SECTION OF SURGERY.

PRESIDENTIAL ADDRESS :

THE CONFLICT OF MEDICAL TESTIMONY IN COURTS OF LAW.*

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THE conflict of medical testimony in courts of law has been for many years a matter of great moment to us all. Therefore, I need not apologise for making it the subject of my present address.

I have frequently observed in the Dublin law courts the most distinguished physicians and surgeons divided in their opinions as regards the cause, present condition, and probable future result of real and imaginary diseases or injuries. In face of the conflict of medical evidence it is no wonder that judge and jury sometimes almost find it impossible to arrive at the justice of the case. Let me give you a typical example—railway shock. Where a person complains of injury in a railway collision, a surgeon is called on, either by the alleged injured person or by the railway company, to express his opinion. He must consider the case from at least four aspects :—

1. As to whether the person complaining has really been injured at all.
2. If injured, what is the nature and extent of the injury ?
3. Whether the injury is permanent, or likely to be permanent ?
4. If not permanent, when will restoration be ensured ?

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As regards the first point the great difficulty depends upon what position the surgeon holds to the alleged injured person, whether he is the usual medical attendant, or whether he is engaged in the interest of the railway or other defendant company.

If he is the usual medical attendant of the patient his task is less difficult. The patient will inform him without reserve concerning everything connected with the alleged injuries, and from previous knowledge of his constitution the surgeon will have ample opportunity of comparing accurately the patient's present condition with his state previous to the accident, and from his personal intimacy with the patient he will be in a position to estimate any overstatement of his sufferings.

On the other hand, where the surgeon is the recognised medical adviser of the railway company, or he may happen to be called in for the occasion to protect their interests, his tasks and duties are not nearly so simple. In accordance with professional etiquette he cannot visit the patient unless in the presence of or in consultation with the patient's medical attendant.

This usage is, of course, right in the main, but it has disadvantages. It often leads to inconvenience and loss of time in order to arrange an appointment that will suit all parties concerned. Secondly, when the patient has been made aware of the projected visit he prepares himself for the ordeal in great excitement, describing his sufferings in such a striking and vivid manner and with such minute detail as to compel the medical examiner to use all the knowledge and sagacity he possesses to distinguish whether what has been detailed to him is real, feigned, or exaggerated. Hence it has occurred to me, and doubtless to others of my brethren also, that the cause of truth and justice would be better served, in some instances at least, by leaving it to

the surgeon to exercise his own discretion in visiting without notice certain patients alleged to be suffering from injury. Then, and only then, will he see the patient in his natural or real state. Such visits I feel certain would help greatly to distinguish the cases of feigned from those of actual injury. In support of this view I can cite eminent authority.

Mr. Erichsen, referring to the conduct of railway surgeons when visiting a patient on the part of the defendant company, suggestively observes: "The patient is not yours—he probably does not wish to consult or even see you. Perhaps you are admitted to an interview with him and to an examination of him only after consultation with his solicitors and by their consent, or in virtue of the judge's order. He most probably looks upon you as being hostile to him and as coming with a view to making light of his misfortunes. Hence you will usually have but few opportunities allowed you of seeing the patient, generally only once, at most, twice or thrice. He is always prepared beforehand for your visit, he is excited, annoyed, or apprehensive with respect to it. You do not consequently see him in his usual frame of mind, and the mental disturbance thus occasioned may react injuriously upon and greatly aggravate his physical ailments. Above all you have no opportunity of taking him unawares and unprepared when your visit is expected, because, if unexpected you would have a good opportunity of judging whether this symptom or the other really existed, or if it existed, to the alleged extent."

Speaking from personal experience, I have occasionally gone with the medical attendant of the patient without previous notice of my intended visit having been given, and the information gained under such circumstances has been at times remarkable. In one instance, when we entered the room the patient was sitting on a chair. He received us pleasantly in a laughing, joking manner, not having the least

suspicion that I was the railway company's doctor. The moment he was informed who I was and the nature of my visit the whole aspect of his face suddenly changed. Instead of a pleasant open countenance, he assumed a sullen, dark, dejected look, and seemed greatly annoyed that he had been taken unawares. In another instance where my visit was expected, before my examination was over I was convinced I had to deal with a case enormously exaggerated, for the injury the man had received was so slight as to be incompatible with the symptoms described by the patient himself. The patient was so determined to aggravate and exaggerate his symptoms that for many months he prepared himself—by a continued invalid *regime*, and nursing his injuries, mental and physical, so that his imaginary ailments grew into stern realities—so that he became a confirmed wreck, all for the few hundred pounds he received for compensation. This man managed his case so well that he deceived his own medical attendants to such a degree that they were indignant when I ventured to suggest that some of the symptoms complained of were exaggerated. On another occasion I paid a visit on behalf of an Accident Assurance Company to a gentleman who it was alleged had received very serious injuries by falling off his bicycle in collision with a car. It was alleged that this gentleman was in bed. On arriving at his house and asking who was his medical attendant, I found he had no medical man attending him, that he was not at home, but was that day out shooting on the Dublin mountains.

Of course I am not suggesting that severe and permanent injuries do not take place as well as other accidents. I have on many occasions attended patients who have been severely injured. But I do say that one of the greatest difficulties, in a medical man's investigation is to distinguish between real and feigned injuries. Hence the regrettable conflict of

medical testimony in the law courts. I have heard advocates comment upon it as derogatory to the members of a noble profession and as calculated to defeat justice. An honest difference of opinion is quite another matter, but it is the direct conflict of evidence as to the presence or absence of serious symptoms in obscure cases, like railway shock or railway spine, that lead the public to conclude that doctors will expand or contract their powers of observation as to diagnosis and prognosis according to the interests of the side for which they are paid.

In this city, when an important case of personal injury is to be tried in the law courts, the solicitors retain the services of a powerful Bar, usually three K.C.'s and a junior on each side. Next to securing the Bar the question of medical witnesses crops up. Counsel directs the solicitor to have a consultation with the medical attendant, with the result that the doctor recounts what he knows. Senior counsel may think that his evidence is weak and will not influence a jury or that he is not sufficiently known. Accordingly some leading surgeon is frequently retained to back up the medical attendant's opinion. This gentleman is approached by the solicitor. The fee is arranged, and his attendance is secured to give evidence for the plaintiff. The moment the defendant company learns that an eminent medical witness has been retained their solicitor is put in motion to secure an equally eminent medical expert to give evidence on their behalf. Then it is sometimes thought desirable to have another medical man on behalf of the plaintiff. This is no sooner known than the defendant company in like manner engages the service of yet another doctor. Thus the case comes on for trial. The leading medical witnesses are heard on each side. Hard swearing takes place, resulting in conflict of testimony. How does this affect the court? Lord Coleridge says: "Such conflicts of scientific opinion are puzzling

to a judge who knows little, and to a jury who probably knows less, of science.”

His lordship, it may be observed, omitted all reference to the knowledge of medical science possessed by the Bar, but it probably would be only fair to assume that it does not occupy a higher standard than that at which the learned judge so modestly places the acquirements of the Bench.

Conflict of medical opinion in courts of law I know gives persons who are inclined to speak slightly of the profession an opportunity to misrepresent the real point at issue, as regards the difference of opinion, which frequently is more apparent than real. Indeed, I feel certain that it occurs much less frequently than is represented. Mr. Erichsen thinks that in at least 90 per cent. of all cases of surgical injury in which claims for compensation are made there is perfect accord between the medical men concerned as to the nature, the extent, and the possible duration of the injury. Such cases as these are necessarily settled out of court, and as they do not become the subject of judicial investigation they do not attract the attention of the public in the newspapers. In the small remainder of the cases, not amounting to one-tenth of the whole, a discrepancy or conflict of opinion takes place which is not as a rule with respect to the facts of the case, but has reference to the possible pathology, the ultimate extent of the injury, and the probable duration of the symptoms. When we consider that these injuries are chiefly lesions of the brain and spinal cord, affecting organs and structures the pathology of which is not as yet accurately determined, and consequently is less understood than that of any other part of the body, we cannot feel surprised that there is an occasional want of unanimity even among men who are exceptionally well informed on the subject of the injuries and diseases of the nervous system.

In every department of life conflict of opinion occurs. In

politics, religion, engineering, chemical and biological science, and in the law itself to at least as great an extent relatively as that which is met with in medicine and surgery. Let us see, then, to what extent conflict of opinion occurs in the law courts among the members of our own profession.

There are three classes of medical witnesses who appear in the small proportion of compensation cases which in the end drift into courts of law.

First, there is the *bona-fide* medical attendant of the case. Secondly, there is the recognised medical officer of the railway or other company. And, thirdly, there is the consulting surgeon or medical expert called in from his acknowledged acquaintance with the subject of the injury alleged to have resulted in the case at issue. The first two witnesses detail the actual facts, the present condition, and the various symptoms and signs observed by them or ascertained after careful examination, and the weighing of the objective and subjective symptoms present. As a rule there is not much difference of opinion between these witnesses. The conflict of testimony generally appears among the "experts" called on either side to testify as to whether the injury complained of is feigned or real, and if real, the probable duration of the lesion and the future effect it may have on the patient. I have already stated how these experts have been brought into the case, namely, that their services have been secured by the litigants themselves to give evidence. I think medical experts ought to be nominated by the court, and paid under the directions of the court.

I agree with Mr. Erichsen when he says: "The method of appointing experts is radically wrong and is productive of many evils." A medical man who is retained and paid by a litigant, being only human, does not see why he should not earn twenty or thirty guineas for his opinion when opportunity occurs. With the purest intentions possible, un-

consciously, almost instinctively, he is apt to become biassed in favour of the side he is called upon to support. He is inclined to look for the strong points on his own side and the weak ones on that of his opponents. It is fatal when a medical witness becomes an advocate. He should be in a position to guide the court in the direction of what he believes to be the truth. Conflict of opinion among surgeons as regards actual facts rarely or ever occur in cases of pure surgical injury, such as fractures, dislocations, ordinary wounds, but it is as to the deductions from admitted facts, and the opinions that may be legitimately based thereon, that different views are expressed. The difference of opinion thus conveyed appears to a non-medical tribunal to be much wider than it really is. It is often, as has been said by Mr. Erichsen, rather a difference of degree than an actual divergence of opinion as to actual conditions, and if the case were tried before a tribunal possessing the requisite amount of medical knowledge to form an independent judgment, these differences would be narrowed to a very slender line, if not reconciled. Sometimes discrepancies in scientific opinion cannot be explained away, or due value assigned to conflicting statements in consequence of the want of scientific knowledge on the part of the tribunal before which the case is tried.

How is it possible, to quote Lord Coleridge again, for a judge who knows little of science, and a jury who knows less, to form a trustworthy estimate of the scientific medical evidence that is brought before them? This is especially the case when that evidence relates not to matters of fact but to matters of opinion on some of the most unsettled problems in physiology and pathology, namely, those connected with the functions of the brain and spinal cord.

What would be said if a leading physician or surgeon, having little or any real knowledge of law, were asked to try a case involving some of the most intricate, obscure, and

complicated questions in the law of real property ? Suppose before him several King's Counsellors, debating those questions from opposite standpoints. Would it be possible for him to come to anything like a trustworthy conclusion, or one that would be satisfactory to the members of the Bar ? In the ordinary arbitrations for the compensations to be paid for lands compulsorily taken questions of law arise, and the arbitrator is entitled to have a legal assessor to guide him.

Surely the cases are parallel : on the one hand, the judge who knows little of science in a case which teems with scientific and technical possibilities of the most obscure character ; on the other hand, a surgeon who knows less of law dealing with a legal problem.

Therefore it is that I respectfully suggest that the court in actions for personal injury should be assisted by a medical assessor of undoubted knowledge and eminence who would assist the judge, enabling him to weigh and estimate the true value of the expert evidence given *pro* and *con*. If in the Admiralty Court it has been found desirable for the presiding judge to call to his assistance two nautical assessors, who have practical knowledge and experience in navigation where there is a question of responsibility for a collision, how much more should it be necessary for a judge in cases of railway shock to call to his assistance medical assessors selected and paid under the direction of the court who are above and independent of the contending sides, and who could weigh all matters of medical evidence at their true value ? So strongly did the Council of the Royal College of Surgeons in Ireland think on this matter that last year several discussions took place. On March 7th, 1901, notice of motion was given in these terms :—

“ That the Council of the Royal College of Surgeons in Ireland is of opinion that the conflict of medical testimony so often apparent in the law courts is derogatory to the profession and is fre-

quently subversive of justice. The Council, therefore, consider it desirable, on public grounds, that provisions somewhat similar to those already in force under the Workmen's Compensation Act, 1897, should be made for the appointment of independent medical referees in all cases in which there is likely to be a conflict of medical testimony where suitors seek compensation for personal injury."

A sub-committee of the Council was appointed to consider the matter, and their report came up for discussion at the Council Meeting, April 2nd, 1901. They recommended the adoption of the following resolution :—

"In cases of actions for damages for personal injury, the Council of the Royal College of Surgeons in Ireland is of opinion that the Court should obtain an independent surgical opinion, having regard to the necessary technical nature of surgical evidence, especially in cases of alleged injury to the spine."

After considerable discussion, the Council unaimously adopted a resolution in the following terms :—

RESOLVED,—“That the President and Council of the Royal College of Surgeons in Ireland having regard to the necessarily technical nature of medical evidence, are of opinion that in cases of actions for damages for personal injuries, the court should obtain the assistance of a medical expert other than those employed by the parties in the suit.”

This resolution was printed and a copy sent to each of the judges of the Supreme Court of Judicature in Ireland. But, so far as I am aware, the judges have never replied to this communication.

The action of the Council is not generally known. Perhaps this is the first *quasi*-public intimation. The administration of justice is at all times a subject of public concern. Hence I respectfully venture to hope that the suggestion of the Council of the Royal College of Surgeons, a suggestion which tends to the dignity of the medical profession and to the promotion of the ends of justice, will be duly considered by his Majesty's judges in Ireland and England at an early date.