*Present :* Mr. Justice Middleton and Mr. Justice Wood Renton.

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ATTORNEY-GENERAL *v.* SMITH.

*D.C. Colombo*, 20,723.

*Crown, claim against—Admission of patients into Government hospital —Negligence in performing operation—Liability of Crown—Loss of wife—Damages—Principle of assessment*—Solatium—*Issue not directly raised and argued in the lower Court—Refusal to entertain such point in appeal.*

The Crown held liable in damages for the negligence of its servants employed in the Government hospital, which caused, or contributed to, the death of a patient admitted into the hospital.

A husband is entitled to damages for the loss of his wife occasioned by the tortious act of a third party.

Where in the course of an operation, owing to want of ordinary care and forethought on the part of the nurse who was assisting in the operation, the defendant's wife was burnt by a hot water bottle, and such burn contributed to her death, and the defendant claimed damages from the Crown,—

*Held*, that the defendant was entitled to recover damages from the Crown for the pecuniary loss sustained by him by the death of his wife, and also a *solatium* for the loss of *consortium*.

*Held*, also, that the pecuniary loss ought to be estimated on the principle of annuity.

It was contended for the Crown, on the authority of *Hall v. Lees*[1] and *Evans v. Liverpool Corporation*[2] and the American case of *Powers v. Massachussets Hospital*,[3] that the only duty of the Crown towards the patients admitted into the hospital was to provide a staff of competent physicians, surgeons, and nurses, and where the Crown had done that, it was not liable for their negligence, but the Supreme Court refused to entertain or decide the point, as it had not been expressly taken or argued in the Court below.

The evidence as to negligence discussed.

APPEAL from the judgment of the District Judge (F. R. Dias, Esq.) pronounced after a new trial as directed by the Supreme Court in its judgment reported in (1905) 8 *N. L. R.* 229, where the facts are fully set out.

The District Judge gave judgment for the Crown, as claimed, and dismissed the defendant's claim in reconvention.

The defendant appealed.

*Elliott* (with him *B. F. de Silva*), for defendant, appellant.

*Walter Pereira, K.C., S.-G.* (*Maartensz, C.C.*, with him), for the Crown.

*Cur. adv. vult.*

[1] (1904) 2 *K. B.* 602.
[2] (1906) 1 *K. B.* 160.
[3] (1901) 65 *Law Rep. Ann.* 372.

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The claim in this action was for Rs. 131.70 for the cost of the subsistence of defendant's wife in the General Hospital from 17th May to 8th June, 1903, for her entrance fees to hospital, and for ambulance hire. On this claim the District Judge found in favour of the plaintiff at the first trial, and that finding was not contested on the first appeal or at the second trial or before us, and there is no doubt that the defendant is bound to defray these expenses, and that the judgment recorded against him by the District Judge on the claim must stand.

In reconvention the defendant claimed that while his wife was a patient in the General Hospital, in the course of a certain operation which was performed on her on the 23rd May, 1903, the agents and servants of the Government of Ceylon who were performing or assisting in the said operation acted in so unskilful and negligent a manner that defendant's wife was severely scalded in three places, and sustained such grave injuries that she died from the effects thereof on the 9th of June, 1903.

The action, which was started in the Court of Requests, was transferred to the District Court. The issues settled there were—

I.—Did the agents and servants of the plaintiff in the course of a certain operation which was performed on defendant's wife on 23rd May, 1903, act so unskilfully and negligently that she was scalded in three places ?

II.—Was her death on 9th June due to such scalding ?

III.—What damages did defendant suffer by the death of his wife ?

IV.—Is he entitled to recover such damages from plaintiff ?

On the case coming on for trial in the District Court originally, counsel for the defendant desired to amend the second issue in such a way as to ascertain whether the scalding contributed to the death of defendant's wife rather than actually caused it. This amendment was not allowed by the Judge, and the case went to trial. Judgment was given for the Crown on the claim in reconvention, the District Judge holding that there had been carelessness amounting to negligence as alleged on the part of some servant of the Crown, but that the death of Mrs. Smith was not due to the scalding or burns. On appeal the Supreme Court set aside this judgment of the District Court and ordered a new trial, both the learned Judges stating in their judgments that on the evidence before them the burns, though not possibly the sole cause of death, contributed to it. The Supreme Court directed that the evidence taken at the first hearing might be read at the new trial, provided the witnesses' presence at the new trial could not be readily obtained. At the new trial the following additional issue was settled: Did the scalding contribute to the death of

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Mrs. Smith in any way? It was contended before us by the learned counsel for the appellant, and I believe also before the District Judge, that the finding of negligence in his favour on the first trial obviated any necessity for a finding on that issue on the second. I think, however, that the intention of the Supreme Court was that there should be an entire new trial and findings by the District Judge, not only on the old issues, but also on the new issue, as to whether the burns contributed to Mrs. Smith's death.

The case went back for trial, and the additional issue I have indicated was settled and tried.

On the new trial the learned District Judge, who had not presided at the first trial, found (1) that there was no negligence; (2) that the burns did not contribute to Mrs. Smith's death; and on the hypothesis that the Court of Appeal might not agree with him, he assessed the damages at Rs. 10,000, and dismissed the claim in reconvention.

The defendant now appeals, and for him it is submitted that the findings of the District Judge were wrong on all the three points indicated.

First, as regards negligence, it was argued that the Principal Medical Officer had expressly admitted it in his letter D 3 of 15th July, 1903, in which he stated that no hot water bags should be used in hospital without having a flannel cover to fit; that Mrs. Brohier's evidence (pp. 76-77) shows that the hot water bottle was wrapped in towels and placed under Mrs. Smith's body; Dr. Garvin's evidence (p. 80) shows that an uncovered bag filled with too hot water was brought in; that Dr. Garvin in his report admitted that the towels must have shifted and the bottle have come into contact with Mrs. Smith's body at three different areas; that Dr. Thomasz said the bare surface of the bottle ought not to touch the bare skin, it is easily preventible, not to do so would be neglect; the body may be shifted for purposes of the operation; and that he inferred from the authorities that the hot water bottles should be wrapped up in flannel or blankets (Stonham, vol. II., p. 22); that Dr. Rutnam, who was present at the operation, remembers that the hot water bottle was brought in with water too hot and taken out and brought back wrapped up in a towel by Miss Bell, one of the nurses; that new flannel bags with running strings are provided at the hospital; and finally, that the finding of the District Judge that he was unable to find any evidence that the hot water bag was used in any unusual or negligent manner was against the evidence; that whether the statement T. F. G. made by Mrs. Brohier be taken, or her statement in evidence, that it is clear that the use of the hot water bag was attended by negligence on the part of those taking part as assistants in the operation. For the plaintiff it was contended that the operation was performed under circumstances which satisfied the requirements of the case and in accordance with the ordinary

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practice of the hospital; that Dr. Thomasz and Dr. Rutnam were present and were unable to say that anything in the shape of negligence occurred on the part of those assisting in the operation; that the statements made by Mrs. Brohier to Dr. Craib negative any carelessness on the part of the nurses, and that Dr. Garvin's report shows the same and that the entire weight of the evidence was against the existence of negligence. It is clear, however, that after the operation was over on the 23rd May three burns or scalds on the deceased's right side were discovered by Dr. Alvis, and seen by Dr. Garvin on the 24th; that according to Dr. Garvin (p. 80) one of those burns was at least of the fourth degree, and the others of the second and third.

In his report Dr. Garvin said (p. 27) that these burns were on the right loin between the crest of the ileum and the last rib, one as large as a turkey's egg, the others as ducks' eggs, and all oval; that the first involved the skin in its entire depth, the fourth degree; while the second and third were comparatively superficial, the second and third degree. It is clear, then, that water far too hot must have been used in the hot water bottle even if the towels which were put over it remained as a covering during the whole of the operation. Dr. Garvin, before the commencement of the operation, intimated that the water in the bottle was too hot and asked for a sand bag. Instead of this the same bottle wrapped in towels was used. Dr. Garvin in his report evidently thought that the towels became displaced and the bare bottle came into contact with the patient's bare body during the taking up of her clothing and the arrangement of her in proper position during her struggles when being anaesthetized. Considering that the water bottle was to be used as a prop, the probability is that it was in contact with the patient's body, as it was intended to be during the whole of the operation, which lasted sixty minutes.

To my mind, therefore, a want of ordinary care was shown by the nurse in charge of the bottle, whose duty it was to apply it, in using a bottle the water in which was admittedly too hot, without covering it in such a way as to obviate the possibility of displacement of the covering during the course of a long operation.

That the towels became displaced, as Dr. Garvini apparently thought, is, I think, the truth of the matter, but if they did not, the patient was still scalded, evidently through the use of coverings inappropriate or insufficient in their nature to prevent such a thing, owing to the use of a bottle containing water of a temperature pronounced by the surgeon too hot for the purpose. Whether flannel is the proper material for such appropriate covering I am not in a position to decide, but that the covering should be incapable of displacement by the struggles of a patient in the course of an operation and of a material obstructive to the passage of dangerous heat to the

bare human body I have no doubt. I do not think it is any answer to the charge of negligence to say that two experienced surgeons were present who had no fault to find with what was done.

Dr. Thomasz did not know if the bottle contained hot water, and there is no evidence that Dr. Rutnam knew that the bottle was brought back after its rejection by Dr. Garvin without a change of water. Even if the use of towels was the approved practice—of which there is no evidence—it seems to me that the present case exemplifies the danger of it, and demonstrates that ordinary forethought on the part of those acquainted with the circumstances attending operations and the nature of hot water bottles should have impelled the use of non-displaceable coverings for a hot water bottle used as a prop.

If hot water is of necessity required in the bottle to prevent the temperature of a patient under an operation becoming subnormal, it is all the more necessary that those in charge should remember that there should be no possibility of a dangerous contact between the bare bottle containing the necessarily hot water and the bare skin of the patient. I am unable to agree with the learned District Judge that the burning or scalding was the result of an accident, but feel bound to attribute it to the want of ordinary care and forethought of the hospital nurse entrusted with the duty of providing and arranging the accessories of the operation.

I accordingly find the first issue in the affirmative. If negligence is found to exist causing the burn, in order to arrive at a correct conclusion as to whether the burn contributed to the death of the deceased, it is necessary to survey the facts and circumstances existing and occurring at and upon the death of Mrs. Smith, and to consider the attitude of Dr. Garvin in relation to the fact that a burn of a serious character had occurred durinig the course of an operation on the 23rd May, that the operation for lumbar abscess had been a most successful one, that the patient had appeared to be progressing satisfactorily towards convalescence, when on 4th June a change for the worse took place and the patient died on 9th June. That the burns were not of a negligible character is, I think, demonstrated by the exclamation of Dr. Garvin on the 24th May when he saw them, by their size, their nature, and their position on the patient's body, and by the fact that a slough which had formed had to be removed on the 8th June under the influence of chloroform at a time when the patient was nearly at the point of death. That the patient was submitted to chloroform on this occasion mainly owing to the necessity of the removal of the slough I have no doubt on the evidence of Dr. Sinnetamby.

After the death of Mrs. Smith the evidence shows that Dr. Garvin had made arrangements for the funeral to take place from the hospital. This was objected to by Smith, who moved his wife's body to his own house on the morning of June 9. Upon the removal,

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Smith was told, in the hearing of the witnesses Miss Siegertsz and Miss Vanderstraaten, by Dr. Rutnam that he was not to touch the bandages round his wife's body. Smith, however, cut the bandages, which were very securely fastened, and inspected the wound on the right side, in the presence of Miss Thiedeman, which presented the appearance of raw beef, and was about seven inches in diameter, about one inch deep, but beautifully clean and dark. The same morning Dr. Garvin called on Smith, who, he says, blamed a certain person for the burn, and said that burn was the cause of his wife's death (p. 61), at which Dr. Garvin told him he was quite wrong, but that he was quite welcome to have another opinion if he liked. It is clear, therefore, that Smith was at that time most suspicious as to the cause of his wife's death; that Dr. Garvin knew it, and knew also all the circumstances connected with the burn and its nature. Why, then, did not Dr. Garvin at once suggest a *post-mortem* examination of the body, in fact order it ? I see no answer to the question in the reply that he was confident in his own integrity and knowledge of the cause. A *post-mortem* examination by a qualified surgeon would have demonstrated beyond all doubt the facts, if they were true, that Dr. Garvin contends for, *i.e.*, that the burns were not serious, and that they did not cause or contribute to the death of the deceased.

The fact that he did not do so inevitably gives rise to a suspicion that something had to be concealed. To this must be added the fact that in the bed-head ticket no specific mention of the burns whatever is made. The only entries that it is said do refer to them are two prescriptions for ointments on the 23rd May and the 4th June. Dr. Garvin says he did not know that the bed-head ticket contained no entry beyond these as to the burns, but he has made other entries in the bed-head ticket, and the fact that he did not enter the burns when he discovered them on the 24th gives rise to the suspicion it was undesirable they should appear in the patient's chronicle, for some reason best known to the person omitting it. Dr. Garvin also in his report graphically describes the discovery of the burns by him personally on the evening visit of 23rd May, when in his evidence he admits he did not see them till the morning visit of 24th May. Under the circumstances this hardly appears like a slip of memory, but rather as an attempt to demonstrate the earliest personal discovery and attention to the wounds, and to conceal the fact that the bandage had been removed and replaced and some treatment applied by a student. The death certificate again is signed by a gentleman who is admittedly ignorant of the cause of death. That certificate states that death is due to lumbar abscess complicated by acute mania.

It is now admitted that the proximate cause of death was exhaustion, that the wound from the lumbar abscess operation was healing well, and there is no direct mention of mania in the bed-head ticket

or of its having been diagnosed. Dr. Gavin in his evidence (p. 81) has not the slightest doubt that the patient had an attack of dysentery on the 5th June caused by a chill, but there is no entry in the bed-head ticket of dysentery nor of chill, nor does Dr. Garvin in his report (p. 28) refer to anything but diarrhoea. It was stated by the Attorney-General personally, on the hearing of the appeal on the first trial, that there was reason to think that all mention of the burns was excluded from the bed-head ticket so that the Principal Civil Medical Officer and the superior authorities in the hospital should not hear of them. It is said by the Solicitor-General that it has not been proved that the Attorney-General had the authority of the Principal Civil Medical Officer to enable him to make such a statement, but the Attorney-General is the nominal plaintiff in this action, he is the highest legal authority of the Administrative Government, and it is impossible to doubt that the information in his possession did not support it.

It would seem that the Principal Civil Medical Officer did pay a visit to Mrs. Smith after the operation on two occasions, as his letter of 26th August, 1903, shows, and it is, I think, perfectly clear from that letter that the Principal Civil Medical Officer was then entirely ignorant of the existence of the burns at the time of those visits, or he would have asked her about them. That Mrs. Smith did not mention her burns to the Principal Civil Medical Officer may be owing to the fact that she was, as Dr. Garvin says, a brave woman, and may not have wished to make any complaint to the Principal Civil Medical Officer which might involve blame to Dr. Garvin, to whom, she thought, she owed so much in the successful treatment of the abscess. It is material to remember also that Dr. Garvin nowhere in his evidence or report said what Mrs. Smith died of, or supported the death certificate, or denied, until he was recalled, after his entire examination, that the burns contributed to her death.

Looking at these facts, strong suspicions are aroused in my mind that there was a desire to conceal and hush up the fact of the burn and minimize its effects and consequences. It may be that the object of this was to prevent a slur on the hospital, from *esprit de* corps, to shield the nurses, or to prevent Dr. Garvin being called upon for an explanation, as suggested by counsel for the defendant; but at the same time it is unquestionably open to the inference that it was done with a view to conceal the fact that the burn was much more serious than it appeared to be, and in fact contributed to, if it did not cause, the death of the patient.

The resort to a satisfactory solution of the truth of the matter by *post-mortem* examination was taken away (1) by the granting of a death certificate superficially cogent, though, I take leave to think, scientifically inaccurate in omitting the proximate cause of death, and (2) by the omission of Dr. Garvin to order it.

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It has been argued that it was for Mr. Smith to propose a *post-mortem*, or to take steps to call in an independent medical opinion; but the evidence shows that Mr. Smith was a friend of, and had profound confidence in, Dr. Garvin ; that Dr. Garvin is a man of pre-eminence in the surgical profession in Ceylon ; and I am not surprised that Smith, under the circumstances, did not proceed to stronger measures, and allowed the body to be buried.

At any rate we find that he was not satisfied as to his wife's death, as the letters D 3 and D 5 from the Principal Civil Medical Officer of 15th July and 26th August, 1903, and D 4 from the Colonial Secretary (7th September, 1903), show.

As it appears to me that there was a desire to conceal the burns and minimize their nature and consequences, and a reasonable conclusion is that Dr. Garvin ought under the circumstances to have ordered a *post-mortem* examination, which would have been the only satisfactory means of discovering what was the nature and consequence of the burn, and the death certificate is signed by a medical man who does not know the real cause of death, I feel that the burden of proving that the burn did contribute to the patient's death should be satisfied in a civil action like this by far less cogent evidence than would be required in a case where no such elements were present, even if the principle *omnia præsumuntur contra spoliatorem* is not to be applied.

It is only after most deep and careful consideration, and with a painful reluctance, that I come to the conclusion that a gentleman pre-eminent in the practice of his profession as a surgeon, not only in the country of his birth, and whose high attainments and skill in the performance of the many difficult and delicate operations which in the long course of his professional career have contributed so much to the benefit of mankind, should have acted in this matter as to render his evidence in a Court of justice liable to be doubted and ignored.

My impression, however, from the evidence is that the symptoms of dysentery and mania were availed of after the death of Mrs. Smith to cover (1) the negligence which caused the burns which might affect the reputation of the surgeon or the hospital, (2) a desire to conceal their serious character, which led to an apparent indifference in their treatment during life and an attempt to prevent inspection after death, and the actual prevention of *post-mortem* examination.

It is possible that Dr. Garvin, not having formed any definite opinion as to the real cause of death before Mrs. Smith's death, may have persuaded himself that the symptoms indicated on the bed-head ticket warranted his assertion of the diagnosis of dysentery and mania after death, and persuaded himself that he was justified in maintaining the theory in default of evidence to the contrary, which could only be ascertained by *post-mortem* examination. This view of

Dr. Garvin's action is preferable to my mind to a belief of deliberate perjury, but even that attitude of mind makes his evidence in my opinion unacceptable.

Assuming, however, that Dr. Garvin believed he had diagnosed dysentery and mania before death, and had satisfied his own professional mind that the burns had nothing to do with contributing to the death, he must have been aware, as a man of the world, that Smith was dissatisfied and suspicious as to the burns, that he might give very considerable trouble by throwing public and official doubt on the efficiency of the hospital, and as a professional man, that a *post-mortem* examination would set at rest all suspicion by proving beyond all doubt that Mrs. Smith had not died from the effects of the burns: and yet he did not promptly order one. He could have vindicated his opinion and reputation by this simple step, which he did not take. Could he, then, think that his professional reputation and opinion stood so high that he was strong enough to bear the brunt of suspicion and inquiry without *post-mortem* examination in a case where the death of a patient of his had occurred under circumstances which, when revealed, must at least lead to a strong suspicion of negligence, or that the death had been caused or accelerated by the burns ? If he did so think, his knowledge of human nature in its mental aspect is very decidedly less than I should have imagined of a man of his scientific attainments and experience. I find it difficult, therefore, to believe that this was the attitude of Dr. Garvin's mind. It is with regret I am driven to the conclusion that the more probable inference is that he did not desire the *post-mortem* examination, for other reasons best known to himself.

It is suggested by the learned Solicitor-General that Smith was not a reliable witness, and his admitted inconsistency (p. 69) of the former part of letter D 12 with the latter is quoted against him, also his statement at p. 68 that he knew the pain proceeded from the burn, when in fact he was writing in his letters that the pain proceeded from the operation wound. None of the letters written by Smith to his daughter were definitely challenged by the Crown as fabrications for the purpose of the action, and I fail to see anything in the evidence alluded to by the Solicitor-General to show that Smith's answers show more than a confused witness. The letters were to a daughter at a distance, whom naturally a father would not wish to unnecessarily alarm, by a husband concerning his sick wife and his daughter's mother, who saw them all before they were posted.

Again, as regards his cross-examination as to documents "B," "D," "G." The matters alluded to in those documents were circumstances which occurred in 1895, and it may well be that the witness's memory in respect to them was not particularly accurate.

Again, Dr. Garvin (p. 82), whose daughters were educated by Mrs. Smith, states of him that he cannot believe that Mr. Smith would have written to his daughter things which he did not believe to be true

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and that he had no reason to doubt he was a straightforward and truthful man. It is contended for the plaintiff that there was no obligation to furnish the defendant with the original or a copy of the bed-head ticket, as they were private documents kept for the information of the hospital authorities ; also that the omission to enter diagnosis and symptoms was not unusual, and might very well and did often occur under the pressure of work. As regards the first point, Rule 17 of the rules of the paying wards of the hospital ordains the record of the histories of patients in detail for the information of the relatives and friends when death takes place. I fail to see, therefore, why a copy of the bed-head ticket might not have been at once furnished to Mr. Smith on his application, or that he might not have been given an opportunity to take a copy. As regards the second point, it is no argument to say that rules are made to be broken. The bed-head tickets contain headings providing for the entry of diagnosis, present symptoms, and treatment of patients, and the failure to make these entries by the medical man is unquestionably a breach of the hospital regulations for which he may be called in question.

We have, then, to consider if it has been established that Mrs. Smith was suffering from acute mania, which caused her death, or whether the symptoms of alleged mania are not consistent with the fact that she was labouring under delirium caused by the severe pain and sleeplessness which she had been undergoing from the 4th June until her death.

The theory of mania depends mostly on the evidence of that most eminent authority on the subject Dr. Savage, and Drs. Garvin and Sinnetamby. Dr. Stonham contemplates delirium as the cause of exhaustion in the alternative to mania, and Dr. Hewlett speaks of her mental condition causing exhaustion (p. 62). Dr. Manson (p. 59) says mania or delirium and want of sleep would be serious complications in increasing exhaustion. Dr. Savage (P. 63) thinks that her condition was not the delirium of exhaustion, because there was no increase of temperature, and physical strength was maintained, as evidenced by the record of violence requiring control. He gives the causes as predisposition from former attack, prolonged sleeplessness due to the lumbar abscess and consequent pain, and the recurrence of sleeplessness after recovery from the operation. Dr. Savage further says the treatment would be suitable for some cases of mania. It is admitted that Mrs. Smith was put into Stone Lunatic Asylum in the early part of the year 1896 owing to mental illness resulting from change of life, overwork, and insomnia.

It does not seem to have been brought home to the mind of Dr. Savage and the other experts that the deceased was suffering great pain during the last few days of her life, except perhaps from the entries on the bed-head ticket, which do not greatly emphasize it. Dr. Savage, moreover, does not appear to have considered the

length of time elapsing without any recurrence of the attack which Mrs. Smith suffered from at her change of life.

No nurse was called by the plaintiff to prove the condition of the patient, nor why the two attendants were required on the night preceding her death. It may have been that the attendants were required for attending to the necessary duties following on approaching death.

There is no evidence that the prolonged sleeplessness was due to the lumbar abscess. In fact on the nights of 2nd and 3rd June the bed-head ticket shows that she slept well on those nights, and the cocaine prescription on the 4th points to severe pain from the burn wounds that day.

If the mania was brought on by pain resulting from the burn wounds, there can be no question that Dr. Savage is a witness for the defendant, as claimed by his counsel. If, however, the deceased was suffering from acute mania, it is difficult to understand why that fact was ignored in the bed-head ticket when it was diagnosed by Drs. Garvin and Sinnetamby, and why some steps were not taken with a view to securing the use of an asylum, which Dr. Garvin admitted to be indispensable, and Allbutt at p. 360 says is almost inevitable.

The evidence of Dr. Rutnam is that he thought Mrs. Smith was insane, and Dr. Rodrigo (p. 19) would have called the delirium mania, if there was no disease to cause the delirium. There is nothing in the prescription in the bed-head ticket, including trianol, which is said to indicate that the deceased was suffering from acute mania rather than delirium. Taking into consideration the absence of and omission from the bed-head ticket of the recognized primary symptoms of acute mania or its diagnosis (pages 358, 359, vol. VIII., of Allbutt), the evidence of Drs. Pepper and Carr, and the evidence of other local doctors and of Miss Siegertsz, my opinion is that the deceased was not suffering from acute mania, but rather from delirium induced by pain resulting from the burn wounds she had received on the occasion of the operation for the lumbar abscess. I may here mention that in reviewing the medical evidence I have more particularly dwelt on that given by the experts on both sides called in London. The evidence given both by Dr. Thomasz and Dr. Rodrigo seems to me to bear out the conclusions contended for by the defendant's counsel on the question of mania, dysentery, and contribution to death by the burn wounds. As regards Dr. Thomasz, although he goes so far as to admit that he hates Dr. Garvin, his evidence in nowise appears to be strained against him, but to be given fairly and conscientiously. As regards Dr. Rodrigo, his opinion appears to be borne out by the eminent authorities he quoted in support of them, and I can find no trace in the record of his evidence of any malevolent feeling towards the hospital authorities.

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The learned counsel for the appellant, in arguing that the burns contributed to Mrs. Smith's death, contended that if he showed from the evidence that Mrs. Smith did not suffer from acute mania and could not have had dysentery, that her death was due to exhaustion produced by internal inflammation caused by or contributed to by the burns.

Sir Patrick Manson, Drs. Pepper, Carr, Stonham, Hewlett, Sinnetamby, and Rodrigo all attribute the proximate cause of death to exhaustion. Dr. Rutnam, who signed the certificate, omitted the proximate cause, but says (p. 13) if he had had to put down the cause of death he would have put down lumbar abscess, complicated by mania, dysentery, and burns. Dr. Garvin himself nowhere stated what was the cause of death, except in so far as his clerk filled in the certificate according to Dr. Rutnam. Dr. Savage gives no opinion. The evidence of the bed-head ticket and the assertion on behalf of the plaintiff of dysentery as a disease from which the deceased was sufferinig presupposes the existence of some inflammation or disturbance of the intestines. If this inflammation was not produced by dysentery, it must have been caused by some other factor.

It is not suggested by the medical evidence that it was caused in any way by the result of the operation from lumbar abscess. Can dysentery, then, be eliminated as a disease from which Mrs. Smith was suffering? In the first place, the bed-head ticket does not mention dysentery as a diagnosed illness from which deceased was suffering, it is not mentioned in the death certificate, it is not specifically mentioned in Dr. Garvin's' report, and it is not even now relied on for the plaintiff as a cause of death, but it is suggested that it was present.

As regards the symptoms of dysentery, the most important and indicative are admitted to be blood and mucus in the stools and tenesmus. The former symptoms are only mentioned twice and one day in the bed-head ticket, although it shows many motions.

In a number of cases of admitted dysentery, the bed-head tickets of which we have had several before us produced by the Crown for our inspection, show that the stools must have been carefully examined, as the symptom of blood and mucus is constantly mentioned, as also the symptom of tenesmus.

It is admitted, I think, that a daily examination, at least of the stools in dysentery, is of the utmost importance (Manson, p. 400). Both Drs. Manson and Stonham assumed that this was done, but there is no evidence of it. The bed-head ticket does not point to this having been done here, or to the existence of tenesmus. Dr. Stonham, however (p. 61), finds evidence of tenesmus from a certain statement made by Smith, but I find it difficult to follow this.

The prescriptions mentioned in the bed-head ticket are said by Dr. Manson (p. 59) to point to the treatment of dysentery, and by

Dr. Stonham (p. 61) to be proper treatment for dysentery. Dr. Carr says (p. 52) the prescriptions are appropriate to diarrhœa. Dr. Pepper says there is no mention in the bed-head ticket of the symptoms of dysentery, apart from enteritis, and the presence of blood and mucus on these two occasions are not inconsistent with the theory of enteritis. Dr. Pepper says the motions in enteritis may " contain blood, but not necessarily, They generally contain mucus." Dr. Carr in cross-examination says (p. 55): " Blood and mucus noted the first few days, not inconsistent with diarrhœa."

The suggestion—for it is nothing more, that dysentery might have been caused by a chill or the eating of unripe fruit—is not supported by any evidence. No doubt dysentery is common in Colombo, and possibly in the hospital, and there may have been a cold wind on the night of 3rd June in a particular part of Colombo, but there is no record on the bed-head ticket or anything to show that either a chill or that unripe fruit had been taken.

By an unfortunate error of judgment on the part of the learned counsel for the defendant the scientific expert witnesses for the plaintiff were not cross-examined, so that none of them have stated that the symptom of blood noted one day was necessarily inconsistent with diarrhœa.

As regards the evidence of Dr. Garvin, he did not advance the theory of dysentery in his report, and he did not enter a diagnosis of it on the bed-head ticket, and he was not called at the first trial to support it. Dr. Rutnam would have entered the cause of death as dysentery in the death certificate from the character of the motions in the bed-head ticket. Dr. Sinnetamby derives his knowledge on the subject from Dr. Garvin (p. 85). Dr. Thomasz says he cannot say it was dysentery (p. 77), but states that he intended the word " dysenteric " as a qualification throughout his evidence (p. 78). Dr. Rodrigo, who, if I may be permitted to say so, must have given his evidence with marked ability, thinks it could not be dysentery, the symptoms and diet recorded in the bed-head ticket negativing the theory.

The theory of dysentery may not be negatived entirely on the medical evidence, but there is no evidence which negatives entirely the theory of diarrhœa from enteritis or intestinal inflammation. Taking into consideration the omissions in the bed-head ticket and the report of Dr. Garvin, and the medical evidence negativing dysentery, I do not think it has been established, therefore, that the deceased was suffering from dysentery, but may have been suffering from intestinal inflammation producing diarrhœa. In what way, therefore, could this intestinal inflammation have been produced except by the action of the burns? It is postulated by the Solicitor-General that if the burns caused intestinal inflammation, it must have been either from septic absorption or reflex action. It is further argued by the learned Solicitor-General that the theory of reflex action was untenable as the evidence showed no continuous and progressive

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irritation of the wound; and that the theory of septic absorption must be rejected, because the normal temperature of the patient showed no fever, an inevitable concomitant of septic absorption.

If the chart furnished by the plaintiff with the bed-head ticket is correct, 98.4° is the accepted standard of normal temperature, and the chart shows that the temperature of the deceased was below normal from the 25th May till 8th June, except on 29th May, when the drainage tubes of the operation were removed, and on 5th June. There is no evidence that in dysentery such a temperature is to be expected.

Dr. Pepper, however, says (p. 45): "When a patient is exhausted the causes of fever may be present, but the patient does not register the fever"; and again, at p. 46, that septic matter may be so virulent and in such quantity as to cause a fall of temperature. And Dr. Stonham says, "in cases where the dose of poison has been very large the temperature may not rise, because the patient dies right away." Dr. Pepper (p. 47) says exhaustion may be a cause of the temperature being lower than it would otherwise be.

There is no evidence given as to how the temperatures indicated on the chart were taken, whether under the arm or under the tongue, nor are they sworn to be correctly taken, or whether the mean normal temperature of Mrs. Smith varied from the standard normal indicated on the chart, as Dr. Stonham at p. 61 suggests might be the case according to the individuality of the person.

There seems to be a possibility, according to Dr. Pepper and from the evidence of Dr. Thomasz, that, however much attention was given to the antiseptic treatment of the burn, it might have become aseptic owing to its position in respect to the lumbar abscess wound. Dr. Stonham (p. 48, vol. 2) says: "A plentiful supply of septic material is present in all cases of burns."

There is evidence that deceased was suffering from much pain on the 2nd, 5th, and 7th June, from the letters D 10 and D 12 of Smith to his daughter, from Smith's evidence, from Miss Siegerts' evidence that she was crying with pain on the 4th June, which is corroborated by the cocaine prescription in the bed-head ticket. The bed-head ticket on the 6th records pain and restlessness, and on the 7th no sleep whatever on the preceding night, and again on the 8th a very restless night and no sleep on the 7th.

Dr. Pepper (p. 47) says: "Mrs. Smith must have suffered pain, whether she complained of it or not"; and, again, at p. 48, "there must have been severe pain from the burns." Dr. Garvin (p. 80) says: "On the 4th June Mrs. Smith complained of a slight pain over the burnt area"; and at p. 82, "after the infliction of the burn I would have expected pain a good deal." Dr. Pepper thinks (p. 47) that on the 4th June the congestion first arose. I think, therefore, that the evidence establishes that for a very considerable period, at least from 2nd June, in spite of the fact that Mrs. Smith went on

the verandah on 3rd June, she was suffering pain from the burns up to the time of her death.

Dr. Pepper (p. 46), whose experience of burns is admitted, says that " there are cases but of exceptional occurrence where intestinal complications of burns occur even in the case of small burns and which are aseptic." Dr. Stonham (p. 60) says that there is a connection between burns and intestinal inflammation including all the internal organs, brain, &c., and the situation of burns influences the nature and frequency of the complications; and, in stating his opinion that the burns did not directly contribute to the death of Mrs. Smith, thinks that the mental condition which, in his opinion, proved fatal was led up to by the whole illness under which she suffered, but the part the burns played was practically negligible. This infers that the burns in his opinion did play some part in contributing to the death.

None of the expert witnesses examined in London on behalf of the Crown seem to have been aware of the operation which was necessary for the removal of the sloughs, it not being recorded in the bed-head ticket. Dr. Carr at p. 55 thinks the presence of sloughs a source of irritation; that " there cannot be a healthy wound whilst dead tissue is present in it; that it would be a constant source of irritation from the moment it was formed to the moment of its removal; it would be irritating to the tissues beneath; the action might be compared to that of a mustard leaf applied to the skin." Dr. Sinnetamby at p. 85 allowed that the connection between burns and intestinal inflammation was an admitted fact or theory, though the pathology of it was obscure, and also agreed that inflammation sets in from about the second to the fourteenth day.

My findings are that the temperature of the deceased was sub-normal from 4th June to her death, except on two occasions; that sub-normal temperature points to considerable exhaustion; that antiseptic treatment of a wound is palliative only, and may not be a conclusive preventive, particularly in a case like this, where the bandages round an admittedly septic wound resulting from the operation for lumbar abscess embraced, at least on the first occasion, the surface of the burns and were taken off and replaced by Dr. Alvis under circumstances which give rise to a possibility of immediate septic contamination; that pain was present of a severe character from 14th June till the death of the patient; that his would be indicative of continuous and progressive internal irritation; that the weight of the evidence is against the theory that deceased was suffering from dysentery or acute mania; that there was an irritation of the intestines caused either by reflex nervous effects from the burns or in some other way as suggested by Dr. Pepper in his experience; that deceased died proximately from exhaustion; that the operation for lumbar abscess was ably and successfully performed, and that the wound was proceeding satisfactorily to convalescence

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up to the 4th June; that the operation under chloroform on 8th June was more particularly directed to the removal of the sloughs on the burn wounds than to the quieting of the patient by an anæsthetic. I find also that the withholding of the copy of the bed-head ticket from Mr. Smith, the failure of Dr. Garvin to order a *post-mortem* examination, the signature of the death certificate by a medical man admittedly ignorant of the cause of death, all point to a want of candour, if not to a desire of suppression or concealment, on the part of those in medical attendance on Mrs. Smith, which strongly affects my mind as to the value of any evidence in respect to the burns or their consequences given by Dr. Garvin or any medical witness closely associated with him in the hospital.

The abstention of Dr. Garvin from the witness box on the first trial may have been owing to the discretion exercised by those responsible for the legal management of the case, but I take leave to think that it was an unwise discretion.

I find, therefore, that the deceased, Mrs. Smith, died from exhaustion caused by intestinal inflammation contributed to by the effects of the burns inflicted on her body during the course of an operation for lumbar abscess on the 23rd May.

As regards the question whether the Government would be liable or any negligence on the part of the surgeon and nurses of the hospital, it was admitted that this was not argued in the Court below, and there is no issue which directly raises the question. If this point had been taken at the inception of the case, it might have been raised by a special issue of law as provided under the Civil Procedure Code, and a decision in favour of the plaintiff before the commencement of the trial might have been taken to the highest Court of the Empire, and, if affirmed, would have prevented the enormous expense which the two trials of the issues of facts in this case have involved.

There was an authority in the case of *Hall v. Lees*,[1] which was quoted during the trial for another purpose, which was not used as an argument, as it might have been, for the denial of the defendant's right of action in reconvention.

There may be also authorities, like the American case of *Power v. Massachusetts Homœopathic Hospital*,[2] which was furnished to us after the conclusion of the argument by the learned Solicitor-General, which would support the contention of the Government. In my opinion the whole case has been fought on the principle that if the defendant proved negligence, and that negligence caused or contributed to the death of the deceased, the Government were prepared to pay the damages the Court might award.

Without, therefore, expressing any opinion as to the legal position of the Government in its relation to the employés of the hospital,

[1] (1904) 2 *K. B.* 602.

[2] (1901) 65 *Law. Rep. Ann.* 372.

I am prepared to hold that it has waived its legal rights in this respect, if such exist, and must be held now bound to make that reparation which it impliedly admitted must be made if the issues agreed upon were decided unfavourably to it.

It is clear that the issue of law as discussed and disposed of by Mr. Weinman did not involve the Government's liability for negligence as the employers of the surgeons and nurses of the hospital, but only the defendant's liability to pay the charges for medical treatment, if want of skill or negligence were proved on the part of the surgeons and nurses.

As regards the question of damages, it is contended for the defendant that he is entitled to a *solatium* for the loss of his wife's *consortium* and to compensation for the pecuniary loss he has been deprived of by her death in respect to her joint earnings with him as the principal teacher in a school, the business management of which was carried on by defendant, and the argument for the plaintiff (pp. 99-101) in *Blake v. Midland Railway Co., Ltd.*,[1] was relied on as showing that the Scotch Law, which is founded on the Civil Law, would support the claim contended for. Thompson (*vol. II., p.* 450) was also referred to as supporting the theory that a husband could claim pecuniary damages for the death of his wife under the Roman-Dutch Law, and the case of *J. G. K. Carolis v. K. P. Don Bastian et al.*[2] was instanced as showing that Chief Justice Cayley had subscribed to the opinion of Thompson, although the case did not actually involve a decision of the question. The case of *Silva v. Brodie*[3] was also relied on. In that case the claim was for damages for the loss of a wife and child killed by the fall of defendant's wall negligently built without adequate foundation. On the first appeal the Supreme Court thought that formal proof of the death of the wife and child owing to the fall of the wall had not been proved, and sent the case back to enable the plaintiff to substantiate the facts. This was done, and the judgment was again given for the plaintiff for Rs. 1,100 damages. On the appeal coming up for hearing again before the Supreme Court, this judgment was affirmed on the 2nd February, 1906, no reasons to the contrary appearing to the Court. It is, therefore, authority for the contention of the defendant, though no reasons are given.

On the other hand, the Solicitor-General submitted that the defendant had in fact sustained no damage, that it was his duty to support his wife and children, that no damage could be recovered for the loss of the wife's services as schoolmistress more than for the death of a clerk, and that the Roman-Dutch Law would not give the *solatium* sought for, and relied on *Voet* (*Sampson's Translation, p.* 318), *Herbert's Grotius* (*p.* 437), *Kotze's Translation of Van Leeuwen* (*vol. II., p.* 282).

[1] *L. R.* 18 *Q. B.* 93.
[2] (1879) 2 *S. C. C.* 184.
[3] *S. C., Min. Feb.* 2, 1906 (*D. C. Colombo*, 20,450).

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I can find no direct authority from the old text writers to support the right to *solatium* for an act *ex gravi maleficio* causing the death of a wife beyond the general principle laid down in Grotius (*Herbert, book III., ch. XXXII.*) of obligation to make good any inequality. This would include loss of *consortium*, which would certainly cause inequality, assuming no other ground for compensation existed.

As regards the pecuniary loss, it is to be estimated on the principle of annuity (*Grotius, book III., ch. XXXIII.*). Following this I would take a period of five years as a reasonable limit during which the profits of the school, estimated at Rs. 4,000 per annum, might fairly be deemed likely to have continued, and give the defendant half of this sum per annum, amounting in the aggregate to Rs. 10,000. For *solatium* I would award him a lump sum of Rs. 5,000, making altogether a total of Rs. 15,000 as damages. The judgment of the District Judge on the claim in reconvention must, therefore, be set aside, and judgment entered therein for the defendant for Rs. 15,000.

As regards the costs, I think that the defendant's costs on both trials and appeals should be borne by the plaintiff, save and except the costs incurred by the plaintiff in obtaining judgment on the claim for Rs. 131.70, which the defendant must pay.

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I am of the same opinion. I propose, in the first place, to deal with the question whether the present action is maintainable, and then to proceed, avoiding as far as possible any recapitulation of the facts which have been fully stated by my brother Middleton, to consider the case on the merits. It was contended by the learned Solicitor-General, on the argument before us, that the appellant has no cause of action, on the two-fold ground that by the common law of the Colony a husband has no right to sue for damages in consequence of the death of his wife owing to the tortious act of a third party, and also that, even if such a right of action existed, it would not lie against the Attorney-General, against whom, in his official capacity, the appellant's claim in reconvention has been presented. I do not think that either of these points can avail the Crown in this action. I have been unable to obtain access to all the Roman-Dutch authorities which are cited in the ordinary text books on the question of the right of action for patrimonial loss. But I think that, both on principle and on authority, there is nothing to prevent a husband from recovering damages for the death of his wife, if the circumstances of the case show that he, or their common children, have in fact incurred loss in consequence of it. It is quite true that the Roman-Dutch writers give as illustrations of the class of cases in which an action for patrimonial loss will lie that of a widow or of children who have been deprived, by the death of a husband and father, of their usual means of support (*Nathan's Common Law of*

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*South Africa III., ss.* 1620, 1622). But I do not think that they ever intended to limit the right of action in this way. I can scarcely conceive, for instance, that they would have held that an infirm husband, who was dependent on his wife's exertions for his daily bread, would have been debarred from recovering damages on the ground of her death, and if this be so, it would follow that the remedy is competent to any husband who can bring himself within the range of the class of loss for which it is designed to provide compensation, and that pecuniary loss, as well as loss of *consortium*, must be included in the category. It seems to me that this view of the law is confirmed by the Dutch Jurists themselves (see *Grotius, Maasdorp, pp.* 487-8, *ss.* 4 *and* 6), by the learned author of *Thompson's Institutes* (see *vol. II., p.* 451), and by local judicial authority so far as it goes. In the case of *Carolis v. Don Bastian*[1] it was expressly stated by Chief Justice Cayley that a husband had by the law of this Colony a right of action for the loss caused him by his wife's death. It is no doubt true that this statement was merely *obiter dictum;* for in the case in question the Court held that the wife's death had not been shown to be due to the assault of which the husband complained, and that consequently he was entitled to damages only for the loss of her services, and for his expenses and trouble in tending her during her last illness. But the more recent case of *Silva v. Brodie*[2] is an authority directly in point. It was an action by a husband for damages for the death of his wife and child, owing to the fall, in consequence of the negligence of the defendant, of a boundary wall. The case was tried in the District Court, came up before the Appeal Court, was sent back for further evidence, and was decided in the husband's favour, a decision which was affirmed on appeal, without any suggestion being made on any side that the action would not lie. But, even if I were in doubt whether the present action is maintainable on the ground with which I have been dealing. I should still hold that the point was not open to the Crown in this case. When I come to consider the second objection pressed by the Solicitor-General against the appellant's title to sue, I will show more fully what the attitude of the Crown has been towards the present claim. It may suffice in the meantime to say that the objection now before me was never mooted at all until the second trial of the present action, and that it is obvious, from the finding of the District Judge, that even then it was not seriously pressed in the Court below, inasmuch as he deals only with the question whether Mr. Smith was entitled to special damages on the ground of his wife's educational gifts.

I pass on now to consider the Solicitor-General's second point, namely, that, whatever may be the appellant's rights against the Hospital authorities regarded as individuals, all that the

[1] (1879) 2 *S. C. C.* 184.
[2] (1905) 1 *Bal.* 172 *and* 23, *D. C., Colombo*, 20,450, *30th June*, 1905.

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Government undertakes to do in connection with the admission of patients into the General Hospital is to provide a staff of competent physicians, surgeons, and nurses, and that, consequently, when this obligation has been discharged, the responsibility of the Crown is at an end. If this objection had been taken in time, it would, I think, in view of the cases of *Hall v. Lees*[1] and *Evans v. Liverpool Corporation*,[2] and *cf.* the American case of *Powers v. Massachusetts Hospital*,[3] have been a serious one for the appellant. No materials are now before us on which it would have been possible for us to determine the real contractual relationship between the Crown, the Hospital authorities, and patients admitted into the Hospital. Such materials, however, could readily have been obtained. But I am clearly of opinion that no opportunity of adducing such evidence ought at this stage to be given to the Crown. The objection in question was essentially one that ought to have been taken at the outset, in order that the appellant might have the chance of considering whether, abandoning his action against the Attorney-General, he should sue the Hospital authorities as individuals, or whether he should join them as alternative defendants with the Attorney-General, as the Code of Civil Procedure would enable him to do. It was not, however, till the argument of the present appeal that the Solicitor-General's second objection to the competency of the action was raised. It does, indeed, appear from the original proceedings that the Attorney-General, while joining issue with the appellant in his replication on the alleged facts on which the claim in reconvention is based, averred also that the action could not be maintained. It is obvious, however, both from the ruling of the District Judge on that plea and from the judgment of the Supreme Court on the first appeal, that the only point taken under it was that the action, being one in delict, could not be maintained against the Crown. It was that objection which the Supreme Court dealt with and over-ruled, and it would be no longer competent for us to entertain it, even if it were, as it has not been, urged here again. From start to finish the attitude of the Crown towards the present appellant, since the plea of delict was disposed of, has been to court full inquiry and to accept responsibility, if the appellant proved the allegations in his claim in reconvention. I may point out, by the way, that at the second trial the Solicitor-General had the case of *Hall v. Lees*, which I have already mentioned, before him, and that he used it only for the purpose of medical cross-examination. It would be highly inequitable now to permit the Crown, at the eleventh hour, after the case has been fought exclusively on issues of fact, to fall back on a plea in law which would render the proceedings abortive.

[1] (1904) 2 *K. B.* 602. [2] (1906) 1 *K. B.* 160.
[3] (1901) 65 *Law Rep. Ann.* 372.

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I have now disposed of the second objection to the present action being maintained, and I go on to deal with the case itself. It appears to me that that part of the District Judge's decision in which he affirms the appellant's liability to satisfy the respondent's claim must be upheld. For the sum claimed consists almost entirely of actual outlay by the Hospital authorities in connection with Mrs. Smith's maintenance. It was scarcely argued by Mr. Elliott, who conducted his client's case in the Appeal Court with commanding ability, that this comparatively small sum was not due, and I have no hesitation in agreeing with the District Judge's finding in regard to it.

There is one other preliminary matter on which I desire to say a word before proceeding to grapple with the facts. It was contended by Mr. Elliott that, as Sir Charles Layard and Mr. Justice Moncreiff had come to the conclusion on the first appeal that negligence on the part of the Hospital authorities was established, he started at the second trial with a finding in his favour on that issue, and that he was entitled to judgment if he succeeded in proving that the result of that negligence had in fact contributed to Mrs. Smith's death. I am unable to accede to this contention. It seems to me that, in ordering a new trial, the Appeal Court must be taken to have left the issue of negligence as well as that of contribution open to the respondent. It is of course competent for Mr. Elliott to make use of all the arguments by which Sir Charles Layard and Mr. Justice Moncreiff fortified their conclusion that negligence had been proved as *ratio scripta*. But I do not think he is entitled to treat the finding itself as a judicial decision in his favour.

There can be no doubt as to the legal standpoint that we have to assume in considering the facts of this case. It follows from what I have already said that, if there was negligence on the part of the Hospital authorities, they must, in regard to that negligence, be taken in these proceedings to be the servants of the Crown, and that the Crown, as principal, will be responsible for the acts of its agents. In point of law the appellant has to establish, in the first place, that the burns, which were undoubtedly inflicted on Mrs. Smith, were due to the absence of reasonable care on the par of one or other (which is quite immaterial) of the officers of the Hospital who were concerned with her case; and, in the second place, that these burns in fact contributed, in some appreciable degree, to her death. I should premise also that as Judges of the facts as well as of the law we must treat this case as if we were a jury trying a civil action, and return the verdict which the weight of the evidence demands. It is essential to a just estimation of the evidence on both sides that we should make up our minds at the outset as to the reliability, so far as these proceedings are concerned, of the two great protagonists in the suit: Mr. Smith, the appellant, and Dr. Garvin. It is obvious that our decision in regard to such questions as the symptoms that

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Mrs. Smith displayed, the pain (if any) that she suffered, and the character and gravity of the burns must depend to a large extent on the view that we take of these two witnesses. On both sides the issue of their credibility has been placed before us, and, however unpleasant the inquiry may be, that issue has to be fairly faced and decided. The learned District Judge disbelieved Mr. Smith when his evidence came into conflict with the case for the Crown, and, in dealing with the question of damages, he described him as having "lived upon the industry of his wife."

If this stricture is to be interpreted as meaning that Mr. Smith was a loafer content to be maintained by his wife, there is nothing in the record that justifies it. It would appear that Mr. Smith was at one time in the employment of the Church Missionary Society, and that, in consequence of some difference of opinion with his employers, he resigned his appointment. There is nothing to show whether he or the Society was in the wrong. In his evidence he stated that he had at one time been insolvent in consequence of money lent and lost in coffee speculation. Again, there is nothing to show that any personal discredit attached to the insolvency. With regard to the schools carried on by himself and his wife, he described himself as proprietor and manager. There is nothing in the record to disprove his allegation that he was taking a real part in his wife's educational work, although it was admittedly her gifts as a teacher which rendered that work lucrative and successful. It is obvious, indeed, from the whole tone of Mr. Smith's letters to his daughter, and all the evidence recorded as to what passed between himself and his wife during her last illness, that the family was, in every sense of the term, a united one. When we turn to the evidence given by Mr. Smith with regard to the special subject-matter of the action, there are, so far as I can see, only two points on which it is fairly open to suspicion. Mr. Smith denied at first, and afterwards said that he did not recollect, that he had supplied—as he clearly must have done—to the various doctors who were professionally consulted as to his wife's health in 1896 the information on the strength of which she was confined in the Stone Lunatic Asylum.

I am not satisfied that Mr. Smith has not attempted to minimize the seriousness of his wife's symptoms at the period in question, although it certainly does not result from the evidence, either oral or documentary, that he had at any time described her as having then been suffering from an attack of acute mania. Some allowance, however, must be made for the natural reluctance of a husband to admit that his wife had been insane, and I am unable to regard Mr. Smith's attitude towards this question as either destroying or seriously impairing his credibility as a witness. The second point, as to which Mr. Smith's testimony may fairly be challenged, consists in his statements at the second trial (*a*) that he did not know of the burning till he heard of it from Dr. Garvin, whereas at the first trial

he said that he heard of it before speaking to Dr. Garvin from his wife herself; and (*b*) that he had all along regarded his wife's pain as proceeding from the burns, whereas in his letter to his daughter he would seem to attribute it to the operation wound. With regard to (*a*), I see no reason to discredit Mr. Smith's statement that when he spoke of the burning he meant the pain. With regard to (*b*), it may well be that some confusion existed in his mind as to the connection of the operation wound and the pain on the left side, of which, he says, his wife complained, in view of Dr. Garvin's statement to him that the burn was a slight one. Dr. Garvin is the only witness who says that Mrs. Smith had ever been made aware that she had been burned, and as her husband's letters to their daughter in England were for the most part read over by Mrs. Smith before they were despatched, it may be that the omission from them of any reference to the pain of the burning was not accidental. The matter has not been entirely cleared up on the evidence before us; and in view of what I have just said, I do not consider that the inconsistency, if there be one, is a reason for rejecting Mr. Smith's evidence as a whole. That evidence is corroborated on all other essential points by the letters which he wrote to his daughter at a time when no question of litigation had arisen, and also by the statements of Miss Siegertsz, Miss Vanderstraaten, and Miss Thiedeman, whose evidence, in spite of the fact that they were teachers under Mrs. Smith, I find no ground for disbelieving. It was suggested by the Solicitor-General, rather than expressly contended, that there were inconsistencies in Mr. Smith's correspondence with his daughter, which raised a suspicion that the passages emphasizing the pain, from which Mrs. Smith is alleged to have suffered, had been interpolated after his present dispute with the Hospital authorities had arisen. It is admitted that Mr. Smith obtained the originals of the letters in question in England after his wife's death, and of course he had the opportunity of tampering with them. But the letters themselves show no traces of fraudulent manipulation, and in my opinion there is no real inconsistency between any of the passages on which the Solicitor-General relies. Take, for instance, the letter of 2nd June, 1903 (D 12), in which the writer first refers to the splendid progress the patient was making, and then goes on to record the great but, as he believed, diminishing pain from which she was suffering. In view of the fact that Mr. Smith had at that time every reason to expect his wife's recovery, it appears to me that it was perfectly natural for him to record both the patient's general progress and also the pain which he regarded either as incidental to the operation or as due to the attendant burn, which Dr. Garvin had assured him was of a trivial character. It should be added that Dr. Garvin himself stated in his evidence that he did not believe that Mr. Smith, whom he knew well, would have written to his

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daughter things in regard to the health of her mother which he knew to be untrue. I have weighed as carefully as I can what is to be said for and against Mr. Smith's credit, and I have come to the conclusion that he ought to be accepted as a reliable witness. I will show, later on, the effect of the acceptance of Mr. Smith's testimony on the case as a whole.

I come now to Dr. Garvin. It was stated by the Attorney-General, at the first argument in appeal, that there was reason to think that all mention of Mrs. Smith's burns was excluded from the bed-head tickets so that Sir Allan Perry, Principal Civil Medical Officer, might not hear of them. It was practically on the same ground that, in the present appeal, Mr. Elliott put his case against the good faith of the Hospital authorities and particularly of Dr. Garvin. After following with the utmost anxiety the arguments on both sides and all the evidence in the case, I feel constrained to say that, in my opinion, the Attorney-General's explanation was well founded. It is clear that, whether Mrs. Smith's mishap was due to accident or negligence, it was one that could not fail to cause embarrassment to the Hospital authorities directly concerned with her case, and to cast suspicion upon the whole *régime* of the Hospital itself. I think that the evidence leads irresistibly to the conclusion that a deliberate attempt was made to suppress all proof of the real nature of the injury done to Mrs. Smith in the course of the operation upon her. It seems to me idle to contend that if bed-head tickets are, as we are assured and as the Hospital rules require, intended to contain an accurate history of every phase in a patient's case, such a serious development as the accidental infliction of burns under operation ought not to be recorded. We are told by Dr. Pepper that, in St. Mary's Hospital, London, with which he is connected, such an entry would or ought to be made in the notes corresponding to the bed-head tickets in Ceylon. If I understood the learned Solicitor-General aright, he did not dispute this contention. His argument was that Mr. Alvis, whose attention was first called to the burns, had omitted to make the entry, and that Dr. Garvin was unaware of the omission. I am unable to accept this view of the facts. It is clear that Dr. Garvin was following the case of Mrs. Smith personally with the greatest care. Most of the entries in the bed-head tickets are in his own handwriting. He was aware of the existence of the burns. He was dressing them from day to day. It was he who, on the occasion when he admits that Mrs. Smith complained to him of pain on her left side, prescribed boric acid and cocaine, which, he says, brought prompt relief.

I cannot believe that Dr. Garvin was unaware of the original omission of any entry as to the burns, or that if *e.g.*, burns had been inflicted accidentally by Mrs. Smith herself during convalescence by upsetting a spirit lamp which she was using for the purpose of dressing her hair, he would not have recorded *eo nomine* his treat-

ment of them and their appearances from day to day. In the present case the bed-head tickets from first to last are absolutely silent as to an injury which Dr. Garvin himself admitted would retard her recovery, which at least once before Mrs. Smith's relapse required special treatment, and which necessitated an operation under chloroform on the day before her death. I am confirmed in my views as to the cause of the silence of the bed-head tickets on the subject of the burns by the false death certificate issued by Dr. Rutnam—I say false because Dr. Rutnam did not know the cause of the lady's death, and if he had had to certify on his impressions would have added a reference both to the alleged dysentery and to the burns; by the failure of Dr. Garvin to insist on a *post-mortem* examination, which would have demonstrated the cause of death; by the proposal of the Hospital authorities that the funeral should take place from the Hospital; and by the suggestion made by Dr. Rutnam to the appellant, when he came to remove his wife's corpse to his own house, that in any event he should not touch the bandages because it would not be a pleasant sight for him to look at "an ulcer in a dead body." It may well be that each of these circumstances would not carry us far standing alone, but their collective force has created on my mind so strong and adverse an impressions as to the conduct of the Hospital authorities in this case that I am prepared to accept Mr. Elliott's contention that they were not acting in good faith.

The circumstances just enumerated are not weakened, as the District Judge seems to think, by the fact that the accident was generally known in the Hospital, or that Mr. Smith was told of it. Mr. Smith was told only of a slight burn, and there is no evidence of any communication to Sir Allan Perry on the subject during Mrs. Smith's lifetime. I desire to say one word in particular with regard to the death certificate. In his evidence at the first trial Dr. Rutnam stated that, although he had authenticated the certificate as the law required, he did not know the cause of Mrs. Smith's death, and thought that he would himself have added to the certificate a reference to dysentery and burns. It was Dr. Garvin who really settled the statement in the certificate as to the cause of death, though he did not sign it. We were told by the Solicitor-General that this method of issuing death certificates is in vogue in the Hospital, and that it might be justified by a sort of "legal fiction." I can only say that if any such practice exists, the sooner it is abandoned the better, as it exposes those who pursue it to the risk of criminal prosecution. It is impossible that any court of justice should permit the law of death certification to be tampered with in this light-hearted and irresponsible manner.

It may be desirable to refer here to the evidence of Dr. Sinnetamby. Mr. Elliott expressly disclaimed any intention of attacking this witness's honesty, and contended himself with impeaching the accuracy

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of his recollection. He pointed out, however, that Dr. Sinnetamby was himself acting as first physician to the Hospital in 1903, and that he displayed in the witness box the reluctance to say anything that might implicate his colleagues, which was not unnatural under the circumstances. When pressed with the mysterious silences of the bed-head tickets, Dr. Sinnetamby replied: "I don't want to say anything against these tickets or about them." But apart from this aspect of the question, I am unable to hold that Dr. Sinnetamby's evidence rebuts the case against the Hospital authorities. His memory was clearly hazy as to the dates or duration of his visits to Mrs. Smith. He had no notes by which to refresh it. It is clear that he relied at the time largely on what Dr. Garvin told him of the case, and later on, when he came to give evidence, on the entries in the bed-head ticket, which only mentions his name once. Dr. Sinnetamby's evidence further tends to show, it may be noted in passing, that—as one would expect from the condition of the patient—the removal of the sloughs under chloroform on the 8th June was not a mere ordinary dressing carried out with the aid of an anæsthetic, because the patient was restless and would be the better of a little sleep, but an operation sufficiently serious and important to form the subject of consultation between Dr. Garvin and himself.

I come now to consider the question whether the appellant has succeeded in proving negligence as against the Hospital authorities, and I shall deal with this question as briefly as it was dealt with on both sides of the Bar. The learned District Judge concludes that there is no legal evidence of negligence. If he meant that there is no evidence which a Judge would allow to go to a jury—and I can only interpret his language in this sense—I am at a loss to understand the ground of his finding. It appears to me that negligence has been clearly established. We start with the undisputed fact of the infliction of burns of the second, third, and fourth degrees on the patient while under operation. In his report to Sir Allan Perry (D 6, 23rd August, 1903), a report which, he says, was the result of "careful inquiry," Dr. Garvin says that he can only attribute the accident to the fact that during the taking up of the patient's clothing, the arranging her in the proper position for the operation, and her struggles when anæsthetized, the towel must have shifted and the bare bottle come in direct contact with her body over the whole area of the burns. We know that the operation lasted for an hour, and that the burns were not discovered while it was in progress. If Dr. Garvin's explanation is correct, it follows that practically during the whole time that he was operating the process of scalding was going on. There is no contest as to the degree of the burns which were inflicted, and there can be equally little doubt as to the heat that inflicted them. We have, therefore, to ask ourselves how it was that this accident was allowed to happen. On

that point the facts are tolerably clear. Dr. Garvin had rejected the water bottle as a prop for the patient on the ground of its heat, and had directed a sand bag to be brought instead. His direction was not complied with. The identical water bottle which they had rejected was brought back wrapped only in towels. If the nurse, who took upon herself to improve on Dr. Garvin's orders, placed the hot water bottle under the patient without consulting him, she was guilty of breach of duty to begin with, and she also assumed the responsibility of seeing that her departure from the instructions of the operating surgeon caused no harm to the patient. If, on the other hand (and the point is not clear on the evidence), she did submit the bottle to Dr. Garvin and he approved of its condition, he cannot escape the imputation of negligence in having sanctioned the use of a water bottle which he knew was too hot to be allowed to come into direct contact with the patient's skin, and which was in no way secured against the very accident that happened. To the lay mind—and the layman's judgment on the point is corroborated by the opinion of Sir Allan Perry (D 3) and by the fact that flannel bags are now used in the Hospital—it seems incredible that, if for the purposes of operation it is found necessary to use water bottles so hot that should they come into contact with the patient's skin they will inflict burns of the second, third, and fourth degree, they should not be enclosed in bags which will effectually prevent any such mishap from occurring (*cf.* also *Stonham's Manual of Surgery II.*, *p.* 22). Moreover, even if the hot water bottle at the time it was actually placed under Mrs. Smith's body was sufficiently protected by the towels in which it was wrapped from burning her, it was the duty of the nurses who were assisting at the operation to see that it continued in this condition during the whole time the operation lasted. I can quite appreciate the force of Dr. Garvin's statement that his own mind was entirely occupied with the operation itself. No one expects that a general shall do the work of the sentry box. But there certainly ought to be a sentry on guard, and if mischief arises from his absence or inattention, neither he nor his superiors can be held excused.

It was urged by the Solicitor-General that the statement of Dr. Thomasz, who was present at the commencement and during the early part of the operation, that he saw nothing wrong, clearly negatived the suggestion of negligence. I do not think that it did so to any degree; for, in the first place, Dr. Thomasz was not present professionally; in the second place, he says he was in no way superintending the work of the nurses; and, in the last place, if the Solicitor-General's argument were well founded, it would merely serve to bring home negligence to Dr. Thomasz himself. It seems to me impossible to contend on the facts in the present case that there was not negligence somewhere.

I have now to deal with the question whether the burns contributed

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to Mrs. Smith's death. It is conceded on all hands that the immediate cause of death was physical exhaustion, and, even if the theory put forward on the part of the Crown that this condition of exhaustion was due to acute mania and to the weakening effects of dysentery were accepted, it would be a question whether, on the materials before us, the appellant might not still be entitled to succeed. In the state of great weakness in which Mrs. Smith was left, first by the operation, and afterwards by dysentery, with supervening diarrhœa, the infliction of burns of considerable area and of the second, third, and fourth degree must have lowered her vitality and contributed to the exhaustion from which she died. Dr. Savage, indeed, who was examined in England on behalf of the Crown, includes pain as one of the causes that may have provoked the attack of mania from which he holds that Mrs. Smith died, although he (erroneously as I venture to think) confines his statement to the pain from the lumbar abscess antecedent to the operation. But I am prepared to give judgment for the appellant on higher grounds. I think that the weight of evidence shows that the exhaustion, which caused Mrs. Smith's death, was due to intestinal inflammation, and that this intestinal inflammation was itself the direct result of the burns. It is in this connection that the estimate which I have already given of the comparative credibility of the leading witnesses on both sides becomes of paramount importance. The fact—if it be a fact—that the Hospital authorities were endeavouring to conceal the gravity of the burns of course weakens every scrap of evidence which they have adduced in regard to the real facts of the case. We have to solve a problem complicated by their own wrongful acts, by the misleading bed-head ticket, by the false death certificate, and by the absence of any *post-mortem* examination. We are bound, therefore, to keep in view the presumption which the law creates against wrongdoers, and to remember that it is the Hospital authorities themselves who have created the difficulties of proof against which the appellant has had to contend. On the other hand, if we accept Mr. Smith's testimony, we have strong evidence as to the character of the burns and as to the fact that they were causing his wife severe, if not completely continuous poin up to the very eve of her death. It is clear that the lumbar abscess must be eliminated as a factor in the case. It is admitted that Dr. Garvin's operation was brilliantly successful. The bed-head tickets show that the patient made an excellent recovery from the operation. All the oral evidence points in the same direction; and, indeed, the lumbar abscess was inserted in the death certificate only because of one of the rules of the Hospital (of which the common sense is not apparent) that if the disorder from which the patient is admitted is not completely cured at the time of death, it should be given as one of the

causes of death in the certificate.

I now come to deal with the dysentery. It is not alleged by the Crown that dysentery was the actual cause of death, and its presence is relied upon only as accounting for Mrs. Smith's weakness, and as negativing the appellant's contention that the intestinal inflammation from which she unquestionably suffered was in any way connected with the burns. It may be admitted that Dr. Garvin at first believed—and no doubt communicated to Dr. Sinnetamby his belief—that Mrs. Smith was suffering from dysentery. He told Mr. Smith so. It is also clear from the two volumes of the bed-head tickets for June and July, 1903, which we have ourselves examined, that at or about the time in question dysentery was prevalent in Colombo. But I have come to the conclusion that dysentery also must be eliminated from the present case.

In Dr. Garvin's report to Sir Allan Perry, which is put forward by the Crown as a complete history of Mrs. Smith's illness, he not only never alludes to dysentery at all, but impliedly describes the case as being one of diarrhœa. In the bed-head ticket the word "dysentery" is never mentioned. Some of the distinctive symptoms of dysentery—blood and mucus—are noted as having appeared on one day only. The remedies prescribed would be equally applicable in any case of intestinal inflammation; and the diet, which was still left to the patient during the time that the dysentery is said to have lasted, is open to precisely the same observation. I confess that I attach great importance to the omission of the term "dysentery" in the bed-head ticket, and also to the fact that it contains no reference to tenesmus or to the reappearance of the other symptoms I have already referred to. It was argued by the Solicitor-General that there was no obligation incumbent on the surgeon in charge of a case to enter in the bed-head ticket the name of any supervening disease which might attack the patient. He might have diagnosed the disease quite sufficiently for purposes of treatment, and yet object to pin himself down to a formal expression of opinion on the point. It must also be remembered, said the Solicitor-General in effect, that Dr. Garvin is a man overwhelmed with work, and that it would be unreasonable to expect him to do anything more than to record the symptoms of a case and the treatment prescribed for the guidance of his subordinates. If this argument is to be taken as meaning that Dr. Garvin was uncertain of the presence of dysentery, and that, whatever the bent of his opinion might be, he thought it safer merely to deal with the symptoms before him, it goes far to concede the very point which I am endeavouring to establish, although, even under such circumstances, if bed-head tickets are to comply with the Hospital rules and to provide for the information of relatives a complete history of a patient's case, I do not see why an entry should not be made to the effect that the symptoms indicate dysentery or whatever

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the supervening disease may be. If, on the other hand, the Solicitor-General meant to argue that a supervening disease, when once clearly diagnosed, ought not to be entered by name in the bed-head ticket, or that owing to pressure of work the omission of such an entry in the present case may have been accidental, I can only say, with the greatest respect, that I do not think that either branch of his argument will stand examination. The very *raison d'être* of a bed-head ticket requires the development of any new disease to be recorded. We know that the death certificates are prepared from the entries in the bed-head tickets, and unless these entries are accurate and complete, there is no guarantee of the accuracy and completeness of the certificates.

Moreover, as I have already pointed out, Dr. Garvin was following Mrs. Smith's case personally with the utmost care. She was a patient in whom he took the keenest professional and friendly interest, and, whatever may be its cause, his omission to make a specific record of the alleged attack of dysentery cannot be ascribed either to hurry or to forgetfulness. Dr. Rodrigo is positive that Mrs. Smith did not suffer from dysentery, and gives his reasons for saying so: the absence of any symptoms of dysentery except blood and mucus, and (a subject with which I shall deal in a little) the presence of blood and mucus only on a single day. It is suggested, and the learned Judge seems to have adopted the suggestion, that owing to some professional grievances against Sir Allan Perry, Dr. Rodrigo has come forward in this case to wreak his vengeance on the Hospital authorities. Dr. Rodrigo is clearly in matters of professional opinion no respecter of persons, for he breaks a lance indifferently with the experts for the Crown and the experts for the defence. But, like Moncreiff J. on the first appeal, I have looked into those of the authorities cited by him, to which it was permissible to us to refer, and I can only say—speaking on such a subject with the diffidence of a layman—that if Dr. Rodrigo is a venal witness, he has succeeded in clothing his venality with a very respectable garb of authority. Dr. Thomasz, at the first trial, said that, judging by the bed-head tickets, there was dysentery passing into diarrhœa. He immediately added, however, that he should call the motions of the 5th (the only day on which the presence of the symptoms of blood and mucus is recorded) and the 6th, dysenteric and not dysentery, and he explained at the second trial that he intended this statement to be a qualification of his evidence on the subject throughout. It appears (and Dr. Thomasz himself admits the fact) that he and Dr. Garvin are not on speaking terms. Judging by the evidence, however, I think that this state of feeling has only tended to make Dr. Thomasz guarded in the opinions that he expressed. He attended as a witness on subpœna, and I find no trace in his evidence of any desire to make out a case against Dr. Garvin. On the contrary, he seems to me to have spoken with moderation and even reluctance. Dr.

Pepper, though he objects to the term "dysenteric," agrees with Dr. Thomasz that Mrs. Smith's symptoms were "not in the nature of true dysentery." One of the reasons that he assigns for this conclusion, viz., the absence of proof that dysentery was prevalent at the time, is, as we now know from our examination of the bed-head tickets for June and July, 1903, not good. But his other reasons stand: the absence of any mention of dysentery or its symptoms, as distinct from those of enteritis, in the bed-head ticket, and the absence of any reference to tenesmus, or, except on one day, to the passage of blood and mucus. Dr. Carr gives evidence to the same effect, adding that the prescriptions noted in the bed-head ticket are not such as he would expect to find in a case of acute dysentery. In cross-examination, Dr. Carr admitted that he had no practical knowledge of tropical dysentery, and that, in cases of mild dysentery, the symptoms of blood and mucus might disappear early and subside into diarrhœa. But in the present case the diarrhœa got worse.

I proceed now to the evidence for the other side on this point. Unfortunately none of the expert witnesses called for the Crown in London under the commission from Ceylon were cross-examined, the counsel who represented the appellant in England declining to cross-examine them, unless it was proved from the record that the respondent had filed a list of his proposed witnesses in the action in Colombo. I certainly do not think that we should have been justified in rejecting the evidence on this ground. The appellant's counsel could, I have no doubt, easily have obtained from the Commissioner such an adjournment of the proceedings as would have enabled him to prepare for the adequate cross-examination of the respondent's experts. The only result of the attitude that he adopted on the subject has been to increase our difficulty in deciding the case. I begin with Sir Patrick Manson. His pre-eminence as an authority on tropical diseases is indisputable. He stated that he thought Mrs. Smith was being treated for dysentery both from the prescriptions and from the symptoms. He does not, however, say that the prescriptions would be unsuitable for, or that the symptoms might not be indicative of, other forms of intestinal disease. It was pointed out by Mr. Elliott that if the case had really been one of dysentery, we should have expected to find the symptoms of blood and mucus appearing on more days than one. In reply to this argument, the Solicitor-General referred to the statement of Sir Patrick Manson that when once the existence of dysentery has been established, there is no need for the daily repetition of what are not, after all, its essential symptoms. I confess I should have thought from the medical text books that were cited to us in the course of the argument that blood and mucus were at least such highly characteristic symptoms of dysentery (see, *e.g.*, *Manson, Tropical Diseases*, p. 376) as to make their presence or

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absence a matter worthy of daily record, and there is certainly much support for this view in the two volumes of bed-head tickets which my brother Middleton and I called for during the argument in appeal. But, after all, Sir Patrick Manson's statement is applicable only where the *fact* of dysentery has once been clearly diagnosed. In the present case, although the bed-head ticket clearly contemplates the entry by name of any supervening disease, no such diagnosis was ever made. Sir Patrick Manson adds that, judging by the bed-head ticket, he was of opinion that dysentery persisted to the death of the patient. Dr. Garvin, on the other hand, says that after seventy-two hours' treatment there was a distinct improvement in the dysentery, and " the usual symptoms of diarrhœa continued." Mr. Stonham, who acquired a practical and even personal knowledge of dysentery in the South African war, thinks the case was one of " catarrhal " dysentery (in one part of his evidence he described it as " chronic," but afterwards withdrew the term, and there certainly seems to be nothing in the evidence that would have justified its use). The treatment was " suitable for dysentery." The symptoms pointed to it. " Tenesmus " was not mentioned. But it was " highly probable " that it was there all the same. This evidence is open to the same observations as Sir Patrick Manson's. Mr. Stonham nowhere says that the symptoms and treatment, whose actual presence is recorded, might not point to other forms of intestinal inflammation. Dr. Hewlett says the symptoms point to an attack of mild dysentery. Neither Sir Patrick Manson nor Mr. Stonham nor Dr. Hewlett makes any allusion to the significant fact that, although according to Dr. Sinnetamby Mrs. Smith's was " a clear case of common dysentery, " Dr. Garvin never used the word in his report to Sir Allan Perry, but, on the contrary, described the case as one of diarrhœa. With omissions of this character before us, we cannot treat the problem, as the experts for the Crown have treated it, as if the only question at issue were the proper scientific inferences from proved or admitted facts.

I proceed now to deal with the theory that the exhaustion from which Mrs. Smith died was due to mania. Two strong points may be made in favour of it: her undoubted attack of insanity for a few months in 1895-96, and the fact that acute mania was promptly alleged by Dr. Garvin as the cause of death. He entered it as such in the death certificate, and set it out strongly in the same light in his report to Sir Allan Perry. On the other hand, we have the facts (1) that there is no reference to acute mania by name in the bed-head ticket, in spite of the Hospital rule which requires cases of supervening insanity to be notified to the police and made the subject of a special report to the Lunatic Asylum, and which, although perhaps not strictly applicable in such a case as Mrs. Smith's, clearly imposes by implication on the Hospital authorities the duty of recording the development of insanity in any patient

in express terms; (2) that all the symptoms recorded, from the drowsiness and incoherence on the 5th June to the delirium on the 8th, present, as Dr. Pepper said, "a complete clinical picture of the delirium of exhaustion," and are, in any case, far more consistent with such delirium than with mania; (3) that the treatment prescribed in the bed-head ticket would admittedly be suitable in a case of delirium, and would be a mild treatment in one of acute mania (Dr. Savage, it should be observed, however, said that it was not now the practice to give large doses of sedatives for mania); (4) that we have positive evidence from Mr. Smith, Miss Siegertsz, and Mrs. Brohier showing that, in the language of Dr. Thomasz, there was "no more than mere delirium in the case." It must be remembered also, on the one hand, that Mrs. Smith made a complete recovery from her attack of insanity in 1895-96, resuming her former educational work, and continuing it without interruption till 1903, and, on the other hand, that it might perhaps predispose her to delirium as a direct consequence of physical disease. The appellant's witnesses, Dr. Thomasz, Dr. Rodrigo, Dr. Pepper, and Dr. Carr, unanimously pronounce against the presence of mania. The only expert for the Crown who deals with the subject exhaustively is Dr. Savage, a witness, I need scarcely say, of the highest authority. It appears to me, however, that the assumed facts on which Dr. Savage founds his opinion are so inaccurate as to deprive it of weight. He excludes the delirium of exhaustion as a possible explanation of the case because (1) there was no increase of temperature, and (2) the physical strength of the patient was maintained, "as evidenced by the record of violence requiring control." It is clear from the temperature chart that Mrs. Smith's temperature was steadily sub-normal, a fact which would account for the absence of fever. It is clear from the bed-head tickets that Mrs. Smith was so weak that she passed her motions in bed from her physical inability to rise and use the commode. There is no evidence that she ever had special attendants to control her, except on the night of her death. If we are bound, therefore, to reject alike the lumbar abscess, dysentery, and acute mania as the real causes of Mrs. Smith's death, we are left face to face with the intestinal inflammation and the burns. On behalf of the Crown, the Solicitor-General made an able and ingenious attempt to break down the case for the appellant at this point. He argued that, as the evidence negatived any idea of a progressive and continuous irritation proceeding from the burns, it was impossible that they could have produced enteritis by way of reflex action. He contended also that, as the burns had been treated asceptically throughout, there was no room for the theory that enteritis had been brought about by septic absorption. He pointed out that there is no special connection between burns and enteritis, and he made much of the fact that there was no agreement among the appellant's experts, Dr. Thomasz,

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Dr. Rodrigo, Dr. Pepper, and Dr. Carr, on the pathology of the subject. If it were necessary to deal with this argument in detail, it might fairly, I think, be urged on the other side that the pathology of burns and enteritis is on all hands—by the experts for the Crown as well as by the appellant's—admitted to be still obscure; that the evidence discloses a degree of pain which, although it may have not been constant, may have been sufficiently severe and continuous to set up enteritis; that aseptic treatment, even if it is complete, only minimizes the risk of septic absorption, and that in the present case the real aseptic treatment did not commence until the day after the infliction of the burns, may have been forestalled by the removal of the bandages by Mr. Alvis on the afternoon of the operation (Dr. Pepper tells us that if he had left the operation wound and the burn under the treatment described by Mr. Alvis, he would expect infection to follow, and that boric ointment would not have prevented it), and may equally have been disturbed by the shifting of the bandages when the patient put on her clothes for the thanksgiving service on the 3rd June, and the fact that the sloughs were not removed from the largest burn till the 8th. According to Dr. Pepper, the fact (if it be a fact) that there were no external signs of septic absorption would not necessarily show that sepsis was not progressing in the deeper part of the burn. In this connection I need only touch on the Solicitor-General's further argument that, if Mrs. Smith had really been suffering from enteritis, she would also have been suffering from fever. This latter condition would not, according to the appellant's experts, and I do not see that they are contradicted on this point by the experts for the Crown, be present if the patient were in a state of exhaustion approaching collapse. There is abundant evidence of such exhaustion in Mrs. Smith's case, and the chart produced by the Crown itself shows that, except on the days following respectively the operation and the removal of the drainage tubes, her temperature was steadily sub-normal. But I do not think there is any need to discuss these questions minutely here. It is certain that burns may set up intestinal inflammation. It is clear that Mrs. Smith suffered from intestinal inflammation, and if we once eliminate dysentery, we are left with the burns as the sole factor which could have produced it. I accept the evidence adduced on behalf of the appellant —evidence corroborated by Dr. Pepper both as an expert and from personal experience, by Dr. Carr, and to some extent by the entries in the bed-head ticket—which shows that Mrs. Smith suffered severe pain from some cause or other practically from the date of the operation up to the time of her death. This evidence is not disposed of by the statements of Dr. Garvin and Sir Allan Perry that Mrs. Smith never complained to them of pain. A patient who is described by Dr. Garvin himself as "a brave woman," and who has every reason to think that she is recovering in spite of pain,

might very well say little or nothing about it to official visitors. The pain is not proved to have been incessant. Sir Allan Perry is not proved to have been made aware of the burns during Mrs. Smith's lifetime. Now the pain in question was not due to the lumbar abscess. It was not due to the intestinal inflammation, for it was present before any symptoms of intestinal inflammation had manifested themselves. It was unconnected with the presence or removal of the drainage tubes, for Mrs. Smith's letter of 2nd June shows that it was in full operation after the tubes had been removed, and in any event it was of a character quite different from "the slight discomfort," as the Solicitor-General termed it, which the removal of the tubes would occasion. It could have no connection with the lady's mental disturbance. We are forced, therefore, to the conclusion that it was due to the burns. We start, then with the presence of severe burns on a vital part of the human body causing great and frequent pain. The expert evidence for the appellant shows that at the very time when intestinal inflammation might be expected to appear as a consequence of burns, such inflammation sets in. There can be no question that that inflammation contributed to Mrs. Smith's death, and if it was itself the result of the burns, whatever may have been the pathological connection between them, it is equally little open to question that they, too, were a contributing factor to the same event. I hold that on this point also the appellant has made out his case.

On the question of damages I have nothing to add to what has fallen from my brother Middleton, and I concur in the decree which he has proposed.

*Appeal allowed.*