THE
JOURNAL OF MENTAL SCIENCE

[*Published by Authority of the Royal Medico-Psychological Association*]

No. 419 [NEW SERIES NO. 383.] APRIL, 1954 VOL. 100

Original Articles

THE TWENTY-EIGHTH MAUDSLEY LECTURE: MEDICINE AND THE LAW

By

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I WAS asked in the early months of 1952 to deliver this lecture towards the end of 1953. Of course I realized that it was a great honour to be asked, for I knew something of the work of the late Dr. Maudsley, and I was aware of the immense contribution he had made in the treatment of the insane.

I accepted the invitation, and I confess that I am always more ready to accept such invitations if they involve some engagement in the far distant future. Under such circumstances I accept in haste and repent at leisure. I have repented, because I am painfully conscious of the fact that I have no qualifications which justify me in expressing my views to such an audience comprising many people whose views are of much greater value than my own.

I think it right to set out my experience—or perhaps I should rather say—to indicate my lack of experience. I claim no sort of scientific knowledge. I never had a considerable criminal practice at the Bar. Romilly, whose name is honoured amongst lawyers for his work in the reform of the criminal law of his day, was a Chancery lawyer—he had no practice in the criminal Courts.

I speak as a legal 'man in the street'; and I can only cover my nakedness in such an assembly by pleading that the administration of the criminal law and the administration of prisons has been for many years an abiding interest.

My paternal ancestors were Yorkshire Quakers; and perhaps it was in my blood to take an interest in prisoners and prisons; and when I was called to the Bar in 1909 I started my practice on the criminal side. However, at a very early stage I was entrusted with work by the London General Omnibus Company and I rapidly acquired a large practice in 'running down' cases—so large, in fact, that I had but little time for criminal work.

In those early days there were a large number of cases involving injury to horses. I became familiar with the vet. who gave evidence for the plaintiff, explaining that the injury the horse had sustained had rendered him almost useless; whereas the vet. for the defendant would assert that the horse was all the better for the rest involved by the accident.

With regard to injuries to persons, the same pattern would repeat itself. The plaintiff's doctor depicted the injuries caused by the accident as terribly severe; the defendant's doctor would say that they were trivial.

In those days the practice had not developed of having a medical report prepared by some neutral doctor representing neither the plaintiff nor the

defendant; nor was there any arrangement for a consultation between the two doctors in the endeavour to present an agreed report. These innovations are common enough today and represent a great advance; and as this topic bears upon what I have to say presently, I want to try to analyse what went wrong; for there is surely room for an extension of that principle.

It was not, I am convinced, that either vet. or doctor was consciously trying to deceive the Court by telling untruths. It was rather due to the perfectly natural human tendency to "take sides". The doctor or the vet. would want to do the best he could for his client whilst sticking to the truth; and approaching his problem from that angle, he would honestly come to the conclusions he indicated.

The tendency to take sides is ineradicable. We find it in the ordinary affairs of life. The passenger in the car involved in an accident inevitably tends to take the side of his driver, just as the doctor tends to take the side of his patient.

This tendency can, I believe, only be avoided if the witness is completely independent, and does not become more involved with the one side than with the other.

It so happened, however, that after a few very active years in 'running down' I drifted in to the Commercial Court. I acquired a large practice in that Court —and consequently crime, criminals and insanity passed me by.

In 1922 I became a member of Parliament, and in that year I started visiting prisons; and I have continued to do so ever since that time. I have visited nearly all the prisons in this country, and also prisons in most European countries.

I shall never forget my first visit to a prison. It was to Maidstone. I was accompanied by another M.P., who has since rendered great services to the State. We were both young and anxious to learn.

At about the same time, namely in 1922, I was appointed a member of the Royal Commission on Lunacy. I had a vague idea that in the course of our enquiries we should come across a considerable number of persons who were detained in lunatic asylums for no good reason. I imagined perhaps, as one reads in story books, that scheming relatives would have arranged that people possessing some wealth should be deprived of the opportunity of squandering it, so that it might in due course of time be handed over to the relatives. I fully expected that we should come across instances of harsh, or perhaps even brutal, treatment.

I gave a great deal of time to the work of that Commission. I visited both public institutions and private institutions where certified patients were detained. I came across no single case supporting the fears which I have indicated. I thought that without exception the medical superintendents carried out their duties in a humane and considerate way, and I came across no evidence of harsh treatment. Undoubtedly, those in charge were sometimes not unnaturally hesitant about allowing a discharge for fear lest the patient should do himself some injury, in which case had there, for example, been an inquest, some coroner might have expressed disapproval of the conduct of the superintendent in allowing such a patient his liberty.

Of course, I realize that the fact that no cases of improper detention were brought to our attention does not prove that no such cases exist. It is an obvious danger, and the circumstances should surely be kept under constant review.

I think, if only for this reason, that the Government were wholly right in appointing a new Royal Commission to examine the whole subject again; but there is another and more important reason.

Public opinion has changed considerably, and scientific opinion perhaps

more, within the last thirty years. After all, in the days of our grandfathers lunatics were still popularly regarded as persons possessed by the Devil. It has taken a long time for the ordinary folk to realize that a man may have a mental illness just as he may have a bodily illness; that there is nothing to be ashamed of in falling a victim to either form of disease; and that it is useful in both cases to consult a doctor skilled in such matters at an early stage. The attitude of the public towards voluntary treatment has completely altered, and the old prejudices have largely gone.

Dr. Maudsley himself was a pioneer along these lines. He realized how important it was that the patient should be encouraged to accept responsibility for his own cure; and that the very fact that a patient was not prevented from walking out of an institution if he was minded to do so was in itself a reason why he did not want to walk out. He proved that this sense of personal responsibility was an important factor towards the recovery from the illness.

I feel sure that the emphasis of the future will be more upon early voluntary treatment and less upon certification. The Commission will do much good if it emphasizes this aspect of the matter.

I should add on this topic that I became Lord Chancellor in 1945 and remained as such for some 6½ years. As you are well aware, every patient has the right to correspond with the Lord Chancellor. I used to receive a very large number of letters from the inmates of such institutions (unhappily some of my correspondents have not realized that I have ceased to be Lord Chancellor); and periodically I used to make it my duty to go down unannounced to the institution in question and investigate the complaint. I never came across any instance which caused me concern. I remember finding, for example, in one case that a very tall patient had too short a bed, but apart from things of this sort, I never found anything about which I was disturbed.

In the year 1929 I became Attorney General and thus renewed after a long interval my acquaintance with the criminal law. I became distressed to find how large was the number of cases of blackmail and to find that so many persons who had committed offences were having their lives made miserable by others who were threatening to expose them. In those days it was quite exceptional for the person blackmailed, in the event of a prosecution for blackmail, to be referred to in the press merely as Mr. X. I did my utmost to encourage this, knowing that if I succeeded I should strike a real blow at the hold which the blackmailer possessed over his unhappy victim. I like to think that, thanks to the willing co-operation of the press, this practice has now become so common as to be almost invariable, and I hope and believe that the number of blackmail cases has gone down enormously.

I became impressed with another fact. A very large percentage of the blackmail cases—nearly 90 per cent. of them—were cases in which the person blackmailed had been guilty of homosexual practices with an adult person. Indeed, it was obvious that there was a class of adult persons who were carrying on business as homosexuals and making a living out of blackmail.

Conscious as I became of the extent of blackmail, I asked myself whether our law was wise in making it a criminal offence for two male adults to commit acts of indecency with each other in private.

It is, of course, a very different matter if one of the participants is a young person—and I should be prepared to give a wide definition to the term "young person".

It has always been an offence at Common Law to be guilty of such conduct in public, and this, of course, is plainly right.

The history of our legislation is of some interest. In 1885 a Bill to amend the Criminal Law passed the House of Lords. It was a Bill—I quote its title—"to make further provision for the protection of women and girls, the suppression of brothels and other purposes". The Bill as it left the House of Lords contained no reference whatever to indecency between males. In the course of its passage through the House of Commons, Mr. Labouchere moved a new clause which made the commission of acts of indecency between male persons a criminal offence, whether in public or private. The Speaker was asked by one Member whether it was in order to move a clause dealing with a wholly new topic into such a Bill. He ruled that it was a matter for the House to decide, and the clause was then agreed to without any discussion. There was no discussion of this new clause when it was sent back to the House of Lords.

After the Bill had become an Act it received considerable criticism in legal circles. One experienced recorder called it "the blackmailer's charter".

I am afraid it is a fact that the passage of that Act has assisted blackmailers in their loathsome trade. The corresponding acts between women have never been brought within the ambit of the criminal law. It is, I am convinced, foolish to think that the ambit of the criminal law can be, or should be, co-extensive with the ambit of the moral law.

I confess that the doubts which I then entertained have never been wholly removed, though I do not know enough of the matter to form a confident opinion of my own. It may well be that the present time, with its marked increase in sexual offences, is not opportune for an alteration in the law in the sense I have indicated.

I had other experiences as Attorney General which satisfied me that there were some gaps in our criminal system which might usefully be filled if we had the necessary money to spend.

Take, for example, cases of people addicted to drugs. I remember when I was Attorney General my attention being brought to one particular case of a person who had committed a criminal offence with the object of obtaining drugs for his own use. A prosecution, for which of course I as Attorney General was responsible, was pending against him. I was told of it—for I knew nothing about it—by some person in a prominent position in life who knew all the tragic circumstances, and knew how it was that this person came to get a craving for drugs. It so happened that I knew very well the most distinguished solicitor who was acting for that person, and I talked to him as friend to friend about the course I ought to take. He said of course that, as this person's solicitor, he was defending the case and would fight it to the end, but he added off the record that if the person in question was his own child, he would hope that that person would receive a sentence of such length that he could be cured of his craving.

I shall speak presently of the need for some institution, as little like a prison as possible, to deal with such cases.

After ceasing to be Attorney General, again I had but little experience of the criminal law, though I continued my visits to prisons. But when in 1945 I was appointed Lord Chancellor, I naturally became much more closely concerned with the administration of the criminal law, and it fell to me to pilot through the House of Lords the Legal Aid System and the Criminal Justice Act; and in so doing I had to take a more prominent part that I liked in the controversy which raged about the desirability of continuing the capital sentence, or of dividing murder into different degrees.

If I were asked about my general impressions of the prisons I have visited, I should say that the weakness of the system inevitably consists in treating

prisoners as one class, whereas of course, each prisoner in an ideal system requires his own individual treatment.

It all comes to this, that a system or an institution which is suitable for one prisoner may be quite unsuitable for another. That a regime which is too strict for one may be too soft for another. No doubt in an ideal system there would be many differing kinds of institutions, and highly skilled persons would select which prisoners were appropriate for what institutions.

Broadly speaking, if I may use the inaccurate and unscientific formula, there will be better differentiation between the bad and the mad, and to that in fullness of time we shall come. For the rest, I would point out that the Prison Commissioners have vast experience and, with the very limited financial resources available to them, are doing all they can to differentiate between different classes of prisoners.

I have detailed some of the rough conclusions I have drawn from my somewhat limited experience, and I am conscious of the fact that these experiences have little to do with the subject of my address. Let me apply some of these experiences to a subject which is more germane to the topic of Medicine and the Law.

I assume for this purpose, without expressing any opinion of my own, that the death penalty is to continue. If it were decided to abolish the death penalty, many of the problems which arise would, of course, disappear. On that topic I desire to express no opinion beyond saying this: that in my belief the sole justification for the continuance of the death penalty is its deterrent effect. If one could predicate that more murders would be committed if the death penalty were abolished, then the case for retaining that penalty is, to my mind, made out. If, on the other hand, the abolition of the death penalty would have no such effect, then I believe it should be abolished. In arguing this question everybody is entitled to make what use he can of the plentiful supply of statistics which are available to us.

So long as the death penalty continues, there will be cases in which the person accused bases his defence solely on insanity. It is this that gives rise to the main trouble which exists between the lawyers and the doctors.

That the psychiatrists think—whether rightly or wrongly—that they are treated by the lawyers without much respect is, I believe, the fact. Some of them undoubtedly think that counsel by their questions make them "a popular butt and laughing stock". They feel, too, that counsel, and sometimes even Her Majesty's judges, have not got a scientific approach to these problems. I confess, too, that Her Majesty's judges have sometimes admitted to me that they do not derive as much help as they would have expected from the evidence of the psychiatrists.

I do not myself think that either the lawyers or the psychiatrists are to blame for this undoubted state of affairs. The fault perhaps lies rather in the system than in the individuals. Yet it is by no means easy to see how the system can be altered.

Fundamentally, I think the trouble is this: that the eminent medical witnesses are called, as the case may be, for the prosecution or for the defence. They are identified with one side or with the other side. They are in exactly the same position as the veterinary surgeons or the doctors in my early days of running down cases. The idea of a joint report, or of a psychiatrist who is completely independent and unidentified with either side, has not yet developed.

To those who would assert that the lawyers, or even the judges, lack a scientific approach, I would reply as follows: Let it be remembered that in all

these cases science in the person of the medical witnesses is speaking with an uncertain voice. The trumpet sounds with an uncertain note and no one prepares himself for battle. There is generally one eminent expert who says that the accused did have that degree of responsibility which the law requires, and there is another equally eminent expert witness who says that he did not. It is a fallacy to blame either the lawyers or the judges for not attaching sufficient importance to the evidence of these witnesses, when in fact that evidence is about equal on both sides.

I therefore greatly welcome the proposal contained in the Royal Commission's Report that every prisoner charged with murder should be examined by two doctors, one an experienced psychiatrist who is not a member of the Prison Medical Service, and the other an experienced member of that Service; and I stress the word "experienced", since it is inevitable that in some of our smaller prisons the prison medical officer has not had a training in psychiatry.

Neither the prosecution nor the defence would be limited in their selection of witnesses to those who made the report, but I contemplate that the report would be made available to both sides so that they would have the benefit of it in preparing their case. In practice, I should imagine that the persons making the report would generally be called in evidence by one side or the other, and the fact that the report was obtained not at the instance of any party to the suit would add to its weight and authority, and would probably lead to a more scientific approach to the problem involved.

For my own part, I care much more about this than I do about any reframing of the M'Naghten Rules. It cannot be too often remembered that the M'Naghten Rules are not a test of sanity and were not formulated as such. They are a test of responsibility in law for the acts done. I agree that they are illogical; I agree that the test they provide is frequently stretched, and that therefore it may fairly be said to be no test at all. For who can measure responsibility by an elastic yardstick?

Yet, in practice, the Rules have worked well, and the attack on them seems to me to be based on their lack of logic, and not on the fact that they have worked badly. It has often seemed to me that we differ from the Latin races in that we judge any rule or institution not, as they do, from the point of view as to whether it is logical, but rather from the point of view—Does it work well? The British indeed seldom make themselves more ridiculous than when they seek to be logical. Logic is not a characteristic of our native genius. If anybody can convince me that the rule is working badly and that they have a better rule, then I should be quite prepared to accept that better rule. At present I remain unconvinced.

There are two proposals for the reform of the M'Naghten Rules canvassed in the report of the Royal Commission.

The Commission, or at least a majority of the Commission, are of opinion —as was the Atkin Committee—that the rules would be improved if the jury were asked to consider the question of irresistible impulse. If this proposal, which appears to find favour with the Commission, were to be adopted, the question to be put to the jury would be as follows: "Was the accused at the time of committing the act in such a condition, as a result of disease of the mind or mental deficiency, that he did not know the nature and quality of the act, or did not know it was wrong, or was incapable of preventing himself from committing it?"

Now I would point out that the addition of the last head has no practical effect in extending the area of irresponsibility unless it is assumed that there is

a class of persons suffering from some disease of the mind which enables them to realize the nature and quality of the act they are committing, and to realize that it is wrong, and yet, owing to that mental disease, find themselves impelled by an irresistible impulse to commit the act in question. For it is manifest that if an accused person is prevented by a disease of the mind from realizing the nature and quality of his act, or from knowing that it is wrong, he escapes responsibility under the existing law.

Are there people who know the nature and quality of the act they are committing, and know it to be wrong, and yet cannot help doing it? I am trespassing on the territory of the psychiatrist, and it is not for me to answer this question.

Assuming that there are or may be such persons, I would propound a further question: Can the psychiatrist distinguish between those who cannot and those who do not resist an impulse?

I have recently been reading works by eminent psychiatrists and I gather that they admit frankly that in our present state of knowledge it is impossible to distinguish the one from the other. Unless I am told—and I am very willing to learn—that such a distinction can be drawn, I fail to see that there is any point in asking a jury to decide a question which baffles the psychiatrist: but at present it seems to me that I am told the exact contrary.

Take, for example, Dr. Neustatter's book *Psychological Disorder and Crime* published this year; on page 96 I find this sentence: "As long as there is no proof which impulse is genuinely irresistible it would clearly be unsafe to allow it as a plea, as those who would have controlled themselves for fear of the consequences might be tempted not to do so, with consequent danger to the public."

Dr. Henry Yellowlees in his evidence before the Royal Commission made it clear that he was not in favour of extending the M'Naghten Rules by including irresistible impulse. "The only irresistible impulses I recognize," he said at Question 7350, "are those that occur in the advanced forms of certain well-known types of insanity: in established catatonic stupor, for example, where you do get a sudden irresistible impulse. An irresistible impulse does not occur except in the case of a person who has not known the nature and quality of his acts for several years."

I recognize, of course, that the proposal to insert a question to the jury about "irresistible impulse" is supported by the highest authority. It was recommended unanimously by the Atkin Committee in 1923, and that Committee comprised persons of the greatest experience; and it is recommended again by the Gowers Commission.

Lord Darling in 1924 introduced a Bill into the House of Lords to carry out the recommendations of the Atkin Committee—but he received no support and the strongest criticism from Lords Sumner, Dunedin and Hewart, and wisely did not press his proposal for a second reading.

The other proposal which finds favour—and is, I gather the first favourite—is that we should give up any attempt to formulate any test whatever of the dividing line between those who are and those who are not responsible in law for their actions.

How would the judge instruct a jury as to the relevant law as to responsibility of this proposal were to be adopted? I suppose on some such lines as the following: "Members of the Jury, you have heard the evidence. You will have noticed that the doctor called for the Prosecution thinks the prisoner was completely sane, and the doctor called for the Defence thinks he was hopelessly insane. You must ask yourselves whether the prisoner had a disease of the mind; and you must ask yourselves further whether you think that that disease was of

such an extent and intensity that you ought to bring in a verdict that though he did the act he was insane. I cannot help you any further."

Perhaps the Usher in escorting the jury to their retiring room would ask the foreman whether he had a coin on him in case it was decided to settle on the well-established principle of tossing it up.

It must be remembered that our system places the responsibility of deciding all relevant questions of fact upon the jury. It would be a mistake to make the test so scientific that the twelve good men and true who sit in the jury box were quite unable to understand it. It is, under our system, for the jury to find the facts, and not for the jury to concern itself with the appropriate punishment; and I devoutly hope that neither judge nor jury will ever be placed in the position when they have to decide as a matter of discretion whether or not the death penalty shall be enforced.

Many people have been shocked to notice that the sentence of death is pronounced in many cases by the judge; and a reprieve is allowed.

This does not shock me; and indeed it seems to me to show that the present system—if it is decided to retain the death penalty—is working efficiently, and to demonstrate the care that is taken by the Home Secretary and his advisers.

I should most certainly welcome an alteration in the law so as to remove constructive murder and suicide pacts from the category of murder: as was done in recent years by the Infanticide Acts.

In this way the number of death sentences may be reduced; but it is, to my mind, unfair to a jury and against all our traditions to entrust to them the duty of determining not only the facts but also the degree of punishment. What would happen, I wonder, if the jury agreed to a verdict of guilty but differed as to the appropriate punishment? Endless possibilities are opened up.

I believe, in short that our present system, notwithstanding its obvious logical deficiencies, works well; and I cannot regard the discretion of the Home Secretary in deciding whether or not to advise mercy as conflicting with the province of the jury. The jury's task is to say whether the prisoner was responsible in law for his action; the Home Secretary's task is to consider whether, even although he was so responsible, the death penalty should be enforced. The Home Secretary is at liberty to take into account any fact even although it was not before the jury. Moreover, whereas the jury are concerned with the mental state of the accused when he committed the act, the Home Secretary is concerned with his state of mind at a later—and possibly a much later—date. No one wants to hang an insane man: though I confess the idea that an insane man cannot make his peace with his Maker seems to me to be doubtful theology.

I believe that so long as we continue to have the death penalty—and as to the desirability of so doing I express no opinion—the present system should go on. I agree, of course, that the form of the verdict "Guilty but Insane" is illogical; and this, I think, can easily be remedied in the form suggested in the Commission's Report.

For myself, I believe that, notwithstanding the lack of sympathy which exists today between the lawyers and the psychiatrists, the psychiatrists will slowly but surely come into their own.

It is, of course, not merely and not mainly in this particular topic that psychiatrists will come into their own. What will the prisons of the future be like and how will they be conducted? I believe the lines on which the Prison Commissioners are working today will be extended and intensified, as indeed they would themselves do if they had the facilities. Prisoners will be much more closely classified. Those who are bad will be separated from those who are mad;

and with regard to the latter, the psychiatrists will be given a greater opportunity to effect cures. The emphasis will be upon cure and not upon punishment. With regard to the former, stern but not inhuman discipline, and plenty of worth-while work, will be relied upon. The element of punishment will not be, and should not be, disguised.

There will, I should imagine, be homes as little like prison as possible, without the stigma which attaches to prison, but with the power to prevent the inmates from walking out, which will be available for such people as drug-fiends or alcoholics, who have committed criminal acts.

The Commissioners in paragraph 54 of their Report advocate the establishment of such institutions also for psychopaths and other prisoners who are mentally abnormal; and they recommend, too, further research into problems of psychopathic personality. On these matters I feel they are on strong ground and should receive the support alike of the lawyers and the doctors.

There is so much to learn. It is no criticism of those who work in this field to say that our knowledge is slight and patchy. Those who know most are, I find, always the most ready to admit how little they know.

The Commissioners are right in praising the work of the special forensic psychiatric clinics on the Continent of Europe. I am sure that in the future we shall differentiate more and more between those who need to be cured and those who need to be punished; and I expect that in process of time we shall tend to increase the former class and lessen the latter.

With regard to sexual cases, I believe that these will come more and more to be looked at as a problem for the doctor rather than for the penologist. I am not going to air my ignorance on this topic, but it is not at least possible that treatment by hormones or glandular secretion may be found, which will help these unhappy people to eradicate their abnormal desires?

We have the personnel to enable us to conduct all these experiments. In the Prison Commissioners we have a fine body of enlightened men whom we can safely trust. Our doctors and our psychiatrists are of deservedly high standing in the scientific world, but these experiments cost money and involve labour, Society should not grudge the necessary money for this purpose.

Alas, when all is said and done, when all these people have done their best, there will be a hard core of evil-doers, who will not be restrained by the deterrent effect of prison, nor helped by the psychiatrist. If people show that they are determined to lead a life of crime, then society has, to my mind, a right to protect itself by depriving them of their liberty. Transportation, which had much to be said for it, is no longer practicable. For such people preventive detention for long periods of time seems to me inevitable, not primarily from the point of view of deterrence, not from the point of view of reformation—both of these are on my hypothesis impossible; but from the simple point of view of the protection of society. I believe that we shall take steps to see that the incarceration of such persons is made as bearable as possible, and the idea of punishment, beyond that which is mooted in the deprivation of liberty, should be rigorously eschewed.

I hope I shall be forgiven for having made to you these random observations, which do not claim to be based upon scientific knowledge. I have spoken as the man in the street, but as the man in the street who has been interested in this problem for many years past and has given great thought to it. After all, when the scientists, the penologists and the psychiatrists have had their say, it is the man in the street who ultimately has the responsibility of deciding what shall be done. That must be my excuse for letting you know what I believe the man in the street is thinking about these problems.