

In the Privy Council.

No. 84 of 1946.

UNIVERSITY OF LONDON

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INSTITUTE OF LEGAL STUDIES

LEGAL STUDIES

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

44264

BETWEEN

STELLA EILEEN HOCKING (Plaintiff) - *Appellant*

AND

GEORGE BELL (Defendant) - *Respondent.*

Case for the Appellant.

10 1. This is an Appeal in forma pauperis, by special leave, from a judgment and order of the High Court of Australia made and given on the 10th August 1945 dismissing an appeal by the Appellant from a judgment and order of the Full Court of the Supreme Court of New South Wales made and given on the 3rd August 1944, whereby the said Full Court set aside a verdict and judgment for the Appellant in the sum of £800 and entered a verdict and judgment for the Respondent. RECORD.
p. 1678.
p. 1583.

20 2. The said action was one for negligence—the Appellant alleging that the Respondent, a surgeon, had been negligent in failing to remove from the Appellant portion of a rubber drainage tube. By her particulars the Appellant defined the negligence charged as follows:—

30 “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 months; and that she only recovered from this illness on the passing of this tube into the gullet, whence it ultimately passed from the body per rectum.” p. 1714, l. 42.

3. The said action was tried on four occasions by four Juries.

On the first occasion the Jury returned a verdict of £500 in favour of the Appellant. This verdict was set aside by the Full Court of the Supreme Court of New South Wales, upon the grounds that the verdict was against evidence and the weight of evidence.

p. 1580, l. 16. Upon the second and third trials the Juries disagreed, and upon the fourth trial a verdict was found for the Appellant in the sum of £800.

p. 1580, l. 23. In returning such verdict the Jury made the following special finding, namely: "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."

p. 1581. 4. Thereupon the Respondent moved the Full Court of the Supreme Court of New South Wales, asking that by virtue of Section 7 of the Supreme Court Procedure Act.1900 the said verdict of the Jury in favour of the Appellant should be set aside and a verdict and judgment entered for the Respondent. The said Section is as follows:— 10

"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 be entered."

p. 1583. 5. On the 3rd August 1944 the said Full Court by majority (Mr. Justice Roper dissenting) ordered that the said verdict of the jury in favour of the Appellant should be set aside and ordered judgment to be entered for the Respondent with costs. 20

p. 1678.
p. 1679, l. 26. 6. Thereupon the Appellant appealed to the High Court of Australia and on the 10th August 1945 the said High Court by majority (The Chief Justice Sir John Latham and Mr. Justice Dixon dissenting) dismissed the said appeal with costs.

p. 1681. 7. The Appellant then sought special leave to appeal in forma pauperis to the Judicial Committee of His Majesty's Privy Council and on the 18th day of March 1946 such special leave was granted.

8. The following paragraphs numbered 9 to 80 contain a resume of the evidence given on behalf of the Appellant largely extracted from the judgment of His Honour the Chief Justice Sir John Latham. 30

9. The evidence adduced for the Appellant consisted of the testimony of the Appellant 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 David Arthur Welsh and Dr. George Stanley Thompson.

10. There was evidence that the Appellant was in ill health in 1937. She had an enlarged thyroid gland, she was examined by Dr. K. O'Hanlon at Quirindi on the 23rd August 1937. 40

11. That 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 (exophthalmic goitre) and causes a loss of weight.

12. That Dr. Ritchie was of opinion that an operation was desirable and he referred the Appellant to Dr. Bell. Dr. Bell is a surgeon of extensive experience and with high qualifications. The Appellant went into St. Luke's Hospital and was prepared for the operation during a period of rest and treatment.

10 13. That 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 sternomastoid muscle. The infrahyoid muscles would be either separated or cut, the petrachal 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 the operation to avoid damage to the parathyroid glands which
20 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.

14. That in order to provide drainage of the wound, a rubber tube is inserted into the place which had been occupied by the thyroid gland.
30 It is a common practice to cut a small diamond shaped cut in the tube towards the inner end to assist drainage. The tube may be inserted either before or after the stitching is completed. The Respondent was not sure whether he finished stitching before or after the tube was placed in position.

15. That the doctor who gave the anæsthetic to the Appellant had no recollection of the operation but said that the practice of the Respondent, with which he was familiar, was to do some internal stitching, after he had inserted the tube. p. 1163, l. 24.
p. 1234, l. 1.

16. That the hospital records show a normal progress on 15th and 16th March. On 17th March these records state: "Tube removed and
40 3 sutures. Less Discharge. Condition good." Exhibit "A."
p. 1686, l. 1.

17. That the following is the Appellant's account of the removal of the tube:— p. 194, l. 4.

" . . . 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)."

p. 575, l. 48.

p. 577, l. 18.

p. 578, ll. 8-33.

18. That the nurse who was present when the tube was removed was not actually identified by any evidence but the Appellant submits that the Jury was entitled to conclude that the witness Jessie Beatrice Warburton in view of her answers given on cross-examination was present when something out of the ordinary was done to the tube by the Respondent. 10

19. That the progress of the Appellant was then not as satisfactory as before. Sutures were removed from time to time but the temperature of the Appellant rose and there was a purulent discharge from the wound, together with swelling of the neck. The discharge continued until the Appellant left the hospital on 14th April, when she went home.

p. 194, l. 44.

p. 606, l. 48.

p. 607, ll. 7-38.

p. 352, l. 20.

20. That before the Appellant left the Hospital she had a feeling of "pins and needles" in her hands and feet and calcium lactate was prescribed by the Respondent. "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. 20

p. 195, ll. 10-29.

21. That when the Appellant went home she still had the feeling of pins and needles, and she had cramps and severe pain in the feet and legs. 30

Exhibit "D."

p. 1698.

22. That Dr. O'Hanlon saw the Appellant on 30th April and on 2nd May her husband wrote to Dr. Bell a letter in which he stated that:—

"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 tonight.

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

Exhibit "D"

p. 1699.

23. That the Respondent replied on 4th May, stating that he had been speaking to Dr. Ritchie about the Appellant and that Dr. Ritchie suggested that she should take calcium in the form of calcium gluconate. 40

p. 195, ll. 27-45.

Exhibit "B."

p. 1692.

24. That the Appellant 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.

25. That on 10th May, Dr. O'Hanlon wrote to the Respondent a letter containing the following :—

Exhibit " D "
p. 1699.

10 " 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 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 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 per cent. 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.

20

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 Sandos preparation. Some Text books regard post operative tetany as being fatal very often—what is your opinion?"

26. That the Quirindi Hospital records, together with the evidence of the Appellant, 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.)

Exhibit " B. "
p. 1692, ll. 8-35.
p. 195, l. 50.
p. 1065, l. 16.

30 27. That 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 recorded up to 1st June.

Exhibit " B. "
p. 1692, ll. 8, 14.
p. 1693, ll. 9, 16.
p. 1696, ll. 26-29.

28. That the records also contain references to swelling in the Appellant's neck.

Exhibit " B. "
p. 1692, l. 34.

29. That on 9th June the Appellant left the hospital and went home. The wound did not finally close until the end of June or the beginning of July.

40 30. That on 29th June the Respondent wrote to the Appellant'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 him up some special injections for him to use.

Exhibit " D "
p. 1700.

31. That during the succeeding months the Appellant was treated by injections sometimes of calcium and sometimes of paroidin—a parathyroid extract.

p. 277, l. 10.

p. 358, ll. 16-28.
p. 412, ll. 1, to
p. 413, l. 39.
p. 671, l. 42.
p. 688, l. 46.

32. That the medical evidence for the Appellant and for the Respondent was that this treatment was essentially a treatment for tetany.

Exhibit "D"
p. 1700.

33. That on 17th January 1939 Dr. O'Hanlon wrote to the Respondent saying that the Appellant 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. 10

p. 276, l. 41, to
p. 278, l. 41.

34. That Dr. O'Hanlon saw the Appellant in February 1939. The Appellant, her husband, and Dr. O'Hanlon gave evidence that the latter stated that he could do nothing further for the Appellant. He did not see her again until September 1939. In the meantime her husband administered calcium and paroidin, sometimes by subcutaneous injections.

Exhibit "D"
p. 1701.

35. That on 27th May the Respondent wrote giving the Appellant his good wishes and saying that he had been talking to 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. 20

p. 197, l. 35.
p. 264, l. 19.
p. 265, l. 25.
p. 337, l. 30.
p. 348, l. 1.

36. The evidence of the Appellant, 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.

p. 286, l. 15.

37. 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.

p. 277, l. 35.
p. 197, l. 32.

38. The Appellant and her husband gave evidence that there was a continuance of the muscular spasms throughout 1938 and during 1939.

p. 278, l. 52.

39. The Appellant and her husband gave evidence that on 2nd October 1939 she had a very violent spasm. Her evidence is as follows :— 30

p. 197, l. 48.

" . . . 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. 40

p. 198, l. 6.

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.

10 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 in my stomach. It went very slowly. It seemed to move down my stomach.”

40. That after the 2nd October the Appellant suffered no spasms.

41. That the Appellant's husband gave purgatives to the Appellant and in 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.

p. 198, ll. 20-24.
p. 198, l. 39.

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42. That on the next day the Appellant 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 :—

Exhibit " C " p. 1698, p. 199, l. 4.

“ 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.

p. 199, ll. 7-10.

30 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 horse hair, and it would fly back quickly straight. It looked like wire to me but it could not have been wire.”

ll. 11-17.

43. That as was pointed out by the said Chief Justice it was not suggested in cross-examination of the Appellant or by any evidence for the Respondent that the Appellant had any knowledge of or familiarity with drainage tubes or the manner in which they might be cut.

p. 1635, l. 47.

40 44. That Dr. O'Hanlon saw the Appellant on 6th October and on 7th October he sent the Appellant's sketch to the Respondent with a letter in which he said :—

Exhibit " D " p. 1701.

“ 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'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. 10

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. 20

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."

Exhibit "D"
p. 1702.

45. That on 11th October the Appellant wrote to the Respondent 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. 30

Exhibit "D"
p. 1703.

46. That the Respondent 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." 40

p. 200, l. 26.

47. That the Appellant came to Sydney on 26th October and went into St. Luke's Hospital. She remained in the hospital until 3rd November.

Exhibit "Q"
p. 1718.
p. 352, l. 17.

48. That 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.

Exhibit "H."
p. 1711.
p. 201, l. 32.

49. That in November 1939 Dr. Ritchie a witness for the Respondent prescribed calcium gluconate for the Appellant.

50. Professor David Arthur Welsh, who was from 1902–1936 Professor of Pathology in the University of Sydney, gave evidence for the Appellant. 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 in 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.

p. 350, l. 28.

p. 351, l. 9.

p. 352, l. 20.

p. 352, l. 23.

p. 352, l. 37.

51. 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.

p. 353, l. 43.

52. Professor Welsh expressed the opinion that the cramp in the fingers which was recorded on 20th March 1938 could be the very early development of tetany.

p. 354, l. 8.

p. 606, l. 47.

53. Professor Welsh expressed the opinion that 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).

p. 354, l. 19.

54. Professor Welsh expressed the opinion that 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 :—

p. 354, l. 44.

p. 386, l. 20.

“ . . . 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.

p. 355, l. 11.

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.”

p. 355, l. 21.

p. 355, ll. 23-26.

p. 385, l. 22.

55. Professor Welsh 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.

p. 199, l. 11.

p. 258, l. 20.

p. 355, l. 30.

56. The Appellant 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 Respondent's advisers took a piece of tube and inserted wires and a piece of swab in it, and the Appellant 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 $1\frac{1}{2}$ inches. Professor Welsh would not suggest that anything like Exhibit "P" with the wires in it could travel in the body. 10

p. 356, l. 1.

57. Professor Welsh 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.

p. 352, l. 27.

p. 358, l. 51.

58. 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 parathyroids would be disorganised, with tetany as a result. He regarded the history of the Appellant 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 p. 48—"The tetany spasm ceased the day after a tapeworm had been expelled." 20

p. 357, l. 11.

59. Professor Welsh also gave evidence that some two years before the trial he had examined the left tonsil of the Appellant, and had seen a distinct scar in the tonsil of the Appellant 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. 30

p. 358, l. 6.

60. 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. 40

p. 399, l. 38.

61. Dr. George Stanley Thompson a legally qualified medical practitioner who graduated in London at the College of Surgeons and the College of Physicians in 1906 and who is a Licentiate of the Royal College of Physicians 1906 and a Fellow of the Royal College of Surgeons 1911 gave evidence

supporting that of Professor Welsh, stating that in his opinion the history of the Appellant'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. p. 400, l. 27.

62. Dr. Thompson expressed his opinion that the illness of the Appellant during 1938 and 1939 was undoubtedly parathyroid tetany. p. 411, l. 12, to p. 412, l. 35.

63. That in his opinion 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. p. 413, l. 1.
10

64. Dr. Thompson gave evidence with respect to the anatomy of the neck, agreeing with witnesses for the Respondent 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) department 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. p. 1289, l. 3. p. 1096, l. 45. p. 1098, l. 30.
20

65. There was evidence that tubes could break. p. 1234, l. 18. p. 1065, l. 15.

66. Dr. Thompson gave evidence that in his opinion the distance from the upper portion of the capsule of the thyroid to the tonsil was about half to one inch and Professor Welsh that the distance was about one to two inches. p. 414, l. 42. p. 355, l. 39.

67. In Dr. Thompson's opinion it was possible for a piece of rubber tube to travel from the thyroid gland to the tonsil. p. 413, l. 38. p. 414, l. 15.

68. 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 pp. 1372, 1373-4. See also Jamieson, Illustration of Regional Anatomy, figure 50, and Tonsil Surgery by R. H. Fowler (1930), pp. 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. p. 414, l. 15.
30

69. Dr. Thompson gave evidence that in his opinion the Quirindi Hospital records showed conclusively that the Appellant had true tetany. p. 412, l. 35.

70. Dr. Thompson 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. p. 414, l. 37. p. 1289, l. 20.
40

p. 415, l. 26.

71. Dr. Thompson also was of opinion that the fact that the calcium content of the Appellant's blood in October 1939 was 7.2 milligrams per cubic centimetre, instead of 10 milligrams, supported the opinion that the Appellant 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.

p. 276, l. 49.
p. 325, l. 44.
p. 415, l. 42.
p. 497, l. 25, to
p. 501, l. 18.
p. 1285, l. 16.

72. The hospital records showed that the Appellant 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. 10

p. 411, l. 3.
p. 416, l. 43.

73. Dr. Thompson agreed with Professor Welsh that the wound might close notwithstanding the presence of a foreign body.

p. 458, l. 32.
p. 1233, l. 19.
p. 1301, l. 41, to
p. 1304, l. 28.

74. Dr. Thompson 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.

p. 406, l. 16, to
p. 407, l. 35.

75. Dr. Thompson examined the Appellant'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. 20

p. 357, l. 40.
p. 407, l. 32.
p. 1283, l. 1, to
p. 1284, l. 32.
p. 1337, l. 30.
p. 766, l. 24.
p. 784, l. 1.
p. 785, l. 13.
p. 1341, l. 12.
p. 789, l. 15.
p. 969, l. 33, to
p. 974, l. 12.
p. 1054, l. 1.
p. 1347, l. 1.
p. 1217, l. 28, to
p. 1221, l. 32.
p. 1230, l. 2.

76. Certain witnesses for the Respondent gave evidence to the effect that the hole in the tonsil referred to by Professor Welsh and Dr. Thompson was the supra tonsillar fossa, and the Appellant submits on the answers given by those witnesses in cross-examination including, particularly the fact that though a further inspection of the tonsil was offered and was accepted by Dr. Marsh, yet that no such further inspection was made that the Jury were entitled to accept the evidence of Professor Welsh and Dr. Thompson and thereby reach the conclusion that the said hole was not a natural hole but had been caused by the bursting of an abscess and the extrusion of the tube. 30

p. 1640, l. 2.

77. His Honour the Chief Justice summed up the Appellant's case as follows: The Appellant's case was that the inner end of the tube, or at 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 Appellant, 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 Appellant 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 Respondent treated the Appellant 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 40

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.

78. As pointed out in the judgment of His Honour the Chief Justice the Appellant submits that certain evidence called on behalf of the Respondent provides instances of Doctors differing and affords support for the Appellant's case and was of such a nature as to entitle the jury to reject the evidence of the expert witnesses called on behalf of the Respondent. p. 1640, l. 43.

79. Some examples of such evidence are as follows :—

(A) There was evidence by a witness for the Respondent 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. p. 1233, l. 17.

(B) In general the Respondent's witnesses and the Respondent himself agreed that suppuration and infection as well as trauma could interfere with the effective operation of the parathyroid glands and so produce tetany. p. 1215, l. 32.
p. 690, l. 24.

(C) One of the Respondent's witnesses however was of contrary opinion. p. 1136, l. 37.
p. 1141, l. 40.

(D) The Respondent's witnesses in general though conceding that pus might travel almost anywhere denied the possibility 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.” p. 924, l. 38.
p. 970, l. 18.

(E) Some evidence for the Respondent was carefully limited to what was described as “ anatomical possibility ” apparently as distinct from pathological possibility and the Appellant was suffering from a pathological condition. p. 990, l. 1.

(F) Some of the Respondent's witnesses were of opinion that the illness of the Appellant after the operation was in the first place true parathyroid tetany but that after about June 1938 the condition was not true tetany but was a condition of hysteria simulating tetany. The Respondent's witnesses differed to some extent in selecting a point of time at which the true tetany ceased and the hysteria commenced. p. 621, l. 42.
p. 627, l. 18.
p. 1125, l. 44.
p. 1191, l. 50.
p. 1242, l. 9.

(G) One witness for the Respondent however was of opinion that the Appellant never suffered from true tetany but was at all relevant times a victim of hysteria. p. 916, l. 21, to
p. 920, l. 42.

(H) It was not disputed that the Appellant was in fact treated as for true tetany and not as for hysteria. p. 761, l. 42.
p. 926, l. 26.

(I) There was much evidence that the Appellant did sometimes lose consciousness. p. 246, l. 21.
p. 263, l. 9.
p. 276, l. 4.
p. 347, l. 30.
p. 825, l. 44.

p. 622, l. 32.
p. 900, l. 20.
p. 1106, l. 29.
p. 1116, l. 8.
p. 1192, l. 32.

p. 711, l. 28.
p. 942, l. 41.
p. 1148, l. 31.
p. 1222, l. 38.
p. 1285, l. 16.

p. 653, l. 36, to
p. 663, l. 2.

p. 1156, l. 39, to
p. 1158, l. 52.

(J) The Respondent'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.

(K) 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.

80. The Appellant submits that certain answers by the Respondent in cross-examination were of such a nature that the Jury were entitled to conclude that such answers amounted to an admission by the Respondent 10 of the negligence charged.

81. The substantial questions of law to be decided by this Appeal are :—

FIRSTLY, whether it is competent under the law of New South Wales for a Court of Appeal to set aside the verdict of a Jury found in favour of a Plaintiff and to enter a verdict for the Defendant, when sufficient evidence has been adduced on behalf of the Plaintiff to warrant a cause of action to be submitted to a Jury.

SECONDLY, when the Appellant has given direct evidence from which a Jury might come to the conclusion that the Respondent 20 was guilty of the negligence alleged, and when she has adduced the evidence of medical experts as to the possibility of the Respondent having been guilty of the negligence as alleged by her, it is competent under the law of New South Wales for a Court of Appeal to grant a new trial.

THIRDLY, whether there having been four trials in the action in which two verdicts have been found for the Appellant and 12 out of 16 jurymen having so found, the verdict of the Jury in the fourth trial should not have been allowed to stand. In this regard the Appellant will rely upon the following decisions :— 30

Swinerton v. Marquis of Stafford, 3 Taunt. 323 ;
Foster v. Steele, 3 Bing. (N.C.) 892 ;
Foster v. Allenby, 5 Dowl. P.C. 619.

82. With regard to the power of a Court of Appeal to set aside the verdict of a Jury found for the Appellant and to enter a verdict for the Respondent, it was held by the majority of the Supreme Court of New South Wales, Mr. Justice Roper dissenting, and by the majority of the High Court, Mr. Justice Latham and Mr. Justice Owen Dixon dissenting, that the Appeal Court had this power.

83. The majority of the Judges and Justices of the Supreme and 40 High Court respectively reached their conclusions upon differing grounds.

p. 1605, l. 21.

Mr. Justice DAVIDSON upon the ground that although the evidence for the Appellant constituted more than a scintilla and was sufficient to entitle the Appellant to have her case placed before the Jury, the evidence submitted by the Respondent was so preponderant that it reduced the Appellant's evidence to "less than a mere scintilla."

Mr. Justice HALSE ROGERS founded his decision firstly upon the proposition that with regard to medical evidence, "on the worth of the conflicting statements, the Court itself must decide"; and secondly upon the conclusion, disagreed with by the two other Judges of the Supreme Court and the Chief Justice of the High Court, Sir John Latham, that the special finding of the Jury was insufficient to support a verdict in favour of the Appellant in view of the particulars given by the Appellant under her declaration.

p. 1616, l. 6.
p. 1611, l. 16.

10 In the High Court of Australia Mr. Justice RICH founded his decision upon a conclusion that the verdict was an unjust one, that if it had been only the first trial he would consider it proper to grant a new trial, but as it was the fourth trial and as it seemed to him that further Juries would return similar unjust verdicts, to grant a fifth trial would constitute an abuse of the process of the Court, and on the conclusion that the Court had inherent jurisdiction to prevent such an abuse of its own process.

p. 1648, l. 16.

Mr. Justice STARKE decided that the verdict was a perverse verdict, and being perverse the Appeal Court could as a matter of law set it aside.

p. 1662, l. 16.

20 Mr. Justice MCTIERNAN as the basis of his decision stated that the question of the sufficiency of the evidence was a matter not for the Jury but for the Court, and therefore, being a matter of law, the Court had power to set aside the verdict of the Jury and to enter a verdict for the Respondent.

p. 1678, l. 2.

84. With regard to the above judgments and the grounds upon which they are founded, the Appellant desires respectfully to submit as follows:—

(A) With regard to the judgment of Mr. Justice Davidson : that no preponderance of evidence put forward on behalf of a Defendant can ever reduce what was previously sufficient evidence to place a case before a Jury to something less than a scintilla.

p. 1605, l. 21.

30 (B) With regard to the judgment of Mr. Justice Halse Rogers : that medical evidence, like any other type of expert evidence, is a matter to be considered by the Jury, and that the fact that a Judge may consider "a Jury is not qualified in any special way to decide technical questions" is a matter quite immaterial to the point at issue.

p. 1616, l. 6.

40 With regard to the second ground on which Mr. Justice Halse Rogers based his decision, the Appellant would respectfully submit, as held by Mr. Justice Davidson, Mr. Justice Roper and by the Chief Justice of the High Court, that the Jury's special finding was sufficient to fulfil the requirements of the particulars and to support a verdict for the Appellant.

p. 1611, l. 16.
p. 1641, l. 48.

(C) With regard to the judgment of Mr. Justice Rich, that if it did not constitute an abuse of the process of the Court to grant a second trial, it could not constitute an abuse of the process of the Court to grant a fifth trial.

p. 1648, l. 16.

It is further respectfully submitted that His Honour, in coming to the conclusion that the verdict was unjust, was usurping the functions of the Jury. Further, that it did not lie within His Honour's power to anticipate that all or any further verdicts would be unjust. And lastly that there is no inherent power to enter a verdict contrary to that of a Jury the only power being that set out in Section 7 of the Supreme Court Procedure Act, 1900.

p. 1662, l. 16.

(D) With regard to the principle on which Mr. Justice Starke came to his conclusion, it will be respectfully submitted that a perverse verdict, in the sense in which His Honour used that term, really involves the consideration of a question of fact and not of law, and that His Honour was dealing with that term in the sense of weighing the amount and value of evidence and thereby substituting his own opinion for that of the Jury. 10

p. 1678, l. 2.

(E) With regard to the judgment of Mr. Justice McTiernan, that His Honour used the words sufficiency of evidence as meaning amount of evidence, in distinction to the question of evidence or no evidence ; and in so doing His Honour was not deciding a question of law but a question of fact.

85. The Appellant further respectfully submits that she is entitled to have the verdict of the Jury restored, upon the grounds that she herself gave direct evidence from which the Jury was entitled to come to the conclusion that the Respondent was guilty of the particular negligence alleged by her. That her medical experts gave evidence based upon her own sworn testimony, upon the admitted facts in the case, and upon their own expert knowledge, from which they deposed that the events related by the Appellant and constituting the negligence complained of were either possible or probable. That the Appellant adduced further evidence from other persons which inferentially supported the evidence sworn to by the Appellant. That certain evidence given by the Respondent on cross-examination might be regarded by the Jury as admissions of his liability as claimed in the Declaration. 20 30

With regard to the Appellant's submission that the verdict of the Jury should be restored, the Appellant will rely upon the following authorities :—

Dublin Wicklow & Wexford Railway Co. v. Slattery, 3 A.C. 1155.

Mechanical & General Inventions v. Austin, [1935] A.C. 346.

Millissich v. Lloyds, (1936), L.T. 423.

Winnipeg Electric Company v. Dell, [1932] A.C. 690.

Everett v. Griffiths, [1921] 1 A.C. 631.

Benson v. Kwong Chong, (1934), G.L.R. (N.Z.) 145. 40

86. The Appellant humbly submits that the said order and judgment of the High Court of Australia dated 10th August 1945, and the said order and judgment of the Full Court of the Supreme Court of New South Wales dated 3rd August 1944, should be set aside, with costs, and that the verdict of the Jury dated 23rd January 1944 should be restored, for the following among other

REASONS.

- (1) That the Appellant herself gave direct evidence as to the happening of the events giving rise to her claim.
- (2) That the evidence given by the Appellant's medical experts supports the possibility or probability of the events giving rise to the Appellant's claim for damages based upon the negligence alleged.
- (3) That the Jury were entitled to conclude that certain evidence given by the Respondent on cross-examination amounted to an admission of his liability.
- (4) That there having been four trials before Juries, in which the Appellant has succeeded in two of such trials, the verdict of the Jury should be allowed to stand.

10

J. W. SHAND.

BRYAN CARSON.

Counsel for the Appellant.

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.*

Case for the Appellant

BLYTH, DUTTON, WRIGHT & BENNETT,
112 Gresham House,
London, E.C.2,
Solicitors for the Appellant.