No 2 of 1940

IN THE HIGH COURT OF AUSTRALIA.

SCHNEIDER

v.

ROBERTSON & ORS.

REASONS FOR JUDGMENT.

Judgment delivered at SYDNEY

on 21st August, 1940.

H. J. Green, Govt. Print., Melb.

C.2774

S C H N E I D E R

v.

R O B E R T S O N & O T H E R S

Order :

Appeal allowed. Order of the Supreme Court set aside. Verdict of the jury and the judgment entered thereon restored. The defendants to pay the costs of this appeal and of the appeal to the Supreme Court.

SCHNEIDER

v.

ROBERTSON & OTHERS

JUDGMENT

RICH J.
DIXON J.
EVATT J.

SCHNEIDER V. ROBERTSON & OTHERS

By the order under appeal the Supreme Court (Davidson, Halse Rogers & Street JJ.) set aside a verdict recovered by the plaintiff in an action of negligence against a partnership of three medical practitioners and entered judgment for the defendants. The order was made upon the ground that there was no reasonable evidence of any negligent act or omission for which the defendants were responsible contributing to the injury of which the plaintiff complains. That injury is an X-ray burn. The defendants practice their profession at Albury and the plaintiff, a married woman living in the neighbourhood, was one of their lodge

patients. At Albury there is a District Hospital governed by the Public Hospitals Act 1929-1937 and the regulations thereunder. (See secs. 18 & 42, 2nd Sched. and N.S.W. Rules and Regulations 1930 p. 246) The regulations allow any duly qualified medical practitioner to render services to his private and intermediate patients in such a hospital.

For over two years the Albury District Hospital had been equipped with a small X-ray machine, which could be used for radiography or for fluoroscopy. There was no radiologist upon the hospital staff and no technician with a competent knowledge of the apparatus, but the matron and a sister were instructed in its use and

the operation of the machine was entrusted to them exclusively. In August 1938 the plaintiff consulted Dr. English, one of the defendants, about a pain she felt in her chest. He sent her to the hospital so that he might obtain an X-ray picture to help him in his diagnosis. The matron and the sister made a skiagram but it disclosed no explanation of the pain of which the plaintiff complained. Dr. English then suggested that some gastric condition might be the cause and that she should undergo an X-ray examination, that is by fluoroscopy or "screening". He says that he told her that he was not a specialist radiologist and advised her "to go away for it," and that

upon her replying that she was not in a position to do so, he agreed to arrange for her examination by him at the hospital, warning her that he would not guarantee his interpretation of what he saw. But all this she denies. According to her, his offer to examine her by the hospital apparatus was not preceded by any recommendation to go elsewhere nor accompanied by any qualification, deprecation or protest. Two or three days later she attended the hospital and submitted herself to the fluoroscopic examination, which Dr. English conducted. The matron and the sister prepared her for the screening and placed her before the machine, which was on wheels. It did not include an

upright table or frame for the patient to stand against and the practice of the matron and the sister was to place the patient at a distance of twelve inches, measured by a ruler, a practice they say they followed in the plaintiff's case. Immediately in front of the plaintiff they put a chair for Dr. English, who in the meantime remained in an adjoining room, accustoming his eyesight to the darkness. When the lights were turned out he came in, took his seat and held the screen before him, between his eyes and her abdomen. The matron held the plaintiff's arm and administered the bismuth drink when Dr, English gave the direction. The sister operated the machine. Dr. English told her to

turn on the current and she held the flex bearing the press button switch for turning on and off the X-ray. This switch they called a timer although there was no automatic timing of the exposure. The sister pressed the button and released it to put the X-ray on and off respectively under the directions of the doctor. During the screening the plaintiff seemed to tire and Dr. English said that she should have a "breather". The lights were switched up, Dr. English closing his eyes. The evidence contains no statement of what the plaintiff did during the breather, whether she sat down or moved about or remained standing fixed in the same position. During the examination Dr.

English palpated her abdomen, the matron holding the screen as he did so. The plaintiff gives no estimate of the time the screening occupied nor of the number or duration of the exposures nor of the intervals. She says that it seemed a long time because she was standing. Dr. English says that the time of the exposures would average about 4 seconds : the aggregate period of exposure would be just over a minute. The matron gave evidence that there was nothing unusual in the plaintiff's screening, that exposures were commonly of between two and three seconds in length and were not as numerous as thirty and that Dr. English was never slow as compared with other medical men.

About twenty-four days after the screening, a brown patch was noticed upon the plaintiff's back and this developed into a large lesion or lesions on the left of the midline in the sacral lumbar region, forming a sloughing ulcer. Eventually it was diagnosed as an X-ray burn. It could not have been inflicted when the radiograph was taken and the plaintiff's evidence is that the screening was the only other X-ray she underwent.

The possible causes of the infliction of the X-ray burn upon the plaintiff are confined to three heads. She may have been in too close proximity to the tube. She may have been exposed to the rays for too great a time and that

might be because the separate exposures were too long or too numerous or both. Thirdly the intensity of the discharge may have been excessive and that might have happened through a mistake in using the switch for radiography which requires more current instead of the switch for fluoroscopy, or it might have happened if there were no aluminium or other filter upon the machine at the time. Jordan C.J., who tried the action, classified the possible causes briefly in the words "too much, too long, "or too close." It is evident that the intensity of the discharge or the "dosage" delivered varies with factors depending on the apparatus, which must be set for the

desired kilowatts and milliamps, must be switched for fluoroscopy and must be furnished with proper filterage. These are matters depending upon the technician or other person responsible for the state and operation of the machine. The proximity of the patient to the tube is another matter. What is a safe distance is a matter of knowledge, whether rule of thumb or scientific. To place and maintain the patient at that distance is a thing which must rest with those conducting the screening. In the same way the proper length of the exposures and of the intervals between them and the aggregate time of exposure which is safe are things governed by knowledge; but what is done

must depend on the person directing the operation.

Dr. English is a general practitioner who desired to examine his patient through a fluoroscopic screen for the purpose of diagnosis. He was not a radiologist but a diagnostician. It may be suggested that he came to see what the hospital staff could show him by means of their X-ray appliance and not to operate their appliance, nor to direct or control its use in relation to the patient. His position may, in other words, be likened to that of a diagnostician who attends at a radiologist's to observe what the radiologist can show him through a fluoroscopic screen. The responsib-

ility for the instrument and the procedure would, no doubt, rest with the radiologist and his technician. But the conditions at the Albury District Hospital were quite different. There was no specialist or expert to direct the procedure. No one says that Dr. English is to be saddled with liability for any improper condition of the apparatus or for any fault in setting. The care and actual operation of the machine were entrusted by the institution to the matron and the sister. For its use the plaintiff, or rather her husband, paid the Hospital. Its condition, its setting and its switching must be regarded as technical matters lying within the province of the institution and

its staff, whether technically competent or not. But in the absence of a radiologist, upon Dr. English necessarily fell the control of the procedure in carrying out the operation upon the plaintiff. Neither the matron nor the sister could be expected to overrule any direction he gave as to the position of the patient, not as to the number or time of the exposures he required in order to make his examination. In her evidence in chief the matron was asked,- "Then (that is after the patient is in position "and the room darkened) the doctor comes into the X-ray room and what happens then ?" and she answered, "He takes "charge of the patient and from then on he gives his

"instructions as to when he wishes the machine to be oper-
"ated, started and stopped." When she was questioned as to the number of exposures practised, she said they were just as many as the medical man orders and that he decides the times, the number is entirely at his discretion and she would not count them because it is entirely the doctor's orders and she would just carry them out. In her cross-examination she said that in operating the X-ray she acted solely under the doctor's instructions and, to a question whether, if in an X-ray screening , the doctor said "Bring "the patient back towards me a little" would she refuse to do it, she answered, "That would be entirely his responsib-

ility and I would carry out the doctor's orders."

We are, of course, concerned with the responsibility of the medical practitioner towards his patient and ultimately the extent or limits of that responsibility must depend upon what he undertook to do in reference to his patient. If he had held himself out as a radiologist or assumed in relation to her case the part of a radiologist it might be impossible to divide the responsibility for the state and setting of the machine from that for the manner in which the operation of screening was carried out. As he treated the plaintiff as a lodge patient without any special or added fee, the definition of his contractual

liabilities should depend upon his agreement with her lodge, at all events as a primary source of obligation; but that document is not in evidence. Assuming that it is silent as to his duties when, in his opinion, an X-ray examination of a lodge patient becomes desirable, how far his responsibilities go where he does undertake an X-ray examination at the District Hospital must be ascertained, as a question of fact, by reference to the accepted practice of the profession, the conditions obtaining where it fell to him to carry out the work, and the nature and circumstances of the case.

It is enough to say that in the present case

a finding was clearly open that, from the time Dr. English entered the X-ray room, the direction and control of the position and movements of the patient and of the time and number of the exposures and the length of the examination rested with him. It was therefore open to the jury to take the view that it would amount to negligence on his part if he did not understand the dangers of proximity to the appliance and of too much exposure to the rays or did not exercise reasonable skill and care to safeguard his patient from injury through moving towards the tube or from undue exposure to the rays.

But the decision of the Supreme Court and

the contention of the defendants, which was ably presented by their counsel, rests, not so much upon a denial of an obligation on the part of Dr. English to use due care and skill to secure the plaintiff from injury through proximity to the appliance or excessive exposure to the rays, as upon the view that there is no reasonable evidence that he did not fulfil his duty or that either proximity or excessive length of exposures was a cause of the plaintiff's burn.

There is no direct evidence that at any stage the plaintiff was too close to the machine or that the exposures were too many or too long. On the contrary, the evidence adduced by the defendants, if accepted, would

go some distance to negative these explanations. The circumstantial evidence cannot, the defendants contend, support an inference that one or other of these possibilities was in fact the cause of the burn. For, although it may be true that, without fault either in the setting and adjustment of the apparatus or in the procedure followed in its use upon the patient, such a burn would be unlikely to occur, yet, say the defendants, there is no more ground for attributing it to one possible cause rather than to another. The burn would be accounted for if the button for fluoroscopy had been switched the wrong way by the sister, if the aluminium filter had been absent, if the

wheeled machine had been accidentally moved towards the plaintiff during the screening, if the matron had placed the plaintiff at a distance less than twelve inches before the machine, as well as on the hypothesis that the plaintiff was allowed to move closer to the machine or that she was exposed too long or too often to the rays. Why, therefore, the defendants ask, should the jury be permitted to adopt one explanation to the exclusion of the others and that an explanation implying fault on the part of the medical practitioner ?

If all these explanations were consistent with the evidence there would be no answer to the defendants'

argument. If the circumstances proved may be as reasonably accounted for by explanations that involve no failure of care on the part of the defendant as by explanations that imply such negligence on his part, then the plaintiff's proof fails.

But in the present case positive evidence was led which, if accepted, excludes many of the possible explanations otherwise open. Indeed the defendants' case may be said too prove too much; for every fault which might be laid against the machine or the persons conducting the screening was made the subject of actual or attempted disproof. It appeared that, in spite or perhaps because

of their want of technical knowledge, the matron and the sister followed a routine practice and that a great number of cases both before and after the plaintiff's had been screened without any burn. Evidence was given that they had not interfered with the machine and in particular that they had not removed the aluminium filter. The matron gave an account of the manner in which the switch from radiography to fluoroscopy was marked and used by pressing down for the former and up for the latter and of the consequent readings on the voltmeter. She said that before the machine was operated its setting was always checked by herself if the sister had set and vice versa

and that in the plaintiff's case the routine was followed. Further, some evidence was given from which it might be inferred that, owing to the greater intensity of the image, if, through an error, the switch was up for radiography, it would be improbable that the mistake would escape notice. The matron was certain that the patient was correctly placed at least twelve inches away before Dr. English entered and took charge. A movement of the apparatus towards the patient appears to be a most improbable explanation, because there was no reason why it should be handled. It was operated by a flex and if the matron or sister had, through some mischance, applied sufficient force to it to

put it in motion, it is not easy to believe that she would be unaware of the movement. All these matters were proper for the consideration of the jury, who, whether rightly or wrongly, might reasonably conclude that none of the hypotheses put forward as possible explanations of the plaintiff's injury in fact formed the actual cause except one or other of the two things which may have happened while the screening was under the direction and control of Dr. English. Moreover the jury might not unreasonably reject one of these two causes on the strength of Dr. English's own evidence, which on this point they might accept as probable and persuasive. For he said that the

distance of the plaintiff patient from the tube or target (which cross-examining counsel by a slip called the screen) was a thing the practitioner automatically noticed because it is an important factor; that he thought the plaintiff was eighteen inches away; that he was careful to see that she kept her position; and that he thought he could be quite sure because he would have noticed if she moved.

It is true that evidence was also given by Dr. English and by the matron that the exposures were neither too long nor too numerous. But in this the jury might have considered there was greater probability of the witnesses falling into error or into unreliable reconstruction of

an unremembered matter of ~~xxxxxx~~ degree. One radiologist in the course of his evidence said of fluoroscopy," once you start to look you don't realize how long you are looking and that is the whole trouble."

But whether the jury thought that the cause might have been the movement of the patient or excessive length and number of exposures, or confined the cause to the latter, it is at least clear that on the evidence they were at liberty to exclude all causes but those two.

Once they arrived at the conclusion that one or other of these factors, the "too near" or the "too long", must have occasioned the burn, then the next step was

reasonably open as an inference. It being within the province of the practitioner to prevent movement of the patient towards the tube and to restrain the aggregate time of exposure to a safe period, it would not be unreasonable to conclude that without some failure of due care on his part, injury from either of these causes would not occur.

It must be borne in mind that it is peculiarly the function of the jury to determine what reliance may be placed upon particular pieces of evidence and to estimate the probabilities as an aid to doing so. Further the case is open to a general observation which may go some way to explain, if not to justify, the jury's verdict. The

plaintiff sustained a very bad X-ray burn which almost certainly was inflicted during the screening. Experiment showed that she was not particularly susceptible to X-ray burning. Yet Dr. English, after the matter had undergone a full investigation, when given an opportunity to suggest any explanation of the burn, said that he was unable to submit any other reason than that the plaintiff was unduly sensitive to X-ray. When the plaintiff came to him less than a month after the examination for treatment of the sore on that part of her back to which the X-ray discharge had been directed, it did not, he said, occur to him that

it was an X-ray burn and at no time did he give that as his diagnosis of what proved to be a severe and progressive condition.

These were elements in the case which might legitimately influence the jury in the acceptance or rejection of testimony and in strengthening their confidence in the inferences which the evidence otherwise appeared to them to support.

Upon these grounds it appears not to be a case which ought to have been withdrawn from the jury, either at the close of the plaintiff's case, when Jordan C.J. refused an application for a non-suit, nor on the conclusion

of the whole evidence.

The appeal should be allowed : the order of the Supreme Court set aside and the verdict of the jury and the judgment entered thereon restored.

The defendants should pay the costs of this appeal and of the appeal to the Supreme Court.