THE LEGAL PROFESSION AND THE COMMUNITY

By The Honourable Mr JUSTICE REED
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IN the course of his judgment in *Piro v. W. Foster & Co. Ltd.*[1] Sir George Rich made the observation, with reference to forms of action, 'Was it not *Coke* who said that pleading was "the heart-string of the common law" (Preface to *Institutes*)?' We can admire the precision of the process by which the question to be decided in an action was arrived at under that system, and acknowledge the extremely important contribution which it made to the development of the law. At the same time we can review with considerable satisfaction the progress which has been made since pleading could evoke such an emotional reaction, and admire the advantages of modern methods which are designed to ensure that the rules or principles of law to be applied in any matter, and the relief to which a litigant is entitled, shall not be determined merely by the form of an action. Although pleadings are still an important part of procedure, and it is desirable that, like other legal documents, they should be drawn with care and elegance, we now regard the law as having been freed from the bonds of formalism, and as better adapted to meet the needs of the community. Rules of procedure are now servants and not masters.

Whatever views the lawyer of today may hold regarding the course which the evolution of the law has taken, the modern layman would no doubt be surprised to learn that not much more than a hundred years ago rights and duties of members of the community were determined merely by the form in which an action was or could be brought. That such a state of affairs could have existed will offend his notions of justice, and he will feel some sympathy for the disappointed litigant who lost his case because his action was found to have been taken in the wrong form. Like the layman of the time when the dictum of the famous Judge was uttered, he will feel no enthusiasm for a legal system of which that could be said, and if invited to express his opinion about it, he might well use language even more forceful than that employed by Professor Amos when delivering his inaugural lecture at University College London in 1932:[2]

> But while we must recognise that in large and important departments the law and the popular mind have been brought into

[1] (1943) 68 C.L.R. 313, 325.
[2] 'The Legal Mind', (1933) 49 *Law Quarterly Review* 27, 39.

> harmony by processes which have been at least reciprocal, I think that there are, or have been, certain branches of the law of England in which the contact and the reciprocal influence of laymen and lawyers has been small, and in which, as a consequence, the legal mind, bombinating in a vacuum, has produced results of a truly pathological character.

Professor Amos then proceeded to refer to the remarks of Sir William Holdsworth in the ninth volume of the *History of English Law*[3] with reference to the system of procedure and pleading in the common law courts as it stood prior to the Benthamite Reforms in the middle of the nineteenth century. In a footnote[4] it is pointed out, 'These strictures are directed, in the passage quoted from, to common law and equity procedure equally.'

The thesis developed in the lecture to which reference has just been made is very interesting, but this is not the place to discuss it. But whether or not the modes of thought and methods of approach there attributed to the professional lawyer have had the influence and effect claimed for them, it may be accepted that in most cases the layman has an attitude of mind towards the law and legal problems which is fundamentally different from that of the lawyer. In the past the divergence was probably much wider than it is now, when sociological and economic considerations appear to have a greater impact on rules of substantive law than they produced in earlier times. Through the medium of legislation, and the moulding of the common law to meet what are considered to be the requirements of an advanced civilization, many changes in the law have been effected, no doubt with considerable benefits to large sections of the community. Although members of the legal profession have played a most important part in bringing about those changes, the lawyer is not likely to get much credit in the public mind for his part in them. The layman is still prone to form his opinion of the law and the administration of justice almost entirely upon the manner in which they operate in respect of his own affairs, and his dealings with others. If he knows anything of those principles and concepts to which the lawyer must of necessity direct his mind in order to deal with the particular case or matter with which he is for the time being concerned, the layman will probably take little or no interest in them. Such a difference in outlook appears to be almost inevitable unless we can carry education a great deal further than it appears to extend at the present time.

[3] Holdsworth, *History of English Law*, vol. ix, p. 393.
[4] 'The Legal Mind', p. 39.

What has just been said is not intended to imply that a member of the legal profession should not be concerned with the immediate interests of a client who consults him, or entrusts him with the conduct of his affairs. Although the matter which a layman brings to his legal adviser for attention may be a most interesting example of one of the many problems of the law, and even of jurisprudence, the first question for consideration is always a practical one, arising from the situation in which the client finds himself, or the transaction he desires to effect. In order to solve a legal question the lawyer may be led into realms of doubt and difficulty, and he may find himself after considerable research in a state of mind such as that which Mr Justice Henn Collins (later Master of the Rolls) once described in the words, 'On the cases as they now stand there is a complete fog.' The difficulties which a lawyer has to face in advising his client upon the law are not often appreciated by the latter, who is inclined to say, and with some justification, that it is the lawyer's business to know the law and tell him what it is. And even though a litigant, who is one of the parties in a case in which difficult questions of law have been raised, may receive from the judge who has tried it a learned and perhaps lengthy judgment, which is a valuable contribution to the law, his attention will probably be directed to the concluding paragraph or so in which the result is announced. The exigency of the purely practical aspect will no doubt vary from matter to matter and from case to case. But whatever may be the relative importance of practical considerations and legal questions, the layman will still regard his legal adviser as a person possessing the necessary technical knowledge to whom he can go to secure expert advice and assistance with regard to his everyday affairs.

The outlook of most citizens with regard to the work of the legal profession and its place in the community is probably of the same nature as that which he has towards other professions, occupations and trades. If a man is ill, or has sustained an injury, the medical profession is there for his assistance, and he can consult or summon a doctor to effect a cure. If he has a toothache, a dentist can be visited to stop the pain. If he is in difficulty regarding his liability upon a demand for income tax, or desires to ascertain if he can manage his affairs so as to relieve himself from liability, he can seek the advice of a taxation agent. If he desires to build a house, he can secure the services of an architect; or, if he is not prepared to incur that expense, he can find a builder who will supply the plans as well as erect the residence. And so it is in many other departments of

the affairs of life. What is wanted is a person who has the necessary 'know-how'—to adopt a term which seems to be gaining recognition. So far as those who are members of professions are concerned, it is not too much to say that the chief concern which a layman has, regarding the person he consults or engages, is whether he is honest, and possesses the requisite technical qualifications and ability to carry out successfully the task committed to him. A client is not likely to take very much interest in most of the rules which govern the conduct of his legal adviser, although he will undoubtedly concur without question in the enforcement of any rule if the effect will be to advance his own position, even at the expense of his adviser. As to some rules, which are regarded as most important by the profession, the layman may consider that they are an unwarranted limitation upon obtaining work, and perhaps an affront to his own standards of business conduct. Indeed, he may even take the view that by adopting the rules professional men are putting on airs, and claiming for themselves a position of superiority in the community to which they have no right. But however that may be, the layman's view will probably be that, by retaining some of the rules, the legal profession is keeping itself in bondage to outmoded methods and hampering itself with the fetters of conservatism. The prohibitions against advertising and soliciting business are probably the most important examples of rules which may produce that attitude. The art of advertising is now itself regarded by some as a profession. Although the description may be open to debate, there is no doubt that advertising plays a very important part in modern business, and is quite rightly considered to be a most valuable adjunct to many branches of commerce and other spheres of activity. There is nothing inherently wrong in honest advertising; and the objection to the over-persuasive advertisement, that it may induce people to purchase goods or incur expenditure which they cannot afford, may be left to those who are interested in the economics of the country. The object of carrying on business being to secure as much business as possible, the layman is likely to be surprised to find that the professional man is liable to censure—and perhaps to more serious consequences—if he adopts the business-like method of seeking to secure work by simply asking for it. No doubt most laymen, in harmony with the views now held by lawyers, would frown on the type of conduct on the part of serjeants-at-law to which Mr Justice Darling made reference in *Jackson v. Roth*[5]. But apart from practices that are clearly outside the bounds of common

[5] [1919] 1 K.B. 102, 114-15.

decency, there are many ways by which business may be sought quite legitimately, and among them the direct request is widely recognized as being both effective and a mark of efficiency. The layman may well ask, Why should not the lawyer and other professional men adopt the same method?

The standing and reputation of the legal profession in the community is of the greatest importance to the community itself as well as to the members of the profession. We ourselves are in no doubt that the services which lawyers render to their clients are valuable and significant. We are fully convinced that the rules of professional conduct that apply in respect of the formation of the relationship between lawyer and client, and the discharge of the duties undertaken as a result of it, are necessary and desirable in the interests both of the client and of the community generally. We are also satisfied that those interests are best served if the members of the profession are men of probity, well-educated, and possessing the highest qualifications to practise, as well as being completely devoted to the principles of professional men. The views of the profession, however, are only one aspect of the matter. While the profession itself can exercise a considerable influence on the opinion which members of the community entertain regarding the integrity and qualifications of lawyers, and the value of their services, the reputation and the status of the profession depend to a very large extent upon how it stands in the estimation of the public. The administration of justice, and the maintenance of the rule of law, are matters in which all citizens have a very deep interest. Every person is entitled to look to the State to provide and maintain the institutions and the means necessary to preserve his rights, and to enforce the duties of others towards him. There are to be found in the community some who are not lawyers, but who are quite satisfied that they possess the ability and the fitness to undertake legal work, and who consider that they should be free to advise or act for others, and to charge for their services, without being bound by any of the restrictions to which members of the legal profession are subject. It cannot be denied that a good many persons have acquired considerable skill in doing work in certain spheres which require an acquaintance with some branch of the law for the successful conduct of matters which may be entrusted to them. The claim has been made that there is no valid reason why a layman, who considers himself qualified to do so, should not be permitted to appear in court on behalf of a litigant and conduct his case; and indeed in some jurisdictions that kind of thing is already allowed. To the objec-

tion of the lawyer that legal work should be his exclusive preserve the layman may well answer that he ought to be at liberty to employ any person whom he considers to be honest and able to carry out the work entrusted to him; and that his only concern is to secure the services of a person possessing the necessary technical knowledge whom he can trust to give adequate attention to his affairs. That attitude is likely to be encouraged by the difficulty of framing a satisfactory definition of 'legal work'. It may also be contributed to by the circumstance that a great many laymen can probably understand much more about matters upon which they may desire to consult a lawyer than they can about those regarding which they may have to seek the assistance of a doctor, of an engineer, or even of a carpenter. However that may be, the great majority of laymen no doubt regard the legal profession primarily as a skilled body of men whom they can employ to attend to business which is within their province, just as they regard those who practise other professions, or do the work of occupations and trades, as persons possessing the necessary technical knowledge and skill to whom they can turn on appropriate occasions.

The rules which determine the manner in which the relationship between one who practises a profession and his client or patient should be constituted are founded on principles which need not be discussed, as they are well known to those who may be interested to read these remarks. Rules of professional conduct have their basis in the special nature of that relationship. In many cases a client may know nothing of those rules, or of the obligations to which his adviser has become subject. He may even obtain great benefits because the obligations they impose have been faithfully and fully discharged and not be aware of the reason for his good fortune. The legal profession throughout the Commonwealth may well feel gratified that the high standards of conduct which are demanded of them are so widely and faithfully observed. It is very satisfactory that there are so few cases where a member of the profession fails in his duty to adhere to them. On the other hand, it may be as well to remember that, however high the legal profession may stand in public estimation, public opinion is liable to change, and cannot be relied upon to remain constant. So far as it may be influenced by the standard of conduct observed by lawyers themselves, they have the matter in their own hands. But although public opinion of the profession is founded to some extent on what the public observe of the conduct of its members, the profession may at times find some difficulty in influencing public opinion regarding

it. If there were enough people in the community with sufficient influence to persuade Parliament that it would be desirable to pass an Act giving all members of the public over a certain age the right to do legal work, the profession would probably find that representations that legislation of that sort would not be in the best interests of the community would not receive very much consideration. Such a proposal, of course, is an extreme example of what might be suggested by way of amendment of the law. There are, however, less drastic alterations which may from time to time appeal to sections of the community, the effects of which would be to bring about changes in the nature or consequences of the professional relationship. It would be a sorry day for the community if that relationship were interfered with, or its foundations weakened or destroyed. In these days a great deal of emphasis is placed on the importance of technical knowledge and skill, and the necessity to persuade or obtain more and more men and women to embark upon courses of study in various spheres in the realms of scientific and technological activities. There is no doubt that much more can be accomplished for the good of mankind, and the advancement of the material welfare of the community, by an extension of effort in those directions. What may be a danger, however, is the possibility that in the onward march of modern life, the professional man may receive less than his due, and the professional relationship be considered to be of little or no importance. It is in the interests of the legal profession that no such impairment of the present situation should take place. It is also in the interests of the community that its members should have a clear appreciation of the importance and the value to them of the maintenance of the basis upon which legal work is now performed by the profession. Is it too much to hope that some means may be found to ensure that the public mind is not ignorant or prejudiced regarding a matter of such moment to the community?