Original Articles.

THE OPINION EVIDENCE OF MEDICAL EXPERTS.¹

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THERE are few branches of the law, particularly that of evidence, which have more than a general interest for those not of that profession. The subject, however, of expert testimony, and especially that of medical experts, is singular, in that apart from its own intrinsic importance, it excites equal concern in two great professions, the medical and legal. The interests of the physician and the lawyer (as well as of the layman whose property or liberty, when a party, may be intimately involved, or who, as a jurymen, may be called to sit in judgment) here converge in a common centre. The discussion which has waged for years, and while present conditions obtain, will wage long hence, and the numerous proposals for reform in the reception of such testimony has been about equally participated in by these several interests. Each from time to time, through the channel of medical journal, legal periodical or the newspaper, is contributing some thought or suggestion to the subject; and I cannot but believe that your society, whose end is the advancement of the science of forensic medicine, regards it, however trite, as one of surpassing importance.

Some months ago, I had the honor to read, before the medical society of a neighboring county, a paper in which I discussed the position of the medical expert as lawyers see him upon the stand today, and said, in passing that the many proposed schemes of reform seemed to me speculative and impractical. In so far, at least, as I may have seemed by that remark to endorse the method which now prevails in England and America, I beg leave to disclaim that opinion.

When the physician testifies as merely an ordinary witness to facts which have come within his observation, he excites no greater interest or attention than that which might attend the testimony of an intelligent witness from any other vocation. His effectiveness, persuasiveness, and claims to belief depend upon the same conditions as do those of any witness. But when testifying to his opinion, based either on facts which he has himself observed, on admitted facts, or upon some hypothesis, expressing the judgment of a scientific man, ready to submit it to the opinion and criticism of the members of his own profession, to the cross-examination of counsel, publicly and to the world, then he frequently evokes an interest which rarely surrounds a witness under any other circumstances. There is, indeed, no phase of evidence which has attracted more attention, which has been the object of more criticism (frequently from bench and bar) or more the subject of proposed reforms than the opinion testimony of medical witnesses as uttered on the witness stand.

¹ Read before the Massachusetts Medico-Legal Society, February 6, 1901.

Of the scope and extent of such criticism, at least on the part of those who administer the law, we may derive a clearer and more concrete conception if I cite from a few of its most authoritative sources. I will content myself with quoting from a judgment of the Supreme Court of the United States, from the charge to the jury in a capital case of a former chief justice of this Commonwealth, and from the charge in a similar case of one of England's great judges.

Said Mr. Justice Grier in the case of *Winans vs. N. Y. & Erie R. R. Co.*, 21 How., 88, 101: "Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days but even weeks are consumed in cross-examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing instead of elucidating, the questions involved in the issue."

Said Chief Justice Chapman, at the trial of Andrews in this Commonwealth: "I think the opinions of experts are not so highly regarded now as they formerly were, for while they often afford great aid in the determination of facts, it often happens that experts can be found to testify to any theory however absurd." (Trial of Samuel M. Andrews, page 256.)

And in Palmer's case, Lord Campbell, in summing up to the jury, said: "With regard to the medical witnesses called on the part of the prisoner, I must observe, that although there were among them gentlemen of high honor, consummate integrity and profound scientific knowledge, who came here with a sincere wish to speak the truth, there were also gentlemen whose object was to procure an acquittal of the prisoner. It is, in my opinion, indispensable to the administration of justice that a witness should not be turned into an advocate, nor an advocate into a witness. You must say, gentlemen, whether some of those who were called for the prisoner belonged to the category I have described—that of a witness becoming an advocate." (Palmer's case reviewed in 1, Law Magazine and Review, page 332.)

Such opinions, expressed under such circumstances, frequently reiterated by lesser tribunals, provoke the inquiry, which perhaps may be difficult to satisfactorily answer, Where does the fault lie?

I take it, of course, that all comment of the kind which I have quoted, is directed rather to the method of receiving such evidence than to the nature of the evidence itself, for the severest critic would not hold that even under the prevailing law, and assuming that it cannot be improved upon, that opinion testimony, as such, should not be followed or relied upon.

If the physician were to be confined in his testimony to the bare narrative of the facts which he saw or observed, one at least of the safeguards of the community would be destroyed. The phenomena which result from the work of the murderer, the poisoner or the abortionist, as

revealed in the human cadaver, are an enigma to the layman. Though accurately described, though no detail be omitted they mean but little to his mind. To the physician, the surgeon or the toxicologist they may demonstrate with entire certainty that death was not natural, that it was caused by violence or malpractice, or by the administration of poison; or with equal certainty, on the other hand, where guilt is suspected, suspicion to be unfounded. Such certainty, however, can find expression in our courts of law in but one way, viz.: by what is known as expert or opinion testimony.

It is useless, however, to attempt to palliate the contradictions, inconsistencies, exaggerated and absurd theories which under present conditions so frequently characterize the trial of the most important issues. It is seldom that a capital case is tried, which does not result in revelations of a nature which cannot but annoy and mortify the medical profession.

Few theories, however fantastic, need go unchampioned; the question of insanity has become a byword, and it is the experience of lawyers that to testify as an expert is becoming more and more repugnant to those physicians whose evidence would be of the most value. The annals of criminal jurisprudence of the century just past furnish too abundant proof of how strikingly medical experts have been at variance in particular cases; and of what diverse and inconsistent views have been entertained upon a given state of facts, by members of the same profession, and of equal eminence, educated, perhaps, in the same schools, contemporaries in practice.

The case of William Palmer, a surgeon, for example, who was tried in London for the murder by poison of one John Parsons Cook, is a most conspicuous instance of contradictions amongst experts. Four different theories were advanced by as many physicians as to the cause of death, and the analysts called on one side and the other were wholly at variance as to the phenomena which attend the administration of strychnia.

In the case of Dr. Smethurst, tried a few years later in London, for poisoning a woman with whom he had contracted a sham marriage, the conflict of evidence, medical and analytical, as to whether the symptoms of the post-mortem appearances were ambiguous and could be referred either to natural causes or to poison, was such, that though the prisoner was convicted, the public became so agitated, and the controversy carried on by letter and petition reached such a stage, that the home secretary, who investigated the matter remarked, in stating his reasons for recommending a pardon, "that the necessity for it did not arise from any defect in the constitution or proceedings of our criminal tribunals, but from the imperfection of medical science, and from fallibility of judgment in an obscure malady, even of skilful and experienced practitioners."

And we cannot but call to mind the case of Mrs. Maybrick, tried in 1889, the result of which has been so loudly denounced as a judicial error

by some who are, but by so many who are not, familiar with the evidence. The direct conflict which arose at that trial between some of the ablest medical men of Great Britain as to whether Maybrick died of arsenical poisoning, or a natural death from gastro-enteritis, is quite fresh in our minds. Doubt existing, notwithstanding the verdict, the home secretary commuted the sentence, stating that "although the evidence leads clearly to a conclusion that the prisoner administered and attempted to administer arsenic to her husband with intent to murder, yet it does not wholly exclude a reasonable doubt whether his death was in fact caused by the administration of arsenic." And although the report of the trial discloses moral evidence against her of tremendous force, yet, I take it, the question of her guilt or innocence will continue, long hence, to agitate and distract.

But who will say that the conditions of which these cases are but illustrations are not largely owing rather to the defective method of the law, than to the imperfection of science, or that we are confronted with a state of things which it is impossible to ameliorate? Surely the fault cannot be laid at the door of science. Wherever the experts in the cases above referred to were in contradiction, one of them was right and the other wrong. The failure to find traces of strychnia in a dead body is either entirely consistent with, or entirely inconsistent with, its having been administered. The analyst in Palmer's case who maintained one of these propositions was telling the absolute truth and the other was testifying to what was entirely false. Science had a faithful spokesman in one, and a false spokesman in the other. Truth was struggling to express itself through one; error through the other. It would seem, then, that it is at least the duty of the law to establish as many barriers to the progress and triumph of this species of error as is humanly possible. Under the Common Law of England, in vogue in Massachusetts and most of the American States, what are those safeguards? Whoever styles himself as a physician and who has some acquaintance with medicine, or who has had some practice, be it much or little, is regarded as competent to express his opinion as an expert, whatever may be his interest or bias.

To give an opinion as a medical expert, the law does not require that the witness should belong to any particular school of medicine. "The law has nothing to do with the merits of particular systems." (*Corsi vs. Maretzek*, 4, E. D. Smith, 1.) If the witness is a medical man and has the requisite knowledge, he may have acquired this knowledge either by study alone, although in practice he has observed no such case: *State vs. Wood*, 53 N. H., 484; *Finnegan vs. Fall River Gas Works Co.*, 159 Mass., 311; or by practice alone: *Mason vs. Fuller*, 45 Vt., 29. He need not have made the subject a specialty in his practice. Nor to give an opinion as a medical expert, need the physician (except in Wisconsin where it is required by statute) be a graduate of

a medical college, or even duly licensed: *New Orleans R. Co. vs. Albertson*, 38 Miss., 247. Nor need he be at the time in practice: *Roberts vs. Johnson*, 58 N. Y., 613; *Tulles vs. Kidd*, 12 Ala., 648; *Everett vs. State*, 62 Ga., 65. Nor need he have met a similar case in the course of his reading or practice: *State vs. Clark*, 12, Ired., 151. And finally, in some jurisdictions, it is not even essential that he should be a physician or should have studied for one, provided he has acquired the special knowledge required of the medical expert: *Re Toomes*, 54 Cal., 515; *Dole vs. Johnson*, 50 N. H., 452.

Insanity being deemed a disease, it is the general custom of our American judges to accept all educated and practising physicians as experts, whether they have given special attention to the disease of insanity or not. ("Bishop's Criminal Law," Section 544.) And it would even seem, from a dictum of one of our courts, that, in one State, at least, nurses, accustomed to attend upon the sick, are considered experts in respect to the mental capacity of sick persons. (*Fairchild vs. Bascomb*, 35 Vt., 298.)

In an Alabama case (an action for damages for false warranty in the sale of a female slave, a species of suit which was not uncommon in slavery times) a witness was permitted to give an opinion as to the soundness of the slave, whose qualifications were that previous to 1831 (the suit was brought in 1847) he had attended a course of medical lectures, had obtained a license from the Board of Physicians of the State to practise physic, and practised as a physician for one year when he abandoned medicine for the law, and for the period of sixteen years had been and still was following that profession, the witness stating that he had continued to read medical books, had kept up with the improvements of the science, and felt competent to express medical opinions upon the diseases of women. It was stated by the court in its judgment "that the clinical practice is doubtless a most efficient mode of acquiring such knowledge, by enabling the practitioner from his own observation, to verify the assertions or theories of others, or to correct errors into which they may have fallen; and it may be, that medical opinions, not brought to this test are not worthy of much reliance as the basis of the verdict of a jury. But, if one asserts an ability to give correct opinions, upon any art or science from any acquaintance with the subject, acquired by observation and study, we cannot perceive on what ground he can be rejected because he has not been in the actual practice of his profession. This circumstance may deprive his testimony of much weight with the jury, but is no ground for excluding it."

In a late case which arose in Illinois, a physician who had practised thirty-four years, a graduate of a Chicago medical college, who, so far as appeared, had never in his practice witnessed a case of arsenical poisoning, was permitted to express his opinion that the deceased, under the circumstances shown, had died of arsenical poison. (*Siebert vs. The People*, 143, Ill., 571.)

These cases are fairly representative of the general trend of the decisions of the courts in this country upon the degree of qualification required of the medical expert. The question arises, then, whether the law has not lost sight of his true status; whether, permitting a party to call whomsoever he may find, having some general knowledge of medicine and willing to support a favorable theory, is not a departure from the true principles which underlie the admission of such testimony. There can be no mystery as to the real purpose for which experts are called. "What is their function?" says Professor Thayer in his "Treatise on Evidence." "It is just this, of judging facts and interpreting them. They are called in because, being men of skill, they can interpret phenomena which other men cannot, or cannot safely interpret. They 'judge' the phenomena, the appearances or facts which are presented to them and testify to that which in truth these signify or really are; they estimate qualities and values. We say that they testify to opinion. In truth they are 'judging' something and testifying to their conclusion upon a matter of fact. For this reason, in Germany, experts are called *judices facti*—*judices* as opposed to ordinary witnesses, *judices facti* because they do not judge as to the law, but their judgment or opinion only gives as its result a fact." In this connection, it is interesting to note that when opinions were first admitted in the English courts as testimony (those which were offered earliest appeared to have been those of medical witnesses) they were received for the purpose of enlightening the court, and if they reached the jury at all did so through the medium of the court's charge.

In an appeal of mayhem tried in 1353, the justices having failed to determine from their own inspection whether a wound was mayhem, ordered skilled surgeons from London to inform the king and his court on this point.

An ejectment case tried in 1619 involved the question of the legitimacy of a posthumous child, and the court received the testimony of two doctors of physic in regard to the period of gestation, the record of the case reciting: "So the court delivered to the jury that the said Elizabeth, who was born 40 weeks and more after the death of the said Edmund Andrews, might well be the daughter of the said Edmund."

Sometimes the assistance of experts was obtained by the court without an open examination.

In 1703, Lord Holt, upon a question as to the negotiability of a promissory note, took occasion "To speak with two of the most famous merchants in London" as to their customs in regard to the endorsement of such paper. In an earlier case, at a trial for witchcraft in 1665, Dr. Thomas Browne, "a person of great knowledge," after viewing the accused was desired to give his opinion as to what he conceived of him, and he was clearly of opinion that the person was bewitched. (*Trial of Witches*, 6 How. St., Trans., 687, 697.²)

² For the early history of expert testimony under the English law see American and English Encyclopedia of Law. Second edition, vol. xii, p. 49.

It is difficult to perceive how an expert's position in respect to facts differs from that of a judge in respect to the law. The latter, upon all the facts, expresses his judgment as to the law in relation thereto; the former, upon some group of facts, expresses his judgment as to their significance and meaning so that the judge or jury, or whatever tribunal finally passes upon them may have a full understanding. In our law judges there are two requisites which every one is agreed are pre-eminent: learning and disinterestedness, and the faintest trace of prejudice, bias or partisanship disqualifies them. Neither little learning nor much bias, under our practice, disqualifies the expert.

We are zealous for learning and impartiality in our judges of law; why should we not be zealous for learning and impartiality in our judges of fact?

A mistake of law can always be cured by the revision of some appellate tribunal; a mistake in the opinion of the expert is often difficult to detect, and generally impossible to revise. The true status of the expert is entirely appreciated in those countries which inherited the Roman Law. In France and Germany, Italy and Austria, he is treated as a *judex facti*, a theory, which in Germany especially, is carried to its logical extreme. Whenever the man of science is there called on to express his judgment he is treated, not as an ordinary witness but as an assistant to the court, and accordingly is appointed by the court. The latter has the right to call experts at any stage of the case and of its own volition. It determines the number and exercises the selection of them. In but few cases the free action of the court in appointing experts is limited, where, for example, the law provides that in cases involving patents or copyrights, certain persons, *ex officio*, shall act as experts; and in civil cases the court is bound by the choice of both parties.

When the expert testifies he cannot be attacked like an ordinary witness; his veracity cannot be impeached because he is regarded as a part of the court and must be treated with like respect. The mode of questioning and the scope which the opinion may take are entirely discretionary with the judge and, in civil cases, at least, if the experts agree, the parties must accept their opinion as true, though not necessarily binding on the judge.

In America, the compulsory attendance of expert witnesses is of doubtful right and never exercised; in Germany and Austria whoever practices any profession or trade, or is authorized to do so, is obliged to act as an expert, when required, and the only reasons which will exempt him are those which would exempt from testifying as an ordinary witness. In Austria he swears to carefully follow the object of investigation, to truly and carefully state all his observations and findings, and his opinion according to his best knowledge, and upon his conscience, and according to the rules of his science and art. In Germany, he swears that he will give the opinion demanded of

him impartially and upon his best knowledge, and upon his conscience.

The reasons assigned by German writers for so markedly differentiating the casual or ordinary witness from the expert, are principally, that the former is only a witness by chance while the latter is selected because of his standing and should not be subject to like criticism or attack; the ordinary witness is not the subject of choice and cannot be dispensed with; the expert testifies only through the choice or by the permission of the court; the casual witness at the time of the occurrence in question is frequently not impressed with the fact that he is to be called upon as a witness; whereas the expert makes his observations with that in view. The ordinary witness seldom testifies without bias for whatever we live through becomes a part of us and is affected more or less by our feelings and habits of thought and one's personality is apt to permeate his testimony; in the expert, because of his scientific training, the personal element is more likely to be eliminated. In fine, the conclusions of the casual witness are based upon his personal impressions while those of the expert rest upon scientific facts and laws. (Holtzendorff's Encyclopedia of Law, Vol. III, part 2, page 512.)

In criminal trials in Germany the medical witnesses first called to testify are those whom the State has assigned to the judicial courts after previously ascertaining their knowledge in this department. The chief of the staff of professional experts is the district or town physician the statutory regulations requiring him to be scientifically educated, properly licensed and skilled in all the three branches of medical science, medicine, surgery and obstetrics; while there is also an organized series of courts of professional experts to whose judgment the opinion of the medical men first employed may be referred. The law, however, does not exclude private physicians, and they are frequently called to testify along with the official physician and sometimes to his exclusion. (Casper's Forensic Medicine, Vol. III, page 178.)

It may not be uninteresting here to epitomize by a quotation from Casper the German practice in respect to the written reports of official experts, and its provisions for their revision: "A copy of all the medico-legal transactions of all the medical jurists in Prussia, both protocols and reports, without exception, is sent by each respective local magistracy to the provincial government, and through it, in quarterly budgets, to the Royal Medical College of the province, for its revision. The same procedure is followed in regard to all inquiries regarding lunacy or idiocy in civil law. This board, on its part, transmits their transactions, along with its remarks upon each, to the ministry appointed, in which both transactions and revisions are submitted to a super-revision by its scientific commission, and the result is communicated both to the revising medical college and also to the medical jurists concerned, affording to the latter instruction or recognition and encouragement.

"Here we have," says Casper, "no doubt, a cumbersome official apparatus set in motion, but this arrangement is indubitably successful in its operation, inasmuch, as not only does it maintain the central courts constantly acquainted with the doings of their medical jurists, but also indubitably has its share in the elevation of the practice of legal medicine in Prussia, to a perfection hitherto, attained in no other country, a fact which must be acknowledged, and which has quite recently been recognized by a most competent authority."

In Sections 173-177 of the Code of Criminal Procedure, which we have already quoted, the cases are described in which the reference of a medico-legal report to the superior courts shall take place. The rule, and the practice in most cases, is for this report to be sent, along with the other documentary evidence, first, to the medical college of the province, and should the opinion of this board be from any cause disputed, they are then sent to the Royal Scientific Commission for scientific affairs, to obtain its superarbitrium. This is, as in the medical colleges, drawn up by two referees, who work each for himself; both of their opinions are then brought before a meeting of the commission, discussed, and that one which is approved of by a majority of the commission is accepted, signed and issued. A precisely similar sequence of professional courts is found in most of the German states. In some of the smaller ones, which possess no medical boards, the opinions of the medical jurists are sent, along with the documentary evidence, to some faculty, either at home or abroad.

One result of this legislation in Germany, which may seem to us too elaborate and perhaps artificial, is that the medical expert has at his command a series of written opinions and precedents of an authoritative nature, and embodying the best judgment of his profession. To the physician in forming his opinion, they must serve as useful a purpose as do the written judgments of the courts to the lawyer in forming his.

By sketching, perhaps at too much length, some of these features of foreign law, I would be misunderstood if I seemed to think it wise for us to model our own according to the same detail. The real keynote and underlying principle, however, of the law of Continental countries in this respect, is that the expert should be the partisan of neither side; that he should be as dispassionate and just as one of our own Massachusetts judges; that in fact as well as in theory he should be the assistant of the court. That principle, if we are to hope that at some future time the medical expert shall enjoy all the respect and credence which it is his right and the right of science that he should enjoy, must be followed in some form or other. And if we are to reform our procedure in this regard, we must, I believe, finally seek relief from that source to which already the Common Law of England and of this country owe a debt which is difficult to measure, it must be sought in the body of the Roman jurisprudence.

THE UMILLIAN MURDER.¹

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THE Umillian murder trial is said by those who are thoroughly conversant with such matters to be of peculiar interest because of the fact that more than three months elapsed from the time that the deed was committed before any actual evidence of crime was discovered, and of unusual interest because no direct evidence at any time was introduced as testimony into the trial. The murdered man's name was Casimer Jedrusick, the convicted murderer's name was Franciszek Umilian. For ease in description I will refer to them as Jack, the victim, and Frank, the murderer.

On the 10th of April, 1900, I was summoned by State Officer McKay to go to Granby, not knowing what the case was except that a man's body had been found. I reached the farm of Monroe Keith, two and one-half miles from Granby Centre, about 9 P.M. and was informed that a man's body had been found in an old unused well. By the aid of a ladder I went into the well, which was about 30 feet in depth, and found the remains floating, that is a naked body except for a bran sack. The body was lying with the buttocks above the water, with the upper part of the trunk lying in a northwesterly direction. On going to the surface, I gave directions, and the body was brought up by the aid of a rope, and immediately taken to an old unused building near by where I performed an autopsy. The head had been severed from the trunk at the juncture of the second and third cervical vertebræ. The body was mangled and slashed and cut in all directions. First, a punctured wound just above the right clavicle 2 inches in length, another one parallel to it, over the head of the sternum, 2 inches in length. This was also a punctured wound. There was a vertical wound extending from the middle of the right clavicle, about 14 inches long, and ending 2½ inches above the umbilicus. There was a transverse wound about 12 inches long, beginning at the middle of the right clavicle, and ending at the middle of the left. On the right side a wound in the anterior axillary line, 7 inches in length, extending from the sixth to the twelfth rib on the right side. There were incised penetrating wounds on the right arm over the biceps muscle, 2 inches long. The left arm was crushed, lacerated and torn. A transverse wound over the anterior superior spine of the ileum, two incised wounds on the left thigh, 4 inches in length, and an oblique fracture at the juncture of the middle and upper third of the left femur. There were two incised wounds in the inside of the right thigh, one 7 inches in length, and one 4 inches in length. The ribs on the left side, from the first to the ninth, inclusive, were crushed and broken. The sternum was broken and four ribs fractured on the right side. The heart and pericardium were absent, the large vessels being partially torn and partially cut. The stomach was empty except about a pint

¹ Read before the Massachusetts Medico-Legal Society, February 6, 1901.