of the hospital building, about twenty-five feet from the ground, which at the time was frozen hard.

The nurse on duty was proved to be very careful, skilful and conscientious. She had been in the ward, looked at the patient carefully and found him quite quiet and apparently asleep. She then went out quietly into the hall to do something, but was still near the patient. Unfortunately, after this visit by the nurse, he got out of bed and made for the window, which he opened. He was going out head foremost when the nurse rushed into the ward and seized him by the nightdress; unfortunately it gave way, or she lost her hold. He sustained a fracture of the skull, and died, February 14, 1903. The wife brought action, and the case was tried before Mr. Justice Britton and a jury at the Toronto jury sittings. A verdict of $250 was awarded the plaintiff against the hospital. There was no appeal, counsel for the hospital thinking the Glavin case would probably be followed (*pars magna fui*).

After all the cases it is plain that once the "trust fund theory" is got rid of—and it is conceded that it has now no footing in our law—the case is reduced to the question, what did the defendants undertake to do? If only to supply a nurse, then supplying a nurse selected with due care is enough; if to nurse, then, the nurse doing that which the defendants undertook to do, they are responsible for her negligence as in contract—*respondeat superior*.

I am of opinion that the plaintiff should succeed.

The only question remaining is as to the amount of damages to be awarded.

The patient who should have left the hospital in two weeks was forced to remain seven; she was then unable to walk and had to be carried out of the hospital; for more than four weeks she sat in a chair, and when she put her foot to the ground the leg would swell so as to require bandaging; a consultation of doctors resulted in the advice to return to the hospital, she being then just able to hobble putting a little weight on the toe; she remained in the hospital nearly two months, slightly improving, but not permitted to put weight on the foot; even at the end of the time compelled to use a crutch; and now many months after, and after treatment with electricity, etc., is still lame, the foot being very painful at times; she is forced to have a pillow under the back of the heel in bed or she could not sleep. Dr. Gray thinks that the pain is caused by the implication of the nerve in the scar tissue and that an operation would be of advantage. Dr. Reddick once was of that opinion but after consulting some who he thinks know more than he does and who have a different opinion, can only say: "My own opinion is still that there is a possibility of something being done by an operation . . . it is a very questionable operation whether it would be beneficial or maybe make it worse"; and he gives reasons. Dr. Ferguson had his own opinion "that if this pain was being caused by a nerve fibre caught in the scar as I supposed it was that if it could be severed, it might stop the pain." In this state of medical opinion it cannot be said that it is unreasonable for the plaintiff to refuse (if she did or does refuse) to submit to an operation.

After an examination of the cases I laid down the rule in Bateman v. Co. of Middlesex (1911), 24 O. L. R. 84 at p. 87 that "if a patient refuse to submit to an operation which it is reasonable that he should submit to, the continuance of the malady or injury which such operation would cure is due to his refusal and not to the original cause.