1954 *Present:* **Gratiaen J. and Fernando A. J.**

DR. P. J. CHISSEL, Appellant, *and* R. C. CHAPMAN, Respondent

S. C. 484—D. C. Colombo, 21,987M

Delict—Action for "injurious falsehood"—Dolus or animus injuriandi is necessary ingredient—Negligence—Incidence of liability—Duty of care.

If A, in discharge of a contractual obligation which he owes to B, makes to B a negligent but honest and non-defamatory statement in relation to a third party C, A is not liable to C for pecuniary loss sustained by him in consequence of the statement.

Cable and Wireless Ltd. employed the defendant, who was a medical practitioner, to examine the plaintiff and report whether the plaintiff, who had been accepted for service as a telegraphist-apprentice, was physically fit for permanent employment as a telegraphist. Defendant examined the plaintiff, but reported that he was unable to recommend him for service with the Company. As a direct consequence of this report, the plaintiff's engagement as an apprentice was abruptly but lawfully terminated by the Company. Plaintiff then instituted the present action claiming damages from the defendant. He alleged that he was perfectly fit for employment as telegraphist in Cable and Wireless Ltd., and that the defendant's unfavourable report was "due to gross negligence and/or incompetence". He made no allegation that the defendant had acted maliciously or dishonestly in the matter.

***Held*, that the action was not maintainable, even if the defendant's medical opinion concerning the plaintiff's suitability to undertake the duties of a telegraphist had been negligently arrived at.**

***Held further*, that in regard to the question of negligence the law did not impose any duty of care on the defendant towards the plaintiff, other than the duty not to cause him physical injury.**

Conflicting medical evidence discussed.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *S. J. Kadirgamar* and *B. S. C. Ratwatte*, for the defendant appellant.

E. G. Wikramanayake, Q.C., with *H. W. Jayewardene* and *P. Ranasinghe*, for the plaintiff respondent.

Cur. adv. vult.

June 25, 1954. GRATIAEN J.—

The defendant is a qualified doctor, possessing the degrees of F.R.C.S. (Edinburgh), M.R.C.S. (England) and L.R.C.P. (England). He has practised his profession continuously in Ceylon since 1910 except during a period when he served overseas in World War I.

J. N. B. 40779—1,952 (11/54)

On 22nd April, 1949, the plaintiff, then 18 years of age, was accepted for service as a telegraphist apprentice in the Colombo branch of Cable & Wireless, Ltd., subject to the terms of a written agreement which provided *inter alia* that his physical fitness must be certified by the Company's own medical officer, whose decision was to be accepted as final. Two senior executive officers gave evidence at the trial for the plaintiff. One of them explained that this certificate was an essential condition of membership of the Company's Pension Fund ; the other pointed out that, in addition, the exacting nature of a telegraphist's duties called for a high degree of physical and mental efficiency. The defendant had been the Company's medical officer for over 30 years, and was specially conversant with the standard of physical fitness required.

On 14th July, 1949, the plaintiff presented himself at the defendant's consulting room for his medical examination, which the defendant duly carried out in fulfilment of his own contractual obligation to the Company. It will be necessary to discuss at a later stage the precise nature of the legal duties which the situation imposed on him towards the examinee himself.

After a detailed clinical examination, the defendant sent a confidential report P5 to the Company to the effect that, although the plaintiff satisfied the requisite standard of health in other respects, his employment was not recommended because :

> " There is a very forcible impulse over the cardiac area. The heart is enlarged, the apex being outside the nipple area. There are no murmurs. Pulse rate was 108 per minute and the blood pressure was S 154 and D 70 ; at the second reading the S was 144. Applicant is an athlete which I think accounts for his hypertrophied heart. *I am unable to recommend him for service with Cable & Wireless, Ltd.*"

As a direct consequence of this report, the plaintiff's engagement as an apprentice was abruptly but lawfully terminated by the Company on 18th July, 1949, and he was unable to secure other employment for approximately six months. He has continuously thereafter been engaged in the service of the Bank of Ceylon, but there is no precise evidence upon which (on the issue as to damages) the Court could accurately compare his financial prospects in his new employment with those of a telegraphist in the firm of Cable & Wireless, Ltd.

The plaintiff's mother, Mrs. Chapman, was naturally distressed by the events which had taken place, and she arranged for the lad to be examined clinically at her own expense on 18th July, 1949, by Dr. F. J. T. Foenander (another well known practitioner in Colombo). Dr. Foenander certified that in his opinion " there was no evidence of functional or organic disorder of the heart nor was there any enlargement ". On 22nd July, Dr. H. O. Gunawardene (a distinguished cardiologist) also issued a report to the effect that " electrocardiagram and X-ray film of his heart revealed no abnormality ".

These fresh opinions were brought to the notice of the Company's branch manager by Mrs. Chapman, and he in turn communicated them to the defendant who volunteered to examine the plaintiff once again

on 27th July, 1949. On this occasion, the lad's blood pressure was recorded at 150/70, and the defendant informed the manager orally that he saw no reason to revise his earlier opinion as to the lad's unfitness for service as a telegraphist. The Company therefore confirmed its original order of discontinuance.

These were the circumstances in which the plaintiff instituted the present action claiming damages from the defendant in a sum of Rs. 5,000. He alleged that he was perfectly fit for employment in Cable & Wireless, Ltd., and that the defendant's unfavourable report P5 (received by the Company on 15th July, 1949), was " due to gross negligence and/or incompetence ". The plaint makes no allegation that the defendant had acted maliciously or dishonestly in the matter.

After the trial had very nearly been concluded, the (then) District Judge of Colombo was appointed to other duties at very short notice. Fresh proceedings thereupon commenced *de novo* (at additional expense to both parties) before the learned judge whose decision is now under appeal. He held that the report P5 was " substantially incorrect ", and that the defendant had been guilty of gross negligence. The defendant was ordered to pay to the plaintiff a sum of Rs. 5,000. Incidentally, the award includes an unspecified sum by way of " sentimental damages " which are not recoverable in actions based on negligence.

The judgment has been criticised by Mr. Perera on a number of grounds. In particular, he submitted that the evidence was quite insufficient to justify the conclusion that the defendant had acted negligently ; and that in any event no liability attaches under the Roman-Dutch law for pecuniary loss sustained by a person in consequence of incorrect statements (concerning him) made *negligently but honestly* by the defendant to someone else. The first of these submissions is, for obvious reasons, of special concern to the defendant who is jealous of his professional reputation. But the issue of law raised by Mr. Perera is of wider importance, and calls for a definite answer by this Court as to whether or not the learned judge has extended beyond legitimate limits the incidence of liability for negligence under the general law of Ceylon.

I shall first consider the question of law raised by Mr. Perera. What is the extent of a doctor's duty towards a person whom he is required (under a contract with that person's proposed employer) to examine for the purpose of expressing a confidential medical opinion as to the examinee's fitness to undertake employment of a particular kind ? The contract certainly imposes on the doctor an obligation *towards the proposed employer* to exercise reasonable care and skill, but in my opinion his only obligation *towards the examinee* (apart from the obvious duty not to cause him physical injury during the examination) is to express an opinion which is honest. In such a situation, there is no contractual, fiduciary or analogous relationship between the doctor and the examinee which makes the doctor liable to the examinee for pecuniary loss arising from the communication of a negligent, non-defamatory but honest opinion to the proposed employer.

Had the defendant made a defamatory statement to Cable & Wireless Ltd. concerning the plaintiff, he would of course have been liable in damages (not restricted only to pecuniary loss) in an *actio injuriarum* for defamation, provided that the plaintiff could have established express malice so as to defeat the plea of qualified privilege.

The *lex Aquilia* proper is concerned only with liability for acts which cause *physical injury* to person or property through fraud or negligence; but, in order to meet the more complex situations which arise under modern conditions, the incidence of liability has also been extended to cases where *dolus*, as opposed to mere *culpa* (negligence), causes *pecuniary loss* to the aggrieved party. So, in the present case, if the defendant had, through some improper motive, expressed to Cable & Wireless, Ltd., even a non-defamatory opinion (which he knew to be wrong) that the plaintiff was physically unfit for service with the Company, he would without doubt have been liable to compensate the plaintiff for consequential pecuniary loss (though not, as the learned judge appears to have assumed, for sentimental loss as well)—*Van Zyl v. African Theatres*[1]. The elements of this actionable wrong are precisely similar to the prerequisites to an action " on the case " for injurious falsehood under the English common law.

It thus appears that a person in the position of the plaintiff would not have been denied a legal remedy if the doctor's incorrect opinion concerning him had been dishonestly expressed. The question is whether the law also protects him against the consequences of negligence unaccompanied by an improper motive.

In taking the view that the situation imposed on the defendant not merely an obligation towards the plaintiff to act honestly but also a duty to act without negligence, the learned judge purported to follow the ruling of Watermeyer J. in *Perlman v. Zoutendyk*[2]. That decision, however, was not concerned with a negligent false statement made by A to B concerning C, but with a valuation report negligently issued by A (a professional valuator) to B *knowing that it was intended to be used by B for the purpose of inducing C to act upon it.* Watermeyer J. held that the absence of contractual privity between A and C did not preclude C (*i.e.*, the person deceived) from suing A for pecuniary loss sustained in direct consequence of C (as intended and foreseen) having acted on the faith of the negligent valuation.

The judgment in *Perlman's case* (*supra*) proceeds on lines which bear a very close resemblance to the views expressed by Denning L.J. (concerning the English common law in a similar situation) in his notable dissent in *Candler v. Crane Christmas & Co.*[3].

If and when a case arises in our Courts where damages for pecuniary loss are claimed by a person who was actually deceived by another's negligent misrepresentation, it will be necessary to decide whethe

[1] *(1931) C. P. D. 61.* [2] *(1934) C. P. D. 151.*

[3] *(1951) 2 K. B. 164.*

Perlman's case should be followed in Ceylon. I observe that it has been criticised on more than one occasion by judges and distinguished academic lawyers in S. Africa. In *Alliance Building Society v. Deretich* [1], for instance, Berry J. adopted the more conservative view expressed 10 years later in England by the majority of the judges who decided *Candler's case* (*supra*). In *Western Alarm System v. Coini* [2], Jones J. and de Villiers J. found it unnecessary to resolve the conflict of authority, but were content to rule that, in either view, a negligent false statement was actionable *if made directly to the plaintiff* (*i.e., the person actually deceived*) *to whom the speaker or writer was bound by contractual relationship, with knowledge or notice that it would be acted upon.* In a more recent judgment, Malan J. decided that before liability can attach in an action founded on a negligent misrepresentation which takes the form of deceit, "*some special relationship* (between representor and representee) *must exist—contractual or fiduciary—or some special circumstances must exist which create a similar relationship* "—*Mrupi v. Hershall* [3]. This, in his opinion, is the only exception to the general rule that "independently of contract, a false representation causing damage is not actionable *unless fraudulent* "—*Dickson & Co. v. Levy.*[4]

The present state of these S. African authorities indicates that, even in an action under the Roman-Dutch law for damages instituted by someone who was actually misled by another's negligent misrepresentation, it is at least doubtful whether (and if so, to what extent) negligence by itself suffices to establish a cause of action. But there is certainly no precedent for applying the ruling in *Perlman's case* (*supra*) to the elements of an entirely different delict, conveniently described as "injurious falsehood".

The learned District Judge has also claimed support for his proposition in the judgments of the majority of the English Court of Appeal (Scrutton L.J. dissenting) in *Everett v. Griffiths* [5], followed by McCardie J. in *de Freville v. Dill* [6]. The principle laid down in those cases is that, notwithstanding the absence of contractual relationship between doctor and patient, the former is liable for damages caused by the latter's *physical detention* (under the Lunacy Acts) which was the inevitable consequence of a negligent report as to the patient's mental condition. I conceive that this would certainly be so under the Roman-Dutch law, because the *lex Aquilia* proper itself provides a remedy for causing physical injury either maliciously or negligently; compulsory detention in a mental institute obviously constitutes physical interference with the patient's right to his personal freedom.

The analogy of the "lunacy cases" does not lie where a plaintiff complains only of *pecuniary loss* resulting from a negligent statement concerning himself made by the defendant to a third party and acted upon by the third party to the plaintiff's detriment. In such a situation, the *ratio decidendi* of *Alliance Building Society v. Deretich* (*supra*) is precisely in point, and we have not been referred to any authority of the English or S. African Courts which takes a contrary view. Indeed,

[1] (*1941*) *T. P. D. 263.*
[2] (*1944*) *C. P. D. 271.*
[3] (*1953*) *3 S. A. L. R. 553.*
[4] *11 S. C. 36.*
[5] (*1920*) *3 K. B. 163.*
[6] (*1927*) *96 L. J. K. B. 1056.*

Watermeyer J., who wrote the controversial judgment in *Perlman's case* (*supra*), has himself explained in *Van Zyl v. African Theatres Ltd.* (*supra*) that *dolus* or *animus injuriandi* is the true foundation of the action for "injurious falsehood".

It is interesting to note that Atkin L.J. in *Everett v. Griffiths* (*supra*) at p. 213 discusses the kind of problem which has arisen in the present case. Dr. Chissel's duty to the plaintiff could clearly not be placed higher than that of a doctor who, in discharge of his contractual obligations towards an insurance company, examines a person proposing to take out a policy of life insurance with the Company. Lord Atkin contrasted that relationship with the situation of a doctor who is under a statutory duty virtually to decide whether a suspected lunatic should be detained in an asylum. Having first analysed the general duty of a doctor towards his patients, he explains :

> "In all the above cases *the duty to the patient may be negatived by contract express or implied, or by some circumstances that are inconsistent with the existence of such a duty.* A patient may be examined, for instance, by the medical officer of the insurance company ; it would, I think, be reasonably plain that *the patient submitted himself to examination upon the footing that the doctor owed the duty to take care, not to him, but to the insurance company.*"

The learned District Judge does not explain why he found it "difficult to follow the logic" of what Atkin L.J. had regarded as "reasonably plain".

Denning L.J., whose other propositions found favour with the learned District Judge, has also remarked in *Candler's case* (*supra*) at p. 183 :

> ". . . . a doctor, who certifies a man to be a lunatic when he is not, is liable to him, although there is no contract in the matter, because the doctor knows that his certificate is required for the very purpose of deciding whether the man should be detained or not ; *but an insurance company's doctor owes no duty to the* (*proposed*) *insured person, because he makes his examination only for the purposes of the insurance company.*"

I find no trace of faulty logic in either of these pronouncements. Apart from other considerations, a contrary view might well result in the doctor's admitted duty to his own immediate employer coming into sharp conflict with his alleged contemporaneous duty to the "patient" concerned.

Let us suppose that, in a hypothetical situation, the doctor carelessly but honestly considers that the proposed insurance might *possibly* (but not *certainly*) be attended by some aggravated risk to the insurer. What then would be his duty ? To resolve the doubt in favour of the company to whom he was bound by contract, or in favour of the examinee to whom he was not ? The answer is obvious. The law does not favour a situation by which a person binds himself by contract to undertake conflicting duties : *a fortiori*, the law refuses to create the conflict.

In England, "less timorous" common law judges sometimes find themselves free to invent a new cause of action to meet a new situation (if the problem is unembarrassed by binding precedent). But those of us who administer the Roman-Dutch law cannot disregard its basic principles although (on grounds of public policy or expediency) we may cautiously attempt to adapt them to fresh situations arising from the complex conditions of modern society. But we are powerless to alter the basic principles themselves, or introduce by "judicial legislation" fundamental changes in the established elements of an existing cause of action. It is in this respect that, in my opinion, the learned District Judge has erred.

Even in England, as Asquith L.J. pointed out in *Candler's case*, the *ratio decidendi* of *Donoghue v. Stevenson* [1] has never yet been applied where the damage complained of was not physical in its incidence to either person or property. The Australian Courts have also refused to extend Lord Atkin's "love thy neighbour" principle to the cases of a race-course judge who negligently fails to award the prize to the horse which actually won the race—see the decisions mentioned in an article in (*1948*) *11 Modern Law Review at pp. 31–2*. Similarly under the Roman-Dutch law, the race-course judge owes a contractual duty to his employer not to be negligent, but his only obligation to the owners of the horses is to exercise his judgment honestly on each occasion. Whether the patrons of horse-racing in this country ought to be more favourably placed than their Australian counterparts is entirely a matter for legislative decision; this problem certainly leaves no scope for the judges to "out-distance Atkin" or "out-Denning Denning" in the field of legal reform. In *Mrupi v. Hershell* (*supra*) Malan J. said at p. 553:

> "Common sense fortifies the view that some limitation must be placed upon liability in damages for innocent non-defamatory statements negligently made, otherwise ordinary intercourse between individuals would be fraught with great danger, and a person in communicating with another would speak at his peril."

As far as the delict of "injurious falsehood" is concerned, the limitations have long since been fixed and clarified by the basic principles of our general law.

In the present case, the honesty of the defendant's opinion was never in issue. Even therefore if the opinion which he communicated to Cable & Wireless Ltd. concerning the plaintiff's suitability to undertake the duties of a telegraphist had been negligently arrived at, this action would not have been maintainable.

In the view which I have taken, I see no necessity to examine in detail the issues of fact in the case, particularly as my brother Fernando has dealt fully with the charge of negligence in his separate judgment. I too am quite unable to attribute any degree of culpable negligence to the defendant's honest refusal to certify the plaintiff as fit to be employed

[1] (*1932*) *A. C. 562.*

by Cable & Wireless Ltd. Dr. Gunawardene himself was not prepared to say that the defendant's opinion, even if incorrect, betrayed anything more than " at the most, an error of judgment ".

With regard to the allegation of negligence, we have enjoyed the special advantage of hearing the submissions of Mr. E. G. Wikremanayake who represented the plaintiff in both Courts. His argument on the facts may be summarised as follows :

1. The clinical finding on 14th July, 1949, that " the heart was enlarged, the apex being outside the nipple line " was demonstrably incorrect, and could not have been reached without gross carelessness ;

2. Although no legitimate complaint can be made against the original opinion based on the recordings of the plaintiff's blood pressure on 14th July, the defendant was forewarned at the date of the second examination on 27th July that two eminent doctors had specifically reported the absence of any symptoms of heart disease. In these circumstances, he was grossly negligent in adhering " obstinately " (and without sufficient further inquiry) to his earlier diagnosis ; in spite of his recording of a high systolic blood pressure on this occasion as well, he should have carefully carried out another clinical examination in order to locate the apex of the heart in relation to the nipple line ; and he should also have consulted Dr. Gunawardene (and perhaps Dr. Foenander) before arriving at a final decision adverse to the plaintiff.

As to the first complaint, I agree with my brother Fernando that the incorrectness of the defendant's clinical findings on 14th July, 1949, has not been demonstrably established. The foundation of this theory of negligence therefore disappears. The second ground of criticism suggests a counsel of perfection which might well have been observed if the defendant had been engaged (or had even gratuitously undertaken) to treat the patient for suspected heart disease ; similarly if it was his duty to give advice as to future medical treatment by another doctor ; so again, if he had been required to express an opinion as to whether, *from the patient's point of view*, the patient could safely join a strenuous mountaineering expedition. But no such professional duties were in fact undertaken either on 14th July or on 27th July, 1949.

As Lord MacMillan observed in *Donoghue v. Stevenson* (*supra*) : " The law takes no cognisance of negligence in the abstract ". My main difficulty, therefore, in approaching this part of the case is to fix some arbitrary standard of care on the false hypothesis that the situation did impose a duty on the defendant *vis a vis* the plaintiff. For not till then is it possible to consider whether he had in fact fallen short of the (assumed) standard.

I find myself on firmer ground when I address myself to the particular duty of care which the situation *actually* imposed on the defendant—namely, his duty *towards Cable & Wireless Ltd.* In this respect, I am perfectly satisfied that no negligence has been established against him.

The company was not directly interested in the question whether Mr. Chapman was suffering from a disease of the heart. It was concerned only to obtain the defendant's professional opinion as to whether (*from the point of view of the company and of no one else*) Mr. Chapman's employment as a telegraphist and his admission to the privileges of membership of the Pension Fund were attended by undue risk. On that issue, the defendant was honestly satisfied that it would be unsafe to entrust the arduous duties of a telegraphist to a lad of 18 who, on three separate occasions within a fortnight, had (*for whatever reason*) registered an unusually high systolic blood pressure for a person of his age. Even Mr. Chapman's expert witnesses do not dispute that this was a point of view which a cautious medical man (employed only to protect the company's interests) might fairly and reasonably entertain. It necessarily follows that the particular situation did not impose on the defendant a duty to probe still further into the special causes underlying the phenomenon of the patient's high blood pressure. At the closing stages of the trial, the learned judge asked the defendant whether the plaintiff's high blood pressure might not be attributable only to "emotional stress". The defendant pertinently replied that, even on that hypothesis, he still maintained that "the lad was not fit for the job".

I have already explained why, in my opinion, the law did not impose any duty of care on Dr. Chissel towards Mr. Chapman. Even if I were wrong in that conclusion, it is obvious that *he could not have owned a higher duty to Mr. Chapman than he admittedly owed to Cable & Wireless Ltd.* Let us then assume that the law imposed on Dr. Chissel an obligation towards Mr. Chapman *not to fall below the standard of care which he owed to Cable & Wireless Ltd.* Even on this hypothesis, the present action fails.

Mr. Wikremanayake very fairly conceded before us that the alternative allegation of "incompetence" had not been established.

Before I conclude, I desire to make some general observations. The learned judge had clearly formed a very unfavourable impression of the defendant's attitude in the witness box. This is no doubt an opinion which an appellate tribunal ought not to ignore. My criticism, however, is that the learned judge's impression *of the witness* has unduly coloured his assessment of the defendant's sense of duty *as a professional man.*

The plaintiff (who gave his evidence with a commendable fairness and moderation) has himself described the courtesy with which the defendant behaved towards him in the quieter atmosphere of his consulting room. "Dr. Chissel was very cordial" he said, "he greeted me pleasantly and proceeded to examine me". In those circumstances, there was really no need for the gratuitous theory that the defendant's "somewhat forbidding and frigid exterior" must have made a partial contribution to the plaintiff's systolic blood pressure on 14th July and 27th July. This is not one of those very rare cases in which it is relevant for a judge to record his personal opinion of a litigant's personal appearance.

Even the "bare written word" cannot wholly conceal from us the atmosphere that seems to have prevailed in Court at certain stages when the defendant's evidence was being recorded. He obviously lost

his temper in the witness box, and in that state of mind he permitted himself to give some answers which, under normal circumstances, might well have justified a dignified judicial rebuke. But, in the present case, some allowance ought to have been made for the mitigating circumstances which attended the witness' verbal indiscretions. He was a professional man of long experience whose competence had previously been conceded to him by the plaintiff's expert witness Dr. Gunawardene. It is natural, therefore, to suppose that he must have deeply resented some of the insinuations which were made against him at the trial. I am content, by way of illustration, to mention only the disparaging question as to whether he had not received his Fellowship of the Royal College of Surgeons merely as a reward for war service (and not for passing the prescribed examination in the usual way). In this situation, it was quite unsafe to regard symptoms of a doctor's obstinacy in the witness box as positive proof of " perversity " and " arrogance " in his professional outlook.

I would allow the appeal and dismiss the plaintiff's action with costs in both Courts. From everybody's point of view, it is a pity that the case was not decided on the preliminary issue of law which went to the root of the matter.

FERNANDO A.J.—

I have had the advantage of reading the judgment of my brother Gratiaen on the important questions of law which have arisen in this case and I respectfully express my agreement with his conclusions. I would like only to add some brief observations on those questions.

The principle of liability recognised by the decision in *Donoghue v. Stevenson* [1]—a principle which is said also to prevail under the Roman Dutch Law—influences and sometimes compels a Judge, having regard to new situations and modern conditions, to hold in an appropriate case that a negligent act is actionable at the suit of a person to whom a duty of care would not formerly have been acknowledged to exist. But so far as I am aware no " bold spirit " has yet applied the principle in a case where its application would defeat the express protection afforded by both English and Roman Dutch Law to purely negligent misrepresentations made on occasions to which qualified privilege attaches. I therefore agree with Mr. Perera's contention that a modification of the existing law affecting communications made on privileged occasions, even if such modifications were desirable, can only be achieved by legislation and not by the exercise of the judicial function.

Apart from one or two judgments referring to the (hypothetical) case of an examination by a doctor of a proposer for life insurance, no decision which has been cited refers to the existence or scope of the duty which is owed in circumstances similar to those now under consideration. I note however that McKerron (Law of Delict, 1952 Ed., p. 16) accepts as good law a dictum of Cairns L. C. in *Robertson v. Fleming* [2] the report of which is unfortunately not available to me :—" I never had any doubt

[1] *(1932) A. C. 562.* [2] *(1861) 4 Macq. 177.*

of the unsoundness of the doctrine . . . . . contended for by respondent's counsel, that A employing B a professional lawyer, to do any act for the benefit of C, A having to pay B, and there being no intercourse of any sort between B and C—if through the gross negligence or ignorance of B in transacting the business, C loses the benefit intended for him by A, C may maintain an action against B, and recover damages for the loss sustained. If this were law a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed or attested. I am clearly of opinion that this is not the law of Scotland, nor of England, and it can hardly be the law of any country where jurisprudence has been cultivated as a science ".

This would seem to contradict the contention before us of counsel for the respondent that a proctor, who advises his client as to the validity of the title of a third party to a land which the client desires to purchase, would be liable to the third party if his negligent condemnation of the title causes pecuniary loss to the third party which could have been reasonably anticipated. If no duty of diligence is owed to the third party in such a case, I see no reason to think that such a duty existed in the present one, other of course than the duty not to cause physical injury by negligence.

I propose now to deal with the facts.

The defendant is a general medical practitioner with the qualifications of F.R.C.S. (Edinburgh), M.R.C.S. (England) and L.R.C.P. (London). At the relevant time, he had been in practice as such, for the most part in Ceylon, for 43 years. He had since 1913 been medical adviser to the Company known as Cable and Wireless Ltd., and as such, it was one of his functions to examine candidates for employment as telegraphists under the Company and to certify to their fitness for such employment. The form of application which has to be filled in by prospective candidates refers to the necessity for a medical examination by the Company's medical officer and to the fact that his " decision as to the fitness of the candidate is to be final ". The defendant has stated in evidence that he is well aware of the nature of the duties of the Company's telegraphists, that during one half of the year they have to work a six hourly shift at night time, that their duties involve severe concentration of mind in order to avoid errors in recording of telegraphic messages which they have to transmit and receive, and that a very high degree of physical and mental efficiency is therefore necessary. Plaintiff's witness, the present Manager of the Company, corroborated the defendant both on the matter of the latter's knowledge of the strenuous conditions attaching to the work of a telegraphist, as well as in the matter of the Company looking to the defendant and no one else for a report on the fitness of a candidate for employment. I may remark in passing that the learned Judge neither rejects the evidence as to the defendant's knowledge of the specially high degree of physical fitness which is required of the Company's telegraphists, nor takes that knowledge into account when considering the nature of the defendant's duty to the Company as medical adviser examining a prospective candidate.

The minor plaintiff (whom I will for convenience refer to as the plaintiff) was admitted into the service of the Company as a probationer early in 1949 without an examination by the defendant, but subsequently he was one of a batch of fifteen young men who were sent to the defendant for examination, the latter being required to make his report on the usual form (P5) on which he makes his recommendation as to the fitness for the Company's service. (Some suggestion was made in the case for the plaintiff that the examination in this case was required for pension fund purposes and not in connection with his employment or continuation, but as the learned Judge has not considered this matter to have been of much importance it is unnecessary to deal with it). The plaintiff was examined by the defendant in the latter's consultation rooms on July 14th, 1949, being " pleasantly greeted " and " very cordially " treated by the defendant. The plaintiff's description of the nature of the examination conducted by the defendant leaves no room whatever to doubt either the defendant's evidence that he carried out an exhaustive clinical examination or his account of the various stages of the examination.

The defendant's evidence as to the results of his examination were as follows :—he noticed an impulse of the heart firstly on visual inspection ; then he located the apex beat of the heart by palpation ; he " came across the heart " by tapping it with the fingers (percussion) ; he found the heart enlarged, the apex beat being outside the nipple line (a vertical line passing through the nipple) ; he tested the blood pressure (a test he would not normally make in the case of a boy of eighteen) because of the condition of the heart noticed on palpation and inspection ; he found a pressure of 154 systolic and 70 diastolic ; he took a second blood pressure reading after letting the boy rest for a while and found the systolic pressure then to be 144. Upon these observations the defendant made his remarks in the report form (P5) : " there is a very forcible impulse over the cardiac area. The heart is enlarged, the apex being outside the nipple area. There are no murmurs. Pulse rate was 108 per minute and the blood pressure was S 154, D 70 ; at the second reading the S was 144. Applicant is an athlete which I think accounts for his hypertrophied heart. I am unable to recommend him for service with Cable and Wireless ".

The report was transmitted by the defendant to the Company, whose Manager apparently read out to the plaintiff the contents of the " Remarks " column when informing him on 18th July, 1949, that he was discontinued from the Company's service. On the same day, the plaintiff had himself examined by Dr. F. J. T. Foenander who was informed (presumably by the plaintiff) that he had been physically condemned and that the defendant had reported an enlargement of the heart and high blood pressure. Dr. Foenander himself carried out an exhaustive clinical examination of a nature very similar to that conducted by the defendant. He found the blood pressure to be 120S/80D, the apex beat of the heart in its normal position within the nipple line, and the heart not enlarged " so far as he could see clinically ". He therefore made his report to the following effect. (P3) " This is to certify that I examined R. C.

Chapman on July 18th, 1949. His blood pressure was systolic 120, Diastolic 80. There was no evidence of functional or organic disorder of the heart nor was there any enlargement ".

Dr. Foenander advised the plaintiff to have an electro-cardiograph and an X-ray taken, not because he found anything suspicious in his examination, but because he knew that another doctor had taken a certain view with regard to the boy's heart condition.

The plaintiff has also produced a report from Dr. H. O. Gunawardene, then Radiologist of the General Hospital, Colombo, dated 22nd July, 1949, to the effect that the Electro cardiogram and the X-ray film of the plaintiff's heart " reveals no abnormality ". Dr. Gunawardene could not remember the particular occasion when the plaintiff came to him, and is not certain whether he himself took the Film but says definitely that he took the Electro cardiograph. Some attempt was made on behalf of the defendant to cast doubts on the accuracy of the X-ray film by suggestions that the mechanics who operate the equipment of the X-ray institute are not always efficient or careful and that care is not always taken to establish the identity of the subjects upon whom the reports are made. But the learned Judge has rightly considered himself entitled upon the evidence to assume that Dr. Gunawardene's report was based upon a film and cardiograph of the plaintiff's heart competently taken at the General Hospital.

The certificates given by Dr. Foenander and Dr. Gunawardene were handed by the plaintiff's mother to Mr. Whiteside who was then the Manager of the Company. He apparently spoke to the defendant about a second examination and instructed the plaintiff to present himself again before the defendant. The defendant confirms Mr. Whiteside's evidence on this matter and states that before the second examination he was shown the certificates given by the other two doctors. On this occasion (27th July, 1949) he found the blood pressure to be 150 S., and his entry in his day book is " failed ". The defendant states that no report form was sent to him or entered on this second occasion. Mr. Whiteside's evidence is that the defendant after the second examination confirmed his findings on the first examination and he states that " after the second report was received from the defendant he did not reconsider the employment of the minor plaintiff ". Mr. Kirby the present Manager of the Company cannot speak to a second report and states that the only report in the File is the first report (P5). The only inference that can be drawn from the evidence on this matter is that on the second occasion the defendant did communicate his opinion to Mr. Whiteside, but not by means of a written report, and that thereupon Mr. Whiteside finally decided that the discontinuance of the plaintiff would stand.

The plaint in this action alleges that *the report* (the only report referred to in the plaint is P5 of 15th July, 1949) was due to gross negligence and/or incompetence resulting in loss and damage to the plaintiff, and the learned District Judge has held this allegation to be proved. A re-consideration of the Judge's finding on the facts might be thought to be

purely academic, in view of the opinion we have formed that negligence on the part of the defendant in this case, even if proved, does not in law render him liable in damages to the plaintiff. But where the professional reputation of a practitioner of long standing and experience has been not merely assailed by the institution of a civil action, but has been assailed in the course of long and forceful cross-examination, where he has been accused and found guilty not merely of gross negligence and incompetence, but also of conceit, arrogance, perversity, and incredible ignorance of the progress of medical science, where even his physical appearance, " his somewhat forbidding and frigid exterior ", has been the subject of adverse comment, where eminent counsel on both sides have in their arguments in appeal been much concerned with the question whether negligence has or has not been proved—in view of all these circumstances I consider that an appellate court should in the interests of justice closely examine the validity of the finding of negligence which the learned Judge has reached.

Before turning to a detailed consideration of the judgment and the evidence, it is relevant to note that the evidence in this case was first recorded by a Judge who however did not ultimately decide the case. He heard the evidence of all the plaintiff's witnesses on 3rd May, 1950, on 5th October, 1950 and 13th October, 1950 : on the latter date the plaintiff's case was closed and the defendant commenced to give evidence. In consequence of changes in personnel, the Judge who first heard the case ceased to be District Judge and was succeeded by the learned Judge whose judgment is now under appeal. It was agreed between Counsel that the evidence already led would be taken into account, with liberty for either side to recall and further examine or cross-examine. Hence it happened that both Doctors Foenander and Gunawardene were examined and cross-examined on two different occasions. This circumstance became of some importance, particularly with regard to the evidence of Dr. Foenander, because he appears on the second occasion to have acquired a fuller knowledge of text book opinions upon the matters to which he spoke than he had on the earlier occasion. This in no way reflects on Dr. Foenander's reliability as a witness, but on the contrary indicates a proper desire on his part to acquaint the Court with information which had not been conveyed by his earlier evidence. The opinions which Dr. Foenander must be taken to have held when he gave evidence on the first occasion did not diverge from those of the defendant to as nearly a high degree as did the opinions he expressed on the second occasion. I shall refer presently to the relevance of Dr. Foenander's earlier evidence upon the question whether the defendant's knowledge (or rather ignorance) of text book opinions should properly have been held to constitute negligence or incompetence.

The learned Judge has correctly directed himself that in the case of medical men duly qualified there is a presumption of competence and that accordingly, if the plaintiff is to succeed, the burden is on him to show that the defendant had been guilty not merely of negligence but also of incompetence. What we have to decide on appeal is whether the plaintiff has been correctly found to have discharged that burden.

One matter upon which a very large volume of evidence was led and to which reference is made in a substantial part of the judgment is the conflict of medical opinion as to the blood pressure of the plaintiff, and the question whether a person whose blood pressure on 18th July was 120S/80D could have been observed on a reasonably careful and competent examination to have had a pressure of 154S/70D on the preceding 14th July. Counsel for the plaintiff in his closing address stated that he based nothing on the question of blood pressure except with regard to the question of blood pressure taken on the second occasion, that is when the plaintiff was examined a second time by the defendant. Counsel's meaning was that he did not press the issue of negligence in regard to the taking of the blood pressure on 14th July, 1949, and relied only on negligence in using an allegedly defective instrument on 27th July *after* there was reason to doubt its accuracy in view of the conflicting opinions of both Dr. Foenander and Dr. Gunawardene. I shall later consider the relevance in this action of any negligence in connection with the second examination on 27th July.

The learned Judge has not held and plaintiff's counsel has not argued that, in making his report on 14th July, 1949, the defendant was negligent in regard to his taking of the blood pressure or in the conclusion he formed upon the blood pressure as then found by him. I would say with respect that a finding against the defendant on this point would not have been justified by the evidence.

The case against the plaintiff therefore rests on his alleged negligence in diagnosing an enlarged heart, in locating the apex beat as being outside the nipple line, and in permitting this factor in conjunction with his observation as to the blood pressure to induce him to report that the plaintiff was unfit for service with the Company.

With regard to the alleged enlargement of the heart, the defendant's evidence is that he first noticed a forcible impulse over the cardiac area on his visual inspection of the plaintiff's chest. The existence of that impulse was confirmed by palpation. It was because he noticed such an impulse that he decided that it would be useful to take the blood pressure, which was ultimately done at the end of the examination. Dr. Foenander when questioned about this part of the defendant's evidence thought that what was meant was "forcible action of the heart which is more easily appreciated by the palpating hand". Dr. Foenander also said that hypertrophy is an increase in the size of the heart associated with increased bulk of the heart muscle, and that gross enlargement of the muscle can be seen at once on clinical examination. Hypertrophy was apparently the condition which the defendant suspected on his observations by inspection and palpation, a condition which he decided to test by taking the blood pressure.

The defendant's evidence with regard to the placing of the apex beat is that he palpated the chest to locate the apex beat of the heart and thereafter percussed the heart by tapping with the fingers. Defendant stated that he had a special way of percussing " which is in his opinion

infallible ". It is in evidence that the normal mode of percussion is to place the fingers of one hand over the area and to tap those fingers with the fingers of the other hand. Defendant said in examination-in-chief that he himself does the tapping directly and not over the fingers of the other hand. The learned Judge had very strong comments to make on this mode of examination : he makes no allowance for the defendant's admittedly long experience as a general practitioner and for the fact that the defendant's use of this special method would never have come to light but for the latter's own voluntary statement that he employed it : moreover the learned Judge formed the opinion that the defendant's method " would probably have been the early stage reached before the introduction of the present practice of placing one finger over the area percussed and striking it with two or three fingers of the other hand "—an opinion which is not based on evidence given by either Dr. Gunawardene or Dr. Foenander, and indeed appears to be contradicted by the latter's evidence that " there is nothing special in percussing the patient with one finger only ". If the Judge's finding that the defendant's method was an antiquated one is correct, then it involves a conclusion which I feel sure he neither could nor would have formed, namely that during the greater part of the 40 years during which the defendant has been in practice he has been incompetent in employing a method of percussing not known to qualified and experienced practitioners such as Drs. Gunawardene and Foenander admittedly are.

Thereafter the learned Judge proceeds to consider the adequacy of percussion as a means of locating the apex beat of the heart and he refers to certain opinions expressed in medical text books to the effect that percussion is a method highly liable to error and is regarded as obsolete—opinions by which the learned Judge himself appears to have been very much impressed.

The fact that the defendant has not read those text books, that he contradicted those opinions flatly and indeed rashly, and that he preferred to rely on his own experience, has weighed heavily in the mind of the learned Judge, and it is mainly this evidence which has led to his opinion that the defendant is arrogant and conceited. But it should be clear from the evidence given in this case by Drs. Gunawardene and Foenander, that the question whether a particular medical practitioner has been guilty of negligence cannot be answered against him merely on the score of his ignorance or disregard of the opinions which condemn the method of percussion. Dr. Gunawardene said that the apex beat is ascertained by palpation and percussion, that they are both matters of experience, and that the more experience a medical man has the more expert he becomes in placing the apex ; he also admitted that the defendant is extremely well qualified to examine the chest in that manner and that the examination in this case was made by a well qualified and well experienced practitioner.

Another passage in Dr. Gunawardene's evidence is worth reproduction in order to show the divergence of his views from those of text writers who appear to reject percussion out of hand as being dangerous and

obsolete :—" The object of percussion is to map out the heart, that is to detect the extremities of the heart edge. The average practitioner will depend on percussing in order to assist him to map out the heart generally. As a matter of fact when I carry out a clinical examination I percuss to map out the heart very often. I have not given up that sort of examination and I have no intention of giving it up. I always do so in cases where I do not screen ".

Dr. Foenander's evidence is that he employed the same methods as the defendant in his clinical examination of the plaintiff's heart. He was satisfied from the palpation test that the apex beat was within the nipple line. In his view the object of percussing a patient's chest is to find any abnormality in the resonance :—" When you come to the heart you get a duller note because the heart is a more substantial organ than the lung. Percussion is for the purpose of finding out any abnormality in the resonance ". The inference is clear that when you notice the abnormality in resonance at a point outside the nipple line, there is an indication that the heart is where it should not normally be. Dr. Foenander himself employed the percussion test when he examined the plaintiff on July 18, 1949, with a view " to ascertaining whether he suffered from any functional or organic disorder of the heart " ; percussion was a regular item in his normal clinical examination and he agrees that percussion is very largely a matter of experience.

There is no mention whatever in Dr. Foenander's evidence on the earlier occasion of the danger or obsolescence of the method of percussion ; it is no answer to say, as might be said in regard to an ordinary witness, that no question was asked on this point, because one would rightly expect an expert witness, who is called to give evidence on the correctness of a diagnosis found upon a clinical examination of the heart, to refer to so important a matter of his own accord if he himself held unfavourable views as to the method of percussion at the time when he first gave evidence.

It was only when his evidence was (fortuitously) taken on the second occasion that Dr. Foenander expressed the view that " percussion in order to find out the condition of the heart is now obsolete ". At the same time, however, his own practice in cases similar to the present one, namely in examining proposers for life insurance on behalf of Insurance Companies, is to conduct only a clinical examination and not to require an X-ray examination before making his report ; if he is in doubt, he advises the Insurance Company to have an X-ray or cardiograph taken *if they wish to investigate further*. In the result many a proposal might well be turned down by an Insurance Company without X-rays or cardiographs being in fact taken to clear doubts raised by Dr. Foenander's clinical examination.

Having regard to the evidence of Dr. Gunawardene, as well as the earlier evidence of Dr. Foenander, my considered opinion is that, even if text writers have condemned percussion as a means of mapping out the heart and thus of estimating the size of the heart, there was no ground for holding that the employment of percussion by the defendant constituted either negligence or incompetence.

Even on the assumption that ignorance or disregard of the opinions of recognised authorities would constitute negligence, the opinions which were put to the defendant in cross-examination do not justify the inference that it was palpably incorrect in a case like the present one to rely on palpation and percussion in finding cardiac enlargement. One passage reads " the position of the apex beat is the best clinical index, but cardioscopy must ultimately decide the extent and direction of the enlargement *for it is important to delineate the right and posterior borders of the heart* as well as the left border ". Again " Inspection, palpation and percussion are methods adequate on many occasions, *but sometimes inaccurate and sometimes not applicable* ". Thirdly, " This method of measuring the heart has much value if used reasonably . . . . *Very fantastic ideas* have been and *still are held* of the accuracy that can be obtained by percussion ". Fourthly, " Adherence to this traditional method of examination *can never advance our knowledge of cardiology* and since it inevitably deceives both teacher and student of clinical methods, *it may produce harmful effects* ". When these opinions are carefully examined it becomes evident *firstly* that they do not condemn the employment of the method of percussion in clinical examinations, *secondly* that they acknowledge the widespread use of the method by practitioners, and *thirdly* that they are in the nature of a crusade to correct the views of the many who (it is alleged erroneously) have confidence in the method.

The next point considered by the learned Judge is the failure of the defendant to have the plaintiff X-rayed in order to test or confirm the abnormality of the heart found by the defendant. He finds that the defendant was guilty of negligence of an aggravating character and almost of perversity by reason of his failure to order X-ray or screening *even though he* (the defendant) *had positive evidence that an X-ray* (Dr. Gunawardene's) *revealed no abnormality*. This finding and many of the Judge's more severe criticisms of the defendant refer to the second examination by the defendant and not to that of 14th July 1949 ; it is not a finding of negligence at the examination which preceded the report P5. Nowhere in the judgment is there a finding of negligence on the ground of making the report P5 without the confirmation by an X-ray or electro cardiograph. Even if there had been such a finding, it is doubtful whether such a finding would have been justifiable, because all that the defendant was required to do on 14th July, 1949, was to make a clinical examination of the plaintiff and furnish his report on the results of that examination—a task which he carried out to the letter. The Company was well aware, when notice of discontinuance was given to the plaintiff, that their decision to discontinue was upon a report based solely on a clinical examination.

I have dealt thus far with the findings of negligence or incompetence on the grounds of the employment of an invalid test and of the failure to employ a proper one. Counsel for the respondent also relied on the maxim *res ipsa loquitur*, not expressly referred to as such by the learned Judge. He holds that the defendant's diagnosis was wrong because he was guilty of a palpable error in locating the apex beat of the heart.

The finding of " palpable error " appears to have been reached on the reasoning that Dr. Foenander on 18th July correctly diagnosed the apex beat to be normal and within the nipple line and that the X-ray and cardiograph correctly indicated absence of heart enlargement: that it was impossible for the apex beat to have actually been outside the nipple line on 14th July : that the defendant's observation on 14th July of a condition which was medically impossible was therefore palpably erroneous and must be held to have been attributable to negligence and/or incompetence.

The difficulty and indeed the danger in a case where the opinion of a defendant who is a professional man is contradicted by the evidence of professional colleagues is that a determination that the defendant's opinion was wrong comes to be regarded as decisive of the issue of negligence. But even on the assumption that the proposition *error = negligence* is a sound one to apply in the present case, the question to be first decided is whether the condition of the heart as found by the defendant on July 14th was a medical impossibility.

Dr. Foenander on the first occasion stated " there is the possibility of a reduction of a human being's heart within the space of three or four days. On one examination it will be found that there is an enlargement and on a subsequent examination a few days later it will be found that there is no enlargement ", and again " Q. In the case of a heart which is only slightly enlarged it is quite possible that it could be slightly enlarged on one day and three or four days later there was a reduction in the size ? A. Yes ". But on the second occasion he said that his former statement was not correct, and he also modified the former evidence by saying that the reduction in three or four days of the size of the heart " would only apply in the case of disease and not in a normal person ". Again, he said that the size of the heart could be reduced in three or four days, but the amount of the reduction can be appreciated only in a week.

Dr. Gunawardene on the first occasion said that *apart from illness* the condition of the heart as found by the defendant on 14th July " *is not likely* in view of my findings on 22nd July. *It is not usual* to get a thing like that ". Apart from illness *he did not think* the reduction was possible. In re-examination however he did state that reduction in a few days without illness " *could not be possible* ". On the second occasion Dr. Gunawardene's views are not expressed didactically ; the furthest he went was to say " it can happen if a man has heart disease or some illness but not in the case of a normal person. It is a matter of opinion as to whether an enlarged heart can come to normal within a week but in the case of a normal heart there can be no variation within a week ".

Upon this important question of the likelihood of a change in the size of the heart during the relevant period, the several views of the two doctors called for the plaintiff, taken together, give us " possible " twice, " possible if there was some disease " also twice, " not likely ",

" not usual ", " not possible without disease ", " not impossible "' " certain medical men hold that opinion " and " it is a matter of opinion ". The nature of the disease which might account for the reduction is not made clear in any of these opinions. On this evidence, there is ample reason to reach a finding of fact that it was *improbable* or even *very unlikely* that the condition found by the defendant on 14th July did actually exist on that day—but the evidence does not support a finding that the existence of that condition was an *impossibility*. And in my opinion it is only a finding of impossibility which would justify the application, in this case, of reasoning akin to that upon which the maxim of *res ipsa loquitur* is based. Obviously, if the condition was only improbable or very unlikely, the diagnosis of that condition cannot be said to be necessarily and presumptively erroneous, and proof would be required of the actual act or omission which constitutes the negligence complained of. Moreover, the learned Judge has held that the plaintiff was subjected to an exhaustive clinical examination by the defendant ; it is in evidence that the defendant does not normally take the blood pressure when examining in cases like the present ; he only did so because of his observation of a forcible impulse, and he did so a second time after an interval to check on the first reading ; his observation as to the pressure confirmed his earlier observations ; he questioned the plaintiff as to whether he had taken violent exercise ; he tested the eyes, the teeth, the throat, the stomach, the groin, the arms and knees, the urine ; all this is spoken to by the plaintiff himself. Given all these indications of a careful and conscientious examination, is it reasonable to suppose that the error, if error there was, in locating the border of the heart was attributable to carelessness *either* in palpating or percussing within the nipple line and thinking that the area tested was outside *or* in detecting a beat outside the nipple line when there was no beat there at all ?

Even on the assumption (which as just indicated has not been shown to be applicable in this case) that the finding of the apex beat to be outside the nipple line on July 14th was a medical impossibility, there remains the question whether such a finding has necessarily to be attributed to negligence. This was in fact the principal ground upon which Counsel for the respondent relied at the agrument in appeal. He referred to passages in the evidence of Drs. Foenander and Gunawardene in order to show that in their opinion this question must be answered against the defendant. It was in this connection clearly established that the location of the apex beat is a simple matter for a person of experience, particularly in the case of a subject like the plaintiff who is proved to be thin. Dr. Foenander " did not think that he himself could have made a mistake in finding the apex of the heart " and " could not think of any reason for coming to a wrong conclusion, other than either carelessness or incompetence ". When examined in chief, Dr. Gunawardene was asked " is it a mistake that a doctor of experience could have made in the case of this boy ?". The recorded answer which is " likely " is disputed by Mr. Wikramanayake who is certain that the answer was " not likely ". Even the latter answer is not sufficiently definite to justify the presumption that the error in this

case was a negligent one. Dr. Gunawardene on this point said in cross-examination " by an error of judgment a doctor can fail sometimes, but he ought not to ", and " I agree that at the very most it may be an error of judgment ". He also said that a failure to observe correctly " is due to inaccurate observation. It may also be due to carelessness ".

It was sought to explain that the expression " error of judgment ", when used by Dr. Gunawardene, did not carry with it the implication ordinarily attached to it that the error referred to was due to some cause other than negligence ; but Dr. Gunawardene's other evidence on this particular matter does not lend much support to this explanation, nor is there anything in his evidence to indicate that he uses common English expressions in senses unfamiliar to those who learned the language in the pre Swabasha days.

Dr. Foenander unequivocally attributes the alleged error in this case to negligence, but against this there are the much less stringent opinions of Dr. Gunawardene who has functioned as specialist in heart diseases for 30 years and has published a book on the subject. There is no need to determine, and indeed no means of determining, which of them is right and which wrong, but in the face of the disagreement on this point between the plaintiff's witnesses, it is obvious that for the purposes of a judicial decision on the question of negligence the opinions of the specialist must be preferred. I am of opinion therefore, that even assuming error in observation, the plaintiff has failed to prove negligence.

Dr. Foenander on the second occasion appeared to be somewhat more didactic in the expression of his views than was Dr. Gunawardene on either occasion. The learned Judge thought that the latter " was inclined to be a little more generous towards a fellow practitioner ", but the difference of attitude to my mind rests on a sounder basis. According to his evidence, Dr. Gunawardene appears to have had considerable experience, not only of radiology and heart disease, but also of cases of conflict of professional opinion ; and based on his latter experience are his remarks :—" If another medical man disagrees with my opinion, I would say that I am right, but I would not blame the other man for taking a different view and I would not always say that the other man is wrong ". These remarks are in my view a reflection rather of Dr. Gunawardene's professional opinions, than of his kindliness or generosity. I think therefore that more stress should have been laid on his evidence that the error was " at the very most an error of judgment".

For the reasons which I have tried to set out somewhat fully, I am of opinion that the finding of the learned Judge, that the defendant was guilty of negligence or of incompetence, or of both, in his examination of 14th July 1949 and in making his report P5 to the Company, cannot be sustained on the evidence and must therefore be set aside. Mr. Wikramanayake did not in appeal rely on the correctness

of the finding of negligence on the ground of the employment of the percussion test, but I have referred to this matter in some detail because of the importance attached to it in the judgment.

The remaining ground relied on at the appeal in support of the finding of negligence was that the defendant, on the occasion of the second examination of the plaintiff *either* attempted again to locate the apex beat and did so negligently, *or* omitted to make such an attempt, an omission which itself constituted negligence in view of the certificates of the plaintiff's experts as to the condition of the heart. The first ground is not tenable, because there is nothing in the evidence to show that the defendant did attempt on this second occasion to locate the apex beat; indeed the inference from the evidence both of the plaintiff and the defendant is that no such attempt was made. As for the second ground, the evidence is that the defendant took the blood pressure and finding it to be 150S decided that he would not change his earlier opinion as to the fitness of the plaintiff for employment by the Company. It will be remembered that on the first occasion also the defendant appears to have regarded the blood pressure test as confirming the possibility of an enlarged heart, and in addition there is his evidence that high blood pressure by itself even if due to nervousness or excitement would render the plaintiff unsuitable and unfit for the employment. Apparently all that the defendant intended to do when he agreed to make the second examination was to take the blood pressure and test his conclusion (as to fitness) upon it—a course which is not shown by the opinions of the plaintiff's experts to be an unreasonable one. The only justification therefore for holding the defendant to have been negligent on the second occasion would be a finding that since Dr. Foenander had previously read the blood pressure as being 120S and Dr. Gunawardene had pronounced upon the soundness of the heart condition, the defendant should have suspected some defect in his instrument and should have verified its accuracy before relying upon it. If the instrument used by the defendant had in fact been proved defective, one can appreciate the argument that he was negligent in having used defective equipment. But in the absence of any such proof of inaccuracy, it was only an inference of inaccuracy (to be drawn by reason of the different results found by the plaintiff's experts) which remained available to the learned Judge; and this inference he was not entitled to draw, because both Dr. Foenander and Dr. Gunawardene did not definitely or even very strongly exclude the possibility of variations in blood pressure after short intervals of time.

I am of opinion that even if it was open to the plaintiff to rely solely upon negligence at the second examination as the basis of his present action, he has failed to establish that the defendant was negligent on that occasion.

I agree that the appeal should be allowed and the plaintiff's action dismissed with costs.

Appeal allowed.