1944 *Present:* **Soertsz and Hearne JJ.**

THE TRUSTEES OF FRASER MEMORIAL NURSING HOME, Appellants, *and* OLNEY, Respondent.

280—D. C. Colombo, 13,144.

Master and servant—Negligence of servant—Acting within the scope of employment — Principle of respondeat superior — *Damages* — res ipsa loquitur.

The plaintiff, a minor suing by her next friend, claimed damages from the defendants, the trustees of a Nursing Home for injuries caused to her by the negligence of the Sister-in-Charge of the defendant's X-ray plant.

It was admitted that plaintiff had been screened on two occasions at the Nursing Home by the Sister-in-Charge and that fees were charged by the Nursing Home for screening.

It was proved that plaintiff had sustained serious and painful X-ray burns on her abdomen and back.

The learned District Judge found that the burns were the consequence of the screening of the plaintiff at the Nursing Home.

Held, that the defendants were liable for the negligence of the Sister-in-Charge who was acting within the scope of her employment and that the principle of *respondeat superior* applied even where the work the servant was employed to do was of a skilful or technical character as to the method of performing which the employer was himself ignorant.

Held, *further*, that in the circumstances of this case the proper and natural inference was that the injury complained of was the result of negligence unless the defendants could show that they were caused apart from negligence.

In assessing damage the Judge is entitled to take into consideration as one of the elements of damage the fact that the plaintiff's normal expectation of life has been materially shortened.

Flint v. Lovell (1935) *1 K. B. 354* followed.

APPEAL from a judgment of the District Judge of Colombo. The facts appear from the head-note.

N. Nadarajah, K.C. (with him *N. K. Choksy*), for the defendants, appellants.—No act of negligence has been established as against the Nursing Home. The only duty undertaken by the trustees or governors of a public hospital towards a patient who is treated in the hospital is to use due care and skill in selecting their hospital staff. Miss Tait, according to the evidence in the present case, is a competent radiographer. The relationship of master and servant does not exist between the trustees and the nurses and other attendants who perform skilled duties—*Hillyer v. The Governors of St. Bartholomew's Hospital* [1]; *Dryden v. Surrey County Council* [2]; *Lindsey County Council v. Mary Marshall* [3]; *Gold et at. v. Essex County Council* [4]; *Marshall v. Lindsey County Council* [5]; *Strangways v. Lesmere & Clayton* [6]; *Charlesworth on Negligence (1938 ed.) p. 369.*

[1] *L. R. (1909) 2 K. B. 820.*
[2] *(1936) 2 A. E. R. 535.*
[3] *L. R. (1937) A. C. 97.*
[4] *(1942) 2 A. E. R. 237.*
[5] *L. R. (1935) 1 K. B. 516 at 518.*
[6] *L. R. (1936) 2 K. B. 11.*

Assuming that the defendants are liable for any negligence of Miss Tait it cannot be said that such negligence has been proved. The onus of proving negligence is on the plaintiff. The burns on the plaintiff can be explained in various ways: (1) She may have been burnt in the Fraser Nursing Home; (2) She may have been burnt somewhere else; (3) The burns may have been due to hypersensitiveness of the plaintiff's skin, *i.e.*, to an idiosyncrasy—*Pohle's Clinical Roentgen Therapy (1938 ed.) 784 et seq.; George M. Mackee's X-rays and Radium in the treatment of Diseases of the skin (3rd ed.) 363 et seq.; Lymbery v. Jefferies* [1]; (4) The injuries may have been caused by the medicines, *e.g.*, Flavin Emulsion, applied to the rash which appeared soon after the X-ray radiation. In the circumstances the doctrine of *res ipsa loquitur* cannot apply—*Scott v. The London & St. Katherine Docks Co.* [2]*; Wing v. London General Omnibus Co.* [3]*; Mahon v. Osborne* [4]*; Langham v. Governors of Wellinborough School* [5]*; Van Wyk v. Lewis* [6].

The amount of damages awarded is excessive. Loss of expectation of life has been given as a ground for the sum awarded, but there is no evidence to support it. See *Flint v. Lovell* [7]*; Phillips v. London & South Western Rly. Co.* [8]*; Glasgow Corporation v. Muir et al* [9].

H. V. Perera, K.C. (with him *E. F. N. Gratiaen* and *D. W. Fernando*), for the plaintiff, respondent.—The basis of our claim is the negligence of the nurse (Miss Tait). But in view of *Hillyer's case (supra)* we have further pleaded that the Nursing Home was negligent in appointing Miss Tait for performing "screening" operations when she was not competent to do such work. The nurse was qualified only for the purpose of taking X-ray photographs but not for the purpose of "screening" in order to locate a foreign body. The possibilities of errors in the latter are many—*Mackee's X-rays and Radium in the treatment of Diseases of the skin (3rd ed.), 196 et seq.* Even if it can be held that she was competent to screen, there can be no doubt that in the present case she was negligent.

The Nursing Home is liable for the negligence of its nurses. A contract of service is to be distinguished from a contract for services. *Hillyer's case* is closely examined in *Gold v. Essex County Council (supra)*. See also *Law Quarterly Review, Vol. 54, p. 553.*

It is not necessary for the plaintiff to rely on the doctrine of *res ipsa loquitur*, because the inference of negligence on the part of the nurse is inescapable. The Flavin Emulsion treatment, according to the evidence, could not have caused the injuries and cannot break the chain of causation. See *Macintosh and Scoble's Negligence in Delict (2nd ed.), 74.* As regards the theory of idiosyncrasy, a high degree of sensitiveness to X-rays has not been reported—*Robert Knox's A Text-Book on X-ray Therapeutics (4th ed.) 7; Mackie (supra) 370.* If burns due to idiosyncrasy are possible they are improbable, and the doctrine of *res ipsa*

[1] *S. A. L. R. (1925) A. D. 236.*
[2] *(1865) 13 L. T. R. 148.*
[3] *L. R. (1909) 2 K. B. 652 at 663.*
[4] *L. R. (1939) 2 K. B. 14 at 22.*
[5] *(1932) 147 L. T. R. 91 at 93.*
[6] *S. A. L. R. 1924 A. D. 438.*
[7] *L. R. (1935) 1 K. B. 354.*
[8] *L. R. (1879) 5 Q. B. D. 78.*
[9] *L. R. (1943) A. C. 448.*

loquitur will apply—*Macintosh and Scoble's Negligence in Delict (2nd ed.) 189; Mitchell v. Maison Lisbon* [1].

The sum awarded as damages is not excessive when one takes into consideration that the child suffered intense pain and her health is permanently impaired.

N. Nadarajah, K.C., in reply.—Burns due to hypersensitiveness of the skin do occur—*Robert Knox (supra) 9, 143; Glaister's Medical Jurisprudence (7th ed.) 194-5.* It cannot be said that negligence was the only cause of the burns. X-ray burns are normally rare and when they do occur can be explained by idiosyncrasy. Where a case depends on *culpa*, all reasonable doubt must be eliminated—*Hamilton v. Mackinnon*[2].

Cur. adv. vult.

January 14, 1944. SOERTSZ J.—

The judgment of my learned brother which I have had the advantage of reading expresses so completely the views that I myself had come to entertain, after listening to the very able argument addressed to us on both sides in this case, that I would have been satisfied merely to record my concurrence with it had he not suggested that it was desirable, in view of some of the important questions involved, that we should write separate judgments.

First of all, I should wish to say that I am in entire agreement with his observations on the submission made to us on behalf of the appellants that Anthea Olney must have suffered her injuries elsewhere than at the Fraser Nursing Home and later than January 14, 1940. Not only is that submission contrary to the positive evidence of Mrs. Olney which the trial Judge has accepted unqualifiedly but it is also inconsistent with every conceivable probability.

Taking then the Fraser Nursing Home and January 14, 1940, as the place and the occasion where and when Anthea Olney suffered the injuries she complains of, we come next to the admitted fact that she was screened twice on that day, once when she and Nurse Tait were the only persons in the X-ray room and again an hour or two later when Dr. Chissell was also present. Dr. Chissell and Nurse Tait were witnesses in the case. Anthea was not. She was only six and a half years of age at the time and obviously not sufficiently cognisant of what was being done to be able to give any material evidence at the trial some eighteen months later. Even an adult, ignorant of the mechanism of this X-ray apparatus and not conversant with its delicate manipulation and adjustments would scarcely have been in a better position. But both Dr. Chissell and Nurse Tait agree that for the second screening the girl stood with her back to the instrument and that would appear to be the normal exposure. That evidence affords a probable explanation of the burn on the back. But there is a similar burn in front, on the abdomen. Nurse Tait who was the only person other than Anthea who was present at the first screening states positively that on that occasion too the girl stood in exactly the same position. If that were so, the only supposition on which the burn on the abdomen could be explained is that the X-ray went athwart the body on both or at least on one of the screenings. But

[1] *S. A. L. R. (1937) T. P. D. 13.* [2] *S. A. L. R. (1935) A. D. 114 at 118.*

the evidence of the experts is that on that supposition all the internals in the line of the rays should have been similarly burned and of that there were no indications whatever. The medical evidence seems clear that the two burns were the results of two different exposures, one with the girl standing with her back to the machine and the other with her face to it. It follows inevitably that Nurse Tait's recollection is at fault and that most probably in her anxiety for the safety of the child and doing her best to locate this very tenuous thing, a hypothetical needle, she thought she would make a thorough search screening the girl both ways. And Major Sharrard tells us that "There is nothing wrong" in screening a patient consecutively with a front and a back exposure provided of course one keeps within the bounds of safety in regard to the duration of the exposures and the potency of the rays. The next question is whether Anthea's burns were due to the negligent management of the instrument by Miss Tait or by Dr. Chissell, the only other possible person. There can be doubt on that point for Nurse Tait admits that she operated it on both occasions, exercising her own discretion and judgment. It is true that, on the occasion of the second screening, it was Dr. Chissell who looked for the needle and called out certain directions to have the rays thrown from spot to spot but she frankly says she obeyed those directions because she thought they were proper and that she would not have carried them out if, in her opinion, they were fraught with any danger at all. The only possible conclusion therefore is that if there was negligence it was the negligence of Nurse Tait. In regard to this question of negligence on the part of Nurse Tait we heard a great deal in the course of the argument about *res ipsa loquitur*, three apparently simple words from which volumes of discussion appear to have flowed. One thing, however, seems certain and must be borne in mind when there is reference to this maxim and that is that it does not mean that a plaintiff alleging negligence is ever absolved from establishing it and is entitled in every case to point to his or her injury and say that it speaks for itself and proclaims the negligence of the defendant. There are many accidents from which no presumption of negligence can arise. But there are others in which the transaction resulting in the injury seems to speak so eloquently of negligence that the necessity arises at once for the defendant to go forward with his testimony or to take the risk of non-persuasion and a consequent adverse verdict. To put the matter in the way in which Lord Dunedin called attention to it in *Ballard v. N. B. Railway Co.* [1] the injury may amount to "*a piece of evidence* relevant to infer negligence" or may be evidence from which the Court "*necessarily infers* negligence" or in the words of Lord Shaw of Dunfermline in the same case (Ballard) *res ipsa loquitur* "is the expression in the form of a maxim of what in the affairs of life frequently strikes the mind that is, that a thing tells its own story not always but sometimes". How, then, does the present case stand in the light of these observations? We are concerned in it with an X-ray apparatus which, according to the evidence, came from the hands of well recognized makers, was in efficient working order at the time and possessed of a great margin of safety, if the instructions of the makers were observed. In short, it was harmless in normal operation but

[1] *1923–60 Scot. L. R. 448 cited in 1935 A. D. P. 125.*

capable of serious harm if handled unskilfully. That on this occasion it was the source of the injuries suffered by Anthea is antecedently more than probable and the resulting position in law appears to be as stated by Erle C.J. in the leading case of *Scott v. London & St. Katharines Docks*[1] " where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of thing does not happen if those who have the management of it use proper care it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of proper care ". The case of the plaintiff before us is just that and the question arises at once whether it can be said that the defendants have met it with reasonable explanation. All they have done is to suggest that the injuries might have been caused (*a*) elsewhere than at the Fraser Home, (*b*) by some unverified pernicious effect of the ointment and emulsion applied on Doctor Peterson's directions on the skin that had only reacted in a not unusual and not harmful manner to the X-rays, (*c*) by a hypersensitive skin. Hypothesis (*a*) has already been dealt with and rejected " out of hand ". In regard to the alternative of negligence on the one hand and alternatives (*b*) and (*c*) on the other the position, if I may say so, is stated correctly by *Macintosh and Scoble in their Negligence in Delict, pp. 189-190*:—

> " Where the natural explanation of the accident is negligence in the defendant but there are other possible explanations then the Court must decide upon the balance of probability having regard to the fact that the onus remains on the plaintiff and that the probability must be strong; something more than a mere conjecture or surmise. But a difficult question arises as to whether in order to establish a *prima facie* case it is necessary for the plaintiff to negative such other possible explanations or whether if he establishes that the probable explanation was the defendant's negligence it is then for the defendant to provide evidence showing that the accident may reasonably have occurred without fault on his part . . . .
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> It is submitted that the question is really one of degree of probability. If the evidence for the plaintiff points strongly towards the negligence of the defendant a *prima facie* case will be established, even though other possible explanations might be advanced. Where if the most that can be said is that negligence in the defendant is a more likely explanation than others which not uncommonly produce similar accidents not even a *prima facie* case will be established."

Examining this case in that way I would associate myself entirely with the observations made by my brother Hearne in regard to (*b*) and (*c*) and say that in the result the strong probability—such a probability as is contemplated by the explanation given of the word " prove " in section 3 of the Evidence Ordinance—is that Anthea Olney suffered her injuries under the negligent handling of the X-ray apparatus by Nurse Tait.

Then comes the question whether the defendants are responsible for the negligence. On the evidence it is beyond question that Nurse Tait in operating the X-ray instrument was acting in the course and within the scope of her employment under the defendants and the

[1] *3 H. & C. 596.*

defendants would under the general principle of *respondeat superior* be responsible for her negligence unless they are entitled to claim exemption from that rule on the ground that at the time the injuries were caused Nurse Tait was exercising professional or technical skill. Such a ground of exemption was adumbrated in the case of *Hillyer v. St. Bartholomew's Hospital* [1] which was a case in which damages were claimed on account of the alleged negligence of a Consulting Surgeon. This case, however, has occasioned much question and some anxiety. When it came under notice in the House of Lords in the course of the appeal in *Lindsey County Council v. Marshall* [2] it was stated that " it is not necessary to express here any opinion one way or the other about the correctness of that decision ". But when it arose again in the Court of Appeal quite recently in *Gold v. Essex County Council* [3] it was not followed in the instance of a radiographer's negligence which was the cause of action. The decision in the last named case is exactly in point here and I would respectfully adopt the rule laid down in it and hold that the defendants are liable in respect of Nurse Tait's negligence.

The plaintiff went further in this case and alleged that the defendants were also liable on their own negligence in entrusting Nurse Tait *talis qualis* with the screening of patients in order to discover foreign objects. In regard to this and to the amount of damages awarded, I have nothing to add. The appeal must be dismissed with costs.

HEARNE J.—

The defendants-appellants are trustees of the Joseph Fraser Memorial Nursing Home. The plaintiff, a minor, appearing by her next friend, was awarded a sum of Rs. 30,000 as damages for injuries caused to her by the negligence of Miss Tait while acting within the scope of her employment as Sister-in-Charge of the defendants' X-ray plant.

Out of a welter of evidence and theories there emerged one clear, incontrovertible fact—that the plaintiff, Anthea Olney, sustained very serious and most painful X-ray burns on her abdomen and back.

It was admitted that for the purpose of locating a needle she was suspected of having swallowed, she had been " screened " on two occasions at the Nursing Home by Miss Tait on January 14, 1940. In the opinion of Dr. Gunawardene the burns could only have been caused by screening in two positions, her abdomen in one instance and her back in the other, being exposed to the apparatus. In her evidence Miss Tait stated that on the first occasion when she was alone, as well as on the second when Dr. Chissell was present, the plaintiff's back and not her abdomen " was exposed to the machine ". Dr. Chissell agreed in regard to the latter. It was argued on behalf of the appellants that, assuming Miss Tait was right that the abdomen of the plaintiff was not exposed to the rays when she was operating the machine alone, it is possible that subsequent to the screening at the Fraser Nursing Home in one position only, the plaintiff's mother had had her screened at another Nursing Home in two positions, and that the injuries had been sustained at the latter place.

[1] *L. R. (1909) 2 K. B. 820.* [2] *L. R. (1937) A. C. 97.*
[3] *(1942) 2 A. E. R. Vol. 2, p. 27.*

On February 2, 1940, Dr. Peterson saw the plaintiff and "had no difficulty in diagnozing X-ray burns in an early condition in the front and rear." The evidence of some of the medical witnesses suggested that the onset of intense pain, which in the case of the plaintiff was in June, 1940, was inconsistent with the infliction of X-ray burns as early as January 14, 1940, or on any date before February 2. This was pressed on appeal and it was argued that the plaintiff's mother had probably arranged for a second screening at another Nursing Home very much later than February 2.

If this was so, what was the occasion for it? There is no reason to think that Mrs. Olney still suspected that a needle had been swallowed by her child, for Dr. Chissell had assured her to the contrary. But, apart from the improbability of the suggestion, there is the positive evidence of Dr. Peterson that the plaintiff had two X-ray burns on February 2 and his evidence was unreservedly accepted by the trial Judge.

Dismissing this theory of the defence out of hand as the Judge was entitled to do, his finding that the burns were the consequence of the screening of the plaintiff at the Fraser Nursing Home on January 14, 1940, is, in my opinion, unassailable. This involves the implication that on the first occasion Miss Tait screened the abdomen of the plaintiff if not her back as well. She denied it, but it is probable that her memory is at fault.

Two questions arise at this stage. Was Miss Tait negligent? If so, are the defendants liable?

I shall deal with the second question, which is one of law, first. The position taken up by the defendants was that they had no control over the skilled work entrusted to Miss Tait, that they had no reason to doubt her competency and skill as a Radiographer and that they were not responsible for her negligence, if she was negligent. This pleading was no doubt suggested by the decision in *Hillyer's case*[1]

In his judgment the Judge found the defendants were negligent in their appointment of Miss Tait. If it were necessary to do so, I would hold upon the evidence that she was competent to take X-ray photographs—it was for this purpose that she was engaged in addition to ordinary nursing duties—and perhaps also to screen, if necessary, for a very short period of time prior to the taking of an X-ray photograph. I am, however, of the opinion that she was not competent to screen, for instance, for the purpose of searching for a foreign body. By reason of the fact that the exposure to the rays is longer "the process", as Dr. Gunawardene puts it, "is much more dangerous" and the operator and patient are liable to be burnt if the former is not competent. I think that, having regard to Miss Tait's limited experience and the lack of any recognized qualifications, the risk was not justified.

But it is not necessary to decide the question for the purpose of this appeal. The decision in *Hillyer's case* (*supra*) has been critically examined in reference to the liability of a hospital for the acts of nurses. In *Gold v. Essex County Council*[2] Mackinnon L.J. stated that "one who employs a servant is liable to another person if the servant does an act within the scope of his employment so negligently as to injure that

[1] *L. R. (1909) 2 K. B. 820.* [2] *(1942) 2 A. E. R. 237.*

other—this is the rule of *respondeat superior*—and that principle applies even though the work which the servant is employed to do is of a skilful or technical character, as to the method of performing which the employer is himself ignorant ". The position of a Nursing Home relative to a surgeon who, in the circumstances of *Hillyer's case*, is not acting " under a contract of service but a contract for services " is different.

Miss Tait acted within the scope of her employment. She screened and fees were charged by the Nursing Home for screening. If she was negligent the defendants are liable for the consequences of her negligence.

I would point out that, although a medical man was present on the second occasion of screening, he was not a radiologist and gave no instructions which Miss Tait was bound to obey. She was acting entirely as a servant of the Fraser Nursing Home and admitted that, in her adjustment and manipulation of the X-ray machine, she was a free agent and not under the control of any third party.

The trial Judge dealt at length with the negligence of the trustees in their appointment of Miss Tait. However negligent they might have been, judgment could not be obtained against them unless Miss Tait, even if technically unqualified or insufficiently experienced for the duties entrusted to her, was in fact shown to have been negligent when she screened the plaintiff. But he also specifically answered the third issue—were the burns caused by the negligence of Miss Tait ?—in the affirmative.

That is the final question to be answered. Was she negligent ? In the nature of the case it was not possible to prove precisely what she did or omitted to do that amounted to negligence. But the defendants appear to have assumed that the principle of *res ipsa loquitur* operated against them and that, if they could not show the burns were caused apart from negligence, " the proper and natural inference was that the injury complained of was the result of negligence ". Whether this is so or not they certainly advanced at the trial two more theories exculpating Miss Tait. Reference was also made to them at the hearing of the appeal.

In his evidence Dr. C. I. de Silva is recorded as having said, in answer to the question " are these burns on Anthea X-ray burns or not ? ", " when I first came into Court and saw the burns I thought they were but . . . . I have a lingering doubt. They may have been caused by the X-ray pure and simple through some unfortunate accident or by the use of . . . . applications which are injurious if a person has been exposed to X-ray radiation as for instance acriflavin ". The plaintiff's burns had been treated with " Flavin Emulsion ".

The Doctor also said " It is a matter of hypothesis of which I am not sure. In reading Mackee's description of Chronic Radio Dermatitis I notice that he mentions the application of certain ointments and other materials—drugs—has a peculiar action *of turning an ordinary harmless exposure to one which is capable of turning into an apparently harmful exposure* ". The expression " apparently harmful exposure " has no relevance to the facts of this case. The harm suffered by the plaintiff, so far from being merely apparent, was very real indeed. " I noticed ", he went on, " that one of the substances he mentioned was Scarlet R ".

I know that Scarlet R. has a most extraordinary action on X-ray. It is a dye. Flavin is also a dye used in medicine. It immediately started me thinking that Sodium Flourescine which is used to make a small dose of X-ray have the action of a bigger dose. That is done by application before and after. Then I have been working with other radiant energy in my work. I remembered that there is a whole group of substances which have that " dynamic action and I remembered that Acredine was one. That is also a dye and Acredine is the mother substance of Flavin and Acriflavin. When I came to that it confirmed that Acriflavin has some action in a peculiar way . . . . Those burns may have been caused by the neligent use of the X-ray apparatus or (?) by the conjoint use of X-ray and Acriflavin lotion and idiosyncracies ".

Leaving aside for the moment the subject of idiosyncrasy (I shall return to it later), if the learned Doctor meant that X-ray burns would be aggravated by Flavin treatment, it does not help the appellants at all. Assuming the plaintiff was burnt by X-rays, inappropriate treatment would not " break the chain of causation ". If, however, he meant that " a normal dosage " of X-rays followed by Flavin treatment could have produced the physical condition in which Dr. Spittel found the plaintiff, this was admittedly no more than a speculative hypothesis. It would appear to have been based in the main on the ground that Acredine which has " dynamic action is the mother substance of Flavin and Acriflavin ".

I now pass to the other theory of idiosyncrasy. It appears to have been the object of the defence to establish through the medical witnesses that idiosyncrasy as a possibility is recognized by their profession and upon that basis to argue that while there was a possibility of a high degree of hypersensitiveness in the plaintiff, she could not succeed in her action. This means that if a patient is burnt by X-rays and the exact nature of the negligence, if there was negligence, cannot be established, the mere chance that the patient *may* be hypersensitive is a complete answer to an action for damages. That is not the way I can bring myself to regard the matter.

In Knox's work on X-ray (1932 Edition) it is stated that " the variation in sensitiveness of patients does not exceed 10 to 15 per cent." and that no authenticated cases of a high degree of hypersensitiveness had been reported. But if hypersensitiveness has since then been established and accepted as a scientific fact, it does not conclude the case against the plaintiff. The case must be judged as a whole.

There was nothing wrong with the X-ray plant. Disregarding the suggestion of " another " Nursing Home and Dr. de Silva's " hypothesis of which he was not sure ", there remained the evidence of experts called for the defence and on behalf of the plaintiff. What was their view in regard to the X-ray burns from which plaintiff undoubtedly suffered ? How did they think they had been caused ?

" Assume those are X-rays burns " Major Sharland was asked " Burns of that kind would indicate negligence? " His answer was " Yes, there is no doubt about that ".

" You would not conceive of any competent person causing those burns except by utter negligence ? "

" Complete negligence. I would like to know the depth of the ulcers."

Dr. Amarasinghe was asked " Are you satisfied on the evidence that if these are X-ray burns that it indicates negligence on the part of some-one ? " His answer was " Yes, I am satisfied about that ". " Can you mention any possibility other than negligence ?" His answer was that idiosyncrasy might produce it even with a normal dose.

Dr. de Silva said " To produce the two burns the technician is both negligent and insane, to produce one burn only the technician is in-competent or (it may be) the application of Flavin or third idiosyncrasy ".

Even Miss Tait said that, although she did not cause the burns, " who-ever caused them was thoroughly incompetent ".

I think the witnesses called by the defence largely helped to establish the case of the plaintiff.

Dr. Gunawardene was asked " If a radiologist keeps well within the margin of safety do you think it is possible to cause a third degree burn even in the case of a hypersensitive person ? " and his answer was " No ". He was also asked " Do you consider that if a competent radiologist caused an X-ray burn it could only be attributed to negligence ? ". He replied " Yes, I cannot imagine any unavoidable burn ".

In my opinion the trial Judge came to the only possible conclusion. It was also argued that the damages awarded were excessive. Following the principles laid down in *Flint v. Lovell* [1] interference by this Court with the quantum of damages would not be justified.

The appeal is dismissed with costs.

Appeal dismissed.