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*Mar. 18.

THE SISTERS OF ST. JOSEPH OF THE DIOCESE OF LONDON IN ONTARIO (DEFENDANTS) ..... } APPELLANTS;

AND

EDWARD FLEMING (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Hospitals—Negligence—Patient in hospital burned during diathermic treatment—Negligence of nurse—Liability of hospital.

Plaintiff was admitted as a patient to defendants' hospital under a contract for board, nursing and attendance. Defendants maintained and operated for profit in the hospital an equipment for diathermic treatments. Plaintiff's physician (who had diagnosed his trouble as sciatica) ordered the nurse supervising the floor on which plaintiff was located, to see that he was given a diathermic treatment to relieve his pain; and a treatment was given. It was administered by a nurse who was a permanent member of the hospital staff and was in charge of such treatments. Plaintiff's physician had not (nor had any other physician) anything to do with the actual treatment. There was no suggestion of defect in the equipment or of lack of competence in the nurse to use it. In the treatment the plaintiff was severely burned. Plaintiff, alleging that the burn was caused by negligence of the nurse administering the treatment, sued defendants for damages. The trial judge gave judgment for plaintiff, which was affirmed by the Court of Appeal for Ontario ([1937] O.R. 512). Defendants appealed.

Held: (1) On the evidence, the finding in the courts below of negligence in the nurse must stand.

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

(Comment, *per* Duff C.J., Davis, Kerwin and Hudson JJ., as to the proper application of the rule *res ipsa loquitur*. The rule is a special case within the broader doctrine that courts act and are entitled to act upon the weight of the balance of probabilities).

(2) Defendants were liable in law for damages for the nurse's negligence.

Per Duff C.J., Davis, Kerwin and Hudson JJ.: Upon the facts and circumstances of this case, the nurse was, at the time she committed the negligent act, acting as the agent or servant of the hospital within the ordinary scope of her employment. There was nothing in the evidence to take her, as between the hospital and herself, out of this relationship during the time she was administering the particular treatment to plaintiff.

Review and discussion of cases, and of the rule stated by Kennedy L.J. in *Hillyer's* case, [1909] 2 K.B. 820, at 829. However useful that rule may be in some circumstances as an element to be considered, it is a safer practice, in order to determine the character of a nurse's employment at the time of a negligent act, to focus attention upon the question whether in point of fact the nurse, during the period of time in which she was engaged on the particular work in which the negligent act occurred, was acting as an agent or servant of the hospital within the ordinary scope of her employment or was at that time outside the direction and control of the hospital and had in fact for the time being passed under the direction and control of a surgeon or physician, or even of the patient himself. It is better to approach the solution of the problem in each case by applying primarily the test of the relation of master and servant or of principal and agent to that particular work. There may be cases where the particular work upon which a nurse may for the time being be engaged is of such a highly professional and skilful nature and calling for such special training and knowledge in the treatment of disease that other considerations would arise; but the present case is not such a case.

Per Crocket J.: There was ample evidence to warrant the finding at trial that plaintiff's injuries were caused by the negligence of the nurse in administering the treatment while acting in the course of her employment as defendants' servant.

APPEAL by the defendants from the judgment of the Court of Appeal for Ontario (1) dismissing their appeal from the judgment of Hope J. at trial, holding that the defendants were liable to the plaintiff in damages (in the sum of $3,056.60) for injuries alleged by the plaintiff to have been caused to him by negligence of a nurse in her administration of a diathermic treatment to him while he was a patient in the defendants' hospital.

The material facts of the case are sufficiently stated in the judgment of Davis J. in this Court, now reported. The appeal to this Court was dismissed with costs.

A. M. LeBel K.C. and *E. A. Anglin* for the appellants.

J. R. Cartwright K.C. and *R. W. Gray K.C.* for the respondent.

(1) [1937] O.R. 512; [1937] 2 D.L.R. 121.

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The judgment of Duff C.J. and Davis, Kerwin and Hudson JJ. was delivered by

DAVIS J.—The appellants are an incorporated society which owns and operates St. Joseph's Hospital in the City of London, in the Province of Ontario. The respondent was admitted as a patient to the said hospital on the 22nd day of June, 1933, under a "contract" with the appellants "for board, nursing and attendance," to use the words of the appellants in their statement of defence to the action. The respondent alleged in his action against the appellants that he was given a diathermic treatment by one of the nurses in the hospital, that during such diathermic treatment he suffered severe and permanent burns, that the nurse was a servant of the appellants and that the burns were caused by the negligence of the nurse, and he claimed damages from the appellants. The appellants pleaded that the treatment was administered without negligence but in any case was administered in accordance with and on the instructions of the respondent's own personal physician and that the nurse who administered the treatment was acting as agent of the personal attending physician of the respondent and not as a servant of the appellants. From the evidence developed at the trial it is plain that the nurse who administered the treatment was a permanent member of the appellants' hospital staff in charge of diathermic treatments in the hospital and that neither the personal physician of the respondent nor any other physician had anything to do with the actual treatment. It is further plainly established on the evidence, in fact it is really not disputed, that the diathermic department is run by the hospital and that the handling of the machine is solely a matter belonging to the hospital. The attending physician in this case merely gave an order to one of the hospital nurses, who was the supervisor of the floor on which the patient was located, to see that the patient was given a diathermic treatment and the nurse who administered the treatment admits that the order that was given by the physician was for a diathermic treatment "for pain." The respondent's attending physician said that the patient had pain which is usually associated with sciatic involvement and that he

diagnosed the patient's trouble as sciatica. The nurse who was the supervisor of the floor says that she noticed, shortly after the treatment had been given, "a small area" upon the respondent's body "that looked just like dead flesh; it was a dead white"; that "it remained white like that until on towards evening. * * * We kept watching it and it turned dark red."

That the respondent was severely burnt and the resulting injuries of a serious nature are not in dispute. There are two questions, however, raised by the action. Firstly, Was the burn caused by the negligence of the nurse who administered the treatment? If so, secondly, Are the appellants liable in law for the result of her conduct?

The trial judge found against the nurse a specific act of negligence, that in giving the patient the treatment she turned on, by mistake, a much more powerful electrical current than she had intended to by putting the electric plug into, what we may for convenience call, the wrong one of two available sockets, and he held the hospital responsible to the patient for the damages resulting therefrom. The Court of Appeal for Ontario, for reasons to which we shall later refer, affirmed this judgment, and the hospital now appeals to this Court.

On the question of the negligence of the nurse, it is quite impossible for us on the evidence to reverse the finding against her. Counsel for the hospital, after a minute and very careful analysis of all the evidence, sought to escape from the finding upon two grounds. Firstly, he said the specific act of negligence found by the trial judge was not justified upon the evidence. Several facts, however, are not in dispute. The nurse only intended to apply 750 milliamperes and there were two sockets in the room, from one of which not more than 1,000 milliamperes could be obtained while from the other as much as 4,000 milliamperes were obtainable. The nurse says that as a matter of fact she only used 750 milliamperes in the treatment. But the needle on the dial that indicated the number of milliamperes unfortunately points to 750 and 3,000 at the same moment, the figure 750 being on an inner circle and the figure 3,000 being on an outer circle. The result would be that if the nurse had put the plug into one socket the milliamperes could run up

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to 4,000 but if she had put the plug into the other socket, the current could not run up beyond 1,000 milliamperes. In the latter case she would be entitled to rely upon the needle pointing to the figure 750 on the inner circle. Undoubtedly the nurse thought she put the plug into the socket with the lesser quantity of electrical energy and when she saw the needle on the dial pointing to 750 on the inner circle and 3,000 on the outer circle she accepted the figure 750 on the inner circle as indicating the exact quantity of current she desired to use. What is said against her, and found by the trial judge to be a fact, is that by an unfortunate act of negligence she put the plug into the wrong socket and got a quantity of 3,000 milliamperes with the disastrous results to the patient complained of.

There is no suggestion that the apparatus in use was in any way defective or that the nurse was not reasonably competent to administer heat treatments to relieve pain through the use of the apparatus. The question of fact is, Did she negligently apply an excessive quantity of heat to the patient? There is no doubt that the burns were caused by an intensive application of heat. Counsel for the hospital quarrels with the specific finding of negligence by the trial judge upon the ground that it rested upon the evidence of Dr. Mitchell that the plug was in the wrong socket. It is contended that this piece of evidence is a statement of fact by one who had no personal knowledge of the facts, that it was a mere guess on a matter of fact by an expert witness, and was something quite outside the limits of expert testimony. The exact evidence complained of is this:—

> Q. The fact that he received a burn such as has been indicated, what does that indicate, in your opinion, with respect to the machine or the treatment?
>
> A. It would look as though it were on the high instead of the low.

Even taken baldly and isolated from its context, the statement scarcely bears the interpretation put upon it, but read as part of all the evidence of Dr. Mitchell it means in effect nothing more than that the witness having, as an expert, stated that the patient could not be burnt by an application of 750 milliamperes for an indefinite period of time (the treatment here was only twenty-five minutes) and must have had, by the depth and extent of the burn,

an application of heat far in excess of 750 milliamperes, and that as neither the apparatus nor the nurse could obtain any such quantity of heat unless the plug had been put in the wrong socket, he could not find any other possible explanation for the burn. The question put to the doctor was not objected to and his answer was not such as to involve any miscarriage of justice.

Secondly, still on the question of the negligence of the nurse, counsel for the hospital says that the Court of Appeal did not affirm the trial judge's finding of the specific act of negligence but applied the *res ipsa* rule and found negligence in fact against the nurse upon the ground that there was no satisfactory explanation of the burn as something that might have happened without any lack of care on the part of the nurse. Counsel for the hospital argued that the physical condition of the patient at the time was in itself sufficient explanation to rebut the implication of negligence. But there is nothing in the evidence to show that the physical condition of the patient in any way accounted for the burn. The Court of Appeal did not reject the specific finding of fact of the learned trial judge, but, treating the case as one of *res ipsa loquitur,* concluded upon the whole evidence that the nurse had been negligent in giving the treatment. It is unfortunate that the maxim *res ipsa loquitur,* which serves satisfactorily when applied to certain cases in which the cause of the accident is known, has become a much over-worked instrument in our courts in recent years and has been extended to apply to a great many different sets of facts and circumstances to which the rule, when correctly stated and confined, has little or no application. The rule is a special case within the broader doctrine that courts act and are entitled to act upon the weight of the balance of probabilities. It was upon the broad doctrine, we are satisfied, that the Court of Appeal came to the conclusion upon the whole evidence that the plaintiff had made out a case of negligence against the nurse.

We should not be justified upon the evidence in interfering with the finding of negligence against the nurse.

The appeal raises, however, an important and difficult question of law, Whether the hospital is liable for the negligence of the nurse? The trial judge appears to have

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assumed that it is. He did not in his judgment discuss the matter as raising any question of law. The Court of Appeal, however, did consider the question of law and held the hospital liable upon the ground that the treatment by the nurse was a matter of routine in the hospital and that the giving of the treatment was assumed by the hospital as part of its contract to nurse the patient. Mr. Justice Masten, who wrote the unanimous judgment of the court, said that the facts of the case were

> within the category of that which formed the basis of the judgments in the *Lavere* case (1) and in the *Nyberg* case (2), that is to say, routine treatment.

The judgment, in effect, gives recognition to a different consequence in law in hospital cases between a routine or administrative act of a nurse, on the one hand, and the act of a nurse in a matter of professional care or skill, on the other hand.

The act of putting the plug in one or other of two sockets is in itself, of course, the merest sort of a routine act not to be dignified by any such words as "professional" or "skilful," but the determining fact in point of law must be the character of the employment in which the nurse was engaged at the time that the putting of the plug into the socket was a mere incident in her work. One might, without using the word in any strict sense, speak of ascertaining the status of the nurse during the period of time in which she was giving the diathermic treatment to the patient. The language of Lord Justice Kennedy in *Hillyer's* case (3) has been very frequently quoted and adopted as a rule to determine the character of the employment of a physician or nurse at any particular time:

> In my view, the duty which the law implies in the relation of the hospital authority to a patient and the corresponding liability are limited. The governors of a public hospital, by their admission of the patient to enjoy in the hospital the gratuitous benefit of its care, do, I think, undertake that the patient whilst there shall be treated only by experts, whether surgeons, physicians or nurses, of whose professional competence the governors have taken reasonable care to assure themselves; and, further, that those experts shall have at their disposal, for the care and treatment of the patient, fit and proper apparatus and appliances. But I see no ground for holding it to be a right legal inference from the cir-

(1) (1915) 35 Ont. L.R. 98. (2) [1927] S.C.R. 226.
(3) *Hillyer* v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, at 829.

cumstances of the relation of hospital and patient that the hospital authority makes itself liable in damages, if members of its professional staff, of whose competence there is no question, act negligently towards the patient in some matter of professional care or skill, or neglect to use, or use negligently, in his treatment the apparatus or appliances which are at their disposal. It must be understood that I am speaking only of the conduct of the hospital staff in matters of professional skill, in which the governors of the hospital neither do nor could properly interfere either by rule or by supervision. It may well be, and for my part I should, as at present advised, be prepared to hold, that the hospital authority is legally responsible to the patients for the due performance of their servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendances of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like. The management of a hospital ought to make and does make its own regulations in respect of such matters of routine, and it is, in my judgment, legally responsible to the patients for their sufficiency, their propriety, and observance of them by the servants.

That such a rule of difference between matters of professional care and skill and matters purely ministerial and administrative is most difficult of practical application to the varying facts of particular cases is very plain from a consideration of the judgments in the intervening years in the English, Scottish, New Zealand and Canadian courts. Some of these judgments were recently discussed and reviewed by Dr. C. A. Wright, the Editor of the Canadian Bar Review, in Vol. 14 (1936), pp. 699-708. Professor P. H. Winfield, in his valuable new work on the "Law of Tort" (1937), refers to Dr. Wright's article in a foot-note at p. 127 as pointing to "the curiously diverse results which the courts have reached on this matter."

In the case before us, there being no suggestion of any defect in the equipment used and no lack of reasonable competence in the nurse to use the equipment, we are squarely faced with the issue, What, in point of law, is the proper determining fact in arriving at the conclusion whether or not the hospital is liable to the patient for the act of negligence of the nurse? This raises pointedly the question of the correctness of the broad rule stated by Lord Justice Kennedy in *Hillyer's* case (1) or the limitations within which the scope of such a rule must be confined. The House of Lords in the *Lindsey County Council* case (2) refrained from passing upon that question and left the matter open for a case, if it ever occurs in the

(1) [1909] 2 K.B. 820, at 829.

(2) *Lindsey County Council* v. *Marshall*, [1937] A.C. 97.

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House, when that issue must necessarily be decided. In that case the plaintiff developed puerperal fever, a very dangerous and highly infectious disease, while a patient in a maternity home administered by a committee of a county council, under the provisions of the *Maternity and Child Welfare Act*, 1918, managed by a matron and advised by the medical officer and assistant medical officer of health for the county. The patients were attended by their own medical advisers. A patient in the home had become ill and was removed to a hospital where she was found to be suffering from puerperal fever. The matron and the two medical advisers of the home were informed of this and certain steps were taken to disinfect the home and the staff. The plaintiff was subsequently admitted to the home and after a few days she developed puerperal fever. She brought an action against the county council to recover damages for negligence and breach of duty on the part of the council and those for whom they were responsible. The jury found that those responsible for the administration of the home were guilty of breaches of duty in admitting new patients before having ascertained whether any of the staff were carrying infection, and without informing applicants for admission, or their medical advisers, of the case of the patient who had been suffering from puerperal fever and of the steps taken in consequence thereof to rid the home of infection. The decision of the House, as we understand it, rests upon the fact that the premises were unsafe for an invitee and that the authorities who administered the home knew or ought to have known that the premises were unsafe and should have notified the patient of the danger at the time inherent in the premises. The significance of the case to us lies in the language of the Lord Chancellor, Lord Hailsham (1), with reference to the series of cases decided upon the principle stated by Lord Justice Kennedy in *Hillyer's* case (2):—

> Reliance was placed by the appellants upon a series of cases in English and Scottish courts, in which it has been decided that where a Public Authority carries on a hospital that Authority is not responsible to patients for mistakes in medical treatment or in nursing, provided that they have taken reasonable care to appoint competent doctors and nurses. The respondent challenged the correctness of these cases and referred your Lordships to the recent case of *Powell* v. *Streatham Manor Nursing*

(1) [1937] A.C. at 107-108. (2) [1909] 2 K.B. 820, at 829.

Home (1) to show that your Lordships' House gave judgment against the proprietor of a nursing home where the nurses employed by him had been guilty of negligence. It is true that the correctness of the earlier decisions is still open to review in your Lordships' House. But that review should only take place in a case in which the point is directly raised; the question as to the correctness and as to the limits of the doctrine is obviously one of great importance, both to those who are charged with the responsibility of carrying on hospitals and nursing homes, and to the public who make use of such hospitals and homes. In my judgment, those questions are not raised by the facts in this case and nothing that I have said must be taken as throwing any doubt upon the correctness of those decisions. The principle upon which those cases were determined is well stated in *Hillyer* v. *The Governors of St. Bartholomew's Hospital* (2) in the judgment of Kennedy L.J. The learned Lord Justice expresses the opinion that the legal duty which the hospital authority undertakes towards a patient, to whom it gives the privilege of skilled surgical, medical and nursing aid within its walls, is an inference of law from the facts, and he holds that the responsibility of the hospital authorities is limited to undertaking that the patient shall be treated only by experts, whether surgeons, physicians or nurses, of whose professional competence the Governors have taken reasonable care to assure themselves, and further that those experts shall have at their disposal for the care and treatment of the patient fit and proper apparatus and appliances. It is obvious that, if that is the correct view of the relationship between the hospital authorities and their patients, there is no breach by the authorities of such duty by reason of the fact that a competent doctor or nurse is guilty of negligence or lack of due care or skill in their treatment of a patient.

The Lord Chancellor did not think that this principle had any application to the facts of the case which was then before the House. The judgments in the Court of Appeal had largely rested upon the principle stated in *Hillyer's* case (3) but all the Law Lords refrained from putting their judgments upon that ground and confined the decision to the dangerous condition of the premises. The Lord Chancellor proceeded to say:—

> The reason why the hospital authorities were held not liable in *Hillyer's* case (2) is because the doctors and nurses were held not to be acting as their agents or servants in the giving of medical treatment. There is no trace of any authority in those cases or elsewhere for the view that where a corporation acts by an agent its liability for the mistakes of that agent is any less where the agent is a medical man than where the agent belongs to any other profession or calling.

Lord Sankey in discussing *Hillyer's* case (3) as establishing the doctrine that a hospital authority is not liable for the negligence of a doctor while acting in the exercise of his professional functions and knowledge, said:—

> Indeed, Farwell L.J. puts it rhetorically as an example, that when once the doors of the operating theatre are closed upon them for an

(1) [1935] A.C. 243. (2) [1909] 2 K.B. 820, 828, 829.
(3) [1909] 2 K.B. 820.

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operation the doctors and nurses present in the operating theatre are no longer the servants of the authority. I am far from saying that this is not the proper legal result, but I should add that it may be necessary to delimit the frontiers of liability.

Lord Sankey did not find it necessary, he said, to discuss or lay down the law on the subject, having regard to the finding of the jury.

Lord Russell of Killowen only expressed his doubts as to the jury's findings on the question of negligence.

Lord Macmillan said that, there being evidence on which the jury could find that there was negligence on the part of those for whom the appellants were responsible in not knowing, as they ought to have known, that in admitting the respondent to the home they were exposing her to the risk of infection and consequently were negligent in not giving warning of that risk, he was of opinion that the verdict of the jury, so far as upheld by the Court of Appeal, must stand. At the very beginning of his judgment, however, Lord Macmillan made this general observation:—

> The appellants are responsible in law for the due administration of the institutions which they carry on in the performance of their statutory duties or in the exercise of their statutory powers. This responsibility extends to the actings of those through whose agency they perform their duties or exercise their powers. Consequently, if the respondent's unfortunate experiences in the Cleethorpes Maternity Home were due to the negligence of the appellants' agents or servants in the conduct of the home the appellants are answerable. It must be shown that the appellants owed a duty to the respondent, that the agents whom the appellants employed to perform that duty on their behalf were negligent in the discharge of it, and that the injury suffered by the respondent was directly attributable to such negligence.

Lord Wright thought that the facts in this case before the House were to be distinguished from those in *Hillyer's* case (1). He said that not only the matron and nurses but the medical officers were, in his opinion, the servants of the appellants, and the fact that the appellants necessarily relied on their knowledge and judgment did not the less render them the appellants' agents to carry out the responsibility which rested on the appellants in operating the home.

Evans v. *Liverpool Corporation* (2) was the case where a child with scarlet fever had been sent to an infectious diseases hospital maintained by the Liverpool Corporation

(1) [1909] 2 K.B. 820. (2) [1906] 1 K.B. 160.

under the *Public Health Act*, 1875. The child was discharged by the visiting physician while he was still in an infectious condition and when he got home he gave scarlet fever to three other children of the family. The jury found that the visiting physician in discharging the child had not shown the degree of skill and care which was reasonable in the circumstances and had been negligent. The visiting physician was an officer appointed by the Liverpool Corporation to act under the general direction of the hospitals committee and the rules provided that he should be responsible for

> the treatment of the patients from the beginning to the end of their stay, and also for their freedom from infection when discharged.

Notwithstanding that the physician was apparently acting as an agent in performing a wrongful act within the scope of his employment, the court held that the Liverpool Corporation was not liable because its legal obligation extended only to providing reasonably skilled and competent medical attendance for the patients and that the Corporation had discharged that duty.

The case was followed by *Hillyer's* case (1) above mentioned. The plaintiff was a medical man who entered the hospital for a gratuitous operation. He chose the surgeon to perform the operation. His claim in the action was that while he was unconscious on the operating table his left arm had been allowed to be burned by some vessels containing hot water and that his right arm had been pressed with great force against the end of the table and badly bruised, and that traumatic neuritis set in, both arms had become paralyzed, and that he had been unable to carry on his work as a medical practitioner ever since. The Court of Appeal reaffirmed that the only duty undertaken by the governors of a public hospital towards a patient who is treated in the hospital is to use due care and skill in selecting their medical staff; that the relation of master and servant does not exist between the governors and the physicians and surgeons who give their services at the hospital, and the nurses and other attendants assisting at an operation cease for the time being to be the servants of the governing body; further, that an operation creates

(1) [1909] 2 K.B. 820.

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a special set of circumstances. Farwell, L.J., said, in part, at p. 826:—

> If and so long as they are bound to obey the orders of the defendants [the governors of the hospital] it may well be that they are their servants, but as soon as the door of the theatre or operating room has closed on them for the purposes of an operation (in which term I include examination by the surgeon) they cease to be under the orders of the defendants, and are at the disposal and under the sole orders of the operating surgeon until the whole operation has been completely finished; the surgeon is for the time being supreme, and the defendants cannot interfere with or gainsay his orders. This is well understood, and is indeed essential to the success of operations; no surgeon would undertake the responsibility of operations if his orders and directions were subject to the control of or interference by the governing body. The nurses and carriers, therefore, assisting at an operation cease for the time being to be the servants of the defendants, inasmuch as they take their orders during that period from the operating surgeon alone, and not from the hospital authorities.

It is the dicta of Lord Justice Kennedy in that case that have been so much discussed in the subsequent cases.

Anderson or *Lavelle* v. *Glasgow Royal Infirmary* (1) was somewhat similar in its facts to the case now before us.

That was an action in the Sheriff Court at Glasgow against an infirmary for damages for personal injuries. The plaintiff alleged that she attended the infirmary for ultra-violet ray treatment; that the nurse in charge, who was in the employment of the infirmary, allowed her to be exposed to the rays for too long a period; that she thereby sustained injury; and that the injury was due solely to the negligence of the nurse, for whom she sought to hold the infirmary responsible. She further alleged that she had relied on the knowledge and skill of the nurse in applying the treatment. She did not allege, however, that the infirmary had acted negligently in the selection of their medical or nursing staffs or of the apparatus employed. The infirmary, on the other hand, alleged, and the plaintiff did not deny, that their electrical department was in charge of, and was superintended by, a doctor, and that the treatment received by the plaintiff was administered by the nurse upon his instructions.

The Second Division of the Court of Session (2) dismissed the action on the pleadings, holding as a matter of law that the allegations of the plaintiff in her pleading were insufficient to support her action, in the absence of

(1) 1932 S.C. 245. (2) 1930 S.C. 123.

any averment that the nurse or the doctor was professionally incompetent or that the apparatus was defective. The judgments in the Court of Session rested largely upon the law as stated in the *Evans* (1) and *Hillyer* (2) cases. The case went to the House of Lords (3), and in the course of the argument for the plaintiff their Lordships asked counsel whether they would agree to the case being remitted to the Court of Session for a proof before answer in that Court and counsel agreed to the proposal. The House thereupon reversed the decision of the Court of Session and remitted the case for proof.

Viscount Dunedin, who delivered the judgment in the House of Lords and with whom Lord Buckmaster, Lord Warrington, Lord Thankerton and Lord Russell of Killowen agreed, said in part:—

> In this case the issue craved has been disallowed, and the action dismissed, upon the ground that the statements of the pursuer, taken along with the explanations of the defenders, disclose no cause of action. The decision is admittedly based on the case of *Hillyer* v. *The Governors of St. Bartholomew's Hospital* (2), which was approved in the Second Division of the Court of Session in *Foote* v. *Directors of Greenock Hospital* (4).
>
> Now, it is clear that the actual facts in both these cases were not the same as the facts in this case, because in both cases what was complained of was the alleged negligence of a doctor in conducting an operation. But there is undoubtedly a dictum of Lord Justice Kennedy (5), not in any way disapproved of by his colleagues, which covers a much wider field, and would include certain cases of negligence on the part of a nurse. At the same time he indicates that, in certain other cases of negligence by a nurse, there would be liability on the ordinary ground of an employer's liability for his servants for a wrong to another person committed in the carrying out of the employer's business.
>
> The present case therefore becomes very important, not alone to the parties, but as giving rise to an exposition of the law in your Lordships' House. I have felt from the first that it was very unsatisfactory, if not indeed impossible, to come to a proper decision without knowing precisely what the facts of the case were. Undoubtedly the parties are not absolutely agreed as to them.

The case came again before the Court of Session (6). All the Judges held on the facts as then proved that no negligence on the part of the nurse had been established. The members of the Court, however, expressed their views on what Lord Hunter said was "the difficult and delicate question" which had been fully debated as to the defenders'

(1) [1906] 1 K.B. 160.
(2) [1909] 2 K.B. 820.
(3) 1931 S.C. (H.L.) 34.
(4) 1912 S.C. 69.
(5) [1909] 2 K.B. 820 at 828.
(6) 1932 S.C. 245.

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liability to a patient for injury suffered in consequence of the negligence of a nurse attached to the infirmary. Three of the four Judges who sat upon the case remained of the opinion which they had formerly expressed when the case had been before them on the pleadings (1), that is, that the infirmary could not be held responsible for the negligence of a nurse in the course of an electrical treatment given to a patient upon the facts and circumstances of that case. But it is the judgment of Lord Alness, who took a contrary view of the law, to which I desire to particularly refer.

Lord Alness said he knew of no express decision in England or in Scotland which affirmed or negatived the liability of such an institution as the Glasgow Royal Infirmary for the negligence of one of their nurses, and he treated the question of law, therefore, as far as authority went, as open.

> Unless the House of Lords had thought it was, the reason for an inquiry into the facts is not obvious to me. In other words, if an infirmary, having regard to its constitution and profession, may not be responsible for its nurses, then an inquiry into the facts would be superfluous and futile.

After mentioning the *Evans* (2) and the *Hillyer* (3) and other cases, Lord Alness pauses to observe that in none of these cases is there any statement or suggestion—apart from a view expressed by Lord Justice Kennedy in *Hillyer's* case (3)—to the effect that a hospital is not, under ordinary conditions, liable for the negligence of a nurse in the discharge of her professional duties. As to the *obiter* of Lord Justice Kennedy in *Hillyer's* case (3) it would, said Lord Alness, exempt a hospital from liability for the negligence of any member of its staff while performing professional duties, including, he presumed, nurses. From that view he said he respectfully dissented. Proceeding to draw a distinction between the position of a physician and that of a nurse when the physician exercises an uncontrolled direction in the treatment of his patient, and where the nurse is controlled by the superintendent, by the matron, by the doctors, and by the residents, he said,

> That she is a servant and has a master seems to me indubitable. The problem is to find him.

(1) 1930 S.C. 123. (2) [1906] 1 K.B. 160.
(3) [1909] 2 K.B. 820.

Lord Alness with that preamble sought to ascertain the legal principles upon which the solution of the problem depends. He said that the liability of the infirmary for the nurse, if it existed, depended on the principle of *respondeat superior*, and the onus, he thought, was on the infirmary to show that that principle did not apply. The maxim, said Lord Alness, gives rise to many problems, but the only problem with which the case before him was concerned was, Who is the superior?

> In other words, What constitutes the relationship in law of master and servant?

After taking the definition of Lord Justice Bowen in *Moore* v. *Palmer* (1),

> The tests were, Who had the power of selecting, of controlling, and of dismissing?

Lord Alness said that while there may be no difficulty in the ordinary case in determining who selects, who pays, and who dismisses a servant, one must, he thought, be careful in interpreting the requirement of "control," which does not

> necessarily connote control, at the moment of the negligence, of the operation then being conducted.

Keeping in mind " these *indicia* of employment, if they are no more," Lord Alness found that the nurses of the infirmary were selected, were paid, and were subject to dismissal by the institution or its officers.

> As regards control, it is no doubt true that the nurses are not controlled in the actual discharge of their executive duties—which, in light of what I have said, is immaterial—but that in every other sense they are controlled by the defenders and their officers. Why then, I ask, should the defenders not be liable for the negligence of their nurses?

Answering his own question, Lord Alness said in part:

> I cannot, with respect, assent to the view of Lord Justice Kennedy in *Hillyer* (2) that the staff of a hospital are in a different position while performing their professional duties from that in which they are while performing their ministerial and administrative duties. * * * I confess that I cannot find any principle or authority which warrants the distinction which the learned Lord Justice sought to draw.

Lord Alness then dealt with the final argument presented by the defenders that, in any event, treatment by ultra-violet rays may be equiparated to an operation, and that the principle of *Hillyer's* case (2) applies. Lord Alness had no hesitation in rejecting that contention.

(1) (1886) 2 T.L.R. 781.

(2) [1909] 2 K.B. 820.

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The basis of the decision in *Hillyer* (1) was that there was a surgeon in supreme control of the operating theatre, and that the nurse was merely his auxiliary. The facts in this case exclude that view. On the occasion of the pursuer's treatment there was no doctor on the scene. There was no supervisor under whose control the nurse was. What happened was that a doctor prescribed the treatment, but that the sole responsibility for administering it rested on the nurse. Moreover, to assimilate treatment by means of ultra-violet rays to what happens in an operating theatre seems to me a violent and illogical example of assimilation. Had a doctor been present and in command while the ultra-violet rays were being applied, a different question would have arisen for decision.

During the argument we were referred to three recent decisions of single judges in the English courts: *James* v. *Probyn* (2), Swift, J.; *Strangeways-Lesmere* v. *Clayton* (3), Horridge, J.; and *Dryden* v. *Surrey County Council* (4), Finlay, J. The judgment of Swift J. in the first case was adopted and followed in the two later cases. But if the remarks of Swift J. in *James* v. *Probyn* (2) are accurately stated in the *British Medical Journal,* 1935, Vol. I, p. 1245, that learned Judge said that while the principle in the *Evans* (5) and the *Hillyer* (1) cases was binding upon him and he must find that the hospital was not in law responsible, he was much attracted by the reasoning of Lord Alness in the *Glasgow Royal Infirmary* case (6) and if he were deciding the matter for the first time in any court he might possibly follow this opinion rather than that expressed in *Hillyer's* case (1).

The statement of Lord Justice Kennedy in *Hillyer's* case (1) as to the difference between ministerial or administrative duties, on the one hand, and matters of professional care or skill, on the other hand, is entitled to great weight and respect, but even the decision in the case is not binding upon this Court. In fact, the only decision at all applicable to the facts of this case that is binding upon us is the judgment of our own Court in the *Nyberg* case (7). In that case the patient's leg had been burnt by a hot water bottle which had been placed in the patient's bed following upon an operation. The trial judge had found that the proximate cause of the burn was in the first place the filling of the bottle with water that was

(1) [1909] 2 K.B. 820.
(2) (1935) (Unreported). *The Times,* May 29, 1935.
(3) [1936] 1 All E.R. 484.
(4) 82 Law Journal 1936, p. 9.
(5) [1906] 1 K.B. 160.
(6) 1932 S.C. 245.
(7) *Nyberg* v. *Provost Municipal Hospital Board,* [1927] S.C.R. 226.

much too hot without any testing of it and then the failure to investigate and see if any adjustment was necessary. This Court held that the evidence fully justified these findings of the trial judge and also the finding that the latter fact—the failure to investigate—was attributable to the nurse. Upon the question whether for that neglect and its consequences the hospital was legally responsible, this Court, after discussing the propositions laid down in *Hillyer's* case (1), held that that case had no application because the burning of the plaintiff's leg had occurred after the operation had been completed and the patient had been removed from the operating room to his bed in the ward. The duty of the nurse to see that hot water bottles were safely placed in the patients' beds was regarded not as a matter of special instructions for the occasion but as a matter of routine duty under a standing order of the hospital, and the failure of the nurse, after the appearance of the skin of the patient's chest had aroused her suspicion, to make sure that the hot water bottle at his leg was not a source of danger, was inexcusable and negligence in her capacity as a servant of the hospital in a matter of ministerial ward duty, if not of mere routine, which entailed responsibility on the hospital for its consequences. The negligence of the nurse was treated as the negligence of a servant of the hospital in the discharge of contractual obligations.

While nothing was said by the majority of the judges in this Court in the *Nyberg* case (2) in adopting the ratio of the Ontario decision in *Lavere* v. *Smith's Falls Public Hospital* (3), to cast doubt upon the rule of Lord Justice Kennedy in *Hillyer's* case (1), the rule did not require, in either of the cases, in the opinion of the Court, any minute analysis or examination. In the *Lavere* case (3) the plaintiff had been burnt by an overheated brick being placed against her foot in her bed while she was still unconscious following upon an operation that had been performed upon her. It was held that the nurse in placing, as she did, the overheated brick to the foot of the patient was not following the doctor's orders but was merely carrying out a standing order of the hospital to warm the bed. The decision

(1) [1909] 2 K.B. 820. (2) [1927] S.C.R. 226.
(3) (1915) 35 Ont. L.R. 98.

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rested upon the fact that the hospital had contracted to nurse the plaintiff and that the duties of the nurse, when the default occurred, were not to assist the surgeon in matters of professional skill but to perform domestic duties in the way of seeing that the bed was right. As to *Hillyer's* case (1), Mr. Justice Riddell said that certain expressions which were used in that case had been strongly pressed upon the Court, "but all these must be read in connection with the facts of the case" and further, "the expressions so made use of were not intended to be an exposition of the whole law, and are not to be taken literally in a case wholly different in its facts."

Any broadly stated rule that necessarily raises on special facts the manifold difficulties which the rule stated by Lord Justice Kennedy in *Hillyer's* case (1) has presented in so many subsequent cases is not a very practical rule of law. Lord Wright in the *Lindsey County Council* case (2) said:

> In my judgment the facts in this case are to be distinguished from those in *Hillyer's* case (1). It is not necessary to express here any opinion one way or the other about the correctness of that decision. That can be reserved until it comes, if it ever does, before this House: and the same may be said of *Evans* v. *Liverpool Corporation* (3), which presents some differences from *Hillyer's* case (1). Nor is it necessary to consider what difficulties may arise in delimiting the respective frontiers of ministerial or administrative duties on the one hand and matters of professional care or skill on the other hand, if it ever becomes necessary to apply the distinction which Kennedy L.J. draws.

After the most anxious consideration we have concluded that, however useful the rule stated by Lord Justice Kennedy may be in some circumstances as an element to be considered, it is a safer practice, in order to determine the character of a nurse's employment at the time of a negligent act, to focus attention upon the question whether or not in point of fact the nurse during the period of time in which she was engaged on the particular work in which the negligent act occurred was acting as an agent or servant of the hospital within the ordinary scope of her employment or was at that time outside the direction and control of the hospital and had in fact for the time being passed under the direction and control of a surgeon or physician, or even of the patient himself. It is better, we think, to approach the solution of the problem in each case by applying primarily the test of the relation of master and servant

(1) [1909] 2 K.B. 820. (2) [1937] A.C. 97, at 124.
(3) [1906] 1 K.B. 160.

or of principal and agent to the particular work in which the nurse was engaged at the moment when the act of negligence occurred. In the light of that test, if it be the correct and sufficient test, it is not difficult to determine liability in this case. The hospital itself installed, maintained and operated, for profit, the equipment or apparatus that was used. The hospital made a special charge of $1 against the patient for the treatment. The patient's private physician in attendance upon him had nothing to do with the actual treatment. He says that, while he knew such treatment was recommended to relieve pain, he did not himself know anything about the treatment. The nurse says she knew nothing of the patient's disease or condition; all she knew was that the patient was to be given a treatment in an effort to relieve pain. She does not suggest that she thought the treatment was for any curative properties. Nor does the evidence indicate that the working of the apparatus entailed any special professional care or skill or that the treatment had any curative properties for any disease of the body. The physician merely told the floor nurse to see that the patient was given a diathermic treatment; she passed the word on to the nurse who had charge of that part of the hospital work. The treatment was not intended by the physician to be, and was not understood by the nurse herself to be, anything other than a treatment of heat to relieve pain. There was no special training or scientific knowledge required, or at least thought to be required by the hospital or by the nurse, to safely use the apparatus in administering the treatment. It is plain from the evidence of the nurse herself that she went to Toronto some years ago and took for "about one week" what she called "an educational course put on by the manufacturers of the machine" and that following this course in Toronto she had "a practical course" by one of the manufacturers' representatives who came to the hospital "part of a day" to demonstrate the machine. The nurse states in her evidence that she gives as many as 1,600 of these treatments in a year.

Upon the facts and circumstances of this particular case we must conclude that the nurse was, at the time she committed the negligent act, acting as the agent or servant of the hospital within the ordinary scope of her employ-

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ment. There is nothing in the evidence to take her, as between the hospital and herself, out of this relationship during the time she was administering the particular treatment to the patient. She had not passed from the direction and control of the hospital and become for the time being under the direction and control of any surgeon, physician, superior nurse or of the patient himself. The hospital cannot, therefore, escape from the consequences in law of the relationship and must be held liable for the damages which flowed from the negligent act of the nurse. There may be cases, we can readily conceive that there may be, where the particular work upon which a nurse may for the time being be engaged is of such a highly professional and skilful nature and calling for such special training and knowledge in the treatment of disease that other considerations would arise; but that is a totally different case from the one before us.

The appeal must be dismissed with costs.

CROCKET J.—I think this appeal should be dismissed with costs for the reason that there was ample evidence to warrant the finding of the learned trial Judge that the plaintiff's injuries were caused by the negligence of the nurse in administering the diathermic treatment while acting in the course of her employment as a servant of the defendant corporation.

Appeal dismissed with costs.

Solicitors for the appellants: *Murphy, LeBel & Durdin.*
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