

**‘A Kind of Medical Knowledge’ the relationship between
medical and legal practice: some considerations.**

*There is a kind of medical knowledge, which is not so much concerned in the cure of
diseases, as in the detection of error and the causation of guilt.¹*

INTRODUCTION

Medical evidence was being offered in courts of law at least as far back as the time of the early Egyptian civilisations.² While information on the matter is hardly plentiful, a search of legal records suggests that by the eighteenth century it was not unusual for doctors in Wales to be providing testimony of a clinical nature under such circumstances. Many years would pass before they would be adequately prepared for work of this nature. It was not until late in that century that Edinburgh University uniquely offered lectures on what became known as medical jurisprudence.³ At about the same time, the first English language textbook on the subject was published.⁴

The Great Sessions courts were set up in Wales in 1543 and functioned until they were replaced by the assizes in 1830. The National Library of Wales has made available online catalogues of the Sessions records from 1730 to 1830. The documents referred to in those catalogues contain some details concerning the practice of medicine not as readily found elsewhere, and provide a useful starting-point for a study of Welsh doctors as witnesses in legal cases. The evidence being offered would eventually have a significant influence on sentencing policy in some instances. The Library has also made it possible for anyone resident in Wales to have access to a wide-ranging variety of material including parliamentary papers, newspapers and eighteenth-century books *via* the internet. Most of the material referred to in this paper was traced using those two sources.

THE STATE OF CLINICAL MEDICINE c. 1730-1830

Although advances in the understanding of the nature of some diseases had already been made, clinical medicine was still relatively undeveloped during the time under consideration. Despite the earlier work that had been done, this had virtually no impact on day-to-day practice. The treatments in use were, on the whole, unsophisticated. Typical of those times was the management of the Reverend Pryce Davies, who played such a major part in the religious conversion of the revivalist, Howel Harris. In the course of his last, fatal illness, the Brecon surgeon, Gabriel Jeffreys, visited Davies fifteen times between September and October 1760 (for which he was paid ten guineas). His sole purpose in doing so was to drain a gangrenous ulcer of the leg, and finally, to drain ‘the Water of a Dropsy from his leg before he was Interred.’⁵ Few of the other available treatments were of more value. Together with blistering, bleeding,⁶ the use of leeches⁷ – now back in vogue in some quarters – a variety of largely ineffective drugs, and taking the waters at Llanwrtyd and such places,⁸ there was little else on offer.

Statements such as that made by a physician in 1806 ‘that the typhus fever, so prevalent and so fatal about Edwinstford, proceeds from dirt and not from having the cottages paved’⁹ were far from being universally acceptable. Virtually nothing was known of the causes of disease; it was a sphere in which superstitions abounded. Epidemics were viewed by many as the recriminations of a vengeful Supreme Being. Few were as enlightened as Captain P. T. Percival, who wrote to the third Lord Newborough at the time of the 1832 asiatic cholera epidemic, saying:¹⁰

at present it strikes only the poor whose wretchedness render them easy prey to any disease. It may find its way to the door of the affluent unless they open their purses in time and relieve the wants of the poor, so endeavouring to keep them out of the reach of the disease.

CHANGES IN THE LAW: THE REGISTRATION OF DOCTORS

Sometimes, it had not been clear whether those who maintained that they were entitled to treat illness had been properly tutored for work of this nature. By the sixteenth century, the problem caused so much concern that drastic alterations in the law were called for. The Anglican bishops were given the right (by the Act 3Henry VIII, c.11) to issue licences to anyone considered to be capable of practising medicine.¹¹ No period of formal training was required. There were no clearly defined standards to be met and the system in being provided no more than a makeshift form of guarantee of professional competence. Most of those who worked in the clinical field probably did so without having been licensed. And it is only too apparent that it was known to the ecclesiastical authorities that it was common practice for their 'rules' to be ignored. This can be clearly seen from the wording of the model licence prepared by the Archbishop of Canterbury, William Wake, at some time during the period 1716-37:¹²

we have been credibly informed that you have for some time past been conversant in the practice of Surgery and by God's assistance have cured many who have been desperately wounded and have received a laudable Testimonial from several practitioners of your experience...in performing the Cures which you have undertaken.

Had this not been so, many people would have been deprived of the all too scanty medical services that were available. Nor did the references provided for candidates necessarily carry any guarantee of proficiency. They were often written by the parish priest and churchwardens, and only infrequently by other medical practitioners. In 1708, Benjamin Powell of Gwenddwr, Breconshire, was ‘consederably Instructed’.¹³ Less vaguely, in 1720, Richard Prichard of Narberth, Pembrokeshire, was a ‘very carefull & Sober man, and hath done Several very good cures...’.¹⁴ Worse, in 1717, John Jones of Llandysul had been thought by his referees to be suitable as there were ‘few or no profest’ others working throughout the whole county.¹⁵ Occasionally, details concerning applicants’ previous experience were provided, as happened with William Griffiths of Caernarfonshire (1767), who was ‘capable of Dressing Wounds, Locating fractured Bones and performing other operations in Chirurgery’.¹⁶ While no detailed assessment of the arrangements in place can be made, the general impression gained is one of ineffectiveness.

As ill-conceived as these measures were by modern standards, they survived for more than 200 years. For reasons which are unclear, from some time during the second half of the eighteenth century, this scheme largely fell into abeyance. From then until the passing of the Medical Registration Act of 1858, the only means of distinguishing between the trained and the untrained was that there were some who had acquired a medical qualification while many – possibly the majority – had not. But of those who were not qualified, some were experienced enough if they had served as apprentices to other doctors. Whatever their background, they could not be prevented from referring to themselves as doctors. Sometimes, advertisements warning patients of this might be published. The privately produced *Medical Register*

for 1779 contained such a notice:¹⁷

An ingenious Surgeon in this County complains of a set of daring and ignorant persons, who undertake the practice of Physic in Wales. One of these practitioners, and who is the most in vogue, was lately a collier. Our correspondent has favoured us with the following advertisement, which is circulated in the form of a hand-bill.:
Caerleon, 9.7.1778/ Whereas it was falsely reported by some of the Faculty that Thomas James of Trevethin-Church, nr Pontypool, physician, was dead. This therefore is to give notice, that he will attend Abergavenny market as usual, at the Golden Horse-shoe, every Tuesday and at the King's Head at Pontypool every Saturday as usual. Also/ Thos James junior, Apothecary and physician has lately opened a shop in the town of Caerleon where he has laid in a large assortment of fresh goods of the genuine sort the public may depend on having civil usage and dispatch of business, according to the best understanding and abilities of their Humble Servants/ Thos James senior/ Thos James junior.

They will attend Chepstow Market at the Bell, every Saturday.

N.B. Notice will be given in case of death.

With the passing of the Medical Registration Act, only those who were named in the new *Medical Register* would be entitled to refer to themselves as doctors. This did not prohibit others from claiming to be able to diagnose and treat illness.¹⁸

Women practitioners

It had been generally accepted that women should not work as doctors, although there were exceptions. In 1739, a physician and two surgeons attested to the skill of a

doctor's widow who wished to take over her late husband's practice. The matter was sufficiently unclear for Dr Edward Wynne (1681-1755) of Boderwyd, Anglesea, as chancellor of Hereford Cathedral, to be asked whether she should be allowed to do so. He was unable to offer any advice, having 'never heard of Any Instance...ye Masculine Gender only occurring in our Books'.¹⁹ The only eighteenth-century Welsh female apothecary traced in the course of this work, Anne Thomas of Haverfordwest, was successful enough to have left £330 in 1757' (which would be worth more than £480,000 nowadays, using average earnings as a measure).²⁰

The one branch of clinical work which was dominated by women was midwifery. Pregnancy was once described as the most abnormal of normal life-events, and 'the midwives found that upon several occasions ye were incapable of Delivering ye women, so they had recourse to ye men'.²¹ This was a reference to the use of forceps and Caesarean section in delivering babies.

There were ethical issues which were inseparable from the work of midwives which caused both the church and legal authorities some concern. This led to the adaptation of a scheme, similar to that in place for medical men, whereby those thought to be competent to practise would be recognised as such. The oaths which they took show clearly the authorities' level of unease about these matters. The oath concerning Mary Hopkin of Margam, Glamorgan, was written in 1780.²² The age-old fear that Roman Catholic practices would be reintroduced was only too apparent. Only the form of service authorized by the Church of England was to be used in baptizing the newborn, except that allowances were to be made for Protestant Dissenters. Another issue that was of the greatest importance concerned the illegal termination of pregnancy: she should 'not give any Counsell or Minister any herb Medicine or potion nor any other thing to any woman being with Child whereby She should destroy, or cast out that she

goeth with=all before her time.’ The ecclesiastical officials were to be informed of any other women known to her to be practising without a licence. By that time, medical men were no longer being accredited in this way. There is no obvious reason as to why midwives should have had to continue doing so. The state registration of midwives was not brought about until the early twentieth century.

Legal implications arose when abortions were carried out, but no assessment can be made of the frequency with which this happened in the absence of a modern programme of collecting statistics. What appears to be true is that when misdemeanours occurred, those who were brought to justice were few. When this did happen, it did not follow that professionals would be called to testify.²³ Such was the case in 1816 when a Carmarthenshire man described as a yeoman and an occasional Presbyterian preacher had been ‘in the habit of sitting up with the deceased in [her] house for the purpose of courting her as is customary in the country’. On finding that she was pregnant, he had persuaded her to take a combination of arsenic and mercury ‘for purging her blood’. Following a miscarriage and her subsequent death, he was found guilty of having murdered her. His execution, which was witnessed by a crowd of about 10,000 people, was noteworthy as it took on the nature of a religious service, with much hymn singing and the offering of prayers.²⁴

COURT PROCEEDINGS

Inquiries into unexpected deaths had called for some attention from early on. They were viewed as being of several kinds: ‘by the visitation of God, by misfortune, by the subject’s own hand, by the hand of another.’²⁵ It was written in 1761, ‘if the Inquiry be of the Death of one Man by another...you ought to have a Surgeon...to examine and shew the Wound; and who should likewise...give his Evidence upon Oath’.²⁶ But

there was always a possibility that there were no medical men who lived in that district. Therefore, it could happen that verdicts would be arrived at on the basis of what would now be considered to be quite inconclusive evidence. This was so in the case of the secluded hamlet of Crynant, in the Dulais valley in 1763. An inquest was held at the inn there following the death of a man who had last been seen alive when he had been helped over a footbridge in an intoxicated state. He had not arrived at his home by the following day, and his body was later discovered several miles away. Of the witnesses who testified, one had heard a cry for help on the night in question, while another had seen the accused man and his son in that district carrying 'some burden that had seemed heavy'. At the inquest, the man in question was sent for trial on the basis of this flimsy testimony, but a not guilty sentence was passed at the Great Sessions court.²⁷

More striking was an incident involving the death of a young boy at Rhosili, Gower, in 1799. While medical evidence was being presented in Swansea sooner than that, this was not so in the case of the more remote Gower peninsula. In that year, JW was charged with the murder of an eight-year-old 'infant of tender years' who had been employed by him as 'a menial Servant'. Having failed to provide the boy with sufficient food and drink, he 'violently assaulted and beat the Deceased' and had sent him on horseback on a journey of three hours on a particularly cold day. JW, was judged to be guilty of murder without any supporting medical evidence having been produced.²⁸

Even by 1839, at the inquest on the body of TJ of St Martin, Haverfordwest, Pembrokeshire, he having been 'diseased and distempered and labouring under strong symptoms of Hydrophobia departed this life through the Violence of such disease and distemper and not from any hurt...'.²⁹ No further proof was asked for.

One of the most striking features of the early cases was the confident, unequivocal way in which the untrained presented their testimony. In 1730, following a quarrel in a tavern in Swansea, a man, MM, was wounded. A surgeon, Rowland Prichard, and an apothecary, John Witney, were sent for. The injured man had several head wounds, and Prichard 'found him speechless and in a violent fever being so weak.' He concluded that MM was unlikely to live for another day. For that reason, 'he did not think fitt to do anything to him'. The skull had not been fractured, but he died some days after the original injury. Together with Witney and 'in the presence of diverse persons', Prichard examined the body. There was evidence of extensive bruising of his back 'tending to a Mortification if not quite Mortifyed which threw him into the ffeaver of wch he dyed as this Dpt. verily believes.' Thus, 'for want of care and application', the injuries had precipitated a fever which led to the patient's death. (The causative role played by some forms of bacteria in producing infection would not be made apparent for more than another century.) The assailant, being guilty of manslaughter, 'prayed for [and was granted] the benefit of the clergy' (see below).³⁰

In 1800, at the request of the coroner, a surgeon from a well-known Swansea and Gower family, Charles Collins, performed a post-mortem examination on a man who had been killed. Collins was unqualified, but his report was of a vastly better quality than that previously mentioned, and would have done credit to someone who belonged to a later age. On the

right side of the forehead [there was] a wound about three Inches long penetrating to the Perecranium (*sic*) and the whole of the right side of the Head from the Temple to the lower side of the Occiput...a great part of the Temporal bone the right parietal Bone and likewise all the right side of the Occipital Bone down to the

great Foramen was fractured into pieces & a very considerable quantity of the brain beat out. ..the above were the occasion of the Death...and it is his opinion that they were the Effects of repeated violent kicks or Blows with some instrument or stone.

Being deemed to be guilty of manslaughter, the accused was imprisoned for a year and was fined.³¹

Even though the evidence being provided by doctors was assuming a greater degree of importance, the courts obviously felt that they were not invariably bound to accept statements of this nature. In attempting to arrest a man in Neath in 1744, using a sword, the sheriff's bailiff inflicted severe abdominal injuries on him. A local surgeon attended him, but his wounds proved difficult to treat, and the patient died a few days later. The medical testimony produced in court showed quite conclusively that death was attributable to the bailiff's actions, but in spite of this, a not guilty verdict was returned.³² A possible explanation for this is that as he had merely been carrying out his duties as an officer of the Crown, the assailant was considered to be exempt from the workings of the law. The doctor's right to practise without a bishop's licence was challenged by another medical practitioner some years later.³³ The fact that he had not even met the low standards asked for did not exclude him from undertaking work of this kind; nor was the matter raised in court.

A NEW AGE

While age-old beliefs were slow to disappear, there were signs, certainly by the nineteenth century that a new era might be developing. The invention of the stethoscope in 1819 helped to revolutionize the work of the clinician. To mention only

a few of the other changes brought about: the introduction of anaesthetics, a means of reducing and preventing the occurrence of infections during and after surgery, and, later, the discovery of x-rays all helped to transform the practice of medicine. Much would need to be done to improve standards of medical education. Even so, for the privileged few who could have afforded a formal medical training, significant advances had taken place even by the end of the eighteenth century. More attention was being paid to teaching anatomy, and typical of this new approach were the suggestions made by a Carmarthen physician, Dr David Davies, to a Llandovery medical student, David Jones, who was studying in London in 1805.³⁴

Industry, sobriety and attention which he so eminently possesses, will be rewarded anywhere, but particularly in this great Town, where vice and prodigality are so prominent...I have directed his attention to make himself a good Anatomist, which is the surest foundation to become eminent, in either Physick or Surgery./ When he is once grounded in this, all the other Branches of the profession will become easy, & familiar.

Another London medical student, Thomas Hicks of Pembrokehire, wrote in 1830:³⁵

I spend most of my time in the dissecting room studying the nature and structure of the human body and often for hours...enjoying myself very comfortable without being annoyed with any thing but the rats...It is the finest study in the world...It is impossible for a person to pretend to be a medical man without being thoroughly acquainted of Anatomy...

And this increased awareness of the importance of anatomical studies would help in no small measure to advance doctors' skills at performing autopsies. This, in turn, meant that they would now be better equipped to provide specialized evidence for the courts.

FURTHER DEVELOPMENTS

However, neither the statutory registration of doctors nor the improved standards of medical education were the prime factors in accelerating the process whereby they became expert witnesses in legal cases. It has been suggested that, in England, it was the appearance of the defence advocate which provided the impetus for the increased role assumed by doctors in this context. Previously, it had generally been assumed that providing some form of defence was the function of judges.³⁶ In 1731, there were fewer practising Welsh attorneys than was the case in England (one per 1,290 of the population in England and Wales, compared with one to 2,233 in Wales alone.) That ratio had not altered greatly by 1802.³⁷ This probably accounts for the fact that medical evidence occurred less often in the earlier records traced than might have been expected.

Suspected poisoning presents a difficult problem and often, court records are of little help in this context. In 1799, a verdict of murder was reached at the Glamorgan Sessions merely on the basis of a statement made by the previously mentioned Charles Collins, that the 'ponderous' white powder discovered in the stomach of the deceased individual 'he believes to be White Arsenic and was the occasion of [the victim's] Death.'³⁸

Two other Swansea doctors, George Gwynne Bird and James Gibbon, had both been trained at reputable medical schools, the one at St Bartholomew's Hospital, London,

and the other at Edinburgh University. There are no means of telling whether either had received any tuition in toxicology. Nor was everything that was taught to undergraduates necessarily seen as being relevant to their clinical practice. In 1830, Bird, was called to see a woman who was said to have taken some poison. There was a bottle which ‘evidently had contained Laudanum [morphia]’ near her. She resisted his attempt to introduce a stomach pump but eventually vomited. Bird merely testified that he would have been able to detect morphia ‘either by the smell or the taste’. (No proper laboratory facilities were available locally at that time.) More significantly, there was also evidence of injury to her head. He felt that her life was in danger and went for a magistrate so that she should make a statement on oath. By the time of his return, she had died. Gibbon and Bird performed an autopsy examination. Gibbon had known the woman previously and testified that she had ‘been of very intemperate habits and therefore more liable to death from external injuries.’ It was found that her death had been caused by injuries, and her husband was accused of having murdered her. The charge was not proved in court.³⁹

The Great Sessions documents are often lacking in detail in comparison with more recent court records. By the latter part of the period under study, additional evidence concerning matters dealt with there is available in the form of newspaper accounts. Such was the case with a murder trial heard at Swansea in 1806, where a supplementary account of the proceedings appeared in *The Cambrian*. Having been told by his female servant that she had seen his brother’s ghost, an employer assaulted and killed the woman. The bruises later discovered on her body were wrongly attributed to epileptic fits from which it was concluded that she had died.

After the funeral, the coroner, Dr Richard Griffiths, ordered that the body should be exhumed. Having taken such an extreme step, he was satisfied that death had been

brought about by injuries, and did not arrange for a post-mortem to be performed. A distinguished Swansea physician, Dr William Turton, took issue with him, emphasizing that a more detailed inquiry could have revealed other causes for the death. Unusually for that age, he even stressed that psychological factors might have been relevant. (Even if that had been so, it is not clear how an autopsy could have thrown extra light on that matter.) Mr Justice Hardinge was the senior judge for the circuit, and was a man renowned for ‘the truest sentiments of humanity and legal discrimination’.⁴⁰ He favoured Griffiths’s more superficial approach. Angered that the jury had failed to agree on a murder verdict, the judge was forced to accept one of manslaughter. Whether this was because they had misunderstood both the evidence presented and his summary of it was not clear to him. As matters stood, he could only impose a sentence of a year in gaol, but he added that the prisoner would not be released until he had paid an additional fine of £50 (worth more than £3,000 nowadays, using the Retail Price Index as a measure).⁴¹

Turton was evidently equally infuriated by the judge’s dismissal of his observations. He maintained that some of his testimony had been ignored and partly misconstrued. Furthermore, the prisoner, a monoglot Welshman, had failed to follow the proceedings. The accused might as well have been left in his cell throughout the trial. He went further, saying that the interpreter provided was there only for the benefit of the court. The judge seems not to have responded to this attack.⁴²

The results of this limited study confirm that until the 1830s doctors who testified in the Welsh courts only did so as witnesses to fact. The ever-growing pace at which more was learnt about the nature of disease processes was matched in the legal field by the more prominent role being taken by barristers and solicitors in court proceedings. This enhanced the need for doctors to be able to face up to more rigorous

cross-examination. Consequently, the age of the medical witness to fact was replaced by his appearance as an expert witness. Now, he might be called upon to comment on and interpret his own evidence. That marked the beginning of a vastly different episode in medico-legal history.

MENTAL DISABILITY

Psychiatry, too, witnessed some extraordinary changes during the nineteenth century, even though they happened on a lesser scale than in several of the other branches of medicine. The first (private) asylum to be opened in Wales (in 1815) was May Hill's House, Swansea. The information that is available suggests that standards there were reasonably high. The medical attendant, Thomas Hobbes – the first known Welsh psychiatrist – could rightly claim that his 'study has for many years been particularly directed towards the treatment of mental diseases'.⁴³ But as this was an age when law-breaking behaviour was generally regarded as being sinful, his vast experience is unlikely to have included work with criminal offenders. The 'treatment' of mentally disabled lawbreakers often consisted of no more than attempts to contain what were viewed as unmanageable situations.

The more serious psychiatric conditions can be associated with distorted thought patterns and unconventional behaviour. Frequently attributed to external malevolent influences, in a pre-scientific age it was only to be expected that attitudinal changes would be brought about slowly. Often, under the old Elizabethan poor law, those who were homeless might even have been arrested as being rogues and vagabonds.⁴⁴

Civil actions

If proof should be needed of the stagnant state of psychiatry over the preceding centuries, this might be obtained from an examination of civil court practice. Sometimes, decisions had to be made regarding a mentally ill individual's ability to manage financial affairs, or to continue working in some sphere. Where the supervision of money matters was involved, there was a mechanism in being whereby a Commission in Lunacy could be set up. Its function was to decide if the person concerned was able to look after his own financial interests. The form which this commission took had not altered between the seventeenth and the nineteenth century.⁴⁵ Several lay commissioners would take evidence from those who had known the individual concerned. A decision as to the state of his mind and the duration of the illness (sometimes, unrealistically giving the date of the onset of the symptoms) would then be made. Deciding on the person's fitness to follow some occupation would be similarly dealt with. In 1716, a clergyman from the diocese of St Asaph was considered to have been insane for some years. He was incapable of taking the usual Oaths of Allegiance and Abjuration. In discussing whether he should be made to leave his living, it was this rather than his inability to carry out his usual duties which was the issue at stake. It was the opinion of the barrister, Robert Raymond of Lincoln's Inn, that the patron of the living should present another clerk. The Attorney General, Sir Edward Northey, failed to agree. It was his view that it could not be said of someone who was severely mentally ill that he had neglected or refused to take the oath, since he 'hath nor mind or will'. Therefore, the fact that the oaths had not been taken was of no significance. A Commission in Lunacy should now be arranged, and the jury empanelled was to decide when the illness had been brought on. No psychiatric evidence was asked for, or would have been available that early on.⁴⁶

In these cases, reliable testimony of that kind could well have influenced the decisions made. Unsatisfactory as the situation was, matters were unlikely to improve until more specialized help became available. But expert evidence of this kind was altogether more complicated than was the case with physical illness. It was not obtainable in Wales at least until the second half of the nineteenth century.

The criminal field

In spite of the adverse publicity which crimes committed by the mentally ill attracts, they form only a small proportion of the whole criminal population. From 1730 to 1830, 855 from Wales were taken to court for murder. Of those, twelve were considered to be 'insane'. As has been seen, even in the eighteenth century, doctors were not unusually providing substantial medical evidence for the courts. This was not so with the mentally ill, the 'proof' of their insanity having come from other sources. It was, perhaps, unexpected for those who were psychiatrically disadvantaged to comment on their own mental state. E.P. of Anglesey did so on being detained following the death of her child in 1730. Her depositions read:⁴⁷

The s^d Examinant saith that to her sorrow she did put [the infant's] head...in an [?] pott or kettle with water but when doth not well remember being not for a Considerable time in her proper senses and belived that about three years agoo she was much troubled in her senses but sometime after became Somewhat better in her senses but when or for how long a time she so continued she knows not and that for some time agoo she had been troubled in her senses as before but how long agoo Knows not...

Unusually, a man from the Gower peninsula unintentionally provided crucial testimony regarding his own disability. He had viciously attacked and killed both his parents in 1734, and was so obviously lacking in insight as to be unaware of the extent of his own disability. The contents of a neatly written letter of his, of nearly 400 words, constituted the sole proof of his illness. Made up of disjointed statements, it is typical of what might be expected from someone with a diagnosis of the condition now known as schizophrenia. It was addressed to ‘His Royel Hiness King George.’ It begins:⁴⁸

May it Pleas His Royel Hiness...I am Constrained to revele a seckrit, which is to great for one brest to contain, the perpsiels (*sic*) of a woman desiring to [?]know the form of the Creation, with the temtations of the serpent, desiring to know where Cain had a wife, also whether there be a mere-maid and mere-man, and whether there be a unicorn or not...

Had this paper not been produced, his disturbed actions might have been attributed to some other cause. As it was, that produced the terse comment ‘insane. No prosecution.’

Given such circumstances, it is hardly surprising that hearsay evidence often played a major part in deciding on the fate of mentally ill lawbreakers. In the case of a clergyman from Meirionethshire in 1765, his brother and some others believed that he was insane.⁴⁹ That, it seems, was sufficient.

And even had they been asked to do so, it is inconceivable that any of the practitioners working within easy reach could have assessed the mental status of those concerned. On the rare occasions when doctors ventured to pronounce on psychiatric

matters, their opinions were often not likely to be of any more value than those provided by lay persons. This can be seen from the testimony of Lewis Jones, a surgeon of Ffestiniog, who wrote in 1820, concerning Mr Owen Lloyd of Meirionethshire, saying that he 'is appointed to be a High Constable of Ardwydwy (*sic*). As a surgeon I have attended him some time back, with a disease that he is not fit, for undertaking that situation, for certainly he is insane.'⁵⁰

Some years would pass before anything approaching a modern system of diagnosis of psychiatric disorder would emerge. When the necessary expertise was eventually made available, it involved a shift of emphasis from an examination of the physical condition of the victim to an appraisal of the mental state of the convicted individual.

Sentencing procedures

In pre-modern times, there were two means by which a death sentence could be avoided following a charge of murder. The first was brought about when there was evidence of severe psychiatric disorder. This has been replaced by a system more in keeping with the headway made in treating mental illnesses. It had been accepted in Roman law that mentally ill lawbreakers should be treated differently from other offenders. Macer wrote *c.* 180 AD:⁵¹

If you have clearly ascertained that [the defendant] is in such a state of insanity that he is permanently out of his mind and so entirely incapable of reasoning, and no suspicion is left that he was simulating insanity when he killed his mother, you need not concern yourself with the question how he should be punished...he should be kept on close observations and, if you think it is advisable, even kept in restraint...

And therefore, it became established that in murder trials, where there was severe mental disability, the verdict might be altered to one of manslaughter. The assumption was that those who suffered in this way were not answerable for their own actions. As was perceptively pointed out in the eighteenth century, ‘a Mad-man...is only and enough punished by his Madness.’⁵² But not everyone in high places was happy with the notion that doctors should be allowed to influence the way in which courts of law made their decisions. In the 1840s, Daniel McNaughton, believing that he was aiming at Sir Robert Peel, mistakenly and famously killed the Prime Minister’s secretary, Mr Drummond. When the matter went to court, having heard some of the evidence, it was concluded that McNaughton was insane, and so should be spared the death sentence.⁵³ That most unreliable of witnesses, Queen Victoria, for one, refused to accept this on the basis that anyone who tried to kill a politician could not possibly be anything other than eminently sane.⁵⁴ But there were other, more weighty, observers on the judicial bench, who were also reluctant to allow that psychiatric evidence should be brought forward. As late as 1862, in a discussion on the Lunacy Regulation Bill in the House of Lords, the Lord Chancellor maintained that ‘an evil habit had grown up into a precedent with judges and juries of assuming that insanity was a physical disease and not a subject of moral inquiry...even medical men...never made allowance for peculiar idiosyncrasies.’⁵⁵ At a time when it was being acknowledged that at least some physical disorders had definite causes, the view that mental illnesses were brought about by the presence of evil forces had still not disappeared. Nor did psychiatric conditions call for specialized attention. Yet, despite this level of prejudice, some form of decision had to be taken about the placement of those in this position.

When it was not clear what procedure should be followed, it is likely that, where the courts took no further action, an indeterminate number would have been released. They would often have had to fend for themselves, permanently psychologically scarred as they were. At other times, arrangements were made for some form of custodial care. Often, more consideration would be given to the protection of the community rather than the welfare of those being detained. In 1743, a man from Radnorshire, having been born deaf and dumb, was ‘to be kept in close custody for life’, with no further details being provided.⁵⁶ For a woman from Flintshire, it was somewhat optimistically directed in 1768 that ‘the proper persons do attend [to her] to administer medicines or such remedies as shall be thought necessary to restore her to reason’.⁵⁷ (The use of the word reason stems from the mistaken belief that mental disorders were accompanied by an inability to think and behave logically.) With another from Caernarfon, in 1788, he was to be taken to Ireland in the care of his brothers. There, he was to be ‘detained in some safe and proper place of confinement’.⁵⁸

Even when no crime had been committed, imprisonment sometimes presented a convenient way of dealing with the mentally ill, who were often viewed as being nuisances. In 1775, a man from Abergavenny was ‘committed to prison for lunacy and not for any crime.’ As the gaoler ‘had a vast deal of trouble with him’, the parish authorities were presented with a bill for £6 1s., which was considered to be a ‘moderate’ sum, given the circumstances.⁵⁹

It was only in 1808, with the passing of several parliamentary acts, that the detention of mentally ill offenders in prison was officially allowed.⁶⁰ There was a theoretical possibility that some could be released when they were ‘fully cured’ (without having had any treatment). Otherwise, they might be faced with a life sentence. Their

numbers in Wales were never likely to have been large. A random search of records from 1825 to 1846 showed that there were not more than six being kept in Welsh gaols at any one time,⁶¹ and some of those may well have been drawn from sources other than the Sessions court. In 1841, a man had been kept in the Glamorgan county gaol for two years as he was 'insane'. The reason for his prolonged detention was his failure to provide 'sureties to keep the peace' towards a prominent magistrate. At the time, this was probably seen as presenting a reasonable compromise solution in the absence of other facilities. The lunacy commissioners, more enlightened than most of those who felt qualified to speak on the matter, had no objection to those guilty of minor offences being treated in this way. Irrespective of their views, even as early as the 1840s, more disturbed and dangerous mentally ill people were being kept there, to the annoyance and danger of the other patients.⁶² Separate accommodation, wrote the commissioners, should be made for those who were 'an object of dread and disgust to those around them'.

The offences of those being detained in 1890 included feloniously killing a mare (detained at Her Majesty's pleasure), and stealing an umbrella and blanket (eighteen months hard labour). No consideration was given to the fact that a prison environment was often the most inappropriate for those in this condition. The prison commissioners:⁶³

hoped that we may in future have fewer cases of the committal to prisons of ...persons who have been found insane on reception [who] should not have been sent to prison at all...it is not possible to have in every prison proper facilities for the treatment of insane persons...

Other offenders were sent to asylums, often far from their homes. But their use as an alternative to prisons for the small numbers of mentally ill criminals was not universally popular. In 1864, in a *Times* leading article concerning the Act which made this possible, it was said that anyone:⁶⁴

declared insane...may be reprieved by mere force of a certificate of his insanity drawn up by two physicians or surgeons of any character and opinion whatever, attested by two magistrates of any idiosyncracies or intelligence whatever...any clever rascal, by the help of any clever lawyer, might take advantage of...that strange piece of legislation.

Why some offenders should – rarely – have been taken to Bethlem Hospital, London, while others were not, is not known. (This was the original bedlam. It is now one of the most highly regarded psychiatric hospitals in Britain). A fifty-three-year-old yeoman of Montgomeryshire already had a history of asylum treatment when charged with murder in 1799.⁶⁵ He was described as being dangerous ‘and not fit to be trusted.’ He was eventually admitted to Bethlem Hospital, where he died from tuberculosis in 1848. In the case of JR of Caernarfonshire, seven weeks or so after his trial in 1825, a Royal Warrant, signed by the Home Secretary, Sir Robert Peel, was sent to the county’s sheriff. This directed that⁶⁶

being found not guilty by reason of insanity [he should be] kept in strict custody in the common gaol...until our pleasure be known we having thought fit to cause a building to be erected...on the site of Bethlem Hospital for the better care and custody of Insane persons charged with or convicted of Criminal offences...the said

JR [should be] removed...to the Building before mentioned there to remain until our further Pleasure be known...

He was admitted there a fortnight after the issuing of the warrant. His ‘character, as far as is known, [is] represented as very fair, but had laboured under a previous aberration of intellect a few years back.’ He remained there until 1864, when he was transferred to the recently opened Broadmoor Asylum.⁶⁷ (The court records contain few references to inquests. Those who attempted suicide – regarded both as a crime and a sin – were sometimes imprisoned, but more often than not were dealt with by the lower courts.)

The benefit of the clergy

The fate of many mentally disordered nineteenth-century lawbreakers still remains unclear. Some of them, undiagnosed, may have been dealt with using the benefit of the clergy (*privilegium clericale*). This was the second means of avoiding a death sentence for those charged with murder, and has long since been discarded. Originally confined to those in holy orders, it provided them with a means of being tried in the ecclesiastical rather than the secular courts. Eventually, any lay person who was able to read a Biblical text was entitled to ask for this judgment for a first offence. In order to qualify for the ‘privilege’, they were expected to read a section from the Scriptures. The same text (from the Book of Psalms, *Miserere mei, Deus...*, O God, have mercy upon me...) was invariably used. This was open to wide abuse where those involved were able to memorize those words. In Queen Anne’s time, the ‘privilege’ was extended to all those put in this position. When applied, the offender would be

branded on the left thumb – usually in court – with the letter M where the charge was one of murder and T for theft.⁶⁸

Thirty-nine of the 855 charged with murder in Wales from 1730 to 1830 ‘prayed for the benefit’. Of those, the sentence was applied thirty-seven times. Of 141 charged with manslaughter during the same period, twelve asked for the same sentence. Only in six of those was this allowed. Four of those were branded and imprisoned. In neither instance was there any discernible pattern among the various counties in the way in which this form of punishment was administered. There are no indications from the surviving records that any of those in this category were mentally disabled. Nevertheless, it is at least likely, that in the absence of a psychiatric assessment, such a diagnosis would have been overlooked.

It was an increase in the crime rate that eventually led to the abolition of this sentence for the more minor offences, when it could be replaced by the death penalty.⁶⁹ (There were more than 300 in this category by the end of the eighteenth century.⁷⁰) It was last used in a conviction for murder in Wales in 1812 in Denbighshire, and for manslaughter in 1794 in Flintshire.⁷¹ The custom was not abolished by law until 1827.

Often, offenders were transported, either for life, or for seven or fourteen years. For those whose mental health was compromised, the outcome of such a sentence would surely have been disastrous. In the one example found, a thirty-nine-year-old yeoman from the Gower peninsula was charged, in 1817, with the theft of sheep, worth thirty shillings, and was described in the court records as being ‘apparently insane’. That most assiduous of magistrates, Lewis Weston Dillwyn, took statements from the prisoner and five witnesses, none of whom were doctors. A death sentence was passed but this was commuted to transportation for life.⁷²

Even given the advances already made, it was not until later in the nineteenth century that medical practice fully gained that degree of sophistication which marks out the period as being so spectacular. Those concerned with the care of the psychiatrically damaged faced an additional problem. While society as a whole was only too willing to embrace the changes brought about in the field of physical medicine, this was not so in the case of mental illness. The advances made in psychiatry at that time depended to a far lesser extent on improvements in the understanding of the nature of those conditions. Marked progress has since been made in that sphere, but the developments which came at that time occurred in the nature of the care that was made available to patients. Most significantly, by the 1850s, there were appointed properly trained medical superintendents to the new county asylums being opened in Wales. By this means, expert psychiatric evidence was made more readily available to the courts. This signalled the beginnings of a more humane system of assessing and treating the criminally mentally ill.

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Notes

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2. S. Smith, 'The History and Development of Forensic Medicine', *British Medical Journal*, 24 March 1951, 599.
3. *Ibid*, 604.

4. Samuel Farr, *Elements of Medical Jurisprudence* (London, 1788). NLW, Gale.
5. National Library of Wales (hereafter NLW), D. T. M. Jones (3) manuscripts, 1049.
6. NLW, D. T. M. Jones (1)1 manuscripts, 9780.
7. NLW, D. T. M. Jones manuscripts (1), 9649.
8. NLW, D. T. M. Jones manuscripts (1), 9938.
9. NLW, Edwinsford (2) manuscripts, 3033.
10. NLW, Glynllifon estate manuscripts, 648.
11. Edmund Gibson, *Codex Juris Ecclesiastici Anglicani...* 2nd edition, volume the second. Oxford: Clarendon Press, (MDCCLXI), pp. 1097, 1098.
12. NLW, Church in Wales records (hereafter CinW), Diocese of Llandaf Episcopal 2, LL/SM/1.
13. CinW, Diocese of St Davids Miscellaneous, SD/Misc/1194.
14. CinW, *ibid.*, Episcopal 11, SD/Misc/512.
15. CinW, *ibid.*, SD/Misc/1196.
16. CinW, Diocese of Bangor Episcopal 1, B/SM4.
17. NLW, Tredegar (1) manuscripts, 1031.
18. *The Medical Register*, (London, 1859).
19. NLW, Boderwyd (1) manuscripts, 707.
20. NLW, list of wills, SD/1757/38;
<http://www.measuringworth.com/ppowerus/>.
21. NLW, Bathafarn and Llanbedr manuscripts, 422. Lectures on the history and practice of midwifery, bearing the bookplate of Thomas White MD., n.d.
22. CinW, Diocese of Llandaf, Episcopal 2, LL/SM/9.

23. for a nineteenth century exception, see NLW, Great Sessions records (hereafter Sessions) 4/634/1 document 2.
24. Sessions, 4/760/4/document 48; *The Cambrian*, 7 September 1816, 26 April 1817.
25. John Impey, *The Office and Duties of Coroners...* (London, 1800) p. 34. NLW, Gale.
26. Edward Umfreville, *Lex Coronatoria: on the office and duty of coroners*. Volume 2 (London, 1761) p.295. NLW, Gale.
27. Sessions, 4/620/1 documents 13, 28, 29, 30, 31, 41; 4/620/3 document 46.
28. Sessions, 4/630/3 documents 49, 50.
29. NLW, Coleman Collection of Deeds D. D. 448.
30. Sessions, 4/609/8 documents 3, 5.
31. Sessions, 4/630/5 document 35.
32. Sessions, 4/613/8 documents 13-6, 18.
33. CinW, Diocese of Llandaf Episcopal 5, LL/CC/G 1096.
34. NLW, D. T. M. Jones (1) manuscripts, 10077. Dr Davies was obviously well acquainted with some of those in high places in London medical circles. In 1805, he wrote to Jones's parents: 'I had the pleasure of seeing your son this morning...he appears very well. I had an opportunity to introduce him personally to all my surviving friends. We have dined together at Mr Abernethy's...[he is] quite at Home already.' John Abernethy was among the most distinguished London surgeons of the time.
35. NLW, Lochturffin manuscripts, 6; In 1841, a Thomas Hicks, 34, surgeon, lived in St Davids, Pembrokeshire (1841 census, HO107/144/5).

36. John H. Langhein, 'The prosecutorial origins of defence counsel in the eighteenth century: the appearance of solicitors', *Cambridge Law Journal*, **58(2)**, July 1999, 314. NLW, Gale.
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39. Sessions, 4/640/4/document 26.
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42. *The Cambrian*, 5 April 1806, 19 April 1806, 17 May 1806.
43. T. G. Davies, to be published.
44. for example, see NLW, Bronwydd manuscripts, 339.
45. NLW, Aston Hall Deeds (1), no. 4173; T. G. Davies, 'Judging the sanity of an individual', *National Library of Wales Journal XXIV* (Winter 1996), 455-467.
46. CinW, Diocese of St Asaph, Episcopal 2, SA/Misc/512, 513.
47. Sessions 4/A/250/3 document 29.
48. Sessions, 4/610/7 document 21.
49. Sessions, 4/301/2 document 58.
50. NLW, Bronwylfa manuscripts, 271.
51. Thomas G. Gutheil, 'The History of Forensic Psychiatry' *Journal of the American Academy of Psychiatry and the Law* 33: 2005, 259. NLW, Gale.
52. Michael Dalton, *The Country Justice* (London, 1703), p. 350. NLW, Gale.
53. Donald J. West and Alexander Walk (eds.), *Daniel McNaughton: His Trial and the Aftermath* (London, 1977).

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55. *Hansard*, 24 March 1862, vol. 165, cc. 1950-1.
56. Sessions, 4/519/8 document 16.
57. Sessions, 4/1008/1 document 3.
58. Sessions, 4/277/1 document 44.
59. NLW, Milborne manuscripts, 739.
60. British Sessional Papers (hereafter BSP), 1808, (165). NLW, Gale.
61. BSP, 1828 (2) *et seq.*
62. BSP, 1844 (001), pp. 184, 185.
63. BSP, 1890 [C.6191] [C.6191.1].
64. *The Times*, 12 January 1864.
65. Sessions, 4/196/6 document 6.
66. Sessions, 4/282/4 document 18.
67. Bethlem Hospital records, 9 December 1816ff; 12 November 1825. I am grateful to Mr Colin Gale, archivist, Bethlem Royal Hospital, for permission to publish these details.
68. James Fitzjames Stephen, *A History of the Criminal Law of England, volume 1* (London, 1883) pp. 459-62.
69. *Ibid.*, p. 462.
70. Joel Peter Eigen, 'Lesion of the Will: Medical Resolve and Criminal Responsibility in Victorian Insanity Trials', *Law & Society Review*, Vol. 33, No. 2 (1999), 441. NLW, Gale.
71. Sessions, 4/69/8 document 4; 4/1013/1 document 32.
72. Sessions, 4/635/3 document 41, 4/633/4.a