92, 1947

No. 84 of 1946.

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

STELLA EILEEN HOCKING (Plaintiff) - - - - *Appellant*

AND

GEORGE BELL (Defendant) - - - - - - *Respondent.*

RECORD OF PROCEEDINGS

VOLUME 4

(Pages 1547 to 1723)

BLYTH, DUTTON, WRIGHT & BENNETT,
112 GRESHAM HOUSE, E.C.2,
Solicitors for the Appellant.

LIGHT & FULTON,
24 JOHN STREET,
BEDFORD ROW, W.C.1,
Solicitors for the Respondent.

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why they changed their case, and suggesting that it must be the supra tonsillar fossa which is not there. I cross-examined him on that and he finally had to say this—

I said—" Are those words appropriate or not ? " and he said—" I do not think they are appropriate to the case." Those are his own words.

Mr. CASSIDY : The next question.

Mr. SHAND : " Next you saw . . . it was relatively superficial."

You could not see the depth of the hole, and is it not a queer thing that, having seen that, none of these doctors for the Defendant, until 11th December, ever tried to measure it or probe it. Why ? Because they were satisfied what it was they saw and did not want to go any further.

The only other matter I want to add to this aspect of the case is this —that these witnesses before, when I put it to them, when on that last examination, when Dr. Thompson was there, he put the probe in horizontally, but when Dr. Edye realised the effect of what he had said, namely, that if put in that way, it could not have been the supra tonsillar fossa, he said that he had to put it in all over the place to get it in—that was only after he had realised the significance of what he had said. We know there is no supra tonsillar fossa.

The case had to be built up because they had to meet what Dr. Marsh had said—the whole diameter of which was big enough to admit the blunt end of a lead pencil.

When Dr. Poate admitted she might have got a foreign body through the tonsil, not through the neck, some other course had to be taken, and it is taken in this case for the first time—when Dr. Steele says that he has altered his evidence, and you hear all the parade of different names given to this supra tonsillar fossa. You have heard it called " main crypt " —and this is an attempt to cover up the vital weakness which, fortunately, we have been able to meet. And it is very fortunate because there is no supra tonsillar fossa.

You can imagine when I put that question to Dr. Marsh and Dr. Poate —you can imagine the conference these doctors had as to what they should do about it—when Dr. Marsh was invited to make another inspection—the conference as to what they should do—and what did they do ? And when one comes to think of my friend's opening address at page 2 to this effect —" The inference that the Defendant asks you to bring from that—the Plaintiff's evidence—is that all the holes in the Plaintiff's case are endeavoured to be patched up by cunning." Do those words apply to the Plaintiff's case or to the Defendant's case ?

Here we have an example—they cannot get away from it. In a difficulty they have altered their case and, fortunately, we have been able to expose it. Does not it show you that whatever path in this case you like to pursue, if you go far enough, you end up at the finger-post pointing to his own guilt—whether it be his own conduct or the conduct of the case and changing the issues, or whether you simply depend upon the voice of Sister McCallum, when she says—" I remember Dr. Bell doing something with the tube." Everything points in the same direction.

I have finished.

The only other matter which remains to be said, is on the question of compensation, and on that, gentlemen, I am not going to address you at

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No. 52. Closing Address of Mr. Shand, K.C., 21st January 1944, *continued.*

any length. It has been no part of my plan to try and depend upon your sympathy and harrow your feelings. The plain fact is that this woman for 19 months went through practically the valley of death, and she suffered, I suppose, as few people have suffered. Spasms, locking muscles—the unfortunate woman must have been afraid of life—in fear of when the next spasm was coming.

Obviously, she must get substantial damages—she is not a greedy person. She is not asking for anything excessive, and I ask you not to give her any excessive verdict, gentlemen. Sometimes, the method of conducting the case by the other side, not only my friend's conduct, but the whole case, inflames the Jury's mind. You are not entitled to give anything for that, and do not give her anything.

Gentlemen, if you give us a verdict, I want that verdict to stand. I do not want it to be too excessive, and I am suggesting to you, and I ask you, if you consider the Plaintiff is justified in receiving a verdict, that you measure the damages not in thousands, but in hundreds.

(10.15 a.m.)

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No. 53.

SUMMING UP.

His HONOR: Gentlemen of the Jury: Now that the addresses of counsel have concluded it becomes my duty to sum up. At the conclusion of my remarks you will retire to the jury room and consider your verdict.

In summing up I shall explain to you the principles of law which you should bear in mind in considering the facts of this case and in doing so I shall remind you of some of the main features of the evidence.

I do not propose to examine it minutely as counsel have very thoroughly canvassed it from their respective points of view. I, therefore, do not intend to refer to the evidence in any detail.

At this stage, however, I remind you that in considering this evidence and the accuracy of any particular witness you should bear in mind that the main events to which the witnesses have deposed occurred so far back as the years 1937 to 1940, that many of the witnesses have given evidence on three previous occasions, the earliest being as far back as December, 1941. Under these circumstances you may think it is almost impossible to expect from any witness a clear and precise recollection either of what he said at an earlier trial or even more so of the details concerning events which occurred so long ago.

As you have been told, you and you alone are the judges of the facts.

I want to make this quite clear to you, and if I express or appear to express any view about the findings of fact or the inferences which should be drawn from matters of fact which have been established in the witness box, you may dismiss it as readily and as completely as you see fit, or, in other words, if I appear to suggest by anything I say that I have formed a view about the facts one way or the other, remember you are free to accept or disregard that view just as you see fit, because that is your province.

Of course, gentlemen, do not take this as an invitation to reject out of hand any view of the facts which I may express just because I do so.

But the law you will take from me.

In this action Mrs. Stella Eileen Hocking, who is called the Plaintiff, is suing Dr. George Bell, the Defendant, for damages for negligence. The Defendant is a well-known surgeon of very many years' experience.

It is common ground that the Plaintiff in or about the early part of the year 1938 was suffering from thyrotoxicosis and that she engaged the Defendant to perform the operation known as thyroidectomy.

The Defendant undertook this task and the operation was performed on the 15th March of that year.

The law is that if a surgeon undertakes the after treatment of an operation which he has performed and the patient submits to his directions, he, the surgeon, owes a duty to the patient to use diligence, care, knowledge and skill in administering the treatment.

The law requires a fair and reasonable standard of care and competence. A surgeon in the position of the Defendant in this case owed that duty to the Plaintiff in connection with the removal of the drainage tube. It is not disputed that that duty was owed by Dr. Bell to the Plaintiff, and the Plaintiff alleges that there was a breach of that duty which caused injury to her in that in carrying out such removal Dr. Bell broke off a substantial portion of the tube and allowed that portion to remain in her neck for a considerable period as a result of which she suffered injury. It is not disputed that if Dr. Bell did that then he would be guilty of what the law calls negligence or a breach of that duty to take care. That and nothing else is the negligence charged in this case, namely, that Dr. Bell broke off a portion of the tube during its removal and left that portion in the wound.

You will remember during the hearing that it was stated quite definitely by Mr. Shand that although Professor Welsh expressed the opinion that something went wrong at the operation no suggestion was made of negligence or unskilful treatment on the part of the Defendant in the actual performance of the operation. As I have said, the only negligence charged is the alleged breaking and leaving in the wound of the portion of the tube during its removal.

You will remember that after her discharge from St. Luke's Hospital on the 14th April 1938, the Plaintiff returned by motor car to her home at Quirindi where she was more or less ill—depending on the view you take of the evidence—for some eighteen months and then ultimately on the 5th October 1939, she says she passed per rectum the portion of the tube which she alleges was left in.

The law requires that when a person is charged with negligence he should know precisely the charge that he has to meet. There is no such thing as negligence in the abstract. The Plaintiff must point her finger to the particular act of negligence on which she relies. Accordingly, in this case, the solicitors for the Defendant wrote to the solicitors for the Plaintiff asking in effect for a statement of the precise nature of the negligence alleged against Dr. Bell or in other words they asked for particulars of the Plaintiff's allegation of negligence. These particulars were supplied. They appear fully in Exhibit " O," which of course you will take with you into the jury room together with the other exhibits. You have already been supplied with a copy of that exhibit.

Summarising them they amount to this. The Plaintiff claims that the drainage tube left in the wound by the Defendant during the operation was subsequently so negligently or unskilfully manipulated by Dr. Bell that it

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broke and portion remained in the wound and that the Defendant negligently failed to remove that portion. She further claims that the portion of tube so left remained in the wound until some 18 months later when it passed into the gullet and from there it ultimately was passed from the body per rectum.

She further alleges that the piece of drainage tube which was passed from her body was a piece of soft rubber tube about 2 inches long, greyish in colour and had the appearance of having been in water for some time. It was cut off straight at one end and torn at the other. On the side was a straight cut in which could be seen what appeared to be a swab and wire protruding from torn end of tube. That is the description she gave of the object which she said she passed. On that statement in the particulars, omitting from it such features only as might be produced by its remaining in the body for some 18 months, you have a description of the object which it is claimed Dr. Bell left in.

You may consider in the light of the evidence—and whether you do or not is a matter entirely for you—that the only matter which might be affected when you are considering this description of the object passed per rectum would be this : you may think that the description which contains this expression " and had the appearance of having been in water for some time " could hardly apply to the tube as left by the doctor but merely refers to the description of the object which she alleges she found.

In addition to these particulars you will remember that an object which had been made at a previous hearing according to the Plaintiff's directions was produced before you and put in evidence, Exhibit " P." The Plaintiff swore at a previous trial in one place that this object was a fair, and in another that it was a rough representation of what she saw in her motion, but that the rubber in it was much stronger.

At the next trial her evidence was that this same object was a fair representation of what she saw without any qualification whatever.

However, at this present trial, she said that the exhibit was not much like what she saw by reason of the strength and colour of the rubber and the strength of the wire. I have drawn your attention to the various descriptions that she has given of this exhibit on these three occasions. It is for you to say what the Plaintiff actually meant by the different terms of description concerning this exhibit which she used on each of these occasions and whether you think that the variations which she has made in these descriptions from time to time were deliberately made to meet the exigencies of the occasion or were a genuine attempt on her part to convey to you as an ordinary woman her impression of the object which she said she saw and handled, or whether she had any real opinion of that object for the reason that she never saw or handled such an object at all.

Counsel for the Defendant says that these descriptions were changed because the Plaintiff had no real opinion at all as she did not in fact ever see any such thing in her motion and he urges that she adopted the tactics of changing her evidence to meet the changing circumstances of each case.

Subject to these matters the particulars supplied by the Plaintiff and her various descriptions of the object, Exhibit " P," oblige her to prove substantially that an object fairly answering these descriptions was left in her throat. I say " substantially " for this reason : suppose you were satisfied that in all other respects she was right except that it was not quite

2 inches long; if it were not exactly 2 inches you would not say the Plaintiff fails because she said " about 2 inches," but a necessary element is that it was something with wire protruding; that is the description—" what appeared to be a swab and wire protruding." It is not open to you to consider whether a small piece of tube from that which Dr. Bell says he used, was left in. You are entitled to consider and to consider nothing but an object which substantially accords with the description contained in the particulars and the evidence to which I have referred. Or put in another way, it is of no use your considering a case of whether merely a piece of tube was left in; the only object you can consider is a piece of tube about 2 inches long, cut off straight at one end and torn at the other and on the side a straight cut in which could be seen what appeared to be a swab and wire protruding from the torn end of the tube.

As I have said that is the Plaintiff's allegation and she must in this action, as Plaintiffs have to do in all civil actions, make out her case to your satisfaction, or in other words, what is called the onus of proof lies upon her. That means that she must weigh down the metaphorical scales in her favour and must satisfy your minds in regard to those matters upon which her case depends.

She has not to satisfy you beyond reasonable doubt as in a criminal case, but she has to satisfy you by a balance of evidence, by a balance of probability, that she is entitled to succeed. From that it follows that if she does so satisfy your minds to that extent you will find a verdict for the Plaintiff; if she so fails to satisfy your minds then your verdict will be for the Defendant, and if you merely come to the conclusion that what the Plaintiff states is a possible view of the circumstances but that you are unable to say that it is more probable than not that what she says was correct, then your verdict will be for the Defendant, because in that case the Plaintiff will have failed to weigh down the scales in her favour, or, put in another way, if on a review of the whole of the evidence you are unable to say which is the correct view to take, then the Plaintiff will fail to discharge the onus of proof and your verdict will be for the Defendant.

Now, something has been said during the addresses of counsel regarding the way you should approach the evidence as to the facts, the inferences, the probabilities or the conjectures arising out of this case. I mention the matter at this stage because when you are weighing the evidence you should approach the matter from the point of view that I shall now state. It seems to me I cannot do better by way of explanation than to read to you what the learned Chief Justice of New South Wales said on this subject in another negligence action. He said this :—

> " In order that a jury may be entitled to find a verdict for a plaintiff, they must have before them sufficient evidence of every fact the burden of proof whereof lies upon the plaintiff. If there is no evidence which is not merely equally consistent with the existence and with the non-existence of a fact essential to the plaintiff's case, i.e., if the whole of the evidence is neutral: the plaintiff must fail . . .
>
> " It is not enough that the evidence affords material for conjecture that the fact may exist, unless it furnishes data, from which an inference can reasonably be drawn that it does exist.
>
> " The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it

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is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence and if it is a reasonable deduction it may have the validity of legal proof."

As I have said, you are the judges of the facts and you are entitled to take into consideration the evidence and the arguments and the probabilities.

It is the privilege of the parties in this case to have you as members of the business community to try the issues between them. You are here to represent the sense of justice in the community. It is very important that you should come to a consideration of the matters involved in this case free from any sympathy on the one hand for the Plaintiff and free from any prejudice on the other hand for or against either party.

Judges who preside at such trials as these are always anxious to have created an atmosphere of calm, dispassionate and impartial approach to the problem that the parties have set before you and it is in that calm and impartial approach to these problems that you, as judges of the facts, are asked to consider the questions of fact that the parties have put before you in this case.

Perhaps naturally some attempt is always made by counsel for their respective clients to stir in you feelings of either resentment against one party or, at any rate, such feelings as cause you to reject the arguments of the opposing counsel. That is counsel's privilege. Your duty is to see that your minds are free from the sympathy, the bitterness or prejudice which sometimes creeps into trials such as these, and as I say, to attempt a more dispassionate analysis of the facts before you.

In this connection certain questions were asked, and certain suggestions were made to witnesses in cross-examination concerning matters which are quite irrelevant to the question of negligence that you have to consider. These are entirely false issues calculated to divert your attention from this question and to induce you to decide on considerations of prejudice rather than in that calm and impartial atmosphere in which alone as I say the real issue in this case can properly be decided. Unfortunately in the existing state of the law it is impossible to prevent such irrelevant and prejudicial considerations from entering into the case. They do so in many cases, often with disastrous effect on the doing of complete justice between the parties. In this case two such instances of the kind occur to my mind. I refer to the question of the British Medical Association and to the question of what was called loyalty of nurses to doctors. As to the former matter it was opened by Mr. Shand in his first address, was again raised by a voluntary remark by Dr. Thompson in the course of his evidence, occupied some of Mr. Shand's cross-examination of Dr. Bell and other medical witnesses for the Defendant, was referred to by Mr. Cassidy in his address and was again stressed by Mr. Shand in his final address.

It was suggested by Mr. Shand's cross-examination that one member of the British Medical Association was not permitted on pain of boycott by other members to give evidence on behalf of a Plaintiff who was suing a doctor, a member of that Association. You were no doubt relieved to hear Dr. Bell's denial after consideration of the truth of such allegations and the instances he was able to give in support of such denial. As I understand the suggestion behind such questions it was that people suing

members of the Association could not get justice in our Courts because they were limited in the choice of their medical witnesses to doctors who were not members of the British Medical Association, and further that members of the Assocation were bound to support a brother member and practitioner in evidence quite regardless of the truth.

Likewise, with one exception I think, each of the former nurses of St. Luke's and Quirindi Hospitals, who was called to give evidence on behalf of the Defendant, was asked about such a thing as loyalty to the doctor, the inference to be drawn being that truth was to be subordinated to loyalty.

If there were any substance at all in so serious an implication you may ask yourselves when all but two of these witnesses have since become married women and presumably have ceased to depend on their profession for a livelihood, whether they would be likely to swear deliberately what they know to be false, and as to the doctors, gentlemen, do you think that professional men who have given evidence before you would consciously commit the serious crime of false swearing merely because the Defendant is a member of their Association and of its Council, more particularly in this case in which you have heard how certain medical witnesses for the Defendant have differed in their opinions as to important details from the opinions expressed by others, including the Defendant himself. Of course, gentlemen, it is a matter for you, but you should not allow such considerations to distract your minds from the task that you are required by law to perform, namely, to find whether or not the Defendant has been guilty of the negligence charged.

You have heard the evidence of medical men, some members and others not members of the Association. I suggest to you that you should judge the weight to be attached to the evidence of each only by his demeanour in the box, his qualifications by experience or otherwise to offer a medical opinion of weight and by what may appear to you to be the reasonableness or otherwise of such evidence.

With these preliminary observations I shall now deal more specifically with the main incidents of the case of each party.

The Plaintiff's story of what took place when Dr. Bell attended at St. Luke's Hospital to remove the drainage tube is given by her in the following way. She was asked this question :—

> "After the operation do you remember Dr. Bell saying something about the tube ? "

and her answer was :—

> " Yes, he said the tube was not working and he would take it out, so he loosened some stitches and pulled the tube in his fingers, shook the tube and it did not come out and so he pulled a little harder and it still did not come, so he put his hand on my forehead and held the head back firmly and pulled and whatever it was came out and he said ' Damn,' and I said ' Oh.' He held it in his fingers for a second and I saw it, just a little dark piece of rubber, then he threw it into the tray and he and the sister turned around and left the room. I had a stinging sensation in the throat, it stung very much there (indicating).
>
> " Q. You are pointing to the left side now ?—A. Yes.
>
> " Q. How long did you think it was after he pulled it out, after the operation ?—A. I could not say exactly but I think three to four days or perhaps five days. I was very ill then."

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In cross-examination she gave the additional details that Dr. Bell used his bare hands, no gloves, no forceps or instrument of any kind but handled the tube with his bare fingers.

This is the description which she gives of the removal of the tube and from it, if you accept it, you are asked to draw the inference that in some way the drainage tube which was in there was being removed because it was not working and that in some way it became fixed and required some force for its removal, something involving the doctor in putting his hand on the Plaintiff's forehead—that the tube broke and some two inches of it were left in. Plaintiff says that thereafter she became seriously ill in St. Luke's Hospital and that eventually she was permitted to return to her home at Quirindi. She said she then had a long illness which culminated more or less on the 2nd October, 1939, at which time she being very sick felt something burst into the left side of her face which she swallowed and which she felt going down her stomach, going very slowly.

I think perhaps that I should use her own words. She was asked this question :—

"Q. Did you feel any sensation following that ?"

that is the eruption,

"A. I don't remember clearly but I think next day I felt a sensation in the stomach. Of course I felt something going down my stomach, it went very slowly, it seemed to move down my stomach."

She then says that she was given aperients and on the 5th October 1939 she had a motion in the commode pan in her bedroom and that when later taking this pan out to the lavatory she saw something in it. I will read to you what she here says she saw and did :—

"Q. What did you do ?—A. I went back to bed after using the commode.

"Q. After some rest what did you do ?—A. I rested quite a while then I got up and took the pan from the commode and as I was taking it out in the light of the verandah I noticed something in it, I picked it out in my fingers, it was quite a startling looking thing. I took it out and squeezed it and as I did so a yellow greenish pus ran down my fingers. I was holding it in my left hand and I heard someone coming. I picked up the pan and went to tip it into the toilet. As I did I pulled the ring across with my fingers so (indicating), that is the chain, and of course I am left-handed so to speak and I dropped this. I was leaning against the wall holding this in my finger and with nervousness it dropped out. The water was running as it hit the piece of tube.

"Q. What happened then ?—A. Well, it was washed away."

When asked to describe it she does so in these words :—

"Q. Will you describe it generally. First of all, you say you squeezed it, what was it like ?—A. The thing I had in my finger I would say a soft greyish piece of tube like a piece of rubber which had been in water for some time. It was swollen. It was not smooth like a new piece of tube.

"Q. What about the shape ?—A. There was a straight cut at one end. It was split up within half an inch of the end and it had in that opening a swab which I thought was a piece of marine sponge with a blackish looking stuff. It had come from this sponge

and it looked like black wire but when I bent it it would fly back straight. It was like horsehair and it would fly back quickly straight. It looked like wire to me but it could not have been wire."

On the other hand, Dr. Bell, dealing with the removal of the tube in the light of his invariable practice and the records now available to him, denies the Plaintiff's allegations and says that after the operation he removed the tube within forty-eight hours, that being the normal time for removal, by merely cutting a horsehair stitch by which the tube was attached to the skin and drew it out easily with a pair of forceps—that the tube was not broken nor did he leave any broken portion in her neck. Moreover he says that the tube as inserted did not exceed 2 inches in length whilst Dr. Poate told you that he did not think it would be possible to place a tube of over 2 inches in length in the Plaintiff's neck. In fact, his (that is, Dr. Poate's) view was that the Plaintiff being somewhat thin, the tube, if anything, would be shorter than that. Further, after the removal of the tube, Dr. Bell says that he immediately dressed the wound, following his invariable practice in such cases, and also that he did not turn round and leave the room immediately, leaving the wound undressed as the Plaintiff, in her evidence, would invite you to infer, and he gave you reasons which you may regard as obvious for this procedure. Again, the Defendant tells you that although the Plaintiff had some post-operative sepsis and certain symptoms of latent tetany she went from St. Luke's Hospital more or less free of trouble and that such a serious event as she described as having happened in October 1939 had no relation to this tube at all and he invites you not to draw the inference that the Plaintiff invites you to draw. I should also remind you of the evidence of the nursing sisters. You will remember that no one can help you as to who actually was the sister who assisted Dr. Bell in the taking out of the tube but you have heard their evidence as to the practice of the hospital when drainage tubes are removed. Mr. Shand suggests that it was Sister McCallum, now Mrs. Warburton, who assisted in the removal. She it was, you may remember, who stated that she had read in the newspapers about the first trial before seeing the matron of St. Luke's Hospital. However, the Plaintiff stated that it was not Sister McCallum who attended Dr. Bell on that occasion. In addition there is the record made on the day appearing in the day report of the 17th March 1938, the entry reading: "Dr. Bell here a.m. Tube removed and three sutures." You will remember, gentlemen, that sutures are stitches. If that be a correct record how do you think it agrees with the Plaintiff's description on the one hand and the Defendant's on the other?

In addition, the Defendant further relies on the fact that at the time the tube was removed the condition of the wound in her neck was such that rough treatment of any kind would have had disastrous results. Moreover, the evidence of the Plaintiff that Dr. Bell put his hand on her forehead and held her head back firmly would, according to the evidence called by the Defendant, have resulted in all probability in tearing the wound open, with almost certain hæmorrhage accompanied by loud protest on the part of the Plaintiff, screaming at the top of her voice. Moreover, as the Plaintiff would, according to the nursing sisters, have been propped up in bed with her head inclined downwards—you may remember, gentlemen, it is contended on behalf of the Defendant that she would not have allowed Dr. Bell to force her head back owing to the extreme

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tenderness of the neck at this stage. You may remember that many of the medical men called on behalf of the Defendant were emphatic about this.

In addition Counsel for the Defendant laid stress on the fact that according to Dr. O'Hanlon the Plaintiff told him on one occasion that the tube had been removed by the nurse at St. Luke's Hospital and there is also evidence before you from other surgeons that their practice is to leave the removal of drainage tubes to the sisters or nurses as it is a comparatively simple and minor process although it is Dr. Bell's invariable rule to remove such tubes himself. This, you may regard, gentlemen, as some evidence of the care and caution which he exercises towards his patients.

Of course, gentlemen, this removal is the crux of the case and one on which you must focus your attention. Did Dr. Bell leave in the wound the object as described by the Plaintiff both in her particulars and Exhibit " P " as I have already indicated to you, and also in the sketch, Exhibit " C," by which she illustrated the matter to her husband and Dr. O'Hanlon ? You will remember also the comments made by Mr. Cassidy here that if Dr. Bell knowingly left the broken portion of the tube in her wound, as the Plaintiff in her evidence asserts, he would have been guilty of something more than negligence, and that his conduct would have amounted to malpractice and even to criminal negligence. Do you think it is probable, gentlemen, that such a man as Dr. Bell would have so acted.

Obviously the Defendant knows nothing about what occurred between the 2nd and the 5th October 1939, nor does any other person except the husband, Mr. Hocking, and the Plaintiff. You will remember in this connection that the Plaintiff admitted that Dr. O'Hanlon was not called in on or between those dates. He was called in, you may remember, from the pictures on the night of the 6th October, the Friday night. Such being the case, you may think the only course open to Dr. Bell is to suggest through a number of experienced medical witnesses that the story is so improbable and fantastic that it lends colour to his suggestion that the whole incident is symptomatic of the hysterical tetany from which his counsel argues the Plaintiff must have been suffering at the time. Further, in this connection, counsel for the Defendant submits to you that the Plaintiff's story, both of the eruption of the tube on the 2nd October and the passing of it on the 5th October 1939, is a story which has, in law, no corroboration. I shall deal with this question of corroboration more fully at a later stage, but at the moment I may tell you that in a civil action such as this the law does not require that the evidence of a party should be corroborated. If you feel that you are able, on a proper review of the whole of the facts, to accept the Plaintiff's evidence standing alone to the degree of proof I have indicated to you, then you are entitled to act on it even though it be uncorroborated. I think all that counsel for the Defendant probably meant in his reference to the lack of corroboration was that when you find yourselves in a situation such as this, where there is no actual evidence of any eye-witness other than the Plaintiff, who says that he or she saw the object in the Plaintiff's fæces on the 5th October 1939, you would not be criticised for approaching, with some degree of caution, to say the least of it, an important matter which depended upon the observation of a single individual, that single individual being very interested in the result. However, as I say, the question is one for you.

Now as to the issue of negligence itself, I suggest you should take the Plaintiff's case, contrast it with that of the Defendant, and ask yourselves which of the two appeals to you as the more probable.

First of all, the Plaintiff says that the Defendant, a surgeon such as Dr. Bell, after having unsuccessfully attempted to remove the tube by pulling it, shaking it and pulling it again harder, finally placed his bare hand on her head and pulled the tube hard, pulled it out with his bare fingers, rather than with forceps, that this tube broke inside her neck and that he and the sister immediately left the room. You will remember that at that time it was, according to Dr. Bell and the hospital records, just about 48 hours after a serious operation and the first question you will probably ask yourselves is, what real opportunity did the Plaintiff have of closely observing what in reality did take place. It appears to be common ground that at that time the Plaintiff was very ill, as one would expect.

Dr. Thompson, who was called on her behalf, told you that he would not take her account of what took place literally as she was seriously ill and was not a trained observer. And in this connection you will bear in mind the evidence given by the Plaintiff's witness, Professor Welsh, agreeing here entirely with the medical evidence called for the Defendant that the difficulty confronting the surgeon is to keep the tube from slipping in and out of the wound and that in order to overcome that difficulty a horsehair stitch is used to prevent it from slipping out and a safety-pin to prevent it from slipping in, and that was illustrated by an exhibit that was put in, so far as the safety-pin was concerned.

The Defendant puts before you that none of these things took place nor was it probable that they did because the tube was in no sense fixed into the wound except by one horsehair stitch. He invites you to say that it is more probable than not that the taking out of the tube was not accompanied by any pulling or pushing or indeed of any circumstance that would cause it to break. Again the Plaintiff, through her counsel, Mr. Shand, suggests that the reason for this tube becoming so fixed in the wound as to require force for its removal was that the tube was stitched to a muscle or a stitch was caught in the tube. As to these alleged stitches I tell you as a matter of law that there is no direct evidence of anything of the kind having occurred. Dr. Bell denies that the tube was either stitched to a muscle or that a stitch was caught in the tube. Counsel for the Defendant further says that on this evidence it would be unreasonable to draw the inference that the tube was broken as suggested, or at all. As I say, you have to take into account what was the situation of the tube, how it was held and if it broke what caused it to break. Another feature of that matter, arising out of the Plaintiff's evidence, is an inference that Dr. Bell broke the tube and knew that he had broken it. The Plaintiff said that only a small piece was in his fingers and that he said " Damn," apparently at a time when he must have known that the tube was broken. Of course, that particular aspect has been described by Mr. Cassidy as a suggestion of criminal neglect on the part of Dr. Bell in that he deliberately allowed the Plaintiff's neck to remain in a condition which, according to the medical testimony of the Defendant's witnesses, would have led almost certainly to fatal results. Mr. Shand was quite correct in telling you that this case does not involve any charge of criminality but merely involves a charge of negligence as I have outlined to you. If the Plaintiff's evidence be accepted then it does appear, almost of necessity, that Dr. Bell must have known that

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the tube broke and to have left it in there or, at any rate, to have made very little effort to recover the broken piece.

Although, as I say, criminal negligence is in no sense an issue before you here, none the less it is, perhaps, not surprising that the Defendant in these circumstances should take pains, all the pains possible, to dispute the Plaintiff's allegations.

The Plaintiff also says that the Defendant thereupon sent her from the hospital, after an interval, to the care of another doctor and you are asked to apply your minds to the probabilities of that, especially if he knew that he had broken portion of the tube. He does not appear to have told Dr. O'Hanlon anything about that, because the latter made no effort to recover the piece of broken tube nor did he seem to know anything about it when it came up for discussion. Evidence was given also that the hospital practice was to inspect tubes which were removed from drainage cavities.

Further, the hospital records in this case contain no note about a broken drainage tube and not one of the nurses who were there at the time remembers any untoward incident and it is put before you that the proper inference to be drawn is that no such incident took place as the Plaintiff describes. However, you have heard the counter-arguments put by Mr. Shand with regard to the recollection of the nurses, the boiling of the rubber and all the surrounding circumstances, and you have to take into consideration all those matters. The Plaintiff was criticised in regard to this precise happening when she said that the doctor said that he was taking it out because it was not working. It is said that would provide a reason for its removal and make it more probable than not that it was causing some difficulty. On the other hand, Dr. Bell says, and in this connection he was supported by other surgeons, that 48 hours after its insertion was in fact the normal time for the removal of the tube, that in that time it had served its purpose, that to keep it any longer added to the risk of infection, that he did not make use of the expression " Damn," that the tube was not taken out, as the Plaintiff says, because it was not working, and that she is mistaken about that particular piece of evidence. She also says that the Doctor pulled it out with his bare fingers. Dr. Bell puts it to you that that is improbable, because it is neither necessary nor usual and, indeed, it is absolutely unknown in modern surgical practice for an obvious reason. It is, of course, worthy of mention that the Plaintiff being very sick at the time did not appear to have taken much notice of the incident or, at any rate, to have attached much significance to it, because you will remember that both the Plaintiff and her husband told you that she did not mention any details about it to him at the time excepting that it hurt somewhat. No other complaint was made by the Plaintiff as to the removal until after the alleged eruption through her bowels some 18 months later. As I have said, gentlemen, this removal is the real issue in the case.

However, a great number of other matters have come under discussion by counsel with a view to persuading you that their competing arguments for their respective clients are correct, and one of the matters that you have been asked to review in some detail is the events of the 2nd and the 5th October 1939, because to some extent on the view you take of this question rests much of the substance of the Plaintiff's case.

You will remember she says that she swallowed something on the 2nd October which passed through her bowels on the 5th October, and

Mr. Shand says that all those things she described are consistent with the happenings she alleges took place in St. Luke's Hospital more than eighteen months earlier. She says that for some time before the eruption she had been very sick and subject to coughing and tetany spasms and swallowing pus and from that evidence Mr. Shand invites you to draw the inference that she had an abscess in her throat, that it burst and that she swallowed something and that eventually something came out through the intestines. The Defendant on the other hand says about what I may call the swallowing incident, that the natural tendency would be to throw it up and not to swallow it, that her husband had not been told anything about it at that precise time although it is said that he was told about it in the early hours of the following morning when they were in bed together, that it was unlikely or improbable, according to the Defendant or according to the medical evidence, that she would actually feel anything in her stomach that was pricking her and it would be less likely to be a real thing than something suggested by her imagination.

Finally she described to you the loss of the tube in the circumstances which have been so much debated before you that I do not propose to do more than mention them. That must, of course, gentlemen, I should think, inevitably cause you to pause and consider before coming to a final conclusion in the matter. If it be the fact as the Plaintiff says that she picked out something from the commode which has been identified to your satisfaction as a piece of drainage tube of the description given in the particulars and Exhibit " P " and the sketch, Exhibit " C," then you may, of course, take one view of the case, but you have to realise that at that time also the Plaintiff, as she herself says, was ill, that this thing happened when no one else was there, and the question you will have to ask yourselves is what really did happen ? The Plaintiff says, and this is one point of view, that she picked out something from her excreta and observed its character and detail. On the other hand, it may be that she may possibly have seen something in the excreta which she firmly believed was like the rubber tube in question, that she did not in fact pick it out but lost the whole contents of the chamber pot into the cistern without having much opportunity of seeing exactly what it was.

The account that the Plaintiff and her husband gave Dr. O'Hanlon at that time has been referred to. According to Dr. O'Hanlon, the husband told him that the Plaintiff had occasion to use the commode on the morning of the 5th October for her bowels to act and that she passed what appeared to her to be a piece of grey rubber tubing, that it was squarely cut at one end, ragged at the other, partially split down the centre and protruding from the centre were two bits of wire and they were the ends of a piece of wire wound around what she had taken to be a piece of sponge. He further says that Mr. Hocking told him that she had emptied the contents of the commode which contained the tube and the result of the bowel action into the lavatory and pulled the chain, and in consequence he, Mr. Hocking, did not see it. Dr. O'Hanlon further stated that the Plaintiff had here corroborated her husband. At the first trial Mr. Hocking's evidence supported that of Dr. O'Hanlon that the Plaintiff had first emptied the contents of the pan into the cistern and then pulled the chain, although on this trial he maintained that he told Dr. O'Hanlon that his wife had pulled the chain first. You may think that Dr. O'Hanlon's account is borne out by his letter of the following day to Dr. Bell in which he says,

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among other things: "Mr. Hocking gave me the following history"; it contains this passage, gentlemen: "Mrs. Hocking emptied the tube along with the bowel action result into the w.c. so neither Mr. Hocking nor I saw it."

Whether that helps you to say that the Plaintiff is correct or not when she says she lost it in the manner she suggested to you in the witness box, when pulling the chain, is a matter entirely for you. Here, also, you may recall Mr. Cassidy's reference to the answer to Question 9 of the particulars supplied by the Plaintiff's solicitors. In that question the Plaintiff's solicitors were asked: "In whose possession is the alleged piece of rubber tube at the present time and where can the same be inspected on behalf of the Defendant." To which the reply was made, "as the Defendant is already aware, the tube, etc., is no longer in the possession of the Plaintiff having been discarded by her at the time of its passing."

You will notice, gentlemen, the word used is not lost or accidentally lost but "discarded," which you may think corroborates the version given by Dr. O'Hanlon of what he was told. In other words, does the expression in the particulars "having been discarded by her" indicate that what really happened was that the Plaintiff emptied into the cistern the whole of the contents of the commode pan including the object whch she saw in her excreta consciously and not accidentally, and that she only attached importance to that object afterwards. Well, that is a matter which you are entitled to consider.

Dr. O'Hanlon's evidence has been made the subject of a great deal of comment by Mr. Shand with reference, among other things, to his letter to the Defendant of the 7th October 1939, and Mr. Shand's claims that that letter shows that Dr. O'Hanlon had accepted as at least a medical possibility that these happenings could have taken place. You will remember, however, Dr. O'Hanlon's explanation as to his apparent change of attitude in the light of his experience in a subsequent case. I do not propose to go into all those questions in the letter with you. You will have the letter——

Mr. SHAND: Will Your Honor pardon me, he did not change his attitude in the light of his experience. He changed it when he rang up Dr. Bell.

His HONOR: My recollection is that the evidence was that he heard of a case bursting into the œsophagus.

Mr. SHAND: That was a year afterwards.

His HONOR: He gave as his reason that he had not had any experience of something bursting into the gullet and then he did have the experience and the patient died within a few hours.

You will have the letter to read for yourselves and it is for you to say how far the matters mentioned in it will bear upon the accuracy of the Plaintiff's account and the reality of what she said she saw.

Mr. Shand claims that the events of that time point very strongly to the Plaintiff being correct about it, he put to you that the Plaintiff made a statement to her husband immediately afterwards and drew a sketch for her husband and Dr. O'Hanlon. Mr. Shand contends that is strong evidence of her bona fides. He says that she could not have attempted to draw something unless she had really seen the object and

handled it in order to include in that sketch the details which appear in it. That is a matter which you will have to consider along with all the rest of the facts in the case. On the other hand, the Defendant says that the drawing was inconsistent with reality even if allowance be made for the natural state of the Plaintiff; for instance, the presence of sponge in the tube, the presence of wire protruding from it and the question of a slit in the tube are matters which the Defendant claims are entirely inconsistent with the realities of the case even if you make due allowance for the Plaintiff's inaccuracy.

Then again it is stated by the Defendant that it was consistent with a rather disturbed state of the Plaintiff's mind, a symptom in fact of this hysterical tetany, and that that might explain the distortion in her mind if she had persuaded herself in her own mind that such a thing was a possible view of the situation and that perhaps she saw something like that in her excreta.

Reference was made in the evidence to the fact that she had been a long time in hospital and a long time in association with doctors and nurses, and the question for you is whether or not that description by her is of a real happening or merely something which has taken on reality in the mind of the Plaintiff.

It was also stated by the Defendant that the Plaintiff had given on other occasions an inaccurate description of the position of the chain in the lavatory and of the manner in which she pulled it when she says she lost what she picked out of her excreta.

You have heard all these things discussed and I do not propose to do anything more than mention them. I have not purported to examine the evidence exhaustively; Counsel have taken you through it and you have heard their arguments and the comments they have made about the various witnesses called. As I said before you are the sole judges of the facts and the inferences to be drawn from them; you have seen the various witnesses and you have observed their demeanour in the witness box, and the credibility and the weight you attach to their evidence is a matter entirely for you.

I now pass to a consideration of the medical evidence.

(Short adjournment.)

Gentlemen, before the adjournment I had reached the medical evidence, and I will now deal with a consideration of the medical evidence.

A great deal of the evidence in this case and of the addresses of counsel was devoted to the medical aspect. For that reason I do not propose to review the subject in any detail. It will be sufficient, I think, to indicate to you merely the tenor of the views expressed for the purpose of reminding you in the most general way of the nature and effect of the evidence.

It is offered to you in the first instance by the Plaintiff to show that the tube could move from where it had been inserted through the fascial planes to where it was stated to have been erupted out of the tonsil. In addition, you are invited to infer from the medical evidence that the Plaintiff's illness for the 18 months was attributable only to the presence in her throat of this tube.

On the other hand, the Defendant asks you to say from the medical evidence in the first place, that it was impossible for the object said by the Plaintiff to have been left in her throat to have moved out of the

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thyroid capsule and to have erupted out of her tonsil, and further, that her illness was entirely unconnected with the presence of the tube, and in any event, it can be explained by other causes.

The Plaintiff says, in effect, that during this period the object said to have been left in the wound moved from the part of the neck where it was so left and proceeded—I am not attempting to describe the matter in anything but the simplest lay terms—into the left tonsil where it is said to have been erupted on the 2nd October, 1939. It is further urged by the Plaintiff as one of the probabilities that portion of the tube was left by the Defendant, as she charges, because for a period of 18 months following the removal until the object described erupted into her gullet she suffered from tetany.

Now, one of the Plaintiff's medical witnesses, Professor Welsh, definitely protested against the object, Exhibit " P," travelling inside her throat or ever being used in a thyrodectomy. However, when asked to make an assumption on the basis of an object described in the terms of the particulars furnished by the Plaintiff in Exhibit " O," seemingly as interpreted by Professor Welsh, he was of opinion that it could move out of the cavity in a bath of pus, and by passing through what he described to you as the fascial planes, move, over a period of time, to the left tonsil from which it is said to have been erupted.

As against that you have the opinion of Professor Shellshear, Research Professor of Anatomy at the Sydney University, that there are no fascial planes or connections of fascial planes running from the thyroid area to the tonsillar area, whilst the evidence of Dr. Poate and Dr. S. A. Smith is to the same effect.

Incidentally as to Professor Shellshear's evidence and Mr. Shand's reference to the X-ray films produced by the former, I feel I should remind you of what this witness said regarding the accuracy of these X-ray films. He was asked :

> " Q. What would you say as to the correctness or otherwise of what is represented on that plate ?—A. It is within the range of human accuracy.
>
> " His HONOR : Do you mean by that that it is as accurate as you can make it ?—A. Yes. I do not contend that any picture or anything we can do is comparable with the human body for knowledge. These are merely accessory to teaching, but the body is the only thing from which to learn anatomy, not these pictures."

That is to say, the witness regarded these films as mere diagrammatic pictures.

Professor Welsh agreed, however, that in the event of such an eruption there would be visible for some time in that tonsil a scar or mark at the site of the eruption. As to this latter matter, you will remember the medical evidence on each side as to the various examinations conducted for the purpose of discovering a hole or scar in the tonsil, and the conflict between the witnesses as to the indications present.

You have on the one hand Professor Welsh and Dr. Thompson, and on the other the Defendant, Dr. Marsh, Dr. Ritchie, Dr. O'Hanlon, Dr. Steele, Dr. Edye and Dr. Poate, in sharp contrast, both as to the signs observed in that area and the indications manifested.

Again, as far as the lay witnesses are concerned, you have the evidence of the Plaintiff and her husband on the one hand, and in conflict with that

the evidence of Mrs. Fisher, one of the Plaintiff's own witnesses on the other hand, who told you that she looked for but did not see any hole.

Now, on this particular phase, much reliance is placed by the Defendant on a large volume of medical evidence that the presence in the Plaintiff's neck and its subsequent passage to the left tonsil of an object as described by the Plaintiff would have been fraught with grave danger even to her life and would unquestionably have necessitated surgical treatment.

According to Dr. Poate, the presence of infection or abscesses in the neck calls for surgical interference more promptly than if present in any other part of the body. According to the Defendant, nothing of the kind occurred or, indeed, was called for.

You will remember also that Dr. Edwards, who has specialised for some 35 years in radiology, gave evidence that only a needle would move whilst embedded in tissue in the body, and that an object such as Exhibit " P " could not move within the tissues of the body, and even if it became septic it would lie at the bottom of the septic cavity. He further told you that the X-ray film taken by Dr. O'Hanlon on the 7th October 1939, as interpreted by him, showed no abnormality or swelling in the Plaintiff's neck.

No witness was called by the Plaintiff to interpret this X-ray film or to contradict this evidence given by Dr. Edwards.

However, when they were asked to pass what they regarded as these impassable barriers and to assume that such an object could have remained in her neck, some were of opinion that it could move upwards in a bath of pus, causing inflammation on its track, although it is accepted by all the medical witnesses for the Defendant as an elementary medical fact that pus will follow the line of least resistance, that is, out through the sinus.

However, the bulk of the evidence appears to have been that it is physically, surgically and anatomically impossible for such an object said by the Plaintiff to have been left in her throat to have moved upwards and laterally across the neck, and finally to have erupted through the tonsil. They point out, for various reasons which they gave, that an upward passage of such an object was inconceivable, and even were such a passage physically possible it would necessarily have resulted in the death of the Plaintiff.

They say, however, that fundamentally a septic object such as this could not move out of the thyroid capsule. If it did so it would only be by the impetus of great inflammation which would be signified by unusual swelling of the neck, with the result that the wound would never heal. Moreover, it is stated that even if such an object could move out of the thyroid capsule it could do so only by destroying tissue and that the destroyed tissue would be replaced merely by scar or fibrous tissue. This fibrous tissue is non-elastic, and in the result the Plaintiff would have been left with a definitely restricted movement for all time in that portion of the neck. Further, on this assumption, the object when moving would be enclosed in a walled abscessed cavity of a thickness and toughness described by Dr. Poate as at least that of raw hide or of some very thick form of hide.

Counsel for the Defendant here again relies on the X-ray picture taken by Dr. O'Hanlon on the 7th October 1939, as later interpreted by Dr. Edwards, and Dr. Edwards tells you that this X-ray revealed neither swelling in the neck nor anything abnormal about the neck at all such as

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stiffness, and as I have already said, this evidence of Dr. Edwards has not been contradicted.

Further, according to the Defendant, the eruption of an object of the dimensions and contents of that to which the Plaintiff deposes would have been followed by her swallowing a very large quantity of pus, and the colour of the pus as discovered in her fæces would not have been green or greenish yellow but definitely brown.

On this matter counsel for the Defendant also relies on the blood count taken by Dr. Tebbutt which he suggests, taken in conjunction with the other evidence mentioned, is quite inconsistent with the Plaintiff's account of the alleged eruption and the swallowing of great quantities of pus.

Finally, on this aspect of the medical evidence, Professor Inglis expressed the following conclusions —

(1) That the Plaintiff's being alive at all is inconsistent with the presence in the neck over the period mentioned of the object said to have been left there

(2) That if the object had been left in the neck the sinus would never have healed ;

(3) That it is impossible for such an object to have moved in the way suggested by the Plaintiff's witnesses ; and

(4) That from his observation of the Plaintiff's appearance and the movements of her head during a former trial he is of the opinion that the freedom of movement displayed by her was inconsistent with the presence of fibrous tissue in the subject area, which would necessarily have remained had her allegation been correct.

As to the alleged tetany from which the Plaintiff claims she suffered during the intervening period, medical witnesses differ but it is said there is what is known as post-operative tetany due to an inflammation following such an operation as this. This condition can arise, so witnesses say, from operations conducted in the most skilful and careful manner, and further, no negligence is charged by the Plaintiff in respect of the operation itself.

However, whilst some witnesses maintain that some of the Plaintiff's symptoms after the operation were consistent with tetany, others are clearly of opinion that her real malady for these 19 months or the greater portion of that period was hysterical tetany.

If you accept the former view, but think that the presence of this foreign body as described by the Plaintiff continued and perpetuated the tetany, that would support the Plaintiff's case and also would affect your view as to the damages to which the Plaintiff would be entitled, assuming of course that you find in her favour.

Her case is that it is more probable that the Defendant was guilty of the negligence charged because she suffered to a greater extent and for a longer period following the operation than would otherwise have been the case had Dr. Bell not broken and left in her throat portion of the tube and allowed that portion to remain there

In the opinion of Professor Welsh and Dr. Thompson, the effect would have been to continue and to perpetuate the infection which followed the operation itself. And here also the Plaintiff's case is that the illness from which she suffered persisted until the object had finally erupted from her tonsil and was discharged from her fæces three days later. She says that the illness was consistent only with that foreign body described in her

particulars and in her evidence as to Exhibit " P " having been left in her throat, and renders her story of the occurrence at the removal the more probable of the two.

She refers in this connection on the subject of tetany to the evidence as to what are said to be symptoms of that condition, namely, pins and needles and spasms. She refers also to the treatment and drugs given as well as the intravenous and other injections, with a view to making up the normal supply of calcium to the blood rendered deficient by the partial destruction or impairment of the parathyroid glands.

Well, you heard her evidence and the account of her sufferings, also the evidence called on both sides as well as the medical opinion concerning her illness, and it is for you to say whether or not she has satisfied you on this particular feature.

I shall not attempt to deal with this class of evidence. It has been canvassed extensively by both counsel. I may here mention, however, two more or less undisputed matters which may help you. The first is that between October 1938 and October 1939, Dr. O'Hanlon was called to the Plaintiff's home on two occasions only, once in February 1939, and again on the 19th September 1939. Further, as to the illness itself, it is generally accepted by both sides that one marked manifestation of the presence in the Plaintiff's neck of a foreign body, such as that described, would be gross swelling in her neck, and you heard various witnesses relate their views as to her condition in this respect ; but her husband, who you may think would have the best opportunity of observing of the lay witnesses, conceded that during the period from October 1938 to October 1939, the swelling was such that people who knew his wife might notice it, but those who did not might not notice it, though he added that at times the swelling was more pronounced.

The case of the Defendant as to this subject is that whilst there may have been some tetany after the operation, the medical witnesses refer to it as post-operative tetany which could have been due to unavoidable infection, that that tetany ceased by or about June 1938. After this the condition of the Plaintiff was one of hysterical tetany, or hysteria.

By this time they claim that the Plaintiff was free of all the effects of the operation and that the removal of the tube in no sense contributed to the continuance of the tetany even up to June. They also point, amongst other matters, to the records of St. Luke's Hospital as to temperature and pulse rates of the Plaintiff following the operation, but they give a different interpretation to this material from that of the Plaintiff's witnesses.

They say that the signs were not those of a severe infection, but of a not unusual moderate infection culminating on the 20th March 1938, five days after the operation, in a maximum temperature of 103.8 degrees, whereas Dr. Bell and Dr. Poate told you in some cases of thyroidectomy temperatures rise to as much as 105 and even 106 degrees.

Thereafter they say that the Plaintiff's condition improved to such an extent that she was able to return to Quirindi by motor car. About a fortnight later she was admitted to Quirindi Hospital suffering from tetany, but they say that the immediate cause of the trouble was that the infection following the operation lit up.

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They argue that this condition was not necessarily the result of a foreign body having been left in the neck as alleged, for as one witness expressed it, tetany is a complication which may be brought about by a very great number of different conditions. They thus claim that the contention on behalf of the Plaintiff that her illness must have been due to the presence of the foreign body, is what Mr. Cassidy called in his address a " non sequitur," that is to say, that the illness should not, of necessity, be attributed to the presence of the object. They claim that her condition could have been due to sources quite independent of the presence of the remnant of the drainage tube.

They attribute the continuance of the Plaintiff's illness with its accompanying spasms until June to the presence in the neck of undissolved knots of catgut—remnants of the sutures or stitches used during the operation. These they point out having become infected failed to be absorbed. They set up inflammation and thus tetany which continued until the knots passed out of the body through the sinus. These conditions, they say, are established by both the husband's and Dr. O'Hanlon's letters to Dr. Bell, both of which referred to the removal or discharge of knots or sutural material.

Quite independently of these considerations the Defendant contends that at all events from June 1938, the sufferings from which the Plaintiff complains, particularly of October 2nd and 5th 1939, are not real at all but are the result of her imagination. In other words they say that she was for a period after about June 1938, the victim of hysterical tetany to which they claim that the Plaintiff was predisposed, as is common among patients suffering from the disease of thyrotoxicosis, or, as one doctor put it, hysteria is one of the complications of thyroidectomy.

Here you may recall the evidence of Dr. Flynn as to her condition in 1937 when she was sent to him by Dr. O'Hanlon, and also as to her condition in 1938, as described by Dr. O'Hanlon in his letter to Dr. Ritchie of the 12th February 1938, Exhibit " 14."

Medical witnesses point out that this trouble, hysterical tetany, is particularly difficult to diagnose correctly by reason of the extraordinary cleverness of the victim in simulating, all unconsciously, imaginary ailments and experiences, and on account of its close resemblance in certain symptoms to tetany. Now, great stress has, not unnaturally, been laid on this phase of the case by the Defendant as supplying a rational explanation for what are regarded as unwarranted charges against a surgeon of repute in the medical profession. His counsel has pointed to various pieces of evidence which it is claimed tend to show from the history of the Plaintiff that even before this operation, and quite independently of it, she manifested symptoms of hysteria, leading her to imagine events and make charges against people which it is said have no foundation in fact.

There is, for example, the charge she made against Dr. Flynn of having in 1937 burnt her throat during the X-ray treatment which he then carried out. This charge was made by her for the first time in this Court during this trial. According to Dr. Flynn the charge was entirely without foundation and according to Dr. O'Hanlon no complaint of the kind was ever made to him.

Since the operation, however, there is further evidence of charges made by the Plaintiff which it is said have no foundation in fact. For example, there is the complaint said to have been made to Dr. O'Hanlon

by the Plaintiff, in 1941, that her husband had taken advantage of her whilst in a drugged sleep, as a result of which she feared pregnancy.

Then, at the same time, there is the incident about the food being tampered with, the Plaintiff alleging, at least during a former trial, that her food had been interfered with. Of course, you heard the answers by the Plaintiff to Mr. Cassidy's questions in cross-examination, how she now alleges that her complaint was that something was merely wrong with the milk, and you may ask yourselves whether her apparent change of attitude from one trial to another on this and other matters enables you to say whether her story is genuine or not.

Mr. SHAND : Your Honor, that was said before. I will not interrupt now but I will have something to say about that later.

His HONOR : There are other instances which emerged in the course of the evidence. These according to the medical witnesses for the Defendant are suggestive symptoms of the kind of mental instability or hysterical tetany which lead the unfortunate patient to imagine quite unfounded acts of persecution. However, in the way in which the case has been presented on behalf of the Defendant, on the medical aspect, it is suggested that you may not find it necessary to consider this question of hysteria at all.

Counsel for the Defendant says that from every aspect the Plaintiff's story as to her condition after June 1938, and as to the eruption through the tonsil as claimed in October 1939, is incredible. He says that on the evidence she was not suffering from the negligence charged because it is impossible from every conceivable angle that such an object as a tube as described by the Plaintiff could have remained in her neck without drastic surgical treatment being required for its removal to save her life.

He says further that it was equally impossible for such object to have moved along the path and for the distance necessary to bring it to a point whence it could erupt through the tonsil.

He says, moreover, on the oral evidence and on the physical conditions which are found after the 5th October 1939, that there is definite proof that no such object was erupted. Accordingly, if the Plaintiff has not satisfied you in regard to such matters, then you need not trouble about the question of hysteria, but if you find it necessary to go further, counsel for the Defendant says that in any event I offer you an explanation for the Plaintiff's condition during the whole of the latter period, and what is even more important this is the explanation of the story of the eruption and the swallowing of the object and the subsequent finding of it by the Plaintiff only to lose it almost immediately in the way described, a circumstance which the counsel for the Defendant claims that no reasonable men would accept without corroboration.

Mr. Cassidy asks you to find that the whole story exists only in a disturbed mind. For the reasons mentioned he says that, although the Plaintiff may really believe that these events did happen to her, they result merely from her imagination.

In this connection you may remember the passage from " Osler's Principles and Practice of Medicine," by Christian, 12th Edition, a well-

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known medical text-book, which was read in the course of the evidence, in which it was stated :—

> " The practitioner has to bear in mind constantly the strong tendency in hysterical patients to practise deception. The very elect have been fooled by these patients ; their abilities in this regard are to be respected."

You have heard, of course, all the medical witnesses in regard to this subject, and it is for you to say how far the contention of the Defendant is borne out by the evidence. Portion of the evidence of Dr. S. A. Smith you may regard as apposite to the condition of the Plaintiff. Of course, it is a matter entirely for you, but I shall read to you the passage I have in mind. He says :—

> " Beyond exaggeration and beyond perpetuation we know the type of hysteric who goes on to fabrication, that is to say, who not only exaggerates, makes a big story of a very slight foundation, but who will even start to invent curious happenings, not consciously but subconsciously, who will start to invent curious happenings and fantastic stories . . . In this type in whom this arises such patients are extraordinarily vivid in the accounts they give of these happenings. They are most convincing. The evidence upon which they base their story seems frequently to be beyond question. So much so that they will induce a number of quite responsible, intelligent people to believe absolutely in what they say. This type of hysterical person has always the limelight and loves the centre of the stage. So long as he or she—and it is nearly always she—can get it, it is difficult to find any disturbance of intelligence in these patients. You can only detect what is going on by their peculiarities in behaviour. So it is that apparently normal, well, self-contained people will tell you the most astonishing stories, and will bring accusations against those who are, in many instances, the last whom they could accuse . . . Patients with this form of hysteria will go beyond exaggeration and perpetuation. It may start there, but they will go beyond it to the stage of fabrication to the relation subconsciously of extraordinary incidents, to the levelling of serious charges and to a state which is frequently referred to as hysterical sensationalism.
>
> " These patients do not give those indications that most of us think of when we talk about a woman who gets hysterics. It is not that form of hysteria in which people shout and cry and rather make a show of themselves. This type of patient prefers a very-much-more-satisfactory-to-them form of show, in that they get extreme pleasure out of occupying the centre of the stage, or being the observed of all beholders, and of being the most important person in their own immediate circle. And it is this type of hysteria which is associated with the hysterical sensationalism, the fabrication of stories and the levelling of charges . . . During the course of this condition all sorts of physical phenomena arise. Spasms are a very common feature of hysteria, spasms which, as I pointed out this morning, differ in certain important respects from the spasms of tetany, and it is a well-known fact that an individual who has started upon a course of confabulation and exaggeration will reach a stage at which it has to be ended, and usually the ending comes in a very dramatic spasm."

Witnesses also point to a number of external symptoms occurring in the case of the Plaintiff by which they say the complaint may be recognised. They mention several, two of which occur to me at the moment, namely, the absence of all spasms after the dramatic incidents of the 2nd and the 5th October and the relief afforded by massage. These symptoms they say are not found in true tetany. That is all I propose to say about the medical evidence but before I deal with the question of damages I should say something further on this matter of corroboration.

The Plaintiff is without doubt maintaining an action of considerable importance, and is insisting upon an allegation of negligence of considerable gravity. Her allegations for the most part are disputed by the Defendant and as to most of the important features of the case there is a close contest. Naturally enough some aspects of the Plaintiff's case are either not in dispute at all or only in dispute on questions of degree, such as her illness and like matters. When I say the main features are in dispute and matters of close contest, I refer to such questions as the alleged breaking of the tube, the alleged finding of it by the Plaintiff and the loss of it by her at that time, and, indeed, the existence of a broken piece of the tube at all.

Where a person intends to make an allegation of negligence on the happenings of certain events it is perhaps not unnatural for the ordinary man who is called upon to try such a case to inquire from the layman's point of view: "Have you a witness?" It is therefore not surprising that when the Plaintiff in this case, Mrs. Hocking, has in fact embarked upon this litigation and brought the case to court the Defendant says there is no corroboration in the shape of any independent eye-witness as to any one of these highly disputed facts. As I have already said, the law does not require corroboration; a jury may accept the Plaintiff's evidence alone. However, counsel suggests that it must appeal to men of common sense that a defendant so situated should ask them to scrutinise very carefully indeed the allegations made in a court of law on a topic of grave importance which allegations are unaccompanied by the evidence of any eye-witness except that of the Plaintiff. The events she purports to describe took place a great while ago, even allowing for the time this litigation has been on foot. Further, the Plaintiff at the time of the alleged breaking of the tube had recently undergone a serious and major operation. She was from then on at most of the material points of time ill and the Defendant suggests probably disturbed in mind as well as in body. She herself, of course, claims to have been indeed very seriously ill. Further, the Plaintiff is naturally interested in putting forward the case with the utmost emphasis for herself.

With these challenges on the part of the Defendant to the accuracy of the Plaintiff's story his counsel exhorts you not to accept her testimony where the facts are denied by his client, and as I have said seriously in contest in a case in which her evidence has not been corroborated by the evidence of any other eye-witness of the main events.

However, if you come to the conclusion that the Plaintiff on the whole of the evidence and on a calm and a dispassionate and reasonable view of it, has weighed down the scales in her favour and thus discharged the onus of proof—as she must do—then she is entitled to have you consider the question of damages on her behalf.

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If a person is injured through another's negligence then he or she is entitled to such damages as you think reasonable and proper in all the circumstances. The damages are a matter for you and there is no rule of law in which I can assist you in your decision.

The Plaintiff has not been put to any financial loss which can be recovered in this action, so you may put that completely out of your consideration.

She is entitled, however, to have you take into account the amount of pain and suffering she underwent if it be the fact that Dr. Bell's action aggravated the ordinary sufferings of Mrs. Hocking to a material degree. I say "aggravated" because, naturally, if she undergoes an operation and the wound unfortunately becomes infected there would be a certain amount of discomfort and pain and suffering in the very nature of it, but if you think that Dr. Bell by his negligence added to that state of suffering, pain and discomfort, then she is entitled to such sum as you may think reasonable in that respect.

She is also entitled to compensation for the loss of the enjoyment of those amenities of life which you find that she may have suffered. She says that as a result of this portion of the tube having been left behind she was confined to her home for a period much longer than would have been the case had she run the normal ordinary period of convalescence as a result of the operation.

The extent to which she was distressed as a result of this tube having been left, how far she was rendered inactive and unable to pursue her ordinary household duties, unable to enjoy the amenities of life generally, and the enjoyment of life to which a woman of her age and station in life would be normally entitled are matters for you to determine. As I have said there is no rule of law or any assistance I can give you on those matters, except, of course, to say that if you come to the conclusion that the Plaintiff is entitled to succeed you are not to be niggardly at her expense if she has suffered as a result nor are you to be generous with someone else's money. Beyond that there is no rule of law by which I can assist you on this aspect of the case and as counsel has said it is entirely in your hands to do what is right between the parties in that respect and come to your conclusion accordingly.

There is just one further matter before I conclude, and it is this: in the usual case you are asked when you have concluded your deliberations and agreed upon your verdict to say whether you find for the Plaintiff or for the Defendant, and if you find for the Plaintiff to state the amount of damages you award.

However, in some cases Judges think it advisable in the interests of justice and of the parties to ask a jury to answer a specific question or questions.

In this case I propose to ask you, gentlemen, one question and one question only. I have had it typed and I hand a copy to each of you— (handed to jury.) It reads as follows:—

> "Did the Defendant leave in the site of the operation the object substantially as described, that is, a piece of rubber tube about 2 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."

You will see that this question is based on the particulars supplied by the Plaintiff to the Defendant, omitting those matters which could not apply to the tube when put in but only when evacuated.

I should tell you, however, gentlemen, that you cannot be compelled to answer this question, but I would ask you to do so likewise in the interests of justice and of the parties.

Gentlemen, will you now retire and consider your verdict. All the exhibits will be sent out to you and, as promised, I have here and they will be taken out to you, the evidence of the Plaintiff in the first three cases and the transcript in this case. The evidence of the Plaintiff in the three previous cases has been put in separate folders, and the evidence in this case has been put in convenient form and numbered. Will you please consider your verdict.

Mr. SHAND : I submit that Your Honor has put the Defendant's case to the jury very fully, but——

His HONOR : I will hear any submissions after the jury have retired.

Mr. SHAND : Your Honor has not put the Plaintiff's case at all. The Plaintiff has a right to have her case put.

His HONOR : That is a most improper remark for you to make in the hearing of the jury. I am satisfied that what I put to the jury is correct.

(Jury retired at 12.15 p.m.)

Mr. SHAND : I ask that my objection to Your Honor's summing up take place in front of the jury as the Chief Justice has indicated to be the practice of this Court. It is the practice of the Court.

His HONOR : I do not propose to follow that practice.

Mr. SHAND : I ask Your Honor not to leave this question to the jury because Your Honor is leaving a question to the jury describing the tube as being " left in," whereas the Plaintiff describes it when it comes out.

I repeat my submission that Your Honor has not put the Plaintiff's case at all. Your Honor has put every argument, every substantial argument which has been advanced on behalf of the Defendant with almost no exception and none of the Plaintiff's submissions. Your Honor read out a long extract of Dr. Smith's evidence, and that is the type of thing which illustrates what I am putting. Your Honor has put and limited this to the Plaintiff ; the jury should remember the Plaintiff was a person who was interested in putting forward her case much in favour of herself. No such consideration applied to the Defendant. One would think in these Courts it applied equally to either party. They are both interested. Your Honor has limited it to the Plaintiff.

Your Honor referred to the question of the British Medical Association being irrelevant. I wish to refer to the cross-examination. Your Honor admitted that evidence as being relevant. It obviously was relevant because my friend was emphasising the position that he was calling a number of experts of note and the obvious inference would be, unless my friend would say he was not going to make the suggestion, that we only had a limited amount of medical evidence. Your Honor referred to my

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cross-examination as being entirely irrelevant as to whether there was loyalty of nurses to doctors. Your Honor admitted those questions as being relevant. They were not even objected to by my friend. They were obviously admissible and not irrelevant because it turned on the question of bias. We had a good illustration of it when Matron Fall was prepared to swear that she witnessed the state of the Plaintiff's throat when she was not there at all.

Your Honor said no one can assist you as to who actually was the sister who removed the tube.

His HONOR : Who was present.

Mr. SHAND : No one can assist you as to who actually was the sister who removed the tube, were the words. It was a direct statement by Your Honor. Sister McCallum has sworn that she remembers an incident with regard to the removal of the tube by Dr. Bell. Your Honor is virtually directing the jury to put aside that evidence, some of the most vital evidence in the case.

It was put in respect of the incident of the removal of the tube that Defendant would not have allowed Plaintiff to force her head back. There is no evidence of Plaintiff that the Defendant forced her head back, that is my submission.

Your Honor put it that it was common ground that the Plaintiff was very ill when the tube was taken out and, therefore, possible or probable that she would not be in a position to observe. The position is one of great contention instead of being common ground. It is true, Plaintiff's case is she was very ill. The Defendant's case is not that.

Your Honor put it that at the first trial Mr. Hocking had given evidence that the tube was intentionally discarded. Mr. Hocking's evidence given at the first trial appears on page 215 and is the reverse of that.

Your Honor put it to the jury more than once that there was a wire projection from the tube. The evidence and the particulars refer to that projection as being like wire.

Your Honor put it to the jury and the matter is not without importance that Dr. O'Hanlon having had the view that the passage of this tube was a possibility, had changed it because he had come across some case of a piece of liver. The sworn evidence of Dr. O'Hanlon was first of all that he had changed his view because of his reading certain authorities and then that he had changed his view because directly he rang Dr. Bell he learned that Dr. Bell had removed the tube. My friend well knows that the incident about this liver penetrating the gullet had not in fact taken place until after the first trial in this case.

Your Honor put it to the jury that there was a conflict between the Plaintiff and Mrs. Fisher as to whether there was a hole in the tonsil, because Mrs. Fisher looked and did not see a hole or could not see a hole. The evidence of Mrs. Fisher is that owing to the swelling it was difficult to have a view.

(Mr. Shand refers to Mrs. Fisher's evidence at page 226 commencing : " And you could see the back wall of her throat.")

A view of the back of the tongue would not give a view of the whole of the tonsil.

Your Honor pointed out evidence of Dr. Edwards that only a needle or an object like a needle could move in the body. The evidence of Dr. Edwards himself at page 779 refers to the fact that suppuration or pus can track in the body. The evidence of every other doctor in the case is in agreement that if you get suppuration a foreign body can move in and with the suppuration.

Your Honor put it to the jury with regard to the Plaintiff's condition that some of the Defendant's doctors were of opinion that Plaintiff's original condition was due to tetany but that others were of opinion that Plaintiff's condition over those nineteen months was not due to tetany. There is no evidence that others held that belief. The only one who swore he held that belief was Dr. Ritchie.

Your Honor put it to the jury that between October 1938 and October 1939, Dr. O'Hanlon only called twice as reflecting on the credibility of Plaintiff as to her condition then. Your Honor omitted to put to the jury the admitted fact by Dr. O'Hanlon that he had said towards the end of 1938, and I think it was October, it was no use calling him in.

Mr. CASSIDY : That was spasms only.

Mr. SHAND : It is absolutely misleading to the jury. Your Honor put to the jury comment as to there being no independent eye-witness to the happenings. Without referring the jury to the fact that the only independent witnesses there could be to the extraction of the tube were the doctor, the Defendant and the nurse who was present, whose evidence Your Honor has practically told the jury to disregard, no one else could have been present. Your Honor put it as a reason why the jury should be very careful in coming to a conclusion in favour of the Plaintiff.

I think I have already mentioned before that Your Honor put to the jury that she had not before mentioned that her milk had been tampered with.

Those, together with my substantial submission that your Honor did not put the Plaintiff's case at all, and every litigant has a right to have his or her case put, are my submissions.

His HONOR : Your submissions will be noted.
Do you wish to say anything, Mr. Cassidy ?

Mr. CASSIDY : No, but I want a couple of directions in law, and some of them arise out of the inflammatory address made by my friend, that on the evidence in this case, uncontradicted evidence, and on the admissions made by Dr. Thompson and Professor Welsh as to their refusing to accept that such a tube as this would have been used, I ask Your Honor to direct a verdict for the Defendant.

His HONOR : The tube is Exhibit " P."

Mr. CASSIDY : Yes, and on the admissions made by both those witnesses, they would not accept the description of the patient, that Your Honour should direct the jury that evidence having been given that the jury cannot discard the Plaintiff's evidence as to the tube and substitute something else for it and that that being so you should direct a verdict for the Defendant.

The next matter is that as no negligence was charged, or as it is admitted there was no negligence in regard to the operation, that

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Mr. Shand's comments to the jury as to the swab and it not being a swab, as to it being not wire but gut, are comments which are calculated to lead to a mistrial of the action.

I submit, too, that comment as to the British Medical Association having abandoned Dr. O'Hanlon and seen fit no longer to be interested in him and " throwing him to the wolves " is a matter likely to mislead and prejudice a fair trial of the action.

That following Mr. Carson's admission contained in the evidence that the swab and the wires were not picked up in the body that Mr. Shand was not justified in making that statement to the jury.

Mr. SHAND : That was not the admission.

Mr. CASSIDY : The admission is in evidence, I don't want to get into any argument.

That the question of the stitching of the tube at the operation is a matter that cannot be put to the jury on the question of negligence.

There is one other matter and this is a direction in law purely, that Your Honour will direct the jury that a charge of a criminal nature having been made here that the Plaintiff, in order to succeed, must establish the Defendant's guilt beyond reasonable doubt.

His HONOR : Have you got authority for that proposition in a civil case ?

Mr. CASSIDY : Yes, Section 54 of the Crimes Act, Abrahams *v.* Catip, and the North Queensland Newspaper Company *v.* Green (1942, Queensland Weekly Reporter, page 19), which applied Narayanan Chettya *v.* The Official Assignee of the High Court of Rangoon (1941, 39 Allahabad Law Journal 683).

His HONOR : I think that is going a very long way afield for the proposition you put.

Mr. CASSIDY : I think Your Honor has directed the other way. Also King *v.* Crowe (1942, Queensland State Reports, 288).

Mr. SHAND : As regards that, I would like to have a look at the authority.

His HONOR : I don't wish to hear you on any of that, Mr. Shand, because I do not propose to make any further directions.

Mr. SHAND : With regard to the British Medical Association abandoning Dr. O'Hanlon I immediately corrected that, and if Your Honor thinks that would be likely to convey the slightest prejudice to the jury I ask Your Honor to recall the jury and direct them on that, and I would consent to Your Honor doing that.

His HONOR : I do not propose to make any further directions at the request of either party.

At 2 p.m. (In absence of jury) :

His HONOR : I understand you want to mention something ?

Mr. SHAND : Yes. It appears that, from the decision I sent in to Your Honor, the Privy Council has decided as my friend, Mr. Cassidy, said, and I know that Your Honour appreciates that it is necessary to obviate a

further hearing in this matter, and the only solution, might I suggest to Your Honor, would be to put to the jury the further question as to whether they find the case proved beyond reasonable doubt.

His HONOR : The only thing about that, Mr. Shand, is that I have to follow the High Court, and a Privy Council decision as old as 1855——

Mr. SHAND : I submit with respect, that this is not following it.

His HONOR : I don't understand this particular case at all.

Mr. SHAND : What I am submitting is that it cannot do any harm. If the Privy Council have decided that, of course it bears——

His HONOR : I am not too sure that they have.

Mr. SHAND : It appears that they have, and if so that binds the High Court.

His HONOR : Well, what about Brown *v.* Holloway ?

Mr. SHAND : That is a case of the House of Lords.

His HONOR : Do you remember Briginshaw ?

Mr. SHAND : This is later than Briginshaw. In the matter of Smith *v.* The Commonwealth Life the High Court made its own ruling there on the question—in the recent case of Smith *v.* The Commonwealth Life, the High Court had already given its decision as to the fact that the Plaintiff had to establish innocence in a claim for malicious prosecution, and a Privy Council decision was discovered that went against the High Court, and they had to overrule their own decision.

His HONOR : There is another decision later than Briginshaw.

Mr. SHAND : I have that, Your Honor, and I submit that it would not do any harm to ask the question. If it is necessary to ask it and if the Privy Council has decided that, we would be in the position of a new trial being granted against us. It would be unavoidable, I submit. The High Court went this far because they said at page 711——

His HONOR : What I said in this case is the ordinary burden of proof in a civil case. Take the ordinary motor car negligence case. Well, has the Judge then to direct the jury because the Plaintiff's leg was broken and therefore an offence might have been committed under Section 54 ?

Mr. SHAND : I quite follow that reasoning, but even in this case the High Court went further. They said this in their joint judgment at page 711—(read). Your Honor did not direct that. I agree with what Your Honor said.

His HONOR : Here a crime is not in issue. What is in issue here is whether it was negligence.

Mr. SHAND : It was not in issue here, Your Honor sees the position —it cannot do any harm to leave a question to the jury.

His HONOR : They finish up at page 714 : " In a civil case . . , according to the nature—— "

Mr. SHAND : Your Honor has not even directed that. Your Honor sees the position, that it cannot do any harm, and it would appear from

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those Queensland cases that the Privy Council has decided that in civil cases you must have proof beyond reasonable doubt, and if Your Honor puts that question it cannot do any harm.

His HONOR : What question are you asking me to put ?

Mr. SHAND : This question—Your Honor has already directed on the ordinary civil lines. I submit that a further question should be put. Do you find—Your Honor will draw attention to Your Honor's direction already given——

His HONOR : " Do you find beyond reasonable doubt——"

Mr. SHAND : " That the Plaintiff has established her case."

His HONOR : " That the Plaintiff has established that the Defendant broke the drainage tube and left it inside."

Mr. SHAND : Yes. Might I suggest this as something a little shorter. I have objected to this question (indicating document), and I submit that Your Honor could simply say, drawing attention to Your Honor's previous direction—Your Honor could ask the further question : " Does the jury find that the Plaintiff has established that question beyond reasonable doubt ? "

His HONOR : What do you say, Mr. Cassidy ?

Mr. CASSIDY : I submit that my friend cannot adopt this attitude now. In my case when I put to the jury " comfortable satisfaction," Your Honor will remember that Mr. Shand interrupted me, and then Your Honor said that you were not prepared to direct the jury. Your Honor put it to me specifically that you would not direct them in that way.

His HONOR : The trouble is you asked me to do it, and I think you were wrong, as I said so at the time. I had not seen this decision in 1939 Allahabad.

Mr. CASSIDY : I have not had the opportunity of addressing on that aspect of the case.

Mr. SHAND : You brought it up ; you asked for the direction.

Mr. CASSIDY : And His Honor refused to direct the jury.

His HONOR : They seemed to me to be so demonstrably wrong that I decided not to direct the jury on the matter, or it was incorrectly reported.

Mr. SHAND : Well, may I take it that Mr. Cassidy does not ask for that direction ?

Mr. CASSIDY : I do ask for that direction.

His HONOR : That is what is called in equity approbating and reprobating.

Mr. CASSIDY : Your Honor held at an early stage that I was entitled to put it in a limited way, and I had to form my address in accordance with that. It would have made a very big difference if I knew there was a second question going to be left.

His HONOR : Anyhow, I don't propose to do it.

Mr. SHAND : May I plead with Your Honor in this ?

His HONOR : You can plead as much as you like. When I make up my mind I usually make up my mind.

Mr. SHAND : Will Your Honor allow me to put it ?

His HONOR : Yes ; I will allow you to put anything.

Mr. SHAND : Even on the High Court decision Your Honor's decision is not correct, I submit. My friend at the end of this trial, not before—he did not ask for it before ; all he said was a " comfortable satisfaction " at the end of it. He asked for that direction.

His HONOR : And I refused it.

Mr. SHAND : Now I am showing Your Honor the High Court decision and I consent to that direction being given.

His HONOR : And that will be noted and I will give special direction that your consent is now noted—that you consent to that direction being given.

Mr. SHAND : And what happens ?

His HONOR : Is a Judge bound to give a direction which he thinks is wrong in law just because counsel consents ?

Mr. SHAND : Well, Your Honor, what harm can there be in putting a question to the jury ?

Mr. CASSIDY : Your Honor sees the very grave danger there might be.

Mr. SHAND : My friend asked for this right at the heel of the hunt.

His HONOR : Yes, and I pointed out that he is not allowed to approbate and reprobate, and that will be on the record too I suppose.

Mr. SHAND : Yes, and I am consenting to it. I submit that the only prejudice could be to me. I submit that Your Honor should ask this question of the jury. The whole thing is directed towards reaching finality. If it came about that the matter went to the Full Court, well, that tribunal might say : " The jury having been directed and they have not answered and we do not know whether they have decided or not that it is proved beyond reasonable doubt, and we think it should be so proved." One question put to the jury would resolve all that, and it could not do any harm. Otherwise the case may come back for another six weeks' of new trial.

His HONOR : It is actually seven weeks since this trial started.

Mr. SHAND : Yes. The Plaintiff is not a wealthy person and it might mean that Your Honor's omission to put that question—and it cannot do any harm—would block the Plaintiff out from bringing a case. It won't as long as I am here, but it might in other respects. I do ask Your Honor to put that question.

His HONOR : You know quite well that it is the procedure in our Courts that no person is precluded from bringing a case however humble, and it is a very excellent thing that there are members of both branches of

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the profession, as there are members of the medical profession, who do give their services for nothing.

Mr. SHAND : I know that procedure, Your Honor, and I am sorry to say that it is not very satisfactory. But I do put to Your Honor that it cannot do any harm to ask that question, and the Full Court would have the full facts before them. Otherwise we may be just tricked out of a verdict. That is what may happen in the absence of that one question, and is there one possible reason why it cannot be put ? It cannot prejudice anyone. I don't know why this question should not be put. Let me go through the history, and I will do it because I want to get it quite clearly. My friend for the first time at the close of this evidence has asked Your Honor to direct that the jury should be told that this case has to be proved beyond reasonable doubt.

His HONOR : At the close of my summing up ?

Mr. SHAND : Yes, at the close of Your Honor's summing up. My friend did not then argue the matter but referred to certain authorities.

His HONOR : He did argue the matter and he referred to two authorities, one of which I had considerable difficulty in getting down on my notes.

Mr. SHAND : Yes, I know that. The Queensland authorities adopt the principle that in civil cases where what is alleged may amount——

Mr. CASSIDY : I have just been told that this matter was mentioned in the Full Court.

Mr. SHAND : May amount to a crime, the Privy Council has decided that it must be beyond reasonable doubt. If the Privy Council has decided that, the High Court is bound. Now, that is the first matter. Then in Helton *v.* Allen that my friend did not refer Your Honor to——

His HONOR : I referred to Helton *v.* Allen. It does not matter who first found it.

Mr. SHAND : In Helton *v.* Allen the High Court has there laid down a rule which is different from Your Honor's summing up and which, if Your Honor does not put another question, Your Honor has put us in the position where we cannot win and where there must be a new trial. There is no get-away from that. If Your Honor does not put a further question Your Honor is making it impossible for the Plaintiff to succeed, and I know that your Honor would not do that. I have read the passage from Helton *v.* Allen. It is true it does not go so far that it goes beyond reasonable doubt, but you have to go beyond the mere balance of probabilities, as Your Honor has put, but if it is left as Your Honor has put it——

His HONOR : I said you have got to be satisfied on these things.

Mr. SHAND : No, with respect, Your Honor put it to the jury on the mere balance of probability, and Your Honor drew the attention of the jury to the metaphorical scales. On the Privy Council decision, of course, it is obvious that your Honor is making it possible that whatever the result of the jury's verdict, it is possible for the Defendant to go to the Full Court and say, " Give us a new trial," and he will get one. Now, the whole of

that can be obviated by one question to this jury, and I, in all justice, ask Your Honor to put that question. It cannot do any harm. Your Honor sees that no argument from my friend can have any effect. It would prejudice the Plaintiff rather than anyone else—that question. I will consent to any terms in order that we may get finality in this matter; in order that the Plaintiff may have some chance. My friend can address again on that subject if he wants to, and I will raise no objection. What Your Honor has put to the jury, I submit with respect, is wrong law on the High Court decision alone, and I submit that Your Honor will not let that rest, I am sure, because it is just a blind alley for the Plaintiff.

Your Honor will remember in Briginshaw's case that there the distinction—although proof beyond reasonable doubt was considered unnecessary—there the distinction was drawn between the summing up in the ordinary civil case and "comfortable satisfaction," and Your Honor has not directed the jury on "comfortable satisfaction," and, therefore, Your Honor has admittedly wrongly directed the jury. Now, I do ask Your Honor, could Your Honor give me a single reason why that question should not be put, because I would like to be able to meet it if there is a reason. I do ask Your Honor to leave that question to the jury. Is there any reason why it should not, because if there is I would like to have an opportunity of meeting it—as to why that question should be put. I first of all consent to Your Honor directing as my friend asks, and might I ask this, does my friend oppose Your Honor giving a direction to the jury now that this has to be proved beyond reasonable doubt. Now, that is a fair question. Do you, Mr. Cassidy, oppose His Honor now giving a direction to the jury that the case has to be proved beyond reasonable doubt?

Mr. CASSIDY: I am not going to deal with that for the moment. I just want to deal with this Privy Council case.

Mr. SHAND: I am asking my friend does he now ask that Your Honor should not give the direction that the Plaintiff's case must be proved beyond reasonable doubt.

His HONOR: Apparently Mr. Cassidy does not reply.

Mr. CASSIDY: What was that?

Mr. SHAND: But Your Honor can ask him to define his position.

Mr. CASSIDY: Mr. Shand attempts to take charge of this Court. I had both addresses taken down. Now, on this question, what I put was this: I had been speaking of "comfortable satisfaction," and Your Honor said: "I think it is only right . . . but I will leave it till Your Honor sums up."

Mr. SHAND: Yes, that is quite so, and my friend left it.

His HONOR: You asked Mr. Cassidy a question and Mr. Cassidy did not answer.

Mr. CASSIDY: I said that I asked for the direction.

His HONOR: Do you now ask for the direction?

Mr. CASSIDY: No. I asked for the direction at the conclusion of the summing up, and I still ask for the direction, but Your Honor does not understand that I receded from asking the direction?

His HONOR: I understood that you did.

In the Supreme Court of New South Wales.

No. 53. Summing up, 21st January 1944, *continued.*

Mr. CASSIDY : No ; I am opposing the question being put.

Mr. SHAND : Very well, Mr. Cassidy, that is clear.

Mr. CASSIDY : I intimated to Your Honor at an early stage what I proposed to do.

Mr. SHAND : I consent to that direction being given and I ask also that it should be given.

His HONOR : Well, I am satisfied that what I put to the jury as to the onus of proof is correct, and I decline to give any further direction to the jury as to onus of proof.

Mr. SHAND : I understand that the exhibits have not gone out, Your Honor.

His HONOR : Well, I directed that they should go out. I will see the Sheriff's Officer to see that they do go out.

No. 54. Jury's Verdict, 21st January 1944.

No. 54.

JURY'S VERDICT.

(The jury returned into Court at 5.18 p.m. with a verdict for the Plaintiff for £800.)

(The foreman made the following statement :—

" We have not answered the question in the words supplied by Your Honor but we have found certain facts on that particular question, the answers of which I have here.")

(Copy of statement as follows handed to His Honor :—

" We find : That the Defendant left in the site of the operation a piece of rubber tube of a length somewhat less than 2 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.")

His HONOR : That is your answer to the question ?

FOREMAN : Yes.

(Mr. Cassidy, in view of the evidence, asks for a stay of proceedings without security. Objected to by Mr. Shand. Mr. Cassidy points out that there is a very important question of law involved.)

(His Honor grants a stay of proceedings on the usual terms.)

Mr. CASSIDY : I ask for a verdict for Defendant in view of the answer of the jury.

His HONOR : I decline to enter a verdict for the Defendant in view of the jury's answer.

In the Supreme Court of New South Wales.

No. 55. Notice of Appeal, 4th February 1944.

No. 55.

NOTICE OF APPEAL.

No. 96 of 1941.

IN THE SUPREME COURT OF NEW SOUTH WALES.

Between GEORGE BELL (Defendant) - Appellant

and

STELLA EILEEN HOCKING (Plaintiff) Respondent.

NOTICE OF APPEAL AND NOTICE OF MOTION FOR NEW TRIAL.

TAKE NOTICE that in the above-mentioned action which was tried before His Honor Mr. Justice Henry George Edwards and a Jury of four in this Honourable Court holden at Sydney on the 30th day of November last past, the 1st, 2nd, 3rd, 6th, 7th, 8th, 9th, 10th, 13th, 14th, 15th, 16th, 17th, 20th, 21st, 22nd, 23rd, 29th, 30th and 31st days of December last past and the 3rd, 4th, 5th, 6th, 7th, 10th, 11th, 12th, 13th, 14th, 17th, 18th, 19th, 20th and 21st days of January last past when the Jury returned a verdict for the above-named Plaintiff and assessed damages for the Plaintiff at Eight hundred pounds (£800) whereupon His Honour gave judgment accordingly IT IS THE INTENTION of the above-named Defendant to move this Honourable Court before the Court sitting in Banco at the Supreme Court House Sydney on the first day upon which the Court sits in Banco after the expiration of sixteen (16) days after the filing of this Notice of Motion or so soon thereafter as Counsel can be heard on behalf of the above-named Defendant for an order that the verdict and judgment in favour of the Plaintiff for Eight hundred pounds (£800) be set aside and that a verdict and judgment be entered for the Defendant or alternatively that a new trial of the said action be ordered to be had and for such further or other order as to the said Court may seem meet upon the following grounds :—

1. THAT the verdict was against evidence and the weight of evidence.

2. THAT the verdict of the Jury 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.

3. THAT on the evidence the finding of the Jury in favour of the Plaintiff was perverse.

4. THAT on the evidence adduced at the hearing of this action the Jury should have found a verdict for the Defendant.

5. THAT His Honour was in error in not directing the Jury on the evidence to find a verdict for the Defendant.

6. THAT on the evidence adduced on the hearing of this action the Defendant was entitled as a matter of law to a verdict

In the Supreme Court of New South Wales.

No. 55. Notice of Appeal, 4th February 1944, *continued.*

and His Honour was in error in not directing a verdict to be entered for the Defendant accordingly.

7. THAT His Honour was in error in refusing to direct the Jury that the Plaintiff must satisfy the Jury of the truth of her allegation beyond reasonable doubt and that if they found a verdict for the Plaintiff they must be so satisfied beyond reasonable doubt.

8. THAT His Honour was in error in refusing to direct the Jury of the nature of the onus of proof that lay on the Plaintiff and to distinguish the nature of such onus from that applicable in other civil proceedings.

9. THAT His Honour misdirected the Jury on the nature of the proof required to be adduced by the Plaintiff before she would be entitled to a verdict.

10. THAT the conduct of the action on behalf of the Plaintiff was such as to be calculated to and did in fact prejudice the fair trial of the action.

11. THAT His Honour was in error in admitting certain evidence alleged to relate to the policy of the British Medical Association and the conduct of its members.

12. THAT His Honour was in error in admitting certain alleged expert evidence given by the witnesses George Stanley Thompson and David Arthur Welsh called on behalf of the Plaintiff.

13. THAT His Honour was in error in failing to direct the Jury that the Plaintiff's allegation was inconsistent with certain proved and admitted facts.

14. THAT the damages assessed by the Jury in favour of the Plaintiff were excessive and not warranted by the evidence adduced at the hearing of the action.

Dated this fourth day of February One thousand nine hundred and forty-four.

E. REIMER,

Counsel for the Defendant, Appellant.

NOTE.—This Notice of Motion is filed by Geoffrey Richmond Rex, of 12 O'Connell Street, Sydney, Attorney for the above-named Appellant.

No. 56.

RULE OF THE SUPREME COURT OF NEW SOUTH WALES allowing Appeal.

In the Supreme Court of New South Wales.

No. 56. Rule allowing Appeal, 3rd August 1944.

Thursday the third day of August One thousand nine hundred and forty-four.

UPON MOTION made the sixth seventh eighth ninth thirteenth fourteenth fifteenth nineteenth twentieth twenty-first and twenty-second days of June last past WHEREUPON AND UPON READING the Notice of Motion dated the fourth day of February last past the Appeal Book filed herein and the Exhibits tendered at the hearing of the action AND UPON HEARING what was alleged by Mr. J. E. Cassidy of King's Counsel with whom was Mr. H. E. E. Reimer of Counsel on behalf of the above-named Appellant (Defendant) and by Mr. J. W. Shand of King's Counsel with whom was Mr. B. Carson of Counsel on behalf of the above-named Respondent (Plaintiff) IT WAS ORDERED that the matter stand for judgment AND the same standing in the list this day for judgment accordingly IT IS ORDERED that the Appeal herein be and the same is hereby allowed and that the verdict and judgment given in this action at the trial holden at Sydney on the Thirtieth day of November last past the first second third sixth seventh eighth ninth tenth thirteenth fourteenth fifteenth sixteenth seventeenth twentieth twenty-first twenty-second twenty-third twenty-ninth thirtieth and thirty-first days of December last past the third fourth fifth sixth seventh tenth eleventh twelfth thirteenth fourteenth seventeenth eighteenth nineteenth twentieth and twenty-first days of January last past be and the same is hereby set aside and that judgment be entered in the said action for the Appellant (Defendant) AND IT IS FURTHER ORDERED that the costs of the Appellant of and incidental to this Appeal and of and incidental to the four trials of the said action already had be taxed by the proper officer of the Court and that such costs when so taxed and allowed be paid by the Respondent (Plaintiff) to the Appellant (Defendant) or to his Solicitor Mr. Geoffrey R. Rex AND IT IS FURTHER ORDERED that there be mutual rights of set-off as regards any costs ordered to be paid by the Appellant (Defendant) in any of the proceedings taken on his behalf during the course of the action AND IT IS FURTHER ORDERED that any security lodged by the Appellant (Defendant) be returned to him or to his said Solicitor.

By the Court

For the Prothonotary

C. T. HERBERT (L.S.)

Acting Chief Clerk.

In the Supreme Court of New South Wales.

No. 57.

JUDGMENT of Davidson, J.

3rd August, 1944.

No. 57. Judgment of Davidson, J., 3rd August 1944.

DAVIDSON J.: In this litigation which has had an unfortunate history a further stage has been reached. A charge of negligence was made against the Defendant, a prominent surgeon, that he negligently left a piece of drainage tube in the wound in the Plaintiff's neck after an operation for thyroidectomy, with the result that this foreign body, containing certain substances, eventually found its way through the Plaintiff's left tonsil and in transit caused her serious injury. The Writ was issued in January 1941, and in December of that year, at the first hearing which lasted for approximately five days, the jury returned a verdict for the Plaintiff with £500 damages. This verdict was set aside as being against the weight of evidence, and special leave to appeal to the High Court was refused (Hocking *v.* Bell, 42 S.R. 132). In August 1942, after a hearing of 13 days, the jury was unable to agree; and another disagreement followed in December 1942 at a third hearing of seven days. Thereafter an application was made unsuccessfully to this Court on behalf of the Defendant that judgment should be entered in his favour (Hocking *v.* Bell, 43 S.R. 154). The fourth hearing commenced on the 30th November 1943 and occupied 36 days. Additional evidence was adduced on behalf of the Defendant, and it is claimed that there is further support for the Plaintiff's case. On this occasion the jury found a verdict for the Defendant with £800 damages. As a final result in these four trials, 12 jurors have reached a conclusion in favour of the Plaintiff, and only four in favour of the Defendant. In such circumstances it is, therefore, manifestly undesirable that a further trial should be directed, unless the interests of justice clearly demand the adoption of such a course.

The present motion asking for a new trial or, in the alternative, an entry of a verdict for the Defendant, is based on 14 grounds. Under the first and second of these grounds the claim is again made that the verdict is against the evidence and the weight of evidence. The third ground that the verdict was perverse has been abandoned. The fourth, fifth, sixth and thirteenth grounds rest on the contention that the Trial Judge should have directed a verdict for the Defendant and, accordingly, that this Court should do so. The seventh, eighth and ninth grounds raise the question whether, having regard to the nature of the Plaintiff's alleged course of action, the Judge was in error in refusing to direct the jury that the onus lay on the Plaintiff to satisfy their minds beyond reasonable doubt or, in the alternative, to a degree of comfortable satisfaction as to the truth of her allegations.

The tenth ground is that the conduct of the action on behalf of the Plaintiff was so improper that it was calculated to, and did in fact, prejudice the fair trial of the action. The eleventh and twelfth grounds are directed to the alleged wrongful admission of evidence. The fourteenth ground relating to damages has also been abandoned.

The Plantiff's case depends on a chain of inferences or presumptions of fact that is alleged to arise from and link together one admitted fact, and two statements of fact. These statements are of such a nature that

with regard to them the jury were entitled to accept the Plaintiff as a witness speaking with belief in the truth of what she said. The Defendant's contention is that she is the victim of hallucination.

In some circumstances, no doubt her evidence could be accepted in its entirety. In the first place, the admitted fact is that as an essential incident in the actual operation a drainage tube was inserted by the Defendant in the wound in the Plaintiff's neck. The second focal point, which is a statement of fact, consists of the Plaintiff's evidence on oath that the Defendant, when proceeding to extract the tube on the second day after its insertion, said he would cut a stitch, then shook the tube, pulled hard, and later, putting one hand on the Plaintiff's forehead, pulled harder and made some exclamation, threw what appeared to her to be a small black object on a tray, and walked away with the attendant sister.

The third point, also a statement of fact, is that what happened caused pain to the Plaintiff, she became very ill, and continued to suffer for 18 months until something burst through her left tonsil, passed into her throat, was swallowed and eventually left her body in her fæces. This object she examined, but it was lost when the pan was emptied into the closet. Afterwards it was sketched by the Plaintiff and described as a lightish grey-coloured tube, torn at one end, and containing two lengths of wire and what appeared to her to be something like a piece of marine sponge.

The inferences or presumptions of fact alleged to be deducible are that, as a rubber tube was not used in connection with the Plaintiff for any other purpose than the operation, a portion of the drainage tube, after being broken, must have been left in the wound in her throat after the operation, that this portion of tube must have had in it when inserted, or must otherwise have collected the wire and sponge or a swab, and in this formation must have infiltrated through her neck, into and through the tonsil, and caused her to contract tetany and to suffer other injuries.

Having regard to the pleadings, the course of the trial and the evidence, two of these inferences have become basic, namely, first, as to the tube being broken, and if so, as to anything being left in it, and second, if this happened, whether the movement of the foreign body in the neck between the two points from the thyroid to the tonsil occurred. Failure of either or both of these links in the chain of inferences, whether totally or to the degree of such preponderance of evidence to the contrary, as to establish that the jury's verdict was such as reasonable men may not find, must therefore be fatal to the whole connecting chain and to the verdict that has been returned.

As the seventh, eighth and ninth grounds of appeal relate to the quality of the burden of proof which falls on the Plaintiff, it is preferable that they should be discussed at the outset, as the conclusion is relevant to the consideration of the question whether the verdict is against the weight of evidence.

At an early stage of his address to the jury, Counsel for the Defendant announced that, as the nature of the allegations relied on by the Plaintiff was so serious as to amount to a charge of criminal negligence, a direction would be sought that the jury could not find a verdict in her favour, unless their minds should be persuaded to the degree of comfortable satisfaction as to the truth of her story. The learned Trial Judge refused to accept this suggestion, and followed the usual practice in actions for negligence

In the Supreme Court of New South Wales.

No. 57. Judgment of Davidson, J., 3rd August 1944, *continued.*

by directing the jury that they might determine the issues upon the balance of probabilities. In summing up he submitted the test in this form :—

> " As I have said . . . she must in this action, as plaintiffs have to do in all civil actions, make out her case to your satisfaction, or, in other words, the onus of proof lies on her. That means that she must weigh down the metaphorical scales in her favour, and must satisfy your minds in regard to the matters on which her case depends. She has not to satisfy you beyond reasonable doubt as in a criminal case, but she has to satisfy you by a balance of evidence, by a balance of probability, that she is entitled to succeed. From that it follows that, if she does so satisfy your minds to that extent, you will find a verdict for the Plaintiff ; if she so fails to satisfy your minds, then your verdict will be for the Defendant, and if you merely come to the conclusion that what the Plaintiff states is a possible view of the circumstances, but that you are unable to say that it is more probable than not that what she says was correct, then your verdict will be for the Defendant, because in that case the Plaintiff will have failed to weigh down the scales in her favour, or, put in another way, if, on a review of the whole of the evidence, you are unable to say which is the correct view to take, then the Plaintiff will fail to discharge the onus of proof and your verdict will be for the Defendant."

A little later, after mentioning the difference between inference and conjecture, His Honor said :—

> " You will remember also the comments made by Mr. Cassidy here that if Dr. Bell knowingly left the broken portion of the tube in the wound, as the Plaintiff in her evidence asserts, he would have been guilty of something more than negligence, and his conduct would have amounted to malpractice and even to criminal negligence. Do you think it is probable, gentlemen, that such a man as Dr. Bell would have so acted ? "

Again, in referring to a comment by Counsel as to the lack of corroboration of the Plaintiff's story concerning the portion of a tube passing through her throat, the Judge added that if on a proper review of the facts they were unable to accept the Plaintiff's evidence standing alone, they " would not be criticised for approaching with some degree of caution, to say the least of it, an important matter which depended upon the observation of a single individual, that single individual being very interested in the result." A further warning was also given that " Counsel suggests that it must appeal to men of commonsense that a Defendant so situated should ask them to scrutinise very carefully indeed the allegations made in a court of law on a topic of great importance, which allegations are unaccompanied by the evidence of any eyewitness except that of the Plaintiff." Elsewhere in the summing up this additional passage appears :—

> " Mr. Shand was quite right in telling you that this case does not involve any charge of criminality, but merely involves a charge of negligence as I have outlined to you. If the Plaintiff's evidence be accepted, then it does appear almost of necessity that Dr. Bell must have known the tube broke and that he left it in there, or at any rate made very little effort to recover the broken piece. Although, as I say, criminal negligence is in no sense an issue for you here,

none the less it is perhaps not surprising that the Defendant in these circumstances should take pains, all the pains possible, to dispute the Plaintiff's allegations."

It is evident therefore that the learned Judge, whilst advising the jury that they might decide the issues upon the balance of probabilities arising from the evidence when tested by the metaphorical scales, he also, in substance, warned them of the seriousness of the issue and to use care in determining the comparative weight of particular portions of the evidence before applying the test, in order to find whether their minds were persuaded in favour of one party or the other.

At the conclusion of the summing-up and after the jury had retired, the subject of onus of proof was again ventilated.

Relying upon Section 54 of the Crimes Act 1900, Counsel for the Defendant contended that the real issue to be determined was one of criminal negligence which must be established beyond reasonable doubt.

This section provides that whosoever by any unlawful or negligent act or omission causes grievous bodily harm to any person shall be liable to imprisonment for two years. A number of authorities were cited, but the Judge refused to make any addition to or alteration of his instructions to the jury, although Counsel for the Plaintiff joined in requesting that he should decide in the Defendant's favour on this point.

The rule as to the incidence and degree of the burden of proof in civil and criminal trials has been developed gradually in the course of a long history. So long ago as the early part of the 17th century the rule in civil actions was formulated that the Court itself can only give judgment on what is certain and not on what is uncertain; but where the matter is so far gone that the parties are at issue, or that the inquest is awarded by default, so that the jury is to give a verdict one way or the other, there, if the matter is doubtful, they may find their verdict upon that which appears most probable, and by the same reason that which is most probable shall be good evidence: (2) Plowden, 412.

Originally, it appears that in criminal trials guilt and not innocence was presumed, so that if a prima facie case was proved, no defence of an alibi or otherwise was permissible: Phipson, Evidence, Book 3, c. 48. But at an early stage in the 18th century, not only had this presumption been reversed so that it should operate in favour of innocence, but in order to temper the rigours of punishment under the penal code the practice was introduced of demanding cogent evidence of guilt.

This benefit at first, however, was only granted in criminal cases: Phipson, Evidence, Book 1, c. 1. Thereafter, as Professor Wigmore says, it was applied in advancing periods in various tentative forms, such as a warning that guilt should only be founded upon "A clear impression" or that there should be "satisfaction," or "no rational doubt," or that there should be "rational and well-grounded doubt" before conviction, or that a guilt should be "beyond possibility of doubt," and then "beyond reasonable doubt," until Mr. Starkie evolved the formula applicable to all crimes—"moral certainty to the exclusion of all reasonable doubt": Wigmore, Evidence, Vol. IX, page 317, Section 2497. The rule has now been expressed in another form, namely, that an accused is entitled to an acquittal if there is any reasonably possible explanation of the evidence which is consistent with innocence: Peacock *v.* The King, 13 C.L.R., 619.

In the Supreme Court of New South Wales.

No. 57. Judgment of Davidson, J., 3rd August 1944, *continued.*

The subject of the effect of legal but rebuttable presumptions, such as that of innocence, legitimacy of children born in wedlock, and other instances within the same class, has also entered into the development of the rule as to the onus of proof in civil actions, but mostly in relation to its effect on the incidence rather than the extent of the burden.

The Privy Council in 1855, when an issue of forgery arose in an action of ejectment, where the question of the validity of a deed came in question, said that the jury must weigh the evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities.

Two years later, in an action by a plaintiff to recover penalties under a Statute relating to bribery in Parliamentary elections, Willes, J., even apologised for referring to what he described as the elementary proposition that in civil cases the preponderance of probability may constitute sufficient grounds for a verdict, and the Lords expressed no dissent from this opinion: Cooper *v.* Slade, (6) H.L.C. 746 at 772.

The same principle has been applied in an action on a burglary policy, where the defence raised was theft by a servant: Hurst *v.* Evans, 1917 (1) K.B. 352, and in actions against carriers, where the issue was whether the loss arose from the felonious acts of the defendant's servants: L.R. (9) Exch., 93; Boyce *v.* Chapman (2) Bing., N.C. 222.

There appear to have been but few, if any, departures from this principle in actions at law by decisions of any weight. In one instance it is stated to have been said that criminal issues in civil actions must be proved beyond reasonable doubt: Thurtell *v.* Beaumont (1) Bing. 339. But all that was decided there was that the defendant had to prove exactly what he said: compare Brown *v.* McGrath, *per* Murray, C.J., 1920 S.A.L.R. 97 at 110. And in the United States the criticism of the Court of last resort in New Jersey was that in principle Thurtell *v.* Beaumont stood alone and unsupported in English Courts, except in libel and slander, which are to be regarded as exceptional and resting upon considerations peculiar to the nature of the actions and of the injuries for which they are brought.

Four of the five judges, however, who delivered judgments in that case, were not prepared to accept the qualifications as to libel and slander without further consideration: Kane *v.* The Hibernian Insurance Co., 23 A.M. Rep., 239.

With regard to libel and slander, Tindell, C.J., appears to have directed a jury that in a plea of justification alleging forgery the same strictness of proof was required to convict the plaintiff as if he were in a criminal trial: Chalmers *v.* Shackell (6) C. & P., 475. The point was not argued on appeal.

A similar direction to the jury was given by Denman, C.J., where the plea of justification made a charge of bigamy: Willmet *v.* Harmer (8), C. & P. 695. The reason for these two decisions appears to have been that the defence, by relying upon the allegation of a crime, was required to rebut the presumption of innocence, and this involved proof beyond reasonable doubt.

These cases, as well as Thurtell *v.* Beaumont and a number of others, however, were elaborately discussed in Ireland upon an appeal in an action to recover penalties. The majority of the Court said:—

> "The course generally adopted in practice by the judges has been, where the affirmative of the issue lay on either party, or where

either party has sought to displace an existing right or to rebut a presumption authorised by law, to direct the jury that, before they find in the affirmative the issue or before they displace the right, or before they find against the presumption, they ought to be satisfied upon the evidence that the state of facts existed on which the parties seeking any of those results relied. And the jury, although they may consider the case a doubtful one, may, upon weighing the evidence and finding their minds sufficiently influenced by the preponderance of it on one side, be satisfied of the fact by that preponderance" : Magee *v.* Mark (11) I.R.C.L., 449 at 469.

This pronouncement is in accordance with the opinion of the Privy Council in Doe d. Devine *v.* Wilson, where the additional warning was mentioned that the presumption of innocence should not be disregarded. As to this latter factor, so great an authority as Bowen, L.J., has cited with approval a passage appearing in Best on Evidence, which suggests that proof beyond reasonable doubt is necessary to replace a rebuttable presumption of innocence. His Lordship said :—

> "The law presumes against illegality. The principle is, as laid down by Mr. Best, that no person shall, in the absence of criminative proof, be supposed to have committed any violation of the criminal law, whether malum in se or malum prohibitum, and this presumption holds in all civil and other proceedings for whatever purpose originated, and whether the guilty party comes in question, directly or collaterally, and, as far as I know, this principle is always acted on in the Courts." The Hire Purchase Furnishing Co. Ltd. *v.* Richens (20) Q.B.D. 387 at 389.

The principle as so stated, however, was not applied in that case in order to insist upon proof beyond reasonable doubt, but merely to determine that the onus of proof lay upon the party to prove illegality if he relied upon it, and the relevant facts were equally consistent with the transaction being legal or illegal.

In the light afforded by the rule in Doe d. Devine *v.* Wilson, that must only mean that the presumption must not be disregarded but there must be a balance of probability against it if it is to be overcome. The authorities referred to by Mr. Best (Evidence, Section 346) also, so far as they relate to civil actions, go no further except to state that the charge which raises the presumption must be specifically laid. Thus, where a crime was alleged which might lead to a forfeiture of dower, it was said by Lord Chancellor Talbot "The crime ought to be plainly laid to her charge, specified and put in issue, that she may know what to rest her defence upon" : Sidney *v.* Sidney (3 P.W.M.S., 270 at 276).

The decision was to a similar effect in Watkyns *v.* Watkyns (2 Atk., 96). Likewise it was held that where an act is required to be done by one, the omission of which would make him guilty of criminal neglect of duty, the law presumes the affirmative and throws the burden of proving the negative on the party who insists upon it and avers it in pleading : Williams *v.* The East India Company (3 East, 192) ; Afflalo *v.* Lawrence (1903 (1) Ch., 318 at 326) ; (1904 A.C., 17 at 22) ; R. *v.* The Inhabitants of Twyning (2 B. & Ald., 386) ; Lapsley *v.* Grierson (1 H.L.C., 498).

In the remaining two authorities referred to in Best, the point decided was that, as there is a presumption against fraud, the person who alleges it must bear the burden of proof : Ross *v.* Hunter (4 Tr. Reports, 33 at 38) ; Leete *v.* Gresham Life Assurance Society (15 Jur. 1161 at 1162).

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No. 57. Judgment of Davidson, J., 3rd August 1944, *continued.*

Because of the presumption of innocence and that moral culpability is involved, it has been said elsewhere that fraud must be clearly and distinctly proved by the person by whom it is alleged and on whom the onus of proof lies. But the House of Lords, in discussing this matter, did not mention that there should be criminative proof, if that expression means proof beyond reasonable doubt.

Lord Chelmsford, L.C., said that a plaintiff alleging fraud cannot succeed unless he is able to prove his case as it is laid, and that the evidence failed to satisfy His Lordship's mind that the case was such as was represented.

Lord Brougham expressed himself differently in saying that the Master of the Rolls, who tried the case, did not appear to have kept distinctly in mind upon whom the onus of proof rested. The person who alleges fraud must clearly and distinctly prove the fraud he alleges.

Lord Cranworth agreed for the reason that the Plaintiff nowhere stated on oath that he had been imposed upon, his sole witness was unreliable and the defendant denied the fraud : Mowatt *v.* Blake (31 L.T., (N.S.), 387 at 388). This decision was therefore based on the principle that fraud could not be presumed and must be precisely laid, but with the addition that the plaintiff should give evidence sufficient to satisfy or clearly satisfy the minds of the tribunal.

It may be that the reference to the test of clear satisfaction was taken from the criminal procedure applicable at the time ; yet it could not be suggested that there is a stronger presumption against fraud than in favour of innocence of such crimes as forgery, larceny, bigamy or suicide, which has been mentioned by Farwell, L.J. : Bender *v.* Owners of S.S. Zent (1909 (2) K.B., 41 at 45). Consequently, there seems to be no special reason why the burden of proof should be different in cases of fraud from that in other civil actions.

Professor Wigmore is definite on the point that the idea has been generally repudiated that whenever in a civil action a criminal act is charged as part of the case, the rule for criminal trials should apply, and that it does not apply to an action for a statutory penalty, to a plea of truth to an action for a defamatory charge of a crime, nor to a plea of arson by an insurer in an action on a policy of fire insurance, nor in proceedings for disbarment or relating to bastardy, nor in actions for seduction, nor in proceedings for contempt ; but a stricter standard in some such phrase as " clear and convincing proof " is commonly applied to measure the degree of persuasion for a charge of fraud, or of undue influence, or certain other issues mostly of an equitable nature : Wigmore, Evidence (Vol. 9, Section 2498).

The rule as to the test by the balance of probabilities where issues of crime have been raised has been followed in Victoria : Motchall *v.* Massoud (1926 V.L.R. 273), where an issue of forgery arose but not directly on the pleadings ; and in South Australia where there was an issue of bribery in an action of defamation : Brown *v.* McGrath (1920, S.A.L.R., 92). Until recently the same practice has prevailed in N.S.W. But in an application to remove the name of a solicitor from the rolls, which is a civil proceeding, it was said that the tribunal should not be satisfied of alleged acts, criminal in nature, such as grave fraud or crime, unless a preponderance of evidence is such as to establish it clearly : in re a Solicitor (58 W.N., 53).

Although that proceeding was of a civil nature, there was punishment involved, and a similar ruling in such circumstances has been given in a proceeding for attachment for contempt: Scholes *v.* Helton (10 M.W., 15 at 17). Both these decisions also are consistent with the statements of the High Court in Briginshaw *v.* Briginshaw (60 C.L.R., 336).

There have been variations of the Common Law doctrine in the Ecclesiastical and subsequently in the Matrimonial Causes Jurisdiction. In the former the rule was stated to be that "In cases where crime is imputed the presumption of innocence must prevail until guilt has been proved; and in proportion to the gravity of the charge and the rare occurrence of the crime imputed, it is reasonable to require more cogent evidence to overthrow the legal presumption of innocence . . . It would be most unreasonable to find a verdict of guilty where there is simply oath against oath without any further evidence direct or circumstantial to support the charge": N. *v.* N. (3 S.W. & T., 234 at 238). The charge there was of sodomy, and a similar ruling has been given by the Court of Appeal; Statham *v.* Statham (1929 P., 131). Such a direction, however, would not require proof beyond reasonable doubt. Presumably, it would be sufficient to furnish adequate additional evidence to overcome the presumption of innocence, or an equality of balance of probability, to the extent of persuading the mind of the court or jury, as the case may be, to a sense of reasonable satisfaction.

The inference to be drawn from answers in cross-examination might be enough. A similar attitude was adopted as to adultery, which is not a crime in English law, but is of a civil nature under the Acts dealing with Matrimonial Causes: Mordaunt *v.* Moncrieffe (L.R. (2) Sc. & Div. App. 374 at 398). Nevertheless, a requisite proof of the offence in the Ecclesiastical Courts appears to have been satisfaction beyond reasonable doubt: Ciocci *v.* Ciocci (18 Jur., 194 at 198); and a similar test until recently has been applied in N.S.W.: Doherty *v.* Doherty (34 S.R. 290). The law on this point has now been settled by the decision of the High Court that the minds of the jury must be persuaded to a degree of reasonable satisfaction: Briginshaw *v.* Briginshaw (60 C.L.R., 336).

The Court, however, found the key to solve doubts on the subject in the words of the Statute that "Upon a petition for dissolution it shall be the duty of the Court to satisfy itself, so far as it reasonably can, as to the facts alleged."

In N.S.W. the Statutory Provision is that the Court shall pronounce the decree if it is satisfied on the evidence that the case for the petitioner has been proved. This variance in language would presumably make no difference.

The presumption of legitimacy of a child born in wedlock has also been considered in many decisions which seem to constitute a special class based on public policy. This presumption has expressly been said to be only rebuttable, not upon a mere balance of probabilities but upon evidence which must be such as to exclude all reasonable doubt in the minds of the Court or jury, or upon evidence that is strong, distinct, satisfactory and conclusive: Gaskill *v.* Gaskill (1921 P., 425 at 433). And in a proceeding upon a claim under the Workmen's Compensation Act, when the question in dispute was the admissibility of evidence as to the paternity of the child, Lord Atkinson stated that the same considerations would

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apply as in a suit in which the issues of fact is the legitimacy of a child: Lloyd *v.* Powell Duffryn Steam Coal Co. Ltd. (1914 A.C., 659 at 740), c.f. Russell *v.* Russell (1924 A.C., 687 at 710).

The general effect of all these authorities down to the time of the decision in Briginshaw *v.* Briginshaw is that in all civil actions at law the effect of any rebuttable legal presumption only falls for consideration when the issue from which it derives is precisely raised on the pleadings. Then the issue must be proved in substance strictly as it is laid by the party who relies upon it; and the determination may be on the balance of probabilities, except in case of fraud, or where there is an issue as to the legitimacy of a child born in wedlock; in the former instance that balance must be reached upon clear proof from the evidence, and, in the latter, perhaps upon proof beyond reasonable doubt.

Similarly in civil proceedings involving punishment, as distinct from damages, but not including conviction of a crime, the same degree of proof must be found as in the case of fraud. That such a test in civil actions apart from these sections prevails is suggested by Best (Section No. 95), notwithstanding his later treatment of legal presumptions. The author, relying upon Cooper *v.* Slade, says :—

> "But there is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis for decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required."

This is the same proposition that appears in Doe d. Devine *v.* Wilson, which now has been qualified slightly in Briginshaw *v.* Briginshaw.

In 1939, however, Lord Atkin, in presenting the opinion of the Privy Council upon an appeal in a civil action where damages were claimed for an alleged conspiracy to defraud the City of New York, and the trial Judge had ruled that this charge must be proved as clearly as in a criminal proceeding, said :—

> "The proposition of the Judge has been laid down time and again in the Courts of this country, and it appears to be just and in accordance with the law."

The People of the State of New York *v.* Heirs of the Late John M. Phillips and Others (1939 (3) A.E.R., 952 at 955). The decision turned on another point, however, and Lord Atkin's statement has been explained as not having been intended to mean anything different from the rule as stated in Doe d. Devine *v.* Wilson : c.f. Helton *v.* Allen (63 C.L.R. 691). The High Court in that case defined the principles to be applied in such cases in this way :—

> "Although the standard of persuasion required in support of an indictment does not apply, the jury must not disregard the gravity of the issue or lose sight of the consideration that reasonable satisfaction is not independent of the nature of the fact to be proved, as the graver the allegation the greater should be the strictness of proof demanded. Therefore, the jury should not make a mere comparison of the probabilities of guilt with those of innocence, but be really satisfied that the alleged offence was committed. Accordingly, the rule, as now stated, is that there are only two standards of proof, namely, reasonable satisfaction and satisfaction

beyond reasonable doubt; when the law requires proof of any fact the tribunal must feel an actual persuasion of its occurrence, or its existence, before it can be found. It cannot be found as a result of mere mechanical comparison of probabilities independently of any belief in its reality." Briginshaw *v.* Briginshaw ((60) C.L.R. at 361); Helton *v.* Allan (63 C.L.R. 691).

The test as to the balance of probabilities still remains; but in future it will be unsafe to advise the use of the metaphorical scales. The jury must be directed to be certain that their minds are persuaded to a degree of reasonable satisfaction, having regard to the circumstances disclosed by the evidence that the balance of probabilities is one way or the other or neutral, and with the addition that if charges are made, the graver the charge the stricter should be the proof they should require.

Subsequently to the date of those decisions of the High Court, Lord Atkin again, in presenting the opinion of the Privy Council, repeated his former statement that fraud of the nature charged in the civil action that was under review, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt: Narayanan Chettyar *v.* The Official Assignee of the High Court, Rangoon (1941 (39) Allahabad, L.J., 683). Unfortunately, this report is not available for perusal, but from the typed copy of the opinion of the Privy Council, with which this Court was furnished by Counsel, it appears that, as in the former case before the Board, whilst the charge made by the plaintiff was a fraud in the nature of a criminal conspiracy, the claim was rejected as the evidence disclosed no more than suspicion, so that the statement as to the onus of proof was really not necessary to the decision and must be regarded as falling within the comment made by the High Court in regard to the earlier dictum: cf. Helton *v.* Allan (63 C.L.R. 691 at 713, 714). This criticism disposes also of two decisions of the Courts in Queensland, which followed Lord Atkin's dictum: King *v.* Crowe (1942 Q.L.R. 288); Abrahams *v.* Catip (1942 Q.L.R. 26).

It would lead to much confusion, if in every civil action for negligence where grievous bodily harm is alleged to have been caused but an issue of crime is not precisely raised on the pleadings or even in those circumstances it should be essential to advice the jury as to the effect of a presumption of innocence. For instance, if the defendant asserts that the plaintiff's evidence is perjured a counter presumption of innocence would appear, with disastrous hindrance to any clarity of explanation. Such a charge of perjury is really only an argument directed to credibility. Moreover, the question whether negligence amounts to crime presents in itself a difficult problem. Malice is a requisite element of the offence depending under Section 5 of the Crimes Act 1900, upon proof of indifference to human life or suffering or recklessness or wantonness.

In addition, care will in any event be necessary in charging the jury that the degree of proof depends upon the seriousness of the injury sustained by the defendant's act; otherwise the effect of the proof of claims for damages under the Compensation to Relatives Act might result in serious injustice. In those cases the difficulty of procuring evidence is notorious, and yet as the injured person has lost his life, the statement in the particulars of the cause of action must frequently suggest the commission of manslaughter.

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Substantially the learned Judge's summing up in the present case fulfilled the requirements of law, inasmuch as whilst he did refer to the mechanical test of metaphorical scales, he also warned the jury of the gravity of the charge in a manner that would indicate that they should be reasonably satisfied in their minds as to the balance of probabilities before deciding that it was in favour of the Plaintiff. There is, therefore, no reason for interfering with the verdict on this ground.

In order to determine whether a verdict is against the weight of evidence, the Court, whilst not neglecting the important circumstances that the jury have the opportunity of observing the demeanour of the witnesses, must be satisfied that the verdict was so unreasonable as to establish that the jury has not really performed the judicial duty cast upon its members. This conclusion might be reached if the evidence is so overwhelmingly in favour of the defendant that reasonable men might not find in favour of the plaintiff: Mechanical and General Inventions *v.* Austin (1935 A.C., 346). It is necessary then, to consider, in the first instance, the precise nature of the acts the Plaintiff set out to prove and the comparative weight of the opposing sets of evidence.

Upon request, particulars were given of the negligence charged in a general form in the declaration. Three of the questions asked and answered are especially material. First :—

> " What act or omission on the part of the Defendant during the post-operative treatment is it alleged constitutes the negligence on the part of the Defendant on which the Plaintiff relies ? "

The answer was :—

> " The Plaintiff will allege that she was operated on by your client in the lower region of the throat ; that a piece of drainage tube was inserted in the wound by your client, and that this drainage tube was so negligently or unskillfully manipulated by your client that it broke, and that your client thereafter negligently failed to remove the portion of the said drainage tube remaining in the wound, with the result that the Plaintiff developed a complaint, believed to be tetany in a very acute form, to such an extent that she was dangerously ill over a period of more than 18 months, and that she only recovered from this illness on the passing of this piece of tube into the gullet, whence it ultimately passed from the body per rectum."

Second :—

> " What is it alleged is the nature and description of the piece of rubber tube and, in particular, the shape, size, length and colour thereof ? "

This answer was given :—

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

Third :—

> " With regard to the alleged passing of the piece of rubber tube, is it alleged by the Plaintiff that any other foreign body was passed at the same time ? If so, what are the nature and particulars thereof, and was such other foreign body attached or otherwise connected with the alleged piece of rubber tube ? "

The answer was :—

" See answer to previous question. The swab and wire appeared to be the only other foreign bodies passed."

Under Rule 102 of the Practice, particulars are deemed to be part of the record, and their object is to prevent the party desiring them from being taken by surprise at the trial. The Plaintiff therefore must be kept within the limits of proof so defined : McSpedden *v.* Harnett (42 S.R., 116).

Consequently, it must be accepted that the precise charge of negligence made by the Plaintiff relates only to acts after the actual operation. It is also apparent that the case proposed to be made was that the object, consisting of the portion of the tube together with its contents, alleged to have been passed through the Plaintiff's body, was identical with what was left in the wound.

Read strictly, the description in the particulars indicates that what was seen in the cut in the tube was what appeared to be a swab and what were in fact wires protruding from the torn end of the tube. Moreover, that this meaning was intended is established by the reference to wire in the third answer in the particulars, and by the sketch (Exhibit " C ") that the Plaintiff made of the object she claims to have found in her fæces. She said, in effect, that this sketch depicted the object as it appeared to her ; and it offers no suggestion of anything but wire protruding from the torn end of the tube.

Unfortunately, the learned Judge was not asked for a ruling on the construction of the particulars ; so that in the various hearings the Plaintiff in her evidence departed progressively from the precise description originally given until it assumed an entirely different aspect and, eventually, the issue was allowed to go to the jury in a vague and ambiguous form.

On the first occasion she said, in cross-examination, that there were two forked pieces of wire stuck into the swab-like material, and after swallowing it she felt the wire pricking in her stomach. In examination-in-chief in that trial she said she thought " it was wire—it was like wire."

Similarly, at the second trial, according to her own description, there was a piece of greyish-coloured tube, with two pieces of wire sticking out of it.

In cross-examination, she explained that one piece of the wire protruded about three-quarters of an inch beyond the top of the rubber and the other piece was a little shorter. An alteration was made at the third trial, when she repeated that there were two pieces of wire sticking out—like wires—but they were easily bent, and when she pressed them they would spring back straight.

Finally, in the present trial, she further elaborated the description by stating that the projections " looked like black wire, but when she bent it it would fly back straight. It was like horsehair, and it would fly back straight. It looked like wire to me, but it could not have been wire."

In cross-examination she admitted having said at a previous trial that a model tube, constructed at the time subject to her directions (Exhibit " P "), was a fair representation of what passed through her body ; but she added that it was not like the object itself, as the rubber used was red instead of lightish-grey coloured and she could not bend the wires, whilst a lot could be meant by saying it was a fair representation. Yet she did not object to the statement that one piece of the wire, or whatever was its nature, was one and one quarter inches long and the other slightly shorter, or that it scratched in her stomach.

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Finally, before the jury retired, the learned Judge submitted to them a question in terms following the particulars relative to what was left in the wound.

The jury evidently were disturbed as to the meaning of the particulars, and, having given their verdict, said they had not answered the question in the words supplied by His Honor, but they had found certain facts in this form :—

> " We find that the Defendant left in the site of the operation a piece of rubber tube of a length somewhat less than 2 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."

In these circumstances, it is clear that there can be no justification for interference with the verdict merely because of this finding amounting to a departure from the precise terms of particulars.

The next step, therefore, must be directed to an examination of the evidence submitted in proof of the issue whether a portion of the drainage tube with its contents as described, or with those contents in any form, was left by the Defendant in the site of the operation.

Undoubtedly, a tube 2 inches long, or slightly more in length was used for the purpose of drainage as part of the operation that was performed. The incidents to which the Plaintiff deposed as to the attempted removal of the tube have already been stated ; but in this instance she omitted what she had said in the first trial, namely, that the small piece of rubber that the Defendant tossed to the tray was about half an inch long.

The further facts and inferences or presumptions, in addition to this preliminary breaking of the tube, which are relied upon by the Plaintiff's counsel in support of the verdict, may be summarised in this manner :—

(1) The Plaintiff thereafter developed a septic condition in the wound.

(2) Subsequently she suffered from tetany more or less continuously for 18 months.

(3) The tube and its contents as described in the particulars and in evidence eventually burst through her left tonsil into her throat, was swallowed and ejected in her fæces.

(4) The erupted tube could have come from no other source than the wound in the neck.

(5) The condition of the tonsil is consistent with the eruption of the tube.

(6) The symptoms of tetany ceased after the eruption, and therefore were consistent with the presence of a foreign body in the neck.

(7) Admissions are deducible from the conduct of the Defendant and Dr. O'Hanlon, who attended the Plaintiff after the operation, that portion of the tube was left in the wound.

(8) Medical evidence establishes the probability of the passage of the tube from the thyroid cavity to and through the tonsil.

With regard to proof of portion of the tube and its alleged contents being left in the wound, the Plaintiff is faced with many difficulties, apart from the doubts attaching to its subsequent wanderings through the

labyrinth of obstructions between the wound and her tonsil. Both the medical witnesses supporting her version of what occurred would not concede even the possibility of wire being placed in the tube or used in connection with the operation.

Dr. Welsh, who was formerly Professor of Pathology at the University of Sydney from 1930 until 1936, would not suggest that an object such as Exhibit " P, " the reconstructed tube, containing wires, could travel in the neck. He said also that it was not within his province to speak of the manner of extracting drainage tubes ; but he agreed that if a swab were put in the tube it would defeat the whole object of drainage. Whilst he was giving evidence to the effect that in spite of the Defendant's care something went wrong with the operation, there was an objection to evidence, and after argument His Honor said to the jury :—

> " Gentlemen, Mr. Shand (the Plaintiff's Counsel) says, although the Professor said something went wrong at the operation, there is no blame being attached by the Plaintiff to the Defendant in respect of that or anything else [sic]. The negligence charged is 'leaving the tube in the throat of the description the Plaintiff gave '."

Such a statement must mean that there was no allegation of any negligence in the operation itself, as distinct from the subsequent conduct of leaving portion of the tube with its contents, however they came there, in the wound.

Counsel for the Plaintiff has repeated in argument to this Court that his case does not rest on any negligence in the operation, although he insists upon the possibility that something else besides the portion of the tube was left in the wound, perhaps by accident and not by actionable negligence.

Dr. Welsh went on to say that an object such as Exhibit " P " was never used in a thyroidectomy as it could not be used, but he would not accept this model, prepared at a former trial, as being accurate, and when asked about the presence or projection of a swab in it, he would only say " I don't know anything about a swab, I can't answer that question." And further, after being shown the hospital records stating that the tube had been removed from the wound, he said : " I am not assuming that there was any of the tube left in the wound." He added that he would not entertain such an idea.

Counsel for the Plaintiff then introduced, with his witness, Dr. Thompson, a theory that was presented to the jury that a swab may have been left in the wound and may have been stitched into the tube during the sewing up of the wound. The witness was asked whether, if stitching was employed, it would be possible for the stitch to go through the rubber tube, and despite objection, was allowed to answer in the affirmative. He said also that swabs are sometimes used to stop hæmorrhage, as a surgeon may have to be satisfied with stopping it as well as he can, especially if the patient is in a bad condition and has to be got off the operating table. There was no evidence that the Plaintiff had to be got off the table, although the Defendant admitted he had trouble with hæmorrhage and the Plaintiff was very ill.

Dr. Thompson continued that the tube may have been inserted first and stitched in with the muscles by the needle. But he also repudiated the idea of wires and thought they were never there ; also he said the so-

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called swab may have been merely detritus picked up in the intestine, and that he could not contemplate an object like Exhibit " P," which was an exaggeration and a complete caricature of the Plaintiff's original description. His answers on these topics were so evasive, however, that it is almost impossible to understand what he meant. But with regard to the idea of anything in the form of a swab or detritus being picked up in the course of the alleged passage of the tube through the neck or the body, Counsel for the Defendant during his address was asserting that there was no evidence that the tube collected the wires and swab en route when Counsel for the Plaintiff interjected that there was no suggestion of that kind.

In this manner it was again made plain that the Plaintiff's cause of action depended basically upon the assertion that the tube, containing whatever articles were claimed to be in it, was left in the wound in that form. Consequently, as Counsel, in view of the evidence, could not maintain with any reason that wires and the swab or something like marine sponge, or anything of the kind, had been placed in the tube by the Defendant, he was forced to offer some other suggestion. Accordingly, he developed very ingeniously and at great length, despite incessant objection from Counsel for the Defendant, a theory of possibilities that there was a great risk of stitching the tube into the muscle and great care had to be taken, but that, without charging negligence, this act was done by the Defendant, so that the swab was caught up by the stitch and drawn through the small cut near the bottom of the tube.

There is combined with this theory the further contention, as to which there is some evidence, that catgut dissolves in normal tissue but does not do so in pus. Therefore it was urged that the catgut did dissolve partially, and the residue, being in pus, is represented by the two wire-like projections from the tube described by the Plaintiff as having passed through her tonsil and into her fæces.

It is comparatively obvious that, having regard to the jury's finding in answer to the questions submitted to them, it is this theory of the Plaintiff's Counsel they accepted. The idea of the wires and swablike substance being in the tube originally or subsequently picked up was clearly abandoned in favour of the suggestion of pieces of catgut, a contention entirely new in all these proceedings. The passing hint that they might be horsehair was also cast aside. Perhaps propounding the theory that by its agency the swab could be drawn into the tube, required too vigorous a flight of imagination.

As already mentioned, in view of the manner in which the facts were left to the jury, their verdict cannot be disturbed merely for the reason that they answered the Judge's question differently to its form of expression. But the Plaintiff is confronted with much more serious objections. The requisites as to the nature of the evidence upon which a jury may base its finding are very clearly outlined by Jordan, C.J., in Bell *v.* Thompson (34, S.R. 431 at 436) :—

> " In order that a jury may be entitled to find a verdict for the plaintiff, they must have before them sufficient evidence of every fact, the burden of proof whereof lies upon the plaintiff. It is not enough that the evidence affords material for conjecturing that the fact may exist, unless it furnishes data from which an inference can reasonably be drawn that it does exist."

The distinction between a conjecture and an inference was also referred to as it is described in Jones *v.* Great Western Railway Co. (4 T.L.R., 39 at 41) :—

> " A conjecture may be plausible but it is of no legal value for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and, if it is a reasonable deduction, it may have the validity of legal proof."

A mere scintilla of evidentiary value is likewise not sufficient : Ryder *v.* Wombwell (L.R. (4) Exch., 32 at 38).

Far from the suggestion of Counsel as to the catgut and swab being stitched to the tissue constituting a reasonable deduction from the evidence, its quality is entirely to the contrary and is substantially negatived by the evidence.

With regard to the catgut, the evidence is that in the operation there were so many stitches that there were more than 50 knots. There were two slides in evidence as Exhibit " 4," which illustrate from the form of the wound the type of stitching which must have been necessary, and from all the circumstances the obvious inference is that the stitches must have been numerous but with very short lengths of catgut. At least there is not the slightest assistance from the facts to support the claim that two pieces of such catgut, one and a quarter inches and an inch long respectively, could remain without any knots after the residuary portions had been dissolved in the sound tissue. If such remnants of catgut did get into the pus, it is obvious that they would be very short and probably include the knots which would be outside the tissue, and would not dissolve. As to the swabs, the evidence is given solely by the Defendant himself. He said in cross-examination that there was hæmorrhage, and in such conditions he described the procedure which was followed.

Pieces of swabbing are pushed into the wound. The blood has to be mopped up to get the field of operation perfectly dry. There are two types of swab, one large and the other small. The small swab (Exhibit " 7 ") is just dabbed with the fingers on any bleeding point as it is a very delicate area.

The large swab (Exhibit " 5 ") is soaked in saline solution for wiping out the cavity. Everything has to be made dry before the muscles are drawn together. He agreed it was a long operation, and that he did not remember precisely whether the tube was inserted before or after the stitching of the muscles ; but he used absorbent gut and not chromic gut, which takes longer to absorb and had not been used by him for years. Moreover, he said that when putting a horsehair stitch in the skin, to hold the tube a cutting needle was used ; the other has no cutting surface, and, if it struck rubber, it would be noticed.

The tube is left very loose, and has to be held with the horsehair stitch and a safety-pin at the surface to prevent it from slipping into the cavity. A small length of tube is left projecting to the extent of about a quarter of an inch.

The jury, no doubt, have the right to reject the Defendant's evidence ; but there is nothing to suggest that the wound could be or was packed with swabs. In fact, such a procedure appears to be impossible. The swabs also are in evidence. Even the smaller of these articles is about 6 inches long by 2 inches broad and of double thickness. The large one is of quadruple thickness, and in dimensions about 14 inches long by

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12 inches broad. Both are of loosely woven material, but obviously neither could possibly be drawn by a needle into the very small hole at the bottom of the tube, a sample of which is in evidence. Moreover, the hole cut in the tube is, near its end, deeply inserted in the wound near the straight cut end described in the particulars.

The tube itself is placed obliquely in a slightly upward direction, so that an attempt to pull the tube upwards by force would tend, as is indicated by Exhibit "1," to tear towards the bottom and not upwards, and the tube depicted by the Plaintiff discloses no hole cut in the position where it would normally be placed.

The Plaintiff cannot merely, because of the Plaintiff's statement that a particular type of tube with specific contents came into her fæces, even if it be assumed that the tube could only have come from the wound in the neck, therefore contend that the inference may reasonably be drawn that catgut and a swab were sewn into and left in the tube, as such an inference is entirely in conflict with the only evidence of fact. At least, it must be said that the evidence is so overwhelmingly against such a conclusion as to render it unreasonable.

In addition, it is futile for Counsel to contend that the tube was sewn into the muscles with the swab attached without alleging negligence on the part of the Defendant in performing the operation, of which the insertion of the drainage tube forms part.

The Defendant, on Counsel's admission, was not called upon to meet any such charge. The change of the description from protruding wires to pieces of catgut is also used to explain why they were not noticed, if the top of the tube was broken as the Plaintiff suggests.

The further inference is suggested, of course, that they would only develop that protruding characteristic later, otherwise they would have projected well above the surface of the skin and could not fail to have been observed. Still an additional inference in this connection was suggested to the jury, namely, that although the ordinary tube is composed of thick rubber with considerable tensile strength and therefore would be very difficult to break in a longitudinal pull, this particular tube may have been perished.

The evidence is, however, that whilst often tubes are sterilised by boiling after use and again employed in operations, they are always tested before being used again.

A further hindrance to unsupported deductions being drawn in aid of the Plaintiff's story is found in connection with the alleged penetrating through her throat of the objects she described and is illustrated by the evidence as to the anatomical structure of the neck as regards muscles, arteries, veins, glands and mucous membrane. Dr. Welsh accepted the evidence on anatomy given by Professor Shellshear, the Professor of Anatomy in the University of Sydney, and by Dr. S. A. Smith, a former acting Professor in that subject. Both Dr. Welsh and Dr. Thompson regarded any such obstructions as being irrelevant, as they might be evaded, in their opinion, by being pushed aside or externally traversed by the tube travelling in the pus of an ambulatory abscess along the fascial planes of arteries, muscles and such structures until an easy point of access to the tonsil was attained.

Dr. Thompson said he was not prepared to place any limit to the possibility of things in medicine, and characterised as rubbish and twaddle

the evidence of a number of experienced surgeons and physicians, such as Dr. Poate, Dr. Ritchie, Dr. Marsh and Dr. Steele, who regarded such a movement through the neck from the thyroid gland to the tonsil as being impossible or, if hypothetically possible, at least without causing death or serious or permanent injury. Nevertheless, the evidence of several of the Defendant's medical witnesses expressed very definite opinions on the subject and supported them by powerful authority.

Anatomically, Dr. Thompson described the position as being that the foreign body had only to move through the distance of about an inch from the top of the thyroid cavity to the angle of the jaw, and in that region there is a small triangle or compartment, which is only separated from the anteria of the pharynx by a little fibrous and mucous membrane, so that there would be no real obstacle to prevent anything passing from the neck into the pharynx. He did not say into the tonsil.

This triangle is illustrated on Plate 43 of Dr. Jamieson's Illustrations of Regional Anatomy. The Defendant was previously cross-examined on this point, and he and Professor Shellshear both explained that in the diagram the thick fascial plane, which is known as the pharyngo-basilar fascia and which lines the inner surface of the constrictor muscle and anchors the pharynx to the base of the skull, had been stripped for the purpose of demonstration to students.

Dr. Shellshear's opinion generally was that it is anatomically impossible for a foreign body to pass from the thyroid cavity without destroying bone, muscles or arteries. For instance, he explained that above the thyroid is the thyroid cartilege and then the hyoid bone, which lies across the trachea near the Adam's apple. Its position, with its right and left forms, is illustrated in Dr. Jamieson's Regional Anatomy, Plate 52 ; by Professor Spalteholz's Hand Atlas of Human Anatomy, Plates 632 and 302 ; and Sabotta-McMurrich's Atlas of Human Anatomy, Plate 447.

In any movement laterally from the thyroid cavity a foreign body would meet the carotid artery in its sheath which is practically contiguous to the capsule of the thyroid gland, as shown in the last-mentioned work, Plate 558 ; and even more clearly in Dr. Sloan's Treatise on the Thyroid, Figs. 29 and 32, pp. 238 and 244.

Even if those obstructions were capable of being surpassed, Professor Shellshear added that there would still be the palato-pharyngeal and superior constrictor muscles to be penetrated before the tonsil could be reached. On this aspect reference was made to Dr. Todd and Dr. Fowler's article on the Muscular Relations of the Tonsil, pp. 355 and 359. Other illuminating illustrations also indicate the position of the tonsil in this connection, such as Sabotta-McMurrich's Atlas of Human Anatomy, Fig. 333 ; Dr. Fowler's Tonsil Surgery, Fig. 58 ; Professor Testut's Position of the Tonsils, Vol. IV, pages 62 and 63, Figs. 56 and 57 ; and Binnie's Regional Surgery, Figs. 273, 274, pages 497, 498.

Dr. S. A. Smith made the position even more decisive in stating that this portion of the neck is a very compact structure in which there are no spaces, as all the important organs are held together. He described what he termed a division into three compartments of the neck. In the first is situated the thyroid gland, which is shut off at the top by the hyoid bone. The second is occupied by the complicated set of muscles, which have as their function the movements of the tongue and jaw. They are in three layers, densely packed together, and the tonsil inside at the back of the

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throat lies against one of these muscles, the superior constrictor. The third compartment runs upwards alongside the first compartment, and contains the main artery of the head and neck, and the main veins and main nerve of the heart, and the lymphatic glands.

Some idea of the ramifications of these structures may be gathered from the illuminated films which were exhibited to the jury and to this Court during the argument.

Professor Shellshear said that the foreign body, to reach the tonsil, would have to move at least a distance of two and a half inches; and Dr. S. A. Smith added that its only course could be alongside the sheath enclosing the carotid artery, the jugular vein, and main nerve; but if it kept that course it would never reach the tonsil.

The position of this sheath, blood vessels and nerve is very clearly illustrated in Dr. Sloan's Treatise on the Thyroid, Fig. 29 and 32, pages 238 and 234. The tube would not get near the tonsil, but would have to change its direction laterally, and then would still have to pierce the fascia of the constrictor muscle. This is the line which has been adopted by Dr. Welsh and Dr. Thompson. They had to agree with the view expressed by all the experts that the main artery could not be pierced in any form without complete disaster, and that if muscles are penetrated by pus in an abscess, nature has no method of restoring the destroyed tissue except with an inelastic fibrous tissue, which must give evidence of its existence in a deficiency of movement in the neck. Such a disturbance of muscles, therefore, could not have occurred, since there is no evidence that the Plaintiff has sustained such a deficiency of muscular movement, although Dr. Thompson said she had informed him at some stage there was an indication of such a defect.

There is general medical agreement, however, that a foreign body in circumstances in which it is contained with pus in an abscess may make its way through and also along the fascia surrounding muscles and blood vessels.

Considerable time, in fact, was occupied in questions as to the travelling capacity of a psoas abscess downward through the leg; but such an abscess is of an entirely different nature, and the locality and conditions referred to are not comparable.

Professor Inglis, Professor of Pathology at the University, explained the difference and also that for such an object as described by the Plaintiff contained in pus in an abscess, to travel through the neck for 18 months would not be consistent with continuance of human life, as the surrounding tissues would be matted together and eaten away. Such an abscess he said would inevitably cause death.

Other experts said the abscess would be as large as a man's fist and contain as much as an egg-cup full of pus, and they insisted that with the presence in the neck of such conditions the wound at the site of the operation could not have healed completely, as the Plaintiff admitted it did, several months before the alleged eruption of the tube from her throat.

Actually, unless there is some possible reason warranting the acceptance of Dr. Thompson's contention as to the existence of one small triangular spot where there is substantially nothing but thin fibrous membrane and tissue to prevent the foreign body from reaching the pharynx, 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.

Moreover the evidence and illustrations referred to appear to demonstrate to a degree of complete conclusion that the tonsil lies in a muscular cradle with no point of exposure to such a field of mere fibrous or mucous membrane as is mentioned by Dr. Thompson, cf. Sabotta-McMurrich, Fig. 333; Dr. Todd and Dr. Fowler, pages 355, 359 and 363 ; Dr. Fowler's Tonsil Surgery, Fig. 58, and Professor Testut, Vol. 4, figs. 56 and 57.

Even Dr. Thompson did not say precisely that the triangular area which he mentioned gave access to the tonsil itself, but only that there was no obstruction for anything passing from the neck into the pharynx. The Plaintiff's claim is that it passed into and through the tonsil.

There is no question of the demeanour of the Defendant's witnesses detrimentally affecting their evidence on the subject of the anatomy of the neck. Counsel did not attack them on this aspect but relied upon general vituperation, charging that Dr. S. A. Smith and even Professor Shellshear were under the domination of the British Medical Association, and that, presumably, they were giving evidence which they knew to be false. In this connection he adopted an attitude which has led to the inclusion of a ground of appeal that the conduct of the action prejudiced its fair trial.

It was even suggested to the jury by the Counsel for the Plaintiff that they had more responsibility than just in a contest between persons, the suggestion being that it was a contest between the Plaintiff and the B.M.A. In addition, he said that all this talk of the object having to go through muscles and organs was so much nonsense, and that had been admitted; of course, no such thing was admitted, but the contention was based on a claim that the witnesses had admitted all the individual elements which made the passage possible.

There were no such admissions having the effect claimed, or anything approaching that effect. A further unjustified comment was made with regard to evidence of another witness, Dr. Flynn.

Counsel for the Plaintiff informed the jury that we now know that his diagnosis of the Plaintiff's earlier condition before the operation was all wrong. In fact, that statement was quite incorrect inasmuch as the diagnosis in question was supported by the evidence of Professor Inglis, at least in some substantial degree. Counsel maintained that he was justly entitled to use every effort in support of his client. But it must be borne in mind that whilst an advocate should be fearless in advancing the interests of his client, and is armed with many privileges for his assistance to that end, the arms he wields, as Sir Alexander Cockburn, L.J., remarked on one occasion, are to be the weapons of the warrior and not the dagger of the assassin.

As to this phase of the appeal, whilst it appears to have been most probable that an atmosphere of prejudice was instilled into the minds of the jury, it is regrettable to find that the references to the B.M.A. were induced in a considerable degree by some unfortunate remarks by the opposing leading Counsel. Moreover, it has been held that the only remedy in such conditions is to ask the presiding Judge at the time that the jury might be discharged : Fitzpatrick *v.* Walter E. Cooper Pty. Ltd. (54 C.L.R. 200).

On the other side of the picture a further ground of appeal has been taken that both Dr. Welsh and Dr. Thompson were not qualified as expert witnesses because of their lack of experience in surgery, and especially in

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surgery connected with the neck in the vicinity of the thyroid gland. But both are highly qualified academically, and have had some experience, although possibly a long time ago, at least as spectators at such operations, so that their evidence is not open to the objection that has been taken.

The question then arises whether there is something more than a preponderance of evidence against the verdict so that it might not reasonably have been reached, namely an absence of evidence justifying the entering of judgment for the Defendant. Before reaching any conclusion on this point there are, however, several other matters to be considered.

Examination of the transcript indicates that there was evidence before the jury upon which they would have been justified in finding that after her operation the Plaintiff suffered from tetany. This fact, however, is neutral. That complaint, admittedly, is caused by inflammation of the parathyroid glands, preventing them from supplying calcium in proper quantities to the blood, and may have its origin not only through sepsis caused by the presence of a foreign body in the wound of the operation, but by many other circumstances giving rise to sepsis.

A more important feature relates to a condition of the Plaintiff's tonsil, in which it is said that there is found at the present time a hole through which such an object as the Plaintiff describes could have passed. However, it would first have to reach the tonsil, and there is evidence which can otherwise account for the hole.

Very considerable doubt exists as to whether this hole establishes more than an inference that there was an abscess in the locality and that something came out of the tonsil as distinct from through it, which is a very different matter.

The claim that the jury might find that the object described by the Plaintiff was erupted through the tonsil, and that it could have come from no other source than the wound in the neck must fail if the evidence negatives or is inadequate to support the story that the objects like wire and a swab as described were in the tube when, and if it was, left in the wound. Nor could a finding of the jury include an inference that the tube and its contents could proceed without passing through and destroying or partially destroying anatomical obstructions in order to reach the tonsil if the evidence of Professor Shellshear and Dr. S. A. Smith supported by all the text-books is correct.

Furthermore, contentions based on alleged admissions to be deduced from the fact that when the Defendant was faced with a charge by the Plaintiff that he had been negligent in leaving portion of a tube in her neck, he did not deny the charge immediately, are far from being conclusive in effect. Such conduct may be, and frequently is, left to a jury upon the basis that it is a natural attitude to repudiate allegations of serious negligence, and failure to do so may point to guilt.

A doctor is, however, sometimes in a very difficult position in such circumstances, as patients whose treatment has not been immediately successful are apt to make complaints without foundation, and, for their own protection are humoured by the doctor in order to save them from nervous or hysterical outbursts. Something of the kind was suggested by the Defendant in this case. But, in any event, to put such a possible admission at its highest, it could not include an admission as to the contents of the tube if the evidence negatives their presence and the passage of such a combined set of objects through the neck.

This Court has already decided that where it is found that a verdict is against the evidence and the weight of evidence there is no power to grant greater relief than the direction of a new trial: Hocking *v.* Bell (43 S.R., 154).

Where there is any evidence of fact from which the jury may draw reasonable inferences, however plain it may appear on the probabilities of the case or the balance of evidence that the jury fell into error, a new trial only can be ordered. Judgment can never be entered on the grounds that the verdict was against evidence, unless the Appellate Court itself can draw inferences of fact under the procedure as altered in England by the orders made under the provisions of the Judicature Act: Banbury *v.* Bank of Montreal (1918 A.C. 626, at 664, 674, 675); Smith *v.* Chadwick (9 A.C., 187, at 193); Fitzpatrick *v.* Walter E. Cooper Pty. Ltd. (54 C.L.R. 200), per Dixon, J., at 219; Hocking *v.* Bell (43 S.R. 154, at 159). But if the evidence given by the Plaintiff is such that unexplained it could have amounted to a prima facie case, yet, when considered in the light of the Defendant's explanation, it could not be so regarded as capable of constituting a prima facie case, then a verdict might be entered for the Defendant: De Gioia *v.* Darling Is. Stevedoring and Lightering Co. Ltd. (1924 S.R.1). In my opinion the present case falls within that ruling.

The Plaintiff's evidence calls for an explanation from the Defendant, but that explanation which goes far beyond what appears in the previous appeal to this Court so overwhelms the Plaintiff's case as regards the two vital links in the chain of inferences which have been mentioned that it reduces the evidence as to the negligence charged to less than a mere scintilla.

The defect in relation to an inference favourable to the broken tube together with its alleged contents being left in the wound may, perhaps, be regarded as the result only of overwhelming counter-inferences or presumptions of fact; but the position of the tonsil relative to the bands of muscle surrounding it is an anatomical fact and there is nothing to indicate that these muscles are penetrated. A jury cannot, by its verdict, contradict an actuality as to these muscles, disclosed not only by the evidence of these experts but by all the scientific text-books.

A finding, for instance, could not be accepted that the Plaintiff's neck was devoid of all these muscles in which the tonsil is cradled any more than a finding could be accepted that the earth is flat and not round, although some witnesses might be found to advance such a contention. Thus, the inference or presumption relied upon by the Plaintiff as to the passing of the object through the neck is not merely overwhelmed by countervailing inferences but is negatived, as a matter of fact.

For the reasons which have been given, therefore, in my opinion judgment should be entered for the Defendant.

The Order of the Court is that the appeal is upheld and the verdict for the Plaintiff is set aside and judgment is entered for the Defendant. The Plaintiff must pay all costs of this motion and of the four hearings with mutual rights of set-off as regards any costs ordered to be paid by the Defendant in any of the proceedings taken on his behalf during the course of the action.

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JUDGMENT.

HALSE ROGERS, J.: This is an action against a surgeon to recover damages for negligence. Details of the claims have been set out and discussed in previous judgments of the Court. There have been four trials, and this is the third appeal.

At the first trial, the Plaintiff obtained a verdict. That verdict was set aside and a new trial ordered, and an application for leave to appeal to the High Court from this Court's decision was refused. Thereafter there were two abortive trials. On the fourth, a verdict was returned for the Plaintiff, and the jury made a special finding.

The charge against the Defendant is that after a thyroidectomy he negligently failed to remove part of a drainage tube which had broken and that consequently the unrecovered portion of such tube remained for a long time in the Plaintiff's neck, causing damage to her health. The case depends upon the uncorroborated testimony of the Plaintiff as to the breaking of the tube and also that 18 months after the operation a certain object was erupted through her tonsil. She claims that the only possible inference is that the object erupted must have been part of the drainage tube which admittedly was used after the operation.

Normally, a drainage tube is a plain piece of rubber tubing which is left in the site of the operation when the wound is sewn up. Its purpose, as the name indicates, is to facilitate the draining away of serous fluid. It is usual to remove it two days after the operation, and the removal, according to the evidence, is a matter of no difficulty. The Plaintiff told a story—uncorroborated—of the use of force to effect the removal of the tube from her neck, and of the failure of the effort and the breaking of the tube.

According to her story, there were subsequent probings of the wound, and she was not aware that part of the tube remained unrecovered, for 18 months after leaving the hospital she was ill from time to time, there were swellings in her neck, and she had symptoms which led her medical witnesses to testify that she had been suffering from tetany. Then, after 18 months, she had a spasm, and something seemed to burst through her tonsil. Later, this object was evacuated per rectum.

Thereupon the symptoms of tetany disappeared and she soon recovered her health. The object which she said burst through her tonsil was "discharged" or lost in circumstances which have been alluded to in previous judgments. In order to succeed in her claim it was necessary for the Plaintiff to satisfy a jury that this evacuated object was part of the drainage tube which had been broken. If she did that, it followed that the Defendant must have left it in her neck, and her case was established. She could not give direct and positive evidence that anything had been so left behind, but if she established the character of this object and that it could be part of a drainage tube, she could ask a jury to say that the inference was obvious.

So, at an early stage of the case, she was asked to give particulars and to describe what she claimed had been erupted. Her advisers had

ample time in which to furnish the required description, for six months elapsed between the request and the reply. It was given in these terms :—

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

The grammar is not good, and two readings have been suggested. Mr. Shand for the Plaintiff claimed that the words "what appeared to be" qualified the word "wire" as well as the words "a swab," and read the particulars as "what appeared to be a swab" and "what appeared to be wire protruding from the end of the tube."

Mr. Cassidy read it as indicating that what could be seen in the cut appeared to be a swab, and that there was wire protruding from the torn end of the tube. The latter is the way in which I think the particular should be read ; and in any event, if there is ambiguity it should be read against the Plaintiff.

The importance of the particular is obvious ; it is the foundation of the case, the claim being that what came out of the tonsil must have been left in the throat by the Defendant. During this trial it was admitted that nothing could have been picked up during the passage from the thyroid cavity to the tonsil, so the claim was that this object, with appurtenances as described, must have been part of a drainage tube negligently left behind by the Defendant.

The case for the Defendant was a direct denial that he had broken the tube or left anything at all behind ; but he also met the Plaintiff's story by a body of medical evidence that there was no possibility that such object as described could have passed on the route suggested without fatal results or at least permanent damage to the Plaintiff. It was further claimed that it was fantastic to suggest that such an object could have been part of a drainage tube.

From the beginning an attempt was made by Counsel for the Plaintiff to read down the particular and to get away from the allegation that "wire" protruded from the tube. On the first trial, the Plaintiff said that this protrusion was wire, and then added the words "like wire" but she went on to say that after swallowing the object she felt it pricking her stomach. Defendant's witnesses said, without contradiction, that this was an impossibility, as the stomach is an insensitive area, but the statement did indicate the Plaintiff's insistence that the protrusion was something which could prick her. Professor Welsh, who was the only medical witness called for her at the first trial, refused to consider that such an object as described could have been used in connection with a thyroidectomy.

On the second trial a model was made by Counsel from the description given, and this model was said by the Plaintiff to be a "rough" representation or a "fair" representation, but she said that the wire was too thick. This model has been used on subsequent trials, and on this occasion it was marked Exhibit "P." Plaintiff's Counsel throughout have tried to persuade the juries that her admission as to the resemblance of the object erupted to Exhibit "P" was not important, and that it was open to them to find that something different was left behind. At the third trial, Mr. Hardwick said to the jury that he would not insult their intelligence

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by asking them to find that the Defendant left in the Plaintiff's neck an object like Exhibit " P."

It is not clear what case he was attempting to make, but Maxwell, J., said : " 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. My responsibility is, in my sphere, just as great as yours, and I tell you, with a full sense of that responsibility, that the Plaintiff's case is nothing but this, that an object, of which the one which Mr. Hardwick held in his hand was a fair representation, was left in her throat."

On this trial, Mr. Shand in his opening was vague as to the object claimed to have been left behind. I find these passages in his address : " The tube, or part of the rubber drainage tube, was left right in the neck in the thyroid . . . It looks as if what happened was that either when the wound was being stitched up, with a circular needle like that, either a bit of the tube was stitched accidentally into the muscle or neck, or else one of the stitches went through this V-shaped cut and held it . . . You will hear that knots of catgut were being discharged from the wound. That was where it had been stitched up. You will find significance in this ; for some months after the operation knots of catgut were being discharged. It seems clear that ordinary catgut was not used, but some treated material was used . . . It will appear reasonably clear what happened in this case. It was sought to remove the tube, and it broke off. Tubes are used over and over again, are boiled, and you know what happens to rubber under the circumstances. It happens to be the tube which perished. It broke off at the little V-cut . . ."

Then, after referring to the object erupted, he said : " Fortunately, although that is lost, that day she made a drawing of it. The drawing does not pretend to be to scale. She gave this drawing to Dr. O'Hanlon. She had had no experience in anything medical, and this is something which could not have been imagined." And, showing the drawing, he said : " These are the things which she said were like wire, and when you pressed them they bent down. They were *obviously not wire . . probably gut.*"

So Mr. Shand departed from the particular and said that the things protruding were not like wire, even obviously not wire, and suggested gut.

When the Plaintiff came to give evidence, she also departed from the particulars. She said : " I would say that it was a softish grey piece of tube like a piece of rubber which had been in water for some time. It was swollen. It was not smooth like a new piece of tube. It was a straight cut at one end. It was slit up within half an inch of the end, and it had in that opening a swab which I thought was a piece of marine sponge with a blackish looking stuff. It had come from the sponge and it looked like black wire, but when I bent it, it would fly back straight. It was like horsehair and it would fly back quickly. It looked like wire to me, but it could not have been wire."

On this occasion the Defendant and his witnesses again maintained, as they had done throughout, that nothing of the description given or like Exhibit " P " could have travelled from the thyroid to the tonsil. The

Plaintiff's medical witnesses baulked at Exhibit " P." Professor Welsh renewed his protest against being asked to consider any such object in a thyroidectomy. At the end of the case, the matter was put to Dr. Thompson, who then gave these answers :—

" Q. You won't accept Exhibit ' P ' as being a fair representation of what was left in the throat ?—A. No.

Q. And is this right. Your evidence as to probability does not apply to a thing of which Exhibit ' P ' is a fair representation ?—A. I didn't say that.

Q. Well, do you say it, or do you not ?—A. Anything may be possible.

Q. And what is the answer to that question. Does your evidence of the possibility of movement apply to that thing which is a fair representation ?—A. There are a number of ingredients in that.

Q. Does your evidence as to the possibility of it moving apply to a thing of which Exhibit ' P ' is a fair representation ?—A. It is possible, but I don't think those wires were ever there.

Q. But if they were there ?—A. It could still occur. It is possible. All things are possible in medicine.

Q. In medicine ?—A. Yes, extraordinary things happen.

Q. Are you contemplating that in your evidence of which Exhibit ' P ' is a fair representation ?—A. You could contemplate that.

Q. But are you contemplating it ?—A. Not quite.

Q. Are you ?—A. I don't know.

Q. Doctor, I want an answer to that. Are you, or are you not. It may have important consequences ?—A. I don't think I can answer that.

Q. I will ask you to answer it ?—A. I can't."

At an early stage of this appeal I asked Mr. Shand what it was that he had suggested to the jury had been left by the Defendant in the Plaintiff's throat. He referred me to two passages of his address. I set them out here in full because of the importance which in my opinion attaches to this part of the case. This is how he put it :—

" While I am dealing with this matter, I want to deal with an aspect of the case that my friend spent a lot of time on. Of course, the Plaintiff is bound by her particulars that she gives, but you have to regard her particulars from a commonsense and human point of view . . . Let me remind you of this. When the Plaintiff drew this sketch that you know of (Exhibit ' C ') she was undoubtedly a sick woman . . . What is the use of pointing to this sketch and saying ' These are steady lines ' ? We know that everyone has different ideas of measurement, and particularly women . . . This is described by Dr. Bell when he sees it : ' This is an excellent drawing, very good or excellent ' . . . an excellent drawing of what ? Of course of a drainage tube . . . I want you to consider this. Of course it is too big . . . Of course it is about twice the circumference of a drainage tube. But if you put it all into the scale you will see what size it would be. It would be about half that size all round . . . This Exhibit ' P ' was constructed. . . I am not complaining because my friends are entitled to get all they can out of it . . . It was said

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at first to be a rough representation, then a fair representation. The Plaintiff in the box said : ' It all depends on what you mean by fair . . .' Here is the drawing, never seen by the Plaintiff for two years. Is that a fair representation of Exhibit ' P ' ? You see the V-cut where it has been torn—what has been described as a diamond cut, Where is the diamond cut in this ? These fencing wires, as I satirically called them—how do they compare with those in Exhibit ' P ' ? . . . This sketch is one of the most remarkable features in the case. She has no medical knowledge ; she didn't know what the tube was like. She hadn't seen it put in, because she was unconscious, and yet there comes into being immediately when the tube has been lost, this drawing, which even the Defendant says is a good drawing."

Again, Mr. Shand was vague. I don't know what was meant by asking the jury to regard the particulars from " A commonsense and human point of view." It seems quite inconsistent with his previous admission as to her being bound by the particulars. Apparently he was abandoning the particulars and asking the jury to rely on the sketch—or rather something like the sketch, because " of course it was too big."

The learned Judge left to the jury this question :—

> " Did the Defendant leave in the site of the operation the object substantially as described, that is a piece of rubber tube about 2 inches long, cut off straight at one end, on the side a straight cut in which would be seen what appeared to be a swab and wire protruding from the end of the tube ? "

Those were, of course, the very words of the particular. No ruling was given as to whether they should be read in the way suggested by Mr. Cassidy, or as Mr. Shand desired, but Mr. Shand asked that the question should not be left in that form because the particular was as to the object erupted and not as to what was left in the neck. That observation was, of course, perfectly sound, but it leaves me more than ever unable to appreciate what case Mr. Shand was making. It would seem that he was content to claim that part of the drainage tube must have been left in. but did not desire a particularity in description based on the Plaintiff's story as to what came out.

Yet if the object erupted had not been lost or discarded, it would have been necessary for the jury to decide whether that very object and not something like it—was part of a drainage tube ; and in the circumstances it was just as necessary for the jury to have a precise picture of what was erupted before they could decide on the fundamental issue. It was not sufficient for them to decide that something or other came out which might have been part of a drainage tube. The Plaintiff's case depended on a finding that it *was* part of a drainage tube, and unless she satisfied the jury of that, her case must fail.

The jury, however, did not answer the question put to them by the Judge. The foreman said : " We have not answered the question in the words supplied by Your Honor, but we have found certain facts on that particular question, the answers to which I have here :—

> " We find that the Defendant left in the site of the operation a piece of rubber tube of a length somewhat less than 2 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."

If the jury had returned a verdict for the Plaintiff without any special finding, the position would probably have been the same as on earlier appeals to this Court. If an affirmative answer had been given to the question which was put to them, it would again have been maintained that there was *some* evidence to support it, namely, the Plaintiff's story and the medical evidence called on her behalf as to the possibility of the happening.

Difficulties would probably have arisen on account of the abandonment of the claim that it was " wire protruding " in favour of " What appeared to be wire protruding," but no doubt it would have been argued strenuously that the particulars could be read in the very way which is now definitely claimed, that there had been no departure or abandonment, and that the suggested change of ground on the part of the Plaintiff was a matter entirely for the consideration of the jury and that no question of law for the decision of this Court was involved.

In the circumstances, however, the case stands on a different footing. The position now is that the jury has not found proved a case based on the particulars. They have departed from them and have found that the Defendant left in the Plaintiff's neck something which is described by them in minute detail. For their description they have made a kind of hotch-potch and have taken elements from the Plaintiff's particulars, the sketch to which reference has been made, and the Plaintiff's oral testimony on this trial. Apparently they have accepted the suggestion that the particulars are not to be read strictly, and, no doubt, they were influenced by the vagueness by which Plaintiff's Counsel dealt with this part of the case. They have found a formula of their own—perhaps in order to get over the difficulties about which the Plaintiff's witnesses were cross-examined.

The foundations of this case are uncorroborated statements of the Plaintiff, both at the beginning and at the end of the story, and an uncorroborated account of the disappearance of the object whose preservation would probably have prevented any controversy from arising. The Defendant's case has necessarily been directed to a denial of the leaving of any such object and to the demonstration of the impossibility of the travel of such an object so as to bring it from the thyroid to the tonsil. It is manifest that adherence to the particulars was of importance. Perhaps, in response to the invitation to apply commonsense and humanity, the jury has departed from the particulars and endeavoured to make a finding which avoids outstanding difficulties.

It might be claimed that the Defendant is entitled to succeed on this appeal because the Plaintiff failed to prove the case which, on the particulars given, she was bound to prove ; but the Defendant goes further and claims that, in any event, there is no evidence to support this special finding, and if upon examination of the whole of the record that is found to be correct, there is no need to pronounce on the narrower ground.

It must be taken that the jury accepted the Plaintiff's story as to the breaking of the drainage tube and as to the eruption of something. On behalf of the Defendant it is said, nevertheless, that the finding is founded on mere speculation or conjecture and is opposed to the evidence—the only evidence—as to medical practice and as to what happened at the operation.

On all the medical evidence as to the character of drainage tubes used after a thyroidectomy it is unthinkable that an object of the description

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given by the jury could have been put in deliberately as a drainage tube; it follows that the jury have found that the Defendant negligently left in the wound as a drainage tube a piece of rubber containing wire or something like wire and a swab—for it is admitted that these were not picked up after the wound had been sewn up.

Another admission was made in the course of the trial which I take to mean that no negligence is charged in regard to anything done before the insertion of the tube and the sewing up. There is no evidence of any negligence after that stage was reached, but the case was made in this way. It was *suggested* that the Defendant *must* have used a perished tube, and that he *might* have used some treated and insoluble material instead of gut for the sewing; and that he *must* have done the sewing so negligently that he caught up and sewed a swab into the tube (and incidentally prevented the tube from functioning). There is no evidence as to perished rubber; the only evidence as to the material used in sewing is that it was ordinary and proper, and the only evidence as to swabs is that they were of such a size that the sewing of a whole swab into the tube was impossible; and, apparently, it would not have been possible to catch part of one in the sewing without its being plainly visible.

To reach their finding, the jury must have found negligence in regard to three important matters. On each of these they can have proceeded on nothing but conjecture. There was no evidence before them and nothing to lead them to conjecture except the Plaintiff's story. If the Plaintiff had been able to produce the object erupted there would have been a basis for *inference* by the jury: if she had satisfied the jury as to the exact description of that object the jury would have had a similar basis, but it is clearly not open to a jury to make a guess at the precise nature of the object erupted and then to make a series of conjectures as to how such an object could have been left at the site of the operation.

There is in my opinion no evidence to support the finding that the Defendant left in the neck such an extraordinary object. As that finding was the basis of the verdict, it follows that the Defendant is entitled to have that verdict set aside, and to have a verdict entered for him.

As I am of that opinion, it is not really necessary to consider the other grounds of appeal, but so much time was devoted to them before this Court, and the matters on which they are based occupied so much of the time taken at the trial, and so many important points are involved, that it is proper to state the views which I hold.

It is claimed that the jury's finding is against a greatly preponderating weight of evidence on the question of impossibility. The Plaintiff's medical evidence is much the same as on the first and third trials. After reviewing that evidence on the earlier occasions I expressed the view that a finding for the Plaintiff on it could not be reasonable. In this case it has been somewhat elaborated. The same two witnesses were called as on the third trial. Professor Welsh spoke purely as a pathologist. He said that pus could go anywhere in the neck, and pus could carry with it a foreign body in any direction. As to the possibility of an object such as was described passing from the thyroid to the tonsil, I have already pointed out that he repeated his protest against being asked to consider that anything like Exhibit "P" had been used in a thyroidectomy. In cross-examination, he gave the following answers:—

"Q. I suppose I may take it from you then that a thing of which that is a fair representation, could not move as suggested?—A. I won't have that under any consideration.

Q. Will you have the swab in it?—A. I don't know anything about a swab.

Q. Will you have anything sticking out of it at all?—A. Not the wire.

Q. Anything at all?—A. I can't answer that question."

Dr. Thompson, who is a surgeon, was asked in his evidence in chief whether in his opinion it was possible for such an object to ulcerate through as was claimed, and his answer was: "It is not only possible, but in the circumstances in this case I think it is the most likely thing to happen." Towards the close of the case he was asked whether his evidence as to possibility applied to the movement of such an object as Exhibit "P," and he gave the answers which I have already set out.

On the question of *some* object passing, he adhered to his former evidence, and stated that quite near to the tonsil there was a space occupied by nothing but fibrous or mucous membrane, and that the evidence of Defendant's witnesses as to what might be called insuperable obstacles was incorrect. The evidence which he gave was illustrated by reference to certain diagrams. Here is what he said:—

"Q. And you have already expressed your view about the ability of the tube to pass?—A. There is no difficulty whatever in the tube passing from the thyroid through to the angle of the jaw, which is about an inch, a little bit over or under, as the case may be, because the only thing that lies in the compartment and separates it from the interior of the pharynx is the membrane, the mucous membrane of the pharynx. There is a triangle there under the angle of the jaw, and apart from the really fibrous membrane and mucous membrane there is no obstruction to anything passing from the neck into the pharynx. At that point is also the superior laryngeal nerve. That is a sensory, not a motor nerve . . ."

and he said, in reference to particular illustrations:—

"These are accurate illustrations of the anatomy of the body. They are not pulled out of position to demonstrate things like you would in the diagrammatic illustration. Take 43 of Jamieson's Anatomy. Here is the space that I am referring to under the angle of the jaw. The lower border of the superior constrictor is inserted on the inner upper aspect, and the middle constrictor is inserted there (shown). There is the distinct triangle there, and here is the apex of it, and in that space there is the fibrous membrane, and in this there is mucous membrane . . .

Q. The jury want to know where the tonsil would be?—A. Just under the angle of the jaw. If you compress the angle of the jaw, the angle goes down and gives you a misleading idea possibly about the tonsil, but the tonsil is just under the angle of the jaw. There is another diagram here, page 50, and that shows how the thyroid gland is in the visceral compartment between the pro-tracheal layer there, and the pre-tracheal, so it is behind the layer that Dr. Poate

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spoke about, and not in front of it, and you will notice there how it touches the gullet below and the pharynx above, so that there is nothing between the superior constrictor and the middle constrictor in the triangle except mucous membrane and the fascia on it."

The Defendant and all the medical witnesses called on his behalf maintained (1) that an object such as Exhibit " P " could not pass on the line indicated, and (2) that the structure of the neck was such that even an ordinary drainage tube without the appurtenances described could not so pass.

Professor Shellshear, who is Research Professor of Anatomy at the University of Sydney, gave detailed evidence in regard to the anatomy of the neck, and explained his evidence to the jury with text-books and diagrams. He was asked this question :—

" Q. It has been suggested in this case that a foreign body has passed by some means or other from the area of the thyroid to the area of the tonsil. Now, as an anatomist, is that anatomically possible ?—A. No."

Then, in cross-examination, he was asked :

" Q. Can you answer the pathological processes that would occur if pus spread upwards from the thyroid up towards the tonsil ?—A. I can, but not as an authority on the subject.

Q. Very well, that is the proposition. Do you feel qualified as an authority to say what would happen if in fact suppuration spread upwards in the neck from the thyroid ?—A. Death.

Q. As an authority ?—A. Yes—death."

Professor Inglis, who is Professor of Pathology in the University of Sydney, was asked :—

" Q. As a pathologist, can you contemplate or accept the allegation that is made by the Plaintiff in this case as being possible, and her still being alive ?—A. I cannot accept it."

Dr. Smith, who had been at one time Acting Professor of Anatomy, and at another time Acting Professor of Medicine, and who is now Director of Post Graduate Medical Work in N.S.W., made in his evidence a detailed examination of all the regions of the neck through which the object was supposed to have passed. He likewise denied the possibility of the movement. He was asked :—

" Q. To support the story that the infection continued there over a period of 18 months, and of such a nature that it ate through the structures of the neck starting from there and going up and across the tonsil, does it assist in deciding whether this path of pus is possible or not ?—A. No, I regard it as impossible for pus to get from one side to the other. It could not do that without damaging the gullet or the windpipe. There is no space for it to get across, and if it damaged either of those two structures the patient would die. If it started this abscess from this compartment and got into the third compartment, those important blood vessels would be bathed in pus, and structures of that nature bathed in pus over a period of 18 months would be very likely—I won't say inevitably, but it would almost certainly have been damaged, as the walls of those blood vessels are made very thin and the wall of the artery is thicker, but even the arterial walls when bathed in pus do soften and degenerate in that way."

Dr. Edye gave similar evidence. Dr. Marsh said that in his opinion a body such as that described would not move at all. He was then asked various questions on the assumption that the object could move, and dealt in detail with the results from an assumed movement, in various directions, and maintained that the whole theory of travel was impossible.

As already indicated, Dr. Thompson, in support of his evidence, referred to certain plates in Jamieson's "Anatomy," and in particular to a small uncoloured triangle which, he said, indicated an empty space containing nothing but mucous or fibrous membrane. These same plates were shown on cross-examination to Dr. Bell, who stated that there was no empty space and that the triangle was shown uncoloured in the plates because certain things were being shown diagrammatically and that a lot of structures had been cut out. He claimed that the diagram is misleading. Professor Shellshear, on being shown the diagram, gave this evidence :—

"Q. Will you look at this book 'Jamieson's Illustrations of Regional Anatomy.' Do you know the publication ?—A. Well.

Q. Do you know the author ?—A. Very well.

Q. You see that diagram 43. There are two little white spaces. It has been suggested that they are areas of mucuous membrane ?—A. Then they have removed entirely from there the thick fascial plane which is shown as the pharyngo basilar fascia which lines the inner surface of the constrictor muscles which I think are previously mentioned and anchors the pharynx firmly to the base of the skull.

Q. Does that diagram represent areas of mucous membrane ?—A. Not unless they have removed everything down to the mucous membrane in those areas. The picture is a diagram and it is to me a pharyngo basilar fascia, but I cannot say whether he has cut that out in his diagram. There is no evidence of it. It is a diagram for students . . . Q. Assume that some object, a knife or anything else, were being penetrated from beneath through the area, through the tissues to the tonsil, would you pass through any mucous membrane until you got to the tonsil ?—A. The tonsil itself is a modified mucous membrane. That is the first time you would hit the mucous membrane."

Professor Welsh, on being recalled, stated that he was prepared to accept Professor Shellshear's evidence on the anatomy of the neck. So, on the anatomical side the test is between Dr. Thompson on behalf of the Plaintiff, and the Defendant himself, Professor Shellshear, Dr. Smith, Dr. Marsh and Dr. Edye on the other side.

The question of the possibility of passage is primarily one of anatomy. Must the verdict of a jury be taken as conclusive on a matter of exact science such as the structure of the neck ? Surely it is not a case of judging evidence on the demeanour of witnesses or their calibre ! It must be a matter in which the question as to possibility can be answered definitely. On this appeal, both sides have used textbooks and diagrams, and we have been invited to consider closely the anatomy of the neck, and we have done so.

I am forced to the conclusion that the Defendant and Professor Shellshear are correct in their evidence as to the uncoloured triangle relied upon by Dr. Thompson. Other diagrams produced to us show that all parts of the neck on the line of suggested travel are fully occupied

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—with no empty space. Dr. Smith said definitely that there is no space for pus to get across. I regard Dr. Thompson's uncoloured triangle as a touchstone by which we may test the conflicting evidence, and I think that, using it in that way, and taking the totality of the evidence and the diagrams we must accept the evidence given on behalf of the Defendant.

On the worth of the conflicting statements the Court itself must decide. If it were otherwise, on any technical or scientific subject a litigant would be at the mercy of a jury not qualified in any special way to decide technical questions, and quite possibly influenced by prejudice. Of course, if it could be shown that the scientific witnesses were biassed, there would be reason for discarding their evidence entirely. In this case I can see no reason for believing that witnesses for the Defendant have for an ulterior purpose risked their professional reputation by forswearing themselves on matters of precise knowledge. It is worthy of note that Professor Shellshear and Dr. Smith were not cross-examined on their evidence as to anatomy—a matter not of determining importance in itself but one to be taken into consideration; in the case of Professor Shellshear it is of the more importance because of Professor Welsh's acceptance of his statements.

It is instructive to see how Mr. Shand dealt in his final address to the jury with the medical evidence against him. He claimed that although the Defendant's medical witnesses all said that the movement of the body from one relevant place to another was impossible, all of them, or almost all of them, made admissions which supported the theory put forward by the Plaintiff. He said :—

> "I indicated that I would put to you, and I will do it, this, it is easy to say a thing is impossible, very easy to say it, but it is harder to prove it, and I put it to you, and I will repeat it and give you chapter and verse for it, that although most of the witnesses called by the Defendant say this is not possible—this tube passing in that area—it is not possible—I will show you that they have admitted all the individual elements which make it possible."

Mr. Shand thereupon proceeded to deal with the evidence of the various medical witnesses, and, taking one piece here and one piece there, he claimed that you had individual admissions as to different possibilities which showed that the movement claimed was possible; in other words that his case was really admitted. It is necessary to point out that most of the admissions that were obtained were not in regard to the possibilities of what might happen in the neck, but were general possibilities touching pathological conditions in other parts of the body, and as I have indicated, the positive evidence of the people from whom he obtained these admissions on other matters was that movement in the neck, in the circumstances indicated, was not possible at all. After reviewing some of this medical evidence he said :—

> "And that is how it works. All this talk of having to go through all these muscles and organs is so much nonsense, and that is admitted."

The words "and that is admitted" have been much criticised by Mr. Cassidy in his address. It is clear that if they are intended as the submission of an argument, the argument is not well-founded. To my mind it is impossible to regard the admissions he obtained as amounting to an admission that "all this talk if having to go through all these muscles and

organs is so much nonsense." If the words "and that is admitted" are to be taken as a statement of fact—and that is how Mr. Cassidy wishes to read them—then it is obvious that they do not truly state the position.

This method of building up admissions and putting it to a jury of lay people that the total effect of such admissions is to prove the possibility of the Plaintiff's theory is most unsatisfactory. In order that anyone should be able to decide how far the admissions really go, and how far an admission as to the movement of pus in one part of the body has a relevant bearing on the question before the jury, or how close an analogy there is between a psoas abscess and the abscess which must have formed in this case, and the inferences that can be drawn from the happenings in cases of quinsy—a considerable amount of medical knowledge would, in my opinion, be necessary. This mosaic of evidence of admissions obtained in the way I have indicated is to my mind of no weight against the definite expressed opinions as to the impossibility from the very people from whom the individual pieces were obtained.

To my mind, the evidence as to impossibility is convincing, and, reading it in its entirety, one cannot help coming to the conclusion that if that evidence had been properly considered and understood, the jury must have found for the Defendant. At any rate, the weight in favour of the Defendant is so preponderating that no reasonable jury could have refused to give effect to it.

Other grounds of appeal were raised and argued, which call for attention. Two of these are: (1) that the conduct of the action on behalf of the Plaintiff was such as to be calculated to, and did in fact, prejudice the fair trial of the action, and (2) that His Honor was in error in admitting certain evidence alleged to refer to the policy of the B.M.A. and the conduct of its members. The matters are closely connected. Obviously, if an issue could be raised as to the conduct of the B.M.A., it would help to prejudice the jury in favour of the Plaintiff, and could be used to discredit the medical witnesses, and would serve to divert the attention of the jury from the real issue in the case.

Mr. Shand was careful to suggest in his opening address that this was a struggle of the Plaintiff against the combined forces of the medical profession. In the second paragraph of his opening address he said:—

> "The story will be told you by the Plaintiff. You will realise that any plaintiff suing a doctor has a task ahead of her. The case will show you in the most clear way how difficult it is to secure evidence when you are opposed to a medical man, a member of the British Medical Association. Luckily in this case we have available to us the services of two brilliant medical men, one a Professor at the Sydney University, a man who has actually taught some of the doctors available to the Defendant. We have another gentleman of undoubted attainments, not a member of the B.M.A., for reasons as to which I invite cross-examination—reasons which do him credit —who will be able to assist you."

The Defendant's Counsel, by what I cannot help regarding as an incautious cross-examination of Dr. Thompson, gave that witness an opportunity of introducing statements as to boycotts by the B.M.A. of any doctor who gave evidence against medical men who happened to be defendants. In opening his case, the Defendant's Counsel made what has been called a parade of the witnesses whom he proposed to call, and

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it was inevitable that when each of them appeared he would be asked whether he was a member of the B.M.A. It could be plausibly suggested that there was some ground for asking the question, because being a member of that body was something which would tend to influence the witnesses in favour of the Defendant—in other words—would indicate bias.

When the Defendant was in the box, he was cross-examined at length as to whether or not he, as a member of the B.M.A. Council, approved of the attitude of the secretary of that body in advising the Plaintiff's own doctor not to give a statement to her solicitors and on other matters connected with that doctor's conduct. That cross-examination was claimed to be relevant on the question of credit, and on that ground it was admissible. The cross-examination was legitimate, but to raise and put to the jury an issue on it was not proper. In his final address, Mr. Shand said :—

> " The Plaintiff comes to you, I suppose, on a path that has been littered with the gravest difficulties that it is possible to imagine a litigant to suffer under. She is the Plaintiff in a case where medical evidence is necessary, where her own doctor is a traitor to her—a traitor, Gentlemen—I will prove this—a lying traitor, this Dr. O'Hanlon—a traitor, not in the sense that he would not give evidence to help her cause, but he would not give her any at all . . . But what happens then ? He writes down to the B.M.A. and is told not to give her a report. That is all. Not a statement but a report to her legal advisers because it might be misconstrued. And this is a body, this is a union, an upper union of professional men controlling these men on whom we rely for our health and our lives—men, most of them I suppose of the highest calibre. But what does this mean ? The B.M.A. steps in and prevents a person's own doctor to whom she has gone and paid and relied on, from giving her any assistance—even giving a report . . .
>
> I was putting to you some of the difficulties that the Plaintiff was suffering under. She had arrayed against her not only the doctors, through the B.M.A., but apparently also the University is lending itself, through these X-rays. They are obtained through the University, and done by persons in the employ of the University, and in fact Professor Shellshear said that he did give every assistance he could. Apparently he had been giving advice from the beginning, although he has only given actual evidence on this occasion. All the nurses, all available to the Defendant . . .
>
> It is pretty terrible, gentlemen, that in this community that kind of thing can take place, and in your hands in this case there rests more responsibility than just a contest between person and person. In your hands there rests a higher principle, to protect the right of every person to get a fair deal ; because if it were a fact that a person who suffered at the hands of a medical man through his negligence were to be treated in that way—if it were a fact that he or she could not get medical assistance, then this country would not be what we call a democracy . . ."

The only way in which I can interpret that is that this is not a case between the parties before the Court, but a case in which the B.M.A. is on its trial. Nothing could be more calculated to distract the jury from the

real issue which they had to try than to put the matter to them in that way. It is difficult to see how the jury could properly decide the relevant questions after such inflammatory remarks. It may well be that they were induced by them to make a finding which, as I have indicated, is to my mind unreasonable.

It has been urged that such conduct justified the granting of a new trial. There is no doubt that ordinarily where the Court can see that the jury *must* have been influenced by the inflammatory speeches of Counsel, a new trial will be ordered (Chater *v.* Daily Mail Publishing Company, 18 T.L.R.), but in this case there are other matters to be taken into consideration besides this stressing of the position of the B.M.A. In the first place, the Defendant's own Counsel gave a loophole for Dr. Thompson to introduce the matter of a suggested boycott.

Further, Mr. Cassidy, in opening his cross-examination of the Plaintiff, endeavoured to introduce equally irrelevant matter. He attempted to put before the jury what had been said by this Court in regard to the Plaintiff's case—in order, as he explained, to get her reactions. That must have been done for the purpose of prejudice. Usually when Courts grant new trials, they are particularly careful to say as little as possible about the facts, because of the danger of prejudice, but this Court felt bound to examine closely the evidence and to pronounce upon it. It is startling to find that an attempt was made to get its observations before a new jury as something which they might consider. No application was made for the discharge of the jury on account of any happening at the trial. The learned Judge, in summing up, said :—

> "These are entirely false issues, calculated to divert your attention from this question, and to induce you to decide on considerations of prejudice rather than in the calm and impartial atmosphere in which alone, as I say, the real issue in this case can properly be decided. Unfortunately, in the existing state of the law, it is impossible to prevent such irrelevant and prejudicial considerations from entering into the case. They do so in many cases, often with disastrous results on the doing of complete justice between the parties. In this case, too, such instances of the kind occur to my mind. I refer to the question of what was called loyalty of the nurses to the doctors. As to the former matter, it was opened by Mr. Shand in his first address, was again raised by a voluntary remark by Dr. Thompson in the course of his evidence, occupied some of Mr. Shand's cross-examination of Dr. Bell, and other medical witnesses for the Defendant, and was referred to by Mr. Cassidy in his address, and was again stressed by Mr. Shand in his final address . . .
>
> You should not allow such considerations to distract your minds from the task that you are required by law to perform, namely, to find whether or not the Defendant has been guilty of the negligence charged."

Closely connected with this supposed issue of the Plaintiff versus the B.M.A. is the allegation that all the medical witnesses except Professor Inglis and Dr. Tebbutt were in conspiracy to defeat the Plaintiff's claim and that they had lied in the witness box. The making of such charges without foundation is one of the defects of jury trials, because it is a not uncommon practice to attempt to get cases decided, not on the evidence

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but on prejudice. In this case, criticism of the Defendant and of the doctors closely connected with the case was legitimate, but personal attacks on the witnesses who were called as experts was quite unjustifiable.

They are men of the highest standing in the community and were entitled to courtesy at the hands of Counsel. Instead, they received insults. It is a very serious thing for Counsel to say to a man of Dr. Edye's standing in the community: "Have you any regard for your oath, doctor?" or to suggest that there was no need to cross-examine Dr. Smith on anatomy because he had made an exhibtion of himself, or to say deliberately that Professor Shellshear and Dr. Smith had forsworn themselves and were in effect prostituting themselves and their reputations in order that they might aid the Defendant and in furtherance of a conspiracy against the Plaintiff.

These very serious charges should not have been made unless upon a sure foundation. It is advisable to call attention again to the ethical aspect of this matter, and to refer to the remarks of the Chief Justice in Oldfield *v.* Keogh (41 S.R. at p. 211).

The transcript shows that during the course of the case there was a welter of distractions and side issues. A perusal of Mr. Shand's final address shows the very large amount of time taken up in the discussion of matters which are on the fringe of the case. Some of these are irrelevant to the real issue, and touch only what may be called the minor issues. These seem to overshadow or obscure the vital question, which was simply whether the Defendant had been guilty of negligence as charged.

I have already dealt with the false issue that the case was really a contest between the Plaintiff and the B.M.A. Other matters may be referred to briefly. A great deal of attention was devoted to tetany. Close examination and cross-examination on this subject was perfectly legitimate in view of the Plaintiff's claim that she was suffering from tetany from the time when she left St. Luke's Hospital until after the eruption of the object, and that she became well almost immediately after.

Apparently the manifestations of this disease are somewhat doubtful. The Defendant's witnesses expressed the view that the Plaintiff had been suffering from hysteria and not from tetany during the relevant period. The Plaintiff's medical witnesses insisted that the symptoms pointed to tetany, and the matter became one of keen controversy. This in comparison was a minor issue, but so much attention was devoted to it that there was a possibility, or even a probability, that the attention of the jury was thereby distracted from the main issue.

Great stress was laid by Plaintiff's Counsel on Defendant's failure to repudiate the suggestion by the Plaintiff's husband that the doctor left portion of a drainage tube in the Plaintiff's neck, and on what had been called the Defendant's reactions to the suggestion by Dr. O'Hanlon that perhaps the loss of the object erupted was a good thing for the Defendant.

There is no doubt that the failure of the Defendant to repudiate these suggestions is ground for legitimate comment, and, to a lawyer, the Defendant's attitude on these occasions is hard to understand or explain. If the issue before the jury had depended on which of two contradictory accounts of certain events they would accept, the Defendant's silence would have been most important, and it would have been legitimate to ask the jury to draw an adverse inference from it; but in the peculiar

circumstances of the case and in view of the medical claim as to the impossibility of the happening (which, as I have indicated, is convincing, or at the least is one supported by overwhelming weight of testimony) the Defendant's failure to repudiate or discuss the suggestions is a matter of much less weight and not inconsistent with his sworn testimony. Of course it was put to the jury by Counsel that his attitude was a confession of guilt, but if he knew or believed that the claim being made was founded on an impossibility, his conduct, though unwise, was capable of another explanation than that offered by Counsel to the jury.

Ordinarily, of course, it would be for the jury to say what view they took of such conduct, but if the jury had found, as I think they should have found, that the story told by the Plaintiff involved a physical impossibility, then this conduct could not have led them to find a verdict against the Defendant. Consequently I am of opinion that, as the main issue should have been found for the Defendant independently of any consideration of his conduct, this matter is one which they should have been warned not to consider until they had fully considered the medical testimony.

If on that testimony there was an even balance or merely a slight preponderance, this matter of conduct would be of importance, but merely because the Defendant had been foolish it was not open to the jury to find that the impossible had occurred.

Other matters which occupied a large amount of time and were the subject of much comment were Dr. O'Hanlon's correspondence, his refusal to give a statement, and his supplying to the Defendant of certain facts as to the Plaintiff's medical history. Mr. Shand put it to the jury that the B.M.A. had intervened to prevent Dr. O'Hanlon from telling the truth. After dealing with Dr. O'Hanlon's conduct he said : " That was the treatment she got, at the behest of whom or what body ? I will show you that he did not want to do it. It was under instructions. He was convinced that this tube had been left in her neck, but there was a greater power than his honesty—there was a power that forced him."

On these matters Mr. Shand had much to say to the jury, and he said it very forcibly, and in my view the case was won on issues of that kind.

Two other matters were raised in this appeal. The first concerns the proper direction to be given to the jury in a case of this kind. The charge went beyond negligence. It was put to the jury that after breaking the tube and failing to recover part of it, the Defendant, through lack of moral courage, failed to disclose to anybody what had happened, and left to chance what the outcome would be ; in other words, that he deliberately took a course of action which endangered the Plaintiff's life.

Mr. Cassidy asked that the same direction should be given to the jury as in a criminal case, that is, that the Plaintiff must satisfy them beyond reasonable doubt. Alternatively, it was asked that the issue must be proved to their comfortable satisfaction (Brigginshaw *v.* Brigginshaw). The learned Judge directed the attention of the jury to the seriousness of the allegations and the importance of the issue before them, but gave the direction which is usual in civil cases, and refused to alter it.

On this matter we stopped Mr. Shand. What was charged was negligence in leaving part of the tube in the throat. In itself, that was a simple charge of negligence. Incidentally, the charge of misconduct arose, but criminal misconduct was not pleaded, and was not, strictly speaking, in issue. I do not think that the other direction asked for by the Defendant

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was proper. It is clear from the authorities so carefully examined by my brother, Davidson, that something different from the direction actually given was desirable, if indeed, it was not necessary, but in view of the statements with which the learned Judge supplemented his direction, I would not be prepared, in any event, to direct a new trial on the ground of misdirection.

Another ground of appeal was that His Honour allowed Professor Welsh and Dr. Thompson to give expert evidence on medical matters on which, it is claimed, they were not qualified to speak. This ground was not strongly pressed by Mr. Cassidy after members of the Court had expressed their views, and we subsequently relieved Mr. Shand from arguing it.

The Plaintiff's case began with an extraordinary story of man-handling by the Defendant when she was in a weak state after a dangerous operation. To me it is an incredible story. It concludes with another strange story of an eruption through the tonsil, and the disappearance of the article erupted. It depends upon the theory of the identity of the article erupted with part of a drainage tube put into the site of the operation.

To support her case, the Plaintiff called medical evidence as to the possibility of that theory because it was thought that the inference necessary could not be drawn unless evidence as to possibility were tendered. The case then became involved in all sorts of side or minor issues, some of which I have mentioned. In the result, the jury found that the Defendant left in the site of the operation a fantastic drainage tube.

For the reasons I have given, I think that the verdict must be set aside and a verdict entered for the Defendant. Consequently, it is not necessary for me to consider what would have been the proper order if this Court had again merely come to the conclusion that the verdict was so much against the weight of evidence that no reasonable man could have found it. Nor is it necessary to consider the cumulative effect of the several unsatisfactory features of the trial to which I have referred.

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No. 59.

JUDGMENT of Roper, J.

His HONOR : Two vital aspects of the Plaintiff's story in this case are attended by circumstances of extreme improbability.

In the first place, her evidence necessarily involves that portion of the drainage tube was left in the site of the operation by the Defendant, a competent surgeon, with his knowledge, and as he also knew with the knowledge of one other person.

It is necessary to find further that the Defendant knowingly took the extreme risk of detection of the presence of the foreign body by another doctor when he allowed the Plaintiff to leave the hospital and to pass out of his immediate care.

Apart from the medical evidence as to the possibility of the passage of the tube from the site of the operation through the body, this I think, is the most improbable aspect of the Plaintiff's story. The other aspect which is attended with extreme improbability is her story as to the actual passage of the tube and the losing of it.

Notwithstanding these improbabilities, two juries have each found a verdict which necessarily involves that they have accepted these aspects of the Plaintiff's evidence as being the truth. Two other juries have each disagreed on the issues submitted to them.

There are some facts in the case which any jury of reasonable men on the evidence could readily have found in the Plaintiff's favour, and which serve to mitigate the improbabilities in her evidence to which I have referred.

One outstanding matter is that it was clearly open on the evidence for the jury to find that for a period of 19 months after the date of the operation the Plaintiff was extremely ill, and that the illness was due to some infection in or around the site of the operation, and that from the time when she asserted that the portion of tube had passed through her body she recovered rapidly and has had no recurrence of the particular illness which afflicted her before. One other fact which I think it was open to the jury to find, without any possibility of the finding being successfully challenged, was that the Plaintiff's left tonsil exhibited some indications which are consistent with the possibility of the tube having passed through it.

In approaching the question of whether the Plaintiff's evidence as to the passage of the tube is objectively true, I think that the jury must have found that the Plaintiff was ill up to the time she says the object passed and that she recovered shortly thereafter, and that her tonsils did have the indications to which I have referred ; and it must have given great weight to this view of the facts.

If the Defendant's case had rested solely upon evidence in denial of the Plaintiff's evidence of fact and upon the improbabilities inherent in her story, it is clear, I think, that the verdict in her favour would stand. The case, however, went much further than this, and it was sought to show that the inference which follows the acceptance of the Plaintiff's story, namely, that the tube which she says passed through the body must have come from the site of the operation and must have been left there by the Defendant in circumstances establishing negligence, was an inference which could not be drawn because the passage of the tube from the site of the operation into the Plaintiff's throat was a physical impossibility.

Evidence to support this conclusion was given with great medical detail by a number of eminent and highly qualified experts. They were all subjected to searching and difficult cross-examination, which on my view of it failed to shake their opinions.

If this evidence has the quality of establishing impossibility to the degree of mathematical or scientific certainty, the Plaintiff's case must fail, because an inference essential to its success cannot be drawn. If the evidence, without establishing certainty establishes a preponderating degree of probability sufficiently overwhelming to lead to the conclusion that reasonable men properly applying their minds to the whole of the evidence could not have drawn the inference necessary to the success of the Plaintiff's case, the verdict in favour of the Plaintiff must be set aside.

It is necessary, therefore, to consider whether this evidence does establish a case of certainty or of preponderating weight. I have considered it with care, and in my opinion it does not establish a case of scientific certainty. It has no empirical basis, the presence of foreign bodies of the nature of the one involved in this case in the neck being a matter of which

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No. 59. Judgment of Roper, J., 3rd August 1944, *continued.*

there is no recorded experience. It does establish with certainty that there exists between the site in which the tube was alleged to have been left and the point at which it is alleged to have been erupted into the throat structures of various kinds which prohibit the free passage of the tube from one of those places to the other, but to my mind it does not establish with certainty the impossibility of that passage notwithstanding the existence of those structures.

The weight of this evidence is very great, and there is another matter as to which the evidence for the Defendant has, I think, even greater weight, namely, that assuming the possibility of the passage of the object from the site of the operation to the throat that would be attended by destruction of muscular tissue to such an extent, that the Plaintiff must thereafter suffer from and exhibit permanent physical disability which was not present at the time of the trial.

Against this body of evidence has to be set the evidence of two experts called for the Plaintiff. Their evidence is that the passage of an article of the nature of that described by the Plaintiff from the site of the operation to the site of the eruption is a physical possibility without necessarily incurring the death of or permanent visible physical defect in the Plaintiff.

I think, however, that the evidence in support of the contrary view is overwhelmingly strong and (to adopt the test as expressed in Bell *v.* Thompson, 34 S.R., 431 at 437) that it preponderates so strongly in favour of the Defendant as to lead to the conclusion that the jury in finding for the Plaintiff have either wilfully disregarded the evidence, or failed to understand and appreciate it.

At the conclusion of the summing up the Trial Judge left a question to the jury framed upon a passage contained in the particulars furnished on behalf of the Plaintiff. The question and the particular upon which it is framed and the precise form of the jury's answer are set out in the other judgments in this case.

Particulars are furnished to indicate clearly to the Defendant the case which has to be met, and to limit the evidence which can be called in support of it. The particular upon which the question was framed was not strictly part of the particulars of the alleged negligence, they being " that a piece of drainage tube was inserted in the wound by your client and that this drainage tube was so negligently or unskilfully manipulated by your client that it broke and that your client thereafter negligently failed to remove the portion of the said drainage tube remaining in the wound."

The particular on which the question was framed was an answer to a question seeking particulars of the tube passed by the Plaintiff.

From the conduct of the case, however, together with the particulars furnished, the Plaintiff's allegation was that what was passed was identical with what was left in the site of the operation, subject to some possible change in colour and in appearance allegedly due to its immersion in fluids in the body. It appears to me that a finding not based precisely upon the particulars furnished does not necessarily deprive a plaintiff of the right to a verdict, and I agree with Davidson, J., that the particular variation introduced by the jury in this case, would not, if that were the only matter in issue, prevent the Plaintiff from holding the verdict.

I also agree with Davidson, J., as to the other grounds raised by the motion, and think that the appeal should succeed only on the ground that the verdict was against evidence and the weight of evidence for the reason given in the appeal from the third trial in this case (Hocking *v.* Bell, 43 S.R., 154); this, I think, should lead to an order for a new trial; but as the majority of the Court is of the opinion that a verdict should be entered for the Defendant, I think that it is unnecessary to consider whether any, and, if so, what terms should be imposed as a condition for granting a new trial in the circumstances of this case.

In the Supreme Court of New South Wales.

No. 59. Judgment of Roper, J., 3rd August 1944, *continued.*

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10 **No. 60.**

NOTICE OF APPEAL.

In the High Court of Australia.

No. 60. Notice of Appeal, 22nd August 1944.

No. 39 of 1944.

IN THE HIGH COURT OF AUSTRALIA.
New South Wales Registry.

ON APPEAL

From the Full Court of the Supreme Court of New South Wales.

Between STELLA EILEEN HOCKING (Plaintiff) - Appellant

and

20 GEORGE BELL (Defendant) Respondent.

TAKE NOTICE that the Appellant (Plaintiff) herein appeals to the High Court of Australia against the Judgment and Order of the Full Court of the Supreme Court of the State of New South Wales dated the third day of August one thousand nine hundred and forty-four whereby the said Full Court ordered that a verdict for the Appellant (Plaintiff) for eight hundred pounds (£800) be set aside and that judgment be entered for the Respondent (Defendant) for an Order that the said judgment and order be set aside and that the verdict for the Appellant (Plaintiff) for eight hundred pounds (£800) be restored upon the following grounds :—

30 That the said Full Court were in error in setting aside the verdict for the Appellant (Plaintiff) and entering judgment for the Respondent (Defendant).

That the said Full Court was in error in not dismissing the said Appeal.

Dated this 22nd day of August one thousand nine hundred and forty-four.

BRYAN CARSON,
Counsel for the Appellant.

This Notice of Appeal is filed by Wilson and Clapin, of 14 Martin
40 Place, Sydney, Agents for Thomas & Hague, Quirindi, the Solicitors for the Appellant herein.

To : Geoffrey Rex, Solicitor for George Bell, Respondent (Defendant).

In the High Court of Australia.

No. 61. Reasons for Judgment.

Latham, C.J.

No. 61.

REASONS FOR JUDGMENT.

This is an appeal from an order of the Full Court of the Supreme Court of New South Wales setting aside a verdict for £800 for the Appellant in an action claiming damages for negligence, and directing that judgment be entered for the Defendant. The Plaintiff, a married woman, claimed damages for negligence against the Defendant, a surgeon, alleging that after performing the operation of thyroidectomy he left part of a drainage tube in her neck, which remained in the neck until ultimately it came through the tonsil into the mouth some 18 months after the operation. In the meantime, the Plaintiff was seriously ill and suffered great pain.

There have been four trials before a Judge and a jury of four. At the first trial there was a verdict for the Plaintiff for £500. The Full Court set aside this verdict and ordered a new trial: see Hocking *v.* Bell, 42 S.R. (N.S.W.), 130. Leave to appeal from this order was refused by this Court. At the second and third trials the jury disagreed, being evenly divided. After the third trial the Defendant moved the Full Court for a verdict. The motion was dismissed: Hocking *v.* Bell, 43 S.R. (N.S.W.), 154, and a new trial was again ordered. At the fourth trial there was a verdict for the Plaintiff for £800, and the jury made a specific finding in answer to a question submitted to them by the learned trial Judge. The Full Court unanimously set aside this verdict, and by a majority, Davidson and Halse Rogers, JJ., (Roper, J., dissenting) directed judgment to be entered for the Defendant: Hocking *v.* Bell, 44 S.R. (N.S.W.), 468. It is from this order that the Plaintiff now appeals to this Court. The trial lasted for 36 days, and the evidence given at the trial occupies nearly 1,400 pages of transcript. The testimony of the Plaintiff and of witnesses for the Plaintiff as to actual events was challenged by the Defendant, and the expert medical evidence called by the Plaintiff was also challenged. There was a conflict of evidence upon many matters.

In a trial by jury, the jury is the constitutional tribunal for deciding issues of fact. As Lord Wright said in Mechanical & General Inventions Ltd. *v.* Austin, 1935 A.C., 346, at p. 373: "The appellate Court is never the judge of fact in a case where the constitutional judge of fact is the jury." Where there is a conflict of evidence it is not for the judge at the trial, or for any tribunal on appeal, to determine which witnesses should be believed—that is the responsibility of the jury.

If a verdict is against evidence and the weight of evidence a new trial may be ordered. If the evidence on one side so greatly preponderates over the evidence on the other side that it can be said that the verdict is such as reasonable jurors, understanding their responsibility, could not reach, a verdict may be set aside and a new trial may be ordered. Caution is necessary in applying the principle that a verdict may be set aside if it is against evidence and the weight of evidence. That principle must not be interpreted in such a manner as to deprive the jury of its right of believing one witness on one side against twenty (or any number) of witnesses on the other side.

Setting aside a verdict is one thing. Entering a contrary verdict is quite a different thing. The giving of a verdict is the function of jurors, not of judges. Special provision, by statute or rules, is necessary in order to enable the court to go beyond setting aside the verdict of a jury and

ordering a new trial and to enable it to direct a contrary verdict to be entered and to give judgment accordingly : see Shepherd *v.* Felt & Textiles of Australia Ltd., 45 C.L.R. 359, per Dixon, J., at p. 379.

Under the judicature system in England, Order 58, rule 4 of the Rules of the Supreme Court permits the court upon appeal to draw inferences of fact and to enter judgment if it thinks fit, notwithstanding the verdict of the jury. This is a power which should be exercised " with considerable caution " and only " where the evidence is such that only one possible verdict could reasonably be given upon the evidence "—Baird *v.* Magripilis, 37 C.L.R., 321, per Starke, J., at p. 334. But in New South Wales the judicature system is not in force, and the powers of a Full Court are less extensive. After a trial by jury the Full Court upon appeal has no power to draw inferences of fact ; and though it may order a new trial where the verdict is against evidence and the weight of evidence, it cannot order a verdict to be set aside and judgment to be entered for the party against whom the verdict was given unless the conditions prescribed by the Supreme Court Procedure Act 1900, Section 7, are satisfied. Section 7 provides that :—

> " In any action, if the Court in Banco is of opinion that the plaintiff should have been nonsuited, or that upon the evidence the plaintiff or the defendant is as a matter of law entitled to a verdict in the action or upon any issue therein, the Court may order a nonsuit or such verdict to be entered."

Thus, in the present case the Full Court could properly order a verdict to be entered for the Defendant only if the Defendant is " as a matter of law entitled to a verdict." If there is evidence upon which a jury could reasonably find for the Plaintiff, unless that evidence is so negligible in character as to amount only to a scintilla, the judge should not direct the jury to find a verdict for the Defendant, nor should the Full Court direct the entry of such a verdict. The principle upon which the section is based is that it is for the jury to decide all questions of fact, and therefore to determine which witnesses should be believed in case of a conflict of testimony. But there must be a real issue of fact to be decided, and if the evidence is all one way, so that only one conclusion can be said to be reasonable, there is no function left for the jury to perform, so that the Court may properly take the matter into its own hands as being a matter of law, and direct a verdict to be entered in accordance with the only evidence which is really presented in the case : see Shepherd *v.* Felt and Textiles of Australia Ltd (supra) per Starke, J., at p. 373.

> " Where on the uncontroverted facts the action or an issue must be determined in favour of one party, then, as a matter of law, that party is entitled to the verdict in the action or upon the issue. And it is necessarily wrong to leave any conclusion or inference in such circumstances as a question of fact to the jury."

Under Section 7, the Full Court can never direct a verdict for the party upon whom the onus of proof lies (the Plaintiff in this case) because the question whether or not the evidence for that party should be believed is essentially and necessarily a matter for the jury. But however great the preponderance of evidence may be in favour of the other party, the Full Court cannot on that ground direct a verdict to be entered for that party. In De Gioia *v.* Darling Island Stevedoring & Lighterage Co. Ltd., 1942 S.R.

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(N.S.W.) 1, Jordan, C.J., expressed the rule which is applicable by saying that :—

> " . . . if the stage is reached that a prima facie case has been made out, the question whether the jury should accept that case, or should accept rebutting evidence called for the Defendant, is one for them, no matter how overwhelming the rebutting evidence may be ; and the trial Judge must leave it to them. If the jury find for the plaintiff, and the Full Court rules that the rebutting evidence is overwhelming, it is expressing the opinion that the defendant was, as a matter of fact, not of law, entitled to a verdict : Wilton *v.* Leeds Forge Valley Co., 32 W.R. 461 ; How *v.* London and North Western Railway Co. (1891) 2 Q.B. 496 at 500–1. It cannot, therefore, enter a verdict in his favour, but can only order a new trial."

See also Huddart Parker Ltd. *v.* Cotter, 66 C.L.R., 624, at p. 660.

There is sometimes great difficulty in distinguishing between a case of no evidence upon which a jury could reasonably find for a plaintiff (so as to justify entry of a verdict for the defendant) and a case of some evidence for the plaintiff, but greatly preponderating evidence for the defendant (where a verdict for the plaintiff can be set aside and a new trial ordered but it would be wrong to direct a verdict for the defendant.) Davidson, J., and Halse Rogers, J., refer to this difficulty in this case in 43 S.R. (N.S.W.) 154, at pp. 157 and 166 respectively. But this distinction, though difficult to apply in particular cases, is very real and important. The relevant principle was expressed in Dublin Wicklow & Wexford Railway Co. *v.* Slattery, 3 A.C., 1155, by Lord Hatherley, who said at p. 1168 that he concurred with Mr. Justice Barry's opinion in the court below, viz. : " When once a plaintiff has adduced such evidence as, if uncontradicted, would justify and sustain a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury." The question for the Court is not a question whether the evidence for the plaintiff should be believed or not. In the last-cited case their Lordships all agreed in this view and they emphasised the importance of maintaining that principle under a system of trial by jury. The headnote fairly states the decision :

> " Where there is conflicting evidence on a question of fact, whatever may be the opinion of the Judge who tries the cause as to the value of that evidence, he must leave the consideration of it for the decision of the jury."

The Judge must leave the case to the jury, because, however preponderating the evidence against the Plaintiff may be in his opinion, it is a matter for the jury to determine what evidence they believe. All their Lordships were of opinion that the verdict in the case under consideration was against evidence and against the weight of evidence, but nevertheless, it was held that a verdict should not be entered for the Defendant. Lord Cairns, L.C., referring to the distinction between the question whether a verdict was against evidence or the weight of evidence and the question whether there was no evidence which, if believed, would justify a verdict for the Plaintiff, said at page 1165 :—

> " . . . I have already said that your Lordships have not now before you the question of whether the verdict was against evidence, or against the weight of evidence. But I feel bound to say that if

that question were now open, I should, without hesitation, be of opinion that a verdict more directly against evidence I have seldom seen."

Similar statements are made by Lord Penzance at page 1181, by Lord O'Hagan, at pages 1182, 1185 and 1186. Lord Selborne, at page 1187, says that the evidence must be left to a jury, however strong contradictory evidence might be by which it was met. So also Lord Blackburn, at page 1202, said that he quite agreed " that it is not enough that the balance of testimony should be overwhelmingly on one side, and that therefore a verdict the other way ought to be set aside as unsatisfactory," and at page 1216, he said: "in order to avoid all chance of misapprehension hereafter, I think it better to repeat that I do not think that the cogency or strength of the evidence in support of a disputed fact justifies the Judge in directing the jury to find it." He adds that where there is an admission, the Judge is not only entitled, but bound to direct the jury to act upon the admission. Finally, at page 1217, Lord Gordon says, that "Whether the evidence be strong, or conflicting, or weak, it is equally the province of a jury to decide upon it." See the references to the Dublin Wicklow and Wexford Case in Banbury *v.* The Bank of Montreal, 1918 A.C., 626, at pages 672–3. See also Metropolitan Railway Co. *v.* Jackson, 3 A.C., 193, at page 207, per Lord Blackburn : " It is for the jury to say whether and how far the evidence is to be believed."

It may be, however, that, even though the Plaintiff makes out a prima facie case, uncontested and indisputable evidence called by the Defendant may be such as to provide an explanation which deprives the Plaintiff's case of its prima facie effect, as in De. Gioia *v.* Darling Island Stevedoring and Lighterage Co. Ltd. (supra). In such a case the position is that upon all the evidence a jury acting reasonably can only come to one conclusion, so that as a matter of law the party on whom the onus of proof does not lie is entitled to a verdict. But this exceptional case arises only where there is no conflict of evidence, so that the case falls within the general principle which Section 7 embodies, viz., that where there is really no question of fact for the jury to decide the Full Court may determine that, as a matter of law, one party is entitled to a verdict.

I have not referred in detail to the authorities which establish the proposition which I have stated, because they are very fully set out in the judgment of Davidson, J., in this case in 1943 S.R. (N.S.W.) 154. I particularly mention, however, Ryder *v.* Wombwell, L.R. 4 Ex. 32, and Mechanical & General Inventions Ltd. *v.* Austin, 1935 A.C., 346.

The principles stated must be applied in reference to the verdict actually given. In the present case the jury did not merely give a general verdict for the Plaintiff for £800. The jury also answered a specific question submitted to them by the learned Judge. This question related to the basis of the Plaintiff's claim, that is, the leaving of a piece of rubber tubing in her neck after the operation, and the verdict of the jury must therefore be considered in relation to their finding upon the particular fact to which the question relates. But the answer to this question must be regarded from two points of view : (1) In order to determine whether as a matter of law the Defendant is entitled to a verdict, it is necessary to determine whether there was any evidence upon which the jury could reasonably find for the Plaintiff the general verdict which the jury did in fact find. From this point of view the answer to the specific question submitted to

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the jury is not decisive of the case, because if there was evidence which would justify a verdict for the Plaintiff with no reason given, the fact that the jury, in effect, gave (if it does give, as in this case) what may be held to be a wrong or unsupportable reason for the verdict (in the sense that it was a reason that reasonable men could not properly regard as such) would not entitle the Defendant to a verdict. In such a case the Defendant could not be said, as a matter of law, to be entitled to a verdict, though he might have strong grounds for claiming a new trial; (2) Thus when the question is whether the verdict actually given is against evidence and the weight of evidence, so as to justify the granting of a new trial, then the particular reason assigned by the jury for its verdict as the ground of the verdict is a matter of great importance. If, in the present case, a reasonable jury properly instructed could not come to the conclusion stated in the answer to the question submitted to them there would be ground for ordering a new trial, because it would not appear that the verdict was not based upon the unsupportable reason.

There is one other matter to which reference should be made before entering upon a consideration of the evidence. The granting of a new trial is a matter of discretion. The Court is not bound to grant a new trial in every case where it has the power to do so. In exercising the power to grant a new trial the Court should consider all the circumstances of the case, including, in this particular case, the fact that several trials have already taken place.

I propose therefore to examine the evidence in the case for a particular purpose, namely, in order to determine whether there was evidence upon which a jury could reasonably reach a verdict in favour of the Plaintiff. I will also consider whether there was evidence upon which a jury could reasonably answer the specific question submitted to the jury by the learned Trial Judge in the way in which, in fact, the jury did answer that question. The object of the examination of the evidence will not be to consider whether a verdict for the Defendant, if it had been given, could have been supported. There is no doubt that the Defendant adduced evidence which, if believed by the jury, would have justified the jury in finding a verdict for him. He denied the allegations of the Plaintiff as to the actual incident of leaving a part of the tube in the wound, and he adduced a most impressive volume of medical evidence which, if accepted by the jury, would involve a disbelief of other evidence given by the Plaintiff as to her illness and associated incidents, and would involve also a disbelief of the medical evidence called on behalf of the Plaintiff. The question is not whether the Defendant's evidence is overwhelmingly stronger than that for the Plaintiff, but whether the evidence for the Plaintiff, if believed, including evidence as to any admitted or undisputed facts (see De Gioia's case (supra)) is such that a jury could reasonably find for the Plaintiff. The question before this Court emphatically is not a question whether the evidence for the Plaintiff should be believed or not.

The Plaintiff sued the Defendant for damages for negligence. No negligence was charged with respect to the performance of the operation of thyroidectomy. Particulars of negligence were given as follows:—

> "The Plaintiff will allege that she was operated upon by your client in the lower region of the throat; that a piece of drainage tube was inserted in the wound by your client and that this drainage

tube was so negligently or unskilfully manipulated by your client that it broke and that your client thereafter negligently failed to remove the portion of the said drainage tube remaining in the wound with the result that the Plaintiff developed a complaint believed to be tetany in a very acute form—to such an extent that she was dangerously ill over a period of more than eighteen (18 months) and that she only recovered from this illness on the passing of this piece of tube into the gullet whence it ultimately passed from the body per rectum."

It is not disputed that evidence that the Defendant left a piece of tube in the Plaintiff's neck is evidence of negligence.

The Plaintiff gave particulars of the nature and description of the piece of rubber tube mentioned and, in particular, of the shape, size, length and colour thereof in the following terms :—

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

The learned Judge at the trial submitted 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 rubber tube about 2 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."

When the jury returned into the court with a verdict for the Plaintiff for £800 the foreman said :—

> " We have not answered the question in the words supplied by Your Honor but we have found certain facts on that particular question, the answers of which I have here."

The answer to the question was then handed to the learned trial Judge. It was in the following terms :—

> " We find : That the Defendant left in the site of the operation a piece of rubber tube of a length somewhat less than 2 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."

The evidence adduced for the Plaintiff consisted of the testimony of the Plaintiff herself, her husband, and friends and acquaintances who saw her during her illness, and a nurse who nursed her at her home for some time after the operation, and of expert medical evidence given by Professor D. A. Welsh and Dr. G. S. Thompson.

Evidence was given that the Plaintiff was in ill health in 1937. She had an enlarged thyroid gland. She was examined by Dr. K. O'Hanlon at Quirindi on 23rd August 1937. She was then treated by Dr. J. W. Flynn for giant urticaria and angio neurotic œdema, which, as stated by Dr. E. P. Sloan in his book " The Thyroid " (1935), page 120, are affections which occasionally occur in goitre cases. She was treated in the Quirindi Hospital from 19th October to 15th November. In a letter to Dr. H. J. Ritchie written on 12th February 1938, Dr. O'Hanlon describes her goitrous

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condition, stating that the thyroid gland was very prominent, and that he thought she was thyrotoxic. Upon Dr. O'Hanlon's advice she consulted Dr. Ritchie on 21st February 1938, who diagnosed the case as one of thyrotoxicosis. Thyrotoxicosis is a condition produced by over-secretion of the thyroid gland. It results in nervousness, hot flushes, palpitations, emotional disturbance, and sometimes protrusion of the eyes (exopthalmic goitre) and causes a loss of weight. Dr. Ritchie was of opinion that an operation was desirable, and he referred the Plaintiff to Dr. Bell. Dr. Bell is a surgeon of extensive experience and with high qualifications. The Plaintiff went into St. Luke's Hospital, and was prepared for the operation during a period of rest and treatment.

The operation took place on 15th March 1938. The operation involved the making of a horizontal incision at the base of the throat and a penetration of the structures overlying the thyroid gland. The skin, the platysma muscle and the cervical fascia would be cut. The thyroid gland lies behind the infrahyoid muscles (the sterno-thyroid, the sterno-hyoid and the omo-hyoid) and is overlapped laterally by the sterno-mastoid muscle. The infrahyoid muscles would be either separated or cut, the pretracheal fascia continuous with the sheath of the thyroid gland and the capsule of the gland would be cut and so much of the thyroid removed as was in the judgment of the surgeon necessary. Special care is taken in this operation to avoid damage to the parathyroid glands which are small bodies about the size of half a split pea, varying in number, lying behind the thyroid gland itself. The removal of the gland is a delicate operation because the gland is perhaps the most highly vascular part of the body, and a large number of blood vessels have to be tied in order to prevent hæmorrhage. The wound is then sewn up with catgut, the gland being first sewn, and then the various structures overlying the gland are rejoined by stitches as required, and finally the external portion, the platysma muscle and the skin, are sewn, generally with horsehair. In order to provide drainage of the wound, a rubber tube is inserted into the place which had been occupied by the thyroid gland. It is a common practice to cut a small hole in the tube towards the inner end to assist drainage. The tube may be inserted either before or after the stitching is completed. The Defendant was not sure whether he finished stitching before or after the tube was placed in position. The doctor who gave the anæsthetic to the Plaintiff had no recollection of the operation but said that the practice of the Defendant, with which he was familiar, was to do some internal stitching after he had inserted the tube. The tube is removed within 24 to 48 hours after the operation. The tube lies loosely in the wound, but is prevented from slipping into the sinus, that is, the incision, by being attached to the skin by a horsehair stitch and by a safety-pin through the external end of the tube.

The hospital records show a normal progress on 15th and 16th March. On 17th March these records state : " Tube removed and 3 sutures. Less discharge. Condition good." The following is the Plaintiff's account of the removal of the tube :—

> " . . . he (Dr. Bell) said the tube was not working and he would take it out, so he loosened some stitches and pulled the tube in his fingers, shook the tube, and it did not come out and so he pulled a little harder and it still did not come so he put his hand on my forehead and held the head back firmly and pulled and whatever

it was came out and he said 'Damn' and I said 'Oh.' He held it in his fingers for a second and I saw it, just a little dark piece of rubber, then he threw it into the tray and he and the sister turned around and left the room. I had a stinging sensation in the throat. It stung very much there (indicating)."

The nurse who was present when the tube was removed was not identified by any evidence. The progress of the Plaintiff was then not as satisfactory as before. Sutures were removed from time to time, but the temperature of the Plaintiff rose and there was a purulent discharge from the wound, together with a swelling of the neck. The discharge continued until the Plaintiff left the hospital on 14th April, when she went home. Before she left the hospital she had a feeling of " pins and needles " in her hands and feet, and calcium lactate was prescribed by the Defendant. " Pins and needles " are frequently the first sign of tetany, which is a condition involving spasms of the body, in which the muscles of various parts of the body become rigid, resulting sometimes in great pain. Tetany may be caused in various ways, but one cause is to be found in injury to the parathyroid glands. These glands control the quantity of available calcium in the blood and a deficiency in such calcium brings about tetany.

When the Plaintiff went home she still had the feeling of pins and needles, and she had cramps and severe pain in the feet and legs. Dr. O'Hanlon saw her on 30th April and on 2nd May her husband wrote Dr. Bell a letter in which he stated that :—

" The throat is not yet healed, she has taken out seven knots since coming home. It is not discharging so freely.

The whole body has been much swollen until to-day. It seems slightly less swollen to-night.

The tetany is still very annoying, but the attacks do not last quite so long."

Dr. Bell replied on 4th May, stating that he had been speaking to Dr. Ritchie about the Plaintiff and that Dr. Ritchie suggested that she should take calcium in the form of calcium gluconate.

She was treated by Dr. O'Hanlon, and, in accordance with his advice, again went into the Quirindi Hospital, and remained there from 4th May to 9th June. On 10th May Dr. O'Hanlon wrote to the Defendant a letter containing the following :—

" There was a free discharge from her neck and she told me she had recovered several pieces of suture material. She had also been troubled very much by contractions in her forearms and legs and occasionally in her fascial muscles. A few days after I first saw her I persuaded her to go into hospital where she is at present—there we recovered more catgut and with frequent foments to the neck there is less discharge and it appears to be generally better. However, the tetany is I think worse. Yesterday she had a very severe spasm involving practically her whole body, it was accompanied by so much pain that I was forced to administer a mild chloroform anæsthesia (not a very safe treatment I know—considering her condition) until a solution of calcium chloride 10% could be prepared for intravenous administration. I gave 10 cc's of this solution, with remarkably rapid and good result, later in the day Mrs. Hocking

said she felt well, but had the feeling that she was about to go into another spasm—however this has not occurred. I propose to give her a daily intravenous injection for a few days at least.

When I first saw her on her return, I put her on to ' Glucophos ' because of its calcium gluconate content, but I have ordered some of the Sandoz preparation.

Some text-books regard post operative tetany as being fatal very often—what is your opinion ? "

The Quirindi Hospital records, together with the evidence of the Plaintiff, show that the wound in the neck was frequently fomented, and was kept open in order to permit an effective discharge. Pieces of catgut came out from time to time. (Catgut lasts longer in pus than in healthy tissue.) The hospital records also show that the nurses were directed to watch carefully for and report any tetanic spasms, and several spasms are recorded. Intravenous injections of calcium chloride were given. The wound improved, but tetany spasms are recorded up to 1st June. The records also contain references to swelling in the Plaintiff's neck. On 9th June the Plaintiff left the hospital and went home. The wound did not finally close until the end of June or the beginning of July. On 29th June the Defendant wrote to the Plaintiff's husband, saying that he was sorry the news was not better about the muscle spasms, and that he had informed Dr. O'Hanlon about some recent methods of treatment and had sent some special injections for him to use. During the succeeding months the Plaintiff was treated by injections, sometimes of calcium and sometimes of paroidin—a parathyroid extract. The medical evidence for the Plaintiff and for the Defendant was that this treatment was essentially a treatment for tetany. On 17th January 1939 Dr. O'Hanlon wrote to the Defendant saying that the Plaintiff was improving, and that the major attacks, though not less frequent, were becoming less severe, though she had frequent minor spasms which did not leave the muscles involved as sore as before. He reported that she was not able to tolerate the large doses of calcium lactate for more than a month or so, and that she was having occasional doses of paroidin and also of morphia. Dr. O'Hanlon saw the Plaintiff in February 1939. The Plaintiff, her husband and Dr. O'Hanlon gave evidence that the latter stated that he could do nothing further for the Plaintiff. He did not see her again until September 1939. In the meantime her husband administered calcium and paroidin, sometimes by subcutaneous injections. On 27th May the Defendant wrote giving the Plaintiff his good wishes, and saying that he had been talking with Sir Alan Newton, in Melbourne, about a similar case, and that Sir Alan Newton was a great believer in cod liver oil and calcium—a treatment which had resulted in the complete recovery of some patients.

The evidence of the Plaintiff, her husband and a number of friends and acquaintances, including Sister Sly, who nursed her for a time after she came out of the Quirindi Hospital in June 1938, was that her neck was swollen from time to time. There was also evidence that her neck was sometimes swollen so severely that she had difficulty in turning her head, and sometimes had to move the whole body if she wished to look in another direction. The Plaintiff and her husband also gave evidence that there was a continuance of the muscular spasms throughout 1938 and during 1939.

The Plaintiff and her husband gave evidence that on 2nd October 1939 she had a very violent spasm. Her evidence is as follows :—

". . . On the Saturday and Sunday I was constantly drawn up with the tetany spasms. My muscles never relaxed once. I was closely drawn. They would give a little and I could straighten in bed but sometimes my knees were drawn up. I was drawn up, round. My back was bent up, round. On the Monday I was really very ill. Round about 3 o'clock I did not think I was going to live any longer. I had my neck so bad. My husband came home round about then—I could not say exactly what time—and I had a coughing fit. I seemed to be choking. I started to cough and I swallowed something.

Q. How was your mouth ?—A. I could not open or shut it. My teeth were not close together.

Q. You seemed to swallow something ?—A. Yes, and I took a terrific lurch and the muscles seemed to tighten up dreadfully hard. Something burst into the left side of my face. I felt something knock through, as it were. I felt a sensation like something bursting. I had something on my tongue and I swallowed it, whatever it was.

Q. What happened after that. What was your condition ?—A. I was still very ill after that for quite a while.

Q. Did you feel any sensation following that ?—A. I do not remember clearly, but I think next day I felt a sensation in the stomach. Of course I felt something going down my stomach. It went very slowly. It seemed to move down my stomach."

After the 2nd October there were no spasms.

Her husband gave purgatives to the Plaintiff and on the following Thursday morning, 5th October, she had a motion and she said that she saw something in the receptacle from the commode which she picked out in her fingers. She said that while she was emptying the receptacle she was startled by the approach of somebody coming and she dropped the thing into the pan, where it was taken away by the flush. On the next day she made a sketch of the article, which she said was not to scale, but was intended to show her husband what sort of thing it was which had passed through her :—

" The thing I had in my finger, I would say a soft greyish piece of tube like a piece of rubber which had been in water for some time. It was swollen. It was not smooth like a new piece of tube.

Q. What about the shape ?—A. There was a straight cut at one end. It was split up within half an inch of the end and it had in that opening a swab which I thought was a piece of marine sponge with a blackish-looking stuff. It had come from this sponge and it looked like black wire but when I bent it it would fly back straight. It was like horsehair, and it would fly back quickly straight. It looked like wire to me but it could not have been wire."

It may be mentioned that it was not suggested in cross-examination of the Plaintiff or by any evidence for the Defendant that the Plaintiff had any knowledge of or familiarity with drainage tubes or the manner in which they might be cut.

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No. 61. Reasons for Judgment.

Latham, C.J., *continued.*

Dr. O'Hanlon saw the Plaintiff on 6th October and on 7th October he sent the Plaintiff's sketch to the Defendant with a letter in which he said :—

"Mr. Hocking gave me the following history : Last Monday she had as bad an attack of tetanic spasm as she has ever had, she complained of pain in the neck which was swollen. Until Wednesday she complained of pain and soreness from the neck to the stomach, the act of swallowing was painful, he thought she had symptoms of indigestion and gave her castor oil, salts, etc. On Thursday Mrs. Hocking had a bowel action and passed a piece of grey rubber tubing, squarely cut on one end and ragged on the other, the tube was partially split up and stuck in the lumen was what she took to be a small piece of marine sponge about which was twisted a piece of wire. I enclose the sketch she made for her husband and which he passed on to me. Mrs. Hocking emptied the tube along with the bowel action result into the w.c. so neither Mr. Hocking or I saw it. Mrs. Hocking's description is too vivid for the article to be imaginary so of course I was somewhat nonplussed when I was asked to explain it all.

Assuming that it was a piece of drainage tube that was accidentally left behind—I suppose it is possible that it could work its way into the œsophagus, though to me it seems strange that it did not work out through the sinus which persisted for so many weeks after her return from Sydney. Mrs. Hocking on a few occasions did complain of soreness in the neck, but at no time did I ever detect any symptoms that would indicate an X-ray examination —naturally the possibility of a foreign body being the cause never entered my mind. Within a month or six weeks after her return from Sydney her nurse did recover undissolved sutures on several occasions, the sinus eventually closed and now she has an excellent scar. The attacks of tetany have become fewer, nevertheless Mrs. Hocking is still far from well, she is very unsteady when she tries to walk.

If a foreign body has remained in the neck all this time do you think that it may be a possible cause of the tetany and could we now expect an improvement in her general condition ? You understand Doctor, that this question is based on an assumption only."

On 11th October the Plaintiff wrote to the Defendant saying that a piece of drain tube had been left in her neck and that it burst into her gullet so that she almost choked. The Defendant replied on 15th October, saying that he was sorry to hear that she had been ill again, that he had had a letter from Dr. O'Hanlon and had spoken to him on the telephone and adding :—

"It is difficult to explain your last illness and the 'piece of drain tube' which you say passed by the bowel.

I saw Dr. Ritchie during the week.

I think you should come to Sydney for a medical investigation in order to see if we can advise some medical treatment to improve your health."

The Plaintiff came to Sydney on 26th October and went into St. Luke's Hospital. She remained in the hospital until 3rd November. A blood

test was taken by Dr. Tebbutt and it showed a calcium deficiency, the figure being 7.2 milligrams per cubic centimetre when the normal figure to be expected was 10. The Defendant and Dr. Marsh, a highly qualified throat specialist, examined the Plaintiff's throat, and she returned to her home. In November 1939, Dr. Ritchie prescribed calcium gluconate for her.

The evidence to which I have hitherto referred is evidence of events alleged by the Plaintiff to have happened. I come now to evidence consisting of expressions of medical opinion. Professor David Arthur Welsh, who was from 1902–1936 Professor of Pathology in the University of Sydney, gave evidence for the Plaintiff. He had made a special study of the thyroid and parathyroid glands, but had had little or no actual surgical experience. He described the glands and explained that the parathyroid glands regulate the calcium content of the blood by taking calcium salts from the bony skeleton, and that if the calcium content of the blood dropped below 10 there was latent tetany, and if much below 10 there was open and declared tetany. He said that if the parathyroid glands were reduced in number or if their function was interfered with in any way by interference with the blood supply or if they were destroyed by suppuration or inflammation they could not perform their function of taking enough calcium to provide the requisite calcium content of the blood, and that the result was tetany. Inflammation about the thyroid gland would, in his opinion, undoubtedly affect the functioning of the parathyroid glands.

Professor Welsh said that the hospital records, referring to the discharge from the wound after the operation as " a thick purulent discharge," showed that some pus-producing bacteria had been introduced into the wound. The result was suppuration in the wound. The cramp in the fingers which was recorded on 20th March 1938 could be the very early development of tetany. If a piece of rubber had been left in the wound the effect would be to perpetuate the inflammation or suppurative process. Even if there were such a foreign body in the cavity, the wound could heal externally (as in fact it did). In his opinion the pus in the wound could travel anywhere in the neck, and gravity had very little influence in the neck, so that the pus might spread upwards, that is, in the direction of the tonsil. He said that the infection—

> " . . . usually spreads between the various structures in the neck, each little structure, each muscle and the thyroid gland itself and a group of big important vessels in the neck are enclosed in what is called a fibrous capsule and the inflammation and suppuration usually spreads by separating these structures along their fibrous capsules, opening up the spaces between them, what we call the fascial planes. One has to imagine each little structure like a muscle or gland enclosed in a band or sheath of that fibrous tissue and the tendency of the suppuration is to spread up between these and of course to carry any foreign body with it.
>
> Q. Would there be anything to prevent it going to the tonsil ?—A. No, nothing serious to prevent it going to the tonsil.
>
> Q. And would it necessarily on its way injure any blood vessel or muscle ?—A. Not necessarily seriously injure any blood vessel or muscle. It might have taken a different course and seriously injured the blood vessel, but there is no history in this case that it did so."

In the High Court of Australia.

No. 61. Reasons for Judgment.

Latham, C.J., *continued.*

This witness said that suppuration might result only in a thickening of fascial planes without any destruction of muscles, and therefore without any permanent effect in limiting the movement of the neck.

The Plaintiff had given evidence that the thing which she had evacuated had something like wires sticking out of it and something like a swab in it. The Defendant's advisers took a piece of tube and inserted wires and a piece of swab in it, and the Plaintiff said that it was a fair representation or a rough representation of what she had passed. This article, Exhibit " P," was 2 inches long with projecting wires extending another 1½ inches. Professor Welsh would not suggest that anything like Exhibit " P " with the wires in it could travel in the body.

He gave an example of a particular form of tubercular abscess, a psoas abscess, travelling between the fascial planes (that is, the membraneous sheaths of the muscles) for a considerable distance in the body.

The opinion of Professor Welsh was that if there was a foreign body in the thyroid there would be suppuration, and the function of the para-thyroids would be disorganised, with tetany as a result. He regarded the history of the Plaintiff in the Quirindi Hospital as certain proof that she was suffering from true tetany due to calcium deficiency in the blood, and that her account of complete cessation of spasms after the eruption into her throat which she had described was what could be expected when the cause of the tetany had been removed. As to the probability of the sudden disappearance of tetany when the cause thereof is removed, it is of some interest to note that in the Oxford English Dictionary sub " Tetany " there is a quotation from " Allbutt's System of Medicine," 1899, page 48 : " The tetany spasms ceased the day after a tapeworm had been expelled."

He also gave evidence that some two years before the trial he had examined the left tonsil of the Plaintiff, and had seen a distinct scar in the tonsil which indicated that some kind of " volcanic eruption " had taken place from the tonsil which was consistent with an abscess having burst out of that tonsil. He also said that the other tonsil was not anything like the left tonsil. He said that the condition of the tonsil indicated to him that there had been great disorganisation of its structure, and that the area in which the scar appeared was sufficient to permit the exit of a tube such as had been described.

The opinion of Professor Welsh was that the thick purulent discharge showed that there was an infected suppurating wound, that the subsequent history showed spreading suppuration in the neck which began in the region of the thyroid, and that ultimately there was an abscess in the left tonsil which burst.

The evidence of Professor Welsh was challenged in cross-examination, and some of it was contradicted by evidence called for the Defendant. I am, however, at present considering only whether there was evidence for the Plaintiff which, if believed, would justify a verdict for her.

Dr. G. S. Thompson, another witness for the Plaintiff, appears to have extensive medical and surgical knowledge, but no special qualifications with reference to the thyroid gland or the operation of thyroidectomy. He gave evidence supporting that of Professor Welsh, stating that in his opinion the history of the Plaintiff's case immediately after the operation, particularly in relation to her temperature, showed that the wound was

infected. The hospital records showed a long continuance of that infection, the discharge not ceasing until July 1938 ; the illness of the Plaintiff during 1938 and 1939 was undoubtedly parathyroid tetany ; if a piece of tube were left inside the wound made by the operation it could set up suppuration as a result of which the tube could become located in an abscess in the tonsil. He gave evidence with respect to the anatomy of the neck, agreeing with witnesses for the Defendant that the thyroid gland was located in a particular compartment (the visceral compartment) of the neck which was separated by fascia from a (muscular) compartment containing certain muscles and another (vascular) compartment containing blood vessels, etc. The compartment containing the thyroid gland ended in its anterior upper portion at the hyoid bone and no suppuration could take a foreign body past that anterior portion of the compartment without some destruction of the infrahyoid muscles, but in the rear the compartment extended to the base of the skull. In Dr. Thompson's opinion it was possible for a piece of rubber tube to travel from the thyroid gland to the tonsil—a distance variously estimated by witnesses at from about 1 inch to as much as 5 inches (and actually measured in Court in the case of the Plaintiff as being two and a half inches). Reference was made in evidence to the description in Cunningham's Text Book of Anatomy of the visceral compartment and the statement therein as to the presence of loose areolar tissue and fat in the neck near the tonsil. The relevant references in the 7th edition are to pages 1372, 1373–4. See also Jamieson, Illustrations of Regional Anatomy, figure 50, and Tonsil Surgery by R. H. Fowler (1930), pages 34 and 49, as to the tonsil lying in a bed of loose areolar tissue separating it from adjoining muscles. The quantity of connective tissue and fat varies with different individuals.

Dr. Thompson gave evidence that in his opinion the Quirindi Hospital records showed conclusively that the Plaintiff had true tetany. He said that it was quite possible that the tube could travel from the neck to the tonsil without destroying any vital organs and that a psoas abscess provided an example of the travelling of pus in an abscess which illustrated in a comparable manner the effect of pus. He also was of opinion that the fact that the calcium content of the Plaintiff's blood in October 1939 was 7.2 milligrams per cubic centimetre, instead of 10 milligrams, supported the opinion that the Plaintiff was suffering from tetany brought about by some interference with the parathyroid glands. He said that he was unable to see any other explanation of the calcium deficiency. The hospital records showed that the Plaintiff became unconscious on some occasions, and she gave further evidence of unconsciousness during spasms. In Dr. Thompson's opinion unconsciousness did occur in tetany in severe cases. He agreed with Professor Welsh that the wound might close notwithstanding the presence of a foreign body. He gave evidence that it was possible, if stitching were done after a tube was inserted in a wound, for a stitch to catch up the rubber so as to hold it.

Dr. Thompson examined the Plaintiff's tonsil before the first trial and gave evidence that there was a punched-out canal in the tonsil $\frac{1}{4}$ inch in diameter and $\frac{3}{4}$ inch long, and that this indicated that the tonsillar tissue had been killed in some way and had sloughed away. This hole was not the supra-tonsillar recess or fossa or any other of the crypts of the tonsil which appeared in a normal tonsil.

In the High Court of Australia.

No. 61. Reasons for Judgment.

Latham, C.J., *continued.*

A great deal of Dr. Thompson's evidence was attacked in cross-examination, and by contradictory evidence.

The Plaintiff's case was that the inner end of the tube, at or about the small hole in the tube, was accidentally caught in a stitch ; that the tube, possibly being somewhat perished, broke when it was being removed and that what appeared to the Plaintiff, in a condition of exhaustion and distress, to be wire and a piece of swab, were pieces of catgut and a deposit of some kind within the body of the tube ; that the illness of the Plaintiff after the operation was explainable by the presence of the tube in tissues of the neck affected by suppuration, resulting in an abscess which ulcerated through the tonsil, the piece of tube having moved in the affected tissues and along fascial planes without permanently destroying any vital organs ; that Dr. O'Hanlon and the Defendant treated the Plaintiff for true tetany and that she suffered from true tetany which could be explained only by injury of some kind to the parathyroid glands ; that suppuration within and about the capsule of the thyroid gland would produce such injury ; that such suppuration was established by hospital records and other evidence ; that the sudden cessation of the tetany spasms was explainable by the sudden removal of the cause by the bursting of the abscess in the tonsil and the extrusion of the piece of tube ; and that the calcium deficiency discovered in the blood in October 1939 strongly supported this case.

I have already referred to authorities which establish the proposition that, wherever there is conflicting evidence, it is for the jury to determine what evidence they will believe, and that it is not the function of a Judge, either at the trial, or upon an application for a new trial, or upon an application for a verdict to be entered against the party on whom the onus of proof lies, to act upon his own opinion that certain witnesses should be believed rather than other witnesses. If I felt at liberty to act upon my own opinion of the evidence I would regard the evidence for the Defendant as overwhelming the evidence for the Plaintiff. There are obvious improbabilities of high degree in the Plaintiff's statement as to what happened when the tube was extracted, and upon other points the evidence of the Plaintiff is plainly open to serious attack. (See the analysis of evidence upon the first trial in 42 S.R. 130, and upon the last trial in 44 S.R. 468.) Further, the qualifications of the medical witnesses for the Defendant are much superior to those of the medical witnesses for the Plaintiff. But these facts affect the weight and not the existence of the evidence for the Plaintiff. It cannot, in my opinion, be said that if the evidence for the Plaintiff which I have summarised was believed there was no evidence to support a verdict for the Plaintiff. Accordingly, in my opinion, it cannot be held that, as a matter of law, the Defendant is entitled to a verdict in this case.

It may be added that the evidence for the Defendant provides instances of doctors differing and affords support for the Plaintiff's case in certain particulars. I mention some examples. There was evidence by a witness for the Defendant that there was a possibility—though only " a bare possibility "—of a tube being caught by an internal stitch and that a surgeon should guard against such a possibility. In general, the Defendant's witnesses (and the Defendant himself) agreed that suppuration, and infection, as well as trauma, could interfere with the effective operation of the parathyroid glands and so produce tetany. One of his witnesses, however, was of a contrary opinion. The Defendant's witnesses in general, though

conceding that pus might travel almost anywhere, denied the possibiity of a foreign body travelling from the thyroid gland to the tonsil without serious destruction of organs, of which they saw no signs. One witness, however, said that, though highly improbable, it was a "remote possibility," and another admitted that it was "a very vague possibility." Some evidence for the Defendant was carefully limited to what was described as "anatomical possibility"—apparently as distinguished from pathological possibility—and the Plaintiff was suffering from a pathological condition. Some of the Defendant's witnesses were of opinion that the illness of the Plaintiff after the operation was in the first place true parathyroid tetany, but that after about June the condition was not true tetany, but was a condition of hysteria, simulating tetany. It was not disputed that the Plaintiff was in fact treated as for true tetany and not as for hysteria. The Defendant's witnesses differed to some extent in selecting a point of time at which the true tetany ceased and the hysteria commenced. One witness for the Defendant, however, was of opinion that the witness never suffered from true tetany, but was at all relevant times a victim of hysteria. I think I am right in saying that there was no evidence that hysteria would affect the calcium content of the blood. There was much evidence that the Plaintiff did sometimes lose consciousness. The Defendant's witnesses gave evidence that tetany due to parathyroid injury was marked by the feature that the patient did not lose consciousness during spasms, while during hysteria consciousness might be lost on occasions. But these witnesses had to agree that a considerable number of leading authorities expressly stated, as Dr. Thompson had done, that in severe spasms of true tetany consciousness might be lost. Some of the witnesses for the Defendant did not agree with statements or diagrams contained in what were admitted to be leading works of authority. I refer to these divergences of opinion as matters which a jury was entitled to take into account, though, as I have already said, if I had to determine the case according to my own opinion, I would have no doubt whatever in deciding for the Defendant. It is, however, as I have already said, most important that a judge should not usurp the function of the jury, even if he regards the evidence against the verdict as most cogent, and indeed, overwhelming in character.

If then, there was evidence upon which a jury might reasonably find for the Plaintiff, it is immaterial (in determining whether a verdict should be entered for the Defendant) that the jury answered in favour of the Plaintiff the specific question which was asked, even though there might not be evidence to support the answer to that specific question. If the verdict had been against the Plaintiff, then the Plaintiff could not have claimed a new trial on the ground that a question to which she had not objected had been submitted to the jury. But even if there were no evidence to support the answer given by the jury to the question, it does not follow that a verdict should be entered for the Defendant. The fact that there was no evidence to support that particular answer does not show that the Defendant is entitled to a verdict as a matter of law.

But it is unnecessary for me to base my decision in this case upon the view which I have just stated, because, in my opinion, there was evidence which, if believed by the jury, can reasonably support the answer given by the jury to the question submitted to them by the trial Judge. The answer to this question shows that the jury substantially believed the story

In the High Court of Australia.

No. 61. Reasons for Judgment.

Latham, C.J., *continued.*

of the Plaintiff, however improbable that story may appear to be. The description of the piece of rubber tube is based upon the drawing made by the Plaintiff, which is a remarkable feature of the case. That drawing shows what looks like a rubber tube with a " V " cut in it, the tube being torn across the " V " cut, with lines projecting which the Plaintiff says looked like wire " but of course were not wire." There was evidence that it was the practice to make a cut in the inner or distal portion of a drainage tube to facilitate drainage. The finding of the jury may legitimately be read, not as stating that there was actually wire in the tube or an actual swab in the tube, but that there projected from the tube some material which looked like wire and which looked like a swab. The jury, believing the Plaintiff, only describes what the Plaintiff said she believed she saw. As to the size of the tube, much evidence was given to the effect that the whole of a tube would not be longer than 2 inches, but there was also evidence that the length of tubes used varied from time to time, as would naturally be expected, and an illustration of a thyroidectomy operation in a book used by the Defendant's witnesses—Binnie's " Treatise on Regional Surgery " (1917), Vol. 1, page 497—shows a tube in position, the visible projecting part of which appears to be considerably over an inch in length. Some evidence for the Defendant admits that a tube used in a modern thyroidectomy operation may be as long as $2\frac{3}{8}$ inches. The evidence for the Defendant as a whole is that tubes used in such operations are practically never longer than 2 inches. But this question of fact was a matter for the jury, and the answer of the jury is " somewhat less than 2 inches." Thus, in my opinion, there was evidence to support the answer of the jury, though I should not have given that answer myself.

The Full Court of the Supreme Court had already decided on a prior occasion that judgment should not be entered for the Defendant because in that trial there was evidence, though the Court regarded it as highly improbable evidence, upon which a verdict could reasonably be found for the Plaintiff. In his reasons for judgment on this last occasion Davidson, J., examining the evidence called for the Defendant, expressed the opinion that it established that it was " anatomically and pathologically " impossible for a piece of the tube to travel from the position of the thyroid gland to the tonsil, because vital structures would necessarily have been damaged in the course of such a passage. He was of opinion that the Defendant's evidence supplied an explanation of the alleged hole or depression in the tonsil. I agree that there was very strong evidence for the Defendant that it was impossible for a piece of rubber tubing to travel from the thyroid gland to the tonsil without destroying important, if not vital, organs. But the evidence was in conflict on this point and also on the question of the existence and probable origin of the hole in the tonsil. It is for the jury, where there is a conflict of evidence, to say which evidence they will accept. This is not a case where, even if the evidence for the Plaintiff is accepted, some other undisputed evidence for the Defendant explains away the first apparent effect of that evidence, as in De Gioia's case (supra), so that, when the evidence for the Plaintiff is supplemented (not contradicted) by the other evidence, it can be seen that there is no evidence to support the Plaintiff's case. This is a case of direct conflict of evidence. The conflict was extensive and vigorous. Whatever may be thought of the weight of the evidence given on behalf of the Plaintiff, it cannot be described as a mere scintilla. That evidence was actually

held by the Full Court to be more than a scintilla in the case of a prior trial (see 43 S.R. 154), and it is not suggested that any less evidence was given for the Plaintiff at the last trial. But on this occasion it has been decided by the majority of the Full Court that there was no evidence for the Plaintiff to go to the jury. It was said, quite accurately, that more evidence was given for the Defendant at the fourth trial than at the previous trials. But more evidence for the Defendant is not the same thing as no evidence for the Plaintiff. No amount of additional evidence for the Defendant can have the result of reducing the evidence for the Plaintiff to zero.

His Honour Halse Rogers, J., pointed out certain divergences between the particulars given of the object evacuated by the Plaintiff, and the finding of the jury. I agree with the view of Davidson, J., on this part of the case, that there is no substantial divergence between the particulars and the answer given by the jury. Halse Rogers, J., was of opinion that if the jury had returned a verdict for the Plaintiff without any special finding the position would probably have been the same as upon earlier appeals to the Court, but that the specific answer given to the question asked provided a distinction between this appeal and earlier appeals. I have already said that in my opinion there was evidence upon which a jury could answer the question as the jury did actually answer it. Halse Rogers, J., referring to the evidence as to anatomical and pathological possibilities, as to which there is a conflict, said "On the worth of the conflicting statements the Court itself must decide." It may or may not be that it would be better to allow judges to decide such questions, but, in my opinion, under the system prevailing in New South Wales, a decision upon this question is necessarily for the jury, and not for the judges.

I summarise my opinion upon the question of entering a verdict for the Defendant in the following propositions :—

(1) The evidence for the Plaintiff, if it is believed, is such that a jury could reasonably find a verdict for the Plaintiff.

(2) The jury believed that evidence in substance, and found a verdict for the Plaintiff.

(3) The majority of the Full Court was of opinion that no jury could reasonably believe the evidence for Plaintiff and this is quite different from an opinion that the evidence, if believed, could not reasonably justify such a verdict.

(4) The opinion that the evidence for the Plaintiff could not reasonably be believed is not based upon a consideration of that evidence independently of any contradiction or qualification of it by evidence for the Defendant, but is the result of a decision of the Full Court that the jury ought to have accepted the contrary and greatly preponderant evidence for the Defendant.

(5) Thus, the evidence for the Plaintiff is regarded as being reduced to zero (or to "a scintilla"), not by reason of the character of that evidence itself, but as a result of the countervailing evidence for the Defendant.

(6) Accordingly the conclusion that there is no evidence to support the Plaintiff's case is reached on the ground that the jury should have resolved the conflict of evidence by accepting the evidence for the Defendant as against the evidence for the Plaintiff.

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No. 61. Reasons for Judgment.

Latham, C.J., *continued.*

(7) The result is that the Court has substituted its own opinion upon conflicting evidence for that of the jury. This procedure cannot, in my opinion, be justified under Section 7 of the Supreme Court Procedure Act 1900.

Roper, J., while agreeing that the verdict was against evidence and the weight of evidence, and referring to the improbabilities of the Plaintiff's story, said :—

> " Notwithstanding these improbabilities, two juries have each found a verdict which necessarily involves that they have accepted these aspects of the Plaintiff's evidence as being the truth. Two other juries have each disagreed on the issues submitted to them."

He referred to the high eminence and special qualifications of the medical and surgical experts called for the Defendant, and said that it was of preponderating weight, but that it could not be held to establish a case of scientific certainty. Accordingly, His Honour was of opinion that, although the expert evidence against the Plaintiff was overwhelmingly strong, it could not be said that there was no evidence upon which the jury could find for the Plaintiff, and that accordingly the proper order to make was an order for a new trial, and not an order directing a verdict for the Defendant.

I agree with Roper, J., for the reasons which I have stated, that the Full Court should not have entered a verdict for the Defendant.

The next question is whether the verdict should be set aside and a new trial ordered. The fact that, in the opinion of a Judge, a verdict is against evidence and the weight of evidence, should not be regarded as necessarily requiring an order for a new trial. The Court has a discretion in exercising its power to grant a new trial, and all the circumstances of the case should be taken into consideration. This is the second verdict for the Plaintiff. The last trial was the fourth trial, and a new trial would be a fifth trial. The result of four trials is that 12 jurors out of 16 have found for the Plaintiff. If a fifth trial is ordered, the result may be that again a verdict will be given which will be set aside, and the preservation of a consistent attitude by the Court would then result in an order being made for a sixth trial. In my opinion it is proper to adopt the other alternative, namely, to allow the verdict of the jury to stand. I again refer to the all-important principle that it is the function and duty of the jury to decide questions of fact where there is a conflict of evidence, and that the fact that Judges have a different opinion on questions of fact cannot justify the entry of a judgment notwithstanding a verdict, unless there really was no evidence upon which a jury could properly find for the Plaintiff. It is only in such a case that the question for decision becomes " a matter of law " so that it may properly be determined by Judges and not by the jury. The following cases illustrate the reluctance of a Court to order a new trial where more than one jury has brought in verdicts, even though the Court may disagree with those verdicts :—

Goodwin *v.* Gibbons, 4 Burr., 2018 ; 98 E.R., 100 ; Swinnerton *v.* Marquis of Stafford, 3 Taunt., 232 ; 128 E.R. 92 ; Foster *v.* Steele, 3 Bing., N.C., 892 ; 132 E.R. 654 ; Foster *v.* Allenby, 5 Dowl. P.C., 619 ; Davies *v.* Roper, 2 Jur. N.S., 167, and the note thereto.

In my opinion this litigation should be brought to an end by allowing the verdict of the fourth jury to stand, even though the members of this

Court may be of opinion that, if it had been their duty to decide the issues of fact involved, they would have come to a conclusion different from that which has commended itself to the jury.

In the Supreme Court it was argued that the jury should have been directed that, because the allegation against the Defendant could be regarded as a charge of misconduct which was criminal in character, the Plaintiff's case must be proved beyond reasonable doubt. The learned Trial Judge refused to give such a direction, and in my opinion rightly. I do not desire to add anything to the reasons stated by Davidson, J., in support of this view.

Objection was also taken to the conduct of Plaintiff's Counsel in criticising the action of the British Medical Association and members thereof. As pointed out by both Davidson, J., and Halse Rogers, J., these references were provoked, at least to some extent, by Counsel for the Defendant. No application was made on behalf of the Defendant for the discharge of the jury upon this or any other ground. In my opinion the learned Judge gave a direction to the jury which was sufficient to prevent the jury being misled as to the relevance of this or other matters.

I am of opinion that the appeal should be allowed, the verdict of the jury restored, and judgment entered for the Plaintiff for £800.

No. 62.

JUDGMENT of Rich, J.

This is an appeal on a judgment of the Supreme Court of New South Wales that judgment be entered for the Defendant in an action for negligence. There have been in all four trials. At the first, there was a verdict for the Plaintiff, which was set aside on the ground that it was against the weight of evidence. At the second and third, the jury failed to agree. At the fourth, there was again a verdict for the Plaintiff. It is this which was set aside when judgment was entered for the Defendant.

The case sought to be made on behalf of the Plaintiff was that the Defendant, who is a surgeon and had performed the operation of thyroidectomy on her neck in March 1938, negligently failed to remove from the wound a piece of rubber drainage tube, that this object moved about in the tissues of her neck, and that ultimately in October 1939 it made its way through a tonsil into her mouth. She alleged that she suffered much illness and pain through its presence in her neck, from which she did not obtain relief until its removal.

For the Defendant, it was contended in the Supreme Court that not only was the enormous preponderance of evidence against the Plaintiff and in favour of the Defendant, but that when the evidence given on behalf of the Plaintiff was considered in the light of that given on behalf of the Defendant no reasonable man could have regarded the former as sufficient to establish her case.

The evidence is lengthy, and has increased in snowball fashion as the result of the successive trials. I do not propose to analyse it or examine it in detail. I agree with the submission which has been made on behalf of the Defendant that the Plaintiff's story is so inherently suspicious and

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so highly improbable that it is difficult to understand how any jury could have accepted it. I agree also with the submission that the expert evidence called on behalf of the Defendant was such that no one approaching it with an unbiassed mind could have failed to accept it, and to conclude from it that the alleged facts deposed to by the Plaintiff not only did not happen but could not have happened. I feel no doubt about the cause of the miscarriage of justice which led to a verdict for the Plaintiff. It was brought about by the deliberate raising of false issues by those who conducted the case on her behalf, and by the wholly unjustifiable vilification to which the Defendant and his expert witnesses were subjected.

I feel no doubt whatever that the verdict cannot be allowed to stand. I equally feel no doubt that the order of the Supreme Court is the only one which will do justice, and should therefore be upheld unless some defect in the law of New South Wales prevents justice from being done. This is the only aspect of the case which has caused me any doubt. The question is as to the extent of the power of the Supreme Court of New South Wales to correct a miscarriage of justice in a judgment based on the verdict of a jury.

At common law, the verdict of a jury, and a judgment based on such a verdict could be set aside only in certain limited classes of case. In general it could be done only for a mistake in law. If it appeared on the face of the record that the judgment was erroneous in law, or if it appeared by a bill of exceptions attached to the record that the Trial Judge had made a mistake in law, the party aggrieved could maintain a new action, by a writ of error in the Exchequer Chamber, to reverse the judgment, and that Chamber would in a proper case reverse it and give the Plaintiff in error any relief to which he was in law entitled, or direct a venire de novo, a trial de novo. A verdict of a jury could also be challenged otherwise than by proceedings in error. A venire de novo could be obtained from the Court in Banco for a defect in the verdict appearing on the face of the record; and a judgment non obstante veredicto could be entered for the Plaintiff where the Defendant had obtained a verdict on a plea which confessed and purported to avoid by matter which was no answer in law. A new trial would be granted by the Court in Banco for (inter alia) a material mistake in law of the Trial Judge to which objection had been taken at the trial. For a mistake of fact by the jury in returning a perverse or unreasonable verdict, the only remedy was a new trial. The Court in Banco had no power in such a case to substitute itself for the jury and itself make the finding of fact which in its opinion the jury should have made. In a case at common law which went to trial the parties were entitled to the verdict of a jury. A Plaintiff could not be non-suited without his consent. The Court in Banco, if it set aside the jury's verdict, could not either enter a non-suit or enter a different verdict unless empowered to do so by a reservation made at the trial with the consent of the parties, actual or implied; it could at the most direct a new trial (Heydon *v.* Lillis, 4 C.L.R., 1223 at 1227; Shepherd *v.* Felt and Textiles of Australia Ltd., 45 C.L.R. 359, at 379.)

In England, the Writ of Error was abolished by Section 148 of the Common Law Procedure Act 1852 (15 & 16 Vic. Ch. 76); and by the Rules of Court in the schedule to the Judicature Act 1873 (38 & 39 Vic. Ch. 77) it was provided by Order 58 that bills of exceptions and proceedings in

error were abolished, that all appeals to the Court of Appeal should be by way of re-hearing, and that that Court should have power to receive further evidence, and should have power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case might require. In its present form Order 58 provides also that the Court of Appeal shall have power to draw inferences of fact. Order 58 applies to all cases, including those tried with juries: Canada Rice Mills Ltd. *v.* Union Marine & General Insurance Co., 1941 A.C. 55, at 65–6. There have been dicta in the House of Lords suggesting that, in relation to a case tried with a jury, the language of Order 58 should be read in a restricted sense. I refer especially to Toulmin *v.* Millar, 12 A.C. 746, and Mechanical and General Inventions Co. Ltd. *v.* Austin, 1935, A.C. 346. In view, however, of the decision of the Court of Appeal in Allcock *v.* Hall, 1891, 1 Q.B. 444, and the observations of Lord Atkinson and Lord Parker in Banbury *v.* Bank of Montreal, 1918, A.C. 626, at 675–679, 706, I venture to think that the language of the Order has the same meaning when read in relation to a case tried with a jury as when read in relation to a case tried by a Judge alone. It confers on the Court of Appeal the same powers of correction in each case; and the dicta should be regarded not as showing that its powers are restricted in jury actions but as indicating considerations to which proper weight should be given when it exercises its powers: Baird *v.* Magripilis, 37 C.L.R. 32, at 334.

In New South Wales, proceedings in error do not appear to have ever been formally abolished, and Section 226 of the Common Law Procedure Act 1899 still expressly empowers either party to tender a bill of exceptions in an ejectment action, but there is no reported case of proceedings in error since 1857: Australian Trust Co. *v.* Berry, 2 Legge, 992. Rule 150 of the Common Law Rules now provides that applications for various forms of relief, which include those formerly obtainable by proceedings in error, shall now be by notice of motion; and it is provided by Section 7 of the Supreme Court Procedure Act 1900 that in any action if the Court in Banco is of opinion that the Plaintiff should have been non-suited, or that upon the evidence the Plaintiff or the Defendant is as matter of law entitled to a verdict in the action or upon any issue therein, the Court may order a non-suit or such verdict to be entered.

In the result, although in cases tried without a jury Section 5 of the Supreme Court Procedure Act 1900 confers upon the Court in Banco the powers conferred on the Court of Appeal by Order 58, in jury actions Section 7 leaves the hands of the Court still tied as they were in England three-quarters of a century ago, and as they have not been tied there since. It follows that the form of order made by the Supreme Court can be supported only if it could have been supported in England prior to the year 1873. It is highly anomalous that in New South Wales the Court in Banco should have less power to prevent a miscarriage of justice in a trial at nisi prius when the tribunal of fact is constituted by four laymen than when it is constituted by a Judge; but we must take the law as we find it. It was pointed out by the Supreme Court of New South Wales in De Gioia *v.* Darling Island Stevedoring & Lighterage Co. Ltd., 42 S.R. 1, at pages 4, 5, that—

> "The question whether the Plaintiff's evidence, when considered in the light of an explanation (which cannot be regarded

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as seriously challenged) of doubtful or ambiguous features of it, is capable of constituting a prima facie case is one of law ; and if the Trial Judge rules wrongly on the point his mistake is one of law.

On the other hand, if the stage is reached that a prima facie case has been made out, the question whether the jury should accept the case, or should accept rebutting evidence called for the Defendant, is one for them, no matter how overwhelming the rebutting evidence may be ; and the Trial Judge must leave it to them. If the jury find for the Plaintiff, and the Full Court rules that the rebutting evidence is overwhelming, it is expressing the opinion that the Defendant was, as a matter of fact, not of law, entitled to a verdict : Wilton *v.* Leeds Forge Co., 32 W.R. 421 ; How *v.* London and North Western Railway Co., 1891, 2 Q.B. 496 at 500–1. It cannot, therefore, enter a verdict in his favour, but can only order a new trial."

In my opinion, this is a correct statement of the general law on the point as it now stands in that State. In the present case there was no relevant part of the Defendant's evidence which could be regarded as not being challenged on behalf of the Plaintiff ; and hence, prima facie, and if this were the first trial of the action, I think that we should not be justified in doing more than direct a new trial. But it is not the first trial ; it is the fourth ; and the course of the matter up to date sufficiently indicates that it is impossible to expect a reasonable result in such an action as this, whilst the law is in its present defective condition, if it is tried by a jury. A great part of the trials has been taken up with the elicitation and discussion of highly technical medical evidence, and no jury, common or special, could be expected to have a proper appreciation of specious arguments addressed to them upon the proper inferences to be drawn from such evidence, and no Judge could be expected to be able to prevent the importation into the case of matter of improper prejudice. What course, then, is open to us ? It is unthinkable that we should, from motives of expediency, allow justice to be thwarted by permitting a manifestly unjust verdict to stand. Is the Court then powerless ? Must it, as was suggested by Pickford, L.J., in Cooke *v.* Thomas Wilson Sons & Co. Ltd., 114 L.T. 268, at 272, allow the series of trials to be renewed indefinitely, wrong verdicts set aside as often as they are given, and new trials directed until at last the only possible just verdict is returned ? I think not. The Court has inherent jurisdiction to prevent a miscarriage of justice by abuse of its process ; and the course suggested would be such an abuse. The case is very exceptional, and exceptional cases call for exceptional measures. In all the circumstances, I have come to the conclusion that, since the judgment appealed from is the only judgment that can produce a just result, it should be upheld.

I venture to think that this result might have been reached earlier if, after the first mistrial, sufficient attention had been directed to the provisions of Section 15 (*b*) of the New South Wales Arbitration Act 1902, which provides that—

> " In any cause or matter (other than a criminal proceeding by the Crown), if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury or conducted by the Court through its other ordinary

officers, the Court or a Judge may at any time order the whole cause or matter or any question or issue of fact arising therein, to be tried before an arbitrator agreed on by the parties, or before a referee appointed by the Court or a Judge for the purpose."

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In Charles Osenton & Co. *v.* Johnston, 1942, A.C. 130, at 144, Lord Wright expressed the opinion that, although the phrase " scientific investigation " would not include a large proportion of technical or expert evidence, such as that of a handwriting expert or an expert stevedore, it would, especially in modern days, cover a wide range of expert evidence, if that is based on scientific knowledge, such as that of medical or surgical experts.

For the reasons which I have stated, I am of opinion that the appeal should be dismissed.

No. 63.

JUDGMENT of Starke, J.

No. 63. Judgment of Starke, J.

Appeal from a judgment of the Supreme Court of New South Wales which set aside a verdict and judgment obtained by the Appellant, Hocking, in an action against the Respondent, Bell, and entered judgment in the action for the Respondent, Bell.

The Appellant in her declaration charged the Respondent with negligence as a surgeon in performing an operation upon her and in such care and attention as was necessary consequential upon the performance of the operation. But particulars delivered under the declaration made it clear that the negligence alleged was not in the performance of the operation but in failing to remove a piece of drainage tube which had been inserted in the region of the throat during the performance of the operation, and the case was conducted on this basis. The particulars thus described the tube :—

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

The action was tried before a jury, and a verdict was found for the Appellant for the sum of £800. The jury made a special finding as follows—

> " We find that the Defendant (the Respondent) left in the site of the operation a piece of rubber tube of a length somewhat less than 2 inches, cut off straight at one end and torn at the other, part of which tube had been cut down on one side and from which protruded some material which looked like wire and a swab from the torn end of the tube."

It was this verdict that the Supreme Court set aside and entered judgment for the Respondent; hence this appeal on the part of the Appellant.

It appears from the evidence that the Appellant was a patient of Dr. O'Hanlon, who deposed that in August 1937 she was neurotic, neurasthenic and highly strung. He sent her to a specialist in skin diseases, who found that she was suffering from a condition called giant urticaria or angio neurotic œdema, the predisposing causes of which are hysteria,

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neurosis, thyrotoxicosis and various exciting causes. But her condition did not greatly improve, and Dr. O'Hanlon sent her early in 1938 to Dr. Ritchie, an experienced consulting physician in Sydney, who examined the Appellant and diagnosed a "severe case of thyrotoxicosis." He also said that the Appellant was a highly strung nervous woman exhibiting most of the classical signs of thyrotoxicosis. Dr. Ritchie advised the Appellant that her condition required surgical attention and he referred her to the Respondent, who, as the trial Judge said, "is a well-known surgeon of many years' experience" especially in thyroid operations. The Appellant was admitted into St. Luke's Hospital on the 22nd February 1938 and given a course of treatment to prepare her for the operation. On the 15th March 1938 the Respondent, Dr. Bell, operated upon the Appellant and removed portion of the diseased thyroid gland. This operation was well and skilfully performed and doubtless saved the life of the Appellant. On the 17th March Dr. Bell, according to the Appellant, in the course of removing the drainage tube which he had inserted in the wound, broke it. But the Appellant here must be allowed to tell her own story.

> "Q. After the operation do you remember Dr. Bell saying something about the tube?—A. Yes, he said the tube was not working and he would take it out so he loosened some stitches and pulled the tube in his fingers, shook the tube, and it did not come out so he pulled a little harder and it still did not come so he put his hand on my forehead and held the head back firmly and pulled, and whatever it was came out. He said 'Damn' and I said 'Oh.' He held it in his fingers for a second and I saw it just a little dark piece of rubber then he threw it into the tray and he and the sister turned around and left the room. I had a stinging sensation in the throat."

This story is strongly criticised and said to be inherently improbable. First that a skilled surgeon in order to remove a drainage tube should use considerable force. Ordinarily the difficulty is to keep the tube in position, and Dr. Bell, according to his evidence, secured the tube by one horsehair stitch and a safety-pin through the outer end of the tube The stitch is just snipped with a pair of scissors on the removal of the tube, which is lifted out with a pair of forceps. It was suggested that Dr. Bell must have caught up the tube in some stitching necessary in the course of the operation: hence the necessity of using force to remove the tube. But the neck was in a very sensitive and delicate condition at that time and any violence would break the wound down and tear the muscles or the tissues to which the stitches were attached and cause intense pain. And there was no practical difficulty in removing the broken tube. The wound had not healed and the patient could have been taken up to the operating theatre in proper sterile surroundings and the tube removed, using at most a little anæsthetic in the skin. True it is that a medical witness called for the Appellant said it would have been madness to go after the tube in the circumstances then existing, but fortunately that statement has little relevance to the case and is quite opposed, as experienced surgeons indicated, to elementary surgical principles. And the story is quite inconsistent with the report kept by the nursing sisters in the hospital. There is an entry on the 17th March "Tube removed and three sutures." It is true that the nursing sister who was present when the tube was removed

could not be identified, but Sister Will (now Helen Melville), who signed the report, stated the routine and the duties of the sisters. "The theatre (i.e. the operating theatre) people say that the tube was put in and we have to see it comes out. When the tube is removed the sister with the doctor brings it to another sister, preferably the senior one, just to look it over and get it checked, to check that it is out of the wound. It goes into the report after the checking." And finally we find that Dr. Bell was in daily attendance on the Appellant after the 17th March—and this is confirmed by the nursing sister's report—probing the wound to keep the drainage track open and dressing it himself or satisfying himself that the sisters had carried out his instructions. All this conduct is inexplicable if any portion of the drainage tube remained in the wound to the knowledge of Dr. Bell or any of the nursing staff. The stinging sensation in the throat, to which the Appellant above referred, she felt on the left side. And it is also important in the history of the case to observe that the Appellant said that she had twitchings in her hands, pins and needles in the hands, which, according to medical evidence, is indicative of tetany. And tetany, also according to the medical evidence, is due to some disturbance of the parathyroids in the course of an operation on the thyroid gland and possibly also to inflammation set up by infection.

On the 16th March the patient's temperature rose, and continued high until the 20th, but gradually subsided. On the 20th "some thick purulent discharge" was expelled, and from that day onwards to the date of her discharge from hospital on the 14th April some purulent discharge was noticed, though on the 12th April, according to the nursing report, the discharge was much less.

The Appellant returned to her home in Quirindi, which is a considerable distance from Sydney. On the 30th April 1938, she was seen by Dr. O'Hanlon, who found that the wound had healed except for a small sinus in the centre of the scar on the throat which was discharging freely sero-purulent matter, and round about the sinus there was definite inflammatory swelling. On the 14th May 1938, he sent the Appellant into the Quirindi Hospital, where he attended her. The wound was probed, kept open, and foments were applied. On the 9th May, the Appellant was not so well, and according to Quirindi Hospital reports, she had tetany spasms, and others on the 17th May. On the 10th May, Dr. O'Hanlon had reported to Dr. Bell that there had been a free discharge from the Appellant's neck, that several pieces of suture material had been recovered, that after treatment with foments there was less discharge and she seemed generally better, though he thought the tetany worse, and he stated his treatment of the Appellant. But the Appellant at or about this time did not inform Dr. O'Hanlon or any of the attendants of the hospital that any tube had been left in the region of her throat. On the 9th June the Appellant was discharged from the Quirindi Hospital.

A nursing sister—Sister Sly—however, returned with the Appellant to her home and remained with her for some five or six weeks. The wound in the Appellant's neck had not quite healed when she reached her home, she suffered from spasms, her face and neck were very puffy and the hands were a little puffy. During this period the neck improved, and, when Sister Sly left in July, the wound had completely healed and was not suppurating. Dr. O'Hanlon also saw the Appellant frequently after her return to her home. And he states that all swelling round the neck

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had disappeared and the sinus had completely closed. But on the 27th June, the Appellant had another spasm, which recurred.

On the 3rd September 1938, the Appellant was re-admitted to Quirindi Hospital in a tetany spasm, and she had another on 4th September 1938. Dr. O'Hanlon attended her and she was discharged on 7th September 1938. Dr. O'Hanlon continued to attend the Appellant until about October, but did not again visit her until February 1939. In January 1939, in response to an inquiry of Dr. Bell, Dr. O'Hanlon reported that the Appellant was improving slightly, that the major attacks, though not less frequent, were becoming less severe and that she recovered more quickly, that she had frequent minor spasms which did not leave the muscles involved as sore as before. He added that the Appellant looked well and that he could not help thinking that there was a big functional element in her trouble. On 6th October 1939, Dr. O'Hanlon was called to see the Appellant, and her husband stated that on the previous Monday she had a severe tetanoid spasm—as severe as ever experienced. But let the Appellant herself again take up the story, but not forgetting that the Appellant is now speaking of an event that is said to have taken place some 18 months after the operation and the removal of the drainage tube.

"Q. What is the date of your birthday?—A. 2nd October (1939).

Q. Do you remember something happening about that time?—A. Yes, for a while before that date.

Q. That was your birthday. What happened?—A. I was really seriously ill for quite a while before then. With the swelling in my face and neck and shoulder and my back. Well I looked like a hunchback so swollen at the back of the shoulder and my neck was terribly swollen and my face and my eyes were almost closed. I had difficulty in breathing. I breathed mostly with my mouth open. I had a very nasty taste in my mouth like bad teeth or pus coming away.

Q. Round about your birthday do you remember something happening? Did you have any spasms?—A. Yes, on the Saturday and Sunday I was constantly drawn up with the tetany spasms. My muscles never relaxed once. I was closely drawn. They would give a little and I could straighten in bed but sometimes my knees were drawn up. I was drawn up round. My back was bent up round. On the Monday I was really very ill. Round about 3 o'clock I did not think I was going to live any longer. I had my neck so bad. My husband came home round about then. I could not say exactly what time and I had a coughing fit. I seemed to be choking. I started to cough and I swallowed something.

Q. How was your mouth?—A. I could not open or shut it. My teeth were not close together.

Q. You seemed to swallow something?—A. Yes, and I took a terrific lurch and the muscles seemed to tighten up dreadfully hard. Something burst into the left side of my face. I felt something knock through as it were. I felt a sensation like something bursting. I had something on my tongue and I swallowed it whatever it was.

Q. What happened after that? What was your condition?—A. I was still very ill after that for quite a while.

Q. Did you feel any sensation following that?—A. I do not remember clearly but I think next day I felt a sensation in the stomach of course I felt something going down my stomach. It went very slowly. It seemed to move down my stomach."

The Appellant took aperients and used a commode. The story goes on :—

"Q. What did you do?—A. I went back to bed after using the commode.

Q. After some rest what did you do?—A. I rested quite a while. Then I got up and took the pan from the commode and as I was taking it out in the light of the verandah I noticed something in it. I picked it out in my fingers. It was quite a startling looking thing. I took it out and squeezed it and as I did so a yellow greenish pus ran down my fingers. I was holding it up in my left hand and I heard someone coming. I picked up the pan and went to tip it into the toilet. As I did I pulled the ring across my fingers so (indicating), that is the chain and, of course, I am left-handed so to speak and I dropped this. I was leaning against the wall holding this in my finger and with the nervousness it dropped out. The water was running as it hit the piece of tubing.

Q. What happened?—A. Well it was washed away.

Q. On that day did you make that sketch which I show you?—A. Yes.

Q. Whom did you give it to?—A. To my husband.

Q. Was that a drawing to scale?—A. Oh no! I did not intend it to be drawn to scale. It was a sketch to show my husband what I had seen. I did not know what it was.

Q. Will you describe it generally? First of all, you say you squeezed it. What was it like?—A. The thing I had in my finger I would say a soft greyish piece of tube like a piece of rubber which had been in the water for some time. It was swollen. It was not smooth like a new piece of tube.

Q. What about the shape?—A. There was a straight cut at the end. It was split up within half an inch of the end and it had in that opening a swab which I thought was a piece of marine sponge with a blackish looking stuff. It had come from this sponge and it looked like black wire but when I bent it it would fly back straight. It was like horsehair and it would fly back quickly straight. It looked like wire to me but it could not have been wire."

The Appellant's husband said that on this day (2nd October) he remembered a most desperate spasm, that the Appellant was almost black in the face and appeared to be choking, her teeth were locked, clenched, that he could not see inside the mouth, but by the action of the throat it looked as if something had come up into the throat. In cross-examination, the Appellant, I think, made it clear that the "something," which she spoke of, burst through her tonsil on the left side, but whether that was made clear in her evidence is immaterial, for her case was conducted on that footing and medical evidence called on her behalf was directed to the same end. Dr. O'Hanlon, who, as already stated, had been called to see

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her on the 6th October, did not examine the Appellant that night, and he did not then notice any external swelling or inflammation. The next day he examined the inside of her mouth back to the base of the tongue, but nothing was revealed, no swelling or any sign of an abscess. On the 7th October, however, he sent a report to Dr. Bell which was to this effect, that on the 6th he had been called to see Mrs. Hocking, who was complaining of a pain in her left chest and down the middle of the chest, that clinical examination revealed nothing definite; that Mr. Hocking had given him the following history—that last Monday the Appellant had as bad an attack of tetanic spasm as she had ever had, complained of the neck, which was swollen, and until Wednesday complained of pain and soreness from the neck to the stomach; that swallowing was painful, that he thought she had symptoms of indigestion and gave her castor oil, salts, etc., that on the Thursday she had a bowel action and passed a piece of grey rubber tubing squarely cut on one end and ragged on the other, the tube was partially split up, and stuck in the lumen was what she took to be a small piece of marine sponge about which was twisted a piece of wire, that the Appellant had emptied the tube along with the bowel action result in the w.c.

And he enclosed the sketch of the tube made by the Appellant. Dr. O'Hanlon added that neither he nor Hocking saw the tube but he thought that the Appellant's description was too vivid for the article to be imaginary and that he was nonplussed when asked to explain it all. And he discussed the possibility of a piece of drainage tube being accidentally left behind. Ultimately Dr. O'Hanlon in his evidence said that, after consulting books of reference and being satisfied that a surgeon like Dr. Bell would not leave a tube in a wound, he rejected the story. Dr. O'Hanlon, in his letter to Dr. Bell, also stated that the attacks of tetany had become fewer but, nevertheless, that the Appellant was still far from well and very unsteady when she tried to walk. On the 11th October the Appellant herself wrote to Dr. Bell referring to "the piece of drain tube that was left in my neck," and suggesting that it was at the time she had a tetany spasm that the "tube burst into my gullet" and that she almost choked. On the 15th October Dr. Bell wrote to the Plaintiff saying that he had heard from Dr. O'Hanlon and found it difficult to explain her last illness or "the piece of drain tube" which she said had passed by the bowel, and he suggested the Appellant should come to Sydney for medical investigation in order to see if some medical treatment could not be advised to improve her health. Accordingly, the Appellant went to Sydney, but Dr. O'Hanlon did not see her again before she left. On the 25th October the Appellant was admitted to St. Luke's Hospital. In hospital she complained of pain in the throat and chest, and inhalations were ordered. She was examined by both Drs. Bell and Ritchie. Dr. Bell found a superficial pharyngitis, which looked slightly red, but no swelling or any sign of ulceration of the throat or anything to suggest that anything had come through or burst into the throat. Dr. Ritchie found that there was very little wrong with the mouth and throat; that the Appellant had mild tonsillitis on the left side. Dr. Marsh, an experienced throat specialist, was requested by Dr. Bell to examine the Appellant's throat. He did so on 30th October 1939 and found no evidence of swelling, inflammation or anything of that sort, no sign of ulceration or scarring of the throat, no evidence of a "punched out hole in the tonsil" sufficient to let the tube

through, nothing whatsoever consistent with the eruption of a tube through the tonsil or into the throat. But there was evidence of chronic follicular tonsillitis. He prescribed a well-known gargle, Glyco-thymoline, and a simple paint for the throat, which is confirmatory of his statement. Dr. Tebbutt, a pathologist experienced in blood tests, was also requested by Dr. Bell to make a blood test. He did so about the 28th October and reported that the results showed no anæmia and no stained films, that the red cells showed no pathological changes, that reticulocytes were present in normal numbers, also platelets, and the leucocytes showed no signficant pathological change. And his evidence affirms that the blood count was normal, that there was no evidence of any septic infection and that the results he obtained were in no way consistent with the account given by the Appellant of the eruption of a tube into her throat.

Dr. O'Hanlon saw the Appellant again early in 1940. She came to his surgery and drew his attention to what she said was a scar at the back of her throat. Dr. O'Hanlon looked at it but all he could see was an elongated piece of lynthoid tissue on the posterior pharyngeal wall. He could see no hole in her throat nor a scar. Indeed, he noticed no abnormality whatever, though he had no clear recollection of her tonsils, which had made no impression on him.

Now, if this evidence be true, then no jury could reasonably make the finding of fact which the jury made in this case. And why was this evidence disregarded? It is that of a number of highly qualified medical men of physical conditions observed by them. To assert that the jury did not believe them is not enough unless some sound reason can be assigned for disbelieving them, or for concluding that they were mistaken. The suggestion that they were members of the British Medical Association who supported one another and denied assistance to any person attacking one of their members rests on no firmer basis than assertions in cross-examination of Dr. Thompson, a witness called for the Appellant. The statement appears to have been used, and most improperly used, for the purpose of creating an atmosphere of prejudice. It looks as if Dr. Thompson is hostile to the B.M.A., but his statement affords no rational ground for disregarding the evidence of Drs. Bell, Ritchie, Marsh, O'Hanlon and Tebbutt. But it is contended that the evidence of the Appellant and her witnesses, particularly the medical evidence called on her behalf, affords ample reason for disregarding the evidence I have mentioned and supporting the finding of the jury. And this leads me to consider other facts and circumstances surrounding and connected with the story told by the Appellant.

No doubt exists that the Appellant was a very sick woman when the operation was performed. And no doubt exists that the wound made in the course of the operation became infected and was discharging sero-purulent matter until about July 1938, when it healed and closed. And the e is also no doubt that the Appellant suffered from spasms of a tetanoid character which began soon after the operation and were persistent until the beginning of October 1939. It is, I think, unimportant whether these spasms were due to some disturbance of the parathyroid glands in the course of the operation, and infection of the wound, as seems probable, or were due in some degree and at some times to functional or hysterical conditions. I have already stated and commented upon the Appellant's story relating to the removal of the tube.

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Some other statements by the Appellant also deserve attention. One, that the tube had been inserted on the right side of the throat a little to the side, to the right side of the middle. The importance of this statement I shall deal with later. Another, that in the broken tube there was a swab which she thought was a marine sponge. Sponges are no doubt used in surgical operations, but it is a matter almost of common knowledge how carefully they are counted and checked. But in this operation on the Appellant no sponge was in fact used ; gauze squares were used for washing out the cavity or for stopping bleeding points. There is no confirmation whatever in the evidence of the Appellant's statement.

Still another, that the material that protruded from the tube looked like black wire, was like horsehair, and flew back straight. The suggestion that it was like horsehair was made, I gather, on the present, the fourth, trial of this case, and not before. And the Appellant said that she had a sensation in the stomach, something sticking in her, something pricking and scratching in her stomach. And it is to be noted that whilst the Appellant was in Quirindi Hospital in May and June 1938 she said that on one occasion she turned her head towards the left and something stuck in her throat and it started to bleed, that she wiped the blood from her chest with cotton wool and threw the wool in the fire. But this incident, which I suppose is a suggestion in support of the Appellant's main statement, was never reported, strangely enough, to Dr. O'Hanlon or to the nursing staff of the hospital. And there is the critical statement that something burst into the left side of her face—something knocked through, as it were—something on her tongue which she swallowed. Two medical witnesses were called on her behalf, Professor Welsh and Dr. Thompson. Professor Welsh retired from the chair of pathology in the University of Sydney in 1936. He had much knowledge of the thyroid gland and those afflictions which centre around that gland, but he did not profess to be an authority on the technique of a surgical operation for thyroidectomy. The other, Dr. Thompson, has practised in Sydney as a physician and surgeon for many years. Both have high academic qualifications but neither have had large experience in the operation known as thyroidectomy.

During the first trial of this action—December 1941—that, it is to be observed, is some two years after the Appellant said something had burst into the left side of her face, Professor Welsh stated that he had examined the left tonsil and that " there was a distinct shallow oval depression about half an inch in diameter and about one-eighth inch deep and a distinct scar at the foot of that depression. The tonsil was very ragged, strips of tonsillar tissue were running from the tonsil to the back of the throat which indicated some kind of volcanic eruption had taken place from the tonsil, it was consistent with an abscess having burst from the tonsil." In August 1942 he also had a visual examination, and in about the beginning of December 1943 he saw a probe put in the tonsil by Dr. Thompson and pass right through the tonsil to the back of the throat. Dr. Thompson also examined the Appellant shortly before the first trial—December 1941. In answer to the question, " When you first examined the tonsil what did you see ? " he said, " Nearly at the upper end of the left tonsil there was a punched-out canal. It was a quarter of an inch in diameter three-quarters of an inch long going down to the pharyngeal wall through the tonsil. I ascertained the length with a probe and glass " (which he produced). He

also said that what he saw was consistent with an abscess having burst through and consistent with a rubber tube having come through. Since that time he had made several examinations—half a dozen—but the canal had at the time he was giving evidence—December 1943—considerably retracted. All this points to the bursting of some abscess about 1941 and not the bursting of an abscess in October 1939, which must have considerably contracted by December 1941. The observations of Drs. Bell, Ritchie, Marsh and Tebbutt in October 1939, which I have already set forth, do not directly conflict with this evidence, for they refer to a time within a few weeks of "something bursting into the left side of the Appellant's face." But the observations of Dr. Thompson cannot be reconciled with the observations of other medical witnesses, though I do not think those of Professor Welsh are so clearly inconsistent with those other observations, for he only speaks of a distinct shallow oval depression on the left tonsil one-eighth of an inch deep and a distinct scar at the foot of that depression.

About December of 1941 at the first trial of this action Dr. Poate, a highly qualified surgeon, who has specialised in operations connected with the thyroid gland, examined the Appellant's throat in Court. In answer to the question: "Was what you found in the throat consistent or inconsistent with her (the Appellant's) story?" he answered: "Entirely inconsistent with her story. She had evidence of chronic inflammation at the back of the throat. Both tonsils were involved in what is called chronic tonsillitis and in this area in the left tonsil there was a crypt or the orifice of a main crypt of the tonsil . . . The tonsil at the right side was not exactly a mirror picture but closely resembled the one on the left side in its general appearance. She had what is called chronic follicular tonsillitis."

In August 1942 Drs. Marsh and Steel, who is also a specialist in connection with the ear, nose and throat, examined the Appellant with Dr. Thompson. Dr. Marsh said there was a shallow opening in the left tonsil which he was sure was the entrance to the supra-tonsillar fossa or the large crypt and there was no hole in the tonsil as was suggested by Dr. Thompson. Dr. Steel found a condition of ordinary chronic follicular tonsillitis, which is a condition in which the crypts—the small recesses which pass down into the tonsil—have become chronically infected and debris or unhealthy material collects in these crypts and is visible on examination.

On the 11th December 1943 the Appellant was again examined by Drs. Poate, Edye, an experienced surgeon, Marsh and Steel. Dr. Thompson was also present. Dr. Marsh was of opinion that the condition of the tonsils had become worse since he saw them in October 1939, but all agreed that the Appellant had what is called chronic follicular tonsillitis, and all denied in substance that there was a "punched-out canal," such as Dr. Thompson described, though they did observe the "superficial shallow opening of the large crypt." Dr. Thompson pointed, said Dr. Edye, to a small opening in the upper lobe of the tonsil, a slit-like opening about a quarter of an inch long with a little strand of tissue across it which he described as the hole through which the tube had come, and all but Dr. Thompson agreed that this was the supra-tonsillar fossa or the large crypt of the tonsil.

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It is, of course, true that matters of fact cannot be determined merely by the number of witnesses opposed to one another, but by the quality of the evidence. But in this case both number and quality are undoubtedly on the side of the Defendant.

Other matters that require consideration are the anatomical and surgical features involved in the Appellant's case. It will be remembered that the Appellant stated that the drainage tube was inserted on the right side of her throat—a little to the right, and she identified the spot by a scar on the throat. According to Dr. Thompson a tube placed on the right side could not effectively go into the right lobe of the thyroid gland because it would kink, but no difficulty would arise if it were inserted obliquely across the trachea so that the outer end was on the right and the inner end on the left, and he referred to a text-book in support of his statement. Dr. Poate explained that the illustration given in the text-book was an old-fashioned idea in which the tube was not put in the incision but in a special incision above the breast bone. Naturally in that case to get into the thyroid cavity the tube had to go obliquely upwards, but it was not put through the wound. A tube put in across the trachea would cause irritation and the point would be sticking into the muscles on the other side at the back. Dr. Poate and Dr. Edye, surgeons who had performed a great number of operations on the thyroid gland, said that no practising surgeon would dream of putting in a tube in the fashion suggested by Dr. Thompson ; indeed, Dr. Edye said it would be ridiculous. Dr. Bell himself could not remember on which side of the trachea he had inserted the tube, but he thought it would be on the right side on account of having trouble on the left. The tube, he said, goes to one side or other of the trachea about the middle line :—

> Q. You must push it to the right if it is on the right ?—A. Yes, and if it is on the left it might go to the left of the trachea but it must not go straight into the trachea or up in the air or down that way (indicating). You just push it inside the cavity, not to the bottom of the cavity.

There is no evidence whatever that Dr. Bell inserted the drainage tube in a manner opposed to surgical practice and that has manifest drawbacks. But it is necessary for the Appellant's case that the tube crosses the trachea if it or a portion of it is to reach the left tonsil. This difficulty is on the threshold. The case made for the Appellant was that the wound made in the course of the operation had become infected and was discharging thick purulent matter or pus. The broken tube, it was suggested, became embedded in this purulent matter or pus, as in a bath, and might be carried wherever the pus happened to travel, anywhere in the neck. Both Professor Welsh and Dr. Thompson agreed that this was a possible view. Dr. Thompson said that it was not only possible under the circumstances but the most likely thing to have happened ; towards the close of the case he became more emphatic :—

> " Q. Did you take it that there might have been a tube there ?—A. I know there was. There is no doubt about that.
>
> Q. You know there was ?—A. I do.
>
> Q. Have you got second sight ?—A. No, it is as plain as a pikestaff."

Professor Welsh in his evidence-in-chief gave the following evidence :—

"Q. Assume that the wound healed over, what could happen to the tube ? I mean could it go to the tonsil ?—A. Yes, but a great many things would happen before it got there.

Q. Would you describe the processes that would come about before that happened ?—A. The object you mentioned could be carried in the pus that had accumulated within the thyroid capsule wherever that pus happened to travel. That pus could travel anywhere in the neck.

Q. Anywhere in the neck ?—A. Yes, anywhere in the neck.

Q. Is there any particular likelihood whether it would travel up or down ?—A. In my experience of infection of the neck the infection usually spreads upwards.

Q. Has gravity got anything to do with it ?—A. Very little influence in the neck.

Q. How does the infection spread ?—A. It usually spreads between the various structures in the neck, each little structure, each muscle and the thyroid gland itself, and a group of big important vessels in the neck are enclosed in what is called a fibrous capsule and the inflammation and suppuration usually spreads by separating these structures along these fibrous capsules opening up the spaces between them, what we call the fascial planes. One has to imagine each little structure like a muscle or gland enclosed in a band or sheath of that fibrous tissue and the tendency of the suppuration is to spread up between these and of course to carry any foreign body with it.

Q. Would there be anything to prevent it going to the tonsil ? —A. No, nothing serious to prevent it going to the tonsil."

In anatomy a fascia is described as a thin sheath of fibrous tissue investing a muscle or some special tissue or organ, an aponeurosis (see "New English Dictionary," edited by Murray). However, Professor Welsh conceded as a general statement that suppuration followed the line of least resistance. And that when there is an opening through which pus is discharging the tendency of any foreign body is to be carried towards that opening with the pus. The drainage track, as we know, in this case, was open from the time of the operation in March 1938 until it closed in July 1938 and during that period the track was being probed and kept open and foments were being applied from time to time. Yet the broken tube was not discharged with the pus coming from the wound nor did the material "which looked like wire" protruding from the broken tube become visible. All this is inconsistent with the presence of a broken tube in the wound. Professor Welsh also conceded that the broken tube would have to change its course to reach the tonsil. This is his evidence :—

"Q. What you are saying is that this thing has to go up the neck and has to get up beside the tonsil ?—A. That something of which (the Appellant) regards . . . as a rough representation has to do that.

Q. Then it has to turn at right angles to come out the tonsil ? —A. Then it is embedded in an abscess of the tonsil and yes, it would have to turn.

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Q. It would have to turn at right angles to go through ?—A. Yes.

Q. So according to you you have a path up the neck turning at right angles and going through the tonsil ?—A. It would not necessarily go at right angles ; it would be at an angle.

Q. And you really suggest that is possible ?—A. I really suggest that this is possible on the evidence."

Certainly the broken tube was very discerning. Moreover, the progress of this broken tube was extraordinarly slow. The infection appears to have remained more or less dormant or quiescent from July 1938 when the drainage track closed until October 1939 when the tube burst through the tonsil. And all this time the tube was lying, apparently, in an accumulating body or bath of pus. Apart however from these considerations there is a strong body of evidence consisting of professors of anatomy and pathology, of physicians, surgeons and throat specialists who dispute the conclusion of Professor Welsh and Dr. Thompson both on anatomical and surgical grounds.

The anatomy of the neck, so far as it was relevant to this case, was given by Professor Shellshear, Research Professor of Anatomy within the University of Sydney, and by Dr. S. A. Smith, who had been a lecturer and demonstrator and acting Professor of Anatomy within the University of Sydney. It appears from their evidence that the neck in the region mentioned is a very compact structure. All the important organs are held closely together and there is just sufficient looseness to enable the various movements of the head and neck to be made and to enable the gullet to perform its function in swallowing. Fascia, as Professor Shellshear said, surrounds every structure practically in the body. They surround arteries, veins, nerves and muscles and also stretch across the spaces between muscles and are generally found in the lines of movements. In the part of the neck, important in this case, there are no spaces but there are compartments. The gullet, the windpipe and the thyroid gland, and all the arteries and nerves associated with those structures are in what is called the visceral compartment of the neck. Another compartment contains a complicated set of muscles which have as their function the movement of the tongue and the jaw. They are densely packed together. The carotid artery, the jugular vein, the vagus nerve, are in a third compartment called the vascular department. The structures are held together by a strong fibrous net work. So, as Dr. Bell said, the neck contains in a small area a number of vital structures. But apparently none of these vital structures were injured. Professor Inglis said that all structures destroyed by suppurative process are replaced by fibrous tissues, so far as the destroyed part is concerned, which have no power of contraction :—

"Q. Take the fascial planes, if they are destroyed what are they replaced by ?—A. They are themselves fibrous tissues and if they were destroyed fibrous tissue would be present there but instead of having a normal arrangement they would be arranged irregularly.

Q. Could you have destruction of the fibrous tissue without an object like that present without destroying the muscles which are enclosed in the fibrous tissue ?—A. I would think not. I would expect the muscles to be involved as well as the fibrous tissue covering them.

Q. You have seen this lady in Court giving her evidence on a former occasion ?—A. Yes.

Q. You saw the movements of her head ?—A. Yes.

Q. What would you say as to her appearance and her capacity to move her head as being consistent or inconsistent with her story ?—A. I would expect there to be too much contraction of fibrous tissue to permit that degree of freedom of movement."

It is conceded, I think, and in any case it is clear, that a body such as is described by the jury would not move of its own effort; it is inert. The object could not travel otherwise than in the cavity of an abscess. The abscess must have been of considerable magnitude to hold such an object. And while the inflammatory condition existed the patient would, as Dr. Poate said, have run a continuous temperature, there would be intense pain, distress in swallowing and breathing, and the patient would be desperately ill. No doubt the Appellant was ill during the period in question, her neck was somewhat swollen according to the evidence. She suffered pain and had spasms, but her condition was not, I think, anything like that depicted by Dr. Poate.

This medical evidence was given at great length and cannot be summarised. It must be studied with care with the text-books and diagrams to which reference was made in order that it may be understood and fully appreciated. But I think I have sufficiently stated its main features. This evidence demonstrates how opposed to professional knowledge and how unreasonable—if not impossible—is the assertion that an object such as found by the jury was carried forward some two or three inches in an abscess, necessarily of great magnitude, through the dense fascial sheets or sheaths surrounding the structures already mentioned, and which in truth form barriers to the movement of any such object, without attacking, destroying or injuring those structures and the fascia covering them. And yet none of these structures or the fascia appear to have been destroyed or injured. I have not omitted to look at the plates in "Jamieson's Illustrations of Regional Anatomy" and in "Quain's Anatomy," to which we were referred, but these plates are diagrammatic and, as Dr. Bell said, structures and material are dissected out for the purposes of the diagram. No jury could reasonably, I think, make the finding that was made in this case. But it is not the number of witnesses that leads me to this conclusion, but the facts already detailed and the nature and quality of the evidence given by those witnesses.

I must not omit mention of the sketch the Appellant drew of the object she saw in the pan and lost in the sewer. It was much relied upon at the trial. The Appellant said that it was not intended as an exact representation as to size, shape and length of what she saw, but was about the same size. But if the medical evidence demonstrates, as I think it does, that it is beyond the bounds of reasonable probability or even possibility that such an object was carried in an abscess through the delicate regions of the neck and ejected through the tonsil into her mouth, then the sketch ceases to be of importance in this case and it must be attributed to the imagination of the Appellant, who, according to a strong body of medical evidence, manifested many symptoms of hysteria, which is a very real and serious condition in itself. At all events, that, in the circumstances, is the most reasonable explanation of the production of the sketch. Professor Welsh and Dr. Thompson accepted without question the Appellant's

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story and were, I think, more concerned with establishing its possibility than its truth. But the truth of the story is the first consideration and reasonably should only be accepted after consideration of the known facts and the anatomical and surgical knowledge of the day. In my judgment, the Supreme Court was right in setting aside the verdict found for the Appellant. But it was suggested that this Court should in its discretion restore the verdict although satisfied that it is against the weight of evidence or that the evidence is overwhelmingly in favour of the Appellant. Some old cases were referred to, but, if as I think, the verdict was such as no reasonable jury could find and therefore perverse, then, as Pickford, L.J., said in Cooke *v.* T. Wilson, Sons & Co. Ltd., 85 L.J.K.B. 888, at page 897, the verdict ought to be set aside again and again as often as it is found on the same evidence. No doubt the course suggested would end this long litigation but only at the expense of justice and to my mind a grave miscarriage of justice. And this, despite the opinion of the Supreme Court on two separate occasions that a verdict for the Appellant should be set aside.

The remaining question is whether a new trial should be granted or a verdict and judgment entered for the Respondent. Under the Judicature Act and Rules judgment might, in a proper case, be entered instead of granting a new trial (Banbury *v.* Bank of Montreal (1918), A.C. 626 at page 706, and the cases collected in the Annual Practice, 1943, under Ord. 58, r. 4, p. 1289). The judicature system, however, has not been adopted in New South Wales. But the Supreme Court Procedure Act 1900, s. 7, provides :—

> " In any action, if the Court in Banco is of opinion . . . that upon the evidence the plaintiff or the defendant is as a matter of law entitled to a verdict in the action or upon any issue therein, the Court may order . . . such verdict to be entered."

That section was considered in this Court in Heydon *v.* Lillis, 4 C.L.R. 1223 at page 1227 et seq., Griffith, C.J., stated shortly the common law procedure and proceeded : " Bearing in mind the previous defects in the law, which had been remedied, nearly everywhere else but in New South Wales, what was the intention of the legislature?. . . If the jury give a perverse verdict in favour of the defendant, the plaintiff may move to have a verdict entered for him ; if they give a perverse verdict in favour of the plaintiff the defendant may have a verdict entered for him . . . If the Judge ought to have directed a verdict for the plaintiff or the defendant, the Court may order a verdict to be so entered." A perverse verdict as used by the Chief Justice means, I take it, a verdict that a jury could not reasonably find on the evidence. (cf. 11 App. Cas. 152–155.) The authority given by the section should only be exercised in clear cases, but I regard this case as of that character. There is no evidence if the evidence is such that a jury on that evidence could not reasonably find the challenged verdict (Ryder *v.* Wombwell, L.R. 4 Ex. 32).

The question is not whether there is a scintilla of evidence to support the verdict—not whether there is literally no evidence ; but whether there is evidence on which the jury could reasonably find its verdict. But a distinction is drawn between a case in which there is no evidence to support a verdict and a case in which the verdict is against the weight of evidence. In the latter case the verdict is not disturbed unless the jury, viewing the whole evidence reasonably, could not properly find it

(Metropolitan Railway Co. *v.* Wright, 11 App. Cas. 152). The remedy in such a case is a new trial, for the case is not one in which there is no evidence, but of some evidence on which the jury viewing it reasonably could not properly found their verdict. The distinction is fine but it is well enough established.

In the present case the Supreme Court was justified, in my judgment, in concluding that there was no evidence on which the jury could reasonably find a verdict for the Appellant and in applying the provisions of Section 7 of the Supreme Court Procedure Act 1900.

This appeal should be dismissed.

No. 64.

JUDGMENT of Dixon, J.

During the course of this protracted litigation, the evidence has been examined by many Judges, but I believe that it has produced the same impression upon the minds of all of them. There has not, I think, been one of them who, if the responsibility of deciding the facts had rested with him and not with the jury, would not have found unhesitatingly that the Defendant did not leave a piece of tubing in the wound in the Plaintiff's neck. If I myself were a tribunal of fact I should feel much confidence in that conclusion. But two juries have already returned verdicts for the Plaintiff based upon the opposite finding and two others have failed to agree on a verdict. Besides returning a general verdict for the Plaintiff, the last of these juries stated specially and expressly what, in its opinion, the Defendant had left in the wound. The jury found that he left in the site of the operation a piece of rubber tube of a length somewhat less than 2 inches, cut off straight at one end and torn at the other, part of which 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. The Supreme Court of New South Wales considered that such a finding ought not to be allowed to stand, and the majority of the Court went the full length of directing that, notwithstanding the finding of the jury, a verdict should be entered for the Defendant.

It is evident that the question whether, in spite of the very strong opinion formed by the Judges who have considered the facts, the jury's verdict should prevail is one that depends upon the respective provinces of the Court and of the jury in matters of fact. The principles which determine those provinces are well settled and the Courts are often called upon to apply them. But the tests by which, under the principles, the validity of a verdict must be tried are necessarily expressed in a general form and must be flexible in application because of the infinite variety of circumstance arising.

Familiarity with this kind of question does not therefore seem to lessen the difficulties involved in saying whether a given case lies within the exclusive province of the jury. Moreover, in New South Wales the law has not been reformed as it has been elsewhere in the Empire by authorising the Full Court before which a verdict is impugned to draw inferences of fact and make such order as the case may require, so that,

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as has been held in England, when the Court has all the facts before it, after setting aside a verdict as being against the weight of the evidence, the Court may enter judgment for the other party if they think that a new trial could bring to light no further material facts and to do so will do complete justice between the parties.

In New South Wales the power of the Court to enter judgment contrary to the actual verdict of the jury is limited to cases in which the party against whom the jury has found is entitled as a matter of law to a verdict. Otherwise, in New South Wales, " a general verdict can only be set right by a new trial " ; which is no more than having the cause " more deliberately considered by another jury, when there is a reasonable doubt or, perhaps a certainty that justice has not been done " (Lord Mansfield, Bright *v.* Eynon, 1757, 1 Burrows 390, at page 393 ; 97 E.R. 365, at page 366). " But to this there is a limit. Juries may baffle the Court by persisting in the same opinion, and in such cases it has been the practice for the latter ultimately to give way " (Forsyth : History of Trial by Jury (1852), page 191).

In the circumstances of the present case, for the Defendant to be entitled as a matter of law to a verdict, it must appear that upon the evidence adduced no reasonable man could be satisfied that he had left a piece of tubing in the Plaintiff's neck, but it would be sufficient to enable the Court to order a new trial if on the whole evidence, notwithstanding some conflict therein, the contrary conclusion appeared to be the only one which could justly and properly be reached by men who understood their duty and applied themselves faithfully to its discharge.

But, before discussing the operation of these respective tests or standards in relation to the verdict given by the jury for the Plaintiff in the present case, it is necessary to state what, in my view, are the more material considerations arising upon the evidence. The general circumstances of the case have been recounted judicially so often in the course of the litigation that I forbear from restating them.

In the first place, it appears to me that the greatest importance must be attached to the Plaintiff's direct testimony, not for its inherent probative strength or plausibility, qualities not very conspicuous upon the printed Record, but because it is direct evidence, personally given before the jury, of facts which, if true, provide a strong circumstantial foundation for her case. If the piece of tubing with the protruding wire-like material and swab as described by the jury's finding did in fact pass through her alimentary and intestinal tract and was evacuated on 5th October 1939, as she describes, and if on 2nd October she had all the sensations to which she swears of swallowing a foreign body bursting from her pharynx, then, unless some other explanation of its entry into her body appeared to be open, a very strong foundation for her case would exist. Its strength would be so great, that it would be natural, and, I think, not unreasonable, for a jury to treat the conclusion that the tubing was left in the site of the operation as too clear to be overcome by scientific expert evidence of the impossibility or improbability of a broken piece of tubing finding its way from the enucleated capsule of the thyroid gland, whether right or left, through the left tonsil. I say this at the outset, in order to make it clear that, as I see it, the basal question is the truth of the Plaintiff's testimony. If you add to her account of what occurred on 2nd and 5th October 1939, her evidence of the force used by the Defendant in removing the tube, on a date which

must have been 17th March 1938, evidence which fell little short of describing the actual breaking of the tube, and if then you take into account, in addition, her evidence of the progress of her illness and her descriptions of her symptoms, particularly of the swelling of her neck, you have a narrative which, if true, would make a very formidable case indeed.

It appeared in evidence that on 3rd and 6th October 1939 she described what had happened on 2nd and 5th October to her husband and to the general practitioner then attending her, and drew a diagram of the tubing which, among other things, depicted part of a diamond slit such as would have been made in the tube used at the operation.

It is, I think, important to keep in mind that the real question governing the determination of the issue must have been whether, in face of the other evidence adduced, the Plaintiff's testimony could and should be treated as substantially correct. For though, no doubt, it is logically conceivable that what the Plaintiff says she experienced and observed may be susceptible of some other explanation, so far no hypothesis seems to have been put forward consistent alike with her testimony and with the removal by the Defendant of the entire tube.

There is no question in a trial that is regarded as so clearly within the exclusive province of the jury to decide as the reliance to be placed upon the evidence of a witness whom they have seen and heard. The fact must therefore be faced, that however little faith we as Judges may have in all this, yet before the Defendant can be entitled as a matter of law to a verdict he must so utterly destroy the Plaintiff's narrative as to place it outside the competence of a jury to give any credence to the material parts of it, a thing which, in my experience, I have never seen done with reference to direct oral testimony given upon a civil issue.

The Defendant certainly constructs an extremely strong argument of fact for rejecting the Plaintiff's story and for concluding affirmatively that no piece of tube remained in her neck. One somewhat paradoxical feature of her case is that its substance gains strength as her description of the object she says she saw, after she evacuated it, is discounted. If it were possible to suppose, as plainly the two medical witnesses she called as experts wished to do, that she was mistaken in her estimate of its size and in ascribing to it wires, or things that looked like wires, and a swab, it might be easier to overcome the reluctance to believe that such an object could have been discharged through the tonsil after proceeding from the cavity whence the thyroid had been removed, or partly removed.

The finding of the jury has made some modification of her account of the object recovered. But the Defendant is warranted, at all events upon the question whether there should be a new trial, in beginning with the hypothesis that, as the jury say, it was a piece of tube "somewhat less than 2 inches," and that there was some material that looked like wire protruding and a swab or, at least, something that looked like a swab. The size is of great importance, and the very indefinite statement of its length in the finding can scarcely mean less than an inch and a half. Horsehair strands might be considered to look like wire, but none was used. Whether gut could be mistaken for wire after such a length of time in the body, even if undissolved, seems more than doubtful.

The Defendant adduces affirmative evidence, supported by the probabilities, that, at the time of the operation, sound new tubing was in use and gut, not wire stitching, and that no swab would be inserted in the

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tube. He proves that the tube was placed with its orifice slightly on the right side of the middle line of the Plaintiff's neck, and he adduces strong evidence supported by all the probabilities that the tube would therefore be placed on the right side of the trachea and in the cavity or capsule whence the right lobe of the thyroid was enucleated. Strong and cogent evidence is then given by surgical, medical and anatomical witnesses of high standing and attainments, to the effect that the anatomical difficulties of a broken end of tube passing from the right capsule of the thyroid across to the left tonsil and coming through the left tonsil as alleged were insuperable. Even assuming that the tube had been placed in the left capsule, the broken end would need to work through the membrane forming the capsule and then proceed within the pharyngeal wall to the tonsil, but on the inside of the superior constrictor. No pathological explanation would, it was said, account for either phenomenon. Numerous works of reference were produced in support of these views. At the trial by agreement they were treated as in evidence.

There is, I think, much danger of our misconceiving and misapplying the anatomical, surgical and medical treatises and plates, but I am bound to say that, so far as I have been able to master the relevant information they contain, it seems to me to show that many difficulties must be encountered by any hypothesis which would explain what the Plaintiff says happened with the piece of tube described. I cannot, however, imagine these treatises proving of any assistance to the jury.

In answer to the Plaintiff's account of the forcible removal of the tube on 17th March 1938, the Defendant points out that no force would be needed unless the tube was anchored by an accidental suture to a muscle or other firm tissue; that he could not sew through the rubber without knowing it; that the hypothesis is that the muscle or tissue did not give way, but the tube tore, the piece remaining anchored; that, if so, there would be much pain and hæmorrhage, although in fact there was no evidence of bleeding; that there were many gross improbabilities in any surgeon behaving as the hypothesis demanded that it should be supposed he had done on that occasion and thereafter; and that on her own account the Plaintiff had said nothing about the incident, notwithstanding a long continued illness. Then, although the wound became infected, it cleared up and there was evidence that the condition of the patient in some respects was hardly consistent with the presence of so large a body in her neck. It was true that she developed a serious condition of tetany but that, according to much evidence, might be caused by interference with the parathyroids or by a suppurative or infective condition around them without any foreign body, and its apparent long duration was consistent with an hysterical tetany or neurosis succeeding the true tetany. There was much evidence inconsistent both with the swelling of the neck which must, it was said, have accompanied the presence of the foreign body, and with the pus or abscess which was necessarily assumed in order to account for its movement. Some intermittent swelling proved was accounted for as angio neurotic œdema.

An X-ray picture was made on 7th October 1938 and this, it was sworn, was hardly consistent with the experience she had narrated. The condition of her throat, as seen subsequently, was also inconsistent with the discharge of the tube through her tonsil. So, too, was her blood count taken on 27th October 1939. For it disclosed none of the indicia

of a recently discharging abscess of some size, and yet the Plaintiff's own case requires the assumption that such an abscess must have existed. Then, whatever else might be said of the sketch she made of the object recovered, it was pointed out that its firm outlines did not evidence the suffering she had so recently undergone if her account was true.

Finally, it was said that, on the Plaintiff's theory, the movement in pus or suppuration of the piece of tube must have been accompanied by an amount of destruction of the area through which it worked, inconsistent if not with the Plaintiff's survival, at all events, with the whole history of her case, including the present condition and appearance of her throat and neck.

This very brief summary of considerations, telling against the Plaintiff's case, considerations that have been the subject of much elaboration by evidence, argument and exposition, leading into many ramifications of detail, will suffice to indicate the strength of the answer made by the Defendant to the story told by the Plaintiff, a story which, moreover, upon its face, many minds would be cautious of accepting.

But, on the part of the Plaintiff a number of matters is put forward, both as impairing the orce of some of the foregoing considerations relied upon by the Defendant, and as giving confirmation and support to her narrative.

Much reliance was placed on the length of the period over which the Plaintiff suffered acutely from tetany and from its disappearance after 5th October 1939. A calcium deficiency arising from a failure in the function of the parathyroids produces tetany, and the parathyroids might fail in their function because of removal, trauma, or infection.

The Plaintiff's contention was that the presence of a foreign body would explain the obstinate persistence of the tetany. On the Defendant's side, in the course of the proceedings, the theory was developed that, although in the beginning the Plaintiff suffered from post-operative tetany, her later condition was to be ascribed to hysteria or a neurosis. The manner in which the theory was evolved, and the apparent inconsistency of the treatment prescribed by some of the medical witnesses who afterwards supported it, are used by the Plaintiff as matters which the jury were entitled to take into consideration, both upon the issues and as affecting credibility. Further, hysteria or some such neuropathic condition might account for the Plaintiff's putting forward her story, a view which seems eventually to have been adopted on the part of the Defendant as preferable to an earlier hypothesis that it was simply a dishonest invention. The Plaintiff contended that a jury might legitimately regard the readiness of the Defendant and his witnesses to find in hysteria a new explanation, both of the Plaintiff's tetany and of her story, as a further reason for distrusting his case.

As to her physical condition at the time when she alleges the passage of the tube took place, her husband supported her account. There was evidence too from a domestic worker that within a short time afterwards her throat showed pus, and that her neck was swollen. There was a conflict of evidence upon the condition which her throat exhibited at later stages. The medical and surgical expert called by the Plaintiff swore that when he examined her two years after the incident he found in her left tonsil a punched-out canal a quarter of an inch in diameter into which he inserted a probe of three-quarters of an inch. Other experts suggested that what

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he had seen was a crypt or the supra tonsillar fossa, but this he vehemently disputed, saying that the fossa had been destroyed. The evidence of witnesses called for the Defendant, men of undisputed qualifications and high standing, was not consistent with the deduction which the Plaintiff's expert sought to draw, namely, that an abscess had burst out of the left tonsil, thus explaining the passage of the piece of tube. Others who made later examinations also disagreed with him. But, it was naturally contended, that it was for the jury to say which view should be accepted.

To explain how it came about that a broken piece of tubing should be left in the wound, the hypothesis was put forward on the part of the Plaintiff that the rubber from which the tubing would be cut, or the tube itself, had been softened and weakened through boiling, that in the course of stitching up the muscles after the operation a stitch had been passed through one wall of the tube and the diamond cut, that the removal of the tube had been effected at the expense of tearing off the end of the tube, that the condition of the patient had been unfavourable at the time for any surgical procedure to recover the broken piece, that the Defendant had expected that in due course the stitching would dissolve and the tubing would be discharged through the sinus of the wound, and that when the Plaintiff failed to get well and developed tetany, under which she continued to suffer, he was afraid to disclose what he knew about the breaking of the tube and a piece remaining in the wound. As a foundation for this hypothesis, reliance was placed on statements made in evidence as to the Defendant's view of the probabilities of such a piece of tubing working out through the sinus of the wound.

Great stress was placed for the Plaintiff upon the circumstances in which the sketch or diagram of the object found was produced by her. The nature of the sketch and the fact that she herself made it immediately after the event were said to be matters to which a jury might properly give great weight as confirming her story. How, it was asked, unless she had seen it, could she produce a sketch of the torn end of a tube with part of a diamond slit in it, just such as was in fact made in the tube inserted? The answer suggested for the Defendant was that she might have learned that a drainage tube would be so slit from conversation with nurses or from observation during the long period she was a patient in hospitals.

Another consideration advanced for the Plaintiff was the immediate effect of her story upon the general practitioner attending her. For it was plain that when on 6th October 1939 he heard her story of the passage and recovery of the tube, he was impressed with it as something not imaginary, and he did not feel that there was anything impossible or incredible in the supposition that a foreign body left in the wound accounted for her experience and the medical history of her case. His subsequent support of the Defendant's case and the course he followed during the litigation and as a witness, were used on behalf of the Plaintiff as discrediting his evidence. His earlier attitude was relied upon as something in which a jury might find guidance upon the question whether the Plaintiff's case was really incompatible with anatomical and medical facts.

Then, some changes of ground, over the four trials, were attributed to the Defendant and some of his witnesses. These were said to provide the jury with a further reason for distrusting his case. One such matter

was the question whether the tube was inserted in the wound after the stitching was done, or whether there was some stitching round the tube after its upper end was placed in the enucleated thyroid capsule. Another concerned the question whether unconsciousness was characteristic of severe tetany. A third was the attempt to explain the continued tetany as hysterical.

A contention of the Plaintiff, which I think fails, is that the jury might place a construction inconsistent with his denial of the Plaintiff's story upon the Defendant's conduct in his dealing with the matter when he learned what she had said about the piece of tube coming from her throat and her swallowing it and passing it.

I will not go through the details. It is enough for me to say that I do not think a jury could legitimately place upon the Defendant's conduct the construction contended for. What he did is what might be expected of any experienced professional man confronted by a strange but circumstantial story which he believed to be without foundation, but which he could not account for except by the invention or the imagination of the patient.

A great difficulty in the Plaintiff's case is necessarily the anatomical structure of the neck. The theory put forward on her behalf to meet it is that the piece of tube became encapsulated in an abscess, the activity of which varied, that the suppuration broke through the inner wall of the thyroid capsule and that, in the visceral compartment, it passed under the middle constrictor muscle and through some areolar tissue between it and the superior constrictor, being contained within the membrane of the laryngeal and pharyngeal wall until it burst through the left tonsil. On my understanding of the matter, if I were the tribunal of fact, I should reject this hypothesis. But I am not the tribunal of fact. Because, doubtless, there are fewer difficulties if the remnant of the tube was on the left side; it is maintained for the Plaintiff that it was in the left cavity that the tube was inserted. There is no direct evidence to support this allegation, and there are strong reasons for believing that the tube was inserted in the area that had been occupied by the right lobe of the thyroid. But, even so, the thesis is maintained that the piece of tube made its way to the left tonsil, passing, as I understand the theory, in front of the trachea within the pretracheal fascia. Realising, no doubt, the difficulties of this or any other theory, Counsel for the Plaintiff says that it is not incumbent upon her to show how the thing happened; it is enough for her to prove that it did happen, and to rely on the general observation that more surprising and unexpected things have been known to occur with reference to the human body.

However, the surgeon whom the Plaintiff called as an expert, besides expressing confident opinions in her favour concerning the pathological conditions contributing to the passage of the tube, and drawing from the circumstances many deductions of a medical and surgical character supporting her case, gave direct evidence that there was no difficulty whatever in the piece of tube passing from the thyroid cavity behind the fibrous and mucous membrane of the pharynx to the angle of the jaw where, he said, lay a triangle of tissue providing no obstruction.

The highly qualified witnesses for the Defendant, who probably did not conceive of the possibility of such a course being followed, particularly

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by so large a foreign body, had excluded by their evidence almost every other possibility, and had deposed to the general impossibility of the passage of the tube to and through the tonsil. Their evidence is, however, open to the observation that on this question it appears very much to have been concerned with anatomical and pathological conditions outside the pretracheal fascia.

In the Supreme Court, Davidson, J., dismissed the foregoing theory propounded for the Plaintiff, observing that the witness did not refer to the tonsil, that is expressly, and that at the triangle mentioned a thick fascial plane known as the pharyngo-basilar fascia existed, lining the inner surface of the constrictor. But probably the witness would say that the abscess spread between that and the pharyngeal membrane.

The swab and the wire caused much difficulty to this witness and another expert called for the Plaintiff, as appears pretty clearly from a reading of their evidence. The latter would not countenance the idea that in the form depicted the object had been used at the operation, but in many respects his evidence supported the Plaintiff's case. The latter suggested that the "swab" was detritus picked up by the tube, and that what was called wire was in fact gut.

In the foregoing statement, I have attempted to bring to a point, out of a vast mass of material, by no means easy to handle, the chief circumstances and considerations tending to prove or disprove the issue, as distinguished from the many subordinate matters of evidence affecting the details of proof and the credit of witnesses.

It is clear, however, that in all I have said I have been dealing with matters of fact, and that such views as I have expressed amount to comments on and conclusions from evidence. Prima facie, such matters are for the jury. Scientific evidence, even when composed in part of text-books, is no less matter of fact within the province of the jury than is other evidence, and it is the jury's function to estimate the reliance to be placed on scientific witnesses, however eminent.

Great as is the strength of the Defendant's case, it remains true, as it appears to me, that there stands opposed to it the facts sworn to by the Plaintiff and the evidentiary matters upon which she relies, either as supporting her case or detracting from that of the Defendant, as well as much testimony given by her two expert witnesses.

To say that as a matter of law the jury were bound to decide the issue in favour of the Defendant appears to me to be contrary to the conceptions upon which depends the distinction between, on the one hand, the sufficiency of evidence as a question of law, that is as a question for the Court applying legal standards of evidence and proof, and on the other hand the review by the Court of findings made upon conflicting evidence or inferences.

I cannot see how at the conclusion of the Defendant's case it would have been possible for the Judge to withdraw the issue from the consideration of the jury and direct them to return a verdict for the Defendant or non suit the Plaintiff. No one suggests that at the conclusion of the case for the Plaintiff he could have done so.

"The proper legal effect of a proved fact is essentially a question of law, but the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact": Wali Mohammad *v.* Mohammad Bakhsh, 1929, 57 I.A. 86, at page 92 (J.C.).

In the passage so often quoted from his judgment in Ryder *v.* Wombwell, 1868, L.R. 4 Ex. 32, at page 38, Willes, J., makes in a sentence the distinction between the power of the court to control perverse or unreasonable verdicts by new trial, a power the exercise of which involves no question of law, and its duty to decide the question of law whether there is evidence which might reasonably satisfy the jury that the fact sought to be proved is established.

In England, where the Court of Appeal now has powers of reviewing the findings of a jury which do not exist in New South Wales, the difference between there being no evidence to go to the jury and the jury's verdict being against the weight of evidence has less importance than formerly : per Lord Parker, Banbury *v.* Bank of Montreal, 1918, A.C. 626, at page 706. Lord Atkinson (ibid. pages 669–680) discusses the powers of the Court of Appeal, and in doing so maintains the distinction. See further, Mechanical and General Inventions Co. *v.* Austin, 1935, A.C. 346, and particularly per Lord Atkin at page 369, per Lord Wright at pages 372–4.

But though in England the powers of the Court of Appeal are so extensive that they need not consider whether as a matter of law an appellant is entitled to the verdict, yet in relation to other jurisdictions and tribunals the question whether a party is entitled in point of law to a finding may be all important, as for instance in the case of an appeal from a County Court or an attack upon an award of arbitrators or under a case stated.

In the case of Driver *v.* The War Service Homes Commissioner No. 1, 1924, V.L.R. 515 ; 30 A.L.R. 375, at pages 376 et seq., Cussen, J., in reference to an application for an order that arbitrators state a special case, fully discussed the matter and collected the authorities. He ends his discussion by saying : " From these cases I conclude that where there is a real conflict of evidence, no question of law arises and that no such question arises even if the evidence is all on one side, if on that side is the onus of proof, but that the question whether there is or is not any evidence upon which there might properly be a finding in favour of the person upon whom is the onus of proof may be a question of law." See, further, Shepherd *v.* Felt & Textiles of Australia (1931) 45 C.L.R. 359, at page 373 and pages 379–380.

What precisely Griffith, C.J., meant in Heydon *v.* Lillis (1907) 4 C.L.R. 1223, by the expression " perverse verdict " in the passage to which my brother Starke has referred, I am not sure. Sometimes it is used to describe a disregard of a direction from the Judge. Sometimes it refers to a finding contrary to that which the facts of the case legally demand. But I think it always means something more than a verdict against the weight of the evidence: Saunders *v.* Davies, 1852, 16 Jurist 481, per Pollock, C.B. ; Jones *v.* Spencer, 1897, 77 L.T. 536, at page 538 ; per Lord Morris : per Kenny, J., McInernay *v.* Clareman, 1903, 2 Ir. R. 347, at page 369. In any case, the meaning and effect of the terms used in Section 7 of the Supreme Court Procedure Act are too clear and well settled to be affected by the choice of expression of the late Chief Justice.

For the reasons I have given I am of opinion that the course taken by the majority of the Supreme Court in entering a verdict for the Defendant ought not to have been followed.

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There remains what to my mind is the more difficult question, namely whether yet another new trial should be ordered.

In Mechanical & General Inventions *v.* Austin, 1935, A.C. 346, at page 373, Lord Wright said: "For the appellate Court to set aside the verdict of a jury as being against the weight of evidence, merely because the Court does not agree with it, would, in my judgment, be to usurp the functions of the jury and to substitute their own opinion for that of the jury; that would be quite wrong. Much more is necessary in order to justify the setting aside of a jury's verdict where there is some evidence to support it. No doubt the test can be roughly described as being whether the verdict of the jury was reasonable, but what is meant by reasonable in this connection must be carefully defined." And, again (on page 375), he said: "the question in truth is not whether the verdict appears to the appellate Court to be right, but whether it is such as to show that the jury have failed to perform their duty. An appellate Court must always be on guard against the tendency to set aside a verdict because the Court feels it would have come to a different conclusion."

The test propounded by Lord Selborne in Metropolitan Railway Co. *v.* Wright, 1886, 11 A.C. 152, at page 153, was approved by the Privy Council in Cox *v.* E. S. & A. Bank, 1905, A.C. 168, at page 170, viz.: "there must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury as to make unreasonable and almost perverse, that the jury when instructed and assisted properly by the judge should return such a verdict." An expression repeatedly used by Courts is "overwhelming preponderance."

In Place *v.* Searle, 1932, 2 K.B. 497, at page 315, Scrutton, L.J., said: "An enormously strong case is needed before the Court of Appeal can say that though there is evidence given by a witness it cannot reasonably be believed by the jury. Unless we get such a case as that, we must assume, in considering the question whether there is any evidence on which the jury could reasonably find a verdict for the plaintiff, that they accepted the evidence in favour of the plaintiff and disbelieved the evidence given in favour of the defendant," *scil.* where such disbelief is necessary to the conclusion.

A distinction has always existed between cases on the one hand in which the verdict is vitiated by some legal error, such as a material misdirection or misreception of evidence, or was perverse in the sense that the jury disregarded a judge's direction and, on the other hand, cases where, on conflicting evidence, a verdict is found which is said to be against the weight of the evidence. In the former case, apart from the modern rule about substantial miscarriage, a new trial was granted ex debito justitiæ. In the latter it was a matter depending upon a more general discretion.

According to Mr. W. M. Best in a note in 2 Jurist, N.S. 167: "Where a jury disregard a presumption of mixed law and fact, and a fortiori where they find in a particular way on a mere question of conflicting testimony all the authorities agree . . . that the granting of a new trial is only matter for the discretion of the Courts which are moreover very cautious in the exercise of this power." For this reason the fact that a new trial has already been had with a like result to the first has been thought to be a relevant and an important consideration.

In Goodwin *v.* Gibbons, 1767, 4 Burrows 2108; 98 E.R. 100, Lord Mansfield denied, however, that there was any general rule against granting a

third trial, saying: "A new trial must depend upon answering the ends of justice." But the fact that there have been two concurring verdicts must carry weight. In Foster *v.* Steele, 1837, 3 Bing. N.C. 894; 132 E.R. 654, Tindall, C.J., and Park, J., considered that the fact that the second trial produced the same result was decisive, whilst Vaughan and Coltman, JJ., said that they would try the result of a third "but if the third were against the defendant, then the proceedings should end."

In a case of misdirection a majority of this Court ordered a third trial stating the test thus—"To induce a Court to order a third trial, the party against whom the verdict has passed must establish that the second trial took a course clearly prejudicial to him, and so erroneous that the verdict cannot justly be allowed to stand" (Australasian Brokerage Ltd. *v.* Australian & N.Z. Banking Corporation (1934), 52 C.L.R. 430, at page 442).

It is consequently clear that the Defendant assumes a heavy burden in undertaking to make out a case for a new trial. He seeks to strengthen the foundation provided by the facts of the case by two additional grounds of complaint. He says in the first place that the jury should have been directed that a higher measure or standard of persuasion is required by the law in the case of a charge of neglect causing bodily harm. Davidson, J., has shown that this complaint is ill-founded. Indeed, even if the cause of action here amounted to an offence under Section 54 of the Crimes Act 1900, our decisions in Helton *v.* Allen (1940), 63 C.L.R. 691, and Briginshaw *v.* Briginshaw, 60 C.L.R. 336, show that the contention cannot be supported. See, too, Piggott *v.* Piggott (1938), 61 C.L.R. 378, at page 415. The solid body of authority against introducing the criminal standard of persuasion into civil causes cannot be shaken by the unconsidered statement of Lord Atkin in the case from Allahabad, the report of which I have had the advantage of reading. Similar statements will be found elsewhere, and I think they are traceable to Article 94 of Sir Fitzjames Stephen's Digest of Evidence. Unfortunately, the influence of J. H. Wigmore's formidable learning and reasoning has not been felt as it should in this and other matters.

In the next place, the Defendant says that the conduct of the case by the Plaintiff's Counsel was calculated to lead the jury to decide the case on false issues, and generally to distract them from their true duty.

Without denying that the lengths to which Counsel went were such as to require weighing with the other elements in the case, it is, I think, necessary to remember that he was entitled to put strongly to the jury the relative positions occupied by his client and by the Defendant, in obtaining the assistance of the medical profession; and, in the next place, that in the result the jury made a finding very carefully, indeed, significantly framed, upon the exact issue of fact upon which the case depended, a finding expressed in a way which made it clear that their minds were addressed to the very issue.

After all, the fundamental question in the case is whether the evidence opposed to the Plaintiff's case is so overwhelming that the Court should again intervene to destroy the verdict as not only wrong, but as completely unreasonable and unjust.

In determining this question perhaps the most important consideration is that faith in the honesty of the Plaintiff must be ascribed to the jury and an inability to believe that the woman they saw and heard was telling a purely imaginary story.

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No. 64. Judgment of Dixon, J., *continued.*

No doubt they could not reach that view without first weighing against it the very substantial case made by the Defendant. But once belief in her as a witness and acceptance of the veracity of the witnesses called on her behalf is assumed, the evidence for the defence must wear a very different complexion. By that I mean that it must also be taken that the more valid criticisms of and contentions made concerning that evidence were accepted. On those hypotheses the verdict begins to wear much less an unreasonable aspect. The question of credibility and the estimate of the character and reliability of the witnesses is, of course, essentially a matter for the jury.

But their finding gives to the tubing a size, "somewhat less than 2 inches," and that size is really very considerable in relation to the tissues involved. From the beginning, I have been struck with this statement and the reference to the material that looked like wire. If the jury had supposed that the Plaintiff had been quite mistaken in her estimate of size, their finding would have gained strength.

But, as it is, after closely considering the Plaintiff's evidence and the medical and other evidence called by her, I think that the matter is within the province of the jury.

There is, I think, when it is separated out, much evidence supporting the jury's verdict. The case is one in which the strong feeling that the jury's verdict is mistaken, based as it is on a natural incredulity concerning the Plaintiff's story, and on the cogency of the countervailing evidence, makes it difficult to appreciate the amount of evidence really available to support the jury's finding. In such circumstances the decision rests with the jury, and if the result is unjust their's is the responsibility.

On the whole case I think that the Court ought not to interfere and grant another new trial. I am therefore of opinion that the appeal should be allowed, the order of the Supreme Court discharged and the verdict restored.

No. 65. Judgment of McTiernan, J.

No. 65.

JUDGMENT of McTiernan, J.

At the last trial of this action a jury again returned a verdict for the Plaintiff. The Supreme Court in Banco set aside the verdict and ordered that a verdict be entered for the Defendant. This appeal is against the whole of the Court's order.

The Supreme Court in Banco may, under Section 7 of the Supreme Court Procedure Act 1900, in any action order that a verdict be entered for either the plaintiff or the defendant; it is not a condition of this statutory power, as it is of the common law power to enter a verdict, that leave was reserved at the trial to do so: Heydon *v.* Lillis, 4 C.L.R. 1223. Under Section 7 the condition is that in the opinion of the Court the party for whom it enters a verdict is "upon the evidence" entitled "as a matter of law" to a verdict in the action. Instances of the exercise of this power are The New Balmain Ferry Co. *v.* Robertson, 4 C.L.R. 379; Heydon *v.* Lillis (supra); Shepherd *v.* Felt Textiles Ltd., 45 C.L.R. 359. In the last-mentioned case this Court approved an order of the Supreme Court for a verdict to be entered; in the other cases, this Court decided that the

Supreme Court ought on the evidence to have entered verdicts. In the present case the Defendant is as a matter of law entitled to a verdict if there is no evidence on which the jury could reasonably return the verdict for the Plaintiff.

There is a distinction between the power of the Court in the case where there is insufficient evidence to justify the verdict and the case where the verdict is against the weight of evidence. In the latter case the Court may set aside the verdict and grant a new trial, but it may not order a verdict to be entered; the Supreme Court of New South Wales has no power to decide facts in an action tried with a jury; hence in this case this Court has not the power to decide facts. See Hocking *v.* Bell, 43 S.R. 154; De Goia *v.* Darling Island Stevedoring Company Limited, 42 S.R. 5; and Banbury *v.* Bank of Montreal, 1918, A.C. 626, at page 664. In that case Lord Atkinson observed, at page 677: "No doubt in cases where the verdict is set aside as against the weight of evidence, there will be evidence on both sides, but now that the scintilla doctrine has been abandoned the tasks of the Court in the two classes of cases closely approach each other." The " scintilla doctrine "was abandoned in Ryder *v.* Wombell, L.R. 4 Ex. 38.

Davidson and Halse Rogers, JJ., were of the opinion that there is no evidence on which a jury may reasonably find that the Defendant left in the surgical wound a piece of the drainage tube that had been inserted in it, and for that reason the verdict could not stand. Roper, J., was of the opinion that the verdict ought to be set aside on the ground that it is against the weight of evidence and that a new trial be granted. After considering all the evidence I have come to the conclusion that the opinion of the majority is right and the order of the Court should be affirmed. But if it were not correct to hold that there is no evidence that ought or could reasonably satisfy a jury that the Defendant left a piece of the drainage tube in the wound I should agree with Roper, J., rather than restore the verdict. If I thought that, leaving out of account the contrary evidence there is sufficient evidence prima facie to support the verdict, nevertheless I should reach the conclusion that, on the whole, the contrary evidence in point of probability so greatly preponderates against the verdict that it is an unreasonable verdict and that the jury could not have performed their duty judicially and returned the verdict: Metropolitan Railway Co. *v.* Wright, 11 A.C. 152; Mechanical & General Inventions *v.* Austin, 1935, A.C., at pages 369 and 374; Bright *v.* Eynon, 1 Bur. 395, E.R., at page 366.

It is an undisputed fact that no piece of drainage tube was found in any part of the Plaintiff's body or taken from it. Notwithstanding the circumstantial story which the Plaintiff gave of the breaking of the drainage tube, it would not be reasonable for the jury to infer that the Defendant left a piece of tube in the surgical wound unless they were satisfied that the object which, according to her evidence, " burst into the left side of her face," was part of the drainage tube which had been inserted in the surgical wound, and that such object had moved out of the wound inside the neck until it emptied into the pharynx. The story seems to me to be a glaring improbability. Upon the evidence it was unreasonable for the jury to attach any credit or weight to it. The reasons for this conclusion depend upon the discrepancies between the object which she said she swallowed and evacuated, and the part of any tube which, upon the whole of the evidence on the kind of tube inserted

In the High Court of Australia.

No. 65. Judgment of McTiernan, J., *continued.*

into the wound and of stitching and swabs used, could have been left in the wound, if the Defendant had broken the tube and failed to remove the portion left in the wound. The Plaintiff said in evidence that she examined the object evacuated, but lost it and then made a sketch which is in evidence. Her description in the evidence of the object is: "I would say a soft greyish piece of tube like rubber which had been in water for some time. It was swollen. It was not smooth like a new piece of tube. There was a straight cut at one end. It was split up within half an inch of the end and it had in that opening a swab which I thought was a piece of marine sponge with a blackish looking stuff. It had come from the sponge and it looked like black wire but when I bent it back it would fly back straight. It was like horsehair, and it would fly back quickly straight. It looked like wire to me but it could not have been wire." The special finding of the jury was: "We find that the Defendant left in the site of the operation a piece of rubber tube of a length somewhat less than 2 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."

The Plaintiff's case is that the whole thing, that is, tube, swab and the protruding material, was left by the Defendant in the wound. It is not suggested that the Defendant put the swab into the tube as an element belonging to it. Such a thing would defeat the purpose of the tube; and the suggestion, if made, could not possibly be supported by the evidence. The jury does not specify what the "blackish looking stuff" in the Plaintiff's description is. They say that it was "some material which looked like wire." The suggestion made to explain the swab and the protruding material is that a swab was caught by the stitches made at the time of the operation and that the protruding material is gut with which the stitching was done. The only evidence given in the case about the swabs used during the operation and the way in which they were used, and also about the method in which the stitches were made, provides no reasonable basis for any inference along the lines of the suggestion which is made. There is, in my opinion, no evidence upon which the jury could reasonably find that a swab with gut or any other material protruding from it was attached to the drainage tube which the Defendant inserted in the surgical wound at the time of insertion or became attached to it afterwards. The evidence does not support the conclusion that the object described by the Plaintiff, or by the jury in their special finding, was part of or comprised in that drainage tube.

The result is that the jury was left without any explanation, which could be reasonably supported by the evidence, as to what became of the piece of drainage tube which would have been left in the wound if the Defendant had broken the tube; admittedly no piece of tube was found in her neck or taken from it. In these circumstances the jury could not reasonably accept her story about the breaking of the tube or infer from it that the Defendant left a piece of the drainage tube in the wound.

Assuming, however, that the above-mentioned object was left by the Defendant in the surgical wound, it was necessary for the Plaintiff to prove that the object moved upwards, and ultimately entered the pharynx. The Plaintiff called expert witnesses to prove that the object did so. For the purpose of their evidence they assumed that the Defendant left part of a drainage tube in the wound, but it does not seem that they were

prepared to assume that what was left in the wound had the material like wire protruding from it; but whatever its characteristics, they also assumed, for the purpose of their evidence, that her story that she swallowed a piece of tube 18 months afterwards was also correct. If the assumption is made that the thing left in the wound is the identical thing which the Plaintiff said that she swallowed, the hypothesis which, upon the evidence of these witnesses the jury were invited to accept, was that pus accumulated in the thyroid capsule where the internal end of the tube was, that is to say in the space which had been occupied by the gland before the thyroidectomy; that instead of rupturing outwards and re-opening the incision made in the neck, the abscess, consisting of the piece of tube and pus, ruptured the thyroid capsule at a point contiguous to fascial spaces leading ultimately to the point at which the pharynx was penetrated; that it was carried upwards in pus through those spaces until it turned to the right and went through the pharyngeal wall. According to these witnesses the condition of the left tonsil showed that a tube went through the tonsil into the mouth. The hypothesis therefore requires that the foreign body penetrated the pharyngeal wall at the point opposite the left tonsil.

The pictures and drawings, which were put in evidence, representing the anatomy of the neck, show the arrangement of fasciæ muscles and other anatomical parts through which the object in question must have passed if it went from the thyroid capsule through the tonsil into the pharynx. Considering the size, shape and other characteristics of the object which is supposed to have moved through these parts, there are prima facie great difficulties in accepting the hypothesis that it did travel through them. The arrangement of muscles and fascia establish the fact that there are real obstacles. Professor Welsh does not indicate any specific course by which the pus could have carried the tube from the thyroid capsule into the mouth through the tonsil. He accepted Professor Shellshear's evidence about the anatomy of the neck. In my opinion it would not be reasonable for the jury to find on Professor Welsh's evidence that the object which the Plaintiff swallowed had come from the thyroid cavity unless he pointed out how it could overcome the obstacles mentioned in Professor Shellshear's evidence.

According to this witness, there were anatomical obstacles in the region of the thyroid capsule and at the level of the hyoid bone; and the arrangement of muscles forming the pharyngeal wall in the region of the tonsil is another obstacle. Dr. Thompson gave an account of the course by which, in his opinion, the object about which the Plaintiff gave evidence moved from the thyroid capsule into her mouth. His evidence does not agree with the evidence which Professor Shellshear gave about the anatomy of the neck and as I have said, the evidence of Professor Shellshear was accepted by the Plaintiff's only other expert witness, Professor Welsh. The jury could not possibly get as adequate an account of the anatomy of the neck from Dr. Thompson's evidence as from Professor Shellshear's evidence or the pictures and drawings which are in evidence. The jury could not possibly have any reasonable justification for declining to give credit and weight to the evidence of Professor Shellshear. It may be observed that Dr. Thompson's evidence is that the tube penetrated the pharynx. It is not clear that he said precisely that it went through the tonsil. No reliance was placed on any medical condition at any other place than the tonsil to support the hypothesis that the foreign object came into the mouth. The evidence of the expert witnesses called by the Defendant, read from

In the High Court of Australia.

No. 65. Judgment of McTiernan, J., *continued.*

the transcript, is a refutation of the evidence of Professor Welsh and Dr. Thompson. But I decide the matter not on the weight of the evidence on the Defendant's side, but on the question of the sufficiency of the evidence on the Plaintiff's side, that is as a matter of law. The nature and arrangement of the many parts of which the neck consists are facts established by the pictures and drawings in the evidence. Having regard to these facts, I think that the jury could not reasonably find on the evidence which Professor Welsh and Dr. Thompson gave in this case, that the object which the Plaintiff says that she swallowed came from the thyroid cavity, up the neck, through the left tonsil into the mouth.

There is the further evidence about the condition of the Plaintiff's tonsil, the symptoms of tetany, and her illness. I do not think that this evidence adds anything to support the proof of the issue of negligence to which the trial was confined. It adds nothing because there is no evidence on which the jury could reasonably find that the foreign body which the Plaintiff said came out of her neck had been left in her neck by the Defendant.

As I have shown, the foreign body, which the Plaintiff said she swallowed and evacuated, was a piece of rubber tube characterised by the addition to it of a swab and material which looked like wire.

The evidence is insufficient to establish that in the tube which the Defendant inserted in the wound there was a swab either with or without any such material protruding from it. The jury therefore could not reasonably find that the Defendant left in the wound the foreign body described by the Plaintiff in her evidence or by the jury in their special finding. The result is that there is no evidence on which the jury could properly make the special finding or return a verdict for the Plaintiff on the issue in the action as defined by the Plaintiff's particulars of the negligence which she alleged.

In my opinion the appeal should be dismissed.

No. 66. Order, 10th August 1944.

No. 66.

ORDER.

No. 39 of 1944.

IN THE HIGH COURT OF AUSTRALIA.
New South Wales Registry.

ON APPEAL

From the Supreme Court of New South Wales.

(No. 96 of 1941).

Between STELLA EILEEN HOCKING (Plaintiff) Appellant

and

GEORGE BELL (Defendant) - - Respondent.

Before—

Their Honours THE CHIEF JUSTICE, Mr. Justice RICH, Mr. Justice STARKE, Mr. Justice DIXON and Mr. Justice McTIERNAN.

Friday the Tenth day of August One thousand nine hundred and forty-five.

In the High Court of Australia.

No. 66. Order, 10th August 1944, *continued.*

WHEREAS by Order made the Third day of August One thousand nine hundred and forty-four the Full Court of the Supreme Court of New South Wales allowed the Appeal of the above-named Respondent against the verdict of a Jury of four persons given at the trial in action number 96 of 1941 before His Honour Mr. Justice Edwards a Judge of the Supreme Court of New South Wales and set aside the said verdict and entered judgment in the said action for the above-named Respondent AND WHEREAS on the Twenty-second day of August One thousand nine hundred and forty-four the above-named Appellant duly filed and served a Notice of Appeal to this Court from the whole of the said Order of the said Full Supreme Court of New South Wales AND the Appeal to this Court coming on to be heard on the fifth, sixth, ninth, tenth, eleventh, twelfth, thirteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-third and twenty-fourth days of April One thousand nine hundred and forty-five in the presence of Mr. J. W. Shand of King's Counsel with whom was Mr. Bryan Carson of Counsel for the above-named Appellant and of Mr. J. E. Cassidy of King's Counsel with whom was Mr. H. E. Reimer of Counsel for the above-named Respondent WHEREUPON AND UPON READING the certified copy of the transcript record of proceedings transmitted by the Prothonotary of the said Supreme Court to the New South Wales Registry of this Court AND UPON READING what was alleged by Counsel for the parties THIS COURT DID on the Twenty-fourth day of April One thousand nine hundred and forty-five ORDER that this appeal should stand for judgment and the same standing in the list this day for judgment accordingly THIS COURT DOTH ORDER that this Appeal be and the same is hereby dismissed AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify the costs of the above-named Respondent of and incidental to this Appeal and that such costs when so taxed and certified be paid by the above-named Appellant to the above-named Respondent or to Mr. Geoffrey Richmond Rex his Solicitor after service of a copy of the Certificate of Taxation.

By the Court.

(L.S.) F. C. LINDSAY,
District Registrar.

In the Privy Council.

No. 67. Order granting Special Leave to Appeal *in forma pauperis*, 20th March 1946.

No. 67.

ORDER granting Special Leave to Appeal in forma pauperis.

AT THE COURT AT BUCKINGHAM PALACE.

The 20th day of March, 1946.

Present

THE KING'S MOST EXCELLENT MAJESTY

LORD CHANCELLOR	SIR CYRIL ASQUITH
LORD PRESIDENT	MR. WHITELEY
LORD AMMON	SIR LIONEL COHEN

L.S.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 18th day of March 1946 in the words following, viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Stella Eileen Hocking in the matter of an Appeal from the High Court of Australia between the Petitioner Appellant and George Bell Respondent setting forth (amongst other matters) : that the Petitioner on the 15th January 1941 instituted in the Supreme Court of the State of New South Wales an action against the Respondent to recover damages for negligence : and reciting the course of the litigation between the parties up to the 21st January 1944 on which day at a fourth trial the jury returned a verdict for the Petitioner and awarded her the sum of £800 damages : that on the 3rd August 1944 the Full Court of the Supreme Court of New South Wales delivered Judgment whereby the verdict and Judgment for the Petitioner was ordered to be set aside and Judgment entered for the Respondent and the Petitioner was ordered to pay the costs up to date (with certain rights of set-off) : that the Petitioner appealed to the High Court of Australia which Court on the 10th August 1945 by a majority dismissed the Appeal : that the Petitioner submits (*inter alia*) :—(*a*) that by virtue of Section 7 of the Supreme Court Procedure Act 1900 the Supreme Court of New South Wales has no power to set aside the verdict of the jury in favour of the Petitioner and to enter a verdict for the Respondent except as a matter of law ; (*b*) that in setting aside the verdict and entering a verdict for the Respondent the Full Court of the Supreme Court did so as a matter of fact and not of law ; (*c*) that the Full Court did not have regard to the principles relating to the granting of new trials ; (*d*) that in dismissing the Appeal the majority of the High Court did not have due regard for the said Section 7 : that the questions involved in the Appeal are of great and general importance in the administration of justice in the State of New South Wales : And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal *in formâ pauperis* from the Judgment of the Supreme Court dated the 3rd August 1944 and from the Judgment of the High Court dated the 10th August 1945 :

In the Privy Council.

No. 67. Order granting Special Leave to Appeal *in forma pauperis*, 20th March 1946, *continued.*

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute her Appeal *in formâ pauperis* against the Judgment of the Supreme Court of New South Wales dated the 3rd day of August 1944 and the Judgment of the High Court of Australia dated the 10th day of August 1945 :

"AND Their Lordships do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

Exhibits.

"A."
Records of St. Luke's Hospital,

EXHIBITS.

"A."

RECORDS of St. Luke's Hospital.

DAY AND NIGHT REPORTS.
22nd February, 1938 to 14th Apr., 1938.

PATIENT—MRS. HOCKING.

22nd February 1938.

DAY REPORT.

Admitted on 22nd February 1938.
Mrs. Hocking's room on 2nd floor. Admitted 3.30 p.m.
Drs. Bell and Ritchie attending. Condition is Thyrotoxicosis.
To rest in bed, no further orders from Dr. so far. (Sgd.) J. McCallum.

NIGHT REPORT—22/2/38.

Did not sleep very well. Hot milk given 11 p.m. Specimen of urine saved. (Sgd.) E. E. Johns.

23rd February 1938.

DAY REPORT—23/2/38.

Drs. Bell & Ritchie here a.m. Patient may go to toilet. To have Brom. Mist. drs. IV, T.D.S. p.c. Bowels open. Vegetable laxative given. (Sgd.) J. McCallum.

NIGHT REPORT—23/2/38.

Slept fairly well. (Sgd.) E. E. Johns.

24th February 1938.

DAY REPORT—24/2/38.

Drs. Bell & Ritchie here a.m. Continue the same. Brom. Mist. given T.D.S. p.c. B. Vegetable laxative (1 pill). (Sgd.) O. Barrington.

NIGHT REPORT—24/2/38.

Slept fairly well. (Sgd.) E. E. Johns.

25th February 1938.

DAY REPORT—25/2/38.

Dr. Bell here. Continue same treatment. Brom. Mist. T.D.S. p.c. Bowels open. (Sgd.) E. H. Julius.

NIGHT REPORT—25/2/38.

Slept fairly well. (Sgd.) E. E. Johns.

26th February 1938.

DAY REPORT—26/2/38.

Comfortable day. Mist. T.D.S. p.c. Seen by Dr. Bell. No orders. Bowels open. Cas. p. (Sgd.) E. M. Ward.

NIGHT REPORT—26/2/38.

Slept fairly well. (Sgd.) E. E. Johns.

27th February 1938.

DAY REPORT—27/2/38.

Comfortable day. Dr. Bell here. Mist. T.D.S. p.c. To have extra dose of Brom. Mist. at B.N.O. Cascara evac. p.m. bedtime tonight only. Given 8.30 p.m. (Sgd.) E. H. Julius.

Exhibits.

"A"

Records of St. Luke's Hospital, *continued.*

28th February 1938.

NIGHT REPORT—27/2/38.

Slept fairly well. (Sgd.) E. E. Johns.

DAY REPORT—28/2/38.

Comfortable day. Nourishment taken well. Mist. T.D.S. p.c. Bowels open. (Sgd.) J. McCallum.

NIGHT REPORT—28/2/38.

Slept fairly well. (Sgd.) E. E. Johns.

1st March 1938.

DAY REPORT—1/3/38.

Very comfortable today. Mist T.D.S. p.c. Bowels open. (Sgd.) J. McCallum.

NIGHT REPORT—1/3/38.

Slept fairly well. (Sgd.) E. E. Johns.

2nd March 1938.

DAY REPORT—2/3/38.

Quiet day. Not complaining. Mist. T.D.S. p.c. Dr. Bell no orders. Dr. Shipton 'phoned for Bmr test 8 a.m. tomorrow morning. Nothing to eat after tea tonight. May have water to drink only. Not to have bath until after Dr. has done test. Bowels open no aperient. (Sgd.) E. M. Ward.

NIGHT REPORT—2/3/38.

Slept well. Nothing given to eat a.m. (Sgd.) E. E. Johns.

3rd March 1938.

DAY REPORT—3/3/38.

Comfortable day. Dr. Shipton here a.m. Bmr test done. Dr. Bell here p.m. To have lugols M5 T.D.S. Bowels open. (Sgd.) E. H. Julius.

NIGHT REPORT—3/3/38.

Slept well. (Sgd.) E. E. Johns.

4th March 1938.

DAY REPORT—4/3/38.

Comfortable day. Dr. Bell here a.m. Continue with lugols iodine M5 T.D.S. Mist. drs. 4 T.D.S. Bowels open Cascara p.m. (Sgd.) J. McCallum.

NIGHT REPORT—4/3/38.

Slept fairly well. (Sgd.) E. E. Johns.

5th March 1938.

DAY REPORT—5/3/38.

Dr. Bell here. No change of orders. Comfortable day. Lugols M5 given T.D.S. p.c. & Mist. T.D.S. (Sgd.) M. Grace.

NIGHT REPORT—5/3/38.

Slept fairly well. (Sgd.) E. E. Johns.

6th March 1938.

DAY REPORT—6/3/38.

Dr. Bell here. Patient to have extra dose of Mist. bedtime tonight. Given. Lugols iodine M5 given T.D.S. half an hour after Mist. T.D.S. B.O. (Sgd.) J. McCallum.

NIGHT REPORT—6/3/38.

Slept fairly well. (Sgd.) E. E. Johns.

Exhibits.

"A"

Records of St. Luke's Hospital, *continued.*

7th March 1938.

DAY REPORT—7/3/38.

Comfortable day. Lugols M5 given T.D.S. Sedative Mist. T.D.S. Dr. Ritchie here. No Orders. Bowels open cascara p.m. (Sgd.) E. M. Ward.

NIGHT REPORT—7/3/38.

Slept fairly well. (Sgd.) E. E. Johns.

8th March 1938.

DAY REPORT—8/3/38.

Drs. Bell & Ritchie here. Continue with Mist. drs. 4 T.D.S. followed in ½ hour lugols iodine M5. B. (Sgd.) J. McCallum.

NIGHT REPORT—8/3/38.

Slept well. (Sgd.) E. E. Johns.

9th March 1938.

DAY REPORT—9/3/38.

Quiet day. Not complaining. Mist. T.D.S. p.c. Lugols M5. T.D.S. Dr. Ritchie here continue same. Bowels open. (Sgd.) E. M. Ward.

NIGHT REPORT—9/3/38.

Slept fairly well. (Sgd.) E. E. Johns.

10th March 1938.

DAY REPORT—10/3/38.

Usual day. Not complaining. Lugols M5 Mist. given T.D.S. p.c. Dr. Aspinall here. No Orders. Bowels open. (Sgd.) D. L. Paul.

NIGHT REPORT—10/3/38.

Slept fairly well. (Sgd.) E. E. Johns.

11th March 1938.

DAY REPORT—11/3/38.

Quiet day. Not complaining. Mist. given T.D.S. Lugols M5 T.D.S. Nourishment taken well. Pulse 88–92–96. Bowels open. Dr. Ritchie here. No orders. (Sgd.) E. M. Ward.

NIGHT REPORT—11/3/38.

Slept fairly well. (Sgd.) E. E. Johns.

12th March 1938.

DAY REPORT—12/3/38.

Usual day. Not complaining. Mist. given T.D.S. p.c. Lugols M5 given T.D.S. p.c. Bowels open. (Sgd.) J. Judges.

NIGHT REPORT—12/3/38.

Slept fairly well. (Sgd.) E. E. Johns.

13th March 1938.

DAY REPORT—13/3/38.

Dr. Bell here. Patient for operation on Tuesday 7.30 a.m. Thyroidectomy. Mist. and iodine V given T.D.S. Bowels open. (Sgd.) H. Will.

NIGHT REPORT—13/3/38.

Slept fairly well. (Sgd.) E. E. Johns.

Exhibits.

"A."
Records of St. Luke's Hospital, *continued.*

DAY REPORT—14/3/38. 14th March 1938.

Dr. Bell here. Patient for operation 7.30 a.m. Thyroidectomy. To have H.I. morphia grs. $\frac{1}{4}$ at 5.45 a.m. Please give S. & W. enema and save specimen of urine. Prepare skin and give early morning nourishment. Bowels open. (Sgd.) M. Grace.

NIGHT REPORT—14/3/38.

Slept fairly well. Specimen of urine saved. Early nourishment given. S. & W. enema given with a good result. Skin prepared and H.I. morphia given grs. $\frac{1}{4}$ 5.45 a.m. (Sgd.) E. E. Johns.

DAY REPORT—15/3/38. 15th March 1938.

Operation today. To operating theatre 7.30 a.m. Surgeon Dr. Bell. Local anæsthetic, and part oxygen, Dr. Hunter. Assistant, Dr. Kay. Thyroidectomy. Wound sutured with plain gut and HH. One tube draining wound. $\frac{1}{6}$ morphia given in O.T. Back to bed 10 a.m. Semi-conscious and very restless. Pulse rapid and light Dr. Bell here. Ordered lugols iodine M10 four hourly. Dose given 10.15. Vomited. Lugols iodine drs. 1 with pulv. sodii Brom $\frac{1}{2}$ dr. in saline ozs. 6 given p.r. at 10.30 a.m. and retained. Lugols M10 given 2 p.m. and 6.30 p.m. Give copious fluids. Pulse settled down by 3 p.m. Breathing deep and steady. Free drainage from tube. Dressings changed 5 p.m. Dr. Bell here 6 p.m. given morphia grs. $\frac{1}{8}$ and repeat P.R.N. Night Special (Sgd.) H. Will.

NIGHT REPORT—15/3/38.

Vomited clear fluid with mucous. Very restless 7.45 p.m. H.I. Morphia grs. $\frac{1}{8}$ given with effect. Has slept fairly well. Awake several times for short intervals only. Complained of headache and sore throat 3 a.m. Dose of A.P.C. Mist. given with effect. Has taken fluids well. Lugol M10 given 4 hourly. Last 6.30 a.m. Pulse rate 98–120. Back attended to. Patient has only dozed since 4 a.m. Specimen of urine saved a.m. P.U. last 6 a.m. oz. 14. Dressing changed 6.30 a.m. Fair amount of serous and blood stained oozing. (Sgd.) M. W. McEwan.

DAY REPORT—16/3/38. 16th March 1938.

Drs. Bell & Ritchie here a.m. Pleased with patient's condition. Dressings changed. Slight serous oozing through tube. Continue with lugols iodine M10 in milk. Given orally every four hours. Last 6 p.m. Has been fairly comfortable during the day. Mist. A.P.C. drs. 4 given for headache and sore throat 8.30 a.m. and 3 p.m. Pulse rate regular 96–104. Volume good. Respirations fairly slow. Taking fluids and nourishment fairly well today. Aperient p.m. Dr. Bell here p.m. ordered sedative mist. If not effective may have morphia $\frac{1}{8}$. (Sgd.) J. McCallum.

NIGHT REPORT—16/3/38.

Slept fairly well. Sed. mist. given 7.30 & 11.30 cough troublesome at times. Cocillana Co. drs. 1 given 11 p.m. with some effect. Lugols M10 given last 7 a.m. Back attended to. Position changed four hourly. Aperient given p.m. B.N.O. pulse regular and good volume. Chart 4 a.m. 99.4–100–18. (Sgd.) M. W. McEwan.

Exhibits.

"A."
Records of St. Luke's Hospital, *continued.*

17th March 1938.

DAY REPORT—17/3/38.

Dr. Bell here a.m. Tube removed and 3 sutures. Less discharge. Condition good. Continue lugols M.10 four hourly and sedative Mist. four hourly. B.N.O. Give plenty fluids. Appetite improving. Dr. Bell here. To have H.I. Morphia grs. 1/8 at bedtime. Mist. four hourly suspended. Give Mist. A.P.C. PrN. for pain. (Sgd.) H. Will.

NIGHT REPORT—17/3/38.

H.I. Morphia grs. 1/8 given 8.30 p.m. Has slept fairly well. Awake several times for short intervals only. Dressing changed a.m. Cascara evac. given p.m. B.N.O. Cough troublesome 4 a.m. Complained of tightness in chest and sore throat. A.P.C. Mist. given with effect. Chart still elevated 101.8–100–26 4 a.m. Copious fluids taken during night. Lugols M10 given last 7.30 a.m. Patient had skin action 6 a.m. Sponged made comfortable. Charts 7 a.m. 99.4–84–22. Still complaining of pain between shoulder blades. (Sgd.) M. McEwan.

18th March 1938.

DAY REPORT—18/3/38.

Dr. Bell here four H H Sutures removed from wound. May remove a few more sutures tomorrow. Has been fairly comfortable today. Mist. given four hourly, and lugols Mx four hourly. Last 6 p.m. Complained of swelling of neck and chin at 3 p.m. More comfortable later. Bowels open, Cascara p.m. (Sgd.) J. McCallum.

NIGHT REPORT—18/3/38.

Complained of aches and pains in legs and arms. Patient very restless. Chart elevated 101.4–98–24 8 p.m. A.P.C. Mist. given and fully sponged. Still restless and complaining 8.30 p.m. Dr. Bell notified. Ordered H.I. Morphia grs. $\frac{1}{6}$ to be given. Also A.P.C. Mist. four hourly. H.I. Morphia grs. $\frac{1}{6}$ given 9.30 p.m. Has slept well since. Awake only short intervals. Skin acting freely during night, dried etc. Copious fluids taken lugols M10 given last 6 a.m. Chart 12 midnight 98.8–96–22, 4 a.m. 102.4–100–24. Dressing done p.m. and a.m. Patient complained of pain in chest 4 a.m. Soda bicarb. draught given with effect. Large quantity of flatus expelled. (Sgd.) M. W. McEwan.

19th March 1938.

DAY REPORT—19/3/38.

Dr. Bell here. Removed 2 HH sutures. Wound still œdematous. Has complained of a good deal of pain in joints during day. A.P.C. Mist. $\frac{1}{2}$ oz. given P.R.N. last 2 p.m. Patient appears brighter this 5.30 p.m. Give Lugols M.5 four hourly. Chart 12 midday 101.4–96–24, 4 p.m. 100–92–22. B.N.O. Dr. Bell here. To have H.I. morphia grs. $\frac{1}{6}$ tonight at bedtime. (Sgd.) J. Judges.

NIGHT REPORT—19/3/38.

Very restless and distressed 7.30 p.m. Complaining of pains in legs and back. Chart 102.8–98–26. A.P.C. Mist. with hot lemon drink given 7.45 p.m. with good effect. Sponged and made comfortable. H.I. Morphia grs. $\frac{1}{6}$ given 8.30 p.m. Skin acted freely and slept fairly well till 12 midnight. Chart 97–88–22. Feeling more comfortable and has slept for long intervals since. Fluids taken well when awake. Chart 4 a.m. 103.8–98–26. Lugols M.5 given last 6 a.m. Aperient given p.m. (Sgd.) M. W. McEwan.

DAY REPORT—20/3/38. 20th March 1938.

Dr. Bell here a.m. Dressed wound. Some thick purulent discharge expelled. To have 5 foments at ½ hourly intervals with dry dressing between. Same applied. Sulphonal tab. 1 to be given at 4 p.m. Dr. will telephone tonight. Complained of faintness at 2 p.m. Pulse soft. Brandy ½ oz. given with some effect. Complained of cramp in fingers same sponged and rubbed with effect. Somnosal tab. 1 given 3 p.m. with little effect. Restless and complaining of headache 5 p.m. Ice packs applied with some effect. Chart 12 midday temp. 103.2–100–24. 4 p.m. 102–102–22. Bowels open. Cascara Evac. p.m. (Sgd.) O. Barrington.

NIGHT REPORT—20/3/38.

Dr. Bell here 8.30 p.m. Wound probed fair amount sero-purulent discharge. Dressing done. Patient more comfortable after same. Wound still inflamed and swollen. To have foments continuously for ½ hour and dry dressing in a.m. Dr. will do dressing when he visits in a.m. Give H.I. Morphia grs. ⅙ if not sleeping at 10 p.m. Same given. Has slept fairly well since. Back attended to and position changed. Fluids taken well. Aperient given p.m. Foments applied and dressing changed a.m. Fair amount of discharge. Lugols M5 given last 7 a.m. (Sgd.) M. W. McEwan.

DAY REPORT—21/3/38. 21st March 1938.

Drs. Bell and Ritchie here a.m. Wound fomented hourly a.m. Large amount serous discharge from middle of incision. Swelling decreased and feels more comfortable. Sedative Mist. given 11.30 a.m. for pain and restlessness. Sulphonal cachet grs. 10 given 4 p.m. (Dr. Bell's orders). Temperature swinging, pulse more steady. B.O. (Sgd.) H. Will.

NIGHT REPORT—21/3/38.

Dr. Bell here 8.30 p.m. Wound probed, little sero-purulent discharge expressed. Foment applied for ¼ hour dry dressing. Same repeated 7 a.m. If restless may have morphia grs. ⅙. Chart elevated 8 p.m. 101–80–20. Patient very restless and cough troublesome. B.M.S. pulv. dr. 1 given 10 p.m. for flatulence, with some relief. Still restless 10.30 p.m. Morphia grs. ⅙ given. Patient has been quieter but only sleeping for short intervals. A.P.C. Mist. with Brom. given 2.30 a.m. Has been sleeping since 3 a.m. till 6 a.m. Lugols M.5 given last 7 a.m. (Sgd.) M. W. McEwan.

DAY REPORT—22/3/38. 22nd March 1938.

Drs. Bell and Ritchie here. Remaining sutures removed. Patient had prontosil tabs. 2 T.D.S. p.c. Give barbitone grs. 7½ for sleep. Dress wound P.R.N. Keep sinus open. Dressed 9 a.m. 1.30 and 5 p.m. Free purulent discharge. Has had a fair day. Temp. normal until 4 p.m. Temp. 100.2–98–20. Bowels not open. Cascara evac. p.m. (Sgd.) O. Barrington.

NIGHT REPORT—22/3/38.

Complained of pains in legs and extremely restless 7.50 p.m. A.P.C. Mist. given with relief. Barbitone pulv. 7½ given 10 p.m. with Ovaltine with good effect. Has slept for long intervals. Cough very troublesome at times. Cocillana drs. 1 given 11.30 p.m. with effect. Lugol M.5 given

Exhibits.

"A."

Records of St. Luke's Hospital, 22nd March 1938, *continued.*

last 6.30 a.m. Foment applied to wound then dry dressing 8 p.m. Same repeated in a.m. Has taken fluids well. Back attended to. Chart 4 a.m. 97–76–20. Patient more comfortable this a.m. B.S.O. P.M. (Sgd.) M. W. McEwan.

23rd March 1938.

DAY REPORT—23/3/38.

Drs. Ritchie and Bell here a.m. Dress wound p.r.n. last 5 p.m. Give Barbitone Nocte. Lugols four hourly and prontosil 1 T.D.S. Same given. Save and test daily specimen of urine for albumen. Fair amount purulent discharge from wound. Has had a fairly comfortable day. Bowels open. Cascara evac. p.m. (Sgd.) M. Grace.

NIGHT REPORT—23/3/38.

Barbitone grs. 7½ pulv. given 9 p.m. Has slept well. Awake for very short intervals only. Lugols M.5 given a.m. Dressing changed 8.30 p.m. Very little discharge. Same done when awake a.m. Specimen of urine saved a.m. (Sgd.) M. W. McEwan.

24th March 1938.

DAY REPORT—24/3/38.

Dr. Bell here. Dress wound p.r.n. same done. Still discharging freely. Dr. Ritchie here. Continue prontosil tabs. 1 T.D.S. Lugols M.5 T.D.S. p.c. and give ½ dose Barbitone to sleep. Given 8 p.m. No night Special. A.P.C. Mist. given 4 p.m. for headache. Bowels open, Cascara p.m. (Sgd.) M. Grace.

NIGHT REPORT—24/3/38.

Slept fairly well. Awake 2 a.m. and complained some discomfort. Mist. A.P.C. drs. 4 given with relief. Dressings changed and large amount sero-purulent discharge from wound. (Sgd.) J. McCallum.

25th March 1938.

DAY REPORT—25/3/38.

Drs. Bell & Ritchie here. Improvement maintained. Give Lugols M.5 T.D.S. and prontosil tabs. 1. ½ Barbitone powder for sleep p.r.n. given 8.15 p.m. Dress wound p.r.n. Sero-purulent discharge free. Bowels open. (Sgd.) H. Will.

NIGHT REPORT—25/3/38.

Irritable cough 9 p.m. Cocillana Co. drs. 1 given with relief. Slept well. Less discharge from wound. (Sgd.) J. McCallum.

26th March 1938.

DAY REPORT—26/3/38.

Comfortable day. Seen by Dr. Bell. Treatment the same. Prontosil tab. 1 T.D.S. Lugols M.5 T.D.S. Bowels open. (Sgd.) L. Troman.

NIGHT REPORT—26/3/38.

Slept well. Mist. A.P.C. drs. 3 given for headache 9 p.m. (Sgd.) J. McCallum.

27th March 1938.

DAY REPORT—27/3/38.

Drs. Bell & Ritchie here a.m. No orders. Wound dressed T.D.S. and p.r.n. Still a fair amount of discharge. Prontosil Tab. 1 given T.D.S. and Lugols M.5 given T.D.S. Bowels open. Cascara Evac. p.m. A.P.C. given for pains 7.30 p.m. (Sgd.) O. Barrington.

Exhibits.

"A."
Records of St. Luke's Hospital, 27th March 1938, *continued.*

NIGHT REPORT—27/3/38.

Cough troublesome 9.30 p.m. Cocillana Co. drs. 1 given with relief. Mist. A.P.C. drs. 4 given for headache 9 p.m. Slept well later. (Sgd.) J. McCallum.

DAY REPORT—28/3/38. 28th March 1938.

Drs. Bell and Ritchie here a.m. Continue Lugols M.5 T.D.S. Prontosil tabs. finished. Ask Dr. Ritchie before ordering more. Dressing done T.D.S. and p.r.n. Still fair quantity of purulent discharge. Give half dose barbitone powder at 8 p.m. Given. Patient sitting on edge of bed a.m. No ill effects. B.O. (Sgd.) H. Will.

NIGHT REPORT—28/3/38.

Complaining severe headache 9.30 p.m. Unable to sleep. Barbitone ½ powder given with effect. Slept fairly well later. Fair amount oozing from wound. (Sgd.) J. McCallum.

DAY REPORT—29/3/38. 29th March 1938.

Dr. Bell here a.m. Dressed wound. Patient to sit out in chair. Up ¾ hour. No ill effects. Dressing changed p.r.n. Still fair quantity discharge. Prontosil tab. 1 given T.D.S. Lugols M.5 given T.D.S. Bowels open. (Sgd.) O. Barrington.

NIGHT REPORT—29/3/38.

Complained headache unable to sleep. Barbitone ½ pulv. given 10 p.m. with effect. Large amount discharge from wound. (Sgd.) J. McCallum.

DAY REPORT—30/3/38. 30th March 1938.

Comfortable. Dr. Bell here. Less discharge from wound to-day. Up for while. Feeling a little stronger. Lugols M.5. T.D.S. (Sgd.) L. Troman.

NIGHT REPORT—30/3/38.

Slept well. Fair amount purulent discharge from wound. Dressing changed. Specimen of urine saved. (Sgd.) J. McCallum.

DAY REPORT—31/3/38. 31st March 1938.

Drs. Bell and Ritchie here a.m. No new orders. Give Lugols M.5 T.D.S. Pulv. barbitone for sleep, p.r.n. Dress wound T.D.S. Still some purulent discharge. Patient up for some hours. Feeling very well and walking a little. Bowels open. Dr. Bell here p.m. Dressed wound. Continue same. (Sgd.) H. Will.

NIGHT REPORT—31/3/38.

Slept fairly well. Awake at intervals. Dressings changed. Less discharge from wound. (Sgd.) J. McCallum.

DAY REPORT—1/4/38. 1st April 1938.

Not feeling so well a.m. Better p.m. Dressing changed T.D.S. Discharge less. Dr. Ritchie here no orders. Up in chair p.m. Lugols M.5 given T.D.S. p.c. Bowels open. Aperient p.m. Barbitone pulv. given 8.30 p.m. (Sgd.) O. Barrington.

Exhibits.

"A."

Records of St. Luke's Hospital, 1st April 1938, *continued.*

2nd April 1938.

NIGHT REPORT—1/4/38.

Slept fairly well. (Sgd.) J. McCallum.

DAY REPORT—2/4/38.

Drs. Bell and Ritchie here a.m. Wound syringed with H_2O_2. Same looking better. Less discharge. Up and walking a little Lugols M.5 given T.D.S. p.c. Bowels open. Own aperient. Barbitone pulv. given 8.30 p.m. (Sgd.) O. Barrington.

NIGHT REPORT—2/4/38.

Unable to sleep well early p.m. Barbitone ½ pulv. given 12 midnight. Slept well later. (Sgd.) J. McCallum.

3rd April 1938.

DAY REPORT—3/4/38.

Comfortable day dressing T.D.S. and p.r.n. Still a little pus. Up and walking a little. Lugols M.5 T.D.S. p.c. Barbitone pulv. Nocte if unable to sleep. Bowels open. Dr. Bell here. No orders. (Sgd.) L. Troman.

NIGHT REPORT—3/4/38.

Unable to sleep. Barbitone pulv. given 9.30 p.m. with delayed effect. Slept fairly well after 11.30 p.m. (Sgd.) J. McCallum.

4th April 1938.

DAY REPORT—4/4/38.

Comfortable day. Dr. Ritchie here. No orders. Dressing the same. Lugols M.5 T.D.S. p.c. Pulv. Barbitone Nocte p.r.n. (Sgd.) L. Troman.

NIGHT REPORT—4/4/38.

Has slept fairly well. Awake at intervals. Dressing changed. Some purulent discharge from wound. (Sgd.) J. McCallum.

5th April 1938.

DAY REPORT—5/4/38.

Comfortable. Drs. Bell and Ritchie here. No orders. Still a little purulent discharge from wound. Pulv. Barbitone Nocte p.r.n. given 8.30 p.m. Lugols M.5 T.D.S. p.c. (Sgd.) L. Troman.

NIGHT REPORT—5/4/38.

Slept fairly well. Fair amount purulent discharge from wound. Dressing changed. (Sgd.) J. McCallum.

6th April 1938.

DAY REPORT—6/4/38.

Drs. Bell & Ritchie here a.m. Continue same. Lugols M.5.T.D.S. Barbitone grs. 5 given for sleep 8.30 p.m. Dress wound p.r.n. Very little discharge. May go to bath. (Sgd.) H. Will.

NIGHT REPORT—6/4/38.

Sleeping better. Less discharge from wound. (Sgd.) J. McCallum.

7th April 1938.

DAY REPORT—7/4/38.

Comfortable day. Still a little purulent discharge from wound. Lugols M.5. T.D.S. p.c. Barbitone grs. 5 for sleep p.r.n. given 8.30 p.m. Dr. Bell here 5.40 p.m. No orders. (Sgd.) L. Troman.

NIGHT REPORT—7/4/38.

Sleeping fairly well all night. (Sgd.) J. McCallum.

DAY REPORT—8/4/38.

Still has some purulent discharge from wound. Dressed T.D.S. Up and about some time. Give Lugols T.D.S. and pulv. for sleep p.r.n. B. Dr. Bell dressed wound p.m. Small slough discharged. Wound touched with blue stone. (Sgd.) H. Will.

NIGHT REPORT—8/4/38. 8th April 1938.

Not sleeping and complaining of headache. Barb. pulv. and tab. aspirin grs. 5 given with effect. Sleeping fairly well later. (Sgd.) J. McCallum.

DAY REPORT—9/4/38. 9th April 1938.

Comfortable. Still a little purulent discharge from wound. Dress same p.r.n. Give Lugols M.5 T.D.S. p.c. Pulv. for sleep p.r.n. given 8 p.m. (Sgd.) L. Troman.

NIGHT REPORT—9/4/38.

Has slept fairly well not complaining. Knot of catgut obtained from wound 6 a.m. (Sgd.) J. McCallum.

DAY REPORT—10/4/38. 10th April 1938.

Dr. Bell here a.m. Dressed wound. Some purulent discharge and small sloughs expelled. Bowels open. A.P.C. Mist. given for headache 7 p.m. (Sgd.) H. Will.

NIGHT REPORT—10/4/38.

Sleeping well most of the night. (Sgd.) J. McCallum.

DAY REPORT—11/4/38. 11th April 1938.

Usual day. Dr. Bell here a.m. No orders. Dressing done p.r.n. Still fair amount of discharge. Bowels open. Dr. Ritchie here a.m. No orders. Give Barb. grs. 5 for sleep p.r.n. (Sgd.) L. Luke.

NIGHT REPORT—11/4/38.

Slept very well. (Sgd.) D. McGillivray.

DAY REPORT—12/4/38. 12th April 1938.

Dr. Ritchie here. No orders. B. Give Barb. grs. 5 for sleep p.r.n. Wound looks better. Discharge much less. Up some time—feeling well. To have Lugols M.5. T.D.S. and calcium lactate tabs. 2 T.D.S. (Sgd.) H. Will.

NIGHT REPORT—12/4/38.

Slept well. (Sgd.) D. McGillivray.

DAY REPORT—13/4/38. 13th April 1938.

Dr. Bell dressed wound a.m. Patient will leave Hospital after Drs. visit a.m. To take Mists, dressings and script with her. Comfortable day. Dressing changed p.m. Bowels open. (Sgd.) E. Johns.

NIGHT REPORT—13/4/38.

Slept very well. (Sgd.) D. McGillivray.

Discharged on 14th.

Exhibits.

"B."

Records of Quirindi District Hospital.

"B."

RECORDS of Quirindi District Hospital.

DAY AND NIGHT REPORTS.

4th May, 1938 to 9th June, 1938.

PATIENT—Mrs. HOCKING.

4th May 1938.

DAY REPORT—4/5/38.

New pt. admitted for Dr. O'Hanlon. Foments to neck 2nd hrly. Probe wound for sutures to have own pulv. T.D.S. Watch carefully for and report any tetanic spasms. Save spec. of urine in a.m. please. (Sgd.) H. A. Spencer.

NIGHT REPORT—4/5/38.

Seen by Dr. O'Hanlon 10 p.m. Nembutal capsule 1 given 10.15 p.m. Pt. did not sleep very well. Foments applied last 5.45 a.m. Wound probed. No tetany detected. To have own capsules immediately any twitching observed. Glucose D to be given strictly T.D.S. aperient given. (Sgd.) K. See.

5th May 1938.

DAY REPORT—5/5/38.

Comfortable day. Had twitchings in body and face during day. Foments applied 2nd hrly. last 7.30 p.m. Wound probed nil found. May sit out on lounge when desired. M.S. in a.m. please. (Sgd.) H. A. Spencer.

NIGHT REPORT—5/5/38.

Did not sleep very well. Awake most part of p.m. Foments applied to neck last 6 a.m. Mag. Sulph. given. (Sgd.) K. See.

6th May 1938.

DAY REPORT—6/5/38.

Feeling comfortable. Sitting out in chair most of day $\dot{\bar{c}}$ no ill effects. Foments applied 2nd hrly. Wound probed v. little oozing pus from same. (Sgd.) H. A. Spencer.

NIGHT REPORT—6/5/38.

Slept fairly well. Awake at times. Foments to neck 2nd hrly. when awake last 5.30 a.m. Aspirin $\overline{\ddot{11}}$ given 6 a.m. for headache. (Sgd.) K. See.

7th May 1938.

DAY REPORT—7/5/38.

Swelling on neck opened this a.m. under "Local Keblings" Sinus $\overline{\ddot{11}}$ to be kept opened and foments applied 2nd hrly. Granulations touched $\dot{\bar{c}}$ copnii, sulp. B.O. (Sgd.) H. A. Spencer.

NIGHT REPORT—7/5/38.

Awake most of p.m. Slept fairly well a.m. Foments applied to neck last 5.30 a.m. (Sgd.) K. See.

DAY REPORT—8/5/38. 8th May 1938.

Feeling comfortable. Wound probed. Blood-stained oozing from same. Foments applied 2nd hrly. (Sgd.) H. A. Spencer.

NIGHT REPORT—8/5/38.

Did not sleep very much p.m. slept fairly well a.m. Foments applied to neck last 6 a.m. (Sgd.) K. See.

DAY REPORT—9/5/38. 9th May 1938.

Not so well. Had tetany spasm 12.45. Seen by Dr. O'Hanlon. Given intravenous injection of calcium chloride 10 ccs. Feeling little better p.m. To have own mist. (Sgd.) A. Abberton.

NIGHT REPORT—9/5/38.

Own mist. given 8.10 p.m. repeated 1 a.m. Slept fairly well. No further spasms. Foments to neck. (Sgd.) K. See.

DAY REPORT—10/5/38. 10th May 1938.

Fairly comfortable day. No tetany spasms. Intravenous injection of calcium chloride given 12 M.D. to be given daily. Own mist. given. B.O. (Sgd.) H. A. Spencer.

NIGHT REPORT—10/5/38.

Not sleeping 11.15 p.m. Own mist. $\overline{\overline{11}}$ repeated slept well a.m. No spasms, foments to neck last 5.30 a.m. (Sgd.) K. See.

DAY REPORT—11/5/38. 11th May 1938.

More comfortable day. Intravenous injection "Calcium Chloride" 10 cc. given 2 p.m. Wound probed by Dr. this p.m. nil found. Little bleeding from same. Foments 3rd hrly. Last applied 6 p.m. Mist. as usual. B.O. (Sgd.) H. A. Spencer.

NIGHT REPORT—11/5/38.

Slept fairly well this a.m. Foments applied to neck. Last 5.30 a.m. (Sgd.) K. See.

DAY REPORT—12/5/38. 12th May 1938.

Up in chair for a time $\dot{\overline{c}}$ no ill effects. Foments to neck 3rd hrly. Granulations touched $\dot{\overline{c}}$ copnii sulph. (Sgd.) H. A. Spencer.

NIGHT REPORT—12/5/38.

Slept fairly well. Awake at times. Foment to throat last 6 p.m. (Sgd.) K. See.

DAY REPORT—13/5/38. 13th May 1938.

Comfortable day. Foments to neck 2nd hrly. last 7 p.m. B.O. (Sgd.) H. A. Spencer.

NIGHT REPORT—13/5/38.

Awake 1.30 p.m. Mixt. repeated. Foments applied to neck last 6 a.m. Slept fairly well. (Sgd.) K. See.

Exhibits.

"B."
Records of Quirindi District Hospital, *continued.*

14th May 1938.

DAY REPORT—14/5/38.

Feeling comfortable. Intravenous injection "Calcium Chloride" 10 cc. given. Foments to neck for 10 minutes every 4 hrs. then dry dressings. (Sgd.) H. A. Spencer.

NIGHT REPORT—14/5/38.

Slept fairly well. Neck attended to last 6 p.m. (Sgd.) K. See.

15th May 1938.

DAY REPORT—15/5/38.

Good day. Has had no signs of tetany. (Sgd.) A. Abberton.

NIGHT REPORT—15/5/38.

Slept fairly well. Foments applied to neck last 6 a.m. (Sgd.) K. See.

16th May 1938.

DAY REPORT—16/5/38.

Comfortable day. Up in chair for awhile to-day. Foments to neck as usual. To have tab. $\dot{\bar{1}}$ T.D.S. and own mixt. $\overline{3}$ p. nocte. Capsules suspended. (Sgd.) H. A. Spencer.

NIGHT REPORT—16/5/38.

Slept fairly well. Foments applied to neck last 6 a.m. (Sgd.) K. See.

17th May 1938.

DAY REPORT—17/5/38.

Fair day. Had tetany spasm 6 p.m. Lasting until 7 p.m. Chloroform given. Intravenous injection Calcium Chloride 10cc given 6.45 p.m. H.I. morphia gr. $\frac{1}{4}$ given 7 p.m. Foments to throat as usual. (Sgd.) H. A. Spencer.

NIGHT REPORT—17/5/38.

Feeling miserable until 12 m.n. Fairly comfortable a.m. Slept in dozes. (Sgd.) K. See.

18th May 1938.

DAY REPORT—18/5/38.

Fair day. Very drowsy and weary this a.m. Intravenous injection. Calcium Chloride 10% given by Dr. M.D. Appears a little brighter this p.m. to have own tabs. $\dot{\bar{1}}$ T.D.S. and mist. $\overline{3}$ p. nocte. (Sgd.) H. A. Spencer.

NIGHT REPORT—18/5/38.

Slept fairly well. No spasms. (Sgd.) K. See.

19th May 1938.

DAY REPORT—19/5/38.

Comfortable day. Treatment the same. (Sgd.) H. A. Spencer.

NIGHT REPORT—19/5/38.

Slept fairly well. (Sgd.) K. See.

DAY REPORT—20/5/38. 20th May 1938.

Comfortable day. Intravenous injection, Calcium Chloride 10% 10cc given by Dr. This a.m. Dressing attended to. Foments 10 minutes every four hours and dry dressing. B.O. (Sgd.) H. A. Spencer.

NIGHT REPORT—20/5/38.

Slept fairly well. Foments to neck last 6 a.m. (Sgd.) K. See.

DAY REPORT—21/5/38. 21st May 1938.

Comfortable day. No tetany spasms. Intravenous saline given. Cascara given. Repeat in a.m. if B.N.O. Up. *Not to walk.* (Sgd.) H. A. Spencer.

NIGHT REPORT—21/5/38.

Did not sleep. Mixt. repeated 12 m.n. Foments applied to neck last 6 a.m. (Sgd.) K. See.

DAY REPORT—22/5/38. 22nd May 1938.

Comfortable day. No tetany spasm. Intravenous calcium chloride given a.m.; sitting out of bed. (Sgd.) A. Abberton.

NIGHT REPORT—22/5/38.

Did not sleep very much. Still awake 1 a.m. Mixt. repeated. (Sgd.) K. See.

DAY REPORT—23/5/38. 23rd May 1938.

Good day. Treatment as usual. (Sgd.) H. A. Spencer.

NIGHT REPORT—23/5/38.

Slept fairly well. (Sgd.) K. See.

DAY REPORT—24/5/38. 24th May 1938.

Good day. Intravenous injection given 4 p.m. Wound on neck improving. Treatment unchanged. (Sgd.) H. A. Spencer.

NIGHT REPORT—24/5/38.

Slept fairly well. Awake for a time early a.m. (Sgd.) K. See.

DAY REPORT—25/5/38. 25th May 1938.

Comfortable day. Intravenous injection given this a.m. Treatment as usual. Foments last applied 5 p.m. B.O. (Sgd.) H. A. Spencer.

NIGHT REPORT—25/5/38.

Slept fairly well. (Sgd.) K. See.

DAY REPORT—26/5/38. 26th May 1938.

Good day. Same treatment. Dry dressing to neck wound. (Sgd.) H. A. Spencer.

NIGHT REPORT—26/5/38.

Slept fairly well. Awake at times. (Sgd.) K. See.

Exhibits.

"B." Records of Quirindi District Hospital, 26th May 1938, *continued.*

27th May 1938.

28th May 1938.

29th May 1938.

30th May 1938.

31st May 1938.

1st June 1938.

DAY REPORT—27/5/38.

Comfortable day. Same treatment to have Gluco. Phos. ℥ 1 T.D.S. on porridge and in milk. (Sgd.) H. A. Spencer.

NIGHT REPORT—27/5/38.

Slept fairly well. (Sgd.) K. See.

DAY REPORT—28/5/38.

Fair day. Complained of "muscles feeling tight" this a.m. Out on lounge for a while. Feeling easier this p.m. (Sgd.) H. A. Spencer.

NIGHT REPORT—28/5/38.

Slept fairly well. (Sgd.) K. See.

DAY REPORT—29/5/38.

The same. Intravenous injection given as usual. Aspirin grs. X given this a.m. (Sgd.) M. Patterson.

NIGHT REPORT—29/5/38.

Slept fairly well. (Sgd.) K. See.

DAY REPORT—30/5/38.

Comfortable day. Treatment as usual. Out on lounge for a while. B.O. (Sgd.) H. A. Spencer.

NIGHT REPORT—30/5/38.

Slept fairly well. (Sgd.) K. See.

DAY REPORT—31/5/38.

NIGHT REPORT—31/5/38.

Slept at intervals. Not complaining. (Sgd.) H. A. Spencer.

DAY REPORT—1/6/38.

The same. Dry dressing applied to wound. Calcium Gluconate 10 cc. given intravenously this a.m. Had tetany spasm 6 p.m. May have H.I. Morphia gr. ¼ if absolutely nec. (Sgd.) M. Hensman.

NIGHT REPORT—1/6/38.

Had tetany spasm 9.15 p.m. lasting 15 minutes. H.I. Morphia grs. ¼ given 9 p.m. Complained of fair amt. of pain and unable to sleep. H.I. Morphia grs. ⅙ given 2 a.m. Slept at short intervals after same. Feeling more comfortable this a.m. (Sgd.) H. A. Spencer.

Exhibits.

"B."

Records of Quirindi District Hospital. 1st June 1938, *continued.*

DAY REPORT—2/6/38. 2nd June 1938.

Not feeling well to-day. Taking very little nourishment. Complaining of severe headache. Pulv. 553 given 3.30 p.m. c slight relief. Wd. dressed. Intravenous injection given. B.O. (Sgd.) M. Hensman.

NIGHT REPORT—2/6/38.

Slept at intervals. Mixt. given. Complg. good deal of headache. (Sgd.) H. A. Spencer.

DAY REPORT—3/6/38. 3rd June 1938.

Calcium lactate 10cc given this a.m. Good day. (Sgd.) E. Burfoot.

NIGHT REPORT—3/6/38.

Slept at short intervals. Feeling comfortable. (Sgd.) H. A. Spencer.

DAY REPORT—4/6/38. 4th June 1938.

Complaining of a fair amt. of pain in thoracic region. W'd. dressed. Intravenous injection Calcium Chlor. given as usual. (Sgd.) M. Hensman.

NIGHT REPORT—4/6/38.

Slept fairly well. (Sgd.) H. A. Spencer.

DAY REPORT—5/6/38. 5th June 1938.

Comfortable day. W'd. dressed. Intravenous injection Cal. Chlor. given. (Sgd.) M. Hensman.

NIGHT REPORT—5/6/38.

Slept at intervals. (Sgd.) H. A. Spencer.

DAY REPORT—6/6/38. 6th June 1938.

Comfortable day. Intravenous injection given as usual. W'd. dressed. (Sgd.) M. Hensman.

NIGHT REPORT—6/6/38.

Slept well. (Sgd.) H. A. Spencer.

DAY REPORT—7/6/38. 7th June 1938.

Comfortable day. Treatment as usual. (Sgd.) M. Hensman.

NIGHT REPORT—7/6/38.

Slept well. Feeling more comfortable this a.m. (Sgd.) H. A. Spencer.

DAY REPORT—8/6/38. 8th June 1938.

The same. For discharge to-morrow. (Sgd.) M. Hensman.

NIGHT REPORT—8/6/38.

Slept well. (Sgd.) H. A. Spencer.

Discharged 9/6/38. 9th June 1938.

Exhibits.

"C."
Sketch of Object found.

"C."

SKETCH of Object found.

"D" (i). Letter, E Hocking to George Bell, 2nd May 1938.

"D."

(i) LETTER, E. Hocking to George Bell.

Telephone 241 Quirindi.

Hill St.,
Quirindi,
2–5–38.

Dr. Geo. Bell,
133 Macquarie St.,
Sydney.

Dear Doctor,

Mrs Hocking stood the trip from Sydney rather better than I expected. Staying the first night at Newcastle as suggested.

The throat is not yet healed, she has taken out seven knots since coming home. It is not discharging so freely.

The whole body has been much swollen until today. It seems slightly less swollen tonight.

The tetany is still very annoying, but the attacks do not last quite so long.

Cheque herewith for Twenty five Guineas.

Yours faithfully,

EDMUND HOCKING.

Exhibits.

"D."

(ii) **LETTER, George Bell to E. Hocking.**

"D" (ii). Letter, George Bell to E. Hocking, 4th May 1938.

133 Macquarie St.
4.5.1938.

Dear Mr. Hocking,

Your letter & enclosed cheque to hand.

I am glad to learn that Mrs. Hocking stood the journey home satisfactorily.

I was talking to Dr. Ritchie today about Mrs. Hocking & he suggested that she took calcium in the form of calcium gluconate. It is put up in chocolate tablets.

I will drop Dr. O'Hanlon a line. I would be glad to know how Mrs. Hocking progresses—she should gradually improve now & I hope she will be able to take her place on the tennis court next summer.

Kindly remember me to Mrs. Hocking.

Yours faithfully,
GEORGE BELL.

"D."

(iii) **LETTER, Dr. O'Hanlon to G. Bell.**

"D" (iii). Letter, Dr. O'Hanlon to G. Bell, 10th May 1938.

Dr. Kevin O'Hanlon.
"Maringa,"
Thomas Street,
Quirindi.
10th May, 1938.

Dear Dr. Bell,

Many thanks for your letter in reference to Mrs. Hocking. Not knowing that she had returned from Sydney I did not see her until a fortnight after her return.

There was a free discharge from her neck & she told me she had recovered several pieces of suture material. She had also been troubled very much by contractions in her forearms and legs and occasionally in her facial muscles. A few days after I first saw her I persuaded her to go into hospital where she is at present—there we recovered more catgut & with frequent foments to the neck there is less discharge & it appears to be generally better. However, the tetany is I think worse. Yesterday she had a very severe spasm involving practically her whole body, it was accompanied by so much pain that I was forced to administer a mild chloroform anæsthesia (not a very safe treatment I know—considering her condition) until a solution of calcium chloride 10% could be prepared for intravenous administration. I gave 10 cc's of this solution, with remarkably rapid and good result, later in the day Mrs. Hocking said she felt well, but had the feeling that she was about to go into another spasm —however this has not occurred. I propose to give her a daily intravenous injection for a few days at least.

When I first saw her on her return, I put her on to "Glucophos" because of its calcium Gluconate content, but I have ordered some of the Sandoz preparation.

Some text books regard post operative tetany as being fatal very often —what is your opinion.?

I hate to think what the poor G.P. is going to live on when the National Health Insurance is adopted—as it is we don't collect half our fees.

Yours sincerely,
KEVIN O'HANLON.

Exhibits.

"D."

"D" (iv). Letter, G. Bell to E. Hocking, 29th June 1938.

(iv) LETTER, G. Bell to E. Hocking.

133 Macquarie Street,
Sydney.

29–6–38.

Dear Mr. Hocking,

Many thanks for your letter re Mrs. Hocking although I am sorry the news was not better concerning the muscle spasms.

Since your letter I have been in touch with Dr. O'Hanlon and have informed him about some recent methods of treatment and also sent him up some special injections for him to use and I will hope for better news.

Yours faithfully,

GEORGE BELL.

"D" (v). Letter, Dr. K. C. O'Hanlon to G. Bell, 17th January 1939.

"D."

(v) LETTER, Dr. K. C. O'Hanlon to G. Bell.

"Maringa,"
Thomas Street,
Quirindi.

17th Jan. 1939.

Dear Dr. Bell,

Your enquiry as regards Mrs. Hocking to hand a few days ago.

I must admit that the extraordinary heat wave has caused me to neglect my correspondence.

If anything I would say that the lady is improving slightly. The major attacks though not less frequent are becoming less severe, she recovers from them more quickly than before. She has frequent minor spasms which do not leave the muscles involved as sore as before.

She was not able to tolerate the large doses of Calc. Lactate for more than a month or so. At present she is having occasional doses of Paroidin s o s. also Morphia only when she is feeling "staticy" (as she calls it).

For the first time since her return from Sydney she attended a picture show last week, this I regard as useful and definite evidence that she is recovering as Mrs. Hocking always said she would attend the pictures when she was better.

She certainly looks very well and I can't help thinking there is a big functional element in her trouble.

Kindest regards,

Yours sincerely,

KEVIN O'HANLON.

Exhibits.

"D."

(vi) **LETTER, G. Bell to Stella Eileen Hocking.**

"D" (vi). Letter, G. Bell to Stella Eileen Hocking, 27th May 1939.

133 Macquarie Street,
Sydney.

27/5/1939.

Dear Mrs. Hocking,

Many thanks for your letter. I am glad to see that your writing is so good. I only wish some of the medical students could write as clearly as you do. I hope you will be able to take up tennis next summer.

I was talking to Sir Alan Newton in Melbourne about similar cases to yours. He is a great believer in cod liver oil and calcium and he puts his patients on this treatment. I saw another patient some time ago and she is completely recovered. I will write to Dr. O'Hanlon. I told Dr. Ritchie that I had heard from you.

Best wishes,

Yours sincerely,

GEORGE BELL.

"D."

(vii) **LETTER, Dr. K. C. O'Hanlon to G. Bell.**

"D" (vii). Letter, Dr. K. C. O'Hanlon to G. Bell, 7th October 1939.

Dr. Kevin O'Hanlon.

"Maringa,"
Thomas Street,
Quirindi.

7th October, 1939.

Dear Dr. Bell,

re Mrs. E. Hocking.

Last evening I was called to see Mrs. Hocking who was complaining of pain in her left chest and down the middle of the chest. Clinical examination revealed nothing definite.

Mr. Hocking gave me the following history—Last Monday she had as bad an attack of tetanic spasm as she has ever had, she complained of pain in the neck which was swollen. Until Wednesday she complained of pain and soreness from the neck to the stomach, the act of swallowing was painful, he thought she had symptoms of indigestion and gave her castor oil, salts, etc. On Thursday Mrs. Hocking had a bowel action and passed a piece of grey rubber tubing, squarely cut on one end and ragged on the other, the tube was partially split up and stuck in the lumen was what she took to be a small piece of marine sponge about which was twisted a piece of wire, I enclose the sketch she made for her husband and which he passed on to me. Mrs. Hocking emptied the tube along with the bowel action result into the w.-c. so neither Mr. Hocking or I saw it. Mrs. Hocking's description is too vivid for the article to be imaginary so of course I was somewhat non-plussed when I was asked to explain it all.

Assuming that it was a piece of drainage tube that was accidentally left behind—I suppose it is possible that it could work its way into the

Exhibits.

"D" (vii). Letter, Dr. K. C. O'Hanlon to G. Bell, 7th October 1939, *continued.*

œsophagus, though to me it seems strange that it did not work out through the sinus which persisted for so many weeks after her return from Sydney. Mrs. Hocking on a few occasions did complain of soreness in the neck, but at no time did I ever detect any symptoms that would indicate an X-ray examination—naturally the possibility of a foreign body being the cause never entered my mind. Within a month or six weeks after her return from Sydney her nurse did recover undissolved sutures on several occasions, the sinus eventually closed and now she has an excellent scar. The attacks of tetany have become fewer nevertheless Mrs. Hocking is still far from well, she is very unsteady when she tries to walk.

If a foreign body has remained in the neck all this time do you think that it may be a possible cause of the tetany and could we now expect an improvement in her general condition ? You understand Doctor, that this question is based on an assumption only.

Mr. Hocking had worked out the foregoing explanation for himself, though he did ask me if it were possible for a piece of tubing to get into her alimentary tract during the administration of oxygen.

To-day I X-rayed Mrs. Hocking's chest and neck—her heart shadow does not seem normal to me also the transverse processes of the cervical vertebræ on the right side appear rather indistinct and blurred—though this I think is due to faulty posture, I could detect no f.b. in the neck or lung fields.

Kind regards,

Yours sincerely,

KEVIN O'HANLON.

"D."

(viii) LETTER, Stella Eileen Hocking to G. Bell.

"D" (viii). Letter, Stella Eileen Hocking to G. Bell, 11th October 1939.

Hill Street,
Quirindi.
11th October, 1939.

Dear Dr. Bell,

Thanks for your letter received some time ago.

You have probably heard from Dr. O'Hanlon giving you full details of the piece of drain tube which was left in my neck. I have been feeling quite worried. Doctor, please don't think I blame you or anyone at the Hospital.

I am a little better this afternoon it is ten days since I was so ill. The tetany had me drawn into a ball for twenty-four hours.

I think it was then the tube burst into my gullet, I almost choked. I am not quite so sore on the sides of my body, but still very sore along the spine and in the throat.

The left side of my neck is very red and hot. My voice is much improved. If you can suggest anything to help me back to health I would be thankful but Doctor do not worry about the tube.

Yours sincerely,

CHICKQUETTA HOCKING.

"D."

Exhibits.

"D" (ix). Letter, G. Bell to Stella Eileen Hocking, 15th October 1939.

(ix) LETTER, G. Bell to Stella Eileen Hocking.

133 Macquarie Street,
Sydney.
15.10.39.

Dear Mrs. Hocking,

I am sorry to learn that you have been ill again. I had a letter from Dr. O'Hanlon and I spoke to him by telephone on 13th October. It is difficult to explain your last illness and the "piece of drain tube" which you say passed by the bowel.

I saw Dr. Ritchie during the week.

I think you should come to Sydney for a medical investigation in order to see if we can advise some medical treatment to improve your health.

Yours faithfully,

GEORGE BELL.

"E."

"E." Records of Quirindi District Hospital.

RECORDS of Quirindi District Hospital.

DAY AND NIGHT REPORTS.

3rd September 1938 to 6th September 1938.

Patient—Mrs. HOCKING.

3rd September 1938.

DAY REPORT—3/9/38.

Re-admitted for Dr. O'Hanlon in tetany spasm. H.I. Morphia grs. ¼ given 4.45 p.m. Intravenous injection of Calcium Chloride given 5 p.m. c success. Muscles relaxed 5.15 p.m. Keep tray set. Dr. will repeat injection in a.m. if no further spasms. Save spec. of urine in a.m. (Sgd.) M. Hensman.

NIGHT REPORT—3/9/38.

Slept at short intervals. No tetany spasms. Not complg. (Sgd.) H. A. Spencer.

4th September 1938.

DAY REPORT—4/9/38.

Very miserable and listless all day. Tetany spasm this a.m. (25 mins). Seen by Dr. O'Hanlon. Intravenous injection not given. Reoccurrence of spasm during doctor's visit. H.I. Morphia grs. ¼ given 12 m.d. To have own injection. B.O. Calcium Lactate grs. x p.c. Medinal tab. 1 bedtime. Thyroid tab. 1 bedtime. Complained of severe headache 7.15 p.m. Aspirin grs. x given. (Sgd.) A. Abberton.

NIGHT REPORT—4/9/38.

Had a good night. (Sgd.) H. A. Spencer.

Exhibits.

"E"
Records of Quirandi District Hospital, *continued.*

DAY REPORT—5/9/38.

Condition satisfactory today. No spasms. Own injection given. Give Cal. Lact. tabs. grs. $\dot{\bar{x}}$ P.C. Medinal Tab. $\dot{\bar{1}}$ 8 p.m. and thyroid tab. $\dot{\bar{1}}$ 8 p.m. Not complaining this p.m. To have injection 8 a.m. and 8 p.m. (Sgd.) M. Hensman.

5th September 1938.

NIGHT REPORT—5/9/38.

Had comfortable night. Slept fairly well. No tetany spasms. Injection. o. tabs. given. (Sgd.) H. A. Spencer.

6th September 1938.

DAY REPORT—6/9/38.

Good day. No spasms. Give own injection 8 a.m. and 8 p.m. Give medinal tab. $\dot{\bar{1}}$ and thyroid tab. $\dot{\bar{1}}$ 8 p.m. (Sgd.) M. Hensman.

NIGHT REPORT—6/9/38.

Had a good night. Own tabs. and injection given 8 p.m. (Sgd.) H. A. Spencer.

"F."
Records of St. Luke's Hospital.

"F."

RECORDS of St. Luke's Hospital.

DAY AND NIGHT REPORTS.

25th October 1939 to 3rd November 1939.

Patient—Mrs. HOCKING.

25th October 1939.

NIGHT REPORT—25/10/39.

Mrs. E. Hocking, 2A. Admitted 6.15 a.m. for Dr. Bell. Chart normal. (Sgd.) P. Fletcher.

26th October 1939.

DAY REPORT—26/10/39.

Has been fairly comfortable. Dr. Bell here. Examined chest, back and neck. Encourage patient to eat. Dr. Ritchie will see patient. Has taken a fair amount of nourishment. Voice very husky. Save specimen of urine a.m. Dr. Ritchie here p.m. Will examine patient tomorrow. Does not mind patient having a sedative. Please ask Dr. Bell re same. (Sgd.) A. Saunders.

EVENING REPORT—26/10/39.

Not complaining. Aperient given. (Sgd.) E. A. Weston.

NIGHT REPORT—26/10/39.

Drowsy early p.m. Has slept well. Dr. Bell 'phoned. Patient for Blood Calcium test 9 a.m. No morning tea or breakfast till after test. Dr. Bell will be here 8 a.m. Specimen of urine saved this a.m. Bowels open 5.30 a.m. (Sgd.) P. Fletcher.

DAY REPORT—27/10/39. 27th October 1939.

Comfortable day. Dr. Bell here. No orders. Dr. Tebbutt here. Blood test done. Dr. Ritchie enquired. Eating well. Bowels open. Veg. lax. (Sgd.) A. Saunders.

EVENING REPORT—27/10/39.

Dr. Bell here p.m. Patient may have luminol gr. 1. if necessary. Give inhalation T.D.S. one given p.m. (Sgd.) E. A. Weston.

NIGHT REPORT—27/10/39.

Voice seems stronger. Luminol gr. 1 given 9.45 p.m. Has slept very well. (Sgd.) P. Fletcher.

DAY REPORT—28/10/39. 28th October 1939.

Better day. Dr. Bell here. Encourage patient to eat, may sit in chair. Give luminol gr. 1 only if necessary nocte. Inhalation given T.D.S. taking food well. Up in chair for time p.m. Tired on return. Dr. Ritchie here. No orders. Bowels open p.m. (Sgd.) E. A. Weston.

EVENING REPORT—28/10/39.

Comfortable. Inhalation given. Give luminol gr. 1 later if necessary. (Sgd.) P. Fletcher.

NIGHT REPORT—28/10/39.

Slept well. Luminol not given. (Sgd.) P. Fletcher.

DAY REPORT—29/10/39. 29th October 1939.

Good day. Up in sun p.m. Dr. Bell here throat examined. Patient may get up and walk about. May go to bathroom, etc. Taking food well. Inhalations given T.D.S. Give luminol gr. 1 nocte if necessary. B. (Sgd.) J. Murray.

EVENING REPORT—29/10/39.

Inhalations given p.m. Luminol gr. 1 given 8.15. (Sgd.) A. Saunders.

NIGHT REPORT—29/10/39.

Complained of sore throat 9.30 p.m. Aspirin gargle given with some relief. Awake with flatulence and heartburn 11 p.m. B.M.S. pulv. given with good effect. Bowels open once. Bismuth pulv. given 5.30 a.m. (Sgd.) P. Fletcher.

DAY REPORT—30/10/39. 30th October 1939.

Seen by Dr. Bell. Patient to walk about more. Several times a day. Same done p.m. Inhalations given T.D.S. Luminol gr. 1 nocte if necessary. Bowels open. (Sgd.) M. Grace.

EVENING REPORT—30/10/39.

Refused tea. Orange and glucose given. Complained of burning feeling in throat. Complained of nausea 7.30 p.m. Soda-bic. draft given with effect. Refused inhalation. (Sgd.) J. Murray.

Exhibits.

"F."
Records of St. Luke's Hospital, 30th October 1939, *continued.*

NIGHT REPORT—30/10/39.

Luminol gr. 1 given 9 p.m. with no effect. Quite a lot of flatulence and complained of a burning irritation down the œsophagus. Mist. A.P.C. given 12.30 a.m. with little effect. Irritation and pain increased in throat and chest. Linct. coch.co. taken with no effect. Refused inhalations (patient says they cause the complaint) chest and throat rubbed with menthol and camphor and luminol gr. 1 given at 2 a.m. Had no effect. Large Soda-bic. draft given 3.15 a.m. and returned with large amount of flatulence. Tea and food given. Feeling much better. Sponged and mist. A.P.C. given 5 a.m. Had practically no sleep. Do not disturb if asleep this a.m. Bismuth carb. given without effect. (Sgd.) P. Fletcher.

31st October 1939.

DAY REPORT—31/10/39.

Dr. Bell here examined throat. Patient to have plenty of milk. Same given 2nd hourly between meals. Prescribed Mist. to be given T.D.S. p.c. and halivol capsules 2 nocte Dr. Marsh to see patient. Feeling better this afternoon. Bowels open. (Sgd.) O. Barrington.

EVENING REPORT—31/10/39.

Refused tea. Complaining of burning in throat and nausea. T.D.S. Mist. given with effect. Gargle given. Throat painted. Milk given 8 p.m. (Sgd.) P. Fletcher.

NIGHT REPORT—31/10/39.

Luminol gr. 1 given 9.15 p.m. with Halival tabs. 2. Slept fairly well first part of night for short intervals since. Mist. given 11 p.m. and 3 a.m. Fair amount of flatulence this a.m. Bowels well open this 3.30 a.m. (Sgd.) P. Fletcher.

1st November 1939.

DAY REPORT—1/11/39.

Dr. Bell here p.m. May go home at the week-end. Continue with plenty of milk. Mist. and capsules given. Throat treated. Bowels open. (Sgd.) M. Grace.

EVENING REPORT—1/11/39.

Gargle given and throat painted. Halival cap. 2 given 8.30 p.m. (Sgd.) O. Barrington.

NIGHT REPORT—1/11/39.

Much quieter night. Has slept for short intervals. Hot milk given when awake. (Sgd.) P. Fletcher.

2nd November 1939.

DAY REPORT—2/11/39.

Feeling better. Gargle given T.D.S. Throat painted B.D. Mist. given T.D.S. p.c. Dr. Bell here p.m. Patient to have plenty of fruit, fish, milk and meat once a day. Continue with Capsules 2 nocte. Please get Dr. Ritchie to see patient a.m. (Sgd.) J. Murray.

EVENING REPORT—2/11/39.

Throat treated. Halival Capsules given 8.30 p.m. (Sgd.) M. Grace.

NIGHT REPORT—2/11/39.

Slept well. (Sgd.) P. Fletcher.

3rd November 1939.

Discharged 3rd November 1939.

"G."

Exhibits.

"G."
Records of Quirindi District Hospital, *continued.*

RECORDS of Quirindi District Hospital.

DAY AND NIGHT REPORTS.

19th October, 1937 to 15th November, 1937.

PATIENT—Mrs. HOCKING.

DAY REPORT—19/10/37. 19th October 1937

N.P. adm. to Private Ward. Dr. O'Hanlon's patient. P.U. by Dr. this p.m. To be kept strictly to diet ; milk and milk foods, cereals, eggs, toast, bread and fruit. Foods forbidden—*Meat*, *meat extracts*, *broths*, *tea*, *coffee*, *alcohol*, no sedatives other than ordered. To have capsule $\overline{1}$ T.D.S. for 3 days and observe for any signs of quinine overdose. Mist. $\overline{3}\ \overline{10}$ 10 a.m. and 2 p.m. $\overline{3}\ \overline{1}$ 8 p.m. No visitors other than husband, daughter and sister (Miss Maher). Bowel Lavage given on admission, brown fluid result, urine test clear. *Please do not give MS in a.m.* (Sgd.) D. Pasley.

NIGHT REPORT—19/10/37.

Did not sleep very well. Complained of headache and pain in both legs—same rubbed $\overline{8}$ Meth. Sol. B.N.O. (Sgd.) M. Patterson.

DAY REPORT—20/10/37. 20th October 1937.

Fair day, complaining of head aching a little at times. Capsules $\overline{1}$ given T.D.S. Mist. $\overline{3}$ p. given 10 a.m. and 2 p.m. Please give $\overline{3}\ \overline{1}$ 8 p.m. ; complaining of a few ringing noises in ears this p.m. Nourishment taken fairly well. B.N.O. M. Sin. a.m. please. (Sgd.) D. Pasley.

NIGHT REPORT—20/10/37.

Better night. Has slept fairly well. M.S. given. (Sgd.) M. Patterson.

DAY REPORT—21/10/37. 21st October 1937.

Fairly comfortable day : nourishment taken well. Capsules $\overline{1}$ given T.D.S. Mist. $\overline{3}\ \overline{p}$ 10 a.m. and 2 p.m. $\overline{3}\ \overline{1}$ 8 p.m. B. well O. (Sgd.) D. Pasley.

NIGHT REPORT—21/10/37.

Slept fairly well. (Sgd.) M. Patterson.

DAY REPORT—22/10/37. 22nd October 1937.

Fairly comfortable day. Capsules ceased. Nourishment taken fairly well. B. well O. Mist. given as usual. (Sgd.) D. Pasley.

NIGHT REPORT—22/10/37.

Comfortable night—has slept fairly well. (Sgd.) M. Patterson.

Exhibits.

"G."
Records of Quirindi District Hospital, *continued.*

DAY REPORT—23/10/37.

Fairly comfortable day, usual treatment B. not O. M.S. in a.m. Patient not allowed to read. (Sgd.) D. Pasley.

NIGHT REPORT—23/10/37.

Comfortable night. Has slept fairly well. (Sgd.) M. Patterson.

23rd October 1937.

DAY REPORT—24/10/37.

Feeling comfortable. Treatment the same. B.O. (Sgd.) H. A. Spencer.

24th October 1937.

NIGHT REPORT—24/10/37.

Fairly comfortable night. Cough troublesome. Cocillana $\overline{\overline{3}\ \dot{1}}$ given. B.O. $\dot{1}$ (Sgd.) M. Patterson.

25th October 1937.

DAY REPORT—25/10/37.

Fairly comfortable day. To have thyroid tabs. grs. $\frac{1}{2}$ T.D.S. Pt. may read a little. B.O. Other treatment the same. (Sgd.) H. A. Spencer.

NIGHT REPORT—25/10/37.

Comfortable night. (Sgd.) M. Patterson.

26th October 1937

DAY REPORT—26/10/37.

Comfortable day. Tab. $\dot{1}$ given. T.D.S. Cascara evac. given if B.N.O. during night. Please repeat in a.m. Treatment unchanged. (Sgd.) H. A. Spencer.

NIGHT REPORT—26/10/37.

27th October 1937.

DAY REPORT—27/10/37.

Good day. May have weak tea, strained broth, fruit, eggs and milk foods. B.O. (Sgd.) H. A. Spencer.

NIGHT REPORT—27/10/37.

Fairly comfortable night. (Sgd.) M. Patterson.

28th October 1937.

DAY REPORT—28/10/37.

Good day. Continue $\dot{c}$ same treatment. May have full diet. B.O. (Sgd.) H. A. Spencer.

NIGHT REPORT—28/10/37.

(Sgd.) M. Patterson.

29th October 1937.

DAY REPORT—29/10/37.

Comfortable day. Diet: Tea, strained broth, toast, eggs, milk and milk foods. To have egg flips. B.O. (Sgd.) H. A. Spencer.

NIGHT REPORT—29/10/37.

Fairly comfortable night. (Sgd.) M. Patterson.

Exhibits.

"G."

Records of Quirindi District Hospital, *continued.*

DAY REPORT—30/10/37. 30th October 1937.

Comfortable day. Same treatment and diet. B.O. (Sgd.) H. A. Spencer.

NIGHT REPORT—30/10/37.

Slept well. (Sgd.) M. Patterson.

DAY REPORT—31/10/37.

Had a good day. All treatment the same. (Sgd.) F. Thomas.

NIGHT REPORT—31/10/37. 31st October 1937.

Good night. (Sgd.) M. Patterson.

DAY REPORT—1/11/37.

Good day. All treatment the same. B.O. (Sgd.) H. A. Spencer. 1st November 1937.

NIGHT REPORT—1/11/37.

Good night. (Sgd.) M. Patterson.

DAY REPORT—2/11/37. 2nd November 1937.

Comfortable day. Same treatment. To have egg flips 2 daily, milk and cocoa (unsweetened). Pt. weighs 6 stone 13 lbs. (Sgd.) H. A. Spencer.

NIGHT REPORT—2/11/37.

Slept well. (Sgd.) M. Patterson.

DAY REPORT—3/11/37. 3rd November 1937.

Good day. May have mashed vegetables and a small piece grilled steak for dinner tomorrow. (Sgd.) H. A. Spencer.

NIGHT REPORT—3/11/37.

Comfortable night. (Sgd.) M. Patterson.

DAY REPORT—4/11/37. 4th November 1937.

Comfortable day. Mixt. and tabs. given as ordered. B.O. (Sgd.) H. A. Spencer.

NIGHT REPORT—4/11/37.

(Sgd.) M. Patterson.

DAY REPORT—5/11/37. 5th November 1937.

Comfortable day. Treatment unchanged. (Sgd.) H. A. Spencer.

NIGHT REPORT—5/11/37.

Fair night. Did not sleep so well early part night. (Sgd.) M. Patterson.

DAY REPORT—6/11/37. 6th November 1937.

Comfortable day. Weight 7 stone 2½ lb. Continue same treatment. B.O. (Sgd.) H. A. Spencer.

NIGHT REPORT—6/11/37.

Did not sleep very well beginning of night. Skin acting freely early a.m. (Sgd.) M. Patterson.

Exhibits,

"G."

Records of Quirandi District Hospital, *continued.*

DAY REPORT—7/11/37.

Good day. All treatment the same. (Sgd.) F. Thomas.

NIGHT REPORT—7/11/37.

Good night. (Sgd.) M. Patterson.

DAY REPORT—8/11/37.

7th November 1937. Up in chair for ½ today $\dot{\bar{c}}$ no ill effects. Pt. feeling comfortable. (Sgd.) H. A. Spencer.

8th November 1937. NIGHT REPORT—8/11/37.

Good night. (Sgd.) M. Patterson.

9th November 1937. DAY REPORT—9/11/37.

Good day. Up for awhile $\dot{\bar{c}}$ no ill effects. Same treatment. (Sgd.) H. A. Spencer.

NIGHT REPORT—9/11/37.

Slept well. (Sgd.) M. Patterson.

10th November 1937. DAY REPORT—10/11/37.

Feeling comfortable. Up in chair for a while and walked short distance $\dot{\bar{c}}$ no ill effects. B.O. (Sgd.) H. A. Spencer.

NIGHT REPORT—10/11/37.

Slept well. (Sgd.) M. Patterson.

11th November 1937. DAY REPORT—11/11/37.

Good day. Up as usual and walking a little. (Sgd.) H. A. Spencer.

NIGHT REPORT—11/11/37.

12th November 1937. DAY REPORT—12/11/37.

Up for awhile. Complained of headache a.m. Celris tablets $\ddot{\bar{1}\bar{1}}$ given. Mixt. and other treatment the same. (Sgd.) F. Thomas.

NIGHT REPORT—12/11/37.

Good night. (Sgd.) M. Patterson.

13th November 1937. DAY REPORT—13/11/37.

Good day. Weighed today. Treatment the same. (Sgd.) F. Thomas.

NIGHT REPORT—13/11/37.

Slept well. Gargle given this a.m. (Sgd.) M. Patterson.

14th November 1937. DAY REPORT—14/11/37.

Good day. Same treatment. (Sgd.) F. Thomas.

NIGHT REPORT—14/11/37.

Good night. (Sgd.) M. Patterson.

15th November 1937. Discharged from Hospital 15/11/37.

E. H. FOX.

Exhibits.

"H."

COPY PRESCRIPTION of Dr. Ritchie.

"H." Prescription of Dr. Harold Ritchie, 10th November 1939.

Dr. Harold Ritchie,
225 Macquarie Street,
Sydney.

Telephone B 5071.

10.11.39.

Mrs. S. Hocking,

R. Tab. Calcium Gluconate

mitte C.

Sig. two to four thrice daily.

H.J.R.

"J."

LETTER, Mrs. Hocking to Dr. H. J. Ritchie.

"J." Letter, Mrs. Hocking to H. J. Ritchie, 6th May 1939.

Hill St.,
Quirindi.
6.5.39.

Dear Dr. Ritchie,

Sorry for the delay in sending the fee, which you will find enclosed.

But I have been waiting for the return of my voice which you teased me about. It is much better than when I left St. Luke's; I would not be of any use in the Church choir yet. Although; now, don't laugh, I had visitors the other night and one of the gentlemen said, gosh but you are beautiful. But Doctor, I was not flattered, he had too much cherry brandy.

The year has passed but I am not yet well. I don't think you are a good prophet. But you were right when you said I should not leave St. Lukes. It's a case of we live & learn.

Yours sincerely,

CHICKQUETTA HOCKING.

Exhibits.

"L."

"L." Prescriptions of Dr. G. Bell, 31st October 1939.

TWO PRESCRIPTIONS of Defendant—one undated—one dated 31st October 1939.

St. Luke's Hospital,
Roslyn Street,
Darlinghurst.
31.x.1939.

Mrs. Hocking.

℞

Ammon. Bromid.	gr. X $\ddot{\text{II}}$
Mag Carb. Pond.	gr. $\overline{\text{XX}}$
Bismuth Carb.	gr. $\overline{\text{X}}$
Pulv. Trag. Co.	qs.
Tr. Carminativæ	m $\ddot{\text{IV}}$
Aq. menth. pip ad	℥

Fl.Mist.

Sig. Shake the bottle

℥ t.d.s. p.c.

℞ Halivol Capsules P.D. & Co.

Sig. 2 nocte.

Mitte
X $\ddot{\text{II}}$

GEORGE BELL.

Undated.

St. Luke's Hospital,
Roslyn Street,
Darlinghurst.

Mrs. Hocking.

℞ Tabloid calcii lactatis
B. W. & Co.
gr. 5

Sig. 2 t.d.s. p.c.

Mitte
50

GEORGE BELL.

"M."

PRESCRIPTIONS of Dr. H. S. Marsh.

Exhibits.

"M." Prescriptions of Dr. H. S. Marsh, 31st October 1939.

St. Luke's Hospital,
Roslyn Street,
Darlinghurst.

31.10.39.

Mrs. C. Hocking.

℞ Glyco Thymoline ℥ ⁞ Xll

Sig. ℥ss in a tumbler of warm water to gargle thrice daily.

10

℞ Ac. carbol gr. ℣

Glycerin ad. ℥ ℈

F Prig Sig. Paint the throat b.d.

H. SEWARD MARSH.

Exhibits.

" O."

" O."

Particulars 25th August 1941.

PARTICULARS.

Letter from A. S. Boulton, Lane, Rex and Co. to Wilson, Steed & Clapin, dated 21st February, 1941.

In this action, it would appear from the declaration, that the Plaintiff is alleging that Dr. Bell has been guilty of negligence in and about the performance of an operation on the Plaintiff and also in and about medical attention subsequently to the operation. We understand that it is alleged by the Plaintiff that some time after the Plaintiff had returned to her home in the country she passed per rectum what is alleged to be a piece of rubber tube for the presence of which in the Plaintiff's body the Defendant in this action is alleged to be responsible and that this allegation is the basis of the alleged negligence on the part of Dr. Bell.

Before filing pleas to the Plaintiff's declaration herein, we ask you to inform us whether the above statement correctly sets out the gist of the Plaintiff's allegation in this action ; and if so, to supply us with the following particulars in respect of the same :—

1. Was the said operation performed on the 15th March, 1938 ?
2. Was the said operation performed at St. Luke's Hospital, Darlinghurst ?
3. Was the medical attention subsequent to the operation of which the Plaintiff complains, given at St. Luke's Hospital, and if so over what period ?
4. What act or omission on the part of the Defendant during or in the performance of the said operation is it alleged constitutes the negligence on the part of the Defendant on which the Plaintiff relies ?
5. What act or omission on the part of the Defendant during the post operative treatment, is it alleged constitutes the negligence on the part of the Defendant on which the Plaintiff relies ?

Letter from Wilson & Clapin to A. S Boulton, Lane, Rex & Co., dated 25th August, 1941.

In reply to your letter of the 21st February last asking for certain particulars in this matter, we have to inform you that your client, long before the commencement of this action interviewed Mrs. Hocking with reference to her illness following on the performance of the operation upon her by your client and was thus made aware of the nature of Mrs. Hocking's allegations against him. However, we propose to give you the best particulars which are available in the circumstances.

First with reference to the first two paragraphs of your letter, the Declaration is perfectly clear and we see no reason to elaborate the matters therein set forth.

With reference to the specific questions asked, we answer these as follows :—

1. Yes.
2. Yes.
3. Yes. 15th March, 1938 to 14th April, 1938.

4 & 5. For reasons which we have already indicated, we are entirely unable to set forth in technical medical language the precise acts of negligence on the part of the Defendant. You may take it, however, that putting the position briefly the Plaintiff will allege that she was operated upon by your client in the lower region of the throat ; that a piece of drainage tube was inserted in the wound by your client and that this drainage tube was so negligently or unskilfully manipulated by your client that it broke and that your client thereafter negligently failed to remove the portion of the said drainage tube remaining in the wound with the

result that the Plaintiff developed a complaint believed to be tetany in a very acute form—to such an extent that she was dangerously ill over a period of more than eighteen (18) months and that she only recovered from this illness on the passing of this piece of tube into the gullet whence it ultimately passed from the body per rectum.

6. When is it alleged that the Plaintiff passed a piece of rubber tube per rectum ?

6. This is a matter of evidence but as a matter of courtesy we inform you that the piece of tube was passed at about 8 a.m. on Thursday 5th October 1939.

7. What is it alleged is the nature and description of the piece of rubber tube and in particular the shape, size, length and colour thereof :

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

8. With regard to the alleged passing of the piece of rubber tube, is it alleged by the Plaintiff that any other foreign body was passed at the same time ? If so what are the nature and particulars thereof and was such other foreign body attached or otherwise connected with the alleged piece of rubber tube ?

8. See answer to Question 7. The swab and wire appeared to be the only other foreign bodies passed.

9. In whose possession is the alleged piece of rubber tube at the present time and where can the same be inspected on behalf of the Defendant ?

9. As the Defendant is already aware the tube, etc., is no longer in the possession of the Plaintiff, having been discarded by her at the time of its passing.

10. When is it alleged that the piece of rubber tube entered into the body of the Plaintiff ?

10. At the time of the operation.

11. How is it alleged that the piece of rubber tube entered into the body of the Plaintiff ?

11. By the agency of the Defendant.

12. In what manner and to what extent is it alleged that the piece of rubber tube injured the Plaintiff in her health and constitution and caused pain to the Plaintiff ?

12. See answer to Questions 4 and 5. The Plaintiff was for a period of over eighteen (18) months so dangerously ill that at times it was thought she could not live. The pain suffered by the Plaintiff would probably be well within the knowledge of your client.

13. With regard to the particulars supplied by the Plaintiff under Rule 517 :—

13. (*a*) The times when and the purposes for which the amounts referred to were incurred were as follows :—

(*a*) When and for what purpose were the following items incurred and how are the said amounts made up :—

Dr. Ritchie	March to April 1938 for medical attention for Plaintiff.

Exhibits.

"O."
Particulars, 25th August 1941, *continued.*

Dr. Harold Ritchie ..	£5	5	0
Dr. Kevin O'Hanlon ..	£30	4	6
Sister Sly	£23	7	6
Miss Maher & Miss Barnett	£60	0	0
Dr. Hansman	£6	6	0
Dr. Marsh	£3	3	0
Dr. Harold Ritchie ..	£3	3	0

Dr. O'Hanlon	April 1938 to October 1939—medical attention for Plaintiff.
Sister Sly	9th June 1938 to 14th July 1938—nursing attention for Plaintiff.
Miss Maher & Miss Barnett	April 1938 to October 1939—for nursing and general attention to the Plaintiff at various times between these dates.
Dr. Hansman	November 1939—for blood test.
Dr. Marsh	November 1939—for throat examination.
Dr. Ritchie	November 1939 March and May 1940—medical attention to Plaintiff.

(*b*) What physical condition of the Plaintiff is alleged necessitated the Plaintiff entering Hospitals when the following accounts were incurred :—

Quirindi Hospital ..	4/5/38
to	9/6/38
,, ,,	3/9/38
to	7/9/38
St. Luke's Hospital ..	26/10/39
to	3/11/39

and what act of negligence is alleged to have caused such physical condition ?

(*b*) Mrs. Hocking's admission to Quirindi Hospital was necessitated in both instances by the severity of the tetanic spasms causing unconsciousness and necessitating proper nursing and treatment. Her re-admission to St. Luke's Hospital was, inter alia, because of the purulent discharge into her throat after the passing of the portion of drain tube. The acts of negligence causing her condition are set out in the answer to your questions 4 and 5.

(*c*) What are the full particulars of the items shortly stated as follows :—

Chemists	£35	0	0
Incidental and travelling expenses	£50	0	0

We confirm our telephone conversation of yesterday to the effect that time for the filing of pleas by the Defendant shall not be deemed to run until particulars have been supplied.

(*c*) With regard to the amount paid to the chemist, this is an estimate only, as no detailed records were kept. The payments were made to Mr. R. H. Davies, Chemist of Quirindi.

With regard to the item Incidental and Travelling Expenses, this again is an estimate, as precise records were not kept. Roughly the amount of £50 is made up as follows :—

Rail fares from Quirindi to Sydney and back ..	£11	10	0
X-ray Quirindi Hospital ..	2	1	0
Cost of accommodation of Sister Sly	6	5	0

Exhibits.

"O."
Particulars, 25th August 1941, *continued.*

Cost of accommodation of Plaintiff whilst visiting Sydney as the result of her condition as previously referred to	25	0	0
Sundries—items used in the treatment of the Plaintiff and purchased from persons other than R. H. Davies—These were 3 Bottles pirophan tablets @ 3/6		10	6
Thyroid and medinal tablets		6	6
1 Tin Gluco Phos.		3	6
3 Tins Calcium Gluconate tablets		10	6
Cotton Wool, spirits etc. used for dressing and sterilising, say	1	0	0
2 x 500 jars Calcium tablets		15	0
3 x 1 lbs. calcium lactate powder		15	0
3 tins Glucose D.		9	0
Quantity cod liver oil (used) with calcium	1	0	0
1 x 5 cc. Syringe (used for parodin injections) ..		10	6
1 x 10 cc. for intravenous injections		12	6
3 bottles parathyroid tablets @ 10/6	1	11	6
	£8	4	6

Exhibits

"Q."
Blood Count by Dr. A. H. Tebbutt, 28th October 1939.

"Q."

BLOOD COUNT by Dr. A. H. Tebbutt.

Dr. A. H. Tebbutt
Dr. F. S. Hansman Pathological & Biochemical Laboratories.
Telephone BW 4649. "Harley,"
143 Macquarie Street,
Sydney.

28th October, 1939.

Dr. George Bell,
133 Macquarie Street,
Sydney.

Reporting on Mrs. Hocking.

FULL BLOOD COUNT

Total red blood cells	4,950,000 per cmm.
Hæmoglobin value	94% (13 gm)
Colour Index	1.0.
Total Leucocyte count	5,700 per cmm.

Hæmatocrit reading (volume of packed red cells) = 42.

Mean corpuscular volume = 86 cu. (normal 75–95).
,, ,, hæmoglobin = 26 (,, 26–31).
,, hæmoglobin concentration = 31% (,, 32–36).

These results show that there is no anæmia, and in stained films the red cells show no pathological changes. Reticulocytes are present in normal numbers, also platelets. The leucocytes show no significant pathological change.

The Wassermann test gives a negative result.

The calcium content of the blood was estimated at 7.2 mgm. %.

With kind regards,

Yours faithfully,

A. H. TEBBUTT.

F.S.H.

Exhibits.

"T."

LETTER, Dr. O'Hanlon to British Medical Association.

"T." Letter, Dr. K. C. O'Hanlon to British Medical Association, 12th April 1940.

Thomas Street,
Quirindi.

12th April 1940.

Confidential.
The Secretary,
British Medical Association,
Sydney.

Dear Sir,

On 13th March 1938 a patient of mine (Mrs. E. Hocking) was operated on (Thyroidectomy) by a Sydney surgeon.

From approximately that time until October 1939 the patient was very distressed by tetanic spasms which came on very frequently, at times she was desperately ill.

On 2nd October 1939 Mrs. Hocking maintains "something" worked into her throat which almost choked her, she swallowed it and on 5th October she says she passed a piece of rubber tube p.r. From that date she has been quite well. The "tube" was disposed of by way of the lavatory.

Mr. and Mrs. Hocking are of the opinion that a piece of drainage tube was left in her neck and was responsible for her condition from the time of the operation.

They propose seeking compensation and today their Solicitor asked me to furnish him with a report of the case, this I refused to do until I obtained an opinion from you as to my position.

I would be very pleased if you would advise me as early as possible as I am being pressed for the report.

Yours faithfully,
KEVIN O'HANLON.

"T."

LETTER, British Medical Association to Dr. Kevin O'Hanlon.

"T." Letter, British Medical Association to Dr. K. C. O'Hanlon, 13th April 1940.

British Medical Association,
New South Wales Branch,
135 Macquarie Street,
Sydney.

13th April 1940.

CONFIDENTIAL:
Dr. Kevin O'Hanlon,
Thomas Street,
Quirindi.

Dear Sir,

In reply to your letter of the 12th instant, I would advise you, in view of the fact that any statement you make may be misconstrued, to refuse to make any statement.

Faithfully yours,
J. G. HUNTER,
Medical Secretary.

Exhibits.

"8."
Synopsis of temperature, pulse and respiration charts from Hospital Records (St. Luke's, 1938).

DEFENDANT'S EXHIBITS.

"8."

SYNOPSIS of Temperature, Pulse and Respiration Charts from Hospital Records (St. Luke's 1938).

(D=Day. N=Night.)

		Temperature.	Pulse.	Respiration.	Date in Hospital Records.
Feb. 21	(Dr. Bell)		132		
March 11	(D)		88–92–96		Mar.11 (D)
March 15	(Operation)				
,, 16	6.30 a.m.		98–120		,, 15 (N)
,, 16	(D)		96–104	Slow	,, 16 (D)
,, 17	4 a.m.	99.4	100	18	,, 16 (N)
,, 18	4 a.m.	101.8	100	26	,, 17 (N)
	7 a.m.	99.4	84	22	
,, 18	(N) 8 p.m.	101.4	98	24	,, 18 (N)
	12 p.m.	98.8	96	22	
,, 19	2 a.m.	102.4	100	24	,, 18 (N)
,, 19	(D) noon	101.4	96	24	,, 19 (D)
	4 p.m.	100	92	22	
	(N)	102.8	98	26	
	later	97	88	22	
,, 20	4 a.m.	103.8	98	26	,, 19 (N)
,, 20	(D) noon	103.2	100	24	,, 20 (D)
	4 p.m.	102	102	22	
,, 21	(D) Temp. Swinging		Pulse more steady		
,, 21	(N) 8 p.m.	101 (elevated)	80	20	,, 21 (N)
,, 22	(D) 4 p.m.	100.2	98	20	,, 22 (D)
		(Normal till 4 p.m.)			
,, 23	4 a.m.	97	76	20	,, 22 (N)

March 22 last record.

Exhibits.

"14."

Letter, Dr. K. C. O'Hanlon to Dr. H. J. Ritchie, 12th February 1938.

"14."

LETTER, Dr. O'Hanlon to Dr. Ritchie.

"Maringa,"
Thomas Street,
Quirindi.
12/2/38.

Dear Dr. Ritchie,

In reference to Mrs. Hocking who will consult you on Monday—I first saw her last August when she complained of an irritating rash on her back and shoulders. Some weeks later as she had not improved I referred her to John Flynn who treated her with X-ray over the affected areas with fair results. On her return to Quirindi she was very wretched, had lost much weight, her thyroid gland was very prominent, very coarse tremor, clammy skin and very rapid heart rate and generally speaking a "bundle of nerves." I put her in Hospital for about three weeks at complete rest. Quinine Hydrobromide gr. $\dot{x}$ produced evidence of Cinchonism which I understand is against hyperthyroidism. On several occasions in Hospital the rash on the shoulders returned and there was little response as regards improvement in the heart rate. However, Mrs. Hocking gained about two pounds in weight though evidence of increased metabolism persisted. Yesterday when I saw her, though she has continued to gain in weight—I was not satisfied, the tremor is very marked, heart rate 150 (this varies). I feel that she is thyrotoxic though there are some features about Mrs. Hocking which just don't fit in.

Kind regards,

Yours sincerely,

KEVIN O'HANLON.

Exhibits.

"24."

"24."

LETTER, Respondent's Solicitors to Appellant's Solicitors.

"24." Letter, Respondent's Solicitors to Appellant's Solicitors, 28th November 1941.

12 O'Connell Street,
Sydney.
28th November 1941.

Messrs. Wilson & Clapin,
Solicitors,
14 Martin Place,
Sydney.

Dear Sirs :

BELL ats HOCKING.

We refer to the Writer's telephone conversation with your Mr. Wilson on the 14th instant concerning a proposed medical examination of your client, when Mr. Wilson stated that the matter of submitting Mrs. Hocking to a medical examination on behalf of the Defendant would be considered by Counsel.

We have heard nothing further from you and shall be glad if you will let us know whether your client will consent to this course so that arrangements to that end may be made in an anticipation of her coming to Sydney for the trial of this action.

Yours faithfully,
A. S. BOULTON, LANE, REX & CO.,
Per Geoffrey R. Rex.

"24."

LETTER, Appellant's Solicitors to Respondent's Solicitors.

Exhibits.

"24."
Letter, Appellant's Solicitors to Respondent's Solicitors, 1st December 1941.

Wilson & Clapin
Solicitors

Colonial Mutual Chambers,
14 Martin Place,
Sydney.

1st December, 1941.

Messrs. A. S. Boulton, Lane, Rex & Co.,
Solicitors,
12 O'Connell Street,
Sydney.

Dear Sirs,

HOCKING *v.* BELL.

Your reference : R/J5027.

We acknowledge receipt of your letter of the 28th ultimo and regret that we overlooked communicating with you again in regard to your request for medical examination of Mrs. Hocking. It is not alleged that Mrs. Hocking's health is now impaired and as her present condition is not relevant to the action and we cannot therefore consent to submit Mrs. Hocking to a medical examination by or on behalf of the Defendant.

In order to save the expense of strict proof, we shall be glad to know whether you are prepared to admit all or any of the items of expense set out in the particulars. We are not at the moment in possession of various receipts, but expect to have them in the next day or two and if you are prepared to admit the items subject to production of the receipts, we will produce them to you when we receive them. Your early reply would oblige.

Yours faithfully,

WILSON & CLAPIN,

Per : W. J. Southey Wilson.

No. 84 of 1946.

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

STELLA EILEEN HOCKING (Plaintiff) - - - - *Appellant*

AND

GEORGE BELL (Defendant) - - - - - - - *Respondent.*

RECORD OF PROCEEDINGS

VOLUME 4

(Pages 1547 to 1723)

BLYTH, DUTTON, WRIGHT & BENNETT,
112 GRESHAM HOUSE, E.C.2,
Solicitors for the Appellant.

LIGHT & FULTON,
24 JOHN STREET,
BEDFORD ROW, W.C.1,
Solicitors for the Respondent.

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