

**On surgical evidence in courts of law : with suggestions for its improvement / by John Eric Erichsen.**

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ON  
SURGICAL EVIDENCE IN  
COURTS OF LAW

WITH SUGGESTIONS FOR ITS IMPROVEMENT

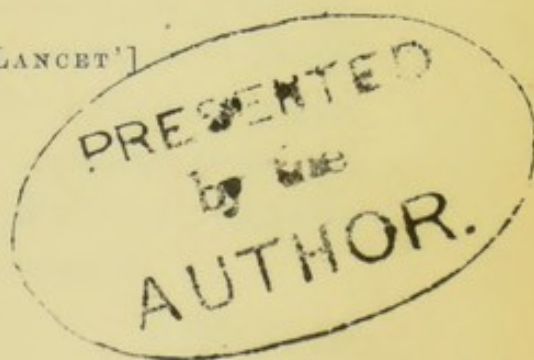
BY

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## NOTE.

IN the year 1866 I published a small work on a class of injuries that had then been very imperfectly studied, and were much misunderstood. It was entitled 'On Railway and other Obscure Injuries of the Nervous System.' This was followed, in 1875, by a more extended work on the same subject: 'On Concussion of the Spine, Nervous Shock, and other Obscure Injuries of the Nervous System in their Clinical and Medico-legal Aspects.' The publication of these works led to my being consulted in a large number of cases of the kind treated of in them. Many of these involved claims for compensation, and not a few became the subject of litigation. I found myself involved, more frequently than I could have wished or had contemplated, as a witness in those actions at law to which they often gave rise. Having thus had exceptionally abundant opportunities of observing the working of the Law as it at present stands in relation to these cases, I have ventured to point out in the following pages some of the inconveniences that have appeared to me to be connected with its practice, and to offer some suggestions that I trust may lead to its improvement.

J. E. E.

6 CAVENDISH PLACE, W.

*June 1878.*



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## SURGICAL EVIDENCE IN COURTS OF LAW.

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SURGEONS are now very frequently called into Courts of Law as witnesses in civil actions. Formerly this rarely happened, and it was not often that the surgeon appeared in the witness-box, except in cases of malpractice, which in this country have seldom become the subject of judicial investigation. In criminal cases a surgeon used occasionally to be called, as he is at present, either as an ordinary witness or as an 'expert,' to guide the Court in the solution of some intricate medico-legal problem. With physicians the case has been different. In Civil Courts they were frequently seen as witnesses in commissions *de lunatico inquirendo*, and in contested Will cases. In the Criminal Courts, also, when the law has had to seek the aid of medicine to guide it to a just conclusion, the opinion of the skilled physician has necessarily been sought in his capacity of medical jurist or scientific chemist. But so far as surgeons are concerned all this is now altered. The class of cases in which the physician is called continue as heretofore, but those in which the evidence of the surgeon is



needed have enormously increased in number as well as in importance. They are not criminal but civil; and I wish it to be clearly understood that it is to these alone that my observations will apply. Anyone who has had much experience in these cases must feel that, as the law now stands, a serious and very unnecessary inconvenience is inflicted on the medical practitioner. Much valuable time is wasted, the public convenience is disturbed, and in many instances it is a matter of grave doubt whether the ends of justice have been attained.

The more frequent appearance of the surgeon in courts of law at the present day is mainly owing to the change that has come over our social habits during the last quarter of a century. The enormous increase of locomotion by railway, tramway, omnibus, and steamboat; the crowded state of the streets; and the many perilous occupations in which multitudes of people are engaged, have greatly increased the number of accidents of all kinds. Many of these are, undoubtedly, the fault, more or less directly, of the sufferers themselves, who either are the victims of their own carelessness or contribute by their neglect of ordinary precautions to the occurrence of the catastrophe. But in no small proportion of the cases this is not so, and the sufferer believes himself to have been the victim of the neglect of those who were bound to exercise ordinary care in respect of him, and he therefore appeals to the law to soothe his sufferings and mitigate his losses by an award of damages from those by the acts of whose servants he has sustained personal injury.

The claims for the compensation which he seeks may be divided into three categories: *First*, claims for the expenses that have been entailed upon him in consequence of the accident in the way of surgical and medical attendance, nursing, change of air, extra food, &c. *Secondly*,



claims to fair compensation for the loss that he has sustained in his business or profession. *Thirdly*, claims for compensation, founded on the severity and the extent of his injuries, the probable duration of his sufferings, and his future incapacity for work. With the first two items the surgeon has, necessarily, nothing whatever to do ; they are entirely matters for the consideration of the legal advisers of the parties, and an equitable adjustment of them can very commonly, and without great difficulty, be obtained. The claims in the third category, however, have reference to the medical aspects of the case, and it is in the determination of these questions that the patient is necessarily compelled to seek the aid of the practitioner under whose care he has been. But in addition to this he usually takes the advice of some surgeon of known skill and judgment, not only to guide him in the treatment of his injuries, but to advise him as to their probable course, duration, and consequences, and thus to enable him to form some estimate of the claim that he may make in respect to them. Further, the company, be it a rail, tram, omnibus, or steamboat company, through the neglect of whose servants the injury has been inflicted, very naturally and very properly seeks to ascertain for its own guidance the truth of the statements made by the alleged sufferer. Having ascertained that he has been injured, it is of much importance that the company should know the extent, the nature, and more especially the duration of the injuries which incapacitate him for the ordinary exercise of his duties, and for which he seeks to obtain compensation. Accordingly a third surgical element is added to the two already existing, in the shape of the medical officer of, or the consulting surgeon to, the company. Thus we have from an early period in the case three



surgeons, or more commonly groups of surgeons, for they are often multiplied, or increased by the addition of specialists. Their number in the course of time also becomes swollen by the various medical practitioners whom the patient consults at different watering-places or health-resorts to which he has been advised to repair for the restoration of his shattered frame. Thus it not unfrequently happens that as many as from ten to fifteen surgeons and medical practitioners, of various kinds and from widely separated parts of the country, become involved in the case as it progresses.

As the law now stands, every one of these surgeons may be and probably will be, subpœnaed as a witness on one side or the other if the case goes on to trial. It is thought that the plaintiff's case will be prejudiced if any surgeons under whose care he has been should happen not to be called. If, when subpœnaed, a surgeon who knows but little of the case very naturally says to the attorney, 'It is really of no use for me to attend; the case is one of which I have seen but little, and I can be of no service to you;' or if he thinks it to be an unimportant or trivial one, and remarks that in his opinion it is a very light one, and his testimony can really add no weight to it, the reply usually is, 'We are very sorry to trouble you, and will take care that you are inconvenienced as little as possible; but if it comes out that you have seen the patient, and are not called, we fear it will prejudice our client's case.' If subpœnaed, the surgeon must, under severe penalties, attend on the day of trial, and from day to day so long as it lasts, and he must do this wherever the venue is laid. The country surgeon may thus be brought up to the metropolis, or the London surgeon carried down to some possibly far distant assize town in the provinces.



He must leave his practice, however extensive, and his patients, however numerous, and however serious and urgent their cases may be. The medical practitioner must leave the case of typhoid, which he has watched sedulously up to its crisis ; he must absent himself from the woman who is hourly expecting her confinement, or whom he has delivered but a day or two previously. The surgeon must leave the case of retention, which his skilled hand can alone relieve ; he must give over the amputation, the hernia, or the breast case operated on but a few days previously, and hanging between life and death, to the care of an assistant or a fellow-practitioner, who may know nothing of it. He must do this under the penalty of a fine of 100*l.*, and all the possible consequences that may ensue in being punished for 'contempt of court' if he wilfully disobeys the summons of the subpoena. No reason is valid for absence except illness, and this he may have to prove by a witness in court. He may suffer all this inconvenience, and his patients submit to all this peril, in the cause of a patient whom he has attended gratuitously in a hospital, from whom he never has received, or will receive, a farthing.

He may be subpoenaed in this way on the most trivial pretences. About twenty-five years ago the writer had under his care in the hospital a girl who, as she was walking along the street, had the misfortune to have the fore part of her foot crushed by the wheel of a coal-waggon. The injured part of the foot was removed by Chopart's amputation. When the girl was recovering, the writer one day casually said to the surrounding students, and partly to encourage the patient, that he thought she would not be much the worse for the injury she had sustained, as he had known a young lady who had suffered the same amputation able to walk and even to



dance without the mutilation being detected. The owner of the coal-waggon in some way heard of these remarks, and the writer was subpoenaed by him in order to prove that the girl was no worse for the loss of half a foot! The case, happily, did not come on for trial, being settled out of court.

One peculiar hardship that the habit of indiscriminately subpoenaing medical men in these cases inflicts upon the profession, and one which greatly aggravates the difficulty and inconvenience of their position, is this—that, as no day can be fixed for the trial, unless it happens to be the first on the list, he is kept in a state of uncertainty as to when it comes on, and often for days previously he is unable to make any appointment for consultation or operation with a certainty of being able to keep it. The hardship to the medical practitioner, when he is suddenly called away from his professional duties, is much greater than to the man of business under similar circumstances. The work of the professional man is usually of a purely personal character, and cannot well be deputed to others. Hence his professional losses are proportionately great. But the man of business habitually transacts some of his work through the instrumentality of partners, clerks, and agents, and his business does not consequently cease, nor does it even, in most cases, suffer by a few days of compulsory absence.

Now, for what grave ends is the surgeon subjected to this great inconvenience and loss, and the safety of his patients imperilled? Is it to give such evidence as will lead to the conviction of a poisoner, or to the acquittal of one falsely accused of some great criminal offence? Is it to lend his aid to the vindication of public justice? Is it even to give evidence that can in any way seriously influence one way or the other the most trivial case? He



is often called merely to swell the damages possibly by a very small amount. For A B has brought his action against the Railway Company; the negligence is admitted; the company has paid a sum of money into court, which their advisers contend to be adequate compensation. The plaintiff is not satisfied with the amount, an issue is joined for the recovery of some additional sum to which he considers himself entitled, such as the medical charges, or for the legal costs 'as between attorney and client.' The whole case is, indeed, narrowed down to the smallest possible compass. It becomes simply an assessment of damages within a very narrow margin, which very probably may be settled after brief consultation between the opposing counsel as soon as the plaintiff's evidence has been heard, and without a single witness being called. The evidence that the surgeon may have to give is perhaps absolutely valueless so far as the real justice of the case is concerned, but it is thought that unless called 'the case may be prejudiced.' Hence, at a great sacrifice of time, to the detriment of the well-being of his patients, he is called to speak to the injuries of a person whom he may only have seen once or twice, whose symptoms he can barely recollect, and in whose case he does not feel the slightest interest. For this great end every medical man who, in any way and at any time, has been consulted by the plaintiff, is forced to attend in support of his claim. Surely the machinery thus set in motion is altogether out of all proportion to the results aimed at, and many are endangered that one may profit.

Now it may be said—and the argument is a perfectly sound one so far as it goes—that the surgeon being a citizen and protected by the law, must in his turn when required, like every other good citizen, set aside all his private affairs, and give his aid to the law when it requires



his services. Undoubtedly this is so; and if the surgeon were the only person inconvenienced, he would have no reason to offer why he should be treated differently, as a witness, from any other member of the community. But the peculiar hardship here is that it is not the surgeon alone, but his patients, who are the real and principal sufferers by his compulsory absence. Setting aside the anxiety that is necessarily entailed upon him in being suddenly removed from important avocations, the only real loss sustained by the surgeon himself is a pecuniary one, though that in some cases might possibly be no slight matter. But even this loss is not always or necessarily sustained by him, for in many cases, more especially if a skilled witness, he is able to make arrangements with respect to fees that may be satisfactory to himself, and indemnify him against probable though not possible contingencies. But the penalty is, in reality, paid by his patients. They are the sufferers, and persons who have no concern whatever with the case, who can receive no remuneration whatever for the inconvenience to which they are subjected, may suffer most seriously by the sudden withdrawal of the services of their medical attendant. In this way a most prejudicial effect may be produced upon the health of one, the cure of the illness of another is suspended, or life itself may be imperilled, by the enforced and prolonged absence of the surgeon. This is no imaginary picture; the writer has often experienced it in his own practice, and knows that other surgeons have done the same in theirs. It is not only so far as his private patients are concerned, but his public duties are also brought to a standstill; and if he be a hospital surgeon, a teacher in one of the larger medical schools, or officially connected with one of the great medical examining bodies, hundreds of persons—patients,



students, and colleagues—may most seriously be inconvenienced, and suffer much by his compulsory absence from his duties.

So great have these evils become, that some of the leading surgeons now refuse altogether to see patients who have been injured on railways, or whose cases may become the subject of litigation. A medical man is of course entirely within his rights in refusing any special kind of professional work for which he may have neither taste nor time. He may refuse to go into a court of law as a witness just as he may refuse to sit on the Council of the College of Surgeons—decline to act as an Examiner, or take the office of President. So long as a few individuals only abstain from the performance of certain professional duties, no inconvenience results. But it is clear that if this course of action were to become general in the profession, its public business could not go on. And so it is with respect to surgeons declining to appear as witnesses in courts of law. Those who have neither time nor taste for such work naturally refuse to undertake it. But were *all* to decline to come forward, the public business of the community would certainly suffer serious injury and much inconvenience would necessarily arise. It is clear that if this practice were generally adopted the victims of such accidents would doubly suffer, for not only would they have sustained injuries, often of the most serious and protracted character, but they would find that the best and most skilled surgical advice was withheld from them. The refusal to see patients who have thus been injured, although under the circumstances perfectly justifiable, has an appearance of harshness, and is certainly not in accordance with those feelings which prompt surgeons to be ever ready to render aid to those in need, regardless of consequences to themselves. Other



surgeons again, if they consent to see the patient, do so only on the distinct understanding that they are not to be called as witnesses if the case goes on to trial. Such an understanding given by the patient is, I need scarcely say, absolutely worthless, for if the attorney thinks that the evidence of the surgeon so consulted will benefit his client's case, he necessarily and very properly, from his point of view, disregards his client's promise, and subpoenas the surgeon who can assist him.

Thus the present mode of calling surgical witnesses to speak to the sufferings of the injured has a tendency to deprive those who are unhappily the victims of the negligence of the great carrying companies of much of the most skilled surgical aid which this country can offer. The position of the surgeon is, in fact, this: If he refuses to see the patient injured, he not only damages his own practice, but inflicts a hardship on the sufferer; whilst if he sees him he punishes himself for his act of humanity by bringing on himself a subpoena compelling him, perhaps at a great sacrifice of time and at much inconvenience to his other patients, to attend at the trial. The position in which the surgeon is thus placed is most anomalous. The members of the medical profession, indeed, stand in a totally different relation towards the public in these respects to that of the members of any other profession or calling. Their position is as peculiar as it is anomalous. They are supposed to be ever ready to obey the call of those in distress, whether from sickness or from injury, and the very obedience they show to the summons in the case of some of those injured may eventually place them in a position to be unable to render to others the aid demanded of them. A surgeon actually engaged in practice is exempt from serving on a jury, because his compulsory absence from his



practice might be attended by serious inconvenience to the public at large. A surgeon, like every other duly qualified citizen, would have to discharge the duties of a jurymen without regard to personal inconvenience or loss, were it not that the compulsory and perhaps prolonged absence from his practice might entail serious and even perilous consequences on his patients and the public.

Now the inconvenience that arises by compelling surgeons, regardless of their other professional duties, public and private, to absent themselves from their practice, often for days together, in order to attend as witnesses in compensation cases, is certainly attended by at least as much detriment to the public good and convenience as would be their absence if serving on the jury which had to assess the claim. It can signify little to a woman in labour whether her medical attendant is detained in the jury-box or in the well of the court: from neither can he be released, however urgent her need, until his evidence has been given, or possibly till the case to which he has been called is concluded. But it may be said that it is easy for a surgeon to find a substitute, and to have his work done by deputy during his absence. Patients object much to the intrusion of a stranger in the place of their ordinary medical attendant, and will often only submit to it in cases of extreme urgency; and I have sometimes known it to happen that as many as two or three practitioners have been summoned from one small country town as witnesses in the same case, and detained in London for three or four days, and thus a gap has been left in the medical practice of the district which it is not easy to fill, more especially at a short notice.

The present system of compelling the personal attendance in courts of law, under heavy penalties, for the



purpose of giving oral evidence, of all those surgeons who have attended or been consulted in a case of injury on which a claim for compensation is founded, is not only, as I have endeavoured to show, attended by the greatest possible inconvenience, amounting often to great hardship to the surgeon himself, but, what may be considered of more importance, is the source of much suffering, and no little danger, to the public by depriving them for a time, often for days together, of medical service, possibly in the time of greatest need.

But there is another evil attendant on the present method of subpœnaing surgeons on one side or the other in compensation cases—viz., that it leads to conflicts of scientific opinion in court, by which, to say the least, the ends of justice are seldom furthered. As was said, with as much sarcasm as truth, not long since by one of the greatest ornaments of the Bench, Lord Coleridge, at a dinner of the Royal Society, such conflicts of scientific opinion are embarrassing ‘to a judge who knows little, and to a jury which probably knows less,’ of science. His Lordship omitted all reference to the scientific knowledge possessed by the Bar, but it would probably only be fair to assume that it does not occupy a higher standard than that at which the learned and accomplished judge so modestly placed the acquirements of the Bench. There is most certainly nothing discreditable in the fact that the Bench and the Bar should be equally ignorant even of the most ordinary facts in anatomy and pathology, or of the elementary principles of physiology. Their studies have taken different, it may be said almost opposite, directions to those of biological and pathological research. But though no discredit can possibly attach to the individuals, the system under which they act can scarcely be commended, when men who, on the highest



legal authority, are said to know little of science should be the arbiters of cases for the proper comprehension of which a knowledge, and sometimes a profound knowledge, of medical science, and a very special acquaintance with some of its departments, is imperatively necessary. The lawyers do their best, and often with consummate skill and judgment, under serious disadvantages, for they have to strive against a system which is equally unjust to them and capricious in its operations on their clients.

Of the causes of these conflicts of opinion I have elsewhere written at some length,<sup>1</sup> and I need not enter upon that debatable ground here ; but from no inconsiderable experience in these matters, I can truly say that I believe that the frequency and the extent of these conflicts of scientific opinion have been greatly exaggerated ; that the present system adopted in courts of law tends to foster them, and that under a different system they would almost entirely, if not completely, be set at rest. So far as their frequency is concerned, I believe I speak very considerably within the mark when I say that in at least 90 per cent. of all cases of surgical injury in which claims for compensation are raised, there is perfect accord between the various medical men concerned as to the nature, the extent, and the probable 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, do not attract the attention of the public. In the small remainder of cases, certainly not amounting to one-tenth of the whole, a discrepancy of opinion will arise. This difference of opinion is not, as a rule, in respect to the facts of the case, but has rather reference to the possible pathology, the real extent of the injury, and probable

<sup>1</sup> ' Concussion of the Spine, Nervous Shock, and Obscure Injuries of the Nervous System : ' Lecture xiii., p. 360 et seq.



duration of the symptoms consequent on the injury sustained. In fact, it is the true element, viz., the prognosis, or probable result of the case, which as it is always the least certain so it is the most fertile cause of conflict of opinion. And when we consider that these injuries are chiefly spinal or cerebral, that they affect organs and structures the physiology and pathology of which are not accurately determined, and consequently less well understood than that of any other parts of the body, we cannot be surprised at the occasional want of unanimity which occurs even amongst men who are exceptionally well informed on the subject of the injuries and diseases of the nervous system. Were such differences of opinion in the diagnosis and pathology of obscure and complicated diseases, whether of the nervous system or of other and more accessible parts of the body, only exhibited by medical men when they appeared in courts of law, the spectacle would indeed be a melancholy one, and would augur ill for the character and, possibly, even the honesty of our profession. But such conflicts of opinion are the unavoidable accompaniments of all that is still vague and uncertain in the science of medicine. It is, indeed, most unfair to the medical profession to stigmatise it as the only one in which there is a 'glorious uncertainty.' In every department of life, in politics or religion, in science or the law itself, conflict of opinion occurs to an extent equal at least to that which is met with in medicine. There is much in medicine, and probably more in surgery, that is absolutely settled and determined; but in some departments there still exists, and in none, unfortunately, more conspicuously than in that which becomes the subject of investigation in courts of law—namely, the remote consequences of injuries of the nervous system, one of the most intri-



cate, obscure, and difficult, problems in surgery,—a certain amount of uncertainty both as to the true pathology and the possible duration of such lesions. But he must, indeed, have had but a slender experience in the practice of our profession who has not witnessed conflicts of opinion arise, and not unfrequently too, in other places than courts of law. In the hospital ward, in the dead-house, in our medical societies, in the consulting-room of the practitioner, or in the sick-room of the private patient, differences of opinion as to diagnosis and pathology are of frequent occurrence. Such conflicts are, with the increased precision of medical knowledge, daily becoming less frequent here as well as in courts of law, and it may, perhaps, with truth be said that in some cases they are the result of one practitioner possessing a deeper and clearer insight into the real nature of the disease under discussion than his fellow-consultants have as yet attained to.

Inequality of knowledge will certainly cause conflict of opinion. He who is content with the knowledge of the pathology of the nervous system as it existed twenty, fifteen, or even ten years ago, cannot appreciate, and hence cannot coincide with, views founded on the more advanced and more accurate investigation of its diseases, and a clearer insight into the physiology of the brain and cord. But even between men equally well informed conflicts of opinion are on certain points not only unavoidable, but perfectly legitimate, and reflect no discredit either on the science of medicine or on those who entertain conflicting views. On the contrary, such conflicts of opinion may be looked upon as highly creditable to the independence of thought and the individual self-reliance that characterise professional opinion at the present day.

To revert to the subject more immediately under con-



sideration, in such obscure and complicated diseases as are those that result from injury of the brain and spinal cord, the same group of symptoms may, and indeed must, receive different interpretations from different observers, as to the exact nature of the pathological lesion of which they are the external manifestation, and the opinions based on these must be as widely divergent as are the interpretations of the phenomena on which they are founded. Let me give an illustration. Not long since I met in consultation two physicians of great eminence on the case of a lady who had become paraplegic during pregnancy, and in whom there was a suspicion of disease of the spinal cord. In this case electric sensibility, irritability, and reflex action were all completely extinguished, the lower limbs being as insensible to every stimulus that could be applied to them as those of a dead body. One of the consultants pronounced the symptoms to be due to softening of the cord, that the paralysis was incurable, and would consequently be permanent. The other gave it as his opinion that there was no organic disease of the cord, that the paralysis was functional, so-called 'hysterical,' possibly dependent upon anæmia of the cord, and that the patient would recover. This opinion proved to be the correct one. Now, had the paraplegia followed upon an injury sustained on the railway, had this case come into court as it most certainly would have done, if these two physicians had been consulted, the first by the patient, the second by the company, a most intractable and irreconcilable conflict of opinion must have arisen, and one that would have been perfectly honest, but dependent upon the different interpretation, the different value assigned to a particular group of symptoms, by two different physicians, both considered, and justly so, to be equally competent to form an opinion in such a case.



As has already been stated at the commencement of this article, there are three classes of medical men who appear as witnesses in that last small residue of compensation cases that drift into a court of law. These are, first, the *bonâ fide* medical attendants of the plaintiff; secondly, the ordinary medical officers of the company; and thirdly, the consulting practitioners—so-called experts,—those surgeons who are called either by the plaintiff or by the company to give opinions on the nature, the extent, and the probable duration of the symptoms resulting from the accident that the plaintiff has sustained. The duties of the first two classes of witnesses are usually simple enough. They consist in a great measure in relating the surgical history of the case, the treatment adopted, followed by some general opinions as to its future. The real conflict of evidence, if it occur, lies between the so-called ‘experts,’ whose opinions, just as in the case of the paraplegic lady to whom reference has just been made, may differ widely as to the essential nature of the actual condition and probable future of the patient. Let us inquire for a moment by whom this class of witnesses is summoned, and why particular individuals are commonly selected by one side or the other; for, unless I am greatly mistaken, it is in the method of summoning and selecting particular surgeons that we shall find the key to the cause of conflict of opinion that is an almost inevitable result. They are imported into the case by the litigants themselves, and not appointed, as I conceive they ought to be, by the court.

This method of appointing ‘experts’ is radically wrong. It is productive of two evils. A man who is retained and paid by a litigant is apt, with the purest intentions, possibly unconsciously, almost instinctively to become biased in favour of the side that he is called upon



to support. He is inclined to look for the strong points in his own case, and the weak ones in that of his opponents. However mindful he may be of the solemn and threefold obligation that he takes on entering the witness-box, he may, more particularly if he feels strongly the justice and truth of his own views, be led to endeavour to convince rather than to guide the court as to what he believes to be the right view of the case—to infuse somewhat of the advocate into the witness; and if he escapes this danger, and to the best of his ability gives his evidence without prejudice for or against, he is apt to be suspected of bias, which is almost as fatal to his character as a witness, and to the cause on behalf of which he is summoned. The selection of particular individuals is usually guided by the fact that the views of many surgeons with respect to the nature and the pathology of the injuries of the nervous system are well known, either through their published works or from their having been expressed openly in court. Hence each litigant, or, rather, their legal, and, probably, their more intimate medical advisers, take care to consult a surgeon, with the view eventually of subpoenaing him whose views are known to be in accordance with those they wish to have expressed. Thus men honestly and truly entertaining certain views with respect to a special class of injuries, but views that do not accord with one another, come to be pitted against each other when they are required to express in court those opinions which they are well known to entertain. Thus, in the case to which reference has just been made, the physician who gave it as his opinion that the paraplegia was due to incurable disease of the spinal cord would certainly have been called by the patient, whilst he who looked upon it as of a functional and curable character would as



certainly have been summoned to give evidence to that effect by the company.

Let us suppose, for example, that such a question as the 'germ theory of disease' became imported into a medico-legal case. The plaintiff, who wished to prove that his sufferings were due to the implantation of germs into his wound by the culpable negligence of the defendant, would certainly summon Professor Tyndall to support his case, whilst the defendant would as certainly invoke the aid of Dr. Bastian to prove that the germ theory is a fallacy, and that the disease was of spontaneous generation. The scientific witnesses would be selected by either side on account of their previously known and published opinions on the question at issue, and a 'conflict of scientific evidence' must infallibly ensue.

Conflicts of opinion between surgeons rarely, if ever, arise about facts. The only such cases in which I have known them to occur have been as to the condition of the eye as revealed by the ophthalmoscope. All cases of pure surgical injury, such as fractures, dislocations, ordinary wounds, have never, so far as I am aware, become the subject of disagreement, and, indeed, hardly admit of it. But it is in the deductions drawn from admitted facts, and the opinions that may legitimately be based on them, that different views are entertained. The difference of the views thus entertained often appears to a non-medical tribunal to be much wider than it really is. It is often rather a difference of degree than an actual divergence of opinion as to actual condition, and if the case were tried before a tribunal possessing the requisite amount of medical knowledge to form an independent judgment as to the point at issue, these differences would often be narrowed to a very slender line or be completely recon-



ciled. But Lord Coleridge hit the blot in the very interesting remarks that he made on the occasion referred to on the conflict of scientific evidence in courts of law, although, perhaps, he did so unintentionally. Discrepancies in scientific opinion are often fostered, and when they arise cannot be reconciled or explained away, or the due value be 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 for a judge who knows little, and a jury which knows less, of science, to form a trustworthy estimate of the scientific medical evidence that is brought before them; more especially when the evidence has relation, not to matters of fact, but to opinions on some of the most difficult, the most obscure, and hence the most unsettled problems in physiology and pathology—namely, those connected with the functions and diseases of the brain and spinal cord? Let us reverse the picture. Suppose that one of the most distinguished surgeons of the day who knew but little of law were to try a case involving some of the most obscure and complicated questions of legal science, and that he had called before him various Queen's Counsel or serjeants learned in the law as witnesses on either side, 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, on the question at issue? And yet the cases appear to be tolerably parallel—a judge who knows little of science sitting in judgment on a case involving scientific questions of the most obscure character, or a surgeon who knows little of law doing the same by a legal one, and all this before a jury said by a learned judge to know less than little of the matter in dispute before them.

That a want of specially skilled scientific acquirements



on the part of the court is felt to be a serious evil is evident from the fact that in some cases in which questions arise that require for their proper and just solution an amount of technical knowledge which an outsider, however skilled in other branches of learning, cannot be expected to possess, the court is assisted in its conduct of the case and in its judgment on it by men who have a special professional knowledge of the points at issue. Thus in the Admiralty Court the judge is assisted by the Trinity Masters, in the Wreck Commissioners Court by two naval officers who act as assessors. It is felt that questions connected with the science of navigation and the practice of seamanship are too technical to be decided by a tribunal which possesses little knowledge of such matters unless assisted by men who have made the one their special study, and the other the business of their lives. But, surely, the science of navigation is not more specially difficult than that of medicine, or the practice of seamanship than the art of surgery, and yet a judge feels himself incapable, unaided, to pronounce on the one, and has no hesitation in doing so on the other. A special technical knowledge of the question at issue is absolutely necessary in order properly to master its details, and to form a competent judgment on the opinions brought forward in support or in contradiction of it. No general soundness of judgment, no amount of general learning or even of scientific attainment in other departments, will enable a judge to decide whether a ship was on its proper course when a collision occurred, or whether a particular train of symptoms is indicative of some special pathological change in the spinal cord. These questions can only be correctly answered by those who are specially and practically acquainted with that branch of science to which each belongs. In order to judge of the value of



so-called 'scientific' evidence, a special and technical knowledge of that particular branch of science, and of its applications to the art to which the subject under consideration belongs, is needed. A man may be a proficient in one department of science, and utterly incapable of giving an opinion on another. He may be deeply versed in exact, and be profoundly ignorant of natural, science. He may be intimately acquainted with one department of natural science, and know absolutely nothing of another. A Herschel or a Faraday would have been as incompetent to give a scientific opinion on a purely physiological or pathological point, as a Hunter or a Baillie might have been to solve an astronomical problem or explain a chemical phenomenon. The value of special technical evidence can alone be judged by those who possess special technical knowledge of the same department of art or science.

Manifold are the evils and great the inconveniences that arise from the practice of trying surgical questions before legal tribunals that possess little or no knowledge of medical science.

These evils affect alike, though in differing degrees, witness, counsel, and judge. Of these I will instance a few. But first let us consider the effect produced on the mind of the surgical witness and on the character of his answers. In order to make himself at all intelligible, the witness is often obliged to be very defined in his answers, and he often becomes insensibly more positive and dogmatic in his statements than he would have been had the tribunal that he was addressing been better able to understand their real import. He cannot venture to employ those minor shades of expression by which he could more correctly have explained his meaning, had he been addressing members of his own profession. The court is



much in the position of a person who is being addressed in a language with which he is but very imperfectly acquainted. He can comprehend a few sentences plainly spoken, but is completely lost if the person who addresses him ventures upon those niceties of speech, by which his meaning would be rendered much more minutely accurate, and consequently more intelligible to anyone thoroughly acquainted with the language he employed. If a medical witness uses shades of expression to designate different degrees in the severity or nature of the symptoms that he is describing, he will probably be supposed to be using words to conceal his real thoughts, when he is, in fact, simply employing the best forms of expression that he can devise in order to convey with clearness those thoughts which are unfortunately beyond the scientific comprehension of his hearers, but which would be perfectly intelligible, and convey very accurate ideas to the mind of anyone well informed in medical science. Hence, in order to make himself understood, the witness is apt to become too dogmatic in his answers, and he is even occasionally induced to hazard statements which he would scarcely have made before a more scientific tribunal. I have heard, for instance, one eminent surgeon, now dead, when asked if he agreed in the evidence that had been given on behalf of the plaintiff, reply, 'I dissent from every word of it.' I heard another designate the employment of the electric test for the determination of the irritability of muscles as a 'mere toy,' which might be useful to amuse by galvanising the legs of frogs, but could be of no service as a means of diagnosis. Now, there can be little doubt that both these gentlemen were led into too positive an assertion in one case, and to an undue disparagement of an important scientific test in the other, because they were addressing an audience which might



have misjudged their meaning, had they attempted to qualify it.

Another inconvenience in giving medical evidence before a tribunal that possesses no scientific knowledge is this, that the most ordinary terms are liable to misconstruction. They are understood, in fact, by the non-medical public in a sense different from that in which they are received by medical men. Take, for instance, the word 'paralysis.' Every third-year's student knows that there are various forms and degrees of paralysis, and that the term 'paralysis' is a widely inclusive one; that many affections totally distinct in cause, in seat, and in degree, are included under that term: that it may be cerebral, dependent on disease of the brain—spinal, on some lesion of the cord—or local, on an affection of a particular nerve; that it may affect sensation or motion, or both; that it may be hemiplegic or paraplegic; that one muscle only, as the external rectus of the eye, or one group of muscles only, as those supplied by the portio dura of the seventh, or by the external popliteal in the leg, or the musculo-spiral in the arm, may be affected by it. But to the non-medical man the word 'paralysis' is evidently usually associated with one form only—that of cerebral paralysis, giving rise to hemiplegia. Hence the use of the word 'paralysis' in a different and especially in a more limited sense will often occasion great confusion. If a surgeon uses the word 'paralysis' when only one muscle or one group of muscles is affected, and qualifies it by speaking of it as partial, he will very likely be supposed to exaggerate the condition of the patient, and to endeavour to mislead the court. If he says that the plaintiff has paralysis in the lower limbs, he will probably be asked if the patient walks with a 'paralytic gait,' it being evidently erroneously supposed that there is one



peculiar method of walking which is common to all paralytic people. He may reply that there is no such thing as a 'paralytic gait'; that some paralytic people cannot walk at all; that a hemiplegic patient, if able to walk, uses his limbs in a totally different manner to a paraplegic one, and that a paraplegic patient will walk very differently, according to the extent of his paraplegia, the degree of it, and the special nerves affected by it. It is quite clear that a question like this, which appears to be an extremely simple one, is yet of a nature to which no dogmatic reply can be given, while a prolonged explanation is scarcely admissible. The witness cannot deliver a clinical lecture on paralysis from the witness-box, and nothing short of that would explain the different forms of that affection, and the different movements made by patients variously affected by it. But a question of this kind is very apt to be pursued still further. He will be asked whether the patient 'drags his leg,' or raises his heel, or lifts his toe first, and the climax of absurdity will be put to the whole thing when he is probably asked whether he has examined the soles of the patient's boots in order to diagnose the extent and the direction in which the paralysis existed. It is in vain that the surgeon may urge that many patients who are not paralysed wear their boots very unequally, that the boots might be new, and that time had thus not been given to wear them more on one side than the other; that if the patient were malingering he might easily have rubbed down one side of his boots to give a false aspect of wear; that the examination of boots is rather a matter for a shoemaker or a detective than a surgeon; that the latter possesses more certain means of diagnosis to determine the existence or not of paralysis, and of its extent, than the examination of the soles of a patient's boots. He may say



all this, but all is in vain; the boots are pertinaciously stuck to, and the condition of their soles is triumphantly appealed to as evidence of paralysis, or of malingering, as the case may be.

I can picture to myself a student presenting himself for examination, and giving the state of the patient's boots as one of the diagnostic signs of paralysis, and the blank look with which the examiner would receive this novel and certainly not very precise or scientific method of diagnosis. All this is sufficiently absurd, and, were no important issues at stake, the surgeon might afford simply to smile at such a course of inquiry. But when he finds that the object of such an examination is to discredit the evidence which he has truthfully and conscientiously given, to prejudice the jury against him, and to lead them to what he believes to be an act of injustice towards his patient, his feelings become those of indignation and annoyance rather than of amusement.

If the surgeon ventures out of the beaten track, and suggests that some of the symptoms complained of are referable, not to the condition of the brain or of the cord, but to another system of nerves, with the nature, the anatomical relations, and the functions of which all scientific practitioners are well acquainted—namely, the 'sympathetic'; if he ventures to explain a congestion, a discoloration, or a loss of temperature in the part by some disturbance of their vaso-motor action—a doctrine which is perfectly intelligible to any ordinarily well-educated medical man, and the soundness of which would at once be admitted,—he soon finds that he has got out of the depth of the court, and that he has become too technical for those who know 'but little, or less than little,' of medical science; and surely he can scarcely be censured



or considered to be in fault in failing to give an intelligible explanation of somewhat obscure phenomena when those whom he addresses, however learned in their own profession, and however accomplished as scholars, or refined as men of taste, are, from want of a knowledge of medical science, utterly incapable of following out the details of a strictly medical argument.

But it is not only that the surgeon finds that he often has a great difficulty in making a scientific explanation of obscure physiological and pathological phenomena intelligible to those who are not acquainted by previous education and study with biological science. He finds that, however clear and distinct his statement may have been, there is a tendency to disparage and break it down in cross-examination by a method which appears to everyone acquainted with the subject to be in the highest degree unfair, and as tending to obscure rather than elicit the truth, although the course that I am about to describe doubtless appears perfectly just and proper to those who practise it.

Every medical man knows that in the vast majority of diseases a correct diagnosis is formed, not by attention to one symptom only, but by taking a whole group of symptoms, which, when associated together, constitute positive evidence of the existence of some one particular form of disease, though each one of these symptoms, when taken separately, may be common to many affections, surgical or medical. To use a technical expression, the 'pathognomonic' group of symptoms is 'pathognomonic'—that is, absolutely and positively characteristic of, and indeed in themselves constitute—a particular disease; but not any one symptom of that group taken separately is absolutely diagnostic of or constitutes any disease. Now the system of which I am speaking, and which, as I have



just said, doubtless appears a perfectly reasonable and proper one to a non-medical man, is this—that the cross-examining counsel asks the surgeon why he says that the patient has such and such a disease. The surgeon enumerates a group of symptoms. The counsel then breaks up this group into its units, and, taking each one separately, necessarily obtains from the medical witness the admission that it by itself is not characteristic of the disease in question, but is common to many. To illustrate my meaning by an example, I would say that the medical witness states that the patient has had typhoid fever. He is asked on what grounds he makes his statement. He says that the patient had great prostration, a high temperature, a brown tongue, diarrhœa, and spots on the abdomen. Now it is quite clear that if he is asked whether any one of these symptoms is indicative of typhoid fever, he must say no; that prostration, a brown tongue, diarrhœa, high temperature, and red spots on the abdomen, taken separately, may occur, not only independently of typhoid fever, but as a consequence of a great variety of different morbid conditions. It is in vain that he urges that it is the peculiar aggregation or grouping together of the symptoms that is indicative of the disease, and not any particular one.

Mr. Alfred Wills, Q.C., than whom no man is better able to give an opinion on such a subject, writes thus:<sup>1</sup>—‘Cross-examination is very often a keen encounter of wit, and he who gets the worst of it does not altogether like it—nay, sometimes he is very much irritated, and feels very sorely, for the time being, at all events, towards his antagonist who has foiled him.’ No one who has been much in courts of law can fail to remember instances in which the foiled counsel, unable to ‘shake’ the evidence

<sup>1</sup> *Nineteenth Century*, Jan. 1878.



of a witness, has given vent to his ruffled feelings in his reply ; when, secure from interruption or rejoinder, he could revenge himself on a defenceless opponent by the exercise of all his powers of sarcasm and invective. But, according to Mr. Wills, whose great experience must have given him ample opportunities of judging upon this subject, even the occupants of the Bench would not be proof against the irritating effects of prolonged cross-examination if carried on by them, for he goes on to say : ‘ Human nature is not changed by being outwardly clad in scarlet and ermine, and judges must be more than mortal if they could conduct a rigorous and critical cross-examination, and remain under all circumstances in a judicial frame of mind to the last.’<sup>1</sup>

I never listen to a counsel who in his reply, or even to a judge who in his summing up, deals mercilessly with a witness whose testimony has not been in accordance with the interests of the one or the susceptibilities of the other, without having forcibly brought to my mind an occurrence that happened many years ago at a meeting of the British Association for the Advancement of Science, —to the Physiological Section of which I was then secretary—in a large cathedral town. An animated discussion arose in the Geological Section on the comparative truth of the Mosaic account and the geological version of the Deluge. The Dean, who strongly defended the Mosaic account, was thoroughly beaten by the geologists. The next Sunday he preached a sermon in the cathedral, taking for his text a verse from the seventh chapter of Genesis, and proving, to his own satisfaction at least, the absolute accuracy in all its details of the account there given of that great cataclysm. On entering the vestry after the service, he was heard to

<sup>1</sup> *Loc. cit.* p. 174.



exclaim to a friend: 'Ah, none of those fellows could answer me there.' It is not alone in a cathedral that a man may exclaim 'None of those fellows could answer me there.'

Conflict in evidence is apt to be fostered by the different motives that actuate the counsel and the scientific witness. The counsel seeks victory; the scientific witness has, or should have, for his sole object the establishment of the truth. These differing motives often lead either to collision of opinion between witnesses and counsel, or to apparent conflicts of evidence between the witnesses themselves. The counsel seeking, as is undoubtedly his duty, to win his cause, or at least to do the best he can for his client, will often endeavour to perplex and harass the scientific witness by putting questions to him, and insisting upon a categorical answer to them, which cannot be given in justice to the case. It is not to every scientific question that a bald 'yes' or 'no' can be given in answer. Many answers require explanatory statements in order to prevent the reply being too dogmatic and limited in its scope. It is true that such an explanation can be given by the witness, but not until after the question has been answered, and then the answer is taken and the explanation too often ignored.

When a medical man is asked for an opinion as to the probable course or duration of a case, he draws in a great measure from his experience in giving it. It may be difficult for him to assign definite reasons for the particular opinion he holds, but he has generally found such and such cases recover: others do not—why he cannot tell: 'opinion probably right, reasons probably wrong.'

There is no distinct precedent or rule of practice to



guide the surgeon in the formation of his opinion. If all men were cut out of the same block ; if all accidents produced exactly the same effects ; if all patients had the same skilled surgical attendance and careful nursing ; if there were the same freedom from care or the same amount of tenacity in all ; if, in fact, all circumstances, moral and physical, were equal in individuals who were exactly alike,—every surgeon would form the same opinion, and no conflict would occur. But as it happens that every one of these circumstances is unequal, and to what extent the inequality extends is not always easily ascertainable, the surgeon has no positive data to go upon, and must often give a somewhat empirical opinion as to the future condition of the patient

Another evil arising from the want of scientific knowledge in the tribunal before which the case is tried, is the difficulty of appreciation by it of the proper bearing of ordinary means of scientific investigation in medical practice. It is often necessary to test the patient in various ways by scientific apparatus, such as the ophthalmoscope, the æsthesiometer, the dynamometer, and electric batteries of various kinds. The indications afforded by these tests are often of the most important character ; their value is that they furnish the surgeon with a series of objective phenomena by which the diagnosis can be determined, and the patient's real condition ascertained, by evidence of the precise nature of which he himself is probably quite ignorant, and which he cannot influence by any act of his own. The appreciation of the value to be attached to the results furnished by such tests is necessarily a matter of great difficulty to a non-scientific tribunal, and no surgeon would have ventured to have designated such a test as that for the determination of the electric irritability of



muscle as 'a mere toy,' had he been addressing a scientific audience. That there should be a difficulty in the due appreciation of the real value of these scientific tests by non-scientific men cannot be considered altogether a matter of surprise; for, indeed, there are comparatively few men in the medical profession who are sufficiently skilled in these investigations for the results to be relied on in their hands. A very able writer in the *Lancet* of December 15, 1877, says in reference to this subject:—'The injury from which the patient is suffering is usually of a very occult character, and such as can rightly be estimated only by those who have been very specially trained in the observation of nervous disorders, and by the aid of delicate instruments *which few, even within the pale of the profession, are thoroughly qualified to use.*' The writer goes on to say:—'What usually occurs in such cases as these is a disgrace to the judicial system, and is so unfair in its action upon plaintiffs, defendants, and those who are compelled to give professional evidence, that an alteration of the law must be considered as a proved necessity.'

In the remarks which I have hitherto made, I have endeavoured to show that the present mode of subpoenaing witnesses and of taking evidence in the cases under consideration is vexatious and harassing to medical practitioners; that it is attended by very serious inconvenience, amounting in some cases to actual peril, to the public; that it is an anomaly, and indeed a detriment to justice, to try questions, the answer to which depends entirely upon scientific evidence, before tribunals which are notoriously and avowedly quite incapable of appreciating scientific medical evidence, and which have been stated on the highest legal authority to know 'little or less than little of science.' That the want of this special



scientific knowledge, and the consequent inability on the part of the court to check dogmatic assertions, or to appreciate at their true value hasty statements made by the witnesses, tend materially to encourage conflicts of opinion, which might, and indeed would, be effectually restrained, if not altogether silenced, by a tribunal possessing such an amount of scientific knowledge as would enable it to judge of the real value of the statements made before it. This is more particularly the case when those statements have reference rather to matters of opinion, of which different views might naturally be taken by men equally competent to judge, than to the establishment of facts, the existence of which could be determined by direct observation. Another evil connected with the present practice of giving scientific evidence before a non-scientific tribunal is that the relative value to be attached to the statements of different men cannot be correctly appreciated by it. One 'doctor' is as good as another in the eye of the law; and, not to mention the names of living men, if the evidence of a Marshall Hall or a Charles Bell on an obscure point of nerve physiology or pathology were to be positively contradicted by a 'distinguished surgeon,' who derides openly physiology, who designates the electric test 'a toy,' and has never attended to nerve pathology, the court would be greatly puzzled which to believe. Before a skilled tribunal there would be no difficulty in attaching the proper scientific value to each of the two opposing statements.

Having thus discussed the position held by surgical witnesses in respect to compensation cases, and the tribunal before which they are called, let me say a few words concerning the plaintiff, and see whether the law as it at present stands tends to further the ends of justice,



or to impede its administration. We will suppose the case of a man who has been seriously hurt in a railway collision—who has been severely shaken, whose nervous system has in consequence been utterly disorganised, who has become emotional, hysterical, hypochondriacal, partially paralysed—in fact, broken down in body and mind, and reduced to the condition of a miserable nervous invalid. The negligence is admitted, the liability of the company is undoubted; an offer has been made which is considered insufficient on the part of the plaintiff and his advisers, and the question resolves itself into the very narrow one of an assessment of the proper amount of damages for the personal injuries which are admitted to have been sustained, and their legal consequences in the shape of pecuniary loss and increased expenses. The two latter questions are easily settled, and could be satisfactorily adjusted in an hour or two by any accountant. The only point of real importance that is left is, for the plaintiff to prove the extent and probable duration of the injuries from which he has suffered and is still suffering. Now the process through which such a person has to pass before he can recover the compensation which is admitted to be due, is something of the following kind. After having been under treatment, perhaps confined to his house, for many months, possibly for a year or more, too ill to take exercise, to attend to his business, or to enter society, during which time he has been subjected to several prolonged surgical examinations, he is brought up to the town where the action is to be tried. He is there again, and for the last time, examined, a day or two previous to that fixed for the trial, by his own medical men and those retained by the company. This examination is sometimes of an extremely prolonged and elaborate character—very different indeed in all respects from an



ordinary surgical or medical consultation. It is often conducted by eight or ten different surgeons, every one of whom may put any question that he likes, and make any examination of the patient that he thinks desirable. In fact, as this investigation is conducted, it is not a consultation at all. It is an examination of the patient by one party of medical men in the presence of another. It most improperly often assumes a *quasi*-legal form. The patient is examined and cross-examined as to how the accident occurred; when and where it happened; who was in the carriage with him; who assisted him out; how he got home, &c. Copious notes are taken, and the patient's answers carefully taken down. He feels that he is in the presence of a hostile party, that he is suspected, if not actually of malingering, at least of gross exaggeration, that he will be considered to be an impostor, unless he can prove himself to have been honestly and truly hurt. This feeling not very unnaturally ruffles his temper, rendered morbidly irritable by the nervous state in which he is, and he becomes excited and wrangles with his examiners, or sullen and refuses to answer. In either case his manner is unnatural, and the effect produced is unfavourable. The whole business is fatiguing to the patient, and, as a rule, unsatisfactory in the extreme to his medical attendants.

The next day is probably that fixed for the trial. The plaintiff is obliged to attend in court. He finds that there is a 'part-heard' case on, which he is told may terminate at any moment, or may last two or three days. It happens to do the latter. The unfortunate plaintiff has to attend from day to day; and what is his position when so attending? He has to wait either in the close, and sometimes almost pestilential, atmosphere of the crowded court, or to sit outside in some cold gallery or hall, waiting



for his case to be called. No accommodation whatever is provided for plaintiffs of this class; there is no room into which they can retire, no fire by which they can sit, no couch on which they can recline. Those most ordinary comforts which are necessities to an invalid are denied him, and this, it must be remembered, whilst the action is brought during illness, not after recovery. To place a man who is admittedly, and on all sides allowed, to be in a state of great physical suffering, of much mental distress, and of nervous exhaustion—who is supposed to be permanently and organically injured in the most sensitive parts of his frame—in such a position as this is, to say the least, not tempering justice with mercy. Courts of law are constructed for the healthy and the strong, not for the sick and infirm. The accommodation they offer may suit the man who seeks to recover the value of a damaged bale of goods, or of a lost portmanteau, but is scarcely suited to the necessities of him who claims compensation for an injured brain, or concussed spine, from which he is still suffering. I have known many patients suffer seriously at the time, and have their recovery materially retarded, by the exposure thus undergone when their health was little able to bear it. However, an end at last comes to this probationary stage. The case is called, the plaintiff is put into the witness-box, ‘and we have the edifying spectacle of a patch of spinal sclerosis, or softening, or hæmorrhage, possibly no bigger than a pea, argued about by counsel, whose knowledge of nerve pathology is exactly equal to that which would be picked up by a parrot in a medical school, and before a jury more ignorant than the counsel, and a judge who takes a strictly legal view of the nerve-centres.’<sup>1</sup> The plaintiff is now placed in a new and most trying position—one

<sup>1</sup> The *Lancet*, Dec. 15, 1877, p. 895.



in which he has never been before. It is always a nervous matter, even for a healthy and strong man, to appear as a witness in his own case : to a nervously emotional, or hypochondriacal invalid, it is often a most severe, if not a cruel, ordeal. Stared at by a crowded court, contemplated by a doubting jury, and scrutinised by a sceptical judge, he is interrogated by a friendly, and cross-examined by a hostile counsel. He is obliged to give a detail of the particulars of the accident, a minute description of his symptoms, to describe the way in which he has passed his time ; to lay before the court his whole financial position, his business gains and losses, the most intimate details of his family life.

The effect of all this--the novelty of the position, the harass of the examination and the cross-examination--is necessarily greatly to disturb a man who, however honest he may be and however desirous of being truthful, is avowedly in a state of physical suffering and of nervous depression. His condition in the witness-box almost invariably becomes unnatural, totally different from what has been observed by his medical attendants in the quiet of the sick room or the consultation chamber. The effect that is produced upon the patient is one of two kinds--it either hardens him, he forces himself to meet his new position without flinching, becomes excited, flushed, more decided in manner, louder in voice, and more animated in tone, and thus his real weakness is concealed ; or the reverse effect is produced--he becomes unnerved, is overpowered by his position, breaks down, sometimes bursts into tears, sobs, becomes emotional and hysterical. In either case a false impression of his condition is conveyed to the court, which looks upon him as a malingerer and guilty of wilful exaggeration, because his nervous condition has become worse than it was even at the last



medical examination, making no allowance for the aggravation of the symptoms that would necessarily be produced by the fatigue and excitement to which he is and has been exposed. Yet his condition, whatever it may be, is assumed to be his usual one, and the unfortunate man's manner in the witness-box is often taken as evidence against himself. It is no infrequent thing for a medical witness to be asked if he had observed how the plaintiff walked up the steps or down the steps, how he took off his glove or pulled out his pocket-handkerchief, as if these matters had really the slightest bearing upon his actual physical condition, modified as it necessarily is by the excitement of the position in which he is placed. A plaintiff may of course wilfully and deliberately exaggerate his sufferings, but all exaggeration is not wilful. From the state of nervous agitation in which he is, the plaintiff is very apt to become excited as he recounts his own sufferings. He emphasises them, and uses exaggerated terms; he little thinks that all exaggeration weakens his case. This may be nothing more than the unconscious exaggeration common to all patients who are emotional or hysterical; but it is very apt to be construed into a wilful desire to mislead, and then advantage is taken of this interpretation to prejudice all the other statements of the plaintiff. But most men think more of their own sufferings than even their best friends do, and exaggeration is as much an element and an evidence of the hysterical state as is a want of control.

Nothing is more common than for a plaintiff whose memory has notoriously become defective, who forgets the names of his children, the street to which he is going, or the errand that he is upon, to relate the whole history of his accident and of his sufferings clearly, consecutively,



and in detail. This is by no means necessarily a proof that his memory is not defective in other matters. It may be owing to several circumstances; first, that the story of the accident has become indelibly impressed upon his mind by his having had to repeat it over and over again in the various consultations with medical men and lawyers; that the event itself has been of so startling a character as to leave a deeper impression on the mind than the minor incidents of daily life; and, lastly, that in many cases of defective memory past events are distinctly remembered, whilst those of recent occurrence are entirely forgotten.

It is impossible altogether to acquit the officials of railway companies of blame in their behaviour towards persons who have been injured on their line, and their injudicious conduct often excites angry feelings, and leads to litigation, which might not only have been avoided, but which might have been deprived of that angry and personal character which sometimes characterises it. Some of these gentlemen are infected by that 'excess of zeal' which Talleyrand so much deprecated in diplomatic subordinates. They not only seem to consider that every person who alleges that he has been injured on their own particular line is an impostor and malingerer, but they do not even conceal this opinion from the patient and his friends. Such conduct, especially on the part of the medical officers of a company, acts injuriously in two ways. It irritates, not unnaturally, the sufferer, who feels that he has really been hurt, and induces him to press his claim vindictively against the company, stimulated by the additional injury of his *bona fides* being called in question, and by misleading the directors of the company itself, prevents all possibility of an equitable settlement of the plaintiff's claim. It can never be to the interest of a



company to fight a notoriously hopeless case, as they must incur heavy costs in addition to being mulcted in damages, and if properly advised they will not do so, unless the claim be too exorbitant. They are too often led into courts of law by incorrect information as to the real gravity of the case, or are forced into them by the sufferer, irritated by having been dogged by detectives, or the taunts of the company's officers, seeking to obtain exaggerated and vindictive damages. There is no worse defence than that the plaintiff is an impostor and malingerer, unless the charge can be most conclusively established. The failure of such a line of defence invariably enlists the sympathies of the jury in behalf of the plaintiff, whom they consider to have been injured in character as well as in person, morally as well as physically hurt.

The assumption of malingering on the part of the defence when it cannot be proved places the medical witness for the plaintiff in a very embarrassing position. If he feels strongly, as the result of frequent examinations and abundant opportunities of studying the case, that the plaintiff has really been seriously hurt, he will naturally express himself decidedly, and without hesitation, in support of what he not only believes to be the truth, but believes that he has had means of knowing more accurately than anyone else in court; and a certain bias of mind may not unnaturally arise in the medical attendant who has watched the case, from sympathy with and interest in the sufferings of his patient, more especially when he believes that reality to be unjustly questioned. But if he ventures to manifest it in his evidence, he does so at the risk of having unworthy motives imputed to him. By the adverse counsel he may be accused of advocacy; by the judge his sincerity may possibly be doubted,



and in the summing up the jury will be warned not to trust his statements, as he has an evident desire 'that his side should win.' What grosser calumny can be cast on any professional man? How is it possible for anyone to judge of the motives that actuate another? And how can a judge, above all men, reconcile it with his own sense of justice to assign unworthy motives to a scientific witness, without any other foundation than that he has given to the best of his ability his evidence in such a way as will tend to the establishment of what he honestly and conscientiously believes to be the truth? He may be in error. He may have been deceived by a designing patient. But if in error, it may surely have been unknowingly, and with no desire to mislead the jury.

Railway companies are undoubtedly very open to imposition, not so much, perhaps, by direct malingering and fraudulent misrepresentation as by that exaggeration which is so common in all nervous cases, and which is partly unconscious, but sometimes undoubtedly wilful. This exaggeration runs through everything, business losses as well as symptoms. But there is one species of imposition which is systematically practised to a very great extent, and against which the surgeon must be on his guard, and must make allowance for on giving his evidence. It is the *nursing of symptoms*—the going into training for damages. A person is hurt, severely shaken, or locally injured. Under ordinary circumstances, and if no compensation were looming in the distance, such a patient would recover in a few weeks, or, at most, a very few months. But the surgeon will find that, so long as the action is pending, no progress whatever is made towards recovery, and he will have abundance of leisure to admire the ingenuity rather than the honesty of a



patient who can keep his recovery in abeyance until it is convenient to effect it.

From all this it is evident that there is nothing more fallacious or likely to mislead than the plaintiff's demeanour in the witness-box, and that his presence in court can serve no good purpose in enabling the jury to arrive at a correct opinion as to his actual condition, physical or mental.

In the preceding parts of this paper I have attempted to point out some of the principal evils and more serious inconveniences that attend the present method of taking surgical evidence in civil actions. I have endeavoured to show that the law as at present administered in compensation cases is harassing to the practitioner of medicine, is attended by serious inconvenience to the public at large, is wasteful of the time of men otherwise much occupied, and that the result, so far as the attainment of justice is concerned, is at the best doubtful in many cases. But, above all, the whole question as to the appointment and the method of taking the evidence of surgeons who are called as 'experts' to give a scientific opinion on the case appears to require reconsideration and modification in many important particulars. Their selection by the litigants, and not by the court, necessarily lays them open to the suspicion of partisanship, and undoubtedly does tend in the minds of many men to give a bias in favour of the side by which they are retained. Hence it is natural that their evidence should be received (often, I believe, most unjustly) with a good deal of suspicion by the court, and occasionally with marked disfavour by the Bench. But though the evils of the present system are obvious enough, it is not so easy a matter to find a remedy that may not be attended by others as great as those which it is intended to remove, and I throw out



the following suggestions in the hope that they may be productive of some good, by directing attention to the subject, and animating its discussion, rather than in the confident expectation that the alterations of the present system proposed will be found to be readily practicable, or, if so, wholly efficacious. For in dealing with this part of the subject, and in stepping across the boundary line of my own profession into the province of another; I am conscious that my observations are liable to the same objections that attach themselves to those of the barrister who wanders beyond the limits of his own sphere into the confines of medicine.

The first inconvenience of the present practice of the law in the cases under consideration is that which results from the habit of indiscriminately and widely subpœnaing all those medical men who have at any time been consulted by the patient. This practice, attended as it is by serious loss both in time and money to the practitioner, and by much personal inconvenience not only to him but to the public, could in a great measure be corrected by raising the fee of the surgical witness for his attendance in court, in civil actions, to something like a fair and reasonable standard. At present I am not speaking of the experts; they of course can make their own arrangements, and need not enter at all into the case unless they have previously secured adequate remuneration for their professional services, trouble, and loss of time. But the case is very different with the surgical attendant, whether he be a consulting surgeon or a general practitioner. It costs the litigant next to nothing to subpœna him, and as he can only claim the absurdly inadequate fee of two guineas for his day's attendance in court, no hesitation is felt in compelling that attendance. This practice would, I believe, in a great measure be checked if the



fees of the medical witness, to be allowed in taxation of costs, were raised to something like a just and adequate standard. It should be, in the case of a general practitioner or regular medical attendant, at least from five to ten guineas for each day's or part of a day's attendance in court ; and if the action is brought at a distance from the surgeon's residence, mileage at the usual professional rates should be allowed as well. It is clearly a monstrous injustice to compel a medical witness to undergo the fatigue of a journey of perhaps one or two hundred miles to the town in which the venue has been laid, and to remunerate him simply by paying his expenses in addition to the modest two guineas.

The importance of the evidence of the surgeon in a court of law is not so much to depose to facts as to give his opinion on the facts he has observed as these have been submitted to him, and it is surely unfair in the highest degree to compel him to spend a whole day in or about a court of law for the purpose of giving this opinion, and then to award him for that service a sum that would probably not be more than the tithe of what he would expect and would receive from a private patient for a similar expenditure of time and of a like professional service. His opinion, be it remembered, is not asked for the purpose of vindicating public justice. Were this so, I can safely say that there is no class of men who would be more ready to give important professional service and to sacrifice valuable time than the members of the medical profession from a mere sense of duty, and with little thought of pecuniary reward. But it is not for any great end, as has already been shown, that they are compelled to waste precious hours for an inadequate remuneration ; and here it is that they feel the hardship of their case—their time is sacrificed



and their services called for merely in the hope that the opinion they can alone give may swell the damages of the plaintiff, who, when he has obtained his object, can turn round on his medical attendant, and recompense him for the opinion he has been obliged to give in a court of law, which was absolutely necessary for the plaintiff's success in the action he brought, and by which he has directly and pecuniarily profited to a large extent, by a miserable fee which would be considered to be utterly inadequate if tendered elsewhere. The suggestion, then, that I would make, is that the fees to be allowed in taxed costs should, in the case of surgeons and medical witnesses in actual practice, be raised to a fair and adequate remuneration. In this way two important objects would be obtained—the practice of subpoenaing medical men broadcast would be checked, and when called into court their services would be fairly paid.

But another alternative exists by which the evils consequent on compulsory attendance in courts might be lessened. They would, I believe, in a great measure, be done away with, or, certainly, be greatly mitigated, were the evidence allowed to be given by affidavit rather than orally, so far, at least, as it did not relate to matters of fact, but only consisted of opinion.

In addition to the great advantage that would accrue to the practitioner and to his patients, by his not being called away from his professional duties, evidence so given and committed to writing, would be more deliberate, more careful in its wording, the opinions more scrupulously weighed, and would be less liable to be tainted by partisanship, than it is under the present system of oral testimony. There is many a man who can neither trust his judgment nor his temper in the witness-box, and whose opinion might be warped by the confusion of the one or



biased by the loss of the other, who would commit his views to paper on an affidavit in the most logical manner, and in the most temperate language. Another advantage of such a method would be this, that were conflict of opinion to arise between scientific surgical witnesses, it would be easier for the court to come to a fair conclusion as to the value to be attached to each view, if it were clearly set forth in a written document, than if, as at present, often hurriedly, and, perhaps, not very lucidly, expressed by the witness in his oral testimony.

But evidence by affidavit would necessarily be incompatible with trial by jury, and until another and simpler method of adjudicating these cases can be devised, it would not be admissible, however advantageous such a system might be to the surgeon and to the public. The objection to affidavit cannot lie in the fact of the testimony thus given being written and not oral, but in the constitution of the court before which it would have to be given, for it is important to observe, that written testimony is accepted from medical men in cases of a far graver character than those involving claims for compensation, and it is accepted, not as in an affidavit on oath, but unsworn.

Probably the most serious and the most responsible act that a medical man is called upon to perform, in relation to the law in civil cases, is to declare a person, whom he perhaps sees for the first time, to be a lunatic or of unsound mind. And there is certainly no social event, short of condemnation for some heinous offence in a criminal court, that entails more appalling consequences on the individual, and often on his family, than his consignment to a lunatic asylum, though it be but for a single day. There can be no comparison between the social and personal importance of so trivial a matter as an increase of



damages in an action for compensation, and the crushing effect of incarceration in a lunatic asylum to the individual concerned. And yet the law requires the evidence in the first case—that of the claim for compensation—to be given on oath, to be subjected to the close scrutiny of hostile cross-examination of counsel, to be balanced by the calm summing up of the judge, and admits that in the other, and the far graver one, of a declaration of lunacy, to be taken on medical certificates only. Such certificates are unsworn, and are only subjected—and that after the event has actually occurred for which they are written—to the supervision of Commissioners in Lunacy. But the law goes a step further. It refuses all hearsay evidence in the case of the claim for compensation. It admits it in that of the alleged lunatic, for there is a special clause in the certificate in which the medical man is invited to state, in addition to facts that he has himself observed, those that have been communicated to him. Can anything possibly be more unequal! In the minor case oral and sworn evidence is required, carefully sifted, judicially balanced; in the far graver case written unsworn testimony, partly hearsay, is alone needed, and yet no evil is known to result from this system of unsworn certifying—so unnecessary is it to bind medical testimony by an oath.

These considerations with respect to unsworn certifying lead me to say a few words on the question as to whether it is necessary, or even useful and advisable, to require scientific testimony to be given on oath. In doing so I would not wish to enter into the wide question of 'expert evidence,' but simply to confine myself to the position of medical men who are called to give scientific opinions.

I need scarcely remind the reader that every witness who appears in a court of law takes a solemn oath, the



obligation of which is threefold—viz., to tell the truth, the whole truth, and nothing but the truth. That oath is of as definite and at the same time of as comprehensive a character as can be framed by the ingenuity of man and the power of language. No witness who feels its grave and full import can possibly, in deposing to a matter of fact, either evade, conceal, or exaggerate the facts to which he has to speak; and if the business of a scientific witness in a court of law were merely to depose to facts, no surer guarantee could be devised for obtaining a full, complete, and uncoloured statement of such facts of the case as had come to his knowledge.

The object of swearing a witness in a court of law is twofold—to bind his conscience by the solemn obligation he has taken, and to punish him for perjury if he wilfully gives false evidence. Now, however much the oath may secure the truth in a matter of fact, it is certainly a matter of doubt whether it can in any way add to the validity of an opinion. A man may conscientiously be a believer in the wildest theory or the most fanatical doctrine, but no scientific medical man will attempt to sustain a theory or to advocate a doctrine in which he disbelieves, even when unsworn. He is restrained by professional considerations of the strongest kind, by regard for his own character in the profession, by that of the opinions of his colleagues, and no oath is needed to bind his conscience in these circumstances.

It is evident that the second object of the oath—that of binding an untruthful witness to speak the truth by the fear of being prosecuted for perjury, can have no effect whatever on scientific witnesses who are simply giving opinions and not deposing to facts. Even admitting—which I do not—that a man of science will deliberately perjure himself by giving false opinions, it is



evident that it would be impossible to prove that he had wilfully stated that which he believed to be false. No conviction for perjury would be possible in a matter of scientific opinion. Hence the administration of an oath to a scientific or medical witness who is giving evidence as an expert can avail nothing from either point of view, but is, at the best, unnecessary.<sup>1</sup> So far as his credibility is concerned, it is in no way affected by his being sworn. It is determined by other conditions than his oath. His general professional character and social status, his scientific position, and his competency to give an opinion on the special question before him, have much more weight with a jury than the fact of his having sworn that what he is about to say he believes to be the truth. Further than that the oath cannot carry him.

The business of a scientific, and especially of a surgical witness in a court of law is less with the facts that he has observed than with his deductions from them. He is called not merely to state the bald fact that the patient has been injured in a particular way, but to give his opinion on the probable nature, duration, and consequences of such injury. For instance, a person has been injured in a railway collision by having had his leg broken. The surgeon fulfils most conscientiously the threefold obligation to which he is sworn by deposing that the leg has been broken, that the fracture is comminuted, and that no other injury than the fracture has been sustained. But it is not to depose to such facts as these—about which indeed, there has been and can be no contention—that he has been called. These are admitted on both sides. The

<sup>1</sup> Since writing the above my attention has been called to an extremely able article on 'The Evidence of Experts,' by Mr. G. Brooke Freeman, in the 'Law Magazine and Review' for February, 1878, in which the reader will find this question more fully discussed.



questions that he has been called to answer are of a totally different kind. The patient fears he will never be able to use his limb again, or, if he should be able to use it, then only to a limited extent. Now here the real business of the surgical witness begins. His opinion is asked on the admitted facts: 'Will the patient, in your opinion, ever have a useful limb? If he should be able to stand, then will he be able to walk? If to walk, will he be able to run or to jump? And if so, when?'

Now how is it possible for a man however experienced to swear that he will speak the truth about what is not only a matter of opinion, but a matter in which his opinion may differ most honestly and conscientiously from that of other surgeons as able and as experienced as himself? He can, at most, only say on oath what he *believes* to be true; and that which he believes to be the truth may be considered untrue, and the belief in its error may be sworn to by a second witness fully as competent to give an opinion as the first. The truth of a fact can be deposed to absolutely and with certainty; the deductions from that fact can only be believed to be true or false according to the views of the deponent; their truth or falsity is a matter of opinion, not of fact. The presence or absence of bacteria in an infusion of hay can be deposed to as a matter of absolute certainty; their mode of development, if present in that infusion, is a matter of opinion; and what additional strength could be lent to the evidence of two witnesses by an oath, when one deposes that in his opinion they are generated spontaneously, whilst the other swears that he believes that they are the produce of pre-existing germs?

In an ordinary consultation, where there is a difference of opinion between two surgeons—say, for instance, in a case of doubtful injury in the neighbourhood of a joint,



—one *believes* that the bone is dislocated, the other *thinks* not; but neither ventures to assert positively that his opinion is the correct one, however strong his belief in it may be. He does not give a positive but a qualified opinion on matters that admit of doubt. But such qualified opinions are distrusted in courts of law. A counsel is not satisfied with a witness who swears to his belief in a given explanation of fact; but he is very apt to press him further, and often wants him to swear to an impossibility—the absolute truth of his own belief. The ‘germ theory’ can no more be considered to be absolutely true merely because a man of science swears that in his belief it is so, than can the dogma of Papal infallibility merely because a good Catholic swears to his belief in it. Moreover, science is constantly progressing. What is considered to be truth to-day may be proved to be error to-morrow. A scientific truth is not necessarily the absolute and final truth; it is often simply an opinion which, with our present means and appliances, and our present knowledge, we are incapable of disproving.

If the truth in such a case as that of injury of the leg just referred to were absolute and undoubted, there could be no contention; but in the case of the broken leg the whole question at issue, and that on which conflict of opinion arises, is not as to the present state, but as to the future condition of the man’s limb; and not only may it justly be a matter of difference of opinion as to the degree of restoration of which the man’s limb is susceptible, but the period that must elapse before the limb can be usefully employed may also be a point on which surgeons equally competent to judge may entertain different views. The surgeon who swears that in his opinion the limb will be as useful as ever in three months, and he who asserts that in his opinion it will be stiff and useless at the end



of three years, may be equally truthful. Each swears to what he *believes* to be the truth, but neither does nor can swear to what he cannot *know* with certainty about a future event, which is not only beyond his 'ken,' but which may be materially influenced by intercurrent circumstances which are beyond his control.

But further than this, the opinion that has been conscientiously held and given on oath by the scientific witness for the plaintiff, which to the best of his judgment he has believed, and has stated to be the truth, may become materially modified, or may even be completely changed, after he has heard the statement of the medical witnesses for the defendant. The facts of the case, on which all are agreed, may have been interpreted by them in such a way as to throw a new light on the plaintiff's condition in the mind of his own witness. The belief in his own convictions—to the truth of which he has sworn—is shaken, if not destroyed. But he is not permitted to acknowledge the change that has taken place in his opinion. The practice of the Courts will not allow him to re-enter the witness-box, and admit candidly, as he might and probably would do in a discussion in a consulting-room, that after having heard the views of the defendant's witness, his own have undergone a material change, and that his judgment of the case is not now what it was a few hours previously. What he believed to be the truth then he now regards as error. Although the facts of the case remain as he had observed them, the deductions which he had originally drawn from them have been proved to be erroneous. Such a candid admission of change of opinion is not only possible, but is common in consultations, is often the very object of the consultation; but the practice of the Courts renders it impossible before a judicial tribunal.



Setting aside the considerations advanced in the last section of this paper, which have reference mainly to the medical practitioner and to the public, let us now inquire whether some method could not be devised by which a more satisfactory tribunal could be constituted for the award of damages in these cases than that which now exists; whether, in fact, 'a judge who knows little and a jury which knows less' about the nature of the questions at issue, do not constitute about the most unsatisfactory tribunal, whether for plaintiff or defendant, that could well be devised.

That cases involving medical questions of an intricate and difficult character should be tried before a tribunal that possesses a sufficient amount of special technical knowledge to form a correct judgment on the points at issue, admits of no denial. Various suggestions have been made as to the proper constitution of such a tribunal. It may be either purely medical, or be a mixed medical and legal Court, or one consisting of a judge assisted by medical assessors.

Were the questions at issue purely medical, it might be supposed that a tribunal composed of surgeons and physicians would be the best qualified to decide on the case. But even where the negligence is admitted, and all collateral issues thus eliminated, there are two of the three elements in the claim for compensation—viz., the loss of business and the extra expense incurred in the restoration of health—that are in no way of a medical nature, and with which a purely medical tribunal would not be competent to deal. And even the third element in the claim—viz., that of compensation for personal injury—is never satisfactorily dealt with by medical men only. I have several times attended the trial of cases before a medical Referee, and nothing



can possibly be imagined more unsatisfactory or irregular than the whole of the proceedings. The rules of evidence are ignored; discussions between witnesses and the referee, often of an animated nature, spring up; much time is wasted; and a case which before a properly constituted legal tribunal would be disposed of in three or four hours will occupy several days. The referee is apt to be unconsciously swayed by professional feeling—to have a leaning to or a prejudice against particular individuals or particular doctrines. Even if it is possible to suppose a professional man to be entirely above all such influences, the referee, however conscientious, honourable, and painstaking he may be, anxious to do the fullest justice to both parties, becomes overwhelmed and confused by the intricacy of the case, and usually ends by delivering a judgment which is a sort of compromise, and consequently satisfactory to neither side. To quote again, Mr. Wills, who, writing on another subject, makes these very apposite remarks: ‘The truth is, that the qualities necessary for the proper discharge of judicial duties are not often born with a man. . . . Even after long familiarity with the practice and traditions of the best Courts, how many fail ever to gain the habit of not making up their minds prematurely.’ No medical man receives any legal education at all—‘least of all that which consists in being steeped in the traditions and the feelings of which the judges and the Bar are the natural depositaries;’ and indeed the necessity as well as the habit of our profession, and that to which we are accustomed in practice, is to decide quickly, if not prematurely on the case before us.

But if a purely medical tribunal is open to very serious objections, a mixed medical and legal court might be supposed to combine all the elements that would be re-



quired for a thorough comprehension of and a sound judgment on the case in all its bearings and in its relations to both professions. Of this kind of tribunal I can only say that it presents no advantage over the other. It is usually composed of a barrister or accountant, a surgeon, and an umpire, whose decision, in the event of disagreement, is final. The barrister who is associated with the surgeon, after settling the non-medical part of the case, leaves the rest to his colleague, to whom the same objections apply as to the medical referee in the purely medical court.

In both these tribunals there is much of the semblance but none of the dignity or weight of a trial in an ordinary court of law. Witnesses are sworn, examined, and cross-examined; but that decorum, dignity, and order which are so characteristic of our higher courts are utterly wanting in an inquiry conducted in a room at an hotel or in a coffee-house, and before judges who, whatever their strictly professional merits may be, cannot always be credited with 'having gained the habit of not making up their minds prematurely.' In fact, both of these tribunals, with the very best intentions in the world on the part of those who preside over them, with the utmost desire to act honestly and conscientiously, but from want of the properly trained judicial character become a mere mockery of a court of justice; and had I a case to be tried, no consideration would induce me to allow it to be brought before one or other of them, so small is my trust in their competency. Not the least evil connected with these courts of reference or of arbitration is that, however unwise or unjust the decision, however contrary to the evidence, there is no appeal against it, one of the essential stipulations being that it shall be final.

But is there no method of combining the two great



desiderata in a tribunal which has to try cases involving scientific knowledge—viz., the matured experience of the judge with the technical knowledge of the man of science? I think that the answer to this question may be sought and found in the constitution of those courts of law the special function of which is to try cases which are of a mixed legal and technical character. Such are the courts that are concerned with the determination of actions or inquiries connected with nautical affairs involving either a special scientific knowledge of or a practical acquaintance with the subject of navigation.

There are two courts that are engaged in the determination of these questions—one the Court of Admiralty, presided over by a judge, who is assisted in his judgment on the questions at issue by two Trinity Brethren; the other the Wreck Commissioners' Court, presided over by a barrister, assisted by two officers—one belonging to the navy, the other to the mercantile marine.

The constitution of the Court of Admiralty, according to 'Bruce and Williams' Admiralty Practice,' p. 271, is as follows:—'If the questions in the cause depend upon technical skill and experience in navigation, the judge is usually assisted by two of the elder Brethren of the Trinity House, who sit with him as assessors, and who, at the request of the judge, after hearing all the evidence on each side, advise him on all questions of a nautical character. In suits of damage, attendance of Trinity Brethren may be obtained as a matter of course. Either party may file a *præcipe* in registry praying for attendance, and on filing the *præcipe* a notice is sent to Trinity House requesting attendance of Brethren. By the County Court Admiralty Jurisdiction Act, 31 and 32 Vic., cap. 71, sec. 10, the County Court judge, if he thinks fit, or on request of either party, shall be assisted by two



nautical assessors. Sec. 10 enables the judge to summon the assessors, and sec. 14 the registrar of County Courts to form a list of persons competent to act as assessors, the list to be affirmed and published in the *Gazette*.'

Nothing can possibly be more simple, more rational, or more likely to conduce to a just decision on the part of the Court than the practice here laid down, and if a similar course were adopted in other questions than nautical ones requiring for their elucidation technical skill and experience, there could be no fear of a miscarriage of justice arising from want of knowledge on the part of the tribunal of the questions discussed before and by it. We have only in the above regulations to substitute the word 'surgery' or 'medicine' for 'navigation,' and 'Fellows of the College of Surgeons' for 'Trinity Brethren,' and we should at once obtain a tribunal which would certainly not err from lack of knowledge.

But the use of the assessors is no longer necessarily limited to the Court of Admiralty. By the Judicature Act, 1873, sec. 56, the Court may *in any cause* or matter call in the aid of one or more assessors, especially qualified, and try or hear the cause or matter, wholly or partially, with the assistance of such assessors. The assessors' remuneration to be determined by the Court. By rule 30 of Order 36, referees may call in assessors.

It will be observed that the assessors referred to in the Judicature Act are not limited to cases involving only nautical matters. I am, however, informed on reliable legal authority that the powers of trying with assessors given by the Judicature Act have not been acted upon, as there is no power to have assessors in a *jury* case. If these assessors were to sit with a judge in order to help him over the difficulties of that part of the case which is of a purely technical nature, it would be necessary to try



it without a jury; since not only is there no provision for the combined action of assessors and a jury, but there would be a manifest inconvenience in a judge being assisted in the formation of his judgment by experts in the face of the jury, which he in his turn would have to direct in coming to a judgment in matters, not of fact, but of opinion. The only alternative seems to be for the case to be tried, as in the Admiralty Court, by a judge aided by assessors, and without a jury. To those who entertain the view that juries know less than little of scientific matters, this arrangement might appear to be sufficiently feasible. But would it be satisfactory to the public? I doubt it much. It is with much diffidence that I venture to dissent from the not very flattering opinion entertained of the scientific capacity of jurymen to which reference has more than once been made. But I cannot agree with it, for I have known not only scientific men but retired medical men and experienced army surgeons to serve on special juries. Now, such men as these would, from their professional knowledge, be specially competent to form an opinion of their own, and to guide that of their fellow-jurors, in a case depending on the proper solution of medical questions, and would most certainly know much more than little of the questions submitted to the decision of the jury. It may possibly be owing to the presence of scientific or professional men in the jury-box that I have more than once seen a jury, uninfluenced by the stubborn subtlety of counsel or the adverse summing-up of a judge, come to a just opinion on a case, and save the Court from the discredit of a miscarriage of justice.

But although the presence of assessors on the bench is incompatible with that of a jury in the box, a plan might perhaps be devised by which the advantages of the two could be combined, and by which that conflict of



medical evidence might be avoided which, if it is not developed, is certainly fostered and intensified, by the obvious incapacity of the Court to form a correct judgment on the medical questions submitted to it, and on which it has to decide.

The conflict of medical evidence often arises in consequence of a want of proper understanding between the medical men engaged on the opposite sides of the case. As matters are now arranged, there is, as I have already shown, no 'consultation,' in the proper sense of the word, between them. The surgeon of the company examines, it is true, the plaintiff before, and in the presence of his (the plaintiff's) own medical men; but there is no after-discussion of the case, no attempt, as in an ordinary consultation, to reconcile discordant views, and to come to a combined opinion on the case. Neither party knows the exact views of the other on any point, or on the value of any one symptom, until they are heard in court. This is a great evil, and might be corrected by the surgeons on the two sides meeting as ordinary consultants discussing the case together, and, if possible, drawing up and signing a conjoint report. If such a report could be obtained, it might be handed in for the guidance of the judge and counsel, and the strictly medical part of the case would be much simplified. In fact, it would be disposed of if all parties concerned had substantially agreed before the trial as to the nature, extent, and probable duration of the plaintiff's injuries and their consequences, the tripod on which the medical question always rests. In the event of there being such discrepancy of opinion that an agreement could not be come to on any or all of these points, the judge should appoint at least two surgeons of known character, and of recognised skill in the particular class of injury under



consideration, to draw up a report upon the plaintiff's past and present condition and future prospects. This report would serve to guide the Court in coming to an opinion on the purely surgical part of the case, and afford it that information which men who admittedly know little of a subject on which they are to decide must necessarily be supposed to wish to obtain. The experts or assessors who draw up this report should be appointed by the Court, and not by the litigants. Their position would consequently be an independent one. They could not be accused of unworthy motives. They could not be calumniated, and their evidence would not be disparaged by groundless charges of partisanship.

The report of such surgical assessors would necessarily be final. It could scarcely be successfully disputed by those medical witnesses from whose conclusions it differed. Hence it would be of paramount importance that none should be selected for such an important post as that of assessor who was not recognised as possessing not only a sound general knowledge of surgery, but such special experience in the diseases resulting from injuries of the cord and brain, as to render his opinion worthy of all consideration in the eyes of his professional brethren. Such a plan would not interfere with the present machinery of the courts. The case would continue to be tried in the ordinary common law courts, before a jury who would decide on all its facts. Their judgment, and that of the Court, would be guided in all matters of scientific opinion either by a conjoint surgical report, or if that cannot be arrived at, by the written statement of competent surgical assessors, who having had free access to the plaintiff and to the medical reports on both sides, could arrive at a definite and unbiassed conclusion as to the nature, extent, and probable duration of his injuries



and their consequences. It would, I venture to submit, be in the highest degree advantageous to the medical as well as the legal profession. The great inconvenience of the system of indiscriminately subpoenaing medical practitioners who were but little concerned in the case would be stopped; conflict of medical evidence would no longer occur. Engendered as it is partly by the want of proper understanding between the medical witnesses, and greatly encouraged by the want of due scientific knowledge on the part of the Court, it would not survive the necessity of both parties either making a conjoint report or submitting their differences of opinion to the arbitrament of skilled surgical assessors selected by the Court. And, lastly, the ends of justice would be attained with more certainty than they often are under the present system.

The conclusions that may be drawn from the foregoing observations are as follow :—

1. That a serious hardship is inflicted on medical men by the present system of uselessly multiplying medical witnesses in compensation cases.

2. That this might be mitigated by raising the fees allowed to medical witnesses to something like an equitable standard, and increasing them in proportion to the distance that the surgeon is called from his practice.

3. That much evil results from the want of adequate scientific and technical knowledge on the part of the Court.

4. That the Court should be assisted by assessors of known skill and experience in surgery.

5. That such assessors should be appointed by the Court and not by the litigants.

6. That the surgical witnesses on both sides should be required to meet and to draw up a conjoint report on the case before the trial comes on. Such report to



be submitted to the Court for its guidance in the medical and surgical parts of the case.

7. That in the event of the surgical witnesses being unable to agree on the terms of such a report, the case be referred to the assessors, who will report to the Court on the nature, extent, and probable duration of the Plaintiff's injuries.

8. That the report of the assessors be final.

