unlikely as not to merit serious consideration, the court may be so impressed with the evidence of the wife that it will refuse to infer adultery. (Bowden v. Bowden, (1917) 62 Sol. Jo. 105.) At the other end of the foetal scale, strong medical evidence that it would be impossible for a child to survive if it were born 174 days after an act of intercourse may be rejected if the evidence of the woman satisfies the court of its truth. (Clark v. Clark (1939), P. 228.) This latter case affords an interesting example of the danger, both to the expert and to the court, of treating a scientist's formula as a scientific law. The question here arose in regard to the notional calculation of the period of gestation by reference to the date of the last menstrual period, but I regret that time will not permit me to elaborate upon that feature of the case.

The readiness with which a court may be inclined to draw conclusions from the other evidence which are at variance with the opinions of experts will depend very largely upon the nature of the science involved. No amount of credible evidence will convince a court of the inaccuracy of the mathematical proposition that two and two add up to four, and the evidence of the mathematician or surveyor, if his skill and accuracy are undoubted, will be unassailable. Medicine, however, is not an exact science, and what is known or believed to be known is an infinitesimal proportion of what there is to know. Theories which were confidently advanced a very few years ago are now discarded. We are told, in extenuation of a medical witness who is cross-examined on an opinion which differs from that of the writer of a textbook that "all textbooks are out of date by the time they are published." (Dr. Alexander Gibson in a paper published in the Canadian Bar Review of May, 1952.) No court can in the circumstances reasonably be criticized if after obtaining what assistance it can from the observation and

the knowledge of the expert it finds that other evidence persuades it to a conclusion which is at variance with the current scientific opinion. The fact, however, that the court will not always agree with the opinion of the expert does not diminish the importance of his testimony nor the degree to which the due administration of justice depends upon his willingness to assist.

From the nature of the assistance which the expert can give the court, and which the court is entitled to expect from him, the importance of his testimony and the great responsibility which rests upon him can both be readily appreciated. The importance of his testimony is that no informed decision upon a matter which involves, however incidentally, a reliance upon the specialized knowledge which he alone possesses can be given without such testimony. And the importance of his testimony emphasizes his responsibility to discharge fully and faithfully the oath he takes as a witness. A witness who testifies to facts which are matters of common experience can be fully tested by cross-examination, and his reliability and accuracy assessed, because both judge and counsel are equipped to deal with him. But the expert "who prepares his subject and maintains his temper and presence of mind in the witness box should be more than a match for any defending counsel." The words I have quoted are those of the late Dr. C. H. Mollison, and let me hasten to add that I have taken them from their context and that no responsible person would infer that the doctor was suggesting in his work that the medical witness should use his knowledge to mislead the court or to confuse counsel. I use them only because they truly set out the power of the expert; they demonstrate that the normal weapon with which the court and the barrister are armed to unmask dishonesty or to expose weakness is of little practical effectiveness in a field in which they are unskilled and the witness is expert. It is so easy for an expert witness to ignore a fact which to him alone has significance, to exaggerate the significance of others, to tell the truth but not the whole truth. The ease with which he can mislead should, in the case of any responsible person, dispose him to greater care, to frank admission of any facts which might be or appear to be inconsistent with the opinions he is advancing, to guard against both conscious and unconscious partiality.

How have expert witnesses discharged this responsibility in the past? It must be confessed that in legal circles there has been much criticism, both oral and written. In a leading text-

book on evidence it is stated: "The testimony of experts is often considered to be of slight value since they are proverbially, though perhaps unwittingly, biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmation of preconceived theories; moreover support or opposition to given hypotheses can generally be multiplied at will." (Phipson, 9th Ed., p. 403.)

In 1843 in the Tracey Peerage case in the House of Lords, which is reported in 10 Clark and Finnelly, Lord Campbell, after referring to the evidence of a handwriting expert, said at page 191: "I do not mean to throw any reflection on ——" (the witness). "I dare say he is a very respectable gentleman, and did not mean to give any evidence that was untrue; but really this confirms the opinion I have entertained that hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked."

In 1849 in the matter of Dyce Sombre (1 Mac. and Gordon, at page 128) Lord Chancellor Cottenham said: "I have seen enough of professional opinions to be aware that in matters of doubt upon which the best constructed and best informed minds may differ, there is no difficulty in procuring professional opinions upon either side. If the question involves any theory or principle upon which the members of a profession are divided, the course is obvious; but upon any other subject of doubt, any person seeking for pecuniary advantage to obtain an object by managing, conducting, and obtaining the favourable report of professional men will find no difficulty in procuring such favourable opinions."

In 1873 in the case of Abinger v. Ashton (L.R. 17 Eq., at pages 373 and 374) Sir George Jessel, M.R., said: "Now I will consider the evidence on this point, but before doing so; I must say how the plaintiffs contest it. They contest it by producing the evidence of some experts, whose evidence was met by at least as many experts on the part of the defendants. 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." (I should interpolate that His Lordship was concerned with engineers, not doctors.)

"Now it is natural that his mind, however honest he may be, should be biased in favour of the person employing him, and accordingly we do find such bias. Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. . . . 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 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."

These are harsh judgments but they are the judgments of highly placed and distinguished lawyers. It is but fair to quote a kinder one of more recent days. In 1937 Lord MacMillan, in a work entitled *Law and Other Things,* said: "I have had a long and wide experience of expert witnesses, and despite the unkind things which have been said of them, I am prepared to pay tribute to the fairness which they in general exhibit. But the witness-box is a difficult place for the scientific man to occupy. It is wrong for him to be an advocate, and the contentious atmosphere of the courts is not always conducive to the calm and dispassionate exposition of truth. Probably it is quite salutary for the more pretentious type of expert to be exposed

to an occasional rigorous cross-examination, but the irritation which that process causes him, especially if at the hands of an advocate for whose knowledge of the subject he has a supreme contempt, may well lead to the pronouncement of confident assertions which he may have occasion subsequently to regret. Fair cross-examination—and I emphasize the epithet—is one of the best means of eliciting and testing the truth, but not all cross-examinations are fair. Of one thing I am certain, and that is that no scientific man ought ever to become the partisan of a 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 advocate in evidence a particular view merely because it is the view which it is in the interests of the party who has retained him to maintain. To do so is to prostitute science and to practise a fraud on the administration of justice."

Let me sum up the criticisms which are contained in these passages:

(1) That the evidence of the witness is usually biased in favour of the side which calls him. Such bias might be due to mercenary motives of self-interest, but in the great majority of cases it is unconscious and springs from a natural tendency to support the party who has in a limited sense become the witness's client, a reluctance to say anything which would be damaging to the side which calls him, and frequently a desire to support and convince the court to accept an opinion previously expressed to the party. It is this type of bias which so often turns a witness into an advocate.

(2) That as the expert is selected by the party because his views are those most favourable to the party's case, the court does not obtain the evidence of fair professional opinion but of exceptional opinion.

(3) That the expert is impatient of and resentful to cross-examination, and such impatience and resentment leads him to exaggerate or to refrain from volunteering information which he realizes may be relevant.

The statement of these three criticisms indicates that the fault is not all that of the expert. Our legal system is an adversary system. The expert is necessarily cast in the role of witness for one party or the other, and try as he might to be independent, there is an immense psychological pressure upon him to be helpful to the side which calls him. The lawyer,

in the interest of his client, is not concerned with general professional opinion but with the expert whose view is most favourable to his client's case. The more willing the witness is to be an advocate, the more ready the lawyer is to employ him, provided his advocacy is not so patent as to discredit him. Cross-examination is necessary to test the soundness of observation and opinion, but unfortunately it is not always directed to this purpose; in jury cases in particular it is too often designed to mislead and confuse. Even under the best of circumstances, the eliciting of scientific information by the legal process of examination and cross-examination may present a disjointed and confusing picture. It is not however within the scope of this paper to deal with the various alternatives to our present procedure which have been suggested as means of overcoming the drawbacks in the presentation of expert evidence. Several such alternatives were considered by Sir James Fitzjames Stephen in his *History of the Criminal Law of England,* but, for reasons which he outlined, he stated that he had the strongest possible opinion in favour of the maintenance of the present system. My medical friends will forgive me if I quote what he says on the question of medical witnesses and cross-examination. He says (p. 575):

"They are not accustomed to it and they do not like it, but I should say that no class of witnesses ought to be so carefully watched and so strictly cross-examined. There is one way in which medical men may altogether avoid the inconveniences of which they complain, and that is by knowing their business and giving their testimony with absolute candour and frankness. There have been, no doubt, and there still occasionally are, scenes between medical witnesses and the counsel who cross-examine them which are not creditable, but the reason is that medical witnesses in such cases are not really witnesses but counsel in disguise, who have come to support the side by which they are called. The practice is, happily, rarer than it used to be; but when it occurs it can be met and exposed only by the most searching, and no doubt unpleasant, questioning."

It is only fair to accompany that quotation with the statement that in some of the scenes which I have witnessed between medical witnesses and the counsel who cross-examine them the discredit has by no means attached solely to the witness.

It has been suggested by Professor King that some of the difficulties in regard to expert witnesses could be overcome by

calling them, not as witnesses for a party, but as witnesses of the court. This course, he suggests, would tend to avoid bias on the part of the witness, and would reduce the necessity for him to be expert *as a witness* rather than expert as a scientist in the particular field concerned. I point out, however, that he would still be a witness and not a final arbiter upon the particular issue; he would still have to give his evidence in open court and be subject to cross-examination. Although the alteration of our law of procedure to enable this course to be adopted would not constitute an insuperable obstacle, there are several disadvantages in the proposal.

(1) It would result in such delays that in criminal and other jury cases, where the main danger lies, it would be quite impracticable. The question of whether the evidence of a court expert is needed cannot be determined by the court until it appreciates the precise conflicts. From the practical point of view it cannot determine that until it has heard the evidence led by the parties. Unless there is to be a preliminary hearing every time the position might arise, this involves an adjournment until the expert is chosen and has an adequate opportunity to acquaint himself with the case.

(2) How is the expert to be chosen? Obviously by the court, but apart from the practical difficulty of ascertaining who is the expert on the particular matter—this might be overcome by having a panel compiled by the profession on various subjects—the judge still has to determine whether it is a matter for the anatomist, the pathologist, the physiologist, or one of the many other specialists; again, as the difficulties are mainly encountered in matters of opinion where professional opinion may not be unanimous, is he to pick one from each school of thought, in which case he is not much better off than if the choice is left to the parties, or quite unsatisfactorily to pick one who may belong to either school?

(3) The parties cannot be denied their right to call experts themselves and the same conflict would develop. The relative independence of the court witness would be an advantage but it is extremely doubtful whether it would compensate for the other disadvantages.

I have to the present stage largely contented myself by expressing the opinions and criticisms of distinguished lawyers of the last century. May I now descend to a more homely plane

and add some of my own impressions from a practice which has mainly been in the jurisdictions in which the most extensive use of medical evidence is made, namely, in "running down", workers compensation and criminal cases.

I am fully conscious of the tendency of the medical witness to become an advocate, and I have no need to add anything to what has already been said on that matter, except perhaps to say that in very few cases today would Sir George Jessel's fears that the expert's testimony is coloured by his own financial interests have any reality in the case of medical witnesses. Attendance as a witness is far more often a cause of financial loss than of financial gain. I have frequently seen a medical witness's apprehension of and impatience with cross-examination, but in almost every case it has been due, not to any fear that dishonesty shall be unmasked or unsoundness of opinion demonstrated, but to the fear of misrepresentation, of being manoeuvred into a false position, of being forced into acceding to half truths without the opportunity of saying that they are half truths. Such a fear is not groundless. A witness is bound to answer the question asked. He may appreciate that without some qualification his answer may in the particular facts of the case, although it is literally accurate, be misleading or be made the premise for a false conclusion. He feels that he cannot add the qualification without a rebuke for being non-responsive. Re-examining counsel is not equipped with the scientific knowledge which would enable him to see the danger and give the witness the opportunity to avert it. So the witness lets it go, conscious that he has unwillingly been forced to mislead the court and resentful of the system which has made it possible.

The solution to the problem is not as difficult as it appears. In the first place, the danger can be greatly reduced by a conference between counsel and witness before he gives his evidence. Such a conference not only simplifies the task of both counsel and witness in ensuring that no salient matters are inadequately dealt with in evidence in chief, but enables both to be apprised of the more obvious dangers in cross-examination. The conference has another advantage in that the witness will not be oppressed with the feeling that he is "letting down the side" when matters unfavourable to the client on whose behalf he is called are elicited in cross-examination if he has candidly informed counsel of those matters and his opinion upon them beforehand. The second safeguard is that while such a con-

ference cannot of course deal with the unexpected, it is unlikely that any judge would prevent a witness from intimating in cross-examination that a particular answer may need qualification. Although he may be prevented from qualifying it at that stage if cross-examining counsel is foolish enough not to follow up the intimation, re-examining counsel has been warned and the difficulty no longer exists. Medical witnesses are frequently cross-examined as to whether some unlikely or even fantastic hypothesis is not possible. Unless the witness has already exhausted the court's patience by evasive answers, I would be surprised if any objection were taken to an answer that the hypothesis was possible, "but in this case extremely unlikely". Very few doctors give this assistance to the court. They assent to the most unlikely possibilities without striking any warning note. This is common with the experienced doctor as with the young resident. Whatever the immediate aim of counsel may be, the court is anxious to ascertain the truth, and as long as the witness acts with discretion and does not give the impression that he is trying to take the control of the examination out of the hands of counsel, a short intimation that some qualification is necessary, even if it is not strictly responsive to the question, will usually be welcomed by the court. The adoption of both of these safeguards should remove any legitimate objection to cross-examination.

A common fault of the medical man as a witness is the use of terms which are incomprehensible to the layman. The object of calling a medical witness is to enlighten the court upon the facts and he should make use of the simplest possible language to express his thoughts. It is wise to remember that judge and counsel may be no better qualified than jurors to understand medical terms. As far as I know, the word "oedematous" to the scientist may be more precise and accurate a term than "swollen" and the word "erythema" may carry a shade of meaning which is lacking in the word "redness". But even if the scientific word with all its implications were explained to the layman, it would convey to him no more than the simple word would. I might in this connection quote a short extract from each of two papers recently published in the Canadian Bar Review. The first is by a lawyer.

"I have seen juries sit up expectantly when a doctor is called to the witness box and then gradually lose interest as he proceeds to describe the case in technical language. He might as well

have been speaking in a foreign language. Not only is the attention of the jury lost, but jurymen, and sometimes even judges, are irritated by being asked to listen to what they cannot understand."

The second is by a doctor who, after recommending the use of layman's terms, says:

"This choice of words is apt to go against the grain, for there is a loss of precision. Some loss, however, is preferable to a state of things where, though precision may have its place in your mind, the judge or jury may be in a condition of hopeless confusion. It is important to recollect that one is not presenting a scientific protocol, but trying to convey the truth to someone else, who is desperately anxious to learn the truth."

Lastly, I would like to direct attention to the reluctance of many doctors to say "I don't know" or "I am not qualified to express an opinion on that matter." No sensible man expects a doctor to be an expert upon every branch of his profession, nor the young and recently qualified doctor to have the knowledge and authority which can come only from years of experience. A frank admission of his lack of qualification on some newly introduced matter in no way discredits the evidence which the doctor has properly been called to give. This failing is most noticeable in the criminal court, where young residents are frequently called to testify merely as to the injuries from which a patient was suffering on his admission to hospital. Counsel for the defence, knowing that a pathologist or other specialist will be subsequently called to give evidence which is very prejudicial to his client, seizes the opportunity to obtain some statement of opinion which he can use later in cross-examination of the expert or, more wisely, in comment to the jury as to the contradictory nature of the medical evidence. The young man feels that as a medical witness he is bound to do his best to answer any medical question, or if he does volunteer hesitantly that it is really a matter for a specialist he is coaxed into an answer by counsel guilelessly remarking, "We appreciate, doctor, that you have not made a specialized study of this matter, but from your general knowledge can you not give us some assistance?" I may say that not only young doctors fall into a trap so baited. Counsel having got what he wanted is subsequently aided and abetted by the reluctance of the specialist to say anything publicly which might, even indirectly, reflect upon his younger brother's competence. The place in

which this failing might most easily be corrected may be in the course of lectures on forensic medicine, and if so I trust it is being done.

There are a number of other matters which might properly fall within the scope of this subject, such as the question of privilege, the lawyer's reaction to the psychiatrist, the so-called "wall of silence" in malpractice actions, but I have already trespassed grossly upon your time. The tenor of this paper has been critical but I trust that all the criticism has not been destructive. It has been necessary for me to generalize, and generalizations are never completely true. I would be unhappy if I have falsely given the impression that I have not a great respect and admiration for the medical profession as such. I have known many medical witnesses who, although their views are firmly held, express themselves with such moderation, are prepared so readily to make concessions apparently inconsistent with such views, and are so equally ready to explain with care and clarity why such concessions do not lead them to alter their conclusions, that courts and counsel have been deeply impressed by their fairness and their skill. We have had the pleasure of hearing one of these gentlemen to-night. What I have tried to do is to indicate what to the practising barrister are the most common failings of the doctor as a witness. I have conceded that in many respects the barrister and the system of judicial proof must accept some responsibility for those failings. Might I close by saying that the doctor who bears in mind that, however imperfectly it may be accomplished, the aim of the court is to ascertain the truth, and that in calling him as a witness it is relying upon him to assist it in that important task; who consequently is conscious of the responsibility which rests upon him, and tolerant of our shortcomings, is playing his part in a field of human relationships and happiness which is as vital to our community welfare as the field of healing in which he is predominantly engaged; and if he brings to the law the same high principles of truth and service which guide him in his own profession, the law will be both grateful and content.

*STEWART MACARTHUR PRIZE ESSAY FOR 1948*

# THE CONTROL OF PATENT MEDICINES

By NORMA O'CONNOR

THE term "patent medicines" should, properly speaking, be applied only to medicines sold under letters patent which are still in force. This was held by the court in Pharmaceutical Society v. Fox (1896), 12 T.L.R. 471, a case decided under the Pharmacy Act of 1868, which exempted the "making and dealing in patent medicines" from the provisions of that Act. The word "patent" attached itself to medicine in England in the early eighteenth century. In 1722, a patent of royal favour was granted for the first time to the owner of a medical product. Usually these patent medicines were sold as complete preparations, the formulae from which they were manufactured being exclusive property of the manufacturers. The majority of medicines for which a patent exists today are ethicals and pharmaceuticals. The term, however, is usually applied to those classes of medicinal preparations which are put up in uniform packages and which are offered for sale under distinctive trademarked or copyrighted names. They are not patented, but are more correctly designated as proprietary medicines because the manufacturers have proprietary rights in the formulae or trade names. The Victorian Health (Patent Medicines) Act 1942 uses the phrase in this latter and wider sense, and this is the usage adopted here. The Act (section 2) defines the term thus:

"Patent medicine means any substance or mixture or compound of substance or biological product which is intended to be administered or applied whether internally or externally to persons for the purpose of preventing, diagnosing, curing or alleviating any disease, ailment, defect or injury or for the purpose of testing susceptibility to any disease or ailment but does not include

(a) any such substance, mixture, compound or product extemporaneously dispensed or prepared for a specific and individual case; or

(b) any such substance, mixture, compound or product