Liability of Hospital for Negligence of a Nurse

Judgment of The Honorable
MR. JUSTICE RIDDELL
(Supreme Court of Ontario)

in

Levere v. Smith's Falls Hospital

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Levere vs. The Smith's Falls Public Hospital

"The Nurse and the Law," by the Hon. William Renwick Riddell, Justice of the Supreme Court of Ontario, appeared in THE NURSE for December, 1915. In his discussion of the legal responsibility of the nurse, Mr. Justice Riddell gave a most interesting exposition of the personal responsibility of the nurse in guarding against negligence and of her responsibility when negligence occurs.

Immediately after the publication of THE NURSE for December, Mr. Justice Riddell's Court had occasion to consider the responsibility of a hospital for the carelessness of a nurse, in an action brought by a patient to recover damages for an injury sustained during treatment in the institution. All the members of the Court, Chief Justice Sir Glenholme Falconbridge and Justices Riddell, Latchford, and Kelly gave written reasons for judgment in favor of the plaintiff.

The reasons of Mr. Justice Riddell are very full and elaborate, and as his judgment contains all that is to be found in any of the other judgments, we have confined our report of the case to it. Because of the importance of this decision, THE NURSE publishes Mr. Justice Riddell's opinion practically in full.—THE EDITOR.

APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

SECOND DIVISIONAL COURT.

C.J.K.B., RIDDELL, LATCHFORD AND KELLY, JJ.

LEVERE
v.
THE SMITH'S FALLS PUBLIC HOSPITAL

HUTCHINSON, K. C., for the appeal.

G. H. WATSON, K. C., contra.

The Smith's Falls Public Hospital is an incorporated body conducting a public hospital in the Town of Smith's Falls, Ontario; there are no shareholders or capital stock, and the institution is conducted not for private profit but simply as a public charity and for the benefit of the community—a most admirable and commendable object.

The plaintiff, Mrs. Levere, suffering from *prolapsus uteri* was advised by her physician, Dr. Gray, to go into the Hospital and be operated upon. She accordingly went to the Hospital of the defendants and selected her room, agreeing to pay $9.00 a week "to include her board and attendance and nursing."

She was operated on (successfully) under an anæsthetic by Dr. Gray, Dr. Ferguson assisting; and then she was taken to her own selected room and put to bed, still unconscious. On recovering consciousness she felt a severe pain in her right foot; and on the surgeon being sent for, he discovered a serious burn on her right heel about the size of a fifty cent piece; a blister had formed. Dr. Reddick thinks the burn must have been at least a quarter of an inch in depth. The plaintiff was treated properly and she left the Hospital at the end of seven weeks with the burn about healed; but she still has a scar at the locus, of about an inch by an inch and a half. This is not only painful but disabling; and there does not seem to be much hope of

improvement unless an operation be performed; and the result of such an operation is doubtful.

She brought an action against the Hospital which was tried before Mr. Justice Britton at Brockville, May 26, 1915; the learned Judge decided in favour of the defendants (34 O. L. R. 206), and the plaintiff now appeals.

There can in my mind be no possible doubt that the burn was caused by an overheated brick being placed against the foot of the anæsthetized and unconscious plaintiff; that this was done by the nurse in charge; and that such an act was improper. There can be no doubt of the liability of the nurse civilly in tort, unless she can justify herself by a command of some one she was bound to obey; but the nurse is not sued here. The sole question is whether the Hospital is liable for this act of its nurse.

The Matron was the head of the nursing staff; a trained nurse herself, she was the superintendent of the nurses; she selected the nurses, hired and discharged them, subject to the approval of the Board.

The nurses, in addition to board etc., received a "honorarium" in money ("honorarium" which really means a gift on assuming an office, is now often used as equivalent to "salary" by those who do not like to think they receive wages). The particular nurse to wait on her, the plaintiff had nothing to do with selecting. The Matron appointed her to that particular work, and she never became the servant or employee of the plaintiff, but continued the servant and employee of the Hospital, and was sent by the Hospital to perform for the Hospital its contract to supply the plaintiff with nursing.

In the absence of authority and of special circumstances, it would be plain that the Hospital is liable for her act. The cases will be examined after dealing with the circumstance most relied upon by the defendants.

It is contended that the nurse was under the orders of the operating surgeon; that she carried out his orders, and consequently the Hospital could not be made liable. But this connotes a state of affairs which does not exist in the present case.

If the nurse obeyed the express order of the surgeon, she was not guilty of negligence at all—that is the duty of a nurse. Of course she must take some pains to see that she quite understands the doctor's meaning and must not act on what she should know to be a slip of the tongue. To put it in other words, the order she obeys must be a real order, not such as is an apparent order but so expressed that it cannot be supposed to set out the doctor's real meaning.

A nurse holds herself out to the world as being possessed of competent skill and undertakes to use reasonable care. If the command of the surgeon is plainly a slip, she should call his attention pointedly to the order. When his attention has been called to the order and he shows that the order made was that intended, she may obey; "he is the doctor," and it is not negligence for a nurse to act on the belief that he is the more competent.

In Armstrong v. Bruce (1904), 4 O.W. R. 327, the nurse contended that the surgeon had ordered her to fill the "Kelly pad," upon which the unconscious patient was to lie, with boiling water. She did fill it with boiling instead of hot water, with the result which was to be expected. The patient sued the surgeon for damages; the defendant and other surgeons swore that the nurse had been told to fill the pad with hot water (not boiling) and the trial Judge believed them. My learned brother said, p. 329: "I have no manner of doubt that if the doctor had said to any experienced nurse that she was to

fill that pad with boiling water, it would have struck her as an extraordinary thing and one calling for some explanation. . . . it was a thing that could not have been done by Dr. B. unless through a slip of the tongue."

Of course, a surgeon could not shield himself from the results of an improper order. He has at the operation table no more right to make a slip of the tongue than a slip of the knife, and must guard against both equally.

But granted that an order is a real order of the medical man, a nurse is justified in obeying it unless it is plainly dangerous; and not being guilty of negligence herself, she cannot by so acting render her employers liable for damages for her acting in accordance with such an order.

Here the facts do not bring the nurse into such a condition.

Where a patient is or has recently been under an anæsthetic, there is a standing order in all hospitals to keep the bed warm. "It is," says the Matron, "a standing order to warm the bed"; this is taught by "the doctors originally training the nurses." The nurse under whose charge the patient is, attends to the heating of the bed and to the heating of bricks if bricks are used for that purpose. It was the duty of the nurse "when she was told that she had charge of the room where the patient was . . to see that the bed was properly warmed," and "the doctor would not give her any direct order." If then the doctor finds the bed not such as he thinks it should be, he may give such orders as he sees fit, and these orders must be obeyed, but he does not ordinarily inspect the bed. As I have heard it said by a very eminent surgeon: "If I cannot trust my nurse I must give up surgery."

My learned brother at the trial put it quite accurately as follows:

"His Lordship: That narrows it to this extent, it is the duty of the nurse in the first place to do as suggested to her, in seeing that the bed is properly warmed for the patient, and then if the doctor comes in, it may be his duty to see if it is overheated or underheated, and give his directions in regard to that, but in the absence of any directions in regard to that, it stands that it is the nurse's duty."

There is much evidence, more or less loose, about the nurses being under the doctor's orders and the like, but the above fairly represents the result of the evidence taken as a whole.

In the present case the operating surgeon assisted in placing the patient in her bed after the operation, but took it for granted that the bed was properly heated, made no inquiries and gave no orders—and indeed such was the usual course; "they (the doctors) consider them (the nurses) all right, competent."

It cannot, therefore, be successfully contended that the nurse in placing as she did an overheated brick to the foot of the patient was following the doctor's orders; and it is quite clear that he knew nothing about what she did and that he gave no directions of any kind.

The main contention of the defendants is that they are not liable for the negligent act of the nurse, and many cases are cited in support of that proposition.

The first English case in point of time relied upon is Perionowsky v. Freeman (1866), 4 F. & F. 977. There the plaintiff came into St. George's Hospital in London suffering with a disease which required a warm hip bath, which was ordered by the surgeons. The nurses gave him a hip bath hot, too hot, so hot that he was severely scalded, but the surgeons were not near to give specific directions. They followed the usual course, "gave their directions that patients were to have hot baths and left it to the nurses to see to

the baths . . . the usual hospital practice . . . a surgeon no more knew what was a fit temperature of hot water for a bath than a nurse who was necessarily quite familiar with it." The patient sued the medical men; but it was proved that they had no control over the nurses as to appointment or dismissal and therefore the relationship of master and servant did not exist, and as the Lord Chief Justice Sir Alexander Cockburn said, they "would not be liable for the negligence of the nurses unless near enough to be aware of it and to prevent it." The defendant had a verdict.

In that case the Hospital Board were not sued, and there is no suggestion anywhere in the case that the Board would not have been liable if they had been sued. No doubt it satisfactorily decides that had the plaintiff here sued Dr. Gray instead of the Hospital, she could not have succeeded; but it decides nothing more.

In Hall v. Lees, 1904, 2 K. B. 602, an association called the Oldham Nursing Association was formed to supply aid and instruction in skilled nursing by nurses located in Oldham. It appointed nurses and paid their salaries, making charges for the services of their nurses to those who were supplied with them. A patient who had to undergo a serious operation was supplied with two nurses by the Association, one or other of whom negligently applied a hot bottle to her when still insensible from the anæsthetic, and burned her severely. The Association was sued, but the action was dismissed. The Master of the Rolls in giving judgment puts the case in a nutshell, pp. 610, 611: "The question, therefore, is whether under the circumstances of the case and having regard to the rules and regulations of the Association and the other documents, the contract is to nurse the patient or only to supply a nurse to the patient." The learned Master of the Rolls after discussing the rules and regulations etc., comes to the conclusion, p. 614: "the correct view of the contract is that the Association merely undertook to supply competent nurses who were to be under the orders of the patient's medical man and not the servants of the Association for the purpose of nursing the patient . . when the Association sent the nurses I do not think they were sending them to do in their place that which they had themselves undertaken to do. They never undertook . . . to nurse the female plaintiff but only to supply a competent nurse for that purpose." Stirling, L. J., says, p. 615: "The question broadly stated is whether the Association contracted to nurse the female plaintiff or merely to supply properly qualified nurses for that purpose." He thinks that there was no power in the Association to interfere with the nurse once supplied in "her duties in nursing the patient as between her and the employer." Mathew, L. J., puts his decision squarely on the ground that "the plaintiffs (i. e. the patient and her husband) were the nurses' employers for the purpose of nursing the patient" (p. 618). The Court was unanimous and the action was dismissed.

It seems to me that the *ratio decidendi* of the case just cited is conclusive of the present. The test is, did the defendants undertake to nurse or did they undertake only to supply a nurse? The Matron herself says that the $9.00 paid per week was to include nursing; and this concludes the defendants from denying that they contracted to nurse the patient.

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Hillyer v. Governor etc. St. Bartholomew's Hospital, 1909, 2 K. B. 820, is another case much relied on by the defendants. Hillyer, a medical man, entered St. Bartholomew's Hospital in London solely for the purpose of being

examined gratuitously under an anæsthetic; there was no bargain of any kind expressed. Mr. Lockwood, a consulting surgeon attached to the hospital, examined him, but through some carelessness Hillyer's arm was allowed to come into contact with a hot water tin and was badly burned, and also bruised in some way. He sued the hospital, but his action was dismissed by Grantham, J. In appeal the decision of the trial Judge was affirmed. Ferwell, L. J., expressly approves Glavin v. R. I. Hospital (to be considered later) and holds that the doctors were not at all the servants of the board but "all professional men employed by the defendants to exercise their profession . . . . according to their own discretion . . . in no way under the orders or bound to obey the directions of the defendants." "It is true that the corporation has power to dismiss them, but it has this power not because they are its servants but because of its control of the hospital where their services are rendered."

The learned Lord Justice considers the nurses to be on a different footing, and assumes that they are the servants of the corporation; but he says: "Although they are such servants for general purposes they are not so for the purposes of operations and examinations by the medical officers . . . . 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 . . . . . the nurses . . . 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." Then he says: "The contract of the hospital is not to nurse during the operation, but to supply nurses . . I take the test applied (in Hall v. Lees) by Lord Collins, then Master of the Rolls: 'They are not put in his place to do an act which he intended to do for himself.' The nurses . . . are not put in the place of the hospital to do work which the governors of the hospital intended to do themselves because they had not undertaken to operate or assist in operating . . ."

Kennedy, L. J., while holding the defendants not liable, does appear to hold that the hospital "by the admission of the patient to enjoy in the hospital the gratuitous benefit of its care" does not undertake that the nurses shall use proper care; but this is far from saying that in an express agreement for nursing, the contract is only to supply a competent nurse.

Cozens-Hardy, M. R., agrees in the result.

It will be seen that this case does not carry us further when considered in relation to its facts; one Lord Justice confines his remarks to the operating room, while the remarks of the other are made on the case of a person coming to a hospital solely to be examined (and consequently not expecting to be out of the operating theatre or to receive nursing) without any special contract. The expressions so made use of are 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.

The duties of the nurse when the default occurred in the present case 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," "with everything in order," as the Matron swears.

I find nothing helpful in the cases referred to in Taylor's Medical Jurisprudence, 6th Ed., Vol. 1, pp. 87 sqq.

The Irish cases are not helpful. In Dunbar v. Guardians Ardee Union (1897),

2 Ir. 76, the son of the plaintiff was a patient in the Workhouse Hospital of the defendants, Poor Law Guardians; his death was caused—at least accelerated—by neglect to provide him as a patient with the care and attention which he required. The mother sued under Lord Campbell's Act, but the action was dismissed.

In that case the nurse did all she could, but the master and perhaps the porter failed to do their duty, whereby the patient escaped from the hospital and suffered severely from exposure. The Court at the trial dismissed the action; this was affirmed by the Exchequer Division, and the plaintiff took the case to the Court of Appeal. That Court approved Livingston v. Guardians of the Lurgan Union, I. R. 2 C. L. 202, that Guardians are answerable to their patients for the wrongful acts and apparently the negligently injurious acts of those acting under their orders or in their behalf; but held that on the proper construction of the Statute of 1838, The Irish Poor Relief Act (1 & 2 Vict. c. 56) the ministerial work of poor law relief is intrusted to officers whose *status* is recognized as to some degree independent of the Guardians and who are rather part of the system controlled by the commissioners than servants or agents of the Guardians, discharging duties which primarily fall upon the Guardians themselves. To paraphrase the decision—the duty of the Guardians is not to care for the poor but to appoint officers to do so.

The Court approved a former case of Brennan v. Limerick Guardians, 2 L. R. Ir. 42, which decided that in such cases the Guardians were not liable because they had done their own duty. All they were required by the statute to do was to appoint the officers.

The same principle is laid down in a case not in other respects applicable, O'Neill v. Waterford County Council, 1914, 2 Ir. R. 41, same case in appeal 495.

The Scottish case of Foote v. Directors of Greenock Hospital, 1912, Sess. Cas. 69, is next to be considered. The plaintiff had her leg broken and was advised by her doctor to go into the Greenock Infirmary "in order to have the advantage of the medical appliance there." She went in as a paying patient but without any special contract; the house surgeons it was alleged treated her in an unskilful and negligent manner to her great physical and pecuniary loss and injury. She sued the hospital but the Court held she could not succeed, as in the absence of a special contract the hospital undertook to furnish to the public the services of competent medical and surgical practitioners, and nothing more. It is pointed out that the board had no control over the doctors and could not interfere with them except to discharge them. To paraphrase the language in Hall v. Lees, what the defendants undertook to do was not to treat the plaintiff through the agency of the doctors or their servants but merely to procure for her duly qualified doctors. Had there been a special contract to treat her, as in our case to nurse the plaintiff, the case would be in my opinion wholly different.

The American cases are not few; some of them will be mentioned.

In Benton v. Trustees Boston City Hospital (1885), 140 Mass. 13, the trustees of the hospital were held not liable for the negligence of the superintendent of the hospital who left the stairs unsafe. The Court held (1) that the defendants were but the managing agents of the city in maintaining the hospital. This view is quite in accord with our law and is sufficient to dispose of the case; Ridgeway v. Toronto (1878), 28 U. C. C. P. 574; McDougall v. Windsor Water Commissioners (1899), 27 A. R. 566; 31 S.

C. R. 326. The Massachusetts Court, however, goes further and holds (2) that the city would not be liable, and (3) consequently the trustees could not be. The former of these conclusions is to be found in very many of the American decisions and it is based upon the principle which is laid down in Halliday v. St. Leonard (1861), 11 C. B. N. S. 192; 30 L. J. C. P. 361; 4 L. T. 406; 8 Jur. N. S. 79; 9. W. R. 694. It may be thus stated (substantially in the words of the head note in 11 C. B. N. S.): "Persons intrusted with the performance of a public duty, discharging it gratuitously and being personally guilty of no negligence or default, are not responsible for an injury sustained by an individual through the negligence of servants employed by or under them." This was supposed to be the law of England, but it received its quietus in Mersey Docks Trustees v. Gibbs (1866), L. R. 1 E. & I. 119; 11 H. L. C. 723. See also Freeman v. Canterbury Corporation (1871), L. R. 6 A. C. 217; Hillyer v. St. Bartholomew's Hospital, 1909, 2 K. B. 830 *ut supra*.

In Massachusetts this assumed principle was applied to a city in Hill v. Boston (1877), 122 Mass. 344, the *locus classicus* in which the earlier cases are reviewed.

Findley v. Salem (1883), 137 Mass. 171, decides that the exemption extends to acts in the discretion of the city and is not confined to acts done in performance of a duty, statutory or otherwise.

Then an offshoot from this doctrine, logically distinct but analogous, is the theory that where any individual or corporation carries on any undertaking for the benefit of the public with funds mainly derived from public and (or) private charity held in trust for the purposes of the undertaking he or it cannot be held liable for the negligence of servants selected with due care. This is laid down in McDonald v. Massachusetts General Hospital (1876), 120 Mass. 432.

I do not further investigate the decisions in Massachusetts as the law there is not the same as ours.

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Cunningham v. The Sheltering Arms (1909), 119 N. Y. Supp. 1033, shows that it is the law of New York that "a charitable institution from which no financial benefit accrues to the directors or organizers is not liable to a recipient of its charity (for damages) resulting from the negligence of one employed in furtherance of its objects provided due care is exercised in selecting the employee." But even here the absence of a special contract is of importance; the Court refers to Ward v. St. Vincent's Hospital, 50 N. Y. Supp. 466; 39 App. Div. 624; 65 App. Div. 64; 78 App. Div. 317. That was a case of a patient making "an express contract whereby the defendants agreed to furnish her a skilled, competent and trained nurse" (57 N. Y. Supp. 784). She was furnished "a mere pupil in the defendants' training school not a trained nurse in the sense of being a graduate, having studied only nine months." The nurse while the plaintiff was unconscious applied an unprotected rubber bag containing very hot water to the patient's leg and caused serious injury, and an action was brought against the hospital. The trial Judge held that the action was in tort (as it would undoubtedly have been had it been brought against the nurse) and that there was no breach of duty on the part of the hospital; he accordingly dismissed the action and his decision was affirmed by the Supreme Court (50 N. Y. Supp. 466). On appeal the Appellate Division held that the action against the hospital was in contract, i. e. the contract to supply a skilled, competent and trained nurse and that, while one act of negligence would not necessarily

prove the nurse not to be such, a jury might infer that this act of negligence was attributable to her inexperience and lack of skill. A new trial was ordered. On the new trial the plaintiff had a verdict for $10,000.00 but the trial Judge refused to charge the jury that the defendants were not bound to assign to the plaintiff the best nurse in the hospital but only a nurse ordinarily well trained and ordinarily competent and skilful; and the unfortunate plaintiff, the flesh on whose leg had been "literally cooked to the bone," had to have another trial; 65 App. Div. 64. This time the trial Judge made another mistake by ruling out evidence and the verdict of $19,420.00 was set aside (1903), 78 App. Div. 317. I do not find any report of the next trial if there was one. Perhaps the plaintiff died or despaired of a trial without the Judge making a mistake or possibly the hospital paid up. At all events there is nothing in that case of use in the present. It was not a contract for nursing which was in question there but a contract to supply a particular kind of nurse.

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[At this point a portion of the judgment, the omission of which is made necessary by lack of space, sets forth that the "trust fund" theory, which exempts hospitals from liability for the acts of its servants, is in force in Pennsylvania, Ohio, Maryland, and Michigan.]

The most recent American case I have seen is one which eluded the vigilance of the diligent counsel but was quoted and discussed during the argument. It is in the Supreme Court of Alabama, Tucker v. Mobile Infirmary Ass'n (1915), 68 Sou. Rep. 4, which if I may say so without presumption contains a very valuable discussion of the law. There the plaintiff alleged that she went into the defendants' hospital and the "defendant undertook and promised to properly nurse and care for plaintiff preparatory to and during a surgical operation . . and thereafter until she had sufficiently recovered to leave" it; that "by reason of the negligence of one of the nurses employed by the defendant . . . after she had been operated on . . . plaintiff was badly scalded with boiling water both internally and externally." The defendant pleaded that it was a charitable institution, not operated for profit, having no stock and no stockholders, and exercised due care in the selection and retention of the nurse complained of and had no notice or knowledge of her incompetency. To this the plaintiff demurred; the demurrers were overruled, and the plaintiff appealed to the Supreme Court. The Court, Anderson, C. J., Gardner, McClellan, Sayre, Somerville and Thomas, JJ., (Mayfield, J., dissenting) held (1) that there was no difference between the case of a patient with an express and an implied contract, citing Duncan v. St. Luke Hospital, 113 App. Div. 68; (2) that a charitable hospital is in no higher position than any other corporation in respect of liability for the negligence of its servants, the "charitable trusts" theory, though supported by a great weight of authority in the American Courts, being untenable. The demurrers then were allowed. Most of the cases of moment are cited, and many discussed, in the very able judgment of Gardner, J. (speaking for the majority of the Court) and Mayfield, J. dissenting. I unreservedly approve the conclusions of the majority of the Court.

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In Everton v. Western Hospital (an Ontario case), there was no special contract, the patient being admitted in the usual way to the Western Hospital, Toronto. He was a somewhat dissipated person, and was suffering from pneumonia. He was placed in a ward on the top flat

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.

Whether such refusal is reasonable or not is a question to be decided upon all the circumstances of the case." This rule was not questioned by the Divisional Court or the Court of Appeal; 25 O. L. R. 137; 27 O. L. R. 122.

Dr. Reddick, her own physician, who had attended her before and after being in the hospital, cannot do more than say the operation might do good and might do harm. He does not seem to have advised it. In these circumstances it cannot be said that the condition of the patient is due to unreasonable refusal to undergo the operation. Were I permitted to draw on my own experience I could tell of a patient who refused to allow his arm to be amputated—the surgeon advising the operation but saying he could not be quite certain that it would do good. The patient made an excellent recovery, with the arm almost as useful as before.

Doctor Reddick's prognosis I give in his own words:

"Q. Has she recovered yet?

A. No.

Q. What is your opinion as to whether she will ever recover?

A. Very doubtful, to my mind, that she won't always be a sufferer more or less—perhaps get some better."

Little evidence is given of pecuniary damage. Perhaps most of such damage is that of the plaintiff's husband, who is not a party to this action, and whom we must leave to bring his own action if so advised.

But the pain and disabi'ity, past, present and future, call for a substantial assessment of damages; and with every regard for the defendants' position as a most estimable charity, I think the sum of $900 cannot be regarded as excessive.

The appeal should be allowed with costs, and judgment entered for the plaintiff for the sum of $900 and costs.

It may not be amiss to add a few statements:

(1) We proceed on the ground of an express contract to nurse, and express no opinion as to the law in the ordinary case of a patient entering the hospital without such contract.

(2) As a corollary of the above (while we think an implied contract has the same effect as an express contract in the same terms) we express no opinion as to the contract implied from a patient entering a hospital.

(3) We express no opinion as to what the result would have been had the negligence occurred in the operating theatre.

(4) None of the cases in any of the jurisdictions expresses any doubt that, whether the hospital is or is not, the nurse is liable for her own negligence in a civil action in tort; in some cases also criminally for an assault, simple or aggravated, and in fatal cases for manslaughter.

(5) There is no hardship in the present decision. The hospital can protect itself as was done in Hall v. Lees and in some of the American cases.