PERERA *v.* CHINNIAH.

1904.
June 15.

C. R., Colombo, 22,779.

Professional opinion—Advice of veterinary surgeon—Exercise of reasonable professional skill—Purchase of unsound horse—Liability of veterinary surgeon.

A professional adviser does not guarantee the soundness of his advice. His duty is to bring to the exercise of his profession only a reasonable degree of care and skill, but not the highest degree of skill.

If his honesty and good faith are admitted, a properly qualified veterinary surgeon would not be liable for the consequence of an opinion given after careful diagnosis.

Gross ignorance or crass negligence alone would justify an action for damages against him.

THE plaintiff sued the defendant to recover the sum of Rs. 300 as damages, alleging that by the negligence and incompetence of the defendant, who was a veterinary surgeon, in giving his opinion for reward, the plaintiff was induced to purchase an unsound horse for Rs. 600 (with its harness). The defendant denied that at the time he gave his opinion the horse was unsound, and he pleaded that his opinion was given honestly, faithfully and after due exercise of reasonable skill.

The Commissioner (Mr. A. de A. Seneviratna) found that defendant's opinion, though honestly delivered, did not rest on a due exercise of reasonable professional skill.

"His failing to notice lameness at any time, his omission to refer in his certificate to the defects which he observed in the horse at the time he examined it, his imputing the peculiarity of its gait first to the hardness of the skin at the fetlocks and afterwards to bad training, force me to the conclusion that his opinion, honest as it was, is not founded upon a due exercise of reasonable professional skill.....Mr. Sturgess (who examined the horse) says that there was no difficulty in seeing that the horse was suffering from osteoporosis, and that the splint under the knee of the near foreleg was such as to render him lame.....I find that at the time the defendant examined the horse it was not sound by reason of weakness in the spine, a splint in the foreleg, enlargement of the right side of the lower jaw bone, and other defects. I find that the horse is not worth more than Rs. 250 owing to its unsoundness, and I assess the plaintiff's damages at Rs. 250. I give him judgment for that amount with costs."

The defendant appealed.

The case came on for argument before Wendt and Middleton, J.J., on 23rd May, 1904.

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Dornhorst, K. C. (with *Elliott*), for appellant.—Lord Campbell said: "When I had the honour of practising at the Bar of England, though I was tolerably cautious in giving opinions, I have no doubt I have repeatedly given erroneous opinions, and I think it was Mr. Justice Heath who said that it was a very difficult thing for a gentleman at the Bar to be called upon to give his opinion, because it was calling upon him to conjecture what twelve other persons would say upon some point that had never before been determined." *Purves v. Landell, 12 Cl. & Fin. 102.* A professional man does not guarantee that his opinion is right. That would make him an insurer. Here Mr. Sturgess, the adverse expert, says it is very difficult to give an opinion on such a question. The horse was not bought because of the opinion given, but of the exercise of the plaintiff's own choice. He was not bound to act on the opinion given. That opinion was not given ignorantly. Every professional man is presumed to be competent to advise, but the person who seeks it may act on it or not, as he likes. Plaintiff says that the defendant is liable because of the unsoundness of the horse. If osteoporosis made the horse unsound, it may have been a development after the defendant had examined the horse. Doctors disagree, and who can be sure whether defendant or Mr. Sturgess is right? Defendant used his best skill, and no negligence is proved. According to Vanderlinden, a professional man is not responsible unless his advice has been given *malâ fide*. Vanderlinden's *Institutes, p. 242; Swinfen v. Lord Chelmsford, 5 Hurls. & Norm., 916; Williams v. Ceylon Company, Ltd., 3 Browne, 127.*

Walter Pereira (with him *Wadsworth*), for respondent.—Cases against barristers, such as *Swinfen v. Lord Chelmsford*, do not apply to cases like the present, because barristers cannot sue for fees. The defendant is liable because he did not exercise due professional skill. Mr. Sturgess's evidence proves the defendant to have been negligent. Negligence is the absence of such care as it was the duty of the defendant to use. *Grill v. General Iron Screw Collier Coy., L. R. 1 C. P. 612.* Tindal, C.J., said: "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause; nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill." *Lamphier v. Phipos, 8 Car. & Payne, 479.* When the plaintiff employed the defendant, he expected a fair, reasonable, and competent degree of skill.

Defendant may have done his work as well as he could, but if that work fell short of the standard of fair, reasonable, and competent degree of skill, he would be liable. Holland's *Jurisprudence, p. 100.* The Court has found that the defendant failed to note what even common farriers detected. Sturgess corroborates their diagnosis. The finding of the Commissioner, according to the evidence, and his judgment on the question of damages sustained, is right.

Dornhorst, K.C., in reply.

Cur. adv. vult.

15th June, 1904. MIDDLETON, J.—

This was an appeal against a judgment ordering a veterinary surgeon to pay Rs. 250 damages and costs to the plaintiff, a proctor, for alleged negligence and incompetence on the part of the defendant in giving his opinion for reward as to the soundness of a horse, by which the plaintiff was induced to purchase the horse.

It is a curious fact in this case that the defendant's certificate is as to a black horse eight years old, while Mr. Sturgess refers to a brown horse seven years old.

Neither counsel for the appellant nor for the respondent were able to produce any authority bearing on the question as to whether and to what extent a properly qualified veterinary surgeon was liable for the consequences of an opinion given *bonâ fide* and after careful diagnosis. The learned Commissioner who heard the case held that the defendant, when he gave his certificate, was honestly of opinion that the horse was sound; but his failing to note lameness at any time, his omission to refer in his certificate to the defects which he says he observed at the time, his imputing peculiarity of gait first to the hardness of the skin at the fetlock and afterwards to bad training, forced him to the conclusion that the opinion of the defendant, honest as it was, was not founded on a due exercise of reasonable and proper skill, and found him guilty of and responsible for negligence.

It is difficult to see how the defendant has been negligent except as regards his diagnosis, but it is proved he examined the horse carefully; he states that he observed both the splint and the growth of the lower jaw and noticed no lameness, but an awkward hind gait, and he does not regard any of these symptoms as indicative of unsoundness. He also looked at the back and loins, which he says are not weak.

If anything is to be charged against the defendant, it must be ignorance or incompetence.

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It is submitted to us by the respondent's counsel that, even if the evidence of Walles and De Silva is not taken into consideration, the evidence of Mr. Sturgess shows that the defendant displayed gross negligence and incompetence.

I feel that I cannot accede to this, as, even if I prefer the opinion of Mr. Sturgess to that of the defendant, I am not prepared to say upon it that defendant has no knowledge of his profession.

There does not appear to be authority in the Roman-Dutch Law bearing on the question that the learned counsel for the appellant can point out to us, but he has called our attention to p. 102 of *M. de Villier's Translation of and Annotations to Book 47 of Voet.*

The observations there set out appear to apply to the case of an injury arising from a statement made by a doctor as regards a patient's condition of health in respect of its defamatory character.

The first requisite under the Roman-Dutch Law appears to be the *animus injuriandi*, which apparently may be either expressed or implied; but if that is so, where is that element to be found in this case? Can it be held, if a professional person is consulted by one of the public, who tells him he purposes to act on the advice given in a matter of business, and the advice is given in absolute and unheeding ignorance of the subject upon which it is asked, that so entire a disregard of professional obligation may amount to such complete recklessness, as to whether he injures or not, as to imply an intention to injure. I doubt it.

It would be extending the doctrine of implied intention too far. The Roman-Dutch Law, which I presume should govern this case, seems to be against the Commissioner's ruling. I will now examine the English cases to which our attention has been called.

Chief Justice Tindal, in *Lamphier v. Phipos* (*1838*), *8 C. & P. 479*, which was an action against a surgeon for negligent and unskilful treatment, lays it down that every person who enters a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill, but does not undertake to use the highest degree of skill.

Lord Campbell, in *Purves v. Landell*, *12 Cl. & Fin. 97* (*1845*), apprehending that there is no distinction between the law in Scotland and that in England, says "the professional adviser has never been supposed to guarantee the soundness of his advice," and Lord Brougham in the same case, which was an action in the Scotch Courts against a Writer to the Signet for compensation for mismanagement of a case, held that the very essence of the action was that there should be negligence of a crass description or gross ignorance.

A veterinary surgeon of the present day, if not strictly a member of the learned professions so-called, is at least a member of a profession which requires considerable learning and attainments to acquire its higher professional qualifications; and it is admitted that Mr. Sturgess has acquired these in England and the defendant has acquired them at the Government Veterinary College at Bombay, which Mr. Sturgess admits is one of the best in the East.

Mr. Sturgess's opinion as to the unsoundness of the horse in question is supported by Mr. Walles and a farrier, and the weight of the opinion is distinctly in favour of the theory that the horse was unsound when Mr. Sturgess saw it and gave his certificate on the 8th January, 1903.

The evidence that I think is required under the English Law to make the defendant responsible is to the effect that it would be impossible for any person professing to be a veterinary surgeon to say in that capacity that he considered the horse was sound, unless he were quite ignorant of the A B C of his profession, and that a man would be quite ignorant of his profession if he did not know the difference between a swelling on a bone and osteoporosis, or between an injurious and a harmless splint.

I think it would be on the plaintiff to demonstrate that the defendant's opinion arises from gross incompetence or ignorance, or from crass negligence in his diagnosis and examination of the horse.

As the case at present stands, there is one qualified person's opinion against another's, coupled with the opinion of two practical men. It is notorious that doctors or lawyers and experts of every kind are constantly differing in opinion on the same facts, and, although as a matter of opinion a reasonable man would prefer to accept what appears to be the weightiest and most valuable, yet that acceptance does not of necessity imply that the opinion of the defendant is the outcome of gross ignorance or crass negligence, which I think alone would be a good ground for holding him responsible to the plaintiff. I feel, therefore, that I cannot hold the defendant responsible in this case either under the Roman-Dutch Law or English Law.

I am of opinion that the appeal must be allowed with costs, but I think the parties should pay their own costs in the Court of Requests.

WENDT, J.—

Under the *Lex Aquilia* a surgeon was liable in damages for unskilfulness or negligence (*Instit. 4, 3, 6, 7; Dig. 9, 2, 7, 8*), and

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the principle was well recognized in the Roman-Dutch Law (Voet, *Ad. Pand. 9, 2, 23*), being founded on the maxim that " no one ought to affect that in which he knows or ought to know that his want of skill or of strength would be injurious to another." If then a physician or surgeon is liable for unskilfulness or negligence in prescribing for or operating upon a patient, I do not see why in principle he should not be equally liable for unskilfulness or negligence in pronouncing as to the soundness of a horse which he is retained to examine and report upon in order that his opinion may form the basis of a purchase by his employer. In the present case the defendant's skilfulness is not impugned; he is a duly qualified veterinary surgeon. But the learned Commissioner has found him guilty of negligence, of not duly exercising the professional skill he possessed. His honesty and good faith are not questioned. For the reasons given at length by my brother Middleton I agree with him in holding that plaintiff has failed to prove the negligence alleged, the proof establishing that defendant made a careful examination of the horse before forming an opinion as to its unsoundness.

Mr. Sturgess's evidence, based on a subsequent examination, is not conclusive proof that there must have been negligence on defendant's part.

The decree appealed from will therefore be reversed and the action dismissed.

I agree with my brother in his order as to his costs.