Privy Council Appeal No. 84 *of* 1946

Stella Eileen Hocking - - - - - - - - *Appellant*

v.

George Bell - - - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER, 1947

Present at the Hearing:

VISCOUNT SIMON
LORD PORTER
LORD UTHWATT
LORD DU PARCQ
LORD OAKSEY

[*Delivered by* VISCOUNT SIMON]

This is an appeal by the plaintiff *in forma pauperis,* brought by leave of the Privy Council from a decision of the High Court of Australia. (Rich, Starke and McTiernan, J.J., Latham, C.J. and Dixon, J. dissenting). The litigation out of which the appeal arises has a regrettably long history, for the case has been before a Judge and jury of New South Wales no less than four times. The jury on each occasion consisted of 4 members. After the first trial, which resulted in a verdict and judgment for the plaintiff for £500, the Supreme Court of New South Wales ordered a new trial on the ground that the verdict was against the weight of evidence; at the second trial, and again at the third trial, the jury disagreed, being equally divided; and at the fourth trial (which is the one with which this appeal is immediately concerned), the jury found a verdict for the plaintiff for £800 damages, and the Trial Judge on January 21st, 1944, gave judgment accordingly.

From this decision the defendant appealed to the Supreme Court of New South Wales, claiming that judgment should be entered for him or, alternatively, that a new trial should be ordered, and the appeal was heard by Davidson, Halse Rogers and Roper, J.J. Of the 14 grounds adduced, the main one was that the verdict was against the weight of evidence and was such as no reasonable jury could have found. One of the further grounds was that, in the circumstances, the defendant was entitled " as a matter of law " to succeed. This ground is based on Section 7 of the Supreme Court Procedure Act, 1900, with the interpretation and application of which their Lordships will subsequently deal. The Supreme Court allowed the appeal and directed that judgment should be entered for the defendant, though Mr. Justice Roper's view was that the proper order to make would be for yet another trial. The plaintiff then appealed to the High Court of Australia which, by a majority, as already stated, affirmed the decision of the Supreme Court.

It is now necessary for their Lordships to state the nature of the claim and defence in this complicated case, and outline the evidence on either side. The whole of this evidence, which is very voluminous, has been closely scrutinised by the Board with the help of Counsel on either side, but their Lordships must emphasize that it is no part of their duty to express, or even to form, their own opinion on facts in controversy. A finding on such facts is for the jury. Their Lordships' function is to determine whether the verdict of the jury can be supported and if not, whether the judgment for the defendant now appealed against can stand; if both of these questions were to be answered in the negative, then the question of a new trial would have to be considered. In these circumstances, it is not necessary for their Lordships to recount all the material evidence in detail, though they have considered every part of it with anxious care. For the purposes of the present appeal a summary of the salient matters is sufficient.

On January 15th, 1941, the present appellant, Mrs. Hocking, issued a writ for damages for negligence against the present respondent, Dr. Bell, who is a surgeon of high standing and great experience, in respect of his treatment of her, following upon an operation of thyroidectomy which he performed on her in St. Luke's Hospital, Sydney, on March 15th, 1938. No criticism is made of the skill with which the operation itself was performed, but what Mrs. Hocking alleges is that when, a few days later (in fact on March 17th), Dr. Bell personally undertook the removal of the rubber drainage tube from her wound, he did not remove the whole of it, but negligently left *in situ* a portion of its inner end, which broke off—it is suggested that it was caught and held by a stitch—and never got it out. A few days later the wound, from whatever cause, became heavily infected. After many purulent discharges it ultimately closed at the end of June, and the plaintiff's case is that the foreign body, enclosed in a suppurating cavity, brought about violent and painful attacks of tetany—that is, uncontrollable spasms of the muscles. Such attacks might occur through infection interfering with the normal functioning of the para-thyroid glands. These attacks, according to the plaintiff's case, recurred from time to time until a period of more than 18 months from the operation had elapsed, and were accompanied by severe and painful swellings in the neck. But on October 2nd, 1939, during a particularly severe tetanic spasm, a portion of tube, as she alleges, was carried into her mouth, owing to the bursting out from her left tonsil of the abscess surrounding this foreign body. The plaintiff's case therefore essentially involves the view not only that a portion of the tube was left behind on March 17th, 1938, but that it travelled from the thyroid area into and through the tonsil. According to the plaintiff's evidence she could not do other than swallow this object, for her teeth were spasmodically clenched, and three days later she found it after a bowel motion. The object was not forthcoming at the trial, for it was, she said, owing to her weakness, accidentally dropped in the water-closet receptacle when she was emptying the commode-pan. It was carried away by the flush. But before this happened the plaintiff said that she had picked it out with her thumb and finger and examined it, and on the same day, after its loss, she made from recollection a pencil drawing of it—not, she said, to scale. The drawing was an exhibit at the trial. A particularly curious feature of the plaintiff's description and drawing is that there projected from the recovered piece of tube two filaments which had the appearance of wires, and that in the exposed interior, where the tube appeared to have a " V " shaped cut, there appeared something which she described as like " a marine sponge " or " swab ". After the alleged expulsion of this object the appellant never had any further attack of tetany.

To this remarkable story, the respondent, besides criticising it by reference to hospital records, and by what had been said at the earlier trials; opposed an impressive body of scientific evidence drawn from medical experts of high qualifications and experience, to the effect that the alleged travelling of a foreign body, and especially such a body as the plaintiff alleged, from thyroid to tonsil could not in fact occur. According to this

evidence, the contents of that portion of the neck are too closely packed, and the compartments of the neck too completely separated, to permit of such passage; moreover, the suppuration involved in such an abscess eating its way by any route that could be suggested, between these two points, must, according to this evidence, in any case have involved vital organs with fatal results. In a word, the respondent's case was that the thing was impossible, and therefore that it did not happen. A contrary view was taken by two medical experts called by the plaintiff, one, Professor Welsh, a former Professor of Pathology in the University of Sydney, and the other, Dr. Thompson, and much depends in this appeal on examining the testimony of these two witnesses in order to see whether in the result, they conceded the essential proposition of the defendant's experts or whether there emerged at the end a difference of opinion as to the possibility of the events alleged by the plaintiff having happened.

At the trial the Learned Judge, in the course of a careful summing up, which showed a full appreciation of the difficulties in the plaintiff's way, invited the jury to say whether it accepted the plaintiff's account of the object said to have been left in the wound after the operation, and he provided each member of the jury with a specific question on the point, which the jury, as the learned Judge pointed out, was not obliged to answer. The jury, however, did answer it in a modified form, in addition to finding a verdict for the plaintiff. Their Lordships take the view that the two answers of the jury must be combined, and the verdict would therefore run as follows:—

" We find that the defendant left in the site of the operation a piece of rubber tube of a length somewhat less than two inches, cut off straight at one end, and torn at the other, part of which tube had been cut down one side and from which protruded some material which looked like wire and a swab from the torn end of the tube, and we accordingly find a verdict for the plaintiff for £800."

Some discussion arose before their Lordships and at the earlier stages of the trial as to the meaning to be attributed to the phrase " which looked like wire and a swab ", but their Lordships have no doubt that the true meaning is " which looked like wire and looked like a swab "—there is no finding that either of the things referred to was in fact wire or in fact a swab. The evidence of the plaintiff when fairly read is, in their Lordships' opinion, plainly asserting not the true character of these strange objects, but merely what they looked like. If the plaintiff's story were to be accepted, it would not be inconsistent with her description to imagine that the filaments were pieces of stitching material (if indeed stitching material of this length and durability were used), and that the thing like a swab was *detritus* of some sort picked up in the passage of the foreign body at some stage in its course. The real issue in the case, in their Lordships' opinion, does not turn on these minutiæ, strange and surprising as they may be, but upon the broad issue whether the jury should be upheld in believing the plaintiff's story in view of the mass of evidence brought against its possibility.

In dealing with appeals in New South Wales, there is no provision corresponding to Order 58, Rule 4 of the Rules of the Supreme Court in this country, by which the appeal tribunal is authorised to draw inferences of fact and to enter judgment if it thinks fit notwithstanding the verdict of the jury. In making this observation their Lordships must not be understood to imply that, if such a Rule existed in New South Wales, the present case might fall within it, for the Supreme Court of New South Wales, in directing that, notwithstanding the verdict of the jury, judgment should be entered for the defendant, was not merely drawing an inference of fact, but was taking the view that no reasonable jury could find otherwise than against the plaintiff. The observations of Chief Justice Latham on this point in the course of his judgment in this case, were not, as their Lordships understand, disputed by the defendant's counsel, and in any case

their Lordships consider that these observations were perfectly correct. The passage is as follows:—

> " After a trial by jury the Full Court of New South Wales 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:—
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> > ' 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 a 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.'
>
> " 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."

The Chief Justice's application of the section is, as it seems to their Lordships, perfectly in point. If, at the end of the hearing of witnesses, the evidence is all one way, so that no jury can reasonably find for the plaintiff, and a verdict and judgment in favour of the plaintiff are nevertheless given, it is within the competence of the Supreme Court to direct that verdict and judgment should be entered for the defendant. The main question in this appeal really is whether that is the situation with which the Supreme Court had to deal.

It appears to their Lordships that the situation that there is no evidence upon which a jury can reasonably base their verdict may arise at one of two stages, either at the end of the plaintiff's case or, sometimes, at the close of all the evidence. When the burden of proof rests on the plaintiff and at the end of the plaintiff's case this burden has not been discharged, the plaintiff may at that stage be non-suited: mere speculative possibility not being the same thing as *prima facie* proof. It would not, in their Lordships' opinion, be possible to say in the present case that when the plaintiff's case was closed there was no evidence to support it. To go no further, there was the evidence of the plaintiff herself, as well as that of her two medical witnesses. But there is a second stage at which it may sometimes be correct to decide that the plaintiff cannot succeed and that the defendant is entitled to judgment. This is at the end of all the evidence if there is undisputed evidence of further facts called by the defendant which render it impossible to accept the plaintiff's story, or which negative the assumption on which the plaintiff's case depends. To give a simple example, if a plaintiff brings an action for trespass and proves that the defendant, without his permission entered upon his premises, this situation established at the end of the plaintiff's case would not justify a non-suit; but if the defendant thereupon proves beyond dispute that he was authorised by lawful authority to enter, the plaintiff's case collapses and there is nothing left in issue upon which the jury can decide in the plaintiff's favour. This is the essence of the defendant's contention here. He claims that though the plaintiff made a *prima facie* case in the first instance, the

evidence subsequently called established beyond dispute that what the plaintiff alleged and swore to have happened could not possibly have happened, and, this not being an age of miracles, the defendant must succeed. Their Lordships must therefore proceed to examine the testimony for the purpose of seeing whether, on the evidence taken as a whole, this is the resultant position.

On this crucial question, their Lordships find themselves in substantial agreement with the judgments of Chief Justice Latham and Mr. Justice Dixon. Whilst not expressing any opinion as to what their own view would have been if the responsibility of deciding the facts rested with them and not with the jury, who saw and heard the witnesses, they agree with Chief Justice Latham and Mr. Justice Dixon that there was evidence upon which the jury were entitled to find a verdict in favour of the plaintiff. It cannot be suggested, nor has it been suggested, that any matter of fact has not been fully and sufficiently sifted. There was a conflict of evidence between the witnesses for the plaintiff and the witnesses for the defence on nearly all the material issues in the case, viz. the circumstances of the removal of the tube by the defendant on the 17th March 1938, the condition of the plaintiff's health from 1938 to October 1939, the condition of the plaintiff's left tonsil after the 2nd October, 1939 and the possibility of the object described by the jury travelling from the thyroid gland to the tonsil.

In their Lordships' view it is impossible to say that there was not evidence for the plaintiff which entitled the jury to resolve all these issues in favour of the plaintiff. In particular, there was the evidence of the plaintiff as to the removal of the tube and also the evidence of Mrs. Warburton which may have influenced the jury on this question; there was the evidence of the plaintiff, of her husband, of Sister Sly, of Mr. and Mrs. Nancarrow, of Fisher, of the hospital records, of Dr. O'Hanlon's contemporary letters as to the plaintiff's condition coupled with the admitted fact that the plaintiff was throughout treated for real tetany and that the diagnosis of hysteria was never suggested by anyone at the time except by Dr. Ritchie to the Defendant and by Dr. O'Hanlon in one sentence of the letter of 17th January 1939; there was the evidence of Professor Welsh and Dr. Thompson that the plaintiff's left tonsil when examined during the first trial was in a condition consistent with the passage of the tube through it; and there was the evidence of these two doctors that, in their opinion, an object such as was described by the jury might have travelled from the thyroid gland to the left tonsil.

It is true that Professor Welsh and Dr. Thompson agreed that the construction built up at a previous trial when the plaintiff was in the box which was produced as exhibit "P", and which had actual wires in it, could not have travelled from the thyroid gland to the tonsil, but the question put to the jury and their answer to it, in their Lordships' view, was not intended to refer to exhibit "P". The plaintiff more than once repudiated the suggestion that "P" was an exact replica of the actual object.

If, therefore, the jury believed the evidence of the plaintiff as to her experiences from the 2nd to the 5th October 1939,—as to which there was not, and, of course, could not be, contradictory evidence,—they were entitled to draw the inference from the body of evidence to which their Lordships have referred that an object such as the jury described had been left by the defendant in the plaintiff's neck after the operation. The evidence called for the defence was, no doubt, entitled to great weight and the circumstances of the case are of a most unusual nature; but their Lordships do not think, particularly in view of the results of the four trials, that it can be said that no reasonable jury could have reached the verdict at which the jury in this case arrived. There is therefore no adequate ground for ordering a new trial.

Their Lordships will therefore humbly advise His Majesty that this appeal shall be allowed and judgment entered for the plaintiff for £800 with such costs here as are allowed to persons appearing *in forma pauperis* and taxed costs in the Courts in Australia.

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In the Privy Council

STELLA EILEEN HOCKING

v.

GEORGE BELL

DELIVERED BY VISCOUNT SIMON

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