Medicine and Law

The Rt. Hon. Lord Ross

Summary

This paper covers the period where medicine and law have come into contact over the past two or three hundred years. From the time of the Scottish Enlightenment, doctors and lawyers met philosophers and scientists in a sharing of intellectual activity.

A later example in the nineteenth century, did not reflect well on an anatomist Dr Knox, who appeared in the criminal trial of Burke and Hare. His misdemeanours resulted in a change of the law on dissection.

The increasing use of medical evidence with the growth of medical science led to the development of forensic medicine. Differences between legal and medical thinking led to the need for definitions of mental illness in relation to criminal responsibility. The law has also needed to protect public interest in distinguishing between medical negligence and misadventure. The history of both professions helps an understanding of the problems.

Résumé

Au cours des deux ou trois siècles écoulés, la médecine s'est frottée bien des fois à la loi. De sorte que, dès le "siècle des Lumières", des médecins et hommes de loi écossais ont rejoint les philosophes et esprits scientifiques de l'époque dans leur cheminement intellectuel.

Au XIXe siècle encore, on relève le cas d'un anatomiste, le Dr Knox, impliqué dans le procès criminel intenté aux dénommés Burke et Hare. L'inconduite du praticien a d'ailleurs entraîné une modification de la loi sur la dissection.

Mais le recours plus fréquent à l'évidence scientifique ainsi que le progrès médical ont favorisé le développement de la médecine légale. Certaines disparités entre la légalité et la pratique médicale ont d'ailleurs abouti à mieux définir les troubles mentaux, surtout en matière de responsabilité criminelle. La législation de l'époque a également servi la cause publique en établissant une nette distinction entre la négligence et l'erreur médicale. L'historique de ces deux professions nous aide à mieux appréhender cette problématique.

Medicine and Law are among the older professions, though neither of them would claim to be the oldest profession. That description is commonly applied to another!

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The Scottish Enlightenment was a period which was marked in Scotland by an extraordinary outburst of intellectual activity, and although some historians apply the term to the whole of the 18th century, the better view perhaps is that the years from 1760 to 1790 mark what was truly a Golden Age. The movement was centred in Edinburgh, and an English visitor of the time was said to have declared "Here I stand at what is called the Cross of Edinburgh, and can, in a few

minutes, take 50 men of genius and learning by the hand".

Included among these men of genius and learning were philosophers, geologists, chemists, and of course medical men and lawyers. Prominent doctors of the period were William Cullen and his famous pupil Joseph Black. They were friends of David Hume the philosopher and Henry Home, Lord Karnes the judge and James Burnet, Lord Monboddo another judge. Black is said to have often dined with Lord Monboddo and his circle of friends. Lord Monboddo, was learned but eccentric. Anticipating in a sense the theories of Charles Darwin, he was convinced that everyone was born with a tail, which midwives had all agreed to remove !

This was a period in which there was considerable activity in the fields of both medicine and law. Of course the work was carried out by different men in different disciplines. However Professor Peter Jones has described the Enlightenment (Jones) as a period when men who came from different directions worked in parallel for a time and pursued recognisably similar goals. Lying at the root of the Scottish Enlightenment was the desire for improvement. It has been said "The goals of much scientific work were explicitly practical, and the notion of improvement was everywhere apparent."

David Hume in an essay in 1752 (Hume) declared "The spirit of the age affects all the arts, and the minds of men being once roused from their lethargy, and put into a fermentation, turn themselves on all sides, and carry improvement into every art and science". Thus the period of the Scottish Enlightenment was a time when men from medicine and men from law were seeking to develop and advance medical and legal thinking.

Another area of Scottish life about this period in which one sees an association between doctors and lawyers is the Royal Society of Edinburgh. That learned Society was founded in 1783. Those present at the f i rst meeting of the Royal Society of Edinburgh included William Cullen, Professor of the Practice of Medicine and Alexander Monro Secundus, Professor of Anatomy. William Cullen was a distinguished doctor whose son was an advocate and later a judge. Those familiar with the history of medicine in Scotland will know that the professorship of Anatomy at Edinburgh University was held by three Alexander Monros - primus, secundus and tertius, and they held the Chair between them for 126 years - surely a record for any family !

Others present at the first meeting of the Royal Society of Edinburgh also included Thomas Miller the then Lord Justice Clerk, the Solicitor General and three advocates. Other Fellows of the time included on the medical side Joseph Black and James Gregory. Again there were two Gregorys - father and son - who held the chair of Medicine at Edinburgh University.

However, somewhat surprisingly it appears that purely medical matters played only a minor role in the society's meetings at that time. In the history of the Royal Society of Edinburgh by Professor Neil Campbell and Professor Martin Smellie it is stated "It might be thought that a Society which included in its early Fellowship men such as William Cullen, Monro Secundus, James Gregory, Andrew Duncan Senior and Benjamin Bell would be an ideal forum for medical discussion and debate. In fact as Christison pointed out in his presidential address on 7 December 1868, medicine makes only a rare, and for the most part insignificant appearance in the business of the Society" (Campbell).

Christison goes on to mention papers read to the Society, including those in which Doctor Hope describes a case of death from an impacted gallstone; Doctor Butter reports hemlock as a sovereign cure for St. Vitus' Dance; and Doctor Duncan claims to have cured an inveterate

hiccup with a single dose of dilute sulphuric acid. Christison comments somewhat bitingly "If this be all that medicine could do in its most palmy days in Edinburgh to hold up its head in the Royal Society, I confess it is not a subject of regret that, by gradual and tacit consent, papers on pure medical practice had been allowed to drop from our proceedings. For assuredly there is nothing at all so remarkable or particularly instructive in death from an impacted gallstone or from any form of hernia as to deserve being recorded in the proceedings of the Royal Society: nor would I advise patient or physician to trust much either to Doctor Butter's cure for St. Vitus' Dance, or to the remedy which seemed to Doctor Duncan to put an end to inveterate hiccup".

Nonetheless from the inception of the Royal Society of Edinburgh a forum has existed for intercourse and an exchange of ideas between, among others, medical men and lawyers, and the Fellowship at present contains among its Fellows a number of prominent doctors and lawyers.

Moving on in time medicine and the law came into conflict in 1828 with the celebrated case of Burke and Hare, whose crimes arose from the fact that the lawful supply of bodies for dissection by anatomists was wholly inadequate, with the result that graves were frequently rifled and dead bodies removed therefrom and sold to anatomists. Having begun by selling to one Doctor Knox the body of an old man who had died from natural causes, Burke and Hare proceeded to murder a number of unfortunate people and then to sell their bodies to Doctor Knox. In all they committed 16 murders for that purpose. Not surprisingly there was a widespread feeling that Doctor Knox, who had over a period of nine months purchased 16 bodies from Burke and Hare must have had some suspicion of what had been going on. Burke was convicted and executed, and by a sort of poetic justice, his body was handed over to the anatomists for dissection.

As the *Edinburgh Weekly Chronicle* of the time said "In purchasing the bodies which had come under the fell gripe of the Burkes and the Hares, there must have been an utter recklessness - a thorough indifference as to causes and consequences, which, in point of criminality, very closely borders upon guilty knowledge" (Roughead). Ultimately an enquiry under the Chairmanship of the Marquis of Queensberry was held, and the Committee, though accepting that the circumstances were calculated to excite suspicion, "found no evidence of there actually having excited it in the mind of Doctor Knox or of any other of the individuals who saw the bodies".

The contemporary view appears to have been that Doctor Knox who was a most popular lecturer on anatomy and who had found it difficult to obtain sufficient materials for dissection, had wilfully shut his eyes to incidents which ought to have excited grave suspicions in a man of his intelligence. After a time there was a falling off in the numbers attending Knox's classes and he failed to obtain appointment to any University Chairfor which he applied. He moved to London and ultimately went into practice in obstetrics.

Two stories of Doctor Knox may be told. Once when walking in the Meadows with a companion, he gave a penny to a little girl who was playing there and jokingly said to her "Would she come and live with him if she got a penny every day ?". The child, who did not know who he was, shook her head and said "No you'd maybe sell me to Doctor Knox". He was said to be much affected by this reply.

On another occasion a physiologist Doctor Reid had dissected two sharks in which he could discover no sign of a brain. This perplexed him and he asked Knox "How on earth could the animals live without it ?". Knox replied "That is not the least extraordinary : if you go over to Parliament House (the seat of the Law Courts) any morning you will see a great number of live

sharks walking about without any brains whatever".

One result of the Burke and Hare case was that the law relating to obtaining bodies for anatomical dissection had to be changed. In the present century medicine and the law came into contact in unusual circumstances. In 1911 the Royal College of Surgeons of Edinburgh raised a petition in the Court of the Lord Lyon King of Arms to have it declared that they were entitled in all time coming to precedence over the Royal College of Physicians of Edinburgh on ceremonial occasions. The Lord Lyon King of Arms was prepared to entertain the petition and the physicians appealed to the Court of Session. Sadly for the parties the court held that the Lyon Court had no jurisdiction to deal with this matter. They did, however, suggest that parties might informally approach the Lord Lyon and invite him to determine the issue of precedence not as a question of law but simply on the basis that parties would abide by his decision on the matter. That course was followed, and the issue of precedence between the two Royal Colleges is no longer in dispute (Lord Lyon).

In present times medicine and law are frequently in contact with one another. In litigations medical men frequently give evidence for the parties, particularly in cases involving damages for injuries. I n the criminal field doctors often give evidence of examinations carried out of victims of violence and examinations of accused persons. Psychiatric evidence is frequently given if the mental state of an accused person requires to be considered.

It is in the field of forensic medicine or medical jurisprudence that medicine and law have most connection. Clearly, particularly with modern criminals, the law could not hope to bring the guilty to justice without help from doctors and forensic scientists. In murder cases, the evidence of the pathologist is often vital - he can indicate the cause of death, the time of death, the type of weapon used, and the nature of the injuries and the violence which caused them. In all cases involving violence, the evidence of doctors who examined the victim is often critical. Of course, the expert medical witnesses on occasions differ in their opinions, and the judge *or* jury has then to determine which of them to accept, but it is clear that in very many cases justice would not be done but for the fact that the court was able to rely upon skilled medical evidence.

But, of course, the forensic expert does not act solely to assist the prosecution. He is an expert whose position is neutral, and the forensic expert must also act to protect the innocent from unfounded criminal charges. When a sudden death occurs in unexplained circumstances, the law turns to the doctor. The prosecuting authorities want to know whether the death was due to natural or unnatural causes.

If it was due to unnatural causes the prosecutor wants to be told what the cause of death was. For example if a body is recovered from the water, the medical expert will be asked to say whether the person died in the water from the effects of submersion or whether the body had been placed in the water after death, perhaps with a view to suggesting that death had been due to drowning.

In the system of prosecution and investigation in Scotland, the procurator fiscal instructs the investigation and medical evidence is clearly important; the doctor must be part of the investigating team and the doctor and lawyer must work together. This is true of the defence team as well.

Another area in which, in criminal cases, medical evidence is critical is when the mental state of an accused person is in issue. Is an accused sane and fit to plead ? Was he sane at the time of the offence ? If not, was he insane or was his responsibility diminished at that time ?

These are matters for psychiatrists, and their evidence is critical in such cases.

There is a presumption that anyone is sane. As already mentioned, insanity may arise at two stages. There may be a plea of insanity in bar of trial upon the ground that the accused is insane which prevents him from being able rationally to plead and instruct his defence, or it may be claimed that he was insane at the time when he committed the offence. If the latter, in Scotland he cannot be convicted, but must be acquitted with the jury holding that he committed the crime with which he has been charged, but that at the time he was insane. In that event he is acquitted but an order is made for his detention in a State Hospital. In England, the matter is treated differently, and an accused may be found guilty but insane. In Scotland, such a verdict is regarded as illogical.

On occasions psychiatrists may differ as to whether an individual is or is not insane. Space does not allow a discussion of what is meant by insanity in law, but in most cases no difficulty arises. Difficulties arise more often when the suggestion is made that at the material time an accused's responsibility was diminished. Many years ago, when murder was a capital offence, judges in Scotland developed the doctrine of diminished responsibility, which was introduced into England much later by statute. In murder cases where the accused's mental state was not such as to amount to insanity but he nonetheless had some form of mental disorder, the only course which the jury could follow if he committed the crime was to convict him of murder, but recommend him to the Royal Mercy. That was not considered satisfactory and so Scotland developed the doctrine of diminished responsibility. In appropriate cases the jury could convict of culpable homicide instead of murder on the grounds of diminished responsibility. The jury could do this where the accused was not insane in the legal sense and yet laboured under some degree of mental infirmity.

The doctrine was first enunciated in 1867 in the case of *Dingwall.* Lord Deas treated the accused's mental state as a mitigating factor entitling the jury to convict of culpable homicide (manslaughter) instead of murder. Thereafter judges developed strict rules as to when the doctrine of diminished responsibility could be invoked. The theory was that although there was an intention to kill, the fact that intention arose from weakness of mind, deprived the intention of the heinousness which is necessary for murder (Dingwall). As Lord Ardmillan put it to the jury in *Tierney* in 1875 "the man's control over his own mind might have been so weak as to deprive the act of that wilfulness which would make it murder" (Tierney).

What has produced difficulties is that the 19th century judges defined diminished responsibility in the light of 19th century medical knowledge. Modern psychiatry has identified many abnormal conditions unknown in the 19th century which doctors today consider as creating astate of diminished responsibility, and in recent years problems have arisen because psychiatrists appear to use the term "diminished responsibility" in a different sense from lawyer. Moreover during the last decade there have been a number of cases where evidence has been given by psychiatrists to the effect that an accused was of diminished responsibility although it was accepted by them that the accused was not suffering from mental illness or disease. The result has been that the court has had to emphasise what the law means by diminished responsibility. In a seminal case in 1923 Lord Justice Clerk Alness put the matter thus :

> *"It is very difficult to put it in a phrase, but it has been put in this way: that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which was bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full*

responsibility to partial responsibility - in other words, the prisoner in question must be only partially accountable for his actions. And I think one can see running through the cases that there is implied... that there must be some form of mental disease" (Alness).

In a subsequent case Lord Justice Clerk Cooper when charging the jury put it thus :

"You will see, ladies and gentlemen, the stress that has been laid in all these formulations upon weakness of intellect, aberration of mind, mental unsoundness, partial insanity, great peculiarity of mind, and the like" (Cooper).

As mentioned above, the court has recently reasserted that rule and has made it clear that it is not enough for diminished responsibility that an accused has a psychopathic personality or suffers from an extreme personality disorder. There can be no diminished responsibility in law unless there is something in the mental condition of the accused which can properly be described as a mental disorder or a mental illness or disease.

The difficulty which has arisen appears to be because medicine and law do not employ the same terminology but, as a result of a number of decisions in the High Court, psychiatrists now recognise that before there can be diminished responsibility in law the standard defined by the courts must be met. From the point of view of the court, the words "diminished responsibility" have atechnical meaning, and that must be recognised by members of the medical profession giving evidence in support of a suggestion that an accused person suffers from diminished responsibility. The law has insisted on a strict test because lawyers are afraid that if they allow psychiatrists to determine the question of diminished responsibility, the result will be that almost all criminals will be characterised as being of diminished responsibility. Sheriff Gordon, a leading Scottish writer on criminal law, has pointed out that that would destroy the doctrine entirely because there would then be no norm against which to measure diminution (Gordon).

Another area in which medicine and law come together is when claims are put forward based upon alleged medical negligence. The medical profession is concerned at the number of such claims, and the court too is concerned. It is obvious that from time to time mistakes may be made by doctors or events may show that the course of treatment followed was not the best treatment. It is often possible to say with hindsight that a situation might have been treated in a different way.

The court is well aware that it would be disastrous from the public point of view if doctors were to be held negligent merely because something had apparently gone wrong or because another doctor might have acted differently in the circumstances. The law acordingly provides that in the case of professional men such as doctors a departure from normal and accepted professional practice is not necessarily evidence of negligence. On the other hand such a departure may be negligence if it is proved that there is a normal practice applicable to cases such as the one under consideration and that the doctor in question did not adopt the normal practice, and that the course which he did adopt was one which no professional man of ordinary skill would have adopted if he had been taking ordinary care.

That is the high standard which is on the whole favourable to doctors, and means that it is not easy in Scotland for cases based upon negligence to succeed. Indeed before such cases can succeed the injured party will require to lead evidence from doctors to the effect that what the doctor in question did was something which no doctor of ordinary skill would have done if he had been exercising proper care. We all hope that insistence upon this high standard

will mean that we do not reach the stage which has been reached in countries like the United States of America, where actions based upon professional negligence are numerous.

So over the years in this country there has been at various levels close connection between medicine and the law. All present would, I imagine agree that medicine and the law are two important professions which have given valuable service to the community for many hundreds of years. In recent years, however, there has been a significant change regarding government interference with the professions. Judges are not supposed to speak on political matters, but I feel justified in saying that I view with considerable apprehension some of the changes which have recently been proposed in relation to my own profession of the law, and I imagine that many of you must also be unhappy at what is happening within the medical profession.

It seems to me that present day politicians of all parties appear unable to appreciate the importance of professions and indeed to understand what a profession is. Recently, I read a research paper within the legal profession which posed the question of whether law should remain a profession or become in effect a service industry. It seems to me that there is a serious risk that the effect of modern legislation will be that professions are reduced to being no more than service industries. I believe that that would have very serious ill effects for the public. Standards would drop, and the public would not receive from doctors or lawyers the sort of service which it has been traditional for doctors and lawyers to give to the public.

I therefore hope that members of the professions of medicine and law as well as members of other professions will take all necessary steps to resist attempts to reduce their role to that of service industries. It is when such radical proposals are being put forward that it is necessary to know the history of a profession and to be able to identify what are its strengths and essential characteristics. In so far as your Society is concerned with the history of medicine, it is dealing with something which may be of critical importance when consideration is being given to the proper response for medical men and women to make to proposals for the future.

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Biography

The Rt. Hon. Lord Ross is Lord Justice Clerk of Scotland, and as such the second senior judge in Scotland. He practised at the Scottish Bar for 24 years, and became a High Court judge in 1977. He has been Lord Justice Clerk since 1985. He holds honorary degrees from Edinburgh University, Dundee University, Heriot-Watt University and the University of Abertay Dundee. He is a Fellow of the Royal Society of Edinburgh.