[HIGH COURT OF AUSTRALIA.]

HOCKING . . . . . APPELLANT ;*
PLAINTIFF,

AND

BELL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 5, 6, 9-13, 16-20, 23, 24; *Aug.* 10.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ.

Appeal—Negligence—Medical practitioner—Verdict against evidence—Prima-facie case — Scintilla — Defendant's explanation — Sufficiency — Evidence — Inference —Respective functions of jury and judge—Fourth trial of same cause of action—Grant of new trial or entry of judgment—Powers of court on appeal—Entitled to verdict "as a matter of law"—Jury—Prejudice—Conduct of case—Supreme Court Procedure Act 1900 (*N.S.W.*) (*No.* 49 *of* 1900), *s.* 7—*Arbitration Act* 1902 (*N.S.W.*) (*No.* 29 *of* 1902), *s.* 15 (*b*).

A married woman claimed damages against a surgeon alleging that after performing the operation of thyroidectomy he left part of a drainage tube in her neck until ultimately, some eighteen months after the operation, it came through a tonsil, passed through her stomach and was evacuated per rectum, she, in the meantime, having been seriously ill and suffering great pain. There were four trials of the action before a judge and a jury of four. At the first trial the jury gave a verdict for the plaintiff in the sum of £500. This was set aside by the Full Court of the Supreme Court and a new trial was ordered. At the second and third trials the jury disagreed, being evenly divided. At the fourth trial the evidence adduced for the plaintiff consisted of the testimony of herself, her husband, friends and acquaintances who saw her during her illness, a nurse who nursed her at her home for some time after the operation, and of expert medical evidence given by a retired professor of pathology and by a medical practitioner who appeared to have extensive medical and surgical knowledge but no special qualifications with reference to the thyroid gland

* On 18th March 1946 special leave was granted by the Privy Council to the appellant to appeal *in forma pauperis* against this decision.

or the operation of thyroidectomy. The plaintiff herself was the only witness who gave evidence of having seen the piece of tube referred to by her. Medical witnesses called for the defendant, whose qualifications were much superior to those of the plaintiff's medical witnesses, strongly criticized the plaintiff's evidence and said that her story was inherently improbable ; they contradicted some of the evidence given by the plaintiff's medical witnesses. The jury gave a verdict for the plaintiff in the sum of £800 and made a specific finding that the defendant left in the site of the operation a piece of rubber tube as described by them. The Full Court unanimously set aside this verdict, and, by a majority, directed judgment to be entered for the defendant. On appeal,

Held, by *Rich*, *Starke* and *McTiernan* JJ. (*Latham* C.J. and *Dixon* J. dissenting), that the appeal should be dismissed.

By *Rich* J. on the ground that the court has inherent power to prevent a miscarriage of justice by abuse of its process. In all the circumstances, since the judgment appealed from was the only one that could produce a just result, it should be upheld.

By *Starke* and *McTiernan* JJ. on the ground that the Supreme Court was justified in concluding that there was no evidence on which the jury could reasonably find a verdict for the plaintiff and in applying the provisions of the *Supreme Court Procedure Act* 1900 (N.S.W.) which provides that 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, the Court may order such verdict to be entered.

Per Latham C.J., *Starke* and *McTiernan* JJ. : In New South Wales, after a trial by jury, the appellate court on appeal has no power to decide facts or 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 under s. 7 of the *Supreme Court Procedure Act* 1900 (N.S.W.) that party is "as a matter of law entitled to a verdict." A defendant is "as a matter of law entitled to a verdict" if there is no evidence upon which the jury could reasonably find for the plaintiff.

Per Rich J. : Observations as to the application of s. 15 (*b*) of the *Arbitration Act* 1902 (N.S.W.) in matters requiring scientific investigation.

Decision of the Supreme Court of New South Wales (Full Court) : *Hocking* v. *Bell*, (1944) 44 S.R. (N.S.W.) 468 ; 61 W.N. 224, by majority, affirmed.

APPEAL from the Supreme Court of New South Wales.

Stella Eileen Hocking, married woman, of Quirindi, New South Wales, brought an action in the Supreme Court of New South Wales claiming damages for negligence from George Bell, a duly qualified medical practitioner, practising as a surgeon at Macquarie Street, Sydney.

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In her declaration the plaintiff alleged that she retained the defendant for reward to perform upon her a certain surgical operation and to undertake and give to her such care and attention as might be necessary consequential upon the performance of the operation and upon his acceptance of the retainer it became the duty of the defendant as such surgeon to use due and proper care, skill and diligence in and about the performance of the operation and such care and attention as aforesaid yet the defendant in the performance of the operation and in the giving to her of the said care and attention conducted himself so unskilfully and with such lack of proper care and diligence that she, the plaintiff, was a long time sick; was greatly injured in her health and constitution; and suffered great pain and was put to great expense.

The defendant pleaded not guilty and issue was joined.

Particulars delivered under the declaration by the plaintiff's solicitors to the defendant's solicitors were, *inter alia*, 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." In the particulars the tube was described as being "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 tube &c. is no longer in the possession of the plaintiff, having been discarded by her at the time of its passing."

The action was tried four times before a judge and a jury of four. At the first trial the jury returned a verdict in favour of the plaintiff in the sum of £500. The Full Court of the Supreme Court set aside this verdict and ordered a new trial (*Hocking* v. *Bell* (1)). Leave to appeal from this order was refused by the High Court (2). At the second and third trials the jury disagreed, being evenly divided.

(1) (1942) 42 S.R. (N.S.W.) 130; 59 W.N. 79.

(2) (1942) 66 C.L.R. 671 (note).

After the third trial the defendant applied by motion to the Full Court for a verdict upon the evidence given in that trial on the ground that, under s. 7 of the *Supreme Court Procedure Act* 1900 (N.S.W.), he was as a matter of law entitled to a verdict. The motion was dismissed (*Hocking* v. *Bell* (1)).

At the fourth trial the judge 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 two inches long, cut off straight at one end and torn at the other, on the side a straight cut in which could be seen what appeared to be a swab and wire protruding from torn end of tube?" The written answer by the jury was 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." The jury gave a verdict in favour of the plaintiff in the sum of £800. The Full Court unanimously set aside this verdict, and, by a majority, directed judgment to be entered for the defendant: *Hocking* v. *Bell* (2).

The parties agreed at the hearing of the action that medical text-books and treatises referred to by them should be regarded as evidence in the action. Further facts and relevant statutory provisions appear in the judgments hereunder.

From the decision of the Full Court the plaintiff appealed to the High Court.

Shand K.C. (with him *Carson*), for the appellant. There was no power in the Full Court of the Supreme Court to enter a verdict for the respondent. The jury's verdict should be restored: (i) on the appellant's positive evidence as to what occurred; (ii) on the medical evidence called by the appellant and by the respondent as to the possibility—and, on some evidence, of the probability—of the events alleged to have occurred; (iii) upon the history of the illness of the appellant following the operation. The only reasonable explanation of the fact that for some eighteen months the appellant was suffering from tetany was the presence of some foreign body in the vicinity of the thyroid; (iv) because, upon the respondent's admitted conduct and reactions following the operation and other events referred to in the evidence, the jury was entitled to say that they were tantamount to admissions by the respondent

(1) (1943) 43 S.R. (N.S.W.) 154; 60 W.N. 90.

(2) (1944) 44 S.R. (N.S.W.) 468; 61 W.N. 224.

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that the thing alleged by the appellant had happened. There was evidence which, if believed, supports the verdict. The fact that there may be very strong evidence for the respondent is irrelevant for the purpose of considering whether there is evidence which would support the verdict. The story told by the appellant in respect of the drainage tube is not an impossible story but, on the contrary, is a probable one. The respondent's version of his method of procedure in and about the operation varied from time to time in an endeavour to meet the allegations made by the appellant. That variation was significant. The jury was entitled to find that there was no proper or other inference to be drawn other than that the tetany was caused by a foreign body. It is worthy of note that immediately the foreign body was extruded as described by the appellant the tetany ceased. Upon the evidence given by the respondent himself the jury was entitled to say that what was described by the appellant had been done by the respondent. Admissions by a medical practitioner are not in a category different from that of a layman. The science of anatomy is not an exact science. The credibility of the respondent's witnesses, particularly his medical witnesses, was affected by reason of variations which appear in the evidence given at the various trials, therefore the jury was entitled to say that it did not accept their evidence. It may be that the respondent was faced with a dilemma, but, if so, it was a dilemma of his own making. The respondent, doubtless, offset the knowledge that the trouble was caused by the tube by the hope that it would be extruded, or, if it were not, that the infection would become quiescent. The evidence shows that although he denied it originally the respondent thought throughout that the appellant's condition was one of true tetany. The evidence given by the appellant's " family " doctor is such that the jury would be justified in utterly disbelieving it and also in assuming that a certain letter written by the respondent and sent to that doctor was written and sent in bad faith. The final result of the condition of the appellant's tonsil is that the respondent's evidence provides no explanation. That is the only inference and certainly is one the jury is entitled to draw. If, as here, there is some evidence which supports the verdict of a jury, that verdict should not be disturbed by an appellate court. The nature of the tests made and the treatment admitted by the respondent and other medical witnesses to have been given and prescribed following upon the reporting by the appellant of the extrusion of the tube, support the allegations made by the appellant. As far as a question arises between true and hysterical tetany there were available in October 1939 tests well known to

competent medical practitioners dealing with the appellant; the application of those tests would have shown whether in her case it was true or hysterical tetany. These tests were not applied and treatment was given for true tetany. From those facts the proper conclusion is that those medical practitioners believed it was a case of true tetany. The wire-like protrusions from the tube as described by the appellant were doubtless pieces of gut used by the respondent to sew up the wound and which, through oversight or other unexplained reason, had fastened the tube to a muscle. The gut, being in suppuration, had failed to dissolve. The evidence shows that a medical witness believed that the tube had been left in the wound; therefore it is not unreasonable for the jury to believe it. In dealing with the appellant's evidence the Court below did not approach the problem from the correct angle. Members of that Court confused the functions of the court with the functions of the jury. The court must decide upon the worth of conflicting statements. In New South Wales there are three occasions upon which a verdict may be entered for the defendant, namely, (i) where the evidence, as here the medical testimony, is all one way; (ii) where the evidence is documentary the construction thereof is a matter for the court; and (iii) where the evidence by the defendant shows that there is not any foundation for a prima-facie case (*De Gioia* v. *Darling Island Stevedoring & Lighterage Co. Ltd.* (1); *Aitken* v. *McMeckan* (2)).

[STARKE J. referred to *Scown* v. *Haworth* (3).]

The decision of the majority of the Court below was based upon the ground that the case of the appellant depended upon impossibility and therefore no jury could possibly believe it. That was an incorrect approach. There is very little difference between the medical evidence advanced on behalf of the appellant and the medical evidence advanced on behalf of the respondent. It was open to the jury to find that the tube worked itself out by entering the side of the tonsil and then coming out of it, thus, in effect, going through the tonsil. It is a reasonable hypothesis that the tube travelled within the visceral compartment; therefore it would work its way up, perhaps outside the trachea, and burst through the strong substance of the trachea and all the time the inflammation was probably contained in the visceral compartment. That hypothesis meets the contention of the respondent's witnesses that the inflammation and suppuration containing the tube could not issue from the tonsil as alleged without destroying or seriously impairing

(1) (1941) 42 S.R. (N.S.W.) 1; 59 W.N. 22.
(2) (1895) A.C. 310, at p. 316.
(3) (1898) 24 V.L.R. 313.

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something vital, e.g., the structures in the vascular compartment. Reference to medical text-books and treatises shows that there are not any muscles situate between the thyroid and the tonsil, thus the passage of the tube would be practically unimpeded. A likely explanation is that the tube flowed or moved along a channel of infection. The medical witnesses differ as to their opinions and some agree with the representations made on behalf of the appellant. The jury might reasonably infer, once the jurymen were satisfied that the tube entered the wound, that the tube aggravated the infection. The power conferred by s. 7 of the *Supreme Court Procedure Act* 1900 upon the Court below is limited to the granting of a new trial and does not empower the Court to enter a verdict for the respondent: See *Phillips* v. *Ellinson Brothers Pty. Ltd.* (1). There was some evidence before the jury; the verdict of the jury should not be set aside unless reasonable men could not have arrived at the conclusion. The only existing means whereby a verdict can be entered for the defendant is under the common law that if the Full Court is of opinion that on the evidence the plaintiff or the defendant is entitled at law to a verdict, such a verdict may be entered. The principle applicable is as enunciated in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (2)—see also *Shepherd* v. *Felt and Textiles of Australia Ltd.* (3) and *Driver* v. *War Service Homes Commissioner* [*No.* 1] (4). There was not any conflict of evidence in *De Gioia* v. *Darling Island Stevedoring & Lighterage Co. Ltd.* (5). In *Adelaide Stevedoring Co. Ltd.* v. *Forst* (6) there was a lack of unanimity in the medical evidence and, having regard to the facts, a conflict as to the inference to be drawn. In conclusion it is submitted that there is evidence upon which reasonable men could find that the appellant's case was established, and, therefore, that she is entitled to have the verdict of the jury restored. The most the Court below was empowered to do was to grant a new trial; therefore the decision of that Court should be set aside and, in that event, a new trial granted. Having regard to the fact that there have been four trials of the matter and that twelve out of the sixteen jurymen have decided in favour of the appellant the Court should allow the verdict of the jury to stand (*Goodwin* v. *Gibbons* (7)).

[DIXON J. referred to *Foster* v. *Steele* (8) and *Swinnerton* v. *Marquis of Stafford* (9).]

(1) (1941) 65 C.L.R. 221, at pp. 227, 249.
(2) (1878) 3 App. Cas. 1155, at pp. 1181, 1185, 1186, 1202.
(3) (1931) 45 C.L.R. 359, at p. 379.
(4) (1924) V.L.R. 515.
(5) (1941) 42 S.R. (N.S.W.) 1; 59 W.N. 22.
(6) (1940) 64 C.L.R. 538.
(7) (1767) 4 Burr. 2108 [98 E.R. 100].
(8) (1837) 3 Bing. N.C. 892 [132 E.R. 654].
(9) (1810) 3 Taunt. 232 [128 E.R. 92].

Cassidy K.C. (with him *Reimer*), for the respondent. There was a conflict between the evidence given by witnesses, medical and otherwise, for the appellant. Some of the evidence so given is based not upon established facts but upon theories and inferences incorrectly drawn. Upon the evidence the allegations made by or on behalf of the appellant are not only improbable but are also impossible. The charges so made involve a charge of criminal malpractice on the part of the respondent which is entirely without foundation. The story told in support of those allegations could not reasonably be accepted by any jury of reasonable men. The evidence given by the appellant herself during the course of the various trials varies to a greater or lesser extent in many material respects. The evidence so given does not agree in many respects with facts indisputably established. A finding that a tube was or could have been left in the wound is negatived by the weighty evidence of medical and other witnesses and this evidence is supported by hospital and other records. No reasonably minded person who approached the case free from prejudice or wrong considerations could come to the conclusion that a tube with or without a swab could have been left in the position described by or on behalf of the appellant. The evidence given by the appellant as to the alleged eruption and disposal of the tube does not stand up to test and, it is submitted, is merely imagination or hallucination on the part of the appellant. The basis of hallucination exists in this case because it is an accompaniment of the condition of thyrotoxicosis and also of the condition of angio neurotic oedema associated with the appellant. The evidence relating to the appellant's blood count is of vital importance as further supporting the improbability of the allegations made by the appellant. The existence or otherwise of tetany is a comparatively small matter. It is not decisive as to the alleged omission to remove the tube. There is a large body of evidence which supports a medical theory that after a certain date the condition of the appellant was one of hysteria and not of tetany. Under s. 7 of the *Supreme Court Procedure Act* as a matter of law the respondent was entitled to a verdict. A court must satisfy itself that there is credible evidence that can be put to the jury and on which the jury are entitled to make a finding as to what is charged. It is the function of the court to determine whether or not there is credible evidence in the case (*Banbury* v. *Bank of Montreal* (1)). Section 7 empowers the Full Court of the Supreme Court to enter a verdict. *De Gioia* v. *Darling Island Stevedoring & Lighterage Co. Ltd.* (2) is applicable to

(1) (1918) A.C. 626, at p. 670.

(2) (1941) 42 S.R. (N.S.W.) 1 ; 59 W.N. 22.

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this case. The matter of importance is: Where does the onus rest? Alternatively, if the Court be of opinion that a verdict could not and/or should not be entered for the respondent then a new trial should be granted on the ground that the verdict found by the jury was unreasonable as being against the evidence and the weight of evidence. The granting of a new trial depends upon the circumstances of the case (*Goodwin* v. *Gibbons* (1)). The court has a discretion where the verdict is plainly an unreasonable one and effects an injustice. The charge against the respondent involves serious malpractice amounting, under the charge of negligence, to criminal malpractice and in such circumstances the court will not allow an unreasonable verdict to stand. The way in which the case was conducted assisted towards the diversion of the jury's mind away from the real issue. This is of special importance in a case which presented technical difficulties to the jury. The suggestion by counsel that this was a case of a plaintiff fighting the British Medical Association was improperly made and was not founded on fact. In *Commonwealth Life Assurance Association Ltd.* v. *Smith* (2) this Court granted an application for a third trial. The jury should have been directed that the onus upon the appellant, having regard to the serious nature of the charge, was to prove her case either (i) to the comfortable satisfaction of the jury (*Briginshaw* v. *Briginshaw* (3)), or (ii) as in a case *New York* v. *Heirs of Phillips, d'cd* (4)—and see *Helton* v. *Allen* (5); *Narayanan Chettyar* v. *Official Assignee of the High Court of Rangoon* (6); *Abrahams* v. *Catip* (7); *R.* v. *Crowe* (8); and *In re a Solicitor* (9)). Under rule 102 of the Supreme Court Rules the particulars furnished by the appellant became part of the record and became and remained part of the pleading. Those particulars defined the limits of the matters at issue and, being a case of negligence, must be proved strictly.

Shand K.C., in reply. The court is averse to a multiplicity of trials of an action, particularly in cases where juries have more than once found verdicts for the same party (*Swinnerton* v. *Marquis of Stafford* (10); *Foster* v. *Steele* (11); *Davies* v. *Roper* (12); *Foster* v. *Allenby* (13)).

(1) (1767) 4 Burr. 2108 [98 E.R. 100].
(2) (1938) 59 C.L.R. 527.
(3) (1938) 60 C.L.R. 336.
(4) (1939) 3 All E.R. 952, at p. 955.
(5) (1940) 63 C.L.R. 691, at pp. 696, 697, 701, 702, 713, 714.
(6) (1941) 39 Allahabad L.J. 683.
(7) (1942) Q.L.R. 26.
(8) (1942) Q.L.R. 288.
(9) (1939) 56 W.N. (N.S.W.) 53.
(10) (1810) 3 Taunt. 232 [128 E.R. 92].
(11) (1837) 3 Bing. N.C. 892 [132 E.R. 654].
(12) (1856) 2 Jur. N.S. 167.
(13) (1837) 5 Dowl. P.C. 619.

[During the course of argument the following medical text-books and treatises were referred to :—

(*a*) On behalf of the appellant :—*Allbutt & Rolleston* on *System of Medicine* (1910), vol. 8, pp. 590, 594, 694 ; *Barr* on *Modern Medical Therapy in General Practice* (1940), vol. 3, p. 3129 ; *Beasley & Johnston's Manual of Surgical Anatomy*, 2nd ed., pp. 114, 162 ; *Binnie's Treatise on Regional Anatomy*, vol. 1, pp. 494, 496 ; *Boyd's Textbook of Pathology*, 2nd ed. (1934), p. 776 ; *Cecil's Textbook of Medicine* (1927), p. 1139 ; *Cunningham's Textbook of Anatomy*, 4th ed., 6th ed., 7th ed., (generally) ; *Deaver* on *Surgical Anatomy*, vol. 2, p. 457 ; *Fagge* on *Principles and Practice of Medicine* (1886) ; *Gray* on *Anatomy* (1897), pp. 406, 1412 ; *Jamieson's Illustrations of Regional Anatomy*, pp. 20, 26-28, 30, 38, 40, 42, 43, 50, 51, 55B ; *Lexer & Bevan* on *General Surgery* (1908), pp. 46, 170 ; *McCrae's Osler's Principles and Practice of Medicine*, pp. 420 *et seq.* ; *Meakins* on *The Practice of Medicine* (1936) ; *Muir's Textbook on Pathology* (1936), p. 181 ; *Quain* on *Anatomy*, 10th ed. (1898), pp. 57-59, 311 ; *Rolleston's British Encyclopaedia of Practical Medicine*, vol. 9 ; *Spalteholtz* on *Atlas of Anatomy*, vols. 1, 2, 3.

(*b*) On behalf of the respondent :—*Cunningham's Textbook of Anatomy*, 4th ed., pp. 459, 466, 470, 471, 1063, 1066, 1067, 1070, 1135 ; 6th ed., p. 460 ; 7th ed., pp. 418, 1373 ; *Deane-Lewis' Practice of Surgery* (By *Reinoff*), pp. 242-256 ; *Deaver* on *Surgical Anatomy*, vol. 2, pp. 605, 608, 613 ; *Fowler* on *Tonsil Surgery*, pp. 38, 154 ; *French* on *Differential Diagnosis*, pp. 186, 187 ; *Joll* on *Diseases of the Thyroid Gland*, p. 591 ; *Meakins* on *The Practice of Medicine* (1936) ; *Quervain* on *The Goitre*, p. 133 ; *Sabotta & McMurrich* on *Atlas of Anatomy*, vols. 1, 2, 3, pp. 300, 363-365, 460, 463, 464, 467, 468 ; *Shelling* on *The Parathyroids* (1935), pp. 22, 157 ; *Sloan* on *The Thyroid*, pp. 232, 234, 238, 260, 317 ; *Spalteholtz* on *Atlas of Anatomy*, vols. 1, 2, 3 ; *Testut* on *Anatomy*, vol. 4 ; *Thompson* on *Diseases of the Nose and Throat*, 3rd ed. (1926) ; *Todd & Fowler* on *Muscular Relations of the Tonsil*, pp. 362-367 ; *Wright* on *Applied Physiology*, 7th ed. (1940).]

Cur. adv. vult.

The following written judgments were delivered :—

Aug. 10.

LATHAM C.J. 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

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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 eighteen 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 verdict for the plaintiff for £500. The Full Court set aside this verdict and ordered a new trial: See *Hocking* v. *Bell* (1). Leave to appeal from this order was refused by this Court (2). 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* (3)), 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* (4)). It is from this order that the plaintiff now appeals to this Court. The trial lasted for thirty-six 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 and General Inventions Co. Ltd.* v. *Austin* (5): "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

(1) (1942) 42 S.R. (N.S.W.) 130; 59 W.N. 79.
(2) (1942) 66 C.L.R. 671 (note).
(3) (1943) 43 S.R. (N.S.W.) 154; 60 W.N. 90.
(4) (1944) 44 S.R. (N.S.W.) 468; 61 W.N. 224.
(5) (1935) A.C. 346, at p. 373.

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 and Textiles of Australia Ltd.* (1), per *Dixon* J.

Under the Judicature system in England, Order 58, r. 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* (2), per *Starke* J.) 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, s. 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

(1) (1931) 45 C.L.R., at p. 379. (2) (1925) 37 C.L.R. 321, at p. 334.

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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 & Textiles of Australia Ltd.* (1), per *Starke* J.:—"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 s. 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.* (2), *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.* (3); *How* v. *London & North Western Railway Co.* (4). It cannot, therefore, enter a verdict in his favour, but can only order a new trial". See also *Huddart Parker Ltd.* v. *Cotter* (5).

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 (6). But this distinction, though difficult to apply in particular cases, is very real and important. The relevant principle was expressed in *Dublin, Wicklow and Wexford Railway*

(1) (1931) 45 C.L.R., at p. 373.
(2) (1941) 42 S.R. (N.S.W.) 1, at p. 5; 59 W.N. 22.
(3) (1884) 32 W.R. 461.
(4) (1891) 2 Q.B. 496, at pp. 500, 501.
(5) (1942) 66 C.L.R. 624, at p. 660.
(6) (1943) 43 S.R. (N.S.W.), at pp. 157, 166.

Co. v. *Slattery* (1), by Lord *Hatherley*, who said 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 (2) their Lordships all agreed in this view and they emphasized 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: "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" (3).

Similar statements are made by Lord *Penzance* (4), by Lord *O'Hagan* (5). Lord *Selborne* says that the evidence must be left to a jury, however strong contradictory evidence might be by which it was met (6). So also Lord *Blackburn* 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" (7), and 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" (8). He adds that where there is an

(1) (1878) 3 App. Cas., at p. 1168.
(2) (1878) 3 App. Cas. 1155.
(3) (1878) 3 App. Cas., at p. 1165.
(4) (1878) 3 App. Cas., at p. 1181.
(5) (1878) 3 App. Cas., at pp. 1182, 1185, 1186.
(6) (1878) 3 App. Cas., at p. 1187.
(7) (1878) 3 App. Cas., at p. 1202.
(8) (1878) 3 App. Cas., at p. 1216.

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admission, the judge is not only entitled, but bound to direct the jury to act upon the admission. Finally, 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 " (1). See the references to the *Dublin, Wicklow and Wexford Railway Co.'s Case* (2) in *Banbury* v. *Bank of Montreal* (3). See also *Metropolitan Railway Co.* v. *Jackson* (4), 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 & Lighterage Co. Ltd.* (5). 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 s. 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 (6). I particularly mention, however, *Ryder* v. *Wombwell* (7) and *Mechanical and General Inventions Co. Ltd.* v. *Austin* (8).

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 a 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

(1) (1878) 3 App. Cas., at p. 1217.
(2) (1878) 3 App. Cas. 1155.
(3) (1918) A.C., at pp. 672, 673.
(4) (1877) 3 App. Cas. 193, at p. 207.
(5) (1941) 42 S.R. (N.S.W.) 1 ; 59 W.N. 22.
(6) (1943) 43 S.R. (N.S.W.), at pp. 156-161 ; 60 W.N., at pp. 91-95.
(7) (1868) L.R. 4 Ex. 32.
(8) (1935) A.C. 346.

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 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

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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* (1)), 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 two inches long, cut off straight at one end and torn at the other, on the side a straight cut in which could be seen what appeared to be a swab and wire protruding from torn end of tube ? "

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 Honour but we have found

(1) (1941) 42 S.R. (N.S.W.) 1 ; 59 W.N. 22.

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 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."

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 oedema, which, as stated by Dr. *E. P. Sloan* in his book *The Thyroid*, (1935), p. 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 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

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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 haemorrhage. 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 twenty-four to forty-eight 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 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 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 anaesthesia (not a very safe treatment I know—considering her condition) until a solution of calcium chloride 10% could be prepared for intravenous adminis-

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tration. 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 him up 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 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.

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 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

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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.

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 oesophagus, 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

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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.

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."

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 a 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 $1\frac{1}{2}$ inches. Professor Welsh would not suggest that anything like Exhibit " P " with the wires in it could travel in the body.

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 parathyroids would be disorganized, 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), p. 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 disorganization 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.

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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, &c. 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 one inch to as much as five 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 pp. 1372, 1373, 1374. See also *Jamieson, Illustrations 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.

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.

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

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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 (1) and upon the last trial (2).) 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 summarized 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 possibility of a foreign body travelling from the thyroid gland to the

(1) (1942) 42 S.R. (N.S.W.) 130; 59 W.N. 79.

(2) (1944) 44 S.R. (N.S.W.) 468; 61 W.N. 224.

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

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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 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. I., p. 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 a 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* (1), 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 (2)), 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

(1) (1941) 42 S.R. (N.S.W.) 1; 59 W.N. 22.

(2) (1943) 43 S.R. (N.S.W.) 154; 60 W.N. 90.

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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 actually did 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 summarize 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.

(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 s. 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 twelve jurors out of sixteen 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 :

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Goodwin v. *Gibbons* (1); *Swinnerton* v. *Marquis of Stafford* (2); *Foster* v. *Steele* (3); *Foster* v. *Allenby* (4); *Davies* v. *Roper* (5).

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 criticizing 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.

RICH J. This is an appeal from 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

(1) (1767) 4 Burr. 2018 [98 E.R. 100].
(2) (1840) 3 Taunt. 232 [128 E.R. 92].
(3) (1837) 3 Bing. N.C. 892 [132 E.R. 654].
(4) (1837) 5 Dowl. P.C. 619.
(5) (1856) 2 Jur. N.S. 167, and the note thereto.

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 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

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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 nonsuited without his consent. The Court in Banco, if it set aside the jury's verdict, could not either enter a nonsuit 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* (1); *Shepherd* v. *Felt and Textiles of Australia Ltd.* (2)).

In England, the writ of error was abolished by s. 148 of the *Common Law Procedure Act* 1852 (15 & 16 Vict. c. 76); and by the Rules of Court in the schedule to the *Judicature Act* 1873 (38 & 39 Vict. c. 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 rehearing, 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.* (3)). 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* (4) and *Mechanical and General Inventions Co. Ltd.* v. *Austin* (5). In view, however, of the decision of the Court of Appeal in *Allcock* v. *Hall* (6), and the observations of Lord *Atkinson* and Lord *Parker* in *Banbury*

(1) (1907) 4 C.L.R. 1223, at p. 1227.
(2) (1931) 45 C.L.R., at p. 379.
(3) (1941) A.C. 55, at pp. 65, 66.
(4) (1887) 12 App. Cas. 746.
(5) (1935) A.C. 346.
(6) (1891) 1 Q.B. 444.

v. *Bank of Montreal* (1), 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* (2)).

In New South Wales, proceedings in error do not appear to have ever been formally abolished, and s. 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* (3)). 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 s. 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 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.

In the result, although in cases tried without a jury s. 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 s. 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.* (4) that : " The question whether the plaintiff's evidence, when considered in the light of an explanation (which cannot be regarded 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

(1) (1918) A.C., at pp. 675-679, 706.
(2) (1925) 37 C.L.R., at p. 334.
(3) (1857) 2 Legge 992.
(4) (1941) 42 S.R. (N.S.W.), at pp. 4, 5 : 59 W.N. 22.

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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 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.* (1); *How* v. *London & North Western Railway Co.* (2). 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.* (3), 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.

(1) (1884) 32 W.R. 461.
(2) (1891) 2 Q.B., at pp. 500, 501.
(3) (1915) 114 L.T. 268, at p. 272.

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 s. 15 (*b*) of the *Arbitration Act* 1902 (N.S.W.) 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."

In *Charles Osenton & Co.* v. *Johnston* (1), 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.

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 two 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."

(1) (1942) A.C. 130, at p. 144

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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 two 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 oedema, the predisposing causes of which are hysteria, 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 22nd February 1938 and given a course of treatment to prepare her for the operation. On 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 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 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. 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 criticized 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 anaesthetic in the skin. True it is that a medical witness called for the appellant said that 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 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 that 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 17th March—and this is confirmed by the nursing sisters' reports—probing the wound to keep the drainage track open and dressing it himself or satisfying himself that the sister 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

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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 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 14th April some purulent discharge was noticed, though on 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 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 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 9th May the appellant was not so well, and according to Quirindi Hospital reports, she had tetany spasms, and others on 17th May. On 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 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 had disappeared and the sinus had completely closed. But on 27th June the appellant had another spasm, which recurred.

On 3rd September 1938 the appellant was readmitted 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.

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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 her on 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 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, &c., 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.

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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 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 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 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 tonsilitis 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 tonsilitis. 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 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 significant 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 British Medical Association, 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 there 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

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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.

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 1941 at the first trial of this action Dr. Poate, a highly qualified surgeon who has specialized 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

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evidence of chronic inflammation at the back of the throat. Both tonsils were involved in what is called chronic tonsilitis 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 tonsilitis."

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 tonsilitis, 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 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 tonsilitis, 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.

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 threshhold. 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."

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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.

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 extraordinarily 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, surround every structure practically in the body. They surround arteries, veins, nerves and muscles and also stretch across the spaces between muscles

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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 network. 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 summarized. 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 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

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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.* (1), 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* (2), 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* (3). *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. *Metropolitan Railway Co.* v. *Wright* (4). 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* (5)).

(1) (1915) 85 L.J. K.B. 888, at p. 897.
(2) (1918) A.C., at p. 706.
(3) (1907) 4 C.L.R., at pp. 1227 et seq.
(4) (1886) 11 App. Cas. 152, at pp. 153-155.
(5) (1868) 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* (1)). 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 s. 7 of the *Supreme Court Procedure Act* 1900.

This appeal should be dismissed.

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 a 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 two 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

(1) (1886) 11 App. Cas. 152.

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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 authorizing 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, 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* (1)). "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), p. 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

(1) (1757) 1 Burr. 390, at p. 393 [97 E.R. 365, at p. 366].

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

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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 two 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 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 haemorrhage, 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

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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 angioneurotic oedema.

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 were 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 force 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 for three quarters of an inch. Other experts suggested that what 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

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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. Realizing, no doubt, the difficulties of this or any other theory, counsel for the plaintiff say 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

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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 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 nonsuit 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* (1)).

In the passage so often quoted from his judgment in *Ryder* v. *Wombwell* (2), *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* (3)). Lord *Atkinson* discusses the powers of the Court of Appeal, and in doing so maintains the distinction (4). See further *Mechanical and General Inventions Co. Ltd.* v. *Austin* (5).

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

(1) (1929) L.R. 57 Ind. App. 86, at p. 92 (J.C.).
(2) (1868) L.R. 4 Ex., at p. 38.
(3) (1918) A.C., at p. 706.
(4) (1918) A.C., at pp. 669-680.
(5) (1935) A.C. 346, and particularly per Lord *Atkin* at p. 369, per Lord *Wright* at pp. 372-374.

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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. *War Service Homes Commissioner* [*No.* 1] (1), *Cussen* A.-C.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 Ltd.* (2).

What precisely *Griffith* C.J. meant in *Heydon* v. *Lillis* (3) 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* (4), per *Pollock* C.B. ; *Jones* v. *Spencer* (5), per Lord *Morris* ; *McInerney* v. *Clareman*, per *Kenny* J. (6)). In any case, the meaning and effect of the terms used in s. 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.

There remains what to my mind is the more difficult question, namely whether yet another new trial should be ordered.

In *Mechanical and General Inventions Co. Ltd.* v. *Austin* (7), 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

(1) (1924) V.L.R. 515, at p. 532 ; 30 A.L.R. 375, at pp. 376 *et seq.*
(2) (1931) 45 C.L.R., at pp. 373, 379, 380.
(3) (1907) 4 C.L.R. 1223.
(4) (1852) 16 Jur. 481.
(5) (1897) 77 L.T. 536, at p. 538.
(6) (1903) 2 I.R. 347, at p. 369.
(7) (1935) A.C. 346.

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 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 " (1).

The test propounded by Lord *Selborne* in *Metropolitan Railway Co.* v. *Wright* (2) was approved by the Privy Council in *Cox* v. *English, Scottish and Australian Bank* (3), 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 " (4). An expression repeatedly used by courts is " overwhelming preponderance."

In *Place* v. *Searle* (5), *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 justitiae*. In the latter it was a matter depending upon a more general discretion.

According to Mr. *W. M. Best* in a note in *Jurist*, vol. 2 (1856), p. 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

(1) (1935) A.C., at pp. 373, 374, 375.
(2) (1886) 11 App. Cas. 152.
(3) (1905) A.C. 168, at p. 170.
(4) (1886) 11 App. Cas., at p. 153.
(5) (1932) 2 K.B. 497, at p. 515.

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. . . 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* (1), 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* (2), *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 and New Zealand Banking Corporation Ltd.* (3)).

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 s. 54 of the *Crimes Act* 1900, our decisions in *Helton* v. *Allen* (4) and *Briginshaw* v. *Briginshaw* (5) show that the contention cannot be supported. See too *Piggott* v. *Piggott* (6). 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.

(1) (1767) 4 Burr. 2108 [98 E.R. 100].
(2) (1837) 3 Bing. N.C. 892 [132 E.R. 654].
(3) (1934) 52 C.L.R. 430, at p. 442.
(4) (1940) 63 C.L.R. 691.
(5) (1938) 60 C.L.R. 336.
(6) (1938) 61 C.L.R. 378, at p. 415.

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.

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 two 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

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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 theirs 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.

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 s. 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* (1)). Under s. 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 *Balmain New Ferry Co. Ltd.* v. *Robertson* (2) ; *Heydon* v. *Lillis* (1) ; *Shepherd* v. *Felt & Textiles of Australia Ltd.* (3). 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* (4), *De Gioia* v. *Darling Island*

(1) (1907) 4 C.L.R. 1223.
(2) (1906) 4 C.L.R. 379.
(3) (1931) 45 C.L.R. 359.
(4) (1943) 43 S.R. (N.S.W.) 154 ; 60 W.N. 90.

Stevedoring & Lighterage Co. Ltd. (1) and *Banbury* v. *Bank of Montreal* (2). In that case Lord *Atkinson* observed : " 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 " (3). The " scintilla doctrine " was abandoned in *Ryder* v. *Wombwell* (4).

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 that 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* (5) ; *Mechanical and General Inventions Co. Ltd.* v. *Austin* (6) ; *Bright* v. *Eynon* (7)).

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

(1) (1941) 42 S.R. (N.S.W.), at p. 5 ; 59 W.N. 22.
(2) (1918) A.C., at p. 664.
(3) (1918) A.C., at p. 677.
(4) (1868) L.R. 4 Ex. 32.
(5) (1886) 11 App. Cas. 152.
(6) (1935) A.C., at pp. 369, 374.
(7) (1757) 1 Burr., at p. 395 [97 E.R., at p. 366].

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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 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 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."

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 eighteen 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 fasciae 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

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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 fasciae 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 are 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 was 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 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 and 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 characterized 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.

Appeal dismissed with costs.

Solicitors for the appellant, *Thomas & Hague*, Quirindi, by *Wilson & Clapin.*

Solicitors for the respondent, *A. S. Boulton, Lane, Rex & Co.*

J. B.