

In the Privy Council.

UNIVERSITY OF TORONTO
-4 OCT 1956
INSTITUTE OF GRADUATED
LEGAL STUDIES

44265

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN—

STELLA EILEEN HOCKING
(Plaintiff) *Appellant*

— AND —

GEORGE BELL (Defendant)
Respondent.

CASE FOR THE RESPONDENT.

RECORD.

10

1. Prior to the month of March, 1938, the Appellant was suffering from a disease known as thyrotoxicosis, that is a disease of the thyroid gland occasioned by the toxic over-secretion of the thyroid gland—a toxic goitre which in the Appellant's case necessitated surgical treatment. The operation for the removal of the major portion of the gland (seven-eighths) was performed by the Respondent on the 15th March, 1938. As part of the technique of the operation a drainage tube is inserted in the wound, that is the lower part of the neck, for a period varying from about thirty-six to forty-eight hours after the operation. The drainage tube in the Appellant's case was removed by the Respondent on the 17th March, 1938, that is within forty-eight hours of the performance of the operation. In her action the Appellant alleges that the Respondent was guilty of negligence in the post-operative care and attention of the Appellant consequent upon the performance of the said operation of thyroidectomy. The negligence alleged by the

584 (11-52)

890 (5-45)

585 (34)

1685 (11-21)

587 (45-47)

20

595 (20-28)

1714

Appellant is that the Respondent so negligently and unskilfully manipulated the drainage tube that it broke and that thereafter the Respondent negligently failed to remove the portion of the tube remaining in the wound and it was expressly stated by Counsel for the Appellant that no allegation of negligence or blame was being made by the Appellant against the Respondent in respect of the performance of the operation or anything that occurred in the operating theatre.

353 (29-40)

1050 (40)—1051 (9)

1714

2. The Appellant further alleges that after suffering intervening and intermittent ill health from a condition believed to be tetany for a period of some eighteen months (which the Appellant claimed was consistent only with the presence in her neck of a foreign body) the broken piece of drainage tube moved by a process of ulceration up her neck to and through her left tonsil on the 2nd October, 1939 (her birthday), was swallowed and passed through her body per rectum on the 5th October, 1939, whereafter she alleges she regained her normal health. 10

1st T. 31 (31-33)

4th T. 255 (46)—256 (4)

4th T. 198 (39-50)

1715

3. The Appellant further alleges that the object alleged to have so ruptured through her left tonsil and passed by her per rectum was examined by her on the 5th October, 1939, and then discarded in the w.c. with the result that no other person saw the alleged object. 20

1715

4. In the Particulars supplied by the Appellant (which are the basis of her action) the alleged object is described as follows:—

“A piece of soft rubber tube about 2 inches long, greyish in colour and had the appearance of being in water some time. It was cut off straight at one end and torn at the other. On one side was a straight cut in which could be seen what appeared to be a swab and wire protruding from torn end of tube.” 30

1715

5. In the said Particulars in answer to an interrogatory as to whether any other foreign body was passed at the same time as the alleged tube, it was stated—“The swab and wire appeared to be the only other foreign bodies passed.”

6. The Appellant's cause of action against the Respondent was first tried before Mr. Justice Street and a jury of four between the 8th and 12th days of December, 1941, when a verdict was returned by the jury in favour of the Appellant for £500. Against this verdict the Respondent appealed to the Full Court of the Supreme Court of New South Wales. This appeal was heard by Davidson J., Halse Rogers J. and Maxwell J. in February, 1942, who unanimously set the jury's verdict aside as one that no reasonable jury could have found upon the evidence, 40

and directed that a new trial of the action be had. The said Judgment of the Full Court is reported in 42 S.R. (N.S.W.) 130. In his Judgment Mr. Justice Davidson stated *inter alia*:—

42 S.R. (N.S.W.) 130

that the Plaintiff's evidence teems with gross improbabilities;

ibid 153

that the allegation is not a charge of mere negligence but of criminal malpractice;

ibid 134

that the allegation concerning the alleged attempted removal of the tube is simply incredible and offends the conscience;

ibid 134

10

that at its inception the Plaintiff's story rests on an improbability so great as to amount to an absurdity, and at its conclusion equally unacceptable;

ibid 139

that the verdict is so unreasonable that the jury could not have performed judicially the task allotted to it.

ibid 110

7. The Appellant applied to the High Court of Australia for special leave to appeal against the judgment of the Supreme Court of New South Wales, but such special leave was refused.

8. The second trial of the action was heard before Mr. Justice Herron and a jury of four between the 12th and 29th days of August, 1942, when the jury failed to agree.

20

9. The third trial of the action was heard before Mr. Justice Maxwell and a jury of four between the 9th and 19th days of December, 1942, when the jury again failed to agree.

10. The Respondent thereupon applied to the Full Court of the Supreme Court of New South Wales that a verdict should be entered for the Respondent as a matter of law. This appeal was heard in March, 1943, by Mr. Justice Davidson, Mr. Justice Halse Rogers and Mr. Justice Roper. The Full Court held that (on the evidence as it then stood) the Respondent was not entitled as a matter of law to have a verdict entered for him. The said judgment of the Full Court is reported in 43 S.R. (N.S.W.) 154.

30

43 S.R. (N.S.W.) 154

11. The fourth trial of the action was heard before Mr. Justice Edwards and a jury of four between the 30th November, 1943, and the 21st January, 1944, when the jury returned a special finding and a verdict for the Plaintiff for £800.

12. Against this verdict the Respondent appealed to the Full Court of the Supreme Court of New South Wales, which by majority (Davidson and Halse Rogers JJ.; Roper J. dissenting)

40

held that the Respondent was entitled to a verdict as a matter of law upon the ground that there was no evidence upon which the jury could find a verdict for the Plaintiff (the present Appellant).

1597 (38)—1600 (38)

Mr. Justice Davidson held that the verdict of the jury was based upon a theory of possibilities unsupported by the evidence.

1602 (47)—1603 (10)

His Honour further held that the evidence is so overwhelming both anatomically and pathologically against the probability or even possibility of the Plaintiff's story as to render it entirely incapable of acceptance.

1605 (21-26)

And His Honour further held that the evidence of the negligence charged is reduced to less than a mere scintilla. 10

1611 (39)—1612 (33)

Mr. Justice Halse Rogers held that the jury's verdict was based on a guess and a series of conjectures and that there is no evidence to support the finding and the verdict.

1625 (1-10)

Mr. Justice Roper held that the appeal should only succeed upon the ground that the verdict was against evidence and the weight of evidence, and that there should therefore be an order for a new trial of the action.

13. Against the judgment of the Supreme Court of New South Wales, the Appellant appealed to the High Court of Australia, which by a majority (Rich, Starke and McTiernan JJ.; Latham C.J. and Dixon J. dissenting) held that the Respondent was entitled to a verdict as a matter of law and that the appeal should be dismissed. 20

1645 (38)—1646 (11)

Mr. Justice Rich held that the Plaintiff's story is so inherently suspicious and so highly improbable that it is difficult to understand how any jury could have accepted it, and that the verdict for the Plaintiff, could not be allowed to stand, and further held that the Respondent was entitled to a verdict as a matter of law.

30

1661 (19)—1663 (9)

Mr. Justice Starke held that no jury could reasonably make the finding that was made by the jury, and further held that the Supreme Court of New South Wales was justified in concluding that there was no evidence on which the jury could reasonably find a verdict for the Appellant and that therefore the Respondent was entitled to a verdict as a matter of law.

1675 (19)—1678 (29)

Mr. Justice McTiernan held that there was no evidence on which a jury may reasonably find the allegation made by the Appellant, and as there was no evidence to support a verdict for the Appellant, the Respondent was entitled to a verdict as a matter of law. 40

Latham C.J. and Dixon J. in their dissenting judgments considered that there was some evidence to go to the jury in support of the Appellant's allegation, and that the Full Court of the Supreme Court of New South Wales was in error in holding that there was no evidence. Their Honours further considered that the verdict of the jury should be restored.

14. This appeal is brought by the Appellant against the majority judgment of the High Court of Australia, and it is submitted on behalf of the Respondent that there is no important question of law involved in this appeal, but merely a question of whether the majority of the High Court of Australia and the majority of the Full Court of the Supreme Court of New South Wales were right in holding that on the evidence adduced at the fourth trial of the action, there was no evidence to support the Appellant's allegation, and that therefore the Respondent was entitled to a verdict as a matter of law.

15. Paragraphs 16 to 57 hereof set out the bases of the Respondent's contention that there is no evidence to support the verdict given by the jury in favour of the Appellant.

16. Though upon the fourth trial efforts were made by the Appellant and her Counsel to depart from the allegation that the alleged object contained wires, the Appellant in her evidence in the various trials (which formed part of the evidence before the jury on the fourth trial) clearly indicated that her allegation in reference to the alleged tube was that "wires" as such were an integral part of the object she alleged the Respondent had left in her wound. She stated in reference to the alleged wire, *inter alia*:—

(a) that she saw two pieces of wire protruding beyond the rubber, one piece about an inch, the other slightly shorter;

(b) that after swallowing the alleged object she felt the wires scratching her stomach;

(c) that she felt the wires sticking in her neck.

1st T. 11 (35-37)
2nd T. 51 (27-30)
3rd T. 152 (21-23)
4th T. 199 (11-19)

1st T. 25 (48-51)
30 (16-19)
2nd T. 60 (37-40)
130 (6-7)
4th T. 236 (4-10)

1st T. 25 (52)—26 (6)
26 (37-39)
27 (4)
2nd T. 51 (7-10)
123 (23-33)
3rd T. 151 (30-33)
175 (27-30)
4th T. 237 (4-8)
1332 (1-2)
c.f. 198 (15-18)

2nd T. 54 (5-13)
97 (37-42)
99 (31-50)
3rd T. 164 (10-28)

3rd T. 152 (15-17)
4th T. 211 (11)

Ex. C. 1698
13 (36)
1st T. 25 (39)
2nd T. 52 (6)
56 (47-50)

57 (36-49)
60 (19)—61 (3)

61 (7-16)

3rd T. 163 (21-36)
4th T. 235 (44)—236 (36)

17. The Appellant gave evidence that on the 5th October, 1939, she made a sketch of the object she alleged had been left in her neck by the Respondent (Exhibit C) and that the alleged object was about the same size though slightly smaller than the sketch.

18. During the hearing of the second trial of the action a tube of the nature and description alleged by the Appellant was reconstructed in Court in accordance with and under the detailed directions of the Appellant which reconstructed object later was tendered in the fourth trial as Exhibit P. The Appellant in her evidence at the second, third and fourth trials stated that this Exhibit P is a fair representation of the object she alleged she saw on the 5th October, 1939, and that her allegation in the action against the Respondent is that he had left in her neck an object of that size and description and that the same had remained in her neck for a period of eighteen months. 10

19. The Appellant's allegation in this action is that the Respondent left in her neck an object which after remaining in her neck for some eighteen months ulcerated up her neck to and through her left tonsil an object, that is to say, of the type and description as stated in the Particulars and in her evidence and of which Exhibit P is a fair representation. Though attempts were made to whittle down the alleged object to some small piece, the Appellant's case before the juries may be aptly stated in the words of His Honour Mr. Justice Maxwell in his summing up in the third trial and quoted by Mr. Justice Halse Rogers in the judgment of the Full Court—"Mr. Hardwick" (that is the Appellant's Senior Counsel on the earlier trials) "said 'I would not insult your intelligence by suggesting that "Dr. Bell left this object (now Exhibit P) in the Plaintiff's throat.' Now gentlemen, with all the care that I can assume and with all the responsibility that I have, I tell you that substantially that is the Plaintiff's case and it is of no avail to the Plaintiff to suggest now at this stage through her Counsel, but not in the witness box, that it might have been that a little piece of the end of another tube was left in. . . . I tell you with a full sense of my responsibility that the Plaintiff's case is nothing but this: that an object of which the one Mr. Hardwick held in his hand (now Exhibit P) was a fair representation, was left in her throat." 20 30 40

20. His Honour Mr. Justice Edwards, the trial judge on the fourth trial, left the following question to the jury:—

"Did the Defendant leave in the site of the operation the object substantially as described, that is a piece of

11 S.R. 492
1607 (52)—1608 (11)

1570 (47-51)

“rubber tube about two inches long cut off straight at one end and torn at the other on the side a straight cut in which could be seen what appeared to be a swab and wire protruding from torn end of tube.”

The jury returned with a finding as follows:—

“We find: that the Defendant left in the site of the operation a piece of rubber tube of a length somewhat less than two inches cut off straight at one end and torn at the other part of which tube had been cut down one side and from which protruded some material which looked like wire and a swab from the torn end of the tube.”

10

21. The Appellant in support of her allegation gave evidence of—

1580 (23-28)

(a) what she alleged occurred at the removal of the tube;

1st T. 4 (22-33)
30 (26-46)
2nd T. 46 (24-32)
63 (31-46)
3rd T. 147 (40)—148 (3)
158 (18-25)
159 (1)—
160 (21)
4th T. 194 (3-12)
207 (22-33)
227 (42)—
228 (16)
228 (30-47)

(b) a history of ill health from March, 1938, to October, 1939, in which she suffered as she alleged from a condition believed to be tetany which together with certain alleged swellings is claimed to be consistent with the presence of the alleged foreign body in her neck;

e.g. 4th T. 195 (20-44)

(c) the alleged eruption of “something” through her left tonsil on the 2nd October, 1939;

20

(d) the finding of the object as described in her stool on the 5th October, 1939;

1st T. 24 (4-5)
2nd T. 132 (14-18)
193 (13-15)
3rd T. 151 (14-29)
4th T. 197 (47)—
198 (18)

And it is claimed by and on behalf of the Appellant that upon such evidence the Appellant’s allegation is sufficiently established as a matter of law to enable and entitle the jury to find as a matter of fact the issue in favour of the Appellant.

22. The substantial issue between the parties upon the hearing of the various trials was whether or not the allegation of the Appellant against the Respondent as summarised in paragraph nine (9) hereof was a medical, that is an anatomical, physical, pathological and surgical impossibility.

30

23. The Appellant called certain evidence in chief, namely Professor Welsh and Dr. George Stanley Thompson in an endeavour to adduce evidence that her allegation was a medical possibility and thus discharge the onus that rested upon her.

24. The Respondent contends that if on the whole of the evidence the Appellant has failed to discharge the onus upon her of establishing that the allegation is a medical possibility then the Appellant has failed to prove her case and the Respondent is as a matter of law entitled to a verdict.

25. The Respondent contends that not only has the Appellant failed to establish the onus that the allegation is a medical possibility but further contends that on the totality of the evidence it has been conclusively established that the allegation is an utter impossibility scientifically, that is that it is a medical, anatomical, pathological, physical and surgical impossibility and that therefore the Respondent is entitled as a matter of law to a verdict in the action. 10

26. To understand and appreciate the evidence at the fourth trial which the Respondent contends establishes that the Appellant's allegation is an impossibility, requires a detailed study from the evidence, the exhibits and the relevant medical text books (which by consent formed part of the material before the jury) of *inter alia* (a) the technique of the operation of thyroidectomy; (b) the anatomy of the human neck including all structures from the area of the thyroid gland to the area of the tonsil; and (c) the pathology of inflammation and pyogenic infection and in particular such pathology in relation to the reactions of the body tissues to a septic foreign body. The following paragraphs numbered 27 to 56 contain a short resumé of (with some of the references to) certain major aspects of the case. 20

27. The technique of the operation of thyroidectomy was described by Dr. Bell, Dr. Edye and Dr. Poate and by references and diagrams in medical textbooks. The Appellant called no witness with any knowledge or experience in the technique of the operation. Professor Welsh's experience being limited to experimental operations on cats performed many years ago, he admitted that he was not competent to answer any questions regarding the tube, whilst Dr. Thompson though allowed to express sundry opinions had hardly any experience of thyroidectomy, had never performed the operation in a case of a toxic thyroid, had had no experience of drainage tubes in thyroidectomy and did not even know how the superior thyroid artery came to be severed, although this is an essential step in the operation. 30 40

Bell 586 (18)—593 (38)

Edye 1010 (29)—

1011 (40)

1016 (13)—

1018 (16)

Poate 1165 (25)—

1168 (37)

Welsh

356 (46)—357 (2)

360 (25-35)

361 (39-48)

363 (11)—364 (1)

364 (7-9)

Thompson

443 (46-49)

401 (44)—402 (26)

414 (15-18)

422 (28, 29)

422 (49-52)

409 (11, 12)

459 (39-51)

Edye 1022 (38-42)

Bell 587 (14-32)

28. The evidence disclosed that in the performance of the operation a great many sutures and ligatures have to be tied (over 50), that Dr. Bell never used any suture material other than plain cat gut and all hæmorrhage must be completely stopped and the operation field completely dry before the patient is returned to the ward, that only certain types of swabs are used (Exhibit 5), that marine sponge is never used. (The Appellant had described the swab in the alleged tube as "a piece of marine sponge with holes in it like a sponge").

588 (7-10)
 Edey 1011 (6-13)
 Bell 699 (26-28)
 588 (11-21)
 588 (47, 48)
 587 (51)
 589 (36)—590 (8)
 Edey 1010 (45)—
 1011 (10)
 1028 (1-11)
 Bell 589 (28)—590 (8)
 608 (40-42)
 3rd T. 163 (21-22)
 1701 (38)
 O'Hanlon 829 (49)

10 29. The evidence further disclosed that in the case of the removal of a toxic thyroid the incision is made at the base of the neck, that a small drainage tube is inserted in the centre of the operation wound, that such tube is as short as possible, a maximum of two inches long, that the tube is entirely empty, that nothing in the nature of wires or swabs are ever used in connection with the tube, that the tube is inserted a little to the right or left of the centre line and at the lowest point of the operation wound.

Barnett 536 (3-6)
 Melville 553 (6-8)
 Bell 591 (35-37)
 Edey 1016 (13-26)
 Poate 1166 (8)
 1166 (29-34)
 Edey 1017 (11-13)
 Ritchie 895 (36-38)
 Edey 1015 (45)—1016 (2)
 Bell 697 (33-38)
 Poate 1168 (2-7)

20 30. The relevant area in the human neck is a very delicate area and one that is densely packed with vital structures and organs including *inter alia* the trachea, the œsophagus, the thyroid gland, numerous important and vital blood vessels and nerves, numerous muscles, bone and cartilage and other structures vital to life. There are no spaces.

Bell 592 (1)
 724 (35-42)
 Smith 1096 (10-30)
 Shellshear 879 (8-21)
 Inglis 1093 (25-34)
 Edey 1030 (34-40)

31. There is no possible line of travel for a foreign body from the thyroid to the tonsil.

Bell 614 (27-30)
 Ritchie 894 (9-14)
 Shellshear
 979 (12-15)
 985 (8-10)
 985 (16-20)
 987 (29-37)
 Smith 1096 (1-5)
 Poate 1183 (37)—
 1184 (9)
 1186 (7-20)

30 32. Detailed evidence of the anatomy was given by Professor Shellshear and Dr. S. A. Smith which was demonstrated and explained by descriptive X-ray plates, diagrams and references to standard medical textbooks. None of the essentials of the detailed evidence on anatomy called by the Respondent was dealt with by the medical witnesses called by the Appellant while Professor Welsh agreed with and accepted Professor Shellshear's evidence on the anatomy.

Shellshear
 976 (14)—987 (37)

Smith
 1096 (1)—1100 (46)

Welsh 1334 (34-40)

Bell
 613 (47)—617 (4)
 590 (13-18)
 724 (50)—726 (16)

Shellshear
 982 (28-37)
 982 (38)—984 (42)
 987 (5-16)

Smith
 1096 (1)—1100 (46)
 1104 (14)—1105 (6)

Ritchie 895 (4-32)

Inglis
 1072 (29)—1073 (32)
 1093 (14-34)

Edye 1028 (29-32)
 1029 (29)—
 1030 (40)
 1032 (14, 15)

Marsh 773 (36-42)

Edye 1032 (7-11)

Smith 1100 (36-46)

Bell 615 (49)—616 (15)

Poate
 1189 (46)—1190 (6)

Welsh 380 (37-43)

Bell 722 (11, 12)
 725 (20-28)

Shellshear 986 (12-16)

Poate
 1182 (27)—1183 (12)
 1175 (17-36)

Ritchie 892 (6-22)

Bell 605 (1-18)

Welsh 376 (26-30)

Inglis
 1067 (34)—1068 (18)

Inglis 1068 (30-37)

Poate 1176 (4-34)

Thompson 400 (33-37)

33. The evidence on the anatomy of the neck established and it is contended by the Respondent that it can be conclusively demonstrated by the medical textbooks and diagrams that for any foreign body to pass from the thyroid capsule to and through the tonsil the various vital structures of the neck would have to be penetrated and destroyed in part and that such penetration and destruction would be inconsistent with continued life.

34. Moreover by virtue of the anatomy of the neck any possible suggested line of travel for a foreign body would necessitate that the object after having travelled a certain distance from the thyroid cavity would have to change its direction practically at right angles to get into the region of the tonsil. 10

35. The Appellant's Counsel suggested that the alleged tube might have travelled along mucous membrane but the uncontradicted evidence and the medical authorities established that there was no mucous membrane between the thyroid and the inside of the mouth, that the first time upon which mucous membrane would be encountered would be in the tonsil itself, that mucous membrane (in this area) is the inside lining of the mouth and the pharynx. 20

36. The uncontradicted and/or admitted evidence in regard to infection and the medical authorities established:—

(1) That infection may come from a very great number of different sources and causes and is met with in operations in spite of the greatest skill and care on the part of the surgeon.

(2) That infection may be acute or chronic and that acute infection may develop into a chronic infection, that the transition from one to the other is not sudden and that the pathological processes involved in the tissues differ according to the nature of the invading bacteria and whether the condition is acute or has developed into a chronic stage. 30

(3) That in the Appellant's case she contracted a staphylococcal infection in her operational wound shortly after the operation and that this is a pyogenic or pus forming infection which is a type of infection that does the

most damage to the human tissues and as Dr. Thompson (the Appellant's medical witness) stated, infection is aggravated by the locality thereof and is more dangerous in the human neck than in other areas of the body.

(4) That the tissues tend to confine inflammation and infection and prevent its spread—that if not rapidly overcome it will become chronic and is then confined by the fascia of the particular area involved.

10

(5) That though chronic infection or inflammation may become more active, it does not later become acute (in the pathological sense), that the œdema and pathological reactions infiltrate the surrounding tissues and prevent its spread.

(6) That suppurative infection (pus) tracks from a higher pressure area to a lower pressure area—that is, points along the path of least resistance.

20

(7) That suppuration (pus) must find its way out of the body or be absorbed by the body and that if it does not escape from the body it develops into an abscess—i.e., an enclosed area of suppuration, that an abscess without escape of pus does not become quiescent, that if a wound becomes infected the pus must escape somewhere.

(8) That suppuration or an abscess necessarily involves the destruction of tissue and a return to normal is no longer possible.

(9) That if the abscess condition spreads it does so by eating away the surrounding tissues and that necessarily involves further destruction of tissue.

30

(10) That body tissues destroyed by ulceration are not replaced by corresponding tissues but by fibrous tissues which cannot function in place of the tissue destroyed, that the only function of fibrous tissue is to hold other body tissues together and consequently scarring and limitation of movement or function is unavoidable.

Welsh 1333 (34-40)
377 (30, 31)
376 (3-5)

Thompson 400 (33-35)

Inglis 1068 (8-52)

Poate 1186 (24-36)

Poate
1178 (39-46)
1184 (24)—1185 (2)

Inglis 1086 (42-44)

Smith
1100 (49)—1101 (2)

Inglis
1077 (34)—1078 (20)
1092 (45)—1093 (3)

Edwards 762 (16-22)

Shellshear 988 (38-40)
1008 (8-12)

Edey 1029 (4-7)
1029 (29-41)

Ritchie 895 (42-50)

Poate 1181 (25-41)
1186 (30-33)

Smith 1101 (13-26)

Welsh 384 (48)—385 (3)

Inglis 1077 (19-27)

Thompson 459 (10-13)

Welsh 1354 (29-33)

Edey 1046 (46-49)

1033 (15-17)

Shellshear 1008 (41-43)

Smith 1104 (14-41)

Poate 1187 (22-36)

Welsh 385 (33-35)
1354 (14-16)

Thompson
483 (30)—484 (9)

Welsh 1354 (35-38)

Bell 615 (39-48)

Inglis
1072 (36)—1073 (12)

Ritchie
896 (51)—897 (27)

Marsh 772 (11-35)

Bell 616 (49)—617 (2)

Welsh 385 (17-19)

Poate 1187 (6-36)

Smith 1104 (14-30)

Inglis 1093 (14-34)
Thompson 400 (33-35)

Bell 724 (40-42)
Thompson 400 (33-35)
Poate 1174 (40-47)
1182 (4-10)
Smith 1102 (30, 31)

Thompson 458 (8-25)
Welsh 398 (24-26)
1354 (39-44)
Bell 724 (24-34)
614 (5-30)

Smith
1096 (44)—1097 (3)
Poate
1181 (44)—1182 (15)
1186 (8-42)
1253 (15-29)
Shellshear 990 (29-36)
Edye
1029 (29)—1030 (40)

Bell 614 (10-30)
Marsh 774 (1-13)
Ritchie 895 (42-47)
Edye
1029 (29)—1030 (40)
1064 (18-23)

Bell 710 (26-29)
731 (10, 13)

Inglis
1070 (25)—1072 (35)
Poate 1187 (37-46)
1189 (13-35)
1190 (24-45)
Marsh 770 (48)—771 (7)

Smith
1102 (14)—1103 (8)
Edye
1031 (1)—1032 (15)
1062 (12)—1064 (4)

Poate 1191 (1-10)
Smith 1102 (24-31)

Poate
1184 (21)—1185 (11)

(11) That in considering the effect or result of ulceration it is important to know the area involved as different considerations apply to different areas one part of the body bearing no analogy to another (pathologically).

(12) That abscesses in the neck are very dangerous—and that prompt surgical treatment is necessary because of the numerous vital structures in a small area.

(13) That in the thyroid capsule the pus would be in the lowest part and suppuration in that area would track downwards because there is an opening downwards from the thyroid capsule into the anterior mediastinum (the cavity of the anterior thorax) by reason of the pre-tracheal fascia. 10

(14) If pus in the neck did track downwards the inevitable result is mediastinitis which is inevitably fatal to the patient.

(15) The infection in the Appellant's case did not go downwards into the mediastinum because it was purely localised. Inflammation of the thyroid usually remains localised.

(16) Prolonged pyogenic infections involving blood vessels are extremely dangerous due to the likelihood of (a) thrombosis and (b) hæmorrhage. This is especially so in staphylococcal infections. A fatal result in either case is to be expected. 20

(17) When a pyogenic infection involves an operation area there is danger of secondary hæmorrhage which is difficult to control especially in the neck.

(18) A long continued abscess would lead to toxæmia or septicæmia, that is, a generalised blood infection. 30

(19) The destruction of tissues involved in a spreading abscess must be accompanied by marked constitutional disturbances—symptoms of which would be continuous

temperature, a red inflammatory reaction, great pain and the patient would be desparately ill.

37. The Appellant's Counsel contended that suppuration and with it a foreign body could follow fascial planes. The evidence discloses:—

I. (a) you may get division of the fascia in the very early stages of acute inflammation when inflammation may travel along fascial planes;

Inglis 1087 (5-8)
1077 (34)—
1078 (20)
1078 (20)

10 (b) that when the inflammation becomes chronic (that is after a very few days) the fascial planes do not and cannot open up due to the matting of the surrounding tissues (bodily protection) and that consequently in the chronic stage pus does not follow fascial planes like acute inflammation and that consequently it is quite impossible for a foreign body to track along fascial planes;

Edge 1047 (3-26)
Bell 720 (24-36)
Inglis
1092 (45)—1093 (3)

(c) that chronic abscesses can eat through fascial planes and thus destroy them as other tissues.

Bell 720 (24-26)

20 II. That there is a fascia in the neck which divides the upper and lower portion of the human neck and that there are no fascial planes or any connections of fascial planes that run from the thyroid capsule to the tonsil.

Shellshear 984 (26, 27)

Shellshear 984 (8-13)

38. The effect of a septic foreign body, that is a foreign body in an area of septic inflammation is exemplified by suture knots that become involved in septic inflammation following operations. On this all witnesses agreed. This evidence may be summarised as follows:—

(a) the sinus will continue to discharge, that is the inflammation will not subside until all infected suture material has been extruded.

Bell 605 (49)—606 (27)
Ritchie 892 (25-27)
Poate
1175 (33)—1176 (3)
1178 (27-38)
Melville
557 (45)—558 (2)
Edge 1027 (30-47)
Welsh
398 (46)—399 (9)
1354 (6-12)
Thompson 482 (17-38)
483 (14-19)

30 (b) the fact that the sinus heals indicates that all infected material has been got rid of.

Bell 606 (26, 27)

(c) once infection enters an operation wound it is impossible to postulate how long it will take for the infected suture material to be extruded and cases were mentioned where the sinus continued for a period as long as one and two years after a thyroidectomy

Bell 701 (16-25)
606 (13-15)
Thompson 479 (30-38)
482 (17-38)
483 (14-19)

Welsh
1353 (44)—1354 (3)

(d) the sinus in the Appellant's case could have continued as long as it in fact did without the presence of any foreign body.

39. The evidence and the medical authorities establish:—

Inglis 1092 (13-35)

(1) That a non-septic foreign body, that is a foreign body in the tissues which is not infected, becomes surrounded by fibrous tissue and thereby becomes encapsulated and cannot move.

Inglis 1092 (13-35)

(2) That a septic foreign body, that is a foreign body infected by or in an area infected by pyogenic bacteria, develops a suppurative process, that the presence of a foreign body in an area of pyogenic infection would accentuate and aggravate, the inflammatory condition, that the foreign body would perpetuate and continue the suppurative process and the inflammatory reactions. 10

Inglis
1069 (8)—1070 (11)

Welsh 354 (15-20)

(3) That with a septic foreign body the suppurative process would continue as long as the foreign body was there, that is, until it was surgically removed or found its way out—until such time there would be continued suppuration. The sepsis cannot become quiescent while the foreign body remains. 20

Welsh 394 (25-34)
358 (42-48)
354 (18-20)
356 (21-23)
385 (4-12)
385 (49, 50)
387 (13-16)

Inglis 1086 (7-9)
Bell 606 (39-42)

(4) That a wound within which there is a septic foreign body might close over temporarily, but would break open again as the suppuration accumulated within, but it would never heal so long as the foreign body remained within the wound.

Inglis
1069 (17)—1070 (24)
1076 (46-52)
Ritchie 895 (48-52)
Edye
1028 (38)—1029 (11)
Poate
1176 (19-32)
1186 (23)—1187 (30)
Smith 1101 (38-43)
Welsh 354 (43-49)
1354 (1-3)
Thompson
410 (49)—411 (7)

Inglis 1069 (31-33)

Edye 1037 (19-24)

(5) That the fact that a wound in which there has been sepsis heals (as it admittedly did in the Appellant's case) is inconsistent with the presence of a foreign body.

Marsh 772 (34,35)
Edye 1029 (17-23)
Poate 1183 (27-29)
Smith
1100 (15)—1102 (15)
Edwards 760 (30,31)
Smith 1104 (25-37)

(6) That except under conditions hereinafter set out in sub-paragraphs 8 to 20 hereof, foreign bodies do not move in the tissue and that the only foreign bodies known to medical science as likely to move are needles. 30

Welsh 398 (24-36)

Marsh 772 (11-19)

(7) That a septic foreign body would lie in an abscess, that it would lie in a pocket of pus.

(8) That to enable a foreign body to move or be moved at all, that is to change its position at all, the abscess cavity would have to be extended in some direction, that such extension of the abscess cavity means that the surrounding tissues would have to be eaten away, that is destroyed, by being engulfed in the spreading suppurative process. The foreign body could only move in an area of fluid pus as and only if such area of fluid pus were extended.

Inglis
1072 (29)—1073 (5)
1069 (34)—1070 (11)
Marsh 772 (3-19)
773 (28-32)
Bell
613 (47)—614 (14)
Shellshear 989 (48-52)
1008 (41-43)
Ritchie
896 (51)—897 (13)
Cf. 947 (17-25)
Smith 1104 (14-41)
Welsh 381 (43-47)
394 (37, 38)
379 (9-11)
Inglis 1086 (28-35)
Poate
1178 (27)—1179 (7)

10 (9) As previously stated in paragraph 36, sub-paragraph 10 hereof such destroyed tissue is only replaced by fibrous tissue which has no function other than as binding tissue.

(10) That any movement of a foreign body by such an extending suppurative process would be very gradual.

Welsh 397 (36-41)
Bell 615 (15-23)
Poate 1256 (23)
1184 (41)—1185 (11)
1241 (50)—1242 (4)
Smith 1104 (31-37)

40. With regard to the allegation of a foreign body moving or being moved through the dense structures of the neck from the thyroid capsule up to and through the tonsil, the evidence disclosed:—

20 (1) That the foreign body would at the time of the alleged breaking of the tube be at the bottom of the thyroid capsule.

Smith 1101 (3-9)

(2) That to enable the foreign body to escape from the thyroid capsule some part of the thyroid capsule would have to be destroyed by suppuration.

Welsh 1355 (2-6)

(3) That for the foreign body to rupture through the thyroid capsule there would have to be an enclosed abscess with a staphylococcal infection with the accompanying constitutional disturbances and symptoms previously stated in paragraph 36, sub-paragraph 19 hereof.

Poate 1256 (17-20)

30 (4) That the foreign body could not move upwards in the neck without the suppurative process occasioning extensive damage by the destruction of tissues and structures in that area and that such destruction would inevitably cause the death of the patient.

Poate
1184 (24)—1185 (11)
Inglis
1069 (44)—1070 (11)
1072 (16-35)
1076 (46-52)
Bell
614 (42)—616 (15)
Edye 1029 (29-41)
1051 (40-42)
Ritchie
896 (51)—897 (27)
Shellshear
980 (18)—985 (22)
Marsh
773 (18)—774 (31)

Bell
615 (49)—616 (15)
Marsh
770 (22)—771 (4)
Inglis
1070 (25)—1072 (9)
Marsh 773 (39)—(46)

Inglis 1070 (12-24)
Bell 613 (13, 14)
615 (31-38)
Ritchie 896 (38-50)
Marsh 771 (35-49)
Edye 1030 (14-40)
Smith
1101 (51)—1102 (6)
(as above)

Bell
615 (39)—616 (17)
Ritchie 895 (4-16)
Marsh 772 (20-28)
Edye
1033 (15)—1034 (4)
Poate 1276 (15)—
1277 (20)
1186 (8-20)

Marsh 774 (24-31)
Steel
960 (44)—961 (9)
Edye
1033 (40)—1034 (31)
Welsh 382 (13)
355 (23-26)
385 (13-19)

Steel 961 (9)
962 (36-38)
Ritchie 897 (32-34)
Marsh 774 (14-18)
Inglis 1073 (23-30)
Edye 1033 (42, 43)
Poate 1276 (29)
1204 (7-15)

Edwards 762 (35-39)
Marsh 773 (28-32)
Smith 1105 (3-6)
Edye 1030 (21-31)

Edye 1032 (7-15)
Smith 1100 (36-46)
Welsh 380 (37-40)

Bell 710 (26)

Welsh 392 (9-13)
(33-50)
393 (17-18)
398 (6-13)

(5) That the foreign body and the ulcerative process would have had to invade and involve the carotid sheath and that if the blood vessels in the neck do become involved in the suppurative process—death from hæmorrhage would ensue.

(6) That if the trachea were involved in the suppurative process the patient would develop septic pneumonia with a fatal result.

(7) That if the œsophagus were involved in the suppurative process the patient would develop mediastinitis 10 with a fatal result.

(8) That the suppurative process necessarily involved would have had to penetrate and destroy various muscles in the neck and that any destruction of muscles would have resulted in marked limitation of movement which would have been permanent, that the damage would have been irreparable.

(9) That there is no limitation of movement or impairment in the Appellant's head and neck, there is no interference with the palatal muscles, that there is no evidence of any destruction or injury to any blood vessel or muscle. 20

(10) That the Appellant's condition is inconsistent with her allegations.

(11) That the foreign body would have had to be removed by operation otherwise the patient would die.

(12) That for a foreign body to get from the thyroid capsule to the tonsil it would have to change its direction approximately at right angles in the course of its peregrinations. 30

(13) That if a foreign body were in the thyroid capsule its most probable course, if it moved at all, would be downwards, that the course suggested by the Appellant's allegation is the most improbable course, and, as Professor Welsh states, it is hard to suggest a more improbable course.

41. With reference to any foreign body of the type and description of Exhibit F or of which Exhibit P could be said to be a fair representation, the medical experts called on behalf of the Respondent stated:—

(a) that it would not fit into the relevant part of the human neck.

(b) that it would not move.

(c) that it was absolutely fantastic, would never be used; and that if such an object as described by the Appellant were placed in the operational wound following a thyroidectomy, the wires would be protruding beyond the wound and would be observed outside the external skin.

(d) that nothing of that nature was in fact used by the Respondent in the performance of the operation on the Appellant.

(e) that an object of that description would occasion an enormous inflammatory reaction, an abscess cavity of about four inches by two inches in size—"the size of a fist."

(f) that the infective organisms would breed very rapidly, that there would be a dense area of acute inflammation which would spread rapidly into the surrounding tissues, that there would be a continuous and profuse discharge with gross destruction of tissue, that the wound would never heal and that there would be a real swinging temperature for months with profound constitutional disturbances.

(g) that the object would undoubtedly cause serious hæmorrhage and unless the vessels were tied immediately (which would necessitate an operation) the patient would die.

(h) that as the evidence disclosed that the drainage tube in fact used was inserted on the right side of the centre line of the operation and as the alleged object is alleged to have ulcerated through her left tonsil, the alleged object would have had to pass from the right to the left side of the trachea (which is close to the external skin) and that an object of the nature alleged by the Appellant could not have passed from the right side to the left and its presence in the area would have been manifest to everyone.

Edye 1024 (50,51)

Edwards 760 (39-41)

762 (29,30)

Marsh 771 (14-23)

Ritchie 895 (21-38)

Edye 1024 (32-35)

Bell 597 (13-19)

606 (28-32)

Edye

1020 (45)—1021 (47)

Poate 1175 (39)—

1176 (18)

Bell 597 (14,15)

606 (28-32)

606 (33-35)

615 (17-23)

Inglis 1069 (23-27)

Ritchie 895 (48-52)

Steel 964 (8-11)

Edye

1028 (48)—1029 (3)

Poate 1176 (4-18)

1179 (31, 41)

Poate

1178 (23)—1179 (7)

1180 (27)—1181 (41)

1176 (4-31)

Bell 724 (24-34)

606 (39-42)

Ritchie

896 (51)—897 (27)

Marsh 765 (11-43)

Steel

960 (41)—961 (9)

Marsh

770 (27)—771 (6)

Steel 965 (31-41)

1st. T. 4 (8,9)

21 (11)

2nd T. 46 (14)

64 (13-21)

3rd T. 147 (36-39)

162 (27-34)

4th T. 193 (48)—194 (2)

233 (22-34)

234 (30-39)

Welsh 376 (45-47)

Bell

724 (50)—725 (14)

Marsh 771 (7-23)

Ritchie 896 (4-10)

Poate

1183 (37)—1184 (14)

Smith

1104 (42)—1105 (6)

10

20

30

40

Poate 1180 (15-41)

(i) that:—

(i) the evidence of the Appellant's condition while in Quirindi Hospital from the 4th May to the 9th June, 1938;

Poate
1180 (42)—1181 (26)

(ii) the evidence of the Appellant's condition in June, 1938, upon her return home from Quirindi Hospital as deposed to by Sister Sly, a witness called by the Appellant, and

Poate 1180 (47)—
1881 (3)
2nd T. 106 (10-17)

(iii) the fact that no medical attention was required or given to the Appellant for any condition in her neck from June, 1938 to October, 1939, 10 were each inconsistent with the presence in the Appellant's neck of such an object as alleged.

Steel 965 (35-39)

(j) that there is no clinical evidence whatsoever to support the Appellant's allegation of any such foreign body.

42. Professor Welsh, one of the medical witnesses called by the Appellant stated in reference to an object of which Exhibit P would be a fair representation:—

Welsh 355 (26-33)
394 (8-14)

(a) that it could not travel and that it could not pass through from the thyroid capsule to the tonsil. 20

366 (26)—367 (9)

(b) that an object of that description was never and could not be used in a thyroidectomy.

Welsh 380 (20-36,
386 (32-35)

(c) that he would not consider such an object under any consideration, that it could not be like Exhibit P and protested against any such suggestion.

379 (40-43)
380 (26-33)

(d) that he could not answer any question relative to "a swab" or "wires."

43. Dr. George Stanley Thompson, the only other medical witness called by the Appellant and who had expressed certain opinions as to the possibility of a foreign body travelling, stated in reference to an object of which Exhibit P would be a fair representation that:— 20

Thompson
1308 (34)—1309 (11)
421 (50)—422 (7)

(a) he would not accept Exhibit P as a fair representation of an alleged object, and that he was not prepared to accept what the Appellant said.

1309 (21)—1310 (15)

(b) his evidence of the possibility of the movement of a foreign body did not apply to Exhibit P or to an object of which Exhibit P could be said to be a fair representation.

44. On the 7th October, 1939, that is five days after the alleged eruption of the foreign body through the Appellant's left tonsil, Dr. O'Hanlon took an X-ray plate of the Appellant's head and shoulders at Quirindi Hospital—Exhibit 11. As at that time the Appellant alleged:—

(i) that her head and neck were grossly swollen, as she states—“my head was terribly swollen, I had no neck, my head and shoulders were all one, they ran into one.”

O'Hanlon
831 (49)—832 (24)

1st T. 9 (33-37)
10 (4-8)
2nd T. 96 (44)—97 (26)
101 (21-35)
112 (43-47)
3rd T. 165 (19-21)
170 (23)—171 (28)
4th T. 241 (17-19)
(26-49)

(ii) that by reason of her swollen condition she was unable to turn her head, but had to turn the whole of her body.

2nd T. 132 (44-46)
144 (14-17)
3rd T. 154 (8-12)
171 (9-28)
4th T. 241 (33-49)

(iii) that she had pus in her mouth for three months prior to October, 1939, and right up to her admission into St. Luke's Hospital in 1939, which she had to scrape off her tongue with a tooth brush.

1st T. 10 (9-16)
42 (32-36)
2nd T. 50 (37-44)
52 (35-38)
101 (42-43)
103 (5-12)
3rd T. 152 (38)
172 (9-12)
172 (33)—173 (2)
4th T. 248 (3-17)
248 (40-43)

The uncontradicted evidence is that the X-ray, Exhibit 11:—

(a) shows the head fully rotated to the right:

Edwards 759 (38-42)

(b) that that position would not be possible if there were any stiffness in the neck;

759 (38)—760 (6)

(c) that the X-ray shows a perfectly normal neck, that there is no swelling;

760 (17) (32-35)
763 (8)
Bell 616 (23-27)

(d) that the X-ray is not consistent with the Appellant's allegation.

Edwards 763 (3)

45. On the 27th October, 1939, Dr. Tebbutt took a sample of blood from the Appellant for pathological examination, which was thoroughly examined, particulars whereof are contained in Exhibit Q. The uncontradicted evidence discloses:—

Tebbutt 794 (21)
1139 (45-46)
1141 (34,35)
1718.

(i) that there was no anæmia.

Tebbutt 795 (4-5)
800 (48)—801 (5)
Inglis 1074 (8-39)

(ii) that the constituents of the blood were normal and that it disclosed a perfectly normal blood count.

Tebbutt 795 (4-21)
802 (21-39)
Inglis 1074 (8-44)
1092 (6-9)
Smith 1124 (14-45)
Poate 1206 (1-35)

10

20

30

Tebbutt 795 (10, 14)

(iii) that there was no sepsis, that is, no rise in the leucocyte count as occurs in all cases of sepsis.

Tebbutt 795 (22-27)

795 (47-50)

Bell 726 (17-21)

Poate 1207 (6-10)

Smith 1124 (14-45)

Ritchie 904 (13-27)

Welsh

382 (44)—383 (46)

Tebbutt 799 (1-7)

803 (5-11)

(iv) that the blood count is scientifically inconsistent with the Appellant's allegations, with which the Appellant's witness, Professor Welsh, agrees.

(v) that sepsis does not cease when an abscess bursts, but that an abscess must heal right up from the bottom before the blood count can return to normal.

Shellshear 985 (8-22)

987 (25-37)

Ritchie 894 (9-33)

Inglis 1073 (28-30)

1093 (33,34)

1094 (38-41)

Smith 1096 (1-5)

Poate

1183 (37)—1187 (14)

Bell

614 (27)—615 (11)

Edye 1028 (29-34)

1032 (14,15)

O'Hanion 867 (9-14)

Steel 964 (4)—965 (41)

46. According to the medical experts called by the Respondent, the Appellant's allegation was an absolute 10 medical, that is anatomical, surgical, physical and pathological impossibility.

47. The Respondent contends that all material portions of the relevant evidence on the matters briefly set out in paragraphs 17 to 46 hereof which establish the impossibility of the Appellant's allegation have been either admitted or not refuted by the two medical witnesses called by the Appellant.

48. Counsel for the Appellant contended that two of the Respondent's witnesses admitted that the Appellant's allegation was a possibility, though only "a remote possibility," or 20 "a very vague possibility." and cited and relied upon the following alleged admissions to that effect:—

(i) Dr. Ritchie 924 (38)—925 (30).

(ii) Dr. Steel 970 (18—20).

The Respondent submits that upon an examination of the evidence it will be found that:—

(i) Dr. Ritchie contemplated the possibility of the allegation for a very short time and then dismissed it as ridiculous. Dr. Ritchie's evidence clearly shows that he considers the allegation as utterly fantastic and impossible. 30

(ii) in the evidence above referred to Dr. Steel was dealing with a shallow superficial depression in the Appellant's left tonsil and stated not that there was "a very "vague possibility" of the eruption of a foreign body through

Ritchie 956 (9-16)

894 (9)—897 (34)

the tonsil, but that there was "a very vague possibility" of an abscess in the tonsil having burst to cause such depression. Dr. Steel's evidence disclosed:—

- (a) that there was no involvement of the tonsil itself; Steel 972 (24-26)
- (b) that the Appellant's condition was inconsistent with her allegation; Steel
960 (44)—961 (9)
962 (25-38)
- (c) that the allegation was an anatomical impossibility. Steel
964 (4)—965 (41)

10 As to the depression in the Appellant's left tonsil being consistent with an abscess from the tonsil but not through the tonsil, Dr. Steel's evidence corresponds with the evidence of Dr. Poate and Professor Welsh. See Judgment of Mr. Justice Davidson, and see also paragraph 70 (iv) hereof as to later abscesses. Poate 1217 (30-38)
1230 (30)—1232 (5)
1274 (13)—1275 (47)
Welsh 357 (20-22)
P. 1604 (23-26)

20 49. Counsel for the Appellant contended that the jury was entitled to draw the inference that a staphylococcal infection surrounding a foreign body could travel through the human tissues along fascial planes because of the alleged analogy of a so-called psoas abscess. A so-called psoas abscess is a tuberculous lesion caused by the tubercle bacilli which causes cascation (as distinct from suppuration due to pyogenic or pus producing bacteria) and which if its origin is in the lumbar vertebræ may track down the psoas muscle to the groin—hence its name of psoas abscess. It is a cold abscess as distinct from the staphylococcal abscess of inflammation. Inglis 1075 (8-29)
Shellshear 997 (48-50)

50. The uncontradicted and admitted evidence in reference to a psoas abscess or a tuberculous abscess is as follows:—

- 30 (i) that a tuberculous abscess (so called) is pathologically a process of cascation, is not pyogenic, does not produce pus or suppuration properly so called. Inglis
1075 (8)—1076 (38)
Shellshear 997 (48-50)
Poate
1182 (48)—1183 (19)
1252 (34)—1253 (12)
- (ii) that a tuberculous abscess (so called) is an enclosed condition, that it is never opened surgically if it can possibly be avoided, that if it does drain to the external skin it becomes a very serious condition because of super-added pyogenic infection. Poate
1252 (34)—1253 (12)
- (iii) that a tuberculous abscess (so called) is very destructive. Inglis 1076 (32-45)
Eddy 1048 (11-16)
Shellshear 999 (1-6)
989 (2-5)

Inglis 1075 (26-29)
 Poate
 1182 (48)—1183 (19)
 1213 (41-46)
 Shellshear
 996 (37)—997 (7)
 Welsh
 1333 (34)—1334 (7)

(iv) that a tubercular abscess (so called) whether in the psoas muscle (psoas abscess) or caries of the cervical vertebræ, is an entirely false analogy and cannot be compared with the conditions prevailing in a pyogenic infection.

(v) Professor Welsh stated that there was no very close analogy between tuberculous abscess and staphylococcal abscess and that the only analogy was in the spread of pus at certain stages.

51. The Respondent contends that the structures in the confined area of the neck are such and the suppurative process necessarily involved for Exhibit P or any object of which Exhibit P can be said to be a fair representation, to move from the thyroid area to the tonsillar area would be so extensive, the destruction so great that no medical witness will admit of its possibility and that its very presence in the neck would create such a gross and extensive suppurative process that it would have to be surgically removed or the patient must needs die. 10

52. The Respondent further submits that:—

I. Before the Appellant can be held to have discharged the onus which rests upon her, she must have adduced evidence of facts from which inferences can reasonably and properly be drawn that the object she alleges:— 20

(a) was an object which was used by the Respondent in the performance of the operation;

(b) was left in her neck by the Respondent on the 17th March, 1938;

(c) took the course alleged from the thyroid capsule to and ulcerated through, her left tonsil on the 2nd October, 1939.

II. It is a question of law whether it is open to the jury to draw these inferences—a mere scintilla is not sufficient. 30

III. To determine whether the necessary inferences can be drawn, the Appellant is bound by the nature of the object she alleges, that is, something which substantially accords with:—

(a) her particulars;

(b) the sketch Exhibit C;

(c) her sworn testimony; and

(d) something of which Exhibit P can be said to be a fair representation. 40

IV. If the only evidence, the uncontradicted evidence, discloses that an object such as is alleged is not used in

such an operation, then the further necessary inferences, namely:—

(a) that it was left in the Appellant's neck by the Respondent; and

(b) that it ulcerated through the Appellant's neck and through her left tonsil;

cannot be drawn.

10 V. If there is no evidence to support the allegation that an object such as is alleged was used in the operation or that it was left by the Respondent in the Appellant's neck, then the Appellant must fail in her action and the Respondent is entitled to a verdict as a matter of law.

Davidson J. 1604 (27-32)
Halse Rogers J.
1612 (30-33)
1606 (40-42)

VI. If so much of the Appellant's allegations as depend upon an object such as is alleged:—

(i) being in the thyroid capsule; and

(ii) ulcerating through the Appellant's neck to and through her left tonsil;

20 is, on the totality of the evidence, a medical, anatomical, pathological, physical and surgical impossibility, the necessary inferences to that effect cannot be drawn, and the Respondent is entitled to a verdict as a matter of law.

53. The Appellant through her witness Dr. Thompson sought to support her allegations by a theory of possibilities, namely that:—

(i) a swab might or must have been left in the wound.

(ii) the drainage tube might or must have been stitched into the deeper structures in the neck.

(iii) the Respondent might or must have used a piece of perished rubber.

30 (iv) the Respondent might or must have used chromic gut or some other non-absorbent suture material and not plain catgut (to explain the alleged wires).

Thompson
401 (15-39)
403 (22)—404 (10)

54. In this regard it is relevant to note that for the purposes of his opinions Dr. Thompson:—

(a) is not prepared to assume as the basis of his opinion what the Appellant swore on oath;

Thompson
421 (50)—422 (7)

(b) does not accept the Appellant's description of the alleged removal of the drainage tube;

Thompson 481 (13-36)
1301 (34)—1302 (20)

40 (c) does not accept the Appellant's description of the alleged eruption on the 2nd October, 1939;

Thompson 469 (12,13)

(d) does not accept that a two inch drainage tube was used in the Appellant's operation;

Thompson
434 (49)—435 (1)
457 (44)—458 (4)
459 (18-20)

Thompson 458 (43-45)

Thompson 419 (36-41)
458 (32-40)
1302 (29)—1303 (10)
1303 (34)—1304 (17)

Thompson 401 (17-39)

(e) will not accept that the drainage tube used was not perished—assumes that a perished drainage tube was used and states that perished rubber usually ruptures and that perished rubber would not be as strong as the human tissues;

(f) assumes that the drainage tube was stitched into the deeper structures of the neck;

(g) assumes that some material other than plain catgut was used.

55. The uncontradicted evidence, the only evidence 10 established:—

Barnett 536 (1-6)
Melville 553 (6-8)
Bell 592 (30-49)
Hunter 1164 (10-14)

Bell 592 (31)

Bell
593 (48)—594 (26)
Poate
1172 (50)—1173 (3)
Elye 1022 (25-48)
1023 (25-49)

Bell
589 (28)—590 (8)

Bell 588 (11-16)
588 (47,48)
699 (26-28)
Elye 1011 (11-15)

Bell 598 (18-31)
728 (6-16)

Warburton 579 (43)
580 (16-18)

353 (29-39)
1050 (40)—1051 (9)

cf. Halse Rogers J.
1612 (2-5)

(1) That drainage tubes used for thyroidectomies are as short as possible, that the maximum length for use in a neck such as the Appellant's would be two inches, that the tube in fact used by the Respondent was two inches in length and no more;

(2) That the Respondent did not use a piece of perished rubber, that he tested the tube before use;

(3) That the tube could not be stitched in with a round non-cutting needle, the only needle used in the operation 20 except in the final stitching of the external skin;

(4) That the only type of swabs used are the two swabs comprised in Exhibit 5;

(5) That only plain catgut was used by the Respondent in the operation;

(6) That the Respondent never uses chromic gut in a thyroidectomy;

(7) That the knots which were extruded from the Appellant's wound during the period of infection following the operation, were not chromic gut;

(8) That it was expressly stated by Counsel for the Appellant that no allegation of negligence or blame was being made by the Appellant against the Respondent in respect of the performance of the operation or anything that occurred in the operating theatre.

56. The Respondent submits that the theory or possibilities advanced by Dr. Thompson and the Appellant's Counsel as set out in paragraph 53 hereof is not supported by any evidence but is one of pure conjecture without any foundation of fact

whatever and that therefore no verdict based upon such conjecture can in law be supported.

57. The Respondent therefore contends and submits that there was no evidence before the jury upon which the Appellant's allegation against the Respondent could be found by the jury in favour of the Appellant, that the Appellant has failed to discharge the onus that rests upon her and that therefore the verdict of the jury cannot be supported and that consequently the Respondent is entitled to have judgment in the action entered in his favour as a matter of law as was held by the majority of the Supreme Court of New South Wales and of the High Court of Australia.

58. If, however, it is held upon this appeal that there is evidence from which the necessary inferences to support the Appellant's allegation might be drawn as a matter of law, it thereupon becomes a question of fact whether they should be drawn. Even in that case it is subject to the right of the Court of Appeal to set aside a verdict in favour of the Appellant and direct a new trial of the action to be had if the drawing of those inferences is, in the light of the totality of the evidence, so unreasonable that it can be said that no reasonable jury properly instructed could reasonably so find.

59. The Respondent contends that even if it is held that he is not entitled to a verdict as a matter of law, nevertheless that the verdict of the jury in favour of the Appellant is so demonstrably unreasonable and unjust, so clearly against the evidence and the weight of evidence that a new trial of the action should be directed to be had.

60. In support of such contention the Respondent relies upon:—

(a) the matters hereinbefore set out in paragraphs 27 to 56 hereof; and

(b) the matters briefly set out in paragraphs 61 to 112 hereof.

61. With reference to the removal of the drainage tube:—

A. The Appellant stated that the Respondent who was accompanied by a Sister (not a nurse) loosened or removed the single horsehair suture with which the tube was stitched to the external skin and thereupon that:—

(i) the Respondent pulled very hard a couple of times.

(ii) as the tube did not come out, the Respondent thereupon put his hand firmly upon her forehead,

3rd T. 158 (1-6)
159 (28-29)

2nd T. 56 (26)
4th T. 194 (5)

1st T. 4 (22-33)
30 (23-32) (40)
2nd T. 46 (24-32)
63 (31-46)
66 (45)—67 (4)

3rd T. 147 (40)—148 (3)
158 (1-25)
158 (50)—160 (2)

4th T. 194 (3-12)
227 (42)—229 (25)
230 (18-22)

2nd T. 65 (1)
3rd T. 160 (4)
4th T. 231 (36-37)
1328 (9-18)

1st T. 4 (22)
2nd T. 62 (25-50)
3rd T. 157 (23-28)
4th T. 194 (14-16)

4th T. 230 (10-12)

2nd T. 68 (46-47)
3rd T. 161 (23-26)

1st T. 20 (29)
3rd T. 148 (3)
4th T. 229 (39-40)
232 (7-9)

1st T. 23 (32-35)
2nd T. 81 (21-31)
3rd T. 161 (1-9)
Hocking 312 (4-19)

2nd T. 66 (3-25)
4th T. 227 (26-28)
3rd T. 157 (29-31)
2nd T. 66 (3-9)
3rd T. 160 (50,51)

1st T. 4 (30-33)
2nd T. 57 (51)—58 (3)
59 (27-30)
3rd T. 148 (2,3)
162 (38-41)
4th T. 258 (44-47)

1st T. 18 (1-3)
30 (23-27)
2nd T. 58 (6-13)
3rd T. 162 (46,47)
4th T. 232 (16-18)

2nd T. 81 (34,35)
3rd T. 160 (14-22)
162 (6-16)
4th T. 207 (22-33)
213 (6-10)
231 (41-44)

partly to keep her head firm and partly for leverage and pulled hard till the tube came out, that is as the Appellant alleges, till it broke.

(iii) the Respondent examined the piece of tube he had in his fingers, threw it into a tray whereupon the Respondent and the accompanying Sister walked out of the ward without re-dressing the Appellant's wound.

(iv) the Respondent used his bare fingers, used no forceps or other instrument.

B. The Appellant states that the removal occurred 10 five days after the operation, at least more than two days after the operation and not as stated in the hospital records on the 17th March, 1938, and the Appellant further states in reference to the said removal:—

(i) that she did not know whether the removal of the tube as described by her was proper treatment.

(ii) that she did not think that there was anything untoward in the removal.

(iii) that at the time she thought the Respondent had removed the tube and had no idea that anything 20 had been left behind.

(iv) that she made no complaint to the Respondent, the hospital staff or her husband about the alleged removal. It is to be noted that the first occasion upon which the incident was mentioned by the Appellant to her husband was after the 5th October, 1939.

(v) that at the time of the alleged incident the wound was not healed, the stitches had not all been taken out of the wound, that there was no bleeding at the time of the removal and that the wound did not 30 break open.

(vi) that at the time she saw a small piece of tube in the Respondent's fingers about $\frac{1}{2}$ inch long, but could not see how much more than the $\frac{1}{2}$ inch was in the Respondent's hand, that the piece she saw in the Respondent's fingers was black and not red rubber.

(vii) that the object she claimed she saw on the 5th October, 1939, was a different size of rubber from what she had seen in the Respondent's hand at the time of the removal.

(viii) that the Respondent must have known about the broken tube and that her allegation against the Respondent is that he knowingly left the piece of broken tube in her neck. 40

The Appellant further stated that the Respondent was an eminent surgeon who was very nice and gentle, and as far as she knew a very careful man.

2nd T. 81 (45)—82 (6)
3rd T. 161 (33-48)
4th T. 206 (30)
230 (47,48)

62. In reference to the allegations of the Appellant in relation to the removal of the drainage tube as set out in paragraph 61 hereof, the evidence adduced by the Respondent was as follows:—

(1) That the type of rubber tube used in thyroidec-
tomies was always red rubber—never black rubber.

Barnett 535 (47)
Melville 553 (5)
Warburton 572 (12-14)
572 (19-24)
Bell 592 (40-41)
Hunter 1164 (14)

10

(2) That the drainage tube was always as short as possible and that a two inch tube would be the maximum for the Appellant's neck.

Barnett 536 (3-5)
Melville 553 (6-8)
Bell 591 (35-37)
Edye 1016 (10-14)
Poate
1166 (6-27) (30-34)

(3) That the tube slips in and out of the wound easily and that to prevent it slipping out it is attached to the external skin by a single horsehair stitch, and to prevent it slipping in a safety pin is inserted through the tube at the external end.

Melville 553 (16,17)
Bell 592 (13-20)
594 (10,11)

(4) That the tube is removed as early after the operation as possible—always within forty-eight hours after the operation.

20

Bell 595 (20-28)
Melville 553 (18-19)
Barnett 538 (14,15)
Edye 1017 (22-32)
1019 (30-35)
Poate 1166 (9)
1167 (3-11)

(5) That the removal of the tube is an easy matter, that it does not stick to the tissues.

Warburton 578 (50,51)
Edye 1017 (32-34)
Bell 601 (4-8)
Poate 1167 (18-25)

(6) That the Respondent removed the tube himself, that he always examines tubes when they are removed, and that a wound is always re-dressed immediately.

Beil
600 (42)—601 (3)
Edye 1024 (16-22)

(7) That the Respondent re-dressed wounds himself.

Warburton 577 (2-7)

(8) That according to the hospital records (the correctness of which is not disputed by the Appellant) the tube was removed on the morning of the 17th March, 1938.

4th T. 204 (18-22)
1686 (2)
4th T. 537 (10-11)

30

(9) That the Sister who accompanied the Respondent when the tube was removed would be one or other of the two senior Sisters, namely Sister Will (now Mrs. Melville) or Sister MacCallum (now Mrs. Warburton).

Melville 571 (1-3)
Warburton 572 (33-40)

(10) That there is an invariable practice at St. Luke's Hospital in reference to the removal of tubes from patients, namely that the Senior Sister who accompanies the surgeon shows the tube to the other Senior Sister who thereupon makes an entry to that effect in the hospital records.

Barnett
540 (52)—541 (2)
550 (18-26)
Melville 553 (34-38)
559 (44-49)
Warburton
572 (41)—573 (6)
573 (14-17)

Warburton 572 (33-38)

2nd T. 110 (14-19)
3rd T. 160 (21-22)
4th T. 231 (17-25)

Melville 554 (14-16)

Melville 557 (4-15)
Warburton
573 (47)—574 (3)

Bell 601 (16-34)
661 (5)

Barnett 538 (7,8)

Barnett 541 (10-15)
Warburton 582 (45-47)
Saunders 804 (52, 53)
O'Hanlon 821 (45,46)

O'Hanlon 834 (42,43)

Bell 601 (27-34)
Edye 1017 (35-37)

1020 (16-44)
Poate 1172 (13-28)
2nd T. 66 (3-9)
3rd T. 160 (50-51)
4th T. 227 (26-28)
Edye 1020 (1-35)

Thompson 420 (42-48)
406 (3-6)
417 (16-22)
425 (17-25)
442 (16,17)
457 (16-28)

Thompson
405 (47)—406 (2)
417 (21-22)
425 (39)—426 (32)

443 (1-8)

(11) That Sister MacCallum has a vague recollection of the Respondent doing something to the drainage tube in the Appellant's neck but has no clear recollection of exactly what it was. The Appellant stated that the one and only occasion upon which the Respondent touched the tube in her neck was when he removed it.

(12) That the entry in the hospital records for the 17th March, 1938, as to the removal of the tube is in the handwriting of Sister Will.

(13) That nothing of the nature alleged by the Appellant took place in the presence of either Sister Will or Sister MacCallum. 10

(14) That the Respondent denies emphatically that anything such as the Appellant alleges took place.

(15) That the drainage tube was not in the Appellant's neck on the evening of the 17th March, 1938.

(16) That the Appellant made no complaint in relation to the removal of the drainage tube.

(17) That the Appellant told Dr. O'Hanlon in Quirindi that it was a nurse who had removed the tube. 20

(18) That at the time of the removal of the drainage tube the cut surfaces of the operation wound would only be glued together with lymph, and any application of such force as is alleged by the Appellant would tear the wound open.

(19) That the Appellant's allegation with regard to the alleged removal is, from a surgical point of view, quite impossible.

63. The Appellant's witness, Dr. Thompson, notwithstanding that he had had no experience of thyroidectomy, stated (in addition to his assumptions hereinbefore referred to, to the effect that the tube was stitched in and that the tube was perished):— 30

(1) That the drainage tubes in thyroidectomies are always inserted in such a manner that the external end of the tube would protrude from the patient's skin on one side of the trachea, whilst the internal end would lie in the lobe of the thyroid capsule on the other side of the trachea, that is, that the tube would be inserted so as to lie across the trachea, and that therefore the muscles in the neck might grip the tube.

(2) That the tube should not have been removed on the 17th March because the surgeon could have expected infection. 40

(3) That if the drainage tube broke, it was not improper for the Respondent to have left the broken piece in the Appellant's neck, that he might well have had to leave it there, that it would be too dangerous to open the wound to take the broken piece out, that it would have been foolish to do so as the Appellant was too dangerously ill and might have died if the attempt were made, that Dr. Thompson "would not have gone after it" but would have waited indefinitely.

449 (18-34)
419 (1-24)
425 (39)—426 (32)

10 64. The evidence adduced by the Respondent disclosed:—

(i) that the drainage tube is always inserted a little to the right or left of the centre line, and at the lowest point.

Bell 697 (29-38)
726 (47)
Edye
1015 (45)—1016 (2)
1016 (15-24)
1017 (44)—1018 (16)
Poate 1166 (6)
1168 (2-7)

(ii) that the tube is never under any circumstances put across the trachea, that any such suggestion is ridiculous.

Bell 593 (4-19)
597 (24-32)
Edye 1016 (25,26)
Poate 1168 (23-32)

(iii) that in the Appellant's case the tube in fact went straight in.

Barnett 548 (52,53)

(iv) that the muscles in the neck would not and could not grip the tube.

Edye
1018 (32)—1019 (9)
Poate 1172 (42-49)
1209 (36-41)

(v) that if a drainage tube were to break there would be no danger or difficulty in recovering the broken portion; that the statement of Dr. Thompson that he would not recover the broken piece was ridiculous; that it was imperative that the same should be removed immediately.

20

Bell 602 (6-18)
Edye
1025 (35)—1026 (10)
1019 (24-29)
1028 (22-25)

65. The Appellant in reference to the condition of her neck and her general post-operative condition whilst in St. Luke's Hospital in March—April, 1938, stated that her neck was swollen and inflamed and was obviously swollen and inflamed when she was discharged from St. Luke's Hospital on the 13th April, 1938.

2nd T. 88 (21-29)
3rd T. 170 (17-19)

66. The evidence adduced by the Respondent disclosed:—

30

(i) that on the 23rd March, 1938, the Appellant's condition was satisfactory and that a night special was no longer necessary.

Barnett 540 (40,42)
549 (16,17)
531 (31)—535 (8)

(ii) that having regard to the fact that infection occurred, the Appellant made a remarkably quick and good recovery.

Barnett 548 (11-44)
549 (16,17)
Melville 558 (11-14)
Warburton 582 (4-29)
Poate 1175 (14-16)
Ritchie 891 (31-35)

(iii) that upon her discharge from hospital, apart from the sinus, her condition was quite normal, that the sinus was only trifling, almost non-existing.

Warburton 582 (28)
Bell 608 (36)
Ritchie 891 (31-35)
891 (38,39)

891 (42-48)
937 (17-20)
1711 (26)

(iv) that she was advised to stay in hospital not because of her sinus but because of her temperamental condition, the Appellant nevertheless chose to leave the hospital.

67. With reference to the condition of her neck from April, 1938 to October, 1939, the Appellant stated:—

3rd T. 170 (17-23)

(1) That her neck was obviously swollen and inflamed when she was discharged from Quirindi Hospital on the 9th June, 1938.

1st T. 8 (14-17)

(2) That during the whole period that Sister Sly 10 attended her at her home, that is from the 9th June till approximately the 7th July, her neck was swollen and inflamed.

1st T. 21 (21-23)
2nd T. 48 (46-47)
3rd T. 149 (49-52)
170 (8-9)
4th T. 196 (21-32)
O'Hanlon 826 (42)
1st T. 8 (2-4)
2nd T. 48 (48-49)
49 (46-48)
99 (26-27)
3rd T. 170 (27-28)

(3) That after the sinus healed (that is towards the end of June, 1938) the swelling in her neck became worse.

1st T. 9 (33-37)
10 (4-8)
2nd T. 48 (48-51)
89 (39-42)
90 (6-9)
96 (47)—97 (26)
100 (6-17)
3rd T. 151 (1-9)
165 (17-22)
170 (44)—171 (6)
4th T. 239 (33-37)
241 (27-31)

(4) That from September, 1938 to October, 1939, her neck was terribly swollen, that her head and neck were all one, all glued together, that a lump on the back of her left shoulder would come and go, that the swelling ran down her chest and arms, her cheeks bulged out so that she had tiny 20 little eyes, that she had a general swelling of the body.

1st T. 10 (1-3)
2nd T. 48 (37,38)
50 (22-24)
133 (51)—134 (6)
3rd T. 171 (40)—172 (8)
4th T. 223 (23-28)

(5) That from the time of her stay in Quirindi Hospital till October, 1939, her neck was so swollen that she could not swallow, could only eat soft foods and that during a period for three months prior to the 2nd October, 1939, the only food she had was bovril and arrowroot.

2nd T. 131 (29-32)
133 (33-34)

(6) That on the 7th October, 1939, her neck was grossly swollen, and that this condition continued throughout the period from the 7th to the 26th October, 1939, and that the swelling was still present when she was examined by 30 Dr. Marsh on the 30th October, 1939, in St. Luke's Hospital.

139 (18-31)
3rd T. 178 (14-20)

(7) That owing to her swollen condition she was unable to get about her house very much, that from September, 1938 to October, 1938, she never was out of the house.

3rd T. 170 (48-50)
2nd T. 113 (2-5)
8rd T. 150 (40-44)

(8) That owing to her swollen condition she was unable to turn her head, that to turn her head she had to turn the whole of her body and that this condition lasted for months after her discharge from St. Luke's Hospital in October, 1939.

2nd T. 132 (39-46)
144 (14-17)
3rd T. 154 (8-12)
171 (10-28)
4th T. 241 (33-41)

(9) The Appellant nevertheless admits that she received no medical treatment or prescription for the condition of her neck between October, 1938 and October, 1939.

2nd T. 106 (10-20)

68. Evidence adduced by the Respondent disclosed:—

10

(1) That on the 30th April, 1938, the operation wound had healed except for a small sinus from which there was a free discharge, that there was an inflammatory swelling around the sinus, that her face was puffy but that the same was not of an inflammatory nature.

O'Hanlon
821 (49)—822 (21)

(2) That in May, 1938, the sinus was not large, that there was a slight swelling which was localised around the sinus, that the sinus had a sero-purulent discharge.

Fall 736 (49-52)
Roberts 749 (27-37)

(3) That on the 7th May, 1938, the sinus was opened whereafter suture knots were extruded, the discharge subsided daily and the localised inflammation became less.

O'Hanlon 823 (1-13)
824 (12-34)
Roberts 750 (14-27)

20

(4) That during the later period of May and up to the 9th June, 1938 (that being the date of the Appellant's discharge from hospital) the discharge was very thin, dry dressings only were applied (daily), the sinus was slowly healing, that the sinus was a wound of no consequence, that there was no swelling or inflammation, that the neck was normal, that the Appellant made no complaints about her neck or of soreness.

Roberts 751 (15-29)
Fall 737 (16-33)
738 (15-20)
Blundell
745 (35)—746 (20)
O'Hanlon 826 (12-14)
824 (33,34)

30

(5) That at the end of June, 1938, when the sinus finally healed, there was no swelling and no inflammation. In this connection Sister Sly, a witness called by the Appellant, stated:—

826 (38-44)

(a) that when the Appellant returned home from Quirindi Hospital in June the sinus was not quite healed, that there was a thin clear watery discharge.

Sly
262 (45)—263 (2)
263 (44-46)
264 (4-9)

(b) that when the sinus healed, the Appellant's face, neck and hands had a puffy appearance, but that there was no suppuration and no inflammation, that the Appellant's neck required no medical attention, that the Appellant required no further nursing, that the Appellant made no complaint of any swelling in her neck.

263 (35)—264 (34)

40

(c) that when Sister Sly left there was nothing seriously wrong with the Appellant, and that twelve or

264 (25)—265 (10)

eighteen months later she received a letter from the Appellant in which the Appellant thanked Sister Sly for bringing her back to health.

Fall 739 (1-24)
Roberts
751 (47)—752 (13)
O'Hanlon
827 (30)—828 (15)

(6) That in September, 1938, when the Appellant was again admitted for a period of four days to Quirindi Hospital when she had an alleged tetany spasm, her head and neck were normal, there was no swelling, inflammation or redness, that her condition was not such that she could not move her head, swallow or take proper foods.

829 (1-4)
1700 (32-37)

(7) That in January, 1939, Dr. O'Hanlon saw the Appellant attending a local picture theatre and the Appellant looked well. 10

O'Hanlon 828 (17-19)

(8) That on the 1st February, 1939, the Appellant was attended by Dr. O'Hanlon who prescribed a tonic to stimulate appetite (Part of Exhibit K).

829 (12-20)

(9) That on the 10th September, 1939 (that being the next occasion upon which the doctor was called in to attend the Appellant), the Appellant's head and neck were normal, that there was no swelling, that an A.P.C. and a sedative were prescribed (Part of Exhibit K). 20

831 (15-19)
883 (19)—884 (10)

(10) That Dr. O'Hanlon who attended the Appellant regularly until the 10th October, 1938 for her spasms, never gave or prescribed any treatment for the Appellant's neck, that no treatment was required, that he never detected any difficulty as to movement in the Appellant's neck, that though the Appellant frequently complained of her neck, that there was nothing to be found on clinical examination, that he frequently palpated the Appellant's neck without complaint from the Appellant.

O'Hanlon 828 (14-21)
883 (19)—884 (10)

(11) That when Dr. O'Hanlon attended the Appellant in the evening of the 6th October and at the Quirindi Hospital on the 7th October, 1939, when the X-ray was taken and a clinical examination made of her throat, there was no swelling, inflammation or pus and the outlines of the Appellant's head and neck were normal. 30

830 (8)—832 (41)

Saunders
803 (41)—804 (36)
Bell 618 (10,11)

(12) During her stay in St. Luke's Hospital from 26th October, 1939, the Appellant did not appear to be very sick and was eating a full diet.

617 (15-28)
Marsh
764 (15)—765 (22)
769 (33-36)
Ritchie 894 (2-3)
894 (15-27)
Saunders 804 (26-33)
Bell 682 (14)

(13) That upon examinations in St. Luke's Hospital following her admission, it was found that the Appellant was suffering from a superficial pharyngitis, and also a condition of chronic follicular tonsilitis, but that the outlines of her neck were normal, there was no swelling and no inflammation. 40

(14) That there was no reason for the Appellant continuing in St. Luke's Hospital and she was discharged on the 3rd November, 1939.

619 (5-10)
1706 (45)

69. The Appellant's husband though deposing to swelling in the Appellant's face and neck, stated:—

(a) that the sinus healed by the end of June and after Sister Sly left Dr. O'Hanlon never attended the Appellant for her neck, that the only times Dr. O'Hanlon was called in from October, 1938 to October, 1939, were on the 1st February and the 19th September, 1939.

Hocking 321 (49-51)

10

313 (1-8)
285 (10-13)

(b) that the swelling in the Appellant's face and neck from October, 1938 to October, 1939, was such that only persons who knew her well would notice it.

313 (37-48)

(c) that the only thing wrong with the Appellant prior to the 2nd October, 1939, was the spasms, the only complaint was the alleged tetany, that apart from the spasms the Appellant was quite normal, that her only illness was the spasms and a possible cold.

286 (41)—287 (34)

313 (18-24)

70. The Appellant further stated:—

(i) that for a period of three months prior to the 2nd October, 1939, she had pus in her mouth, which she spat out in considerable quantities, that the pus was coated on her tongue and had to be scraped off with a toothbrush.

20

1st T. 10 (9-16)
24 (18-24)
42 (32-36)
2nd T. 50 (40-41)
52 (12-15)
52 (35-38)
101 (16)
101 (42-51)
103 (5-12)
3rd T. 151 (14-17)
152 (37-42)
172 (9-51)
4th T. 248 (1-16)
248 (40-48)

(ii) that between the 2nd and 26th October, 1939, she had a wall of pus in her mouth, that she had a very nasty taste in her mouth like bad teeth or pus coming away, that she was gargling with solyptol and that when she spat out it was yellowish, cloudy looking.

2nd T. 133 (33-42)
4th T. 197 (45,46)
199 (41, 49)
200 (4-9)

(iii) that she was re-admitted into St. Luke's Hospital in October, 1939, because of, *inter alia*, the purulent discharge into her throat after the passing of the tube and that she had a wall of pus on admission and that she had pus in her mouth when she was examined by Dr. Marsh on the 30th October, 1939.

30

1st T. 37 (4-9)
36 (37,38)
13 (5-8)
2nd T. 135 (18)
137 (25-26)
3rd T. 152 (38-42)
179 (31-37)
180 (24-30)

(iv) that after her discharge from St. Luke's Hospital in 1939 until about April, 1940, she had pus in her mouth, repeated abscesses in her tonsils, and pressed out the pus from her tonsils with cotton wool.

2nd T. 54 (17-32)
141 (51)—142 (12)
3rd T. 154 (16-21)
1th T. 217 (3-6)

4th T. 255 (34)—256 (9)

(v) that she knew she had a bad tonsil before she was admitted to St. Luke's Hospital in October, 1939.

71. The Appellant's husband in reference to the same matter stated:—

Hocking 324 (48-50)
325 (25-40)

(i) that the Appellant prior to the 2nd October, 1939, had pus in her mouth—"I called it pus but that may not be "the correct expression, it was a yellow substance, a coating "of the tongue" which she scraped off her tongue with a toothbrush.

Hocking 279 (25-29)
280 (44-48)
286 (16-44)

(ii) that prior to the 2nd October and up to her 10 admission to St. Luke's Hospital, the Appellant was continuously complaining of pus in her mouth, that she gargled with solyptol and that she had pus on her tongue after her discharge from hospital.

72. The evidence adduced by the Respondent disclosed:—

O'Hanlon 829 (21-25)
832 (27-41)

(i) that upon all examinations by all medical practitioners there was no pus but that upon her admission to St. Luke's Hospital she was suffering from chronic follicular tonsilitis.

Marsh 764 (26)—765 (10)
769 (33-34)
784 (29)—786 (35)

Ritchie 894 (2-3)
894 (15-39)

Bell 631 (37-43)
617 (9-29)

Steel 958 (10-26)
Marsh 764 (29-50)
768 (46)—769 (14)

(ii) that the condition of chronic follicular tonsilitis 20 is a condition in which debris and unhealthy material collects and forms masses of cheesy material in the crypts of the tonsils and is visible on examination.

Poate 1201 (8-25)
1202 (29)—1203 (15)
1275 (48-50)
1217 (30-38)
1230 (34)—1231 (20)
1274 (13)—1277 (20)

Marsh 769 (23-45)
776 (17-32)

Edye 1034 (3-31)
Steel 959 (3)—962 (27)

Welsh 384 (17-47)
1338 (15-28)
1350 (17-32)

(iii) that a corresponding condition was found in the Appellant's tonsils upon subsequent examinations in December, 1941, August, 1942 and December, 1943.

73. Professor Welsh, called by the Appellant, stated that he could not assume that what the Appellant called pus was pus, that she was mistaken; he accepts the description as given by Dr. Marsh and that as she had to scrape it off with a toothbrush, it could not have been pus. 30

Thompson 484 (28)
1301 (24-30)

74. Dr. Thompson, the Appellant's other medical witness, stated that he was not admitting that the Appellant had any pus, and agrees with Professor Welsh that it would be the cheesy material referred to.

1718.

75. As set out in paragraph 45 hereof the blood count of the Appellant's blood—Exhibit Q—is inconsistent with the presence of pus.

76. With regard to the alleged incident of the 2nd October, 1939 and the alleged eruption of the foreign body, the Appellant stated:—

(1) That before the 2nd October she did not feel anything trying to force its way through her throat though, as she alleges, her mouth was terribly swollen.

4th T. 210 (15,16)

(2) That for months before and on the 2nd October she thought she was going to die, that on the 2nd October (which was her birthday) she was unconscious several times during the day, that she had been constantly drawn up in a ball for two days by spasms, her limbs had not been straight for two days, that at about 3 p.m. her husband came home, that she was partly conscious, semi-conscious when she started to cough, her jaws were locked and her husband forced some water from a spoon into her mouth, she felt something in her mouth and she swallowed it, that she felt something break through her flesh against her left tonsil but neither she nor her husband called in any medical assistance, although the family doctor, Dr. O'Hanlon, was only a few blocks away. The Appellant further states that she did not inform her husband of her idea that she had swallowed something until 3 a.m. the following morning.

1st T. 10 (21-23)
10 (43-48)
24 (4,5)
24 (49)—25 (23)
26 (12, 13)
2nd T. 50 (37)—51 (10)
120 (20-31)
121 (4-21)
121 (37)—122 (11)
132 (12-18)
2nd T. 133 (13-17)
120 (45)—121 (3)
143 (49)—144 (2)
3rd T. 154 (16-21)
4th T. 232 (28)
237 (14-29)
209 (35-49)

77. The Appellant's husband in regard to the alleged eruption and the incidents on and about the 2nd October stated:—

(i) that on Sunday the 1st October the spasms were very, very severe, that the Appellant had spasm after spasm;

Hocking 278 (37-41)

(ii) that on the 2nd October the spasms were worse, one of the worst she had ever had, the Appellant was almost black in the face and appeared to be almost choking, that her teeth were locked, clenched and that he forced a little water between her teeth;

278 (42)
278 (51)—279 (16)

(iii) that the Appellant at the time was unconscious or at least only partly conscious;

Hocking 327 (21-24)
324 (33-42)
1321 (38)—
1323 (28)
314 (23-25)

(iv) that the Appellant did not say anything to him about having swallowed anything before the 3rd October;

(v) that the Appellant did not say on the 2nd October that anything had broken through her throat;

323 (49)—324 (3)

(vi) that from the 3rd to the 5th October the Appellant complained of something hard in her stomach, he think that she was suffering from indigestion gave her three different doses of aperients;

279 (30-36)
1701 (34-35)

305 (35,36)

1st T. 25 (48)—26 (6)
 26 (37)—27 (8)
 2nd T. 51 (7-10)
 123 (5-33)
 3rd T. 175 (28-47)
 151 (30-35)
 4th T. 198 (15-18)
 237 (4-8)
 1332 (1-2)

2nd T. 123 (40)—124 (2)
 3rd T. 175 (41-47)
 4th T. 252 (1)

Ritchie
 898 (40)—899 (4)
 Edey 1035 (26-31)
 Poate 1201 (15-51)

1st T. 11 (14)—12 (17)
 2nd T. 51 (14-26)
 126 (22)—
 128 (14)
 3rd T. 151 (45)—152 (24)
 176 (16)—177 (23)
 1th T. 198 (39-50)
 253 (25)—
 254 (15)

2nd T. 121 (41)—125 (2)
 3rd T. 176 (52)
 4th T. 198 (34-36)
 253 (29,30)

1st T. 29 (40-43)
 41 (42, 43)
 40 (40)—41 (7)
 2nd T. 58 (22-30)
 126 (7-14)
 3rd T. 177 (33-44)
 4th T. 255 (4-22)
 4th T. 213 (26, 27)

1698
 3rd T. 152 (17-18)
 4th T. 211 (11-19)

(vii) that he suggested to the Appellant calling the doctor but the Appellant said—"No, wait for a while."

78. The Appellant further stated:—

(i) that she felt the wires in the alleged object in her stomach, felt them scratching her stomach, and moving about;

(ii) that she expected an object to appear and that that was the reason why she took the aperients.

79. The uncontradicted and admitted evidence is to the effect that the stomach has no tactile sensation and that such 10 alleged feelings of scratching, prickings and movement in the stomach of a foreign body are quite impossible.

80. The Appellant with reference to the incidents of Thursday, the 5th October, stated:—

(1) That having had occasion to use a commode in her bedroom about 7 a.m. she returned to bed and about an hour later whilst carrying the commode to the w.c. saw the alleged object. She thereupon put the commode on the verandah floor, picked out the alleged object with her fingers, squeezed it and a green or greenish-yellow substance, alleged to be pus, appeared on her fingers; that 20 hearing steps and believing it to be a tradesman she hurried into the w.c., emptied the commode and as she pulled the chain of the cistern, dropped the alleged object and it was lost, or, as described in the Particulars, she "discarded" the object.

(2) That at the time she was very weak and stooped, had to crawl and feel her way along the walls and on the chairs.

(3) That she realised on and shortly after the 5th 30 October that what she had seen in the commode:—

(a) was the thing she had swallowed on the 2nd October, and what had been causing all the trouble;

(b) was the thing that she had been looking for;

(c) had come from the site of the operation;

(d) had been left in her neck by the Respondent and that he had done "this terrible thing."

(4) That she drew the sketch (Exhibit C) on the 5th October of what she claimed she had seen in the commode.

81. The Appellant's husband stated in relation to the same events:—

(a) that he saw the Appellant hurrying from the w.c. with the commode;

Hocking
301 (43, 44)
303 (26)—304 (4)
304 (13-17)

(b) that on the 5th October he was at home till 9 a.m. yet the Appellant did not mention the alleged occurrence before he left;

(c) that he on the 5th October went to the local chemist and obtained a prescription for himself for indigestion but nothing for the Appellant;

286 (23-27)
328 (7-12)

(d) that he saw the sketch (Exhibit C) after lunch on the 5th October, 1939.

304 (30-51)
1698

82. The medical evidence adduced by the Respondent disclosed that the suggestion of green pus or any pus remaining discernable after passing through the intestinal track was not possible, that anything of that nature would be completely disintegrated by the processes of digestion.

Inglis
1078 (21)—1079 (10)
Edye
1034 (40)—1035 (25)
Poate 1205 (11-51)
Bell 627 (12-14)
128 (19-26)

83. The Appellant wrote a letter to the Respondent on the 11th October, 1939 (part of Exhibit D) and has stated in reference to such letter:—

1702.

(i) that she does not remember writing the letter, that in writing the letter she was not stating the truth;

(ii) that at the time she believed she was going to die "so why not tell Dr. Bell all about it when he was so cruel "as to leave me suffering so long";

1st T. 34 (6-36)
2nd T. 134 (9-18)

(iii) and in the fourth trial that she meant it when she wrote that she did not blame the Respondent.

4th T. 213 (36-38)

84. With reference to the object which the Appellant alleges was left in her neck by the Respondent, the Appellant has stated:—

(1) That the tube had been inserted about one inch from the middle line on the right side of her neck and not in front where the subsequent discharge came out and that her allegation is that in some way the alleged broken piece travelled across her neck from the right side to the left side, travelled up her neck and then came through her left tonsil.

2nd T. 64 (3-4)
3rd T. 162 (27-32)
4th T. 194 (40-42)
1st T. 21 (15-18)
24 (13-37)
31 (31-37)

(2) That she was never conscious of a foreign body in her neck.

21 (1-5)

(3) That she never felt anything across her windpipe.

4th T. 234 (48)

(4) That in St. Luke's Hospital in 1938 the Respondent pressed hard on her neck when looking for knots and that

1st T. 4 (51)—5 (2)
2nd T. 70 (11)

3rd T. 148 (17-21)
160 (32-44)
161 (25-32)
164 (46-52)

when the Respondent did so she did not feel any foreign body in her neck.

(5) That at Quirindi Dr. O'Hanlon palpated and pressed on her neck but when he did so she did not feel any foreign body.

1st T. 24 (11, 12)

(6) That she did not feel the tube move in her neck.

3rd T. 179 (8-12)

(7) That she first thought that something had been in her neck after the 5th October, 1939.

1st T. 31 (31-46)

(8) That the first time she was aware that the alleged object had ulcerated through her tonsil was when she was treated in St. Luke's Hospital in 1939, that it was only after Dr. Marsh's examination that she became aware that the tube had ulcerated through her tonsil and that all Dr. Marsh had said to her (upon which she based her assumption) was that her left tonsil was slightly inflamed. 10

1st T. 36 (30-34)
36 (42)—37 (3)
2nd T. 138 (11-19)
3rd T. 178 (20-23)
4th T. 255 (26-31)
255 (46)—256 (9)

Thompson 407 (7-22)

85. With regard to the condition of the Appellant's left tonsil, Dr. Thompson gave evidence that its condition was consistent with an abscess having burst through and consistent with a tube having erupted; he also stated:—

1295 (19-30)

(i) that abscesses in the tonsil might cause the scarring; and 20

(ii) that the abscesses in her tonsil subsequent to 1939 might have caused the scarring.

Bell 617 (15-25)
681 (43)

Ritchie 894 (2-27)

Marsh
764 (15)—769 (46)
776 (17-32)

Steel 958 (7)—962 (38)

Poate
1201 (8-25)
1202 (28)—1204 (14)
1276 (16)—1277 (20)

Edye 1034 (5-31)

86. Evidence adduced by the Respondent disclosed that upon all examinations the condition disclosed in both tonsils was that of chronic follicular tonsilitis, and that the condition of the left tonsil was not consistent with the Appellant's allegation.

87. The Appellant sought to establish the Appellant's allegation by a contention that the Appellant suffered from a condition known as tetany, that this condition was caused by inflammation and suppuration in and around the parathyroid glands which control the ionised calcium content of the blood, and that such inflammation and/or suppuration must have been caused by the foreign body in the presence of the Appellant's neck near the parathyroid glands, that is in the 30

thyroid capsule. In this connection in spite of objection as to their qualification to express opinions as experts on tetany:—

(a) Professor Welsh gave it as his opinion that the Appellant suffered from a true parathyroid tetany though he also stated that some of the indications were such as he had never heard of before.

Welsh 358 (26-28)
359 (47-49)

(b) Dr. Thompson not only was of the opinion that the Appellant had suffered from tetany but also asserted that the broken tube in fact caused the tetany.

Thompson 405 (19-22)

10 88. It is not inappropriate to note in reference to these opinions of Professor Welsh and Dr. Thompson:—

(a) that Professor Welsh:—

(i) does not remember ever having seen a case of tetany;

Welsh
359 (39-44)
1351 (41)—1352 (8)

(ii) in 1897 he made a post-graduate investigation of the function of the parathyroids and in that connection performed certain experimental operations on cats, the last taking place prior to 1914;

361 (28-48)

(iii) that the scientific knowledge and research of the bio-chemistry of the parathyroids and its relation to parathyroid tetany (as distinct from hysterical tetany) is all matter of recent research;

20

Welsh 1352 (21-35)

(b) that Dr. Thompson does not claim to be an expert, has never seen a case of adult tetany or post-operative tetany, that the only cases of tetany he has ever seen are cases thirty or forty years ago due to malnutrition in children.

Thompson
404 (26)—405 (2)
462 (1-11)

89. The Respondent submits and contends that neither Professor Welsh nor Dr. Thompson was qualified to express expert medical opinions upon questions relating to tetany, and that His Honour, the trial judge, was in error in admitting such evidence. The Respondent further submits that the whole question of tetany was introduced into the hearing of the action as a "red herring" which was calculated and did in fact mislead and confuse the jury on the real issues for their consideration.

30

90. The evidence adduced by the Respondent in relation to tetany disclosed that tetany is a condition not a disease, that it occurs in or is a concomitant of many different medical disorders and occurs in true parathyroid deficiency (parathyroid tetany) and in hysteria (hysterical tetany), and that the differential diagnosis between true parathyroid tetany and hysterical tetany is very difficult at times.

40

Ritchie 899 (5-52)
Bell 606 (50)—607 (9)
Poate
1191 (18)—1192 (29)
Bell 624 (12-14)
Smith 1105 (13-37)
Poate
1210 (4-7)
1272 (49)—1273 (4)

91. True parathyroid tetany is due to dys-function of the parathyroid glands which results in a reduced content of ionised calcium in the blood. Such a reduction of the ionised calcium produces a condition of neuro-muscular irritability which may evidence itself by typical tonic muscular spasms.

92. According to the evidence the Appellant from early May, 1938, to the 2nd October, 1939, suffered from or evidenced certain contractions both tonic and clonic which were described by various witnesses called by the Appellant and the Respondent.

10

1st T. 5 (39-47)
 2nd T. 48 (2-22)
 91 (15)—92 (9)
 95 (27-37)
 3rd T. 149 (4-11)
 155 (20-23)
 168 (40)—169 (9)
 4th T. 195 (40-44)
 256 (35-37)
 O'Hanlon
 823 (27-46)
 824 (51)—826 (3)
 826 (34)—827 (32)
 Roberts
 750 (43)—751 (10)
 Fall 737 (37)—738 (14)
 Sly 263 (3-25)
 Hocking 276 (1-7)
 278 (3-10)
 Hannaford
 347 (26-36)
 348 (12)—349 (8)

2nd T. 90 (33-35)
 3rd T. 154 (51-53)

1st T. 9 (1-3)
 2nd T. 48 (21)
 49 (34-37)
 3rd T. 160 (25-29)
 4th T. 209 (40-49)
 246 (22, 23)

1st T. 9 (38, 39)
 2nd T. 50 (19-22)
 100 (42, 43)

1st T. 9 (23-30)
 7 (49)—8 (1)
 6 (41)

2nd T. 48 (45)
 50 (13-18)
 94 (43-47)
 99 (19, 20)
 3rd T. 149 (39-43)
 169 (34-39)
 4th T. 196 (21-24)

1st T. 6 (48, 49)
 2nd T. 100 (42)

1st T. 6 (37-40)
 2nd T. 48 (15-22)
 92 (25-26)
 93 (1-3)

 111 (4-42)
 145 (44-51)
 3rd T. 149 (34-38)
 169 (14-22)
 169 (50-53)

4th T.
 195 (43, 44)
 243 (26)—244 (29)

93. The Appellant in reference to the spasms stated:—

(1) That during the spasms her tongue would be drawn up tight like a ball at the back of the mouth.

(2) That she frequently lost consciousness during the spasms.

(3) That the spasms were almost a daily occurrence.

(4) That during May and June, 1938, she had daily intravenous injections of calcium gluconate or calcium chloride and thereafter almost daily sub-cutaneous injections of paroidin (both being specific therapeutic remedies for true parathyroid tetany).

20

(5) That she had the spasms in spite of the injections.

(6) That during spasms she was frequently massaged and that such massage gave relief from the spasm.

(7) That she had the spasms right up to the 2nd October, 1939.

(8) That there were no spasms after the 2nd October, 1939.

94. The Appellant's husband also gave evidence to the effect that massage was applied to the Appellant during spasms and that such massage gave relief, and further that the spasms continued in spite of the injections given, and further that during spasms the Appellant lost consciousness.

1st T. 92 (27-29)
2nd T. 100 (37, 38)
112 (35-37)

1st T. 15 (3-5)
2nd T. 53 (33-39)
100 (39)
140 (31-32)
3rd T. 154 (1-3)

Hocking
276 (5-6)
318 (22)—319 (19)

321 (18-43)

10 95. Evidence adduced by the Respondent disclosed:—

(1) That massage would not and could not relieve true parathyroid tetany, but would only aggravate the spasm.

Ritchie 901 (25-34)

Bell 623 (27-35)

Smith
1117 (46)—1118 (6)

(2) That Dr. O'Hanlon never permitted massage to be applied to the Appellant whilst in spasm and that massage was never given in Quirindi Hospital.

O'Hanlon
825 (33-39)
883 (49)—884 (14)
Fall 738 (46-49)
Roberts 753 (13-16)

Welsh 1352 (36, 37)

96. Professor Welsh agreed that massage would be improper treatment for true parathyroid tetany.

97. The evidence disclosed:—

20

(i) that in the later stages the nature of the spasms changed, instead of being tonic they became clonic, the Appellant would clutch at things and her hands could only be freed by application of force; she was inclined to throw herself about;

O'Hanlon
826 (49)—827 (13)

Hannaford
348 (20)—349 (8)

(ii) that the unconsciousness occurring during spasms was not real unconsciousness, the Appellant's eyelids were not relaxed but closed and held so tight that it was impossible to open them.

Fall 737 (41-50)

712 (41-52)

Roberts 750 (43-46)
759 (17-21)

O'Hanlon
825 (48)—826 (3)

Bell 621 (13-16)

621 (42-44)

Poate
1191 (33)—1192 (29)

Ritchie 900 (5)—901 (34)

30

98. The experienced medical experts called by the Respondent stated that they considered that in the early stages the Appellant suffered from true parathyroid tetany but that an hysterical tetany (hysteria) became superimposed at a later stage (except Dr. Ritchie who considered that the whole symptoms were indicative of hysteria and that she did not have true parathyroid tetany) and in particular the evidenced disclosed (*inter alia*) that:—

(1) Unconsciousness is never associated with parathyroid tetany except as a terminal event but is common in hysteria.

Bell 622 (32-42)

Ritchie 900 (20-35)

Smith
1116 (1)—1117 (3)
1121 (29-43)
1106 (25-33)

Poate 1192 (33-40)
1197 (17-25)

Poate
1195 (43)—1196 (31)
Smith 1115 (28-30)
1106 (42-44)
Ritchie 901 (10-18)
Bell 714 (28-32)

Poate 1198 (28-43)
Bell 715 (28, 29)
716 (5-8)
Ritchie 901 (25-34)
Bell 623 (30-35)

Poate
1197 (26)—1198 (5)
Smith 1114 (36-41)
1115 (28-35)
Bell 623 (20, 21)
623 (36-41)

Poate
1198 (44)—1199 (9)
Bell 622 (4-31)
674 (1-15)
714 (28-32)
Smith 1117 (6-45)
Ritchie 900 (10-19)

O'Hanlon 820 (1-28)
Bell 584 (14-38)
Fall 736 (2-32)
Ritchie 890 (5-34)
Welsh 352 (49-52)
353 (16-18)

Bell 584 (30)—585 (18)
Edey 1010 (6-26)
Thompson
460 (39)—461 (45)

Poate 1195 (4-42)

(2) The failure of calcium therapy to control and eliminate the spasms was not consistent with parathyroid tetany.

(3) The effect of massage as deposed to by the Appellant and her husband indicated that the spasms could not be due to parathyroid tetany.

(4) The nature of the spasms, especially in the later stages as deposed to by Dr. O'Hanlon and Sister Hannaford, that is spasms of a clonic nature in which the Appellant clutched at things, was not consistent with parathyroid tetany.

10

(5) The sudden cessation of the spasms after the alleged incident of the 2nd October, 1939, is quite impossible in parathyroid tetany and moreover that if tetany persisted for a period of eighteen months due to suppuration and inflammation affecting the parathyroid glands, no sudden cessation is possible but a sudden cessation of spasms is characteristic of hysteria.

99. During the latter part of 1937 and up to the time of the operation in March, 1938, the Appellant suffered from thyrotoxicosis in a severe form; her thyroid was prominent (goitre); she had a rapid pulse, coarse tremor, had lost much weight, was suffering from serious nervous debility, an operation to remove the diseased thyroid was vital or she would have died from the disease.

20

100. The disease of thyrotoxicosis (a toxic over secretion of the thyroid gland) involves increased metabolism, the body resources are consumed as by a fire, the heart is greatly affected and may break down, it has a great effect upon the nervous system, the patients become irritable, suspicious and permanent damage to the nervous system is common and the post-operative condition may end in insanity. When timely operative procedure is undertaken 80% of cases result in complete recovery, whilst 20% result in permanent unbalance, which are divisible into four categories:—

- (i) general mental unbalance;
- (ii) melancholias;
- (iii) phobias; and
- (iv) manias.

101. In September-October, 1937, the Appellant suffered from a condition known as angio-neuroticœdema, a condition in which swellings suddenly appear and disappear. Among the pre-disposing causes of this condition are (i) thyrotoxicosis, and (ii) hysteria. The Appellant was given superficial X-ray therapy for purely psychic reasons with good results.

Flynn
809 (17)—810 (28)
O'Hanlon
819 (22)—820 (10)
Inglis
1079 (11)—1081 (36)
Ritchie
903 (49)—904 (7)

102. The sundry swellings which the Appellant had from time to time of a non-inflammatory nature, which would vary, appear and disappear, e.g., the puffy face and hands, swollen shoulders, swelling of the whole body, down the chest and arms, the slit eyes which at other times were normal, and other swellings desposed to by various witnesses could have no relation to any alleged inflammatory and suppurative process in the neck nor can they be explained by alleged tetany, but are characteristic and symptomatic of angio-neurotic œdema. Further in the condition of angio-neurotic œdema, the swellings have been known to occur in the throat.

2nd T. 48 (49-52)
90 (6-9)
96 (51)—97 (18)
112 (43-47)
3rd T. 150 (24-25)
4th T. 195 (33-35)
1698 (16, 17)
1702, (39-41)
Sly 263 (35-42)
O'Hanlon
821 (50)—822 (6)
Fisher 342 (2-17)
337 (37-46)
Inglis 1083 (6-10)
1094 (1-14)
Flynn 818 (44-46)

103. In the opinion of medical experts called by the Respondent, various matters disclosed by the Appellant in her evidence are indicia of a condition of mental unbalance, that is the medical condition of hysteria. Among such matters are the following:—

(1) That she had no idea that there was anything wrong with her thyroid and did not know she had a goitre and did not know why she was admitted to Quirindi Hospital in 1937.

2nd T. 55 (48)—56 (2)
78 (51)—79 (3)
3rd T. 155 (49)—156 (6)
4th T. 203 (19-22)

(2) That neither her specialist physician, Dr. Ritchie, nor the Respondent informed her as to what she was suffering from or the type of operation she would have to undergo, that she had no idea what the operation was for, thought it had something to do with her heart.

1st T. 5 (21, 24)
3rd T. 156 (17-35)
156 (39-43)
4th T. 205 (19-31)
193 (22-23)
203 (32-33)

(3) That though Dr. Flynn did not personally give her X-ray treatment, only directed it, yet he severely burnt her with the X-ray.

2nd T. 78 (18-25)
4th T. 204 (9-12)
Flynn 810 (29)—811 (2)

(4) That she received "very cruel treatment" in St. Luke's Hospital in 1939 because the staff put chloride in her drinking water so that the wall of pus in her mouth might be removed, and the only food given to her in hospital was milk and biscuits.

2nd T. 53 (17-23)
136 (1-14)
3rd T. 153 (16-19)
167 (36-49)
4th T. 200 (47-50)
1704 (25-26)
1705 (3) (12) (28)

2nd T. 53 (24-29)
137 (23)—138 (7)
3rd T. 168 (30-39)
4th T. 222 (11-25)

2nd T. 79 (6-17)
3rd T. 168 (6-8)
4th T. 204 (26-41)

1st T. 40 (14-17)
2nd T. 70 (35)—72 (20)
3rd T. 166 (9)—167 (25)
O'Hanlon 834 (16-32)
Hocking 294 (11-42)
297 (13-17)

Bell 585 (17, 18)
Ritchie 890 (24-34)
917 (1-4)
O'Hanlon 819 (25-28)
820 (26)
1700 (36, 37)
1721 (23-24)
Flynn 811 (7-13)
Barnett
537 (3-4)
538 (45)—539 (12)
544 (50)
Fall 736 (8)
736 (16-18)
738 (4-9)
739 (20-21)
Saunders 805 (32)
Roberts 758 (16-27)
Sly 264 (47-50)
Hocking 289 (1-8)
Warburton 574 (19-20)

Bell 621 (42-44)
Ritchie
900 (39-45)
902 (44)—903 (48)
955 (7-20)
Smith 1118 (9-18)

Poate
1193 (45)—1195 (3)
Smith
1111 (35)—1112 (7)

Poate
1195 (43)—1196 (36)
Ritchie 901 (10-18)
Bell 714 (28-32)
Smith 1106 (33-44)
Poate 1196 (38-52)
Smith 1106 (42-44)

(5) That she charged the Respondent with deliberately refraining from calling in Dr. Marsh, the throat specialist, until such time as the wall of pus had been cleared from her throat.

(6) That practically the only food given to her in Quirindi Hospital was blue sago.

(7) That she accused her husband (whom she admits has always been kind and considerate) of tampering with her food, putting poison into it, with the deliberate intention of causing her death.

10

104. The evidence disclosed that the Appellant was a very nervous, highly strung, neurotic and unstable type.

105. In the opinion of the medical experts called by the Respondent the later manifestations established that the Appellant was suffering from hysteria. The matters to which importance was attached in this diagnosis were (*inter alia*) the following:—

(1) The Appellant's unstable nervous condition which is a real complaint and not malingering.

(2) The failure of calcium therapy to control the 20 spasms; in parathyroid tetany the spasms respond immediately to treatment.

(3) The extremely long persistence of the spasms.

(4) The fact that the Appellant appeared to become unconscious during the spasms which is not indicative of parathyroid tetany but common in hysteria.

Poate 1197 (17-19)
1192 (33-40)
Smith 1116 (1)—1117 (3)
Bell 714 (23-32)
622 (32-42)
Ritchie
900 (20-35)
901 (44)—902 (43)
Smith 1121 (29-35)

(5) The nature of the spasms at the later stages when the Appellant clutched at objects etc. does not take place in parathyroid tetany but does occur in hysteria; the spasms in parathyroid tetany are purposeless.

Poate
1197 (26)—1198 (5)
Smith 1114 (36-41)
1115 (28-35)
Bell 623 (20, 21)
Smith 1106 (11)

(6) The beneficial effect of massage for the spasms is inconsistent with parathyroid tetany.

Poate 1198 (28-43)
Bell 715 (28, 29)
716 (5-8)
623 (27-35)
Welsh 1352 (36, 37)

10

(7) The sudden cessation of the spasms after the 2nd October is consistent only with hysteria. And on her own allegation the suppuration would have left the area of the parathyroids long before the alleged eruption on the 2nd October, 1939, when the worst spasms were experienced.

Poate
1198 (44)—1199 (9)
Bell 621 (33)—622 (31)
673 (33-35)
714 (28)
Ritchie 900 (10-19)
Smith 1117 (6-45)

(8) The spasms in the eyes during periods of apparent unconsciousness.

Poate 1199 (10-20)
1209 (42-49)
Ritchie 900 (45-53)
Smith 1121 (29-35)

(9) The so called "eye incident" when the Appellant alleged that she watched in a mirror with one eye the other eye rolling back but had no double vision.

2nd T. 916 (15)—92 (7)
3rd T. 149 (25-33)
169 (1-9)
4th T. 196 (10-16)
242 (38)—243 (7)
Bell 623 (42-47)
Poate 1199 (21-37)
Smith 1114 (42-45)
Ritchie
907 (35)—908 (24)
908 (45)—909 (8)

20

(10) The various charges and accusations and statements referred to in paragraph 106 hereof.

Poate 1201 (28-45)
Smith
1111 (47)—1114 (14)
Ritchie
909 (13)—910 (31)

106. The Appellant's Counsel sought to establish that the Appellant suffered from true parathyroid tetany by virtue of:—

(a) the fact that Dr. O'Hanlon applied the so called "Trousseau" and "Chvostek" tests with positive reactions;

O'Hanlon 877 (12-19)

(b) that the blood examination of the Appellant disclosed a calcium content of 7.2 mg.m% which is below the normal, namely 10 mgm.%;

1718 (27)

(c) that some of the hand spasms experienced by the Appellant, that is the so-called "accoucheur's hand" is typical of parathyroid tetany.

107. The evidence adduced at the hearing disclosed:—

(a) that the reactions to the "Trousseau" and "Chvostek" tests may be elicited in many other conditions apart from parathyroid tetany, including hysteria;

(b) (i) that a lowered calcium content of the blood is not of itself evidence of parathyroid tetany;

(ii) that a lowered calcium content of the blood occurs in kidney diseases, thyrotoxicosis, nervous disorders and in hysteria; 10

(iii) that in medical disorders in which the blood calcium is lowered, a new level or norm is frequently established and the patient's body thereafter continues to function normally with a permanent lower blood calcium level;

(iv) the bio-chemistry of blood calcium in relation to parathyroid tetany and other conditions is explained by Dr. Ritchie and by Dr. Poate; 20

(v) that the hand spasm described in the Appellant's case could occur in hysteria as well as in parathyroid tetany;

(vi) that many of the manifestations in the Appellant's case are common to hysteria and other medical disorders apart from parathyroid tetany.

108. Dr. Thompson admitted:—

(i) that in hysteria all the various types of spasm, including spasms in the eyes, occur;

(ii) that the spasms in hysteria may be prolonged and may disappear suddenly. 30

109. The evidence disclosed that persons suffering from hysteria frequently swallow foreign bodies.

110. The Respondent submits that the description of convulsive hysteria contained in the medical treatise "Osler's Principles and Practice of Medicine" by Christian, 14th Edition, 1942, at pp. 14-15, aptly describe the Appellant's unfortunate condition and exactly fit and apply to the Appellant's allegations and evidence in the present case.

Poate 1210 (12-27)
Smith 1107 (22)—1111 (33)
Ritchie 902 (44)—903 (13)

Poate 1207 (11)—1208 (19)
Ritchie 905 (32)—906 (51)

Smith 1107 (9-18)
1114 (23-34)
1155 (2-14)

Poate 1206 (5)—1207 (10)
1208 (17-19)
1262 (23-25)

Smith 1107 (17, 18)

Ritchie 905 (32)—906 (53)

Poate 1247 (17)—1249 (18)

Thompson 461 (20-33)

Smith 1111 (35-43)

Thompson 466 (39-45)
431 (2-10)

462 (18-20)
467 (3-6)

Edwards 760 (45)—761 (3)

111. The Respondent further contends that at the hearing of the action a miscarriage of justice has occurred by reason of the improper conduct of Counsel for the Appellant, that the conduct of Counsel was such as to be calculated and did in fact prejudice the fair trial of the action. The Respondent further contends that if it is held upon this Appeal that he is not entitled to a verdict as a matter of law, that a new trial of the action should be directed to be had by reason of such miscarriage of justice in addition to the matters contained in paragraphs 61 to 109 hereof.

112. The improper conduct of the Appellant's Counsel falls under three main headings, namely:—

I. In the final address to the jury, deliberate misstatements of the evidence and misstatements of fact were made of which the following are examples:—

(a) that the X-rays prepared at the Sydney University and produced by Professor Shellshear were inaccurate;

1463 (31-35)
Shellshear
976 (27)—977 (11)
978 (19)

(b) that Professor Inglis had by fair admissions admitted the possibility of the tube working up the Appellant's neck;

1500 (1-3)
Inglis 1078 (10-20)
1093 (33, 34)
1094 (38-41)
1072 (29-35)

(c) that the jury now know that Dr. Flynn's diagnosis of angio-neurotic œdema was quite wrong. There was in fact no evidence to contradict and much evidence to confirm this diagnosis;

1510 (45-48)

(d) that "all this talk of having to go through all these muscles and organs is so much nonsense—and that is admitted."

1513 (15, 16)

II. A deliberate attempt by comment, by statements and by cross-examination to create an atmosphere of prejudice against the medical profession, of which the following are examples:—

(a) "That is what we expect from the doctors in this case."

225 (41)

(b) In reference to not having cross-examined Dr. S. A. Smith on his evidence of anatomy—"You did not expect me to, did you, after his exhibition";

1185 (46)

(c) on the matters upon which the doctors varied in their views—"Of course they do, and for a very good reason";

1218 (23)

220 (35-37)
1306 (18-20)

(d) His Honour the trial judge had occasion to rebuke the Appellant's Counsel for his comments;

1502 (39)

(e) a comment in the address in reference to Dr. Edye—"That is the kind of thing we are contending "against";

1523 (26-34)
Barrett
545 (51)—546 (1)
Melville 569 (29-38)
Warburton 578 (47-49)
Fall 740 (38-42)
Roberts 757 (23)
Poate 1235 (12)

(f) suggestion in the address and by cross-examination that the nursing staff of the hospital were committing perjury out of a sense of loyalty to the medical profession;

(g) in cross-examining Dr. Poate—"You lapsed 10
"into accuracy on that occasion";

Edye 1042 (1-3)

(h) in cross-examining Dr. Edye as to whether he had any regard for the oath, without any justification whatever;

1530 (29-34)
1529 (28-32)
1541 (36)—1542 (4)
1547 (41-43)

(i) further examples will be found in the references given in the Counsel's address to the jury.

182 (22-25)
1164 (30-33)
1465 (24-32)
1467 (39-42)
1504 (1-8)
1540 (42-49)
Beil 648 (50)—649 (2)
649 (9)—107
650 (20-31)
O'Hanlon 843 (10-14)
843 (46-47)
850 (32-33)
876 (19, 20)

III. A definite allegation made both by cross-examination and in the address to the jury to the effect, as Mr. Justice Halse Rogers put it, that this case was not a case between the parties before the Court but a case in 20
which the British Medical Association was on trial, that in effect the Appellant was faced with difficulties and perjured evidence at the behest of the British Medical Association.

113. The Respondent submits that no important question of law affecting the administration of justice in the State of New South Wales or in the Commonwealth of Australia arises for determination on this Appeal. The real questions raised by this Appeal are twofold:—

(1) Whether this is a case in which there is no evidence 30
in support of the Appellant's allegation as a matter of law, that is, whether the Appellant has discharged the onus that rests upon her. If there is no such evidence then the Respondent is entitled to a verdict as a matter of law and the Supreme Court of New South Wales and the High Court of Australia were not in error in entering a verdict for the Respondent under the provisions of Section 7 of the Supreme Court Procedure Act, 1900, and this Appeal should be dismissed.

10 (2) If it is held that as a matter of law there is such evidence that the Appellant's allegation can be held to be *prima facie* established, or in other words such evidence that it can be said that the Appellant has satisfied the onus that rests upon her, so that the Supreme Court of New South Wales and the High Court of Australia were in error in entering a verdict for the Respondent, then whether this is a case in which the evidence is so overwhelmingly in favour of the Respondent, the verdict of the jury so demonstrably against evidence and the weight of evidence, so unreasonable and so unjust, and a verdict which has been so vitiated by the conduct of Counsel for the Appellant that it is fit and proper notwithstanding that there have been four trials of the action, that a fifth trial of the action should be directed to be had.

20 114. The Respondent submits that His Honour the trial judge was in error in refusing to direct the jury that the Plaintiff (Appellant) must satisfy the jury of the truth of her allegation beyond reasonable doubt, and that before a finding could be returned in favour of the Plaintiff (Appellant) they must be so satisfied beyond reasonable doubt; and the Respondent contends that if it is not held upon this Appeal that the Respondent is entitled to judgment then a new trial of the action should be directed to be had upon the ground that the jury were misdirected upon the nature of the onus of proof that lay upon the Appellant in this case.

30 115. The Respondent humbly submits that the majority of the Supreme Court of New South Wales and the majority of the High Court of Australia were correct and should be approved and that this Appeal should be dismissed, or in the alternative that a new trial of the action should be directed to be had, for the following among other

REASONS.

1. Because as a matter of law there is no evidence to support a verdict in favour of the Appellant.
2. Because the Appellant failed to discharge the onus that rested upon her.
- 40 3. Because the evidence adduced at the trial established that the Appellant's allegation was an impossibility.

4. Because the evidence adduced at the trial established that the Appellant's allegation was inconsistent with certain proved and admitted facts.
5. Because on the evidence adduced the Respondent is entitled to a verdict and judgment in the action as a matter of law.
6. Because the verdict returned by the jury in favour of the Appellant and the special finding of fact by the jury were not supported by the evidence and were such that no reasonable jury could have found. 10
7. Because the verdict of the jury was against the evidence and the weight of the evidence.
8. Because His Honour the trial judge was in error in refusing to direct the jury that the Appellant must satisfy the jury beyond reasonable doubt of the truth of her allegation before they were entitled to return a verdict in favour of the Appellant, and that consequently the jury were misdirected as to the nature of the onus of proof required to support the allegation of the Appellant. 20
9. Because the conduct of the Appellant's Counsel at the trial was such as to be calculated to and did in fact prejudice the fair trial of the action and resulted in a gross miscarriage of justice.

J. E. CASSIDY,

E. REIMER,

Counsel for the Respondent.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH
WALES

— AND —

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA.

HOCKING

— *v.* —

BELL

CASE FOR THE RESPONDENT.

LIGHT & FULTON,
24, John Street,
London, W.C.1,