The Hon. Mr Justice

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The Doctor In Court - An Overview[1]

When, about two weeks ago, I was asked by my friend Dr. Mario Scerri to address you, my first reaction was to say politely "no thank you". What can a lawyer say which can be of interest to medical people gathered to discuss topics in the field of forensic medicine? But then I thought of the many close encounters I have had, both as a prosecutor and now as a judge, with doctors in the court room, encounters that have been in some cases rewarding, in others disappointing, in some cases positively entertaining, in others nightmarish. What is that makes the doctor's role in court, particularly in criminal proceedings, so captivating for the media, so much discussed and criticised by lawyers, and so very often disliked by doctors themselves? After all the doctor in court — unless he happens to be the accused or unless he is giving evidence on something totally unrelated to his medical practice — should be saying in court very much the same thing he would have said in a case conference with colleagues or in a written report submitted to a patient or to whoever requests such a report (e.g. an insurance company). The answer is both simple and complicated. The simple answer is that the moment a doctor is transposed from a purely medical setting into a legal or courtroom setting, the "rules of the game" are changed. The complicated answer is linked to the more or less complex rules of the adversarial legal system, to which are added what to many may seem as quaintnesses and endemic inconveniences peculiar to the Maltese legal system.

Let me try to explain, at the same time promising you that I will keep my intervention as brief as possible.

As a rule no one likes to be summoned to give evidence in court. This is, of course, true of the housewife as of the neurosurgeon, with the difference that the latter's agenda for the particular morning would have been prepared weeks

or months in advance and upsetting it could in practice mean serious inconvenience to many third parties unconnected with the court proceedings. The present position in Malta is that it is left up to individual judges and magistrates to adopt measures to ensure as far as possible that doctors summoned to give evidence in court do not waste hours in the corridors of the court building before they are called to the witness stand. In civil proceedings before the Superior Courts the problem is to a large extent obviated by the fact that most cases are heard by appointment, which means that a particular time of the morning or (with some judges) of the afternoon is set for a particular case. The witness or witnesses are thus also summoned for a particular time rather than asked to be in court from nine in the morning. The situation is different, however, before the Magistrates' Courts in criminal proceedings and before the Court of Criminal Appeal in its inferior jurisdiction. Here the sheer number of cases makes it impractical to have them heard by appointment: they are all set for hearing at nine in the morning, and then the judge or magistrate proceeds by order according to the list. Even so measures may be, and in fact have been, adopted to reduce the time a doctor spends in court. Soon after my appointment to the Bench in March of 1994, it was agreed between Mr. Justice Victor Caruana Colombo and myself[2] to send a memo to the Chief Government Medical Officer asking him to advise all doctors — whether in Government service or not and whether consultants or GP's — that whenever they were summoned to give evidence in their professional capacity before the Court of Criminal Appeal, they could, immediately upon arriving in court at nine, inform one of the court marshals, who would then inform the presiding judge, and the case in which that doctor had to give evidence would then be heard before other cases. If the doctor could not be in court at nine, he was advised to inform the Deputy Registrar by phone, giving either the time when he would be available that morning or, if it was impossible for him to make it that day, to indicate another day and/or time. I must say that this arrangement has worked to the satisfaction not only of doctors but also of the parties to the case, because if the court is informed that a doctor cannot appear on a particular day, the case is immediately adjourned.

The situation tends to be a bit different before the Criminal Court, that is in trials by jury. Here it is up to prosecuting counsel to decide at what stage to produce the witness who happens to be a doctor. If the doctor is being produced as a witness for the defence, it would be up to defence counsel to decide at what stage to produce him. Although every effort is made by counsel to accommodate the needs of doctors, in practice it is not possible for them to

give other than a general idea of when the particular doctor will be called to give evidence, for example, in the morning of a given day or in the afternoon. Doctors must appreciate that although they may be scheduled to give evidence at a particular time, that schedule may be totally upset by an unexpectedly long cross-examination of a previous witness or witnesses, or by some unexpected point of law being raised and requiring lengthy oral submissions and a court ruling.

More recently even the legislator has intervened in an attempt to cut down on the time spent by doctors in court. By an amendment introduced last year[3] to section 646 of the Criminal Code, medical certificates are now admissible as evidence and are, until the contrary is proved, evidence of their contents without the need of the person issuing them having to be summoned to give evidence at the trial. For a certificate to be so admissible certain conditions must be satisfied. (1) the certificate must be issued by a registered medical practitioner or a registered dental surgeon; (2) it must concern his examination of a person (whether alive or dead) or a bodily harm suffered by, or a physical or mental infirmity afflicting, such person; (3) it must bear the clearly legible stamp of the medical practitioner or dental surgeon, showing his name, professional qualifications, expertise and address; and (4) last but not least, the certificate must be confirmed by the affidavit of the medical practitioner or dental surgeon. Such affidavit may be made before a magistrate, before a number of court officials authorised to administer oaths, or before a commissioner for oaths, including those notaries who have applied for and been appointed commissioners for oaths. If all these conditions concur, the doctor or dentist issuing the certificate need not appear to give evidence in court. However either party, or the court *ex officio*, may nevertheless insist that he appear and give evidence in court and *viva voce*. This in practice means that whenever a doctor issues a certificate which is likely to end up exhibited in criminal proceedings, it is in his interest to ensure not only that he has complied with all the requirements I have just mentioned, but also that the contents of the certificate is as clear (by which I mean also clearly legible), precise and as comprehensive as possible. If it is not, either prosecuting counsel or defence counsel or both, or the court *ex officio*, may feel the need to question further the doctor on his findings, by summoning him to appear in court[4].

And this brings me to a more substantial issue: the role of the doctor in court proceedings. Although forensic medicine has a role to play in both civil and criminal proceedings, there is no doubt that in practice, if not in the popular

mind, it is generally associated with criminal proceedings. What is generally not appreciated, sometimes even by doctors themselves, is that a criminal trial proceeds along a set of rules avowedly designed to ensure that the final outcome of the trial — the verdict — reflects the truth. Our system of criminal procedure is essentially adversarial. I emphasise the word "essentially" because although one can detect traces of the inquisitorial system in committal proceedings — better known to you as "il-kumpilazzjoni" — by and large the rules governing the conduct of a trial and the admissibility of evidence have been copied from the English system which, as you may know, is eminently adversarial. Essentially the adversarial system means that the production of the evidence for or against a particular hypothesis is left entirely in the hands of the parties, with the court and, where appropriate, the jurors, acting as independent and final arbiters of the truth or otherwise of that hypothesis. On one important point, however, our system has departed from the English system, and that is on the question of expert evidence in a court of criminal justice. And it is in this context of expert evidence that the role of the doctor falls to be examined.

Unlike the English system, with which some of you, I am sure, are familiar, where either party to the criminal proceedings may produce his or her expert witness, in the Maltese Criminal Justice system experts are appointed by the court. This was also true until recently in civil proceedings in Malta. The 1995 amendments to the Code of Organisation and Civil Procedure have changed all that. A new provision — section 563A — now provides that "where a person is called as a witness, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence only if, in the opinion of the court, he is suitably qualified in the relevant matter". In practice this means that either party in a civil case may now produce his or her expert witness, including expert medical witness. The court, of course, retains the power to appoint its own expert — called a referee in civil proceedings — and will no doubt appoint such a referee if the experts produced by the parties do not agree in their findings or conclusions.

But in criminal proceedings the old position prevails: a witness is only an expert witness if he has been so appointed by the court. This is a point, which, from my experience as a lawyer and a judge, doctors sometimes fail to appreciate. Doctors who, not without justification, believe that they are the experts in medical matters, often take the witness stand in the mistaken belief that they can give evidence as experts. As I am sure most of you know the basic, if

not the only, difference between an expert witness and an ordinary witness is that the former may, in the course of his testimony, express an opinion based on his knowledge or expertise, whereas the latter — the ordinary witness — can only testify as to facts which are within his personal knowledge, that is facts which were directly observed or perceived by him through one of his senses.

The rationale of the distinction between an opinion and a fact is this: the drawing of inferences is said to be the function of the judge or jury, while it is the business of a witness to state facts. Thus, for instance, the doctor who has examined in the emergency or casualty department of a hospital a person who is the presumed victim of a stabbing, or the surgeon who has opened up the victim to explore the wound properly, can only describe the wound, its shape, extent of penetration, the internal organs which have been damaged, the extent of the internal haemorrhage, and so on; but, strictly speaking, they may not venture to state whether the wound is compatible with any type of instrument or with a particular instrument which may already be a court exhibit because, always strictly speaking, they would be expressing an opinion. Indeed, even the statement as to whether the person was at any time in danger of loss of life is, properly speaking, an expression of opinion. In practice, however, our courts of criminal justice have invariably allowed the doctor and the surgeon in these situations to express such opinions.

The question, of course, is whether such a practice is in line with the law ("*secundum legem*") or whether it goes against the law ("*contra legem*"). I would say it is neither, and that it may more properly be conceived as "*praeter legem*" — beyond the law — that is a legitimate interpretation of the law going beyond the original and narrow interpretation given to the provision of the Criminal Code dealing with the appointment of experts. Section 650(1) of the Criminal Code provides that "In all cases where for the examination of any person or thing special knowledge or skill is required a reference to experts shall be ordered". The law further specifies that the experts shall be "chosen by the court" and that "as a rule" they "shall be appointed in an uneven number". The operative words are "examination of any person or thing". In the majority of cases these words do not pose a problem. The doctor examining and describing the corpse at the scene of the crime before it is removed to the mortuary, the pathologists performing the autopsy, the chemist or other person appointed to examine the blood, the tool-mark examiner, the fingerprint expert — these are all in practice examining a person or a thing. But

what about the photographer at the scene of the crime? Can he be said to be "examining a person or a thing" or is he simply "keeping a record of a person or thing" through the medium of the lens and film? Yet we keep appointing expert photographers whenever the inquiring magistrate or a court requires photographs to be taken. Or take the case when what is required is, say, an opinion as to the effect of a given drug on a particular organ of the body. No examination of a given person or thing is involved. Must the court, in such a case, do without an expert opinion simply because no examination is involved? I would venture to say no: in such a case an expert may be appointed by the court. It can legitimately be said that in the practice of our courts of criminal justice the expression "examination of a person or thing" has been understood to include every situation where an expert opinion is required.

In other words, whenever the court is of the view that the judge or the jurors are not properly equipped to draw the right inferences from the facts stated by a witness because they lack special knowledge or skill, expert opinion is admitted. And nowhere does our law state that a person's appointment as an expert must precede his examination of the person or thing. The law merely provides (in section 650(5) of the Criminal Code) that "the court shall, whenever it is expedient, give to the experts the necessary directions, and allow them a time within which to make their report". Clearly it would not be expedient, much less necessary, to give directions to the doctor who has already examined in casualty the presumed victim. Therefore, when the court allows the doctor in the casualty department or the surgeon who has performed the urgent intervention to express an opinion it is in effect appointing them *ex post facto* as experts. What the court must be satisfied of is that that doctor or that surgeon has the required expertise to express such an opinion. In my experience it is not uncommon for doctors, especially junior doctors, on being asked for an opinion on gunshot wounds or even other type of wounds, to say quite frankly that they would rather not answer the question as they feel that it is outside their competence.

When a doctor is giving evidence in court, whether as an expert or as an ordinary witness, he very often has to contend not only with the court atmosphere with which he may be more or less unfamiliar, but also with unsympathetic lawyers and impatient judges. Whatever the doctor has to say, it is most likely to be of help to only one of the parties to the proceedings. The other party will therefore, in cross-examination, attempt to demolish or discredit the evidence of the doctor. Doctors very often feel that their medical reputation is threat-

ened in cross-examination. The purpose of a cross-examination is not to discredit a doctor's reputation — though I will not say that some unscrupulous lawyers will not attempt to do so — but to lessen as much as possible the probative value, that is the weight, which the judge or the jury are to attach to the doctor's evidence. The doctor who prefers a particular medical opinion must, irrespective of however honest he is about that opinion, concede that there may be others who will not agree with that opinion, that he may be wrong in his conclusion, and must therefore be prepared to revise it if cogent arguments are brought to his attention. If no such arguments are advanced he is, of course, to stick to his opinion. My experience as a lawyer and a judge has taught me that the most credible medical expert, especially with jurors, is the unpretentious doctor who is prepared to accept both the limitations of science and his own limitations while at the same time standing strongly by the opinion which he believes to be the correct one. In this context I can do no better than quote from a rather old text-book, John Glaister's eleventh (1962) edition of his "Medical Jurisprudence and Toxicology":

"In giving evidence," he says, "there are certain principles which should never be forgotten by the medical witness. The language used in the witness-box should be clear, concise, and as untechnical as possible. Such terms as "syncope", "comatose", "highly vascular", "oedematous" and others should not be used. It is impossible to expect a jury to know what is meant by the terms "pericardium", "meninges" and "calvarium", but the substitution of "heart-bag", "brain-coverings" and "skullcap" or "vault of the skull", will make matters clear.

"The language should be concise. Adjectives of degree, especially superlatives, should be used sparingly, and only when absolutely necessary, since their use may be regarded as biased opinion, and this discounts the value of the evidence. The voluble witness is often a godsend to opposing counsel with a weak case, since the witness saying more than is required is apt to say more than he means, and in doing so increases his vulnerability while under cross-examination. Categorical answers, where possible, are the best, and when not possible answers should be concise and clear.

"The replies of a witness should invariably be courteous. This is not difficult during examination-in chief, since both witness and examiner are in accord, but it frequently becomes less easy in cross-examination, when the object of the cross-examiner is to weaken, or if possible, negative the evidence given in

the previous examination. However trying the situation may be, the witness should keep the fact clearly before him that he is giving expression to honest opinion, and that he has but consistently to hold by what he has formerly said, and to give fully the reasons for his belief, to convince the court of his sincerity. It is usually with reference to opinions that differences between counsel and witness arise.

"It may be of assistance to the witness under cross-examination to bear in mind that it is the business of the cross-examiner to make the best case he can for his client. Calm but persistent restatement of former evidence will sooner or later break down even the most pressing cross-examiner, and a witness may rely upon the judge interfering when he considers that counsel is overstepping the bounds of legitimate cross-examination. In short, if the witness can preserve himself free of the assumption that cross-examining counsel is his natural enemy, and if he does not, therefore, assume the mental attitude appropriate to that view, he will leave the witness box, if otherwise he has been well prepared, with credit. There are occasions, however, upon which it is absolutely necessary for a medical witness to maintain a very firm attitude, and to decline strongly to have words attributed which have not been stated. Occasionally cross-examining counsel may ask a question, which is based upon a statement which he desires the witness to understand he has already made in reply to a previous question, the answer to which tends to put an entirely different complexion upon the tenor of his evidence. If the witness is collected he will detect the misstatement and at once challenge it....

"Evidence should always be given distinctly, deliberately and audibly. It has often been said by judges that no witnesses are so difficult to be heard and to be understood as medical witness; difficult to be heard from want of clearness in articulation, and difficult to be understood by reason of the nature of the evidence." (pp. 46-48).

Allow me, as a judge, to add a few other comments to that. Sometimes doctors are asked, in examination or cross-examination, to state whether or not a particular hypothesis put to them by counsel is either possible or probable. Very often the importance of a question put in such terms, and especially the importance of the answer given thereto, is not immediately apparent to the witness. The answer to questions put in this way, however, can be decisive for the prosecution or for the defence, and therefore decisive also from the point of view of the judge or jury. The reason is to be found in the rules governing the

degree of proof that must be forthcoming from the prosecution to prove its case, and the degree of proof that may be forthcoming from the accused in order to nullify the prosecution's case. It is therefore important for medical witnesses, particularly medical experts, to be aware of the legal implications of the words "possible" and "probable". It is trite knowledge that the prosecution must prove its case against the accused "beyond reasonable doubt". This means that at the end of the day whoever has to judge on the facts — whether the jurors, the judge or the magistrate — after having taken into account all the evidence, must be convinced, that is morally certain, of the guilt of the accused. If however the accused elects to prove something — which would generally be something to negative the charge by raising a reasonable doubt — or in those exceptional circumstances where, by express provision of the law, the burden of proving specific facts is shifted onto the accused — the accused is regarded as having discharged the evidential burden if he proves the fact or facts on a balance of probabilities, that is, if whoever is to judge comes to the conclusion that the accused's hypothesis even if not certainly true is probably true. A fact is said to be probable if, after taking into consideration all the known circumstances, it is more likely than not to be as stated. The interplay of "possibility" and "probability" within the context of the degree of proof required in criminal proceedings had been very well described by Lord Justice Denning in these words:

"Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice" (cf. *Miller v. Minister of Pensions* [1947] 2 All E.R. 372, 373-374).

Of course here Lord Denning is referring to the evidence taken as a whole, but the same reasoning process can be applied if one were asked a question with respect to one fact. To give an example, the question put to a medical witness who has just described a stab wound somewhere in the abdomen could be something like this:

"Am I correct in saying that the wound you have just described could have been self-inflicted?"

The medical witness has, of course, not heard all the other evidence in the case, and his answer must be based solely on his examination of the wound and the victim in general, and he would be well advised to say so in the first place. This is especially true in most of the cases appearing before our courts where the persons carrying out the autopsy have no idea of what was found, other than the corpse, at the scene of the alleged crime, because they have never been at the scene of the crime, nor even seen photographs of it[5]. The next thing is for the witness to ask himself whether, given the facts as he knows them from his examination of the victim, he is certain that the wound was self-inflicted; or whether it is more likely than not (i.e. probable) that it was self-inflicted; or whether it is possible that it was self-inflicted but, given the circumstances that he knows, it is not probable that it was so; or, finally, whether he can rule out completely even the possibility that it was self-inflicted. If the witness cannot honestly make up his mind as to any of these answers, he should candidly say so, and leave the necessary inference to be made by the judge or the jury after considering all the evidence as a whole. I am pointing all this out to underline the fact that very often a very quick answer, without reflection and fired, as it were, from the hip can have disastrous consequences whether for the prosecution or for the defence, and ultimately disastrous consequences for the proper administration of justice. Incidentally, there is at least one provision in the Criminal Code which specifically requires a doctor or medical expert to address the question of whether a particular consequence was probable as distinguished from either possible or certain. I refer to subsection (2) of section 216 of the said Code, dealing with grievous bodily harm:

"Where the person injured shall have recovered without ever having been, during the illness, in actual danger of life or of the effects mentioned in paragraph (a) of subsection (1) of this section, it shall be deemed that the harm could have given rise to such danger only where the danger was probable in view of the nature or the natural consequences of the harm."

A final point I would like to make is about reference to authority. The practice in our courts of criminal justice is that counsel, whether in examination-in-chief or in cross-examination, are not allowed to confront an expert by citing from text-books, articles in learned journals or other publications. They may, of course, make use of their contents for the purpose of formulating questions and testing hypotheses, but they are not allowed to make known to the jury what a particular author has said and whether that author is in agreement or in

disagreement with the witness. The reasoning of the courts is simple: whether one is referring to Bernard Spilsbury, Hugh Johnson or Keith Simpson, the fact is that none of these are giving evidence under oath; and also, unlike the expert in the witness box, they may not be cross-examined as to their statements, however authoritative those statements may be in medical circles. However, if the medical expert, because of his lack of previous first-hand knowledge of particular circumstances, feels that he cannot assume the responsibility of an opinion without reference to authority, he must be prepared, if so requested by the court, to place the book, article or paper at the disposal of the parties, who may then examine the witness with reference to other relevant parts of that book, article or paper.

Mr. Chairman, in this very brief paper I have tried to draw your attention to a few of the problems doctors encounter in our Courts of Criminal Justice. These problems are ultimately problems more or less of the proper administration of justice. After all forensic medicine would be pretty much useless if it did not take the form of documentary or oral evidence in a court of law. Allow me also to say, lest I be misinterpreted, that I am not in favour of parties to the proceedings being allowed to produce *ex parte* expert evidence. I believe that the situation obtaining under our Criminal Code is by far preferable to that under the Code of Organisation and Civil Procedure, where expert evidence, including expert medical evidence, may ultimately boil down to who may pay most. Finally I trust that I have not put off any one of you from appearing in court, or appearing before me, in your professional capacity, even though as I say this I am reminded of a cartoon which appeared years ago (in 1975, I believe) in a special edition of *Punch* which was largely devoted to courts and lawyers. It depicted an English barrister, looking pretty much distraught, rushing out of the court room and saying to a colleague he met in the corridor: "Six ruddy medical experts and they can't even agree on whether the judge is sane".

Thank you.

REFERENCES

[1]This is the text of an address delivered on the 7 November, 1998 on the occasion of the Maltese Forensic Medicine Conference held at the Westin Dragonara Reef Club Pavilion on the 6-7 November, 1998. The Conference was sponsored by Eli Lilly & Company. Mr. Justice De Gaetano is a Senior Lecturer in the Department of Criminal Law of the Faculty of Laws at the University of Malta. Before his appointment to the Bench he was Deputy Attorney General.

[2]Judge Caruana Colombo and I sat separately in the Court of Criminal Appeal. The Court of Criminal Appeal in its inferior jurisdiction — that is for hearing appeals from judgements of the Magistrates' Court — is composed of one judge. In its superior jurisdiction — that is for hearing appeals from preliminary decisions and from the verdict and sentence of the Criminal Court, the Court of Criminal Appeal is composed of three judges (the Chief Justice and two other judges).

[3] The relative Act was published in the Government Gazette of the 30 December, 1997, which means that in practice the amendment came into effect on the 1 January, 1998.

[4] Another amendment introduced by the same Act provides that when a doctor or dentist give evidence in the course of the inquiry relating to the *in genere* or in the course of committal proceedings (compilation of evidence), the deposition of that doctor or dentist is admissible as evidence in subsequent stages of the proceedings, including subsequent stages before another court, without the need of that doctor or dentist having to be summoned again to testify. However either party may demand, and the court may *ex officio* require, the doctor or dentist to be again examined in court and *viva voce* (section 646(8)). The practical effect of this amendment is that the pathologists who have given evidence in the course of the inquiry relating to the *in genere* would generally be exempted from giving evidence in the committal stage. However it is unlikely that either party or the court will exempt them from having to appear before the Criminal Court, since the autopsy report would generally have to be explained to the jury.

[5] There is nothing in our law preventing the pathologists appointed to carry out the autopsy from familiarising themselves with the scene of the crime or accident so that they may better interpret their findings. Nor are they precluded from receiving information from other persons, including other court appointed experts; the law merely provides that "If in the course of their work, the experts shall obtain from any person information on circumstances of fact, such person shall be mentioned in the report, and shall be examined in court in the same manner as any other witness...(section 653(3) of the Criminal Code).