

PRIVILEGED COMMUNICATIONS: MEDICAL CONFIDENTIALITY IN LATE VICTORIAN BRITAIN

by

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Do doctors have the right, indeed the duty, to keep confidential everything that is imparted to them by their patients? Such secrecy certainly seems to be demanded by the Hippocratic Oath:

Whatever, in connection with my professional practice or not in connection with it, I see or hear in the life of men which ought not to be spoken abroad I will not divulge, as reckoning that all such should be kept secret.¹

But at the turn of the century a number of court cases brought home to British doctors the fact that there were no hard and fast rules governing disclosure. Some in the profession argued that since medical colleagues in Europe and parts of North America had the legal right to defend the secrecy of their “privileged communications”, British doctors’ reputations would suffer if they did not win the same power to guard secrets. At the June 1920 meeting of the British Medical Association a resolution urged its members to fight to keep confidential what they learnt in their consulting rooms. Doctors opposed to such views immediately made their voices heard. One asked rhetorically if the physician was to remain blithely silent and indifferent when he knew that a male patient suffering from venereal disease risked infecting his innocent family. “Does that resolution mean this—that we are, as a profession, to allow a bounder to live and his wife and child to die?”²

In conjuring up the image of the chivalrous physician gallantly protecting a wife from her brutish husband, those arguing in favour of a doctor’s right to decide when and if to divulge information struck upon an appealing ploy. Who could fail to respond to the call to protect women and children? But if doctors were simply relied upon to use their discretion and good sense in such matters, was it likely that most would turn their knowledge to the purposes of protecting the weak from the strong, women from men, servants from their masters?

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¹ Francis Gurry, *Breach of confidence*, Oxford, Clarendon Press, 1984, p. 148.

² *The Times*, 28 June 1920, p. 10.

Only when a court action ensued was the fact that a doctor had disclosed a patient's secrets brought to public attention. Accordingly, an obvious way of probing the complexities raised by the issue is to examine what was long taken to be Britain's most publicized test of "privileged communication", the sensational Kitson versus Playfair trial of 1896.³ This celebrated case centred on a doctor's defence of his right of betraying, not a male, but a female patient's confidences. The primary importance of the trial and the responses made to it both inside and outside the medical profession is that it casts a revealing light on late-nineteenth-century doctors' confused understanding of exactly what confidentiality meant, a confusion exacerbated rather than clarified by court rulings. Secondly, the case demonstrates how the medical profession found, to its discomfort, that it was not left alone to police its duties, but was dictated to by its old rival, the legal profession. The last, though certainly not the least significant, aspect of the trial is that it shows how class and gender preoccupations shaped the practices of both law and medicine. The legal wrangles in *Kitson v. Playfair* took such surprising twists and turns precisely because such preoccupations were used to counter both the letter of the law and the scientific pronouncements of the London medical elite.

The *Kitson v. Playfair* trial was on one level a domestic dispute. The Kitson family fortune was established in the mid-nineteenth century by a Leeds iron founder who sired three sons and one daughter. In 1864, Emily Kitson, the only daughter, married Dr William Smoult Playfair, a well-known obstetrician who was on his way to becoming the royal accoucheur. Sir James Kitson (1835–1911), the eldest son, led an active public life as Lord Mayor of Leeds (1896–97), president of the National Liberal Association (1883–1890), and Liberal Member of Parliament representing Colne Valley (1892–1907). Although a radical, he concluded his career as the first Baron Airedale and left an estate worth one million pounds.⁴ Hawthorn the second son, looked after the family businesses in Yorkshire, which centred on the locomotive works at Hunslet. Arthur, the youngest, filled the role of family ne'er-do-well, his life "undoubtedly marked by irregularities of conduct".⁵ Ostensibly acting as his father's overseas agent, he went off to Australia to make his fortune. There in 1881 he married an English woman, Linda Douglas. She gave birth to two daughters in quick succession; the pregnancies precipitated a good deal of illness followed by a weakening series of miscarriages.

In October 1892 Linda Kitson and her children returned to England while Arthur, still trying to strike it rich and apparently pursued by creditors, set off from Port Darwin on a series of mysterious trips in the Pacific including calls in Hong Kong and Hawaii. Upon Linda Kitson's arrival in England, Sir James and Hawthorn Kitson decided to make over to her and her children the allowance of some £500 a year that

³ Dr Playfair's grandson's account of the trial, based on "original source materials in his own possession" though unfortunately not footnoted, is still useful; see Giles Playfair, *Six studies in hypocrisy*, London, Secker and Warburg, 1969, pp. 134–65. A shorter, garbled version is provided in Edgar Lustgarten, *The judges and the judged*, London, Odhams, 1961, pp. 245–7.

⁴ *Dictionary of national biography: the twentieth century (1901–1911)*, Oxford University Press, 1912, pp. 404–5, hereafter *DNB*.

⁵ *Br. med. J.*, 1896, i: 815.

they had heretofore sent to her husband in Australia. The family had apparently decided that Arthur had led the life of a remittance man long enough and was now to be left to sink or swim on his own. Linda Kitson settled in a house in Kensington and, her health still failing, consulted Dr Muzio Williams.⁶ As an obstetrical problem seemed to be the source of her discomfort, Williams suggested that Dr Playfair, her brother-in-law, should be called in as a consultant. She was initially reluctant, but in January 1894 agreed.

William Smoult Playfair (1836–1903) was perhaps the best known obstetrician in Britain. He had received his MD from Edinburgh in 1856, served briefly in India, and had been appointed Professor of Obstetrics at King's College Hospital in 1872. He enjoyed a reputation as a well known society physician, especially for women's complaints, having introduced to England Weir Mitchell's "rest cure". In the 1890s Playfair—as royal accoucheur and respected patron of the arts—was at the peak of his career. He had recently turned down a knighthood, in the happy expectation of ultimately receiving a baronetcy.⁷

Dr Playfair's personal success made it difficult for him to sympathize with the misfortunes of others. When he saw Linda Kitson on 16 January, he noted nothing exceptional arising from his brief examination. But, in addition to her physical problems, Linda Kitson was plagued by worries about her absent husband's financial problems. "Let him starve," was Playfair's cold response. "It would be the best thing that could happen to him."⁸

Playfair attended the still ailing Linda Kitson again on 24 February. It was now revealed that she had not menstruated since December. She was put under chloroform by Playfair with Williams present, and her cervix dilated (so the court was later crudely informed) to the size of a five shilling piece. According to her later testimony she became partially conscious in the midst of the examination and heard Playfair saying, "I don't know what else it can be. I know very little about her. She must have been up to some hanky panky."⁹ Williams protested that he could not believe this as she had been so candid. Both doctors later denied that any such words had been uttered. Their recollection was that Linda Kitson awoke to ask them what they were accusing her of when they had as yet accused her of nothing.¹⁰

What was said did not really matter. The point was that both men, who had begun the operation in the belief that they were dealing with an intrauterine cancerous growth, discovered that Linda Kitson had recently had either a natural miscarriage or an abortion which they had to clean up.¹¹ This meant that she must have had sexual intercourse within the previous three months and, given the fact that she had not seen her husband for something like a year and a half, it could only be concluded that she

⁶ He is mistakenly identified as "Nunzio" Williams in Playfair, *op. cit.*, note 3 above.

⁷ *DNB*, *op. cit.*, note 4 above, p. 120; *Br. med. J.*, 1903, ii: 439; *Lancet*, 1903, ii: 570–5. Playfair's works included (with T. C. Allbutt), *A system of gynaecology*, New York, Macmillan, 1896, and *A treatise of midwifery*, Philadelphia, Lea, 1893.

⁸ *Lancet*, 1896, i: 897.

⁹ *The Times*, 24 March 1891, p. 13; *Daily Chronicle*, 24 March 1896, p. 9.

¹⁰ For a discussion of anaesthesia bringing on women's "unfounded dreams" of sexual assault, see Frederick J. Smith, *Lectures on medical jurisprudence and toxicology*, London, Churchill, 1900, pp. 187–8.

¹¹ *Br. med. J.*, 1896, i: 817.

was an adulteress. Presumably no discovery made by the royal accoucheur could have been more mortifying than stumbling upon evidence of his sister-in-law's promiscuity.

Playfair had the placental material which he removed from Linda Kitson examined at King's College Hospital by his cousin, Dr Hugh Playfair, who confirmed his suspicions. Playfair immediately determined that he could not allow his unchaste sister-in-law to socialize further with his wife and grown-up daughters and he had Dr Williams inform her of his decision. Linda Kitson frantically wrote to Playfair saying she could not communicate with him through Williams and begged for a personal interview. To his implication that she had been made pregnant by an adulterous relationship, she responded with the guarded assurance: "I can say as to whatever it is you are thinking, that *none but the right one is the cause*. My heart is breaking. There is only one can clear me, but not yet."¹² What she appeared to be implying was that she had been made pregnant, but that her husband, who was responsible, could not for the moment reveal that he had secretly been in England.

Playfair, ever the prig, coolly replied that she should use her illness as an excuse to leave London. If she did not, he would be duty-bound to inform his wife of the facts.

No one who respects himself, his wife and his family can suppose for a moment that I can allow social relations between you and my family to go on as they were when I know you have had a miscarriage.¹³

There ensued a protracted and confusing correspondence. Throughout it Linda Kitson, although never denying the "facts" of the case, pleaded for time to vindicate herself. She repeatedly implied that her husband could clear her name. Playfair never really believed her, but declared himself ready to be convinced. "If you are able to inform me that your husband has been in London I shall not only greatly commiserate you, but be very sorry for the suspicion which under the circumstances was inevitable."¹⁴ But Linda Kitson never provided a straight answer; she would not say that which she insinuated. To do so would be to lie because, as she later admitted, her husband had in fact not been in England.

Playfair, not getting a clear answer and faced with the prospect of his family renewing their social ties with Linda Kitson, finally wrote to say he had no alternative but to inform his wife of the situation.¹⁵ Linda Kitson now wrote to Emily Playfair begging her not to tell her brother, Sir James. Mrs Playfair, like her husband, asked for assurances that Arthur had been in London, though she wondered how that could be since the family had received his telegrams from Australia.¹⁶ No clear response again being made, Mrs Playfair asked her husband to inform Sir James Kitson of the

¹² *Lancet*, 1896, i: 896.

¹³ Playfair, *op. cit.*, note 3 above, p. 164. An 1890 text directed at young medical men anticipated Playfair's actions in carrying the warning that for a doctor to gossip about his cases could be disastrous for his career. "Do not let your wife, or anyone else, know your professional secrets, or the private details of your cases, even though they are not secrets." Jukes de Styrap, *The young practitioner*, London, Lewis, 1890, p. 113.

¹⁴ Playfair, *op. cit.*, note 3 above, p. 143.

¹⁵ Still stalling for time, Linda Kitson in her last letter to Playfair had asked, "Am I too late to say yes?" *Br. med. J.*, 1896, i: 816.

¹⁶ See Linda Kitson to Emily Playfair, 19 March 1894; Emily Playfair to Linda Kitson, 24 March 1894 in the *Daily Chronicle*, 24 March 1896, p. 9.

situation. Sir James immediately wrote to Linda Kitson that all communication with the family had to cease, that her allowance was ended, but that if she returned to Australia he would provide a small maintenance.

In the meantime, all through the spring of 1894, Linda Kitson had been trying to contact her husband, Arthur. A letter finally reached him in Australia in June; by September he was back in London declaring himself ready to fight his own people. His first move was to claim, falsely, that he had, as his wife implied, returned secretly to England the previous December. Playfair was begrudgingly forced to apologize. "Your coming surreptitiously to London without informing the family has been the cause of all this annoyance. Your statement that you have been in London allows of the withdrawal of any imputation on your wife."¹⁷ Kitson was not appeased, presumably because the family allowance was still not renewed. Taking this as evidence that the Playfair apology was worthless, Linda Kitson in February 1895 sued for libel and slander against Dr and Mrs Playfair. The case which began on 21 March 1896 was tried before a special jury at the Queen's Bench, presided over by Mr Justice Henry Hawkins, better known as "Hanging" Hawkins, a devoted opponent of immorality.

The Playfairs' solicitor was the well known Sir George Lewis and their leading counsel Sir Frank Lockwood, Q.C., a former Solicitor-General. Counsel presented the defendants with a choice. One course open to them was "to justify", that is, contend that the slander was true. Truth is an absolute defence against the charge of slander. But proving to the satisfaction of a jury that Linda Kitson had committed adultery—the only evidence being medical—was a daunting challenge and Playfair's counsel was aware that if the distasteful attempt of making such a dishonourable charge failed, an irate jury could be counted on to award punitively high damages.

The apparently safer course was to argue that, even if Dr Playfair's story of Linda Kitson's adultery was false, in this particular situation it was a "privileged communication", that is to say a communication which because it only occurred within the immediate family, could not be considered either libellous or slanderous.¹⁸ Playfair, on the advice of his legal advisers, took this latter course of pleading privilege. The defence's line of argument was that Playfair, with no malice intended, but only the protection of family honour in mind, had felt duty bound to tell his wife of what he thought was evidence of Linda Kitson's immorality, and Mrs Playfair in turn told her brother.¹⁹

The defence had what appeared to be more than enough ammunition to ward off an unfavourable verdict. Despite the fact that Lockwood fought the case on the grounds of "privileged communication", he presented in court a good deal of evidence which substantiated Playfair's belief in Mrs Kitson's adultery. Indeed the medical evidence was almost wholly on the side of the defendant. Only Dr Herbert Spencer, professor of midwifery at University College London, testified on Linda Kitson's behalf.²⁰ He

¹⁷ W. S. Playfair to Arthur Kitson, 22 September 1894; *ibid.*, 25 March 1896, p. 8.

¹⁸ As a husband and wife were in law one person, the fact that a libel had been disclosed to a spouse was not accepted as evidence of its publication. The courts turned back the suggestion that the passage in 1882 of the Married Women's Property Act undermined such a concept. *Law reports: Queen's bench division*, 1888, 20: 635–40.

¹⁹ In fact, Playfair, at his wife's request, had informed Sir James; Mrs Playfair was not called to testify.

²⁰ He is misidentified as "James" Spencer in Playfair, *op. cit.*, note 3 above, p. 147.

made the astounding statement that her miscarriage of February 1894 was possibly related to a legitimate conception that occurred in October 1892. But though Spencer asserted that eighteen months after its “cause” a condition such as Linda Kitson’s could exist, he had to admit he had never seen such a case himself. John Bland Sutton, FRCS, replied for the defence that placental material could not be retained for over six months. And the defence backed up its attack on Spencer’s preposterous argument by calling on London’s leading obstetricians who, in addition to W. S. Playfair and Hugh Playfair, included Dr Francis Champneys, lecturer at St Bartholomew’s Hospital and Sir William Priestley, consultant at King’s College Hospital.²¹ At times it appeared as though the entire membership of the Obstetrical Society of London was in court. With the exception of Spencer, they all supported Playfair’s view that Linda Kitson had been made pregnant a few months before February 1894. Her counsel objected to the lengthy, hostile, medical testimony, but Mr Justice Hawkins allowed it to continue. Dr Spencer’s opinion was clearly laughed out of court by Playfair’s medical witnesses; what the jurors thought of it remained to be seen.

Lockwood’s second line of defence was to call on Sir John Williams and Sir William Broadbent, seasoned experts in issues relating to British medical ethics, to support the contention that Playfair’s violation of his patient’s confidences was, given the particular situation, warranted.²² The testimony of Broadbent, senior Censor of the Board of the Royal College of Physicians, carried particular weight. Both doctors said that as professionals they could envisage doing the same as Playfair.²³

Lockwood largely skirted the embarrassing question of why Linda Kitson prevaricated and why Arthur Kitson had initially lied about being in England in December 1893. He wanted to present Playfair as a gentleman who was not out to humiliate his relatives and, in any event, such details were not directly relevant to the question of privilege. In his summation Lockwood returned to the defence’s basic line of argument that Playfair had been honour-bound to warn his family of his sister-in-law’s situation and that such intimate conversations, being privileged, were not actionable. These arguments, supported as they were by the testimony of so many eminent professionals, should presumably have been sufficient to impress any British court.

Mr Lawson Walton who led for the plaintiff could have argued the case on strictly technical grounds. The rumours that Playfair told others besides his immediate family of his suspicions regarding Linda Kitson might have been used to undermine the defence of “privileged communication”, and malice could have been inferred from the fact that Playfair was aware that his disclosures jeopardized Linda Kitson’s annual allowance of £500.²⁴ But Walton shrewdly appealed to the emotions rather than the intellect of the jurors.

²¹ *Br. med. J.*, 1896, i: 818.

²² The witnesses were implicitly following the line set by Thomas Percival who, at the beginning of the century, argued that when the issue of medical confidentiality arose one simply had to rely upon the doctor’s discretion. Chauncey D. Leake (ed.), *Percival’s medical ethics*, Baltimore, Williams and Wilkins, 1927, p. 90.

²³ *The Times*, 26 March 1896, p. 13; and see also Walter Broadbent (ed.), *Selections from the writings of Sir William Broadbent*, London, Froude, 1908.

²⁴ See Arthur Kitson’s letter to the *Br. med. J.*, 1896, i: 1236.

Privileged communications

After all, the trial was believed by the public to hinge on what in Victorian society could only be considered the riveting question of whether or not a middle-class woman's adultery had been exposed by a man who was both her physician and her brother-in-law. This is what made the affair so sensational. The defence thought it safer and more gentlemanly to avoid such a volatile issue and argue simply for privilege. This proved to be a mistake because it prevented the defence from responding directly to Walton's constant portrayal of his client as an innocent woman fighting to protect her honour against the slurs of a cold-hearted physician whose base motives could only be guessed at.

Linda Kitson was the picture of the affronted female; attractive but wracked by anxiety, dressed elegantly but demurely in black, a white rose at her throat.²⁵ She wept; she swooned. The first day of the trial she almost fainted and was led by her husband into the open air. The judge asked her to sit while testifying. She spoke in a whisper; her water glass rattled against her teeth. When what the press described as the "ordeal" of her testifying was over, she was assisted from the box by her husband.²⁶ He too made a good impression as the poor relative fighting his wealthy and powerful family to protect the honour of his wife.

The fact that Linda Kitson had lied proved no embarrassment. Walton skilfully attributed her toying with the truth to Playfair's instigation.

Mr Arthur Kitson had not been in the country, and yet his wife must assure Dr Playfair that he had been in England within the last three months or have her fair name blasted. Dr Johnson, in the last century, said that if a murderer asked which way his victim had gone, falsehood was justifiable to turn him off the track.²⁷

The inconsistencies and insinuations of Linda Kitson which on the face of it were so damaging, were transformed by Walton into an integral part of his portrayal of an honest, innocent, impressionable woman driven to distraction by a "moral inquisitor".²⁸ The court allowed her simply to apologize for having falsely and repeatedly implied that her husband was in London and it was left at that.

Linda Kitson in short made an excellent witness. Sir Frank Lockwood, sensing that the jury sympathized with a lady who had apparently suffered much, was afraid of subjecting her to an intense cross-examination for fear that it could only win her more support. In any event, since the defence had declared it would not attempt to justify Playfair's allegations, Mr Justice Hawkins could not have been expected to tolerate much questioning along these lines.

But the most important witness for the plaintiff proved to be Dr Playfair. Under cross-examination he was asked if he still retained "an opinion adverse to this lady's honour". Now it is of prime importance to remember that this question was not at

²⁵ The press portrayed her as "a lady who once possessed considerable attractions and even now, in spite of ill-health and mental anxiety, her pale face beneath her dark brown hair is not without its charm". Playfair's countenance was less flatteringly depicted as dominated by "a determined jaw" and "close-cropped iron-grey hair". *Penny Illustrated Paper*, 14 March 1896, p. 214.

²⁶ *Daily Chronicle*, 24 March 1896, p. 9.

²⁷ *Lancet*, 1896, i: 896.

²⁸ *Br. med. J.*, 1896, i: 816.

issue. Playfair had the intelligence to recognize the impropriety of the query and asked the judge if he should answer. Hawkins made the mistake of saying he should, but the self-righteous Playfair made the even greater blunder of coldly and categorically replying to Walton that he continued to view Linda Kitson as dishonoured. Playfair's public assertion that his sister-in-law was guilty of "unchastity" caused a sensation in the courtroom.²⁹ Lawson Walton had what he wanted and pounced. Why then, he asked indignantly, had Playfair not been "man enough" to fight out the issue in court instead of employing the cowardly defence of privilege? Playfair replied, honestly enough, that he had simply followed his counsel's advice. This could only appear as yet another mealy-mouthed answer. Walton had succeeded in indelibly portraying Playfair as a cad.³⁰

Walton proceeded to ask if Playfair was not impressed by Dr Spencer's medical testimony or if in fact any contrary testimony could make him reassess his view. Playfair replied that none would. Though all of this had little to do with the question of privilege, it further fixed in the jury's mind an image of Playfair as a dogmatic moralist who could not be reasoned with.

Playfair's key assertion that it was his duty to protect his family's honour was similarly parried by Walton with the question of how the accusation of so serious a charge as the adultery of a sister-in-law could be based simply on the findings of forensic medicine.

Mr Lawson Walton: In coming to this conclusion do you reject all but medical considerations, and reject all moral ones?

Witness: When a woman has had a miscarriage—in the face of an actual abortion I do reject them.³¹

Walton, skilfully playing on Playfair's penchant for asserting that his medical conclusions were infallible, had teased out the notion that medical practitioners believed they had a right to base moral judgments on evidence unavailable to others, a notion many nineteenth-century juries were known not to share.³² The price of Playfair's claiming the infallibility of his medical opinions, thundered Walton, had been the sacrifice of a lady's honour.³³

In summing up, Walton at last returned to the question of privileged communication. He conceded that Playfair might have had the right to divulge information to his wife, but denied that the right of privileged communication could be extended to defend the passing on of such information to Sir James Kitson.³⁴

Mr Justice Hawkins now had his say. He was not regarded in legal circles as

²⁹ *Daily Chronicle*, 25 March 1896, p. 8.

³⁰ But no one suggested that Playfair's providing of treatment for his sister-in-law constituted a breach of propriety. Today's notion that doctors should give only minor or emergency care to members of their immediate family was not widely shared.

³¹ *The Times*, 25 March 1896, p. 3.

³² On scientists' fears of being made to look foolish in court, see Christopher Hamlin, 'Scientific method and expert witnessing: Victorian perspectives on a modern problem', *Social Studies of Science*, 1986, 16: 485–513.

³³ *Daily Chronicle*, 27 March 1896, p. 7.

³⁴ *The Times*, 27 March 1896, p. 14.

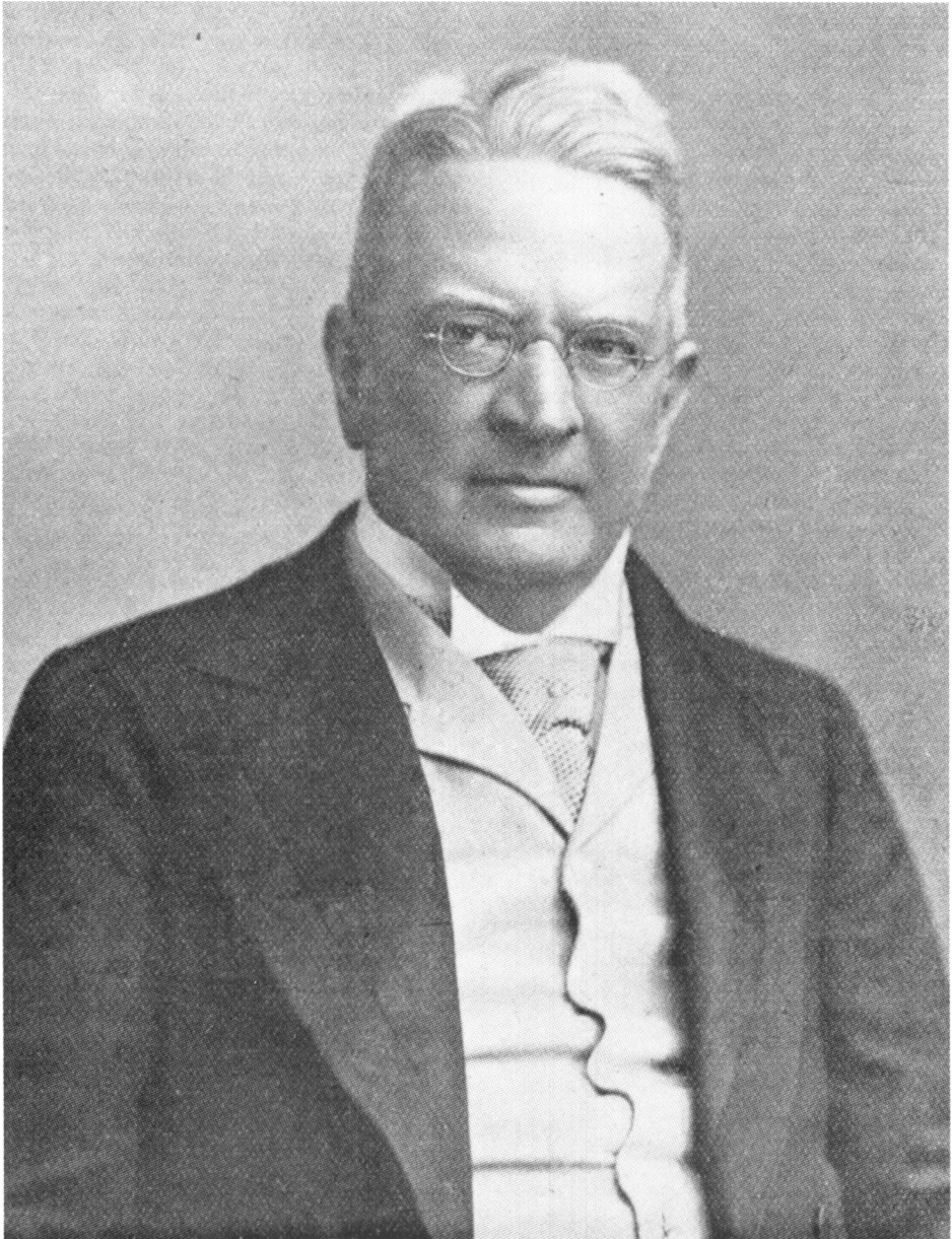


Plate: Dr William Smoult Playfair (*Lancet*, 1903, ii: 573).

particularly able, but that did not prevent him from playing an active role in every trial over which he presided. Some justices were content to take notes; Hawkins declared that it was his “duty to see that the jury does not go wrong”.³⁵ Walton could only have been happy that Hawkins repeatedly allowed the cross-examination to wander off into the realm of justification when it should have been rigidly restricted to the question of privilege. His directions to the jury also pleased Walton because there was little doubt where Hawkins’ sympathies lay. He agreed with the plaintiff’s counsel in opining that if Linda Kitson toyed with the truth, it was because Playfair had put her in a tight corner. Hawkins was moreover clearly hostile to the defence’s use of privilege which he construed as signifying a doctor’s right to betray his patient’s confidences whenever he chose. But most telling of all was Hawkins’ spirited depiction of a doctor’s informing on a woman who had aborted as a “monstrous cruelty”, an issue to which we will return.³⁶

In his summing up, Hawkins instructed the jury that three questions had to be answered; Were the words complained of uttered by Playfair in good faith? Were they uttered without malice? Were they uttered, not from a mere sense of duty, but from some indirect motive? Hawkins reminded the jurymen that whether or not Linda Kitson had been unchaste was not at issue, but that “if they found that she had played the wanton they could take that into consideration in estimating the damages.”³⁷

After three hours the jury returned to find for the plaintiff on all three counts. The amount awarded to Linda Kitson was £12,000, reputedly the largest settlement for libel and slander ever made in a British court.³⁸ *The Times* reported that the verdict was greeted with loud applause in the court. *Reynold’s Newspaper*, a more popular periodical, noted applause, clapping and stamping of feet.³⁹

What is one to make of this trial? Some initial frustration might be felt inasmuch as the case does not live up to its reputation of having been particularly significant in refining the medico-legal definition of privileged communication. But the very fact that *Kitson v. Playfair* left doctors in an ethical muddle is what makes it so interesting. A close examination of the trial and the discussions it precipitated reveal the complex ways in which medical confidentiality was and would remain inextricably enmeshed in legal, class, and gender preoccupations.

The first point to be made is that law, not medicine, determined the boundaries of confidentiality. Playfair was sued, not for breaking confidence, but for libel and slander. The fact that he was a doctor was legally not essential to the plaintiff’s case. Linda Kitson could have sued anyone who had said the same thing as Playfair. The defence of a “privileged communication” raised by him was likewise not specifically

³⁵ Bowen Rowlands, *The life in the law of Sir Henry Hawkins*, London, Wyman and Sons, 1897, p. 44; A. W. B. Simpson (ed.), *Biographical dictionary of the common law*, London, Butterworths, 1984, pp. 229–30.

³⁶ *The Times*, 28 March 1896, p. 5.

³⁷ *Br. med. J.*, 1896, i: 883.

³⁸ On appeal, the award was reduced to £9,200, but the scandalous nature of the case cost Playfair much of his practice and hopes of any further honours from the Queen. Gladstone wrote to express his indignation at the jury’s verdict and to declare “you have done neither more nor less than your duty”. *Lancet*, 1903, ii: 574.

³⁹ *Reynold’s Newspaper*, 29 March 1896, p. 5.

related to his status as a doctor. He was simply asserting that what a husband told his wife was a privileged communication, and so too what a sister told a brother.

In his summing up, Hawkins stated that doctors might have their own rules regarding confidentiality, but they could not impose them on others; in the end the courts would decide. A doctor was not bound to inform on a patient, he told the jury, it all depended on the judge. Hawkins himself refused to instruct the jury on whether or not a doctor who gratuitously revealed a patient's secret was making an illegitimate breach of confidence. So the general question was left unsettled, Hawkins leaving the issue of privileged communication as confused as ever. The *Daily News* chided him, pointing out that the issue of privilege was a matter of law on which he should have made a decision, leaving the question of malice—a fact—to the jury.⁴⁰

The legal discussion of medical privilege began in Britain in 1776 when a surgeon initially refused to testify regarding the Duchess of Kingston's bigamy. Lord Mansfield eventually forced him to give evidence, ruling that doctors could be compelled in court to divulge their patients' confidences.⁴¹ Though criminal acts were not privileged, barristers and solicitors could not be forced to testify; the legal profession, unlike the medical profession, enjoyed the right of privileged communication.⁴² Absolute privilege was only granted to anything that was said—even if false or malicious—in court, in Parliament, and between husband and wife. Qualified privilege pertained to every other situation. Words exchanged in doctors' consulting rooms were not specifically privileged; even confidences imparted to priests were only privileged by tradition. In a suit for breach of confidence and slander the trial judge usually decided if the particular occasion privileged the communication of statements which otherwise, if wilfully and knowingly defamatory, were actionable.⁴³

In France article 378 of the 1810 Criminal Code made medical secrecy mandatory for midwives and pharmacists as well as for doctors.⁴⁴ In North America the state of New York in 1828, as part of a public health campaign, launched the first departure from the common law rule by instituting a statute protecting the privilege of medical communications.⁴⁵ By the end of the century, sixteen other states had followed suit. Charles Meymott Tidy, in enviously noting the American legislation, expressed the hope in 1882 that in Britain the same results would be achieved by individual effort.

It seems a monstrous thing to require that secrets affecting the honour of families, and perhaps confided in a moment of weakness, should be dragged into the garish light of a law court, there to be discussed and made joke of by rude tongues and unsympathetic hearts.⁴⁶

⁴⁰ *Daily News*, 28 March 1896, p. 6.

⁴¹ R. Vasher Rodgers Jr., *The law and medical men*, Toronto, Carswell, 1884, p. 93.

⁴² *Ibid.*, p. 93. On the contemporary assumption that doctors and lawyers had the same duty to keep secrets, see 'Professional secrecy', *Spectator*, 1895, 75: 364–5.

⁴³ James Neal and Hugh Woods, *The conduct of medical practice*, London, Lancet, 1927, pp. 222–3.

⁴⁴ Paul Brouardel, *Le secret médical*, Paris, Baillière, 1880; Robert Tod, 'Le secret médical au XIX siècle dans les textes médicaux et juridiques', *Nouvelle presse médicale*, 1979, 8: 2695–7.

⁴⁵ *New York Times*, 6 April 1896, p. 4; Clinton DeWitt, *Privileged communications between physician and patient*, Pittsburgh, Clarence C. Thomas, 1958.

⁴⁶ Charles Meymott Tidy, *Legal medicine*, London, Smith, Elder, 1882, vol. 1, pp. 20–1.

Privileged communications

Tidy expected that some doctors would sacrifice their liberty for honour and go to jail rather than betray their patients' secrets. John Glaister's more modest suggestion was that, even if courts forced doctors to divulge information, they should always protest in order to impress on the public the jealousy with which they protected their patients' secrets.⁴⁷ By law contagious diseases had to be reported. Since scarlet fever, for example, was known to be on the list of such diseases, a doctor who reported it would not be held to be violating medical secrecy. It was assumed that the patient, in coming to a doctor, implied his or her consent to such disclosure.⁴⁸

In short, the general drift of nineteenth-century British medical discussions of confidentiality was towards the need for greater secrecy. But when doctors were put on the spot, as they were in the trial in question, they frequently allowed their "moral" preoccupations to cloud their understanding of what secrecy entailed. The medical witnesses who appeared for both Playfair and Kitson certainly did not have a firm grasp of what medical confidentiality really meant. Or perhaps it would be more accurate to say that they wanted to present the medical profession as both the guardian of the patient's secrets and the defender of public morality. They did not understand they could not always be both.

Dr Spencer, who appeared for Linda Kitson, when asked by Lockwood to explain the rule of confidentiality, replied that it could be broken only to prevent one being made an accessory to a crime. He would not, for instance, warn a woman that her fiancé suffered from venereal disease since such a marriage violated no law. And if a man, to avoid jury duty, falsely claimed to be ill, what would Spencer do? Spencer replied he would say the man was not ill. And in so doing, Lockwood pointed out, the doctor would be betraying his patient's confidence.⁴⁹ Going further, Mr Justice Hawkins asked Sir John Williams, a leading obstetrician who appeared for the defence:

Suppose a medical man were called in to attend a woman, and in the course of his professional attendance he discovers that she has attempted to procure an abortion. That being a crime under the law, would it be his duty to go and tell the Public Prosecutor?

Witness: The answer of the College of Physicians to that very question was "Yes".

Mr Justice Hawkins: Then all I can say is that it will make me very chary in the selection of my medical man.⁵⁰

Williams was no doubt dumbfounded that a judge should upbraid him for stating that a crime should be reported, but Hawkins' distaste for such tale-telling was obviously shared by the general public. They grasped, as Williams did not, the difference between the spirit and the letter of the law.

The press gleefully noted the pathetic figures cut by the so-called experts in medical ethics. The case, according to one writer, had revealed that at the highest levels of the

⁴⁷ John Glaister, *A textbook of medical jurisprudence*, Edinburgh, Livingstone, 1915, p. 56.

⁴⁸ *Br. med. J.*, 1896, i: 1012.

⁴⁹ *The Times*, 24 March 1896, p. 14.

⁵⁰ *Ibid.*, 26 March 1896, p. 13; *Lancet*, 1896, i: 962.

profession was found an “absolute ignorance of the rules of professional honour”.⁵¹ An editorial in the *Daily News* referred to the “rather irregular evidence” of Sir John Williams and Sir William Broadbent in which they asserted that a doctor, in order to protect his wife, had the right to betray his patient. This was, the journalist, declared, an “alarming proposition”.⁵² Such chiding represented the traditional suspicion, bordering on disdain, which barristers and journalists had for expert witnesses. Playfair’s claims to medical infallibility obviously did him in. Reporters relayed the clear message that the public viewed with hostility a doctor who asserted that his medical evidence could not be challenged, but then refused to submit such evidence to the judgement of the court. “This unscientific dogmatism,” the *Daily News* declared, “as often found in scientific men, is as dangerous as any political or theological prejudice.”⁵³

In columns headed “West End Scandal” and “Doctor and His Patient: A Society Scandal” the press heartily agreed with the judgement and the huge award for damages. A restrained *Times* editorial declared that the trial had been an unfortunate spectacle; the only satisfaction was that a lesson had been taught to the few rash members of the medical profession of the need for careful judgement, it being preferable to sin by silence than by “indiscreet and uncalled for babbling”.⁵⁴ The *Evening News* trumpeted that the verdict, “supplied the medical profession with twelve thousand reasons why a doctor should keep the secrets of his patients inviolate”.⁵⁵ In 1896 judges, barristers, and journalists, not for the first nor the last time, had the great pleasure of lecturing doctors on where their chief loyalties should lie.

Turning from the legal to the medical responses to the *Kitson v. Playfair* trial it can be imagined how distressing the medical profession found the case. British doctors responded in one of two ways. The first, represented by the *Lancet*, was to concede that mistakes had been made.

We feel it our painful duty to assent to the proposition that Dr Playfair did not act as discreetly as he might have done. Was it wise to place such alternatives before Mrs Kitson? . . . Whilst we recognize his perilous position, we believe that he should have sought other professional advice to prove his determination to act justly between man and man.⁵⁶

But this last line was misleading. After all, Playfair had been supported by the most eminent doctors in the land. How would further consultations have made any difference?

The *British Medical Journal* represented a more pugnacious response, demonstrating far more support for Playfair than had the *Lancet*. Playfair, declared the *BMJ*, had only acted, as any honourable man would, to protect his family and

⁵¹ *The Times*, 7 April 1896, p. 6.

⁵² *Daily News*, 28 March 1896, p. 9.

⁵³ *Daily News*, 28 March 1896, p. 6.

⁵⁴ *The Times*, 28 March 1896, p. 11.

⁵⁵ Playfair, *op. cit.*, note 3 above, p. 159.

⁵⁶ *Lancet*, 1896, i: 1292.

had been “mulcted” for doing so.⁵⁷ Turning to the journalistic sniping which medical witnesses had to endure, the *BMJ* ridiculed the notion, popularized by the press, that doctors had to be reminded of the sacredness of confidentiality. It pointed out that doctors were forever caught in the middle: patients wanted their secrets kept, but at the same time the public wanted doctors to report cases of abortion and overlaying.⁵⁸ Doctors who used their discretion were praised by some judges and damned by others. On the one hand those who refused to provide a court with information could be charged with contempt while on the other those who revealed their patients’ secrets could be sued for slander and libel.⁵⁹ The *BMJ* concluded that to spare physicians further humiliations a new, definite law on the subject was needed.⁶⁰

The complexities of confidentiality were further aired in the letters to the editor column of *The Times*. A member of the Royal College of Surgeons reminded readers that medical “secrets” were not possible given the need for medical consultations. Some writers recognized that a doctor’s privilege was no different from the general public’s; others wanted a hard and fast rule.⁶¹ Several correspondents took the occasion to call for an extension of the list of reportable diseases.⁶² Turning to specifics, “E.J.D.” asked if the Playfair judgement meant that a doctor should not inform the customers and employers of a syphilitic milkman of the dangers they ran.⁶³ “Honorarium” replied that the doctor should tell the patient he was legally and morally required to seek treatment; the doctor would not be liable if he sought to protect the public since in so doing, unlike Playfair, he would not be attempting to serve his own interests.⁶⁴ A legally-informed contributor concurred that “justification” provided adequate protection from any charge of violation of confidentiality.⁶⁵ “Medical Jurisprudence” took the high road in declaring that a doctor did not have the right to decide what to do with the information he received from his patients. Citing the Hippocratic Oath, he pointed out that the doctor’s only duty was to cure, and tartly concluded: “It is indeed pitiable if a body of learned gentlemen should have to be forced by punishment to hold their tongues.”⁶⁶

Turning to the social context in which the trial took place, the press’s constant references to the “ladies” and “gentlemen” involved made it clear that class played a key role in colouring nineteenth-century notions of confidentiality. Where one was located in the social hierarchy determined how much privacy one might legitimately enjoy. Playfair was damned with the epithet of “moral inquisitor”. Why? This was the

⁵⁷ *Br. med. J.*, 1896, i: 861.

⁵⁸ *Ibid.*, 1896, i: 861–2.

⁵⁹ Percy Clarke and Charles Meymott Tidy, *Medical law for medical men*, London, Baillière, Tindall and Cox, 1890, pp. 39, 55.

⁶⁰ *Br. med. J.*, 1896, i: 929–30; and see also *ibid.*, 1896, i: 871. The various attempts made in the 1920s and 1930s to establish medical secrecy were all unsuccessful.

⁶¹ *The Times*, 9 April 1896, p. 12.

⁶² *Ibid.*, 3 April 1896, p. 6; 6 April 1896, p. 10.

⁶³ *Ibid.*, 3 April 1896, p. 6.

⁶⁴ *Ibid.*, 4 April 1896, p. 10.

⁶⁵ *Ibid.*, 6 April 1896, p. 10.

⁶⁶ The same writer pointed out that in 1889 Sir Morell Mackenzie had been censured by the Royal College of Surgeons for publishing revelations concerning the cancer death of Emperor Frederick III of Germany. *Ibid.*, 7 April 1896, p. 6.

age of temperance agitation, sabbatarianism, regulation of prostitution, and the raising of the age of sexual consent. Poor Law and Charity Organization Society investigators prowled through working-class neighbourhoods reprimanding the dissolute. Given the fact that the Victorians prided themselves on their moral rectitude, why should Playfair's activities not have been applauded rather than so roundly condemned? Part of the answer lay in whose morality was being policed. The Victorian concept of confidentiality was very much a bourgeois conceit inasmuch as it was presumed that doctors would alert masters of the illnesses of their servants, and help charities sort out the able-bodied from the impotent.⁶⁷ Linda Kitson's case was obviously quite different in that one was dealing, not with a servant or prostitute, but with a middle-class woman. Strikingly enough, the press declared that a woman's character—by which it meant a middle-class woman's character—should never be decided on medical evidence alone.⁶⁸

The concept of "privileged communication" was rarely fought out in court. If one relies, as has been done in this paper, on legal records, one will read only about the violation of the confidences of the Linda Kitsons of this world. This, of course, does not mean that only middle-class women ran such risks; it means that only those with sufficient money to launch costly legal actions appeared in the record. Similarly when we search for suits launched by males we surprisingly find that they often pitted one doctor against another. In 1884 a Dr Casson unsuccessfully sued a colleague for telling those whom Casson served as club-surgeon that his incompetence was responsible for a member's death. The judge ruled that the second doctor's communication to the club was privileged and the trial ended in a nonsuit.⁶⁹ In 1899 a doctor told his assistant that a colleague had been drunk and in "a bit of a fog" when attending a patient. The latter doctor went to court, where he accepted an apology and forty shillings.⁷⁰ Such cases signified, not that doctors were particularly prone to back-biting, but that they were better placed to respond to slander than were their patients. Members of the lower classes were effectively prevented from launching such suits because they lacked both the money and, more importantly, society's recognition that their privacy should be respected.

Gender concerns played as important a role as class preoccupations in determining the outcome of many breach of confidence suits. Linda Kitson won much support by perfectly playing the role of the lady in distress. The only anti-feminist response to the trial surfaced in the pages of *Justice*, the mouthpiece of H. M. Hyndman's Social Democratic Federation. Its chief contributor, the misogynist E. Belfort Bax, having spent all of 1895 berating supporters of women's emancipation—including Eleanor Marx Aveling—was not about to let the trial go by without one last swipe at females. Having noted that the verdict had met with general approval, the "Tattler" went on to reflect:

⁶⁷ On doctors' reporting of malingerers among soldiers and miners, see Sir John Collie, *Fraud in medico-legal practice*, London, E. Arnold, 1932.

⁶⁸ *Daily News*, 28 March 1896, p. 6.

⁶⁹ *Br. med. J.*, 1884, ii: 328–9.

⁷⁰ *Ibid.*, 1 July 1899, ii: 60.

Privileged communications

Without in the least attempting to condone the action of Dr Playfair, however, one is constrained to point out that he, after all, only told his wife, and that, as usual, it was a woman who was mainly responsible for the injury wrought to one of her sex.⁷¹

He concluded that Linda Kitson could consider herself “fortunate in being a woman”. No man would ever receive £12,000 for slander which proved, despite the whining of some, how advantaged women were. Several female correspondents immediately replied that *Justice*, full as usual of coarse and trite anti-feminist abuse, failed to note that the judge and jury were all men. Women wanted not special treatment but “fair play”.⁷²

Aside from *Justice* and the *British Medical Journal*—two unlikely bed-fellows—the press was overwhelmingly on the side of Linda Kitson. A letter which appeared in *The Times* provided in a nutshell the public perception of the trial. “Now we have an Englishman of the very highest standing torturing a feeble and lonely woman by threats of revealing what he thought he had learned.”⁷³ Here were combined all the clichés of the blackmail thriller, the sensational novel and the antivivisectionist tract. Many of the stock characters and situations appeared as well—the cruel doctor (ironically named Playfair), the damsel in distress, the administering of chloroform, the violation first of the woman’s body and then of her secrets.⁷⁴

Walton played up such themes in presenting the trial as a woman’s heroic attempt “to escape from a charge which reflected upon her honour”. Although Playfair was the actual defendant, Linda Kitson never ceased to be regarded by the public as the victim. Even Lockwood had to acknowledge ruefully that it was hard for the jury to free their minds of the image of Linda Kitson as a pathetic, terrorized creature and Playfair as her inquisitor.⁷⁵

It was noted earlier that Playfair’s decision to fall back on defence of privilege was an enormous blunder. Lockwood could not disentangle the question of privilege in the public’s mind, indeed in the minds of the judge and jury, from the aspersions cast on Linda Kitson. Middle-class society resolutely condemned adultery, but was even more hostile to anyone who would be so “unmanly” as to blacken a woman’s reputation and then refuse to back up his words. Walton repeatedly argued that Playfair had cunningly not sought to prove the charges of adultery because he knew it was impossible; claiming privilege was the coward’s way out.

In response Lockwood appealed to the jurors as “men of honour and men of the world” to put themselves in Playfair’s place. What else could Playfair have honourably done? This was another grave miscalculation on the part of the defence; hypothetical situations inspire hypocrisy. Most men felt they could have done far better, been far more charitable. Indeed the response of the popular press was

⁷¹ *Justice*, 4 April 1896, p. 6; and see also 25 April 1896, pp. 4–5; E. Belfort Bax, *The fraud of feminism*, London, Grant Richards, 1913.

⁷² *Justice*, 18 April 1896, p. 3; 9 May 1896, p. 3.

⁷³ *The Times*, 7 April 1896, p. 6.

⁷⁴ Cora Lansbury, ‘Gynaecology, pornography and the antivivisection movement’, *Victorian studies*, 1985, 28: 413–38.

⁷⁵ *Lancet*, 1896, i: 961.

dominated by expressions of self-righteous male indignation. The *Weekly Yorkshire Post* doubted if there existed “twelve rational Englishmen, with hearts beneath their waistcoats, who are capable of taking the Playfair view of the case”.⁷⁶

The trial largely revolved around the way in which men were suppose to behave. Victorian society believed that men necessarily had power over women, but they were not to abuse it. Middle-class males were rarely prosecuted for coercing women; it was rarer still for a doctor to be tried for intimidating a patient. When such rare cases came to light an example was often made of the unlucky culprit. Playfair was no doubt just such a sacrificial lamb, punished for not playing his part as the chivalrous gentleman. The implication drawn by the press was that such misdeeds were not systemic, not the result of any asymmetry in the power wielded by men and women, but the result of some individual quirk. Patriarchal power was thereby strengthened rather than undermined by such show trials, demonstrating as they did that males could be relied upon to police themselves.

So strong was the male chorus of support for Linda Kitson that it drowned out the few female expressions of solidarity. One might have expected feminists to have seized upon the Kitson trial as a classic case of male oppression, but, as far as can be determined, the leaders of the women’s movement avoided extensive comment. Dealing as it did with the adultery and miscarriage of a middle-class woman, the Kitson affair perhaps hit too close to home. The leaders of the women’s movement were more comfortable in displacing concerns regarding sexuality onto the topic of working-class prostitution.⁷⁷

Nineteenth-century feminists had noted that confidentiality was “gendered”, most notably under the Contagious Diseases Act when physicians were relied upon to inform authorities which streetwalkers were ill and accordingly were to be incarcerated by the police.⁷⁸ Male doctors kept the secrets of their male patients, however. Doctors could, of course, be expected to protect each other. The most extreme case occurred when Dr Pritchard, the infamous medical murderer, succeeded in poisoning his wife because a colleague believed it was against the “etiquette” of the profession to report his suspicions.⁷⁹ Dr Spencer, who appeared for Linda Kitson, was presented by Lockwood with a more familiar scenario. A male patient suffering from venereal disease announces his intention to marry; would Spencer warn the woman and prevent such a dangerous union from being forged? Spencer replied that he would not.⁸⁰

Protecting men meant, by the same token, betraying women. The point has been made many times before that doctors often kept nineteenth-century middle-class women in ignorance of the workings of their own bodies and the threats posed to them by others. The classic case would be that of the doctor not informing a woman

⁷⁶ Playfair, *op. cit.*, note 3 above, p. 156.

⁷⁷ Frank Mort, *Dangerous sexualities: medico-moral politics in England since 1830*, London, Routledge and Kegan Paul, 1987, pp. 95–109.

⁷⁸ On doctors opposed to the Act, see Benjamin Scott, *A state iniquity: its rise, extension, and overthrow*, London, Kegan Paul, 1890, pp. 116, 119, 217.

⁷⁹ Glaister, *op. cit.*, note 47 above, p. 60.

⁸⁰ *Br. med. J.*, 1896, i: 817.

that she suffered from a venereal complaint because to do so would reveal that her husband or her husband-to-be had been unfaithful.⁸¹

But doctors also protected some women's confidences. In the Kitson case not deception, but candour was the threat. Playfair played the role of the blackmailer—a stock bogeyman of the age—in inspiring fear by threatening to reveal, rather than suppress, the truth.⁸² If the classic male medical secret was that one was suffering from venereal disease, the female equivalent was to have had an abortion. Keeping the secret of a woman who aborted was morally less problematical than keeping the secret of a man who had a venereal disease because the woman did not pose a medical danger to those around her. But abortion was a crime and communications pertaining to criminal acts were not privileged, even for barristers and solicitors. The confidences of the victims of crimes such as rape were to be protected; not those of defendants. But abortion was a special case. The woman, although party to the crime, was viewed by the courts as also its “victim” and therefore her physician's testimony was usually ruled to be inadmissible.⁸³ When one nineteenth-century doctor, who pretended to be assisting a couple in procuring an abortion, betrayed them and appeared in court as both a medical expert and prosecution witness, the judge, instead of lauding the physician's civic mindedness, damned him for having acted as an *agent provocateur*.⁸⁴

Mr Justice Hawkins went so far as to declare in open court that if a woman aborted to save her character, her reputation and her livelihood he doubted “very, very, very much” the justification of a doctor running off to the police to say:

I have been attending a poor, young woman who has been trying to procure abortion with the assistance of her sister. She is now pretty well, and is getting better, and in the course of a few days she will be out again, but I think I ought to put you on to the woman.⁸⁵

That, Hawkins asserted, would be “a monstrous cruelty”.⁸⁶

In drawing our analysis to a close Hawkins' words serve as a useful reminder of how class and gender preoccupations could lead even a judge to turn a blind eye to certain crimes. When Hawkins thought about abortion he assumed, as did most of his contemporaries, that the woman in question would be poor, single, seduced and abandoned. Since she was in effect a victim of her own crime and her actions jeopardized neither property nor gender relationships his heart could go out to her. But how would the courts respond to a wealthy, married woman who sought an abortion as part of her struggle to free herself from a hated husband? Just such a case

⁸¹ Jill Harsin, ‘Syphilis, wives, and physicians: medical ethics and the family in late nineteenth-century France’, *French historical studies*, 1989, 16: 72–95; Gail Savage, ‘The wilful communication of a loathsome disease: medical conflict and venereal disease in Victorian England’, *Victorian studies*, 1990, 34: 35–54.

⁸² George Ives, *A history of penal methods*, London, Stanley Paul, 1914, pp. 353–6; Alexander Welsh, *George Eliot and blackmail*, Cambridge, Mass., Harvard University Press, 1985.

⁸³ DeWitt, *op. cit.*, note 45 above, p. 247. But for demands made in America that abortions be reported see Norman Barnesby, *Medical chaos and crime*, London, Mitchell Kennerley, 1910, pp. 213, 223–7.

⁸⁴ A. S. Taylor, *A manual of medical jurisprudence*, London, J. A. Churchill, 1891, p. 560.

⁸⁵ *Br. med. J.*, 1896, i: 883.

⁸⁶ *Lancet*, 1896, i: 962.

surfaced a few years after the *Kitson v. Playfair* trial. In 1901 Jessie M'Ewan, who was undergoing the travails of both a nasty marital break-up and an unwanted pregnancy, called in the Edinburgh surgeon P. H. Watson to examine her. Watson (1832–1907), an expert in gynaecology and honorary surgeon in Scotland to Queen Victoria, was to be knighted for his services in 1903.⁸⁷ In his private notes the moralizing Watson took the trouble to record both the background to the patient's marriage problems and his advice that Jessie M'Ewan be sent to a nursing home to await her delivery.

This view not pleasing to patient nor to her father (who has married a second wife), and it seems they are all bent upon inducing premature labour so as to free the patient of any permanent reminder of this marriage, and, if possible, obtain a separation.⁸⁸

Watson showed these notes to the solicitors of Jessie M'Ewan's husband and when the couple sought a divorce in 1903 appeared as a witness on his behalf. Jessie M'Ewan sued Watson for breach of confidence and slander. The case was fought all the way to the House of Lords where Lord Halsbury gave the leading judgement that what Watson told Mr M'Ewan's solicitors was not actionable because it was both true and privileged.⁸⁹ Jessie M'Ewan had to bear both the heavy legal costs and the humiliating public exposure of her private affairs.

There was no doubt that Dr Watson had violated the confidence of his patient. Jessie M'Ewan lost her suit because she emerged, not as a long-suffering female, but as an angry and rebellious wife. There is equally little doubt about Linda Kitson's adultery, but her skilled counsel simply conjured it away. The public was willing in the case of this pretty, persecuted woman to believe in the possibility of a sixteen month pregnancy.⁹⁰ Claiming all the while that in her "lightheaded" way she did not know what she was doing, Linda Kitson, in perfectly portraying the role of the female martyr, got away with adultery, perhaps abortion, and £12,000 as well.⁹¹

At the turn of the century the discussion of privileged communication took place within the context of rising public preoccupation with venereal disease, declining fertility, and changing sex roles. The press and laity thought that the *Kitson v. Playfair* trial had played an important role in establishing a clearer definition of doctors' duties as regards confidentiality.⁹² This was, as we have seen, untrue. Despite

⁸⁷ *DNB*, op. cit., note 4 above, pp. 607–8.

⁸⁸ *Law reports (appeal cases)*, 1905, p. 482.

⁸⁹ *Br. med. J.*, 1904, i: 1416; *Scottish Law Reporter*, 1904, 42: 213–21; Glaister, op. cit., note 47 above, pp. 60–3.

⁹⁰ But even in the mid-twentieth century British courts, in order to accept the validity of a legitimate conception, showed themselves willing to stretch the length of the gestation period. In the 1940s judges took seriously claims that sperm could remain viable in the vagina for as long as twenty-eight days and that births might occur as late as three hundred and sixty days after conception. J. D. Cantley, 'Medical evidence in matrimonial cases', *Medico-legal journal*, 1950, 18: 26–30.

⁹¹ For a discussion of how nineteenth-century women could literally get away with murder if they played the appropriate role, see Mary Hartman, *Victorian murderesses*, New York, Schocken, 1977; Ruth Harris, *Murders and madness: medicine, law and society in the fin de siècle*, Oxford, Clarendon Press, 1989.

⁹² Immediately following the trial the Royal College of Physicians of London set up a committee "to define in a legal sense the proper conduct of a Practitioner when brought into relation with a case of acknowledged or suspected criminal abortion", but the debate over the doctor's duty continued on into the

Privileged communications

the general belief that doctors followed some elaborate secret code of ethics, the reality still was, noted one 1905 commentator, that “obedience to the dictates of medical ethics implies application to the ordinary chances of professional life of the rule that a man should do as he would be done by”.⁹³ In the age of AIDS the whole question of medical disclosure is being debated once more. Is the assumed good sense and ethical behaviour of doctors sufficient protection against abuse of the patient’s confidences?⁹⁴ A review of *Kitson v. Playfair* serves as a timely reminder that it is not quite that simple, that it is impossible to disentangle ethical issues from class, gender, and professional preoccupations.

twentieth century. Sir George Clark, *A history of the Royal College of Physicians of London*, Oxford, Clarendon Press, 1964–72, vol. 3, pp. 980–5.

⁹³ S. Squire Sprigge, *Medicine and the public*, London, Heinemann, 1905, p. 243. But for a discussion of confidentiality, which by its cautious tone indicates a lesson had been drawn from the Playfair fiasco, see Robert Saundby, *Medical ethics: a guide to personal conduct*, London, Simpkin, Marshall, Hamilton, Kent, 1902, pp. 62–5.

⁹⁴ Robert Lee, ‘Disclosure of medical records: a confidence trick?’ in Linda Clarke (ed.), *Confidentiality and the law*, London, Lloyd’s, 1990, p. 26; Irvine Loudon, ‘A question of confidence: how it strikes the historian’, *Br. med. J.*, 1984, **288**: 125–6.