J. R. PARMLEY (DEFENDANT)..... APPELLANT;

AND

T. F. PARMLEY (DEFENDANT)..... RESPONDENT;

AND

AMANDA PEARL YULE (PLAINTIFF).

1945
*April 26, 27, 30
*June 20

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Trespass to the person—Torts—Surgery—Indemnity—Contribution—Judgment for damages against doctor and dentist for unauthorized extraction of teeth while patient under anaesthetic for purpose of another operation—In third party proceedings, indemnity or contribution claimed by dentist against doctor—Facts held not to provide a basis upon which indemnity could be recovered, but judgment given for contribution—Contributory Negligence Act, R.S.B.C. 1936, c. 52.

*PRESENT: Rinfret C.J. and Kerwin, Hudson, Kellock and Estey JJ.

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Judgment had been recovered against appellant, a doctor, and respondent, a dentist, for damages for unauthorized extraction of some of plaintiff's teeth while she was under an anaesthetic for the purpose of an operation by appellant to remove her tonsils. Respondent had not talked with plaintiff before making the extractions, but had had conversations with appellant, who had had conversations with plaintiff and made with respondent the appointment for extractions. Respondent had taken third party proceedings against appellant, claiming indemnity or contribution in respect of any liability to plaintiff found against him, and at trial recovered a judgment for indemnity (60 B.C.R. 395), which was, by a majority, affirmed on appeal ([1945] 1 W.W.R. 405) (the dissenting judges holding that respondent was not entitled to indemnity but was entitled to contribution on the basis of equal liability). On appeal to this Court:

Held: Upon the evidence, the facts did not provide a basis upon which respondent could recover from appellant by way of indemnity. The conversations between them were not such as to amount to a request, instruction or message from appellant to respondent which justified respondent in removing the teeth. In the extractions being done without plaintiff's consent, both appellant and respondent were negligent, even though they may have believed, upon respondent examining the teeth, that they were acting in plaintiff's best interests (professional duty in such circumstances discussed). But the case was a proper one, under the provisions of the *Contributory Negligence Act,* R.S.B.C. 1936, c. 52, for contribution between appellant and respondent; their pleadings raised the question of fault and the evidence throughout was led with regard thereto and established that their fault or negligence led them to so conduct themselves that in law they committed a trespass; a trespass may be the result of negligent conduct; they should be held equally at fault and each should bear one-half of the total loss as fixed by the judgment for plaintiff at the trial.

APPEAL by one of the defendants from that part of the judgment of the Court of Appeal for British Columbia (1) whereby his appeal from the judgment of Coady J. (2) in third party proceedings taken by the other defendant, was dismissed.

The appellant is a physician and surgeon. The respondent is a dentist. They are hereinafter referred to respectively as the "doctor" and the "dentist". The plaintiff sued both of them for damages because of unauthorized extraction of some of her teeth while she was under an anaesthetic for the purpose of the performance by the doctor of an operation for tonsillectomy. The dentist took third party proceedings against the doctor, claiming indemnity or contribution in respect of any liability found against him in favour of the plaintiff.

(1) [1945] 1 W.W.R. 405; [1945] 2 D.L.R. 316.
(2) 60 B.C.R. 395; [1944] 3 W.W.R. 94; [1944] 4 D.L.R. 46.

The evidence in the case is discussed at length in the reasons for judgment in this Court *infra* (and also in the reasons for judgment in the Courts below, cited *supra*).

The trial Judge, Coady J., found that at the time of the extractions the doctor knew or ought to have known that the dentist was relying on the authorization which the doctor led the dentist to believe that he had from the plaintiff, and the dentist proceeded with the extractions on the basis that the plaintiff's consent had been given to the doctor and through the doctor to him; that the doctor did not have such authorization from the plaintiff, and that his words and conduct constituted a representation of authority which he did not have but which the dentist was justified in assuming he did have; that the evidence failed to establish contributory negligence on the part of the plaintiff. He held that both defendants were liable in damages to the plaintiff. He fixed the general damages for the unauthorized extractions at $4,800 for twelve upper teeth and $200 for one lower tooth and special damages at $200, making in all $5,200, for which sum judgment was given against both defendants. In the third party proceedings he held that the doctor was liable to the dentist for indemnity, extending, however, only to the damages awarded against the dentist for the unauthorized extraction of twelve upper teeth, and costs, as he could not find that there was any instruction or representation of authority by the doctor as to the lower tooth. In the formal judgment it was declared that the dentist was entitled to be indemnified by the doctor against the sum of $5,000 payable by the dentist to the plaintiff under the judgment and against the amount of the plaintiff's costs of action payable by the dentist under the judgment; and it was adjudged that the dentist recover from the doctor any amounts up to the said sum of $5,000 and the plaintiff's costs of action as should be paid by the dentist under the judgment and the dentist's own costs of the action and of the third party proceedings to be taxed, those of the action as between solicitor and client.

The doctor appealed to the Court of Appeal for British Columbia, both against the judgment in favour of the plaintiff and against the judgment in the third party pro-

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ceedings. The dentist did not appeal against the judgment in favour of the plaintiff. He gave notice that he contended that the trial Judge was not in error in holding that he was entitled to be indemnified by the doctor, but that, in the event of the Court of Appeal coming to the conclusion that the trial Judge was in error in so holding, but not otherwise, he would contend that he was entitled to contribution, indemnity or other relief from the doctor in respect of the sum of $5,000 and costs of the plaintiff payable by the dentist to the plaintiff in proportion to the degree in which the doctor might be found at fault and that the judgment appealed from should be varied accordingly.

The doctor's appeals to the Court of Appeal, both in the action and in the third party proceedings, were dismissed with costs. As to the third party proceedings, however, O'Halloran and Sidney Smith JJ., dissenting in part, held that the dentist was not entitled to indemnity; that the evidence did not justify a finding that the doctor instructed the dentist to extract any of the plaintiff's teeth, or that he warranted to the dentist that he was the agent of the plaintiff with authority to instruct the dentist to extract any of them; all the doctor did was to pass on to the dentist the information that the plaintiff wished to have some teeth extracted, leaving the dentist himself to get particulars and instructions, and later had casually given him what other information he had or thought he had on the matter; that in the operating room both men thought the dentist was justified in extracting whatever teeth he found decayed; but that the parties came within the provisions of the *Contributory Negligence Act*, R.S.B.C. 1936, c. 52; and, being unable to distinguish between their degrees of liability, they held the parties equally to blame, and held that the dentist was entitled to contribution from the doctor upon the basis of equal liability.

The doctor appealed to this Court from that part of the judgment in the Court of Appeal whereby his appeal in the third party proceedings was dismissed. The dentist gave notice of contention in the present appeal in form similar (*mutatis mutandis*) to that stated above on the appeal to the Court of Appeal.

C. K. Guild K.C. and *E. F. Newcombe K.C.* for the appellant.

F. J. Hughes K.C. for the respondent.

The judgment of the Chief Justice and Kerwin, Hudson and Estey JJ. was delivered by

ESTEY J.—This appeal arises out of third party proceedings in an action of trespass in which Mrs. Yule, plaintiff, recovered judgment against the defendants J. R. Parmley, a physician and surgeon, and T. F. Parmley, a dentist, in the sum of $5,200 and costs, on the basis that they had removed all of her upper teeth and one lower tooth without her authority.

The order for directions in the third party proceedings named T. F. Parmley plaintiff, J. R. Parmley defendant, and directed that the question of liability between these parties "be tried at or immediately after the trial of this action as the trial judge shall direct."

The judgment of the learned trial judge in these third party proceedings directed the doctor to indemnify the dentist up to $5,000 and costs.

The Court of Appeal affirmed this judgment, but two of the learned judges dissented on the basis that this was not a case for indemnity but rather of contribution and that each defendant should pay one-half.

Mrs. Yule, a young lady of twenty-two years of age, a patient of the doctor, arranged to have her tonsils removed at the hospital on October 12th, 1943. Two of her teeth were bothering her and, as her dentist was on active service, she from time to time mentioned them to Dr. Parmley. On Friday, October 8th, she suggested to the doctor that she would like two teeth removed while she was under the anaesthetic for the tonsillectomy. The doctor suggested, and Mrs. Yule agreed, that she might have his brother, a dentist whose office was in the same building, make the extraction. He asked that she at once interview him, but Mrs. Yule could not then conveniently do so, and asked if she might see the dentist at the hospital on the morning of the operation. In that request the doctor acquiesced.

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On the same afternoon of October 8th the doctor called at the office of the dentist and the latter deposed as to the conversation:

He came in the door and he said, "Fred, has Mrs. Yule been in to see you yet?" And I said, "No;" "Well, she wants you to take some teeth out at the hospital on Monday." So I looked at my appointment book, and noting it was a holiday I asked him if Tuesday morning would do as well and he said he would get in touch with Mrs. Yule and see if that was agreeable to her, and that was the end of the conversation.

That was on Friday. On Sunday afternoon they met at their mother's for afternoon tea, when the dentist deposes:

I asked my brother if he knew what teeth Mrs. Yule wanted extracted, and he replied, "They are the uppers."

Mr. McAlpine: Excuse me, I didn't get the answer.

Mr. Tysoe: They are the uppers.

The Witness: I replied that I would take my full kit of instruments in any case.

Q. Anything else said?

A. I think that was all at that conversation.

The dentist also stated that he would not deny that the doctor said, "I am not sure but I think it is just the uppers."

The operation was scheduled to take place at 8.30 Tuesday morning. The dentist arrived at the hospital, and when giving his instruments to a nurse for the purpose of having them sterilized, asked her where Mrs. Yule was. On being informed that she did not know, he made no further inquiry but went to the chart room and there remained until he went to the operating room. While there, his brother came into the chart room, they passed the time of day, and the doctor went on into the hospital. A little later the dentist went to the operating room, and finding that Mrs. Yule was already under the anaesthetic, he exclaimed, "Oh, so you have started already." The dentist then for the first time examined Mrs. Yule's mouth and, as he says, found three upper teeth badly decayed, the upper gum tissue in "a very neglected and deplorable condition," and an advanced condition of pyorrhea. He then said to his brother:

Well, Bob, I think the upper teeth should come out, all right, and also this lower left third molar, which is so badly decayed.

To which the dentist says the doctor replied,

Then you had better go ahead.

The foregoing is all that took place between the doctor and the dentist up to the time of the actual extraction.

On the basis of these brief conversations and his own examination he, assisted by the doctor, extracted all the upper teeth and one lower tooth.

The main case turned upon, what authority, if any, did Mrs. Yule give for the extraction of her teeth? There were conversations extending over a period of time between the doctor and Mrs. Yule. The doctor believed she wanted all of her uppers out. Mrs. Yule wanted only two uppers out, and in any event expected to see the dentist herself. The learned trial judge accepted the evidence of Mrs. Yule.

Mrs. Yule never did see or have any conversation with the dentist respecting her teeth, and the foregoing quotations set forth the conversations between the doctor and the dentist. These provide the basis for the contention of the dentist that he was requested by the doctor to remove the teeth, that he did so in compliance with that request, and as a consequence suffered damage and is therefore entitled to be indemnified.

The question in these third party proceedings is therefore: was there a request by the doctor which authorized the dentist to make the extractions he did?

There is no serious, if any, disagreement between them with respect to these conversations, and therefore it is a matter of the construction thereof. I think it may be pointed out here that the learned trial judge does not make a finding with respect to credibility as between the doctor and the dentist; as between Mrs. Yule and either of them he accepts Mrs. Yule's evidence. He states:

> The doctor is, in my opinion, an honest witness, but his memory as to details is not good. He is uncertain in his evidence.

Then with respect to the dentist the learned trial judge does not accept his evidence as to the condition in which he found the teeth. He accepts the evidence of Mrs. Yule, as will appear in a quotation from his judgment hereinafter set out.

The learned trial judge in the course of his judgment states:

> The dentist therefore, I find, proceeded with the extractions on the basis that the consent of the plaintiff had been given to the doctor and through the doctor to him;

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and again,

> But the doctor's words and conduct in my opinion constituted a representation of authority which he did not have but which the dentist was quite justified in assuming he did have.

This finding, as I read the evidence and the judgment, is a matter of inference and conclusion rather than a question of credibility. In the third party proceedings the dentist, a defendant in the main action, is the plaintiff, and upon him rests the burden of proof. In my opinion, with great respect to the learned trial judge, I do not think in these latter proceedings his conclusion can be supported by the evidence.

The conversations of Friday and Sunday construed most favourably to the dentist, do not, in my opinion, contain an assertion of authority or a request, or the giving of instructions in such clear and definite language as to justify a professional man performing a serious operation.

On Friday the doctor's first words are words of inquiry: "Fred, has Mrs. Yule been in to see you yet?" What follows in this brief conversation is but an inquiry and an intimation that the patient wants "some teeth" extracted. The reason therefor is made neither the subject of an inquiry nor a statement then or at any other time.

Then, as to the effect of the second conversation at his mother's tea on Sunday, when the doctor had said, "The uppers," or "I think the uppers," the following appears in the dentist's evidence:

> Q. You were quite content, I say, to proceed with the extraction on the basis of this conversation which might have been, "I am not sure but I think it is uppers?"
>
> A. I would like to answer yes with a qualification
>
> The Court: That is your privilege. That is your privilege, witness, explain your answer if you wish to.
>
> A. The consent carried by Dr. Parmley to me, along with my own judgment, was the reason that I had to take those teeth out.

There were only the two conversations of Friday and Sunday prior to that in the operating room, and therefore the following is important in the dentists's evidence:

> Q. I would like to get this clear, doctor [dentist], as to whether you extracted the upper teeth on the basis of the conversation you say you had with Dr. Robert in the operating room that morning, or whether it was by reason of instructions you thought you had received before then?
>
> A. It would probably be a combination of them. I think all the conversations had a part in the decision, Mr. Yule.

His appreciation of these two conversations is emphasized by his further evidence:

Q. Isn't it customary to take instructions from the patient personally?

A. We like to see the case we are going to operate on and advise, yes.

Q. Was that your answer?

A. Yes.

Q. Because after all the dentist is the one who knows what teeth should and what teeth should not come out?

A. That is right.

Q. Was it your intention to see Mrs. Yule to find out from her what teeth she wanted out?

Q. I went up with the intention of seeing her mouth, to see the condition of the teeth, and I would have discussed the case with Mrs. Yule if I had seen her.

In view of this evidence it is difficult to understand why he did not make a serious effort to locate Mrs. Yule in this hospital of about forty beds, more particularly as he had not inquired and had not been told why she wanted her teeth out. He knew at that time nothing of the condition of the teeth. Yet, apart from the casual inquiry of the nurse to whom he gave his instruments, he made no effort to locate Mrs. Yule, notwithstanding the fact that the acting matron entered the chart room while he was there. He suggests that he expected to see her in the operating room before she was anaesthetized. This was leaving a most important matter to a time when the patient would be naturally, if not necessarily, disturbed or, as the evidence indicates in this case, Mrs. Yule, who had gone to the hospital the night before, was under the influence of a drug given to her in her room when she went to the operating room. Mrs. Yule states:

When the nurse did come in with the stretcher for me I was feeling sort of funny from the effects of this hypo; I wasn't just myself. I don't remember very much. I remember seeing the doctor and the nurse in the operating room, and that is all I remember.

The dentist admits he was familiar with the hospital, and under all the circumstances he cannot be excused for not having located Mrs. Yule at a time when he could make an examination and discuss the condition of her teeth with her.

It is now important to observe that the dentist was here called upon in his professional capacity and therefore at all times material hereto a relation of dentist and patient existed between himself and Mrs. Yule. She was a young lady of twenty-two years of age, known to the dentist but

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who had not prior thereto been a patient of his. He believed that she had not received professional advice with respect to her teeth.

Q. And your thought was in this particular case that Mrs. Yule had made her own diagnosis?

A. As far as I was concerned, yes.

The dentist therefore knew, or ought to have known, that she was not in possession of that information that a patient was entitled to before arriving at a decision so important that it involved the extraction of many of her teeth.

In the operating room, as he entered upon his examination, he had no idea why she wanted her teeth removed. He then found the condition of pyorrhea. It had not been mentioned to him before, nor did he there mention it to his brother. He takes the position that both the diagnosis and treatment of pyorrhea are matters for the dentist, and by way of further clarifying his position he says:

I think Dr. Parmley was not asked for his professional judgment on pyorrhea. I think it was a straight matter of carrying consent from the patient to myself.

When one keeps in mind that pyorrhea was first discovered by the dentist in the operating room, the following evidence given by the dentist is important:

Q. * * * you would not, or would you, doctor, expect to be instructed under the circumstances by Dr. Parmley for the extraction of teeth on account of a pyorrhea condition?

A. I was willing to carry his message of consent rather than a question of instructions.

Q. In other words, you took the position to be this: When Dr. J. R. Parmley came to you he merely conveyed to you the wishes of Mrs. Yule?

A. That is right, sir.

Q. And that is all he was endeavouring to do?

A. That is right.

* * *

Q. And before you proceeded with the extraction, doctor, you have said that you spoke to the doctor?

A. Yes, sir.

Q. And you told him about the condition that you found, or did you?

A. Yes, just a very brief outline.

Q. That you had found in the mouth?

A. Yes.

Q. And why did you tell him?

A. Probably through courtesy—to gain further consent, I think, seeing he was carrying the consent he was entitled to know.

* * *

Q. And there wasn't any occasion for speaking to him about the uppers?

A. I think I just told you, sir, it was a courtesy conversation.

* * *

In my opinion there is no request, instruction or message which justified the dentist in removing the teeth. An analysis of these conversations shows an absence of precise and definite language. The learned trial judge describes the doctor as "uncertain in his evidence," and certainly one gets that impression as he reads his evidence. Upon the points most important to the dentist he is particularly uncertain and indefinite. He never becomes more specific in his statements than to say, "some teeth," "the uppers," "I think the uppers." These conversations are so general, vague and ambiguous that in my opinion a professional man is not justified in acting upon them.

It seems to me that had the patient herself, Mrs. Yule, made such statements to the dentist, he would not have proceeded, and would not have been justified in proceeding, without making an examination of her teeth and advising and consulting with her; then, if she desired and requested that her teeth or any of them be extracted, the dentist would be justified in proceeding to do so.

> Force to the person is rendered lawful by consent in such matters as surgical operations. The fact is common enough; indeed authorities are silent or nearly so, because it is common and obvious. Taking out a man's tooth without his consent would be an aggravated assault and battery. With consent it is lawfully done every day. [Pollock on Torts, 14th ed., p. 124.]

The respondent has contended that the doctor in the operating room should have there prevented the dentist from removing the teeth. There is much to be said for that view. At the same time that does not excuse the dentist. His duty to the patient remained the same. In my view they were both negligent, particularly in the operating room, not with respect to the quality of any work there performed, that is not an issue. In that room it was in proceeding to extract the teeth without the consent of the patient. The dentist knew she had received no advice, and yet upon these vague and general statements he proceeded with a serious operation.

The conclusion appears unavoidable that both of the parties hereto, particularly in the operating room, failed to recognize the right of a patient, when consulting a pro-

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fessional man in the practice of his profession, to have an examination, a diagnosis, advice and consultations, and that thereafter it is for the patient to determine what, if any, operation or treatment shall be proceeded with. *Slater* v. *Baker* (1); 22 Halsbury, 2nd ed., p. 319, par. 603; *Marshall* v. *Curry* (2); *Schloendorff* v. *The Society of the New York Hospital* (3); *Kinney* v. *Lockwood Clinic Ltd.* (4). Mrs. Yule obviously expected just that. She had been so treated with respect to the tonsillectomy.

It may be that in the operating room the parties hereto were of the opinion that they were acting in the best interests of Mrs. Yule in extracting the teeth, but that is not the point. That would have been very important in their consultation with and their advising of Mrs. Yule, but it does not justify their proceeding without her consent. As was said by Garrison J., "No amount of professional skill can justify the substitution of the will of the surgeon for that of his patient." *Bennan* v. *Parsonnet* (5).

There are times under circumstances of emergency when both doctors and dentists must exercise their professional skill and ability without the consent which is required in the ordinary case. Upon such occasions great latitude may be given to the doctor or the dentist. In this case it is not even suggested, nor is there any evidence to suggest, that any such circumstances exist. In a matter of a very short time the condition of her teeth could have been discussed with the patient. There was no reason for an immediate extraction. Her position under the anaesthetic for the tonsillectomy provided a convenient, but not a necessary, opportunity for the removing of her teeth.

It was urged that the dentist was entitled to take the position upon these conversations with the doctor that he was to remove these teeth unless in his judgment they ought not to be removed. In view of what I have already said, I do not think such a position is tenable in law, and even if it was, it is not open to the dentist in this case because here the learned trial judge has found that the condition of the teeth which the dentist represents as his justification for removing them, did not exist.

(1) (1767) 2 Wils. K.B. 359.
(2) [1933] 3 D.L.R. 260.
(3) (1914) 211 N.Y.R. 125.
(4) [1931] O.R., 438.
(5) (1912) 83 N.J.L.R. 20, at 26.

On the whole of the evidence I am of the opinion that the dentist has failed to establish by a preponderance of evidence that the condition of the teeth was as he states, or if it was, that the teeth could not have been successfully treated. I have no hesitation in accepting the evidence of the plaintiff that she had no knowledge of the existence of a condition such as the dentist says he found, or of any condition other than she has described. I find it difficult to believe that a condition such as the dentist has described could have been present without her knowledge. The teeth may not have been and possibly were not in as good condition as she thought, but on the other hand I am not satisfied the condition was such as the dentist has stated. This examination was hastily made, and made, too, on the assumption that she wanted all the upper teeth out, and that the doctor for some reason wanted them all out.

So far as the last remark, "that the doctor for some reason wanted them all out," is concerned, with great respect I can find no evidence to support it. Apart, however, from this last remark, the learned trial judge in effect has found that the dentist removed teeth which he was not justified in removing, and therefore provided the basis for the substantial damages awarded in this case.

In my opinion the doctor, himself a professional man, in using the vague, general and ambiguous terms which I have already quoted and in not protecting his patient from, rather than acquiescing in, the conduct of the dentist, is himself negligent.

I am also of the opinion that the dentist in going forward and making the extractions as he did, without any inquiry as to why this young woman of twenty-two years of age wanted all of her upper teeth out, relying on conversations or, as he prefers, "messages", in the vague, general and ambiguous terms I have quoted; in not seeing Mrs. Yule, examining her teeth, advising and consulting with her before she went under the anaesthetic; and in removing teeth which were not in the condition he describes, was in all of these particulars himself negligent.

The dentist as plaintiff asks indemnity from the doctor on the basis that the latter requested him to remove the teeth. On his behalf counsel cites Underhill on Torts, 14th ed., p. 43:

If one person does an act at the request of or under the directions of another, which is neither manifestly tortious nor tortious to his knowledge, he will be entitled to be indemnified by that other against all liability which he may incur by reason of that act proving to be a tort, whether he be servant or agent of that other or not.

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The basis for an indemnity based upon a request is set forth as follows:

> The law implies from the request an undertaking on the part of the principal to indemnify the agent if he acts upon the request. It is true that this is not confined only to the case of principal and agent, there are other cases which it is not necessary to examine now. But they all proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so.

Bowen L.J., in *Birmingham and District Land Co.* v. *London and North Western Railway Company* (1).

In my opinion, for the reasons already discussed, there was no request which authorized the extraction of the teeth.

Then if there was a request and there be given to that request the certainty, the definiteness and the extent which the dentist asks, any compliance therewith involves the exercise on the part of the dentist of his professional skill and knowledge. There is no language which restricts or eliminates the duty which devolves upon him as a professional man toward the patient; indeed in this case he admits he applied his professional skill and ability; and therefore I do not think that this type of request, nor the relations which existed between the doctor and the dentist, provides a basis or a foundation for the implication of a promise to indemnify.

Counsel for the dentist cites *Secretary of State* v. *Bank of India, Ltd.* (2), and quotes the following passage from Lord Wright at p. 801:

> There is nothing anomalous in the presence of some element of choice or deliberation on the part of the officer who is the person doing the act, so long as he proceeds on the assertion or claim or direction or evidence of the applicant. Indeed, in the simpler type of case illustrated by *Dugdale* v. *Lovering* (3) it is not necessary that the plaintiff should have been other than a free agent. He may act on the defendant's request, not under compulsion, but of choice. That does not, however, deprive him of the right, if the circumstances are appropriate, to the implied indemnity, though no doubt he may waive the right.

In that case there was the duty upon the person entitled to a government promissory note to satisfy the officer employed by the government of the justice of the claim. There the party did so satisfy the officer, but did so by the

(1) (1886) 34 Ch. D., 261, at 275.
(2) [1938] 2 All E.R., 797.
(3) (1875) L.R. 10 C.P. 196.

presentation of a document which appeared complete and regular upon its face but which was in fact a forgery. It was held that the fact the officer was satisfied and therefore exercised his judgment but in so doing did not detect the fraud that was intended to deceive and mislead him, did not deny to his employer the right to be indemnified.

The facts in that case are so different as to make it clearly distinguishable. In the case at bar the dentist was, however one construes the words spoken, invited or requested to act in his professional capacity. There was no fraud or deception practised upon him, and had he sought to satisfy himself or to have discharged his professional duty he would not have committed the trespass which imposed upon him the damage or loss.

Moreover, if the language used in the conversations is construed as constituting a request, then by virtue of his negligent conduct he cannot recover on the basis of indemnity. The language of Swinfen Eady L.J., appears particularly appropriate where, after quoting certain well known facts of the law, he continues:

> The statement of the law which I have just read, in which it is held that the defendant is bound to indemnify the plaintiff against the consequences of an act done at his request, must be read as meaning that the plaintiff, who claims the indemnity, must have acted without negligence, and that the injury to the third party must be the direct result—that is, the natural and direct consequence—of doing the particular act the plaintiff was requested to do, and not a consequence merely arising from the manner in which the act was done. [*W. Cory & Son* v. *Lambton and Hetton Collieries* (1).]

In my opinion, the facts of this case do not provide a basis upon which the dentist may recover from the doctor by way of indemnity.

The dentist, in the alternative, claims a right to contribution under the provisions of the *Contributory Negligence Act,* ch. 52, R.S.B.C. 1936. Sec. 2 reads as follows:

> 2. Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault:
>
> Provided that:—
>
> (*a*) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and
>
> (*b*) Nothing in this section shall operate so as to render any person liable for any damage or loss to which his fault has not contributed.

(1) (1916) 86 L.J.K.B. 401, at 405.

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It was contended that because Mrs. Yule's action is founded in trespass, there should be no right to contribution under the foregoing Act, on the basis that it was restricted to cases of negligence. It was pressed that the word "fault" was synonymous with the word "negligence," and therefore did not include trespass. There is authority that the word "fault," as used in the *Maritime Conventions Act,* 1911 (1 and 2 Geo. V., ch. 57), upon which the British Columbia *Contributory Negligence Act* is modelled and from which it is substantially copied, means negligence.

There can be no question but that the word "fault" includes negligence, but whether it is a somewhat wider term as used in the British Columbia Act, in my view it is not necessary here to determine.

It appears to me that these third party proceedings constitute an action between two persons whose joint fault caused them to suffer "damage or loss," and the Court must determine whether this is a proper case in which the damage or loss should be apportioned between these parties. To do so in a proper case is precisely the purpose of the Act, and the pleadings of both parties here raised the question of fault, and the evidence throughout is led with regard thereto. It establishes that their fault or negligence led them to so conduct themselves that in law they committed a trespass. It is clear upon the authorities that a trespass may be the result of negligent conduct. 33 Halsbury, 2nd ed., pp. 3 and 30.

The reasons for judgment rendered in *The Cairnbahn* (1) are applicable to this case. That was decided under the *Maritime Conventions Act,* 1911. A hopper-barge, without any blame on the part of those in control thereof, suffered damage in a collision due to the fault of two other vessels. At p. 33 Lord Sumner states:

> The word "loss" is wide enough to include that form of pecuniary prejudice which consists in compensating third parties for wrong done to them by the fault of persons for whose misconduct the party prejudiced must answer.

In my opinion, this is a proper case for contribution between the parties.

It is always difficult to determine, apart from special circumstances, the proportions of the damage or loss which should be assumed by or apportioned to the respective

(1) [1914] P. 25.

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parties. In this case, having regard to the fact that both parties were negligent throughout and both parties took part in the extraction, it seems to me that both parties are equally at fault and therefore each should bear one-half of the total loss as fixed by the judgment rendered in favour of Mrs. Yule.

In my opinion this appeal should be allowed, in the third party proceedings the plaintiff should pay one-half of the claim and costs as fixed by the judgment of the learned trial judge in favour of Mrs. Yule at the trial, that in the third party proceedings there should be no costs to either party at the trial, that the doctor should pay the costs of the appeal to the Court of Appeal for British Columbia, and that the dentist should pay the costs of appeal to this Court.

KELLOCK J.—I concur in the result proposed by my brother Estey.

Appeal allowed (and judgment as stated in above reasons) with costs.

Solicitor for the appellant: *W. S. Lane.*

Solicitor for the respondent: *Charles W. Tysoe.*