A British Medical Association Lecture

ON

THE MEDICAL WITNESS.*

BY

H. H. JOY, K.C.

I WOULD like to preface my remarks by emphasizing the immense responsibility which attaches to the medical witness in connexion with cases of every sort in the various courts of justice involving medical evidence. In some instances the medical questions involved are comparatively simple, and the lay tribunal can to a certain extent exercise an independent judgement upon them. But, speaking generally, the doctor is almost in the position of a man who is interpreting for the court from some foreign language, and accordingly it is obviously his paramount duty to be scrupulously fair and frank. I would like to add that, in the opinion of those best qualified to judge, the medical witnesses as a class prove worthy of the high confidence reposed in them. It is interesting to notice in this connexion that the rules of evidence which apply to ordinary witnesses have had to be modified in an important respect in favour of the medical witness. Speaking generally, the ordinary witness may only give evidence as to facts, and from these facts the court draws its own conclusions; but the medical witness is permitted to give his opinion upon the facts which he has observed, or which are submitted to him—that is, he may state what, in his view, is the proper inference and conclusion to be drawn from a given set of facts; in other words, the court entrusts him with the duty of interpreting those facts, and this at once shows what a responsible and powerful position he occupies.

If the nature of the case to which a doctor is called is such as to suggest to him the possibility of ultimately being required to give evidence—it may be before a coroner or a civil or criminal court—he should equip himself from the start for such an eventuality. I advise him therefore in such a case to observe and record most fully everything that he finds. It is surprising how often great importance afterwards attaches to matters which at the time may not have seemed important. A doctor's connexion with a case may begin only at a later stage—namely, when he is asked to examine with a view to being called as a witness; he may probably be furnished with views or theories by the party engaging his services; he should keep an open mind; he should make his examination fully first and then see to what conclusion it leads; if he cannot to his own satisfaction support the case let him say so plainly; if he can, let him be careful to include in his "case note" everything which really affects his conclusion. It may be a long time before he finds himself in the witness-box; and when there he may refresh his memory from his note; but he may also be asked to show it to the counsel for the other side; obviously, if something to which in his evidence he has attached importance is not to be found in the note made at the time, he lays himself open to criticism. As regards the making of the note, dictation will do provided he takes the precaution to initial it, and he should see that it is dated. The note should be made at, or as nearly as possible at, the time of the examination; the witness should have the original note with him. But the doctor should not make a habit of using this "note" too liberally—any "refreshing" should be done before entering the witness-box; a witness is not likely to create such a good impression on the court if he gives the appearance of not knowing the facts.

Not infrequently, I suppose, you may wish to apply certain tests when making an examination, to help you to decide whether a man's condition is really the consequence of an injury or is due to disease; it is not always easy to know what to do. Each case must depend largely, of course, on its own special circumstances, but I think I may say this much at any rate: if there is some test which in your view is really essential to forming a sound conclusion, but is perhaps lengthy and irksome to the patient, you should at least ask him to consent to it, otherwise you may find,

when in the witness-box it is put to you, "Isn't so-and-so an accepted test of the presence of such disease?" you have to say Yes; and when you are asked why you did not apply it, you can say, "Well, I asked permission to do so, but the man objected and I could do no more." It will at any rate show that you were not avoiding it for fear it might have upset your view of the case. Such difficulties are largely, I think, obviated in cases under the Workmen's Compensation Act, because that Act contains provisions for what is in effect a compulsory examination of the man on behalf of the employer, and further provides that if he refuses to submit to or in any way obstructs such examination his right to compensation may be suspended until he has submitted; so in cases under that Act you would report to the employer's solicitors that you were not able to make what you considered a proper examination, and the court would then have to decide whether the man was refusing to submit to or was obstructing the examination. In connexion with examinations under that Act, you may like to know that the House of Lords has held that there is no absolute right in the workman to have his own doctor present at such examination, so if a workman refuses to submit himself unless his own doctor be present, it is for the court to say whether his refusal is reasonable or not; so that from your point of view you need not worry over any questions of etiquette as regards the attendance of the man's own doctor, though doubtless you would seldom raise objection to his being present.

When the case is one where you have to rely mainly or wholly upon subjective symptoms, test the man's credibility during your preliminary examination by such devices as appear best to you, so as to be able when in the witness-box to fortify your conclusions that he was or was not exaggerating his symptoms or perhaps malingering.

Sometimes doctors from either side meet by arrangement of the parties for an examination of the applicant, with the hope of agreeing, for instance, as to whether there is any incapacity or whether the condition is the result of accident or disease, and so saving litigation. This is an excellent thing to do (except from counsel's point of view); but my own personal opinion is that on all such occasions the discussion should by arrangement be "without prejudice," so that neither doctor can be examined or cross-examined, if the case should eventually come to court, as to what was or what was not said by one to the other. The failure to take this precaution has led to some unpleasant personal conflicts of recollection in the witness-box. Do not give your solicitor a stronger report than you can really maintain in the witness-box. For instance, if your report says that a man is a malingerer, there should be no risk of having to climb down and say that he is not intentionally exaggerating. Remember that counsel opens his case largely from your report, and it is a fatal thing to open it too high and see it being painfully brought down. Counsel's brief is almost invariably marked with a fee of 3 and 1, or 5 and 1, or whatever else he can get and 1. The 1 indicates a conference. When circumstances permit make a point of attending that conference; counsel can then get a far better grip of the medical aspects from a talk with you; he can also discuss with you the nature of the points which the other side is likely to put forward, and get your observations upon them. Also do all you can to get hold of the correct version of the facts—a by no means easy task sometimes, but obviously a most essential matter. In hospital cases ask to see the notes; they are not strictly evidence unless produced by the doctor who made them (who has often gone away), but the Court of Appeal has expressed the view that they should be at the disposal of each side. Of course, if in the progress of the case facts new to you come out which cause you to modify or even alter your views you will naturally have to act accordingly if you go into the witness-box; but in such a case take care to let counsel know how the new or altered facts affect your view. I think I can best explain my meaning by an illustration.

You have been called in to examine a case of a man who has some time ago received a blow over the spinal cord, and is now exhibiting symptoms of paralysis; you are told that the blow was at point A₂ and you see the symptoms of loss

* Delivered before the South Staffordshire Division, February 3rd, 1925.

of power are in the appropriate parts corresponding with an injury at that precise point; you have therefore concluded cause and effect, and were prepared to give evidence accordingly. During the case the doctor is called who saw the man while the mark of the blow was still to be seen, and he locates it at a spot which would not affect the paralysed part. You cannot, of course, any longer rely upon the opinion you had formed; nor can you give evidence—if you give it at all—without qualifying it by saying that “if the seat of injury was really so high up as Dr. So-and-so says, then I must admit it would not be reflected in the part now paralysed, and therefore is not the cause of it.” Now counsel or the solicitor conducting the case would almost certainly not know what a vital change of affairs would result from Dr. So-and-so’s evidence as to the precise spot, and you must at once explain to him what has happened, or else he will find himself hopelessly involved.

Now let us assume a case has reached the court. You are going to give evidence for the defendant’s side. Please do not think it is enough to be on call by the ‘phone to hurry round when your evidence is wanted. In the great majority of cases it is most essential that you should hear all the evidence, and especially, of course, the medical evidence; you may thus obtain some entirely fresh light upon the matter, and you can then, with your special skill and knowledge, be enormously helpful to your counsel; and further, when you go into the witness-box you will know exactly how the case stands and what you have to meet, and will be forewarned against the line of cross-examination.

As regards the actual giving of your evidence I would make a suggestion or two. Remember that the simpler the language of the expert the greater is his effect upon the court. In a case before a judge and jury a doctor stated in his evidence that “on examining the prosecutor he found him suffering from a severe contusion of the integuments under the left orbit, with great extravasation of blood and ecchymosis in the surrounding cellular tissue, which was in a tumefied state; there was also considerable abrasion of the cuticle.” The judge: “I suppose you mean that he had a black eye?” The doctor: “Yes.” The judge: “Then why not say so?”

Scientific evidence should therefore be as unscientific as possible when given in court. Take care to have ascertained beforehand what the real issues in the case are. I am afraid it does not always occur to those who engage your services that it is necessary for you to know the precise issues, but it almost always is, and you should see that you are fully informed. To take one illustration from an actual case. A man has had nystagmus which has incapacitated him, and he has received compensation. He “recovers,” and his employers claim to stop his compensation, alleging that any incapacity due to “the so-called accident” has ceased. He claims a continuance of the compensation, and it is necessary for him to show that his incapacity (that is, in this case inability to resume work in the mine) is due in one way or other to the so-called accident—namely, the disease of nystagmus. The doctors called on his side agree that he is now free from nystagmus, but say that it will probably recur if he again works below; but they omit to say that the danger of that recurrence is due wholly or partly to the attack that he has had. He loses his case; whereas if they could have said, “There is an increased susceptibility consequent on the previous attack,” the man would have succeeded.

In many of the matters that come into court under the Workmen’s Compensation Act the question is whether the injured man is now sufficiently recovered to do some work. In these cases you are asked to give evidence as to his capacity for work or as to what work is suitable for him; you should therefore ascertain what work it is that the employer is suggesting as suitable, and go and get personal knowledge of the actual work and of the surrounding conditions. Counsel for the man cross-examines you somewhat in this fashion: “Don’t you think for a man with impaired sight the work offered is unsuitable, because of his having to go about where machinery is in motion, or chips flying about?”—or whatever it is. If you can say, “No; I have seen the place myself under ordinary working conditions,

and the job is quite suitable for him,” you enormously increase the value of your evidence. Again, I would have you remember that, though the medical aspect of the case is perfectly plain to you, it is seldom plain to the tribunal; so that you should give your evidence in a way which will commend itself and be intelligible to the court: give in as simple language as you can the data upon which you rely and the reasons for your conclusions—for example, “When I find this and this followed by that, I am certain the cause is so-and-so.” The judge says to himself, “This fellow knows his job, and I can see his line of reasoning—it strikes me as sound.” When you are being cross-examined keep your temper, for the gentle art of cross-examination embraces infinite styles and varieties, and some, I am sure, must be enough to try the temper of a saint. Listen carefully to the question; beware of double questions, and if you do not understand what is put to you, say so and get it made intelligible to you before you answer. When being cross-examined do not merely answer Yes or No to medical questions; such questions are put to you presumably—at least they should be—because the witnesses for the other side are going to give them as their views, so explain your reasons for not accepting what was put to you. Avoid arguing with the cross-examiner; if there is anything you consider really objectionable in a question or in the way of putting it appeal to the judge—you are entitled to be protected from unfair treatment—but, of course, don’t do that unless it is really bad. If an extract from a book is cited to you in cross-examination, remember that you are fully entitled to see the passage and its context before you give your answer; it not infrequently happens that when investigated with its context the point which was intended to be made against you wholly collapses; or the quotation may be from a standard work now out of date; or from an old edition of a work, in the recent edition of which a different view is given; or it may happen (indeed, has) that the passage was one cited by the writer of the book for the purpose of contradicting it or exposing its fallacy. But when you know that you are giving a view which is really contrary to the usually accepted view, be ready to fortify it by your special experience or other good ground.

Some doctors, I believe, are so rash as to have themselves committed their views to writing. If faced with some earlier observation of your own on a point on which you have really altered your view, do not try to camouflage the two views, but say why you have changed your mind in the light of further experience or whatever the cause was. I think myself that when such a situation is dealt with fairly by the witness in that way the effect on the judge’s mind is to confirm rather than detract from the value of his evidence. The judge knows as well as you do that science is never final—experience, new discoveries, increased research cause the modification or reversal of views previously held; and while the judge respects a man who is strong enough to say that he has changed his mind in the light of further experience, he necessarily views with mistrust the man who tries to explain away or reconcile the two opinions. When, as sometimes happens, you are going to give your opinion in the witness-box that a man was a malingerer, you must be prepared for awkward questions in cross-examination and be armed at all points. Of course, you sometimes are provided with fairly conclusive evidence—for instance, a man has had an accident some time ago and injured some muscles of his back. He alleges that it is still stiff and that he cannot stoop without great pain. You get him to describe his woes, and listen most sympathetically to all he has to say, and soon get an inkling how far he is to be believed. Then during a friendly chat you “accidentally” drop the handkerchief with which you are wiping your glasses, and of course, if he politely bends down and picks it up without a groan you probably will not need to stay much longer; but it is seldom, I suppose, that you get such easy positive proof.

Let me give you an instance of an actual experience in this connexion. Counsel was cross-examining to try and prove that a man really was suffering from neurasthenia, and that he exhibited certain symptoms of it. The doctor says, “No, he is malingerer neurasthenia.” Counsel:

"Do you say that those symptoms can be voluntarily assumed?" Doctor: "Yes, I do." Counsel then asked him to give a demonstration of voluntary sweating. This so disconcerted him that he at once broke out into obvious perspiration, and so appeared effectively to establish his assertion, though one wonders whether it was quite a case of voluntarily sweating on his part.

If, as I suppose must sometimes be the case even with doctors, in cross-examination you find yourself being cross-examined on a subject on which you have no particular knowledge, do not try to answer; say you cannot deal with that; or, if you like, say what I heard said in court by a well known surgeon, indicating a well known physician who was going to give evidence also: "You'd better put that question to the finished article that follows me; I'm only a surgeon." I assure you the court will esteem you the more highly for not pretending to have knowledge that you do not possess. I need hardly advise you to avoid making any sort of attack upon the other medical witnesses or giving the impression that you consider yourself far superior. You probably know what Max O'Rell says of American experts—"Every fellow wishes the other fellow to think himself a devil of a fellow."

It is often a matter of amazement to counsel, and must even sometimes be so to yourselves, to find how completely doctors differ, or appear to differ, from each other in the evidence that they give about a case. Presumably both sides cannot be right—though I believe that in the great majority of such cases both sides are honestly giving their opinion; the reasons for this difference are no doubt various. Perhaps the most influential one is that of unconscious partisanship. You have become identified, as it were, with the one party: you are for his side; you cannot help noticing particularly and perhaps magnifying the points that assist your side's case; you overlook or fail to give due weight to points that do not fit in so well. The ideal medical witness should be on guard against this from the beginning; he should remember that he has probably approached the case at the very start with one side's views and wishes placed before him, and not the other's; he begins by looking for something, expecting to find it, instead of looking—with a quite open mind—to see what he does find.

Or, again, he is in the witness-box, is being cross-examined; he feels that it is "up to" him to justify the confidence placed in him by his side; it is human nature to want to "play up" accordingly, and almost unconsciously he adds a little or omits a little; he cannot bear the idea of "letting down" his side, or being what might seem to them "disloyal"; and when faced with a point which he sees might be unfavourable, he screws himself up just a little bit to enable him to discount it, justifying it to himself perhaps by saying, "Well, I know my man really is in the right, and is entitled to succeed." A clever cross-examiner will comprehend your state of mind, and try to get you to go a little further, and still a little further, and in the end you have to go too far and the damage is done.

Sometimes the cause for this difference of views is of quite another kind: there may be a real division in the profession upon the point under discussion—some think this, some that. Here is a chance for you to help counsel. As a rule doctors know something of each other's views and theories. I remember once in a case of nystagmus there occurred a remarkable difference of evidence. The question was, Had the man nystagmus or had he not? Eminent witnesses on my side said he had; an equally eminent witness on the other said he had not. Happily the mystery was solved: on a tip from my side the latter was asked what he meant by having nystagmus, and he answered that he admitted no nystagmus where the symptom of oscillation of the eyeballs was not present—little he cared for the extended definition of that disease in the Workmen's Compensation Act. Again, it may be in some cases that the respective doctors may have made their examination at widely different times, and the patient's condition may have essentially differed; no doubt various other reasons will suggest themselves to your minds. I mention these matters to impress upon you that you can frequently be of great assistance to counsel, not only by your giving evidence in the witness-box, but by

closely following the whole evidence and giving advice to him on points of this kind which may be invaluable for cross-examination. May I add, when possible, jot down your "tips" on paper and let him have them; it is not at all easy to take them in from a whispered conversation, while perhaps counsel is on his feet examining or cross-examining. You must remember that rarely, if ever, has counsel sufficient medical knowledge of his own to hope to cross-examine a medical expert effectively; and rarely, too, I am glad to say, has he any ground for cross-examining such a witness as to honesty or credibility; and so his only chance of making any impression is by being supplied by you with material whereby he may throw some new light on the case, or lay bare the reason why the doctor under examination may have been misled into forming such an erroneous view of the case.

If you make a deduction from certain stated facts, be quite sure there is no flaw in your deduction. No less a person than a very learned judge whose face was an exact counterpart of that of George III on the coins, on one occasion when counsel was inviting a jury to infer a certain consequence from the likeness of two people to each other, interrupted him, saying, "Don't dwell too long on that. It has been said I am the son of His late Majesty George III because of my likeness to him; all I can say upon that subject is this: George III was never in Scotland, and my mother was never out of it; so if you can make me out to be his son, do. Now go on." Counsel, in a stage whisper, for the jury to hear, to his neighbour: "But they might have met at the border!"

When you are being cross-examined be on the look-out for questions which assume that you have said something which you have not said, or that something has been proved which has not been proved, and for questions to which you cannot properly answer Yes or No—for example, "Have you given up beating your wife?" Considerable latitude is allowed to the cross-examiner, but he has no right to put unfair questions or make inaccurate statements, and the witness is fully entitled to point out the inaccuracy, and, as I have said—in extreme cases—to appeal to the judge if he thinks the question unfair. When you feel that you have scored a point and floored the cross-examiner with your answer, be content—do not try to kick him as well. That proceeding is apt sometimes to do harm. Your parting kick perhaps discloses something that provides him with a new weapon. So let well alone; remember the epitaph on the tombstone of one who failed to do so: "I was well, I wanted to feel better; I took physic, and here I am."

Bear in mind always that your function is to assist the court to arrive at what you believe to be a correct conclusion upon the medical question in the case, and you will do that most effectively by not showing any resentment at cross-examination, or trying to score off counsel personally, but by answering the questions courteously and simply; and, as opportunity arises, giving the reason why you cannot accept this or that suggestion that is put to you. So long as the medical witness conducts himself as an impartial expert giving assistance to the court, no counsel will gain any advantage by attacking him; it is only where he shows himself biased, or gives the impression that he is keeping something back, that he really exposes himself to effective cross-examination.

A medical witness in the box generally gives his evidence in chief with greater effect if he is allowed to give it in his own way; it is enough as a rule for counsel to say, "You examined Mr. — on such a day; what did you find?" Then you state all that you regard as of importance, and he then asks for your conclusions. This is far preferable to the half-and-half sort of way that so often occurs where counsel asks about this and that, and then the doctor is left wondering whether or not to mention other matters that have not been specifically asked. When that position does occur I advise the doctor to go on and complete all that he thinks bears on the point; but such misunderstandings seldom arise when they have met previously at conference. Again, when you are giving your evidence for the defendants—that is, after the doctors for the plaintiff have been in the witness-box—you should be prepared for

your counsel to travel somewhat freely beyond your mere proof or report, because he will almost certainly ask you to give to the court your views upon the points made by the doctors on the other side; he will probably say, "Now, doctor, you heard Mr. B. say he thought this was a case of so-and-so; what do you say about that?" Then is your opportunity to explain why you differ, and to endeavour to do so in a way that will convince the court that your reasons are sound. By doing this you have incidentally made it difficult for the counsel who has to cross-examine you, because you have dealt in advance with most of his material; and if he still persists in putting it the judge gets a bit restive and says to him, "The doctor has already explained that; what's the good of merely putting it to him over again?"

I would like, if time permits, to say a word about the position of doctors as regards what is somewhat vaguely described as "privilege," in so far as it concerns cases that come into the courts. For a witness in court there is no privilege recognized by the law as regards facts which the doctor may have observed or with which he has become acquainted in his capacity as medical attendant. Obviously there cannot be, because it would conflict often with statute law and nearly always with the administration of justice. As to the former, I may instance the Notification of Diseases Act and the Notification of Births Act. As to civil and criminal proceedings, it is apparent that over and over again the ends of justice would be defeated if doctors were allowed to decline, when in the box, to give evidence of the facts which had become known to them.

One can easily understand that in many cases it must be very unpleasant for a doctor to find himself asked to disclose information about his patients; but I fear that he can do no more than appeal to the judge to know whether he is bound to answer. The judge will say Yes; but the doctor will feel that he has done what he can to preserve the confidential relationship between himself and his patient. If he persisted in refusing to answer he would be liable to be committed for contempt of court. Incidentally I may mention that what a witness says in the witness-box is privileged, which means that it cannot be made the subject of an action for slander.

Now may I just try to give you a short summary of my suggestions?

Approach the case with an open mind.

Your examination should be complete—not limited (except in obvious cases) to the part affected or injured, but generally, of the systems and organs; it may later prove to be as important to say that such and such symptoms were absent as that some others were present.

Investigate carefully all the objective symptoms, and if the man complains of some that you do not then see—for example, sickness or passing blood—try to get a chance of seeing them; satisfy yourself as best you can about the subjective ones; make and keep careful records, and date them; and make as sure as you can that you have got the facts right.

When you make your report or give your proof, let it be as intelligible as circumstances permit to the counsel who is to have it: give the dates of your examinations, what you observed on the several occasions (if more than one), and then your conclusions and the reasons for them; ascertain what are the issues or points in the case, and show the bearing of the medical evidence upon them; attend if possible at a conference with counsel, and tell him what are the debatable features, and the probable criticisms or attacks to be expected from the other side.

When the case comes on, be there, stay there, and listen to the opening and the evidence, and jot down for counsel any tips or comments that occur to you. Diagnose the judge, and see what treatment he needs; then give it to him when in the witness-box—for example, clear his mind of some fallacy you have seen him absorb.

When in the witness-box speak plainly and not too fast, and as much as you can towards the judge; it is a good thing as a rule to adjust your pace to the judge's note; watch his pen; keep cool; do not let counsel make you lose your temper; do not argue with him; do not answer questions without being sure you understand them; and

always remember that the judge regards you as there to assist the court in arriving at the true view, and to give your opinions and make your criticisms honestly and impartially. Try to convey to the judge a clear and definite impression of what your decision would be; he wants you to enable him to arrive at a right and a real conclusion, and not to feel that he ought to give a verdict such as a jury once gave where the doctor at an inquest flirted alike with lightning and foul play as being the cause of death, and the bewildered jury's verdict was "Death from a visitation of God under suspicious circumstances."

An Address

ON

CERTAIN PHASES OF LEUCOCYTE ACTIVITY.

DELIVERED TO THE SHEFFIELD MEDICO-CHIRURGICAL SOCIETY

BY

C. J. BOND, C.M.G., F.R.C.S.,
LEICESTER.

SECTION I.—PATHOLOGICAL.

IN an article published in the *BRITISH MEDICAL JOURNAL* (January 11th, 1919) it was shown that when washed red cells are ground up, a drop of the suspension of the washed and sedimented debris, when incubated (in a closed cell) with two or three drops of the freshly drawn blood from the same individual, exercises a leucotoxic effect on the native leucocytes varying in intensity according to the degree of concentration of the red cell debris in the incubated blood. The leucocytes emigrate very sparsely from the incubated clot, and those cells which adhere to the slide show marked signs of arrested activity, and cytolysis.

Malaria and Leucocytic Activity.

In *The Leucocyte in Health and Disease* (London, 1904) a description is given of the leucocyte films from the incubated blood of a malaria patient taken during the pyrexial and the apyrexial stages of the disease respectively.

In blood obtained during the rigor or pyrexial stage emigration is very scanty, and the cells are spheroidal and show the cytolytic changes characteristic of poisoned cells. If, however, the same clot be detached from the slide, washed in normal saline, and reincubated on a fresh slide, a much more copious emigration of active cells takes place from the same clot after the removal of the serum. This proves that the scanty emigration in the first instance is not wholly dependent on a reduction in numbers of the white cells.

The findings of different observers as to a rise or fall in the mononuclear and polymorph cell count in various phases of malaria, and in blood drawn from different parts of the body, vary a good deal. The fact, however, that the emigration is very scanty from the incubated blood clot, taken during the pyrexial stage, while it is active from the same clot after the serum is washed away, strongly suggests that the inhibitory influence is in some way due to the presence of the blood serum and not to any lack of leucocytes. If blood be taken from the same patient during the apyrexial stage, normal emigration occurs from the incubated clot.

Induced Malaria.

The induction of malaria by the injection of blood from an infected patient in cases of general paralysis, for therapeutic purposes, has enabled us to carry out observations on malarial patients on a more definite plan.

The emigration picture is first obtained by incubating the blood from a case of general paralysis immediately before the treatment is commenced. A second emigration picture is taken during one or more of the dozen or so rigors which usually follow the injection of the infected blood. A third emigration picture is taken during the stage of treatment by quinine, and a fourth after recovery from the malarial infection. The character of the leucocytic