CIVIL LIABILITY ARISING OUT OF HOSPITAL TREATMENT*

By the Hon. Mr. Justice Lowe, a Judge of the Supreme Court of Victoria.

A Meeting of members of the Medico-Legal Society of Victoria was held at Albert Street, East Melbourne, on Friday, 11th December, 1937, at 8.30 p.m. Dr. Kingsley Norris occupied the chair, and there was a large attendance of members.

Chairman: Gentlemen, the privilege of appearing before Mr. Justice Lowe so far has been confined largely to the legal members of this Society. It is sometimes, however, the privilege of the medical members to appear before His Honour. To-night His Honour adopts a new rôle, and now appears before us.

Mr. Justice Lowe said:—Gentlemen, I propose in the first instance to indicate the scope of this paper since the title chosen literally covers some matters with which I shall deal and others with which I shall only deal in passing. From the very title it is apparent that any question of criminal law is excluded; nor am I concerned with matters which are merely procedural. This paper assumes that an action has been properly framed and raises some question of civil liability. The paper is not particularly concerned with questions of liability of the hospital arising out of proceedings which are preliminary to the treatment of the patient; although, in passing, and for the sake of completeness of treatment, I shall advert to some of such matters. Nor am I concerned in this paper with the liability of the patient to the hospital or the surgeon by reason of the patient's treatment in a hospital.

The particular concern of this paper is to discuss civil liability to the patient arising out of his treatment in hospital. That liability may arise through negligence or through unauthorized action. It may be the liability of

*Editorial Note.—See upon this subject "Hospitals and Trained Nurses," by Professor A. L. Goodhart (1938), 54, *L.Q.R.*, 553; *Henson v. Perth Hospital and Campbell* (1939), 12, *A.L.J.*, 480; *Mahon v. Osborne* (1939), 1 *All E.R.*, 535.

the physician or of the surgeon; it may be the liability of the hospital, or it may be the liability of the nurses. It is, of course, clear on reflection that negligence in the treatment of a patient may be due to the actions or omissions of persons other than the physician or surgeon on the one hand and of the nurses on the other hand; but as to such actions or omissions no particular problem, I think, is peculiar to hospital treatment.

After an operation a swab or a needle may have been left in the patient's body; a hot bath may have been negligently administered; a hot water bottle may have been so applied as to scald the patient; X-ray or ultra-violet ray treatment may burn the patient; a limb may have been amputated or an organ removed under an anaesthetic without the patient's consent. These are the kinds of actions or omissions I propose to consider as the basis of legal liability. I shall also consider what are the criteria to determine upon whom the liability rests in such cases.

Some experience as a member of the Medico-Legal Society has led me to think that those problems may present different aspects to the medical and to the legal members. I appreciate that most of the medical members will be more interested in having a categorical statement of what is the liability of the physician or the surgeon in given circumstances, while some of the legal members, at any rate, will be at least as much interested in considering the grounds of liability in such circumstances. I shall endeavour as far as I can to satisfy both. But before I reach these questions there are one or two preliminary matters to be considered. I want to emphasise that any statement of law is made in relation to ascertained facts. Most of the difficulties of medical men arise in the region of fact. When the medical man seeks advice he gives the facts as he understands them. Before the court starts to apply the law it must ascertain the facts, and it may determine them differently from what the medical man believes to be the case.

In court proceedings conflicts of fact constantly occur, and conflicting opinions are given in evidence and the con-

flicts must be resolved as best the court can. None of us, whether judges or jurymen, are free from prejudice or prepossession or are of perfect judgment, and so long as medical men differ so long will it occur that the legal tribunal may find the facts in a way that some medical men believe to be wrong. Such a result does not fairly, I think, afford a ground of criticism of the law so much as a criticism of human nature.

Again, it sometimes happens that when an action is threatened against a medical man, and he seeks legal advice, he is advised to compromise the claim because of the injury which may possibly be feared from publicity even if the claim is contested successfully in Court. The medical man may feel in such a case that he has been unfairly treated; but, again I suggest that the true criticism is not so much one to be directed against the law as against the imperfection of our common human nature.

Those matters being out of the way, let me now come to the particular subject matter of this paper. Let me assume that the patient is minded to enter a hospital, and that the hospital is available for the patient's purpose. What are the duties which rest on the hospital, on the medical man, and on the nurses, and what the liability which arises from breach of these duties? It will be convenient to consider the position of each in turn.

The Hospital

Let me take first the case of the hospital. A moment's consideration will show that those who manage hospitals are, as to some of their relations, no differently placed from those who conduct any other business premises. Whether the hospital be a public hospital or a private hospital (and I shall have something to say as to the distinction later on), the ordinary duties which rest upon those who conduct business premises rest upon the managers of hospitals. Where the occupier of premises invites another to come upon those premises on business in which he and the person invited have a common interest, a duty rests upon the invitor to

use reasonable care to prevent damage from unusual danger of which he knows or ought to know. A recent case in England exemplifies the application of this duty to the governors of a hospital. The mother of a paying patient, in a private ward of the Westminster Hospital visited him, and having seen her son, went into another room to interview the consulting surgeon about him. The floor of this room was covered with highly polished linoleum and when the lady put her foot on a mat resting on this floor the mat suddenly slipped and she fell on her side and broke her left thigh. She brought an action against the Governors of the Westminster Hospital claiming damages for their negligence resulting in injuries to her, and recovered a sum of £2826 damages for which judgment was entered, and the verdict was upheld on appeal. (*Weigall v. Westminster Hospital (1936), 1 All. E.R., p. 232.*)

A somewhat different application of this principle is disclosed by the facts of an action brought in 1935. In that case the plaintiff, a lady expecting to be confined, made arrangements with the authorities conducting a maternity home to enter it for the purpose of her confinement. Shortly prior to her entering into the hospital a case of puerperal fever had occurred. The proper medical officer gave directions for disinfecting the wards, clothes, and so forth, and the staff had had disinfectant baths and were using gargles. No mention was made to the plaintiff of the fact that puerperal fever had recently occurred in the hospital, and the plaintiff entered the hospital, was duly delivered of her child, and three days later developed symptoms which were diagnosed as those of puerperal fever. In due course she brought an action against the County Council which administered the hospital under the provisions of an Act of Parliament, claiming damages both for breach of contract and for negligence on the part of the medical officers and the matron in failing to inform her of the fact that there had been a case of puerperal fever in the hospital a few days before her admission. She recovered £750 damages, a decision which was ultimately upheld in the House of Lords.

It will be convenient to cite a short passage from the opinion of one of the Judges in the House of Lords. He says: "The question was one of the safety of the premises for the admission of the public, and while the appellants may well say that they could not themselves as laymen know whether there was any danger of which intending inmates should be warned, nevertheless I do not think that they can escape responsibility for the negligently mistaken view of their medical officers and matron on this point, any more than they could escape responsibility for a dangerous state of the drains in the home merely because their sanitary inspector had reported them to be in order. The appellants have a duty to take by themselves or by their officers all proper steps to keep the premises safe for the admission of the public, and if they have not done so, either to exclude the public altogether or at least to warn them of the danger." (*Per Lord Macmillan, Lindsay County Council v. Mary Marshall (1937) A.C. 97 at p. 119*).

I mention these two cases rather by the way and I come now to a case of rather a different kind. Where it is sought to make a hospital liable to damages the ground of liability alleged may be a breach of duty resting directly on the hospital management itself or a breach of duty imputed to the hospital by reason of the breach of duty of some servant or agent of the hospital.

The first class of case is indicated in a decision of the Privy Council in 1934. A case had come on appeal from the Court of Appeal of British Columbia. An action for damages for negligence had been brought by a patient who had been admitted for reward into the Vancouver General Hospital. The patient was suffering from diphtheria and was ultimately discharged as cured. Nine days after her discharge she developed smallpox. Investigation disclosed that smallpox patients had been placed in rooms on the same floor as the plaintiff, and that the plaintiff had been attended by the nurses who attended to the smallpox patients. The plaintiff complained that the hospital authorities were negligent in placing the smallpox patients in

close proximity to her and that they were also negligent in allowing her to be attended by nurses who also nursed the smallpox patients. The case made, it will be seen, was one of negligence in the hospital authorities themselves — "a case" as it put in the judgment—"not of vicarious but of direct responsibility." The plaintiff succeeded in the British Columbia Courts, but failed in the Privy Council for the reason that the evidence in the case established that the hospital authorities had in both the respects charged acted in accordance with general and approved practice. The reasoning of the judgment, however, establishes that had there been evidence that the placing of the smallpox and diphtheria patients in juxtaposition to each other or the attendance upon the plaintiff of nurses who had also nursed smallpox patients was not in accordance with general practice, the verdict might have been upheld.

The ground taken by the Privy Council in this matter is but a special application of the law of negligence to the particular facts before it, as is illustrated by the decision of the Supreme Court of Pennsylvania approved with a qualification in the High Court—"No man is held by law to a higher degree of skill than a fair average of his profession or trade" and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which "liability shall be imposed." (*Titus v. Bradford,* etc. *Railroad Company, 20 American State Reports 554*). The qualification added by the High Court is that the "ordinary way" is to be taken as meaning the ordinary way as shown by experience in general not to be unsafe. (*Bellambi Coal Co. Ltd. v. Murray 9 C.L.R. at p. 580*). The Supreme Court of the Irish Free State has held that the hospital may also be guilty of negligence and by reason thereof liable to pay damages because of its failure to provide a sufficient staff of nurses (*Mulrennan v. County*

of Offaly (1930) Ir. R. 345). The plaintiff in this case was a paying patient and it is not clear whether the same result would follow where the patient was treated gratuitously.

The most usual case, however, in which the hospital is sought to be made liable is that in which the plaintiff relies upon some act or omission of a surgeon or physician or of a nurse, and it may well be in regard to this type of imputed liability a distinction is to be made between the case of a public hospital and a private hospital. The typical public hospital is one supported to some extent by the contributions of subscribers or out of public funds, and administered by a committee or governors. The private hospital, on the other hand, is generally a proprietary business owned or administered by a surgeon or physician, or by a matron. Imputed liability in these cases almost invariably rests upon the allegation that there is a relation of master and servant existing between the hospital and the person whose act or omission is in question. It has been said on high authority that "the legal duty which the hospital authority undertakes towards a patient to whom it gives the privileges of skilled surgical and nursing aid within its walls is an inference of law from the facts" (*per Kennedy L.J. in Hillyer's Case (infra)*), and it may well be that the inference to be drawn in the case of the private hospital differs from the inference to be drawn in the case of the public hospital. It may be that in the case of the private hospital the undertaking, for example, is not merely to take care to provide a qualified nurse but actually to nurse the patient (*cf. Hall v. Lees (1904) 2 K.B. 602*). It may well result that in the case of the public hospital, no relationship of master and servant can be established, whereas in the case of the private hospital it may be shown to exist.

With this introduction, I pass at once to consider the case of the public hospital. In 1909 *Kennedy L.J.* in the case of *Hillyer v. The Governors of St. Bartholomew's Hospital* ((*1909*) *2 K.B. at p. 829*), used language which has consistently since that time been regarded as an authoritative

exposition of the position of a public hospital in relation to its surgeons, physicians, and nurses. He said:—"In my view the duty which the law implies in the relation of a 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 while 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 circumstances 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 or propriety and observance of them by the servants."

Members will note the distinction made by the Lord Justice between matters of professional skill and merely min-

isterial or administrative duties. The distinction is one to which I shall have to recur.

The case in which this language was used was one in which the plaintiff sought to recover damages against the governors of a hospital for injuries alleged to have been caused to him during an operation by the negligence of some member of the hospital staff. He had entered St. Bartholomew's Hospital for the purpose of being medically examined under an anaesthetic by Mr. Charles Barrett-Lockwood, a consulting surgeon of eminence. He had been placed on the operating table in such a position that his arms were allowed to hang over its sides. His left arm came into contact with a hot water tin projecting from beneath the table, and the upper part of it was burned and the inner part of his right arm was bruised by the operator or by some other person pressing against it during the operation. Traumatic neuritis and paralysis of both arms had developed. Applying the principles laid down by *Kennedy L.J.* it was held that action was not maintainable against the hospital.

The matter may be further illustrated by an earlier case in 1906. (*Evans v. The Mayor of Liverpool (1906), 1 K.B. 160*). There, the local authority provided a district hospital for the reception of persons suffering from infectious diseases. The hospital appointed as a visiting physician a competent medical practitioner. The plaintiff's son was treated in the hospital for a mild attack of scarlet fever and was ultimately discharged by the visiting physician whilst still in an infectious condition, and under circumstances which a jury found to amount to a want of reasonable skill and care on his part in and about the discharge. After the boy's return home he communicated the disease to three other children of the plaintiff. The plaintiff sued the defendants to recover the expense to which he had been put in regard to the illness of his other children owing to the premature discharge of his son from the hospital by the visiting physician. It was held that the plaintiff was not entitled to recover, for the legal obligation of the defendants only extended to the provision of reasonably skilled and

competent medical attendance for the patient, which they had discharged, and that there was no absolute undertaking or obligation on their part that no patient should be discharged by the visiting physician whilst still in a condition which might cause infection. The learned Judge, *Walton J.*, said:—

"In my opinion (the defendant) undertook the duties of persons who manage and carry on the business of a hospital; that is the duties of persons who undertake to manage and carry on the business of a hospital with all skill and care . . . They do not undertake the duties of medical men or to give medical advice, but they do undertake that the patient in their hospital shall have competent medical advice and assistance. . . . Assuming that he (the doctor) made a mistake, even a negligent mistake, I do not think that the defendants are liable for its consequences. They have done all that the parent could have done had he been able to have his son treated in his own house. He could not have done more than provide a proper home for the boy and provide nurses and good medical attendance. The defendants have not failed in any of those respects, and I think they are not liable for the mistake, if there was a mistake, of Dr. Archer."

He later added:—

"What the doctor really does is to advise the corporation and he gives his opinion as a medical man. If the defendants have employed a competent skilful and duly qualified medical man they have done all that it was possible for them to do. They cannot control his opinion in any kind of way. Indeed, it would be wrong for them to attempt to do so. All they can do is to employ a competent medical man and to act upon his opinion and discharge the patient."

To this citation, I may add a reference to the Scottish case, *Reidford v. Aberdeen* (*(1933) Sc. Session Cases, p. 276*). There the Lord President used this language—

"It follows that the managers of a hospital such as this cannot be made liable for the professional negligence, assum-

ing it occurs, of the doctors or surgeons whom they employ to give their professional services to the inmates of the hospital. Within the sphere of those professional services there is no relation of master and servant between the managers and the professional man, and the managers can neither give him orders nor control him within the limits of the performance of his professional skilled duty. If there is an action it is against the negligent doctor; but that is a very different thing." (*p. 280*).

This, though a Scottish case, is, I think, in accordance with English law. A word of caution must be added in dealing with Scottish cases and South African cases, both of which appear in medical journals. English law is based mainly on the common law. Scottish law rests primarily on the Roman law, and South African law is based on the Roman-Dutch law; but where I cite them in this paper, I think that the Scottish and South African decisions accord in result with those reached by the common law, though the result may in some instances be arrived at by different principles.

The distinction made in the opinion of *Kennedy L.J.* between the skilled services of the professional staff and the purely ministerial or administrative duties of the nurses is one which has led to some difficulty of application, and a distressing difference of opinion has occurred between New Zealand and Canada on the one hand, and England and Scotland on the other hand, as to what constitutes ministerial and administrative duties. The difference is best illustrated by setting out, as shortly as possible, the facts of the cases in which the question arose and the decisions given.

In 1927 a patient was brought to a public hospital in Canada to be operated on for a ruptured appendix. The patient's family physician, assisted by his partner, performed the operation, and the anaesthetic was administered by a third physician. Two qualified nurses were in attendance. As part of the treatment, and to combat the shock of the operation, the bed in which the patient was to be

placed after the operation required to be heated, and for that purpose two rubber hot water bottles placed inside flannel bags were filled in the kitchen by one of the nurses, the water according to her statement being "quite hot." The patient was removed from the operating table and put in the bed which was placed in the hall outside. The next morning when he recovered consciousness it was discovered that his left leg had been severely burned near the ankle by one of those hot water bottles which was found lying next to his skin, and inside the blanket which was still tucked around his legs and apparently had not been disturbed during the night. The patient sued the hospital for damages. The trial Judge found that the injury had been caused through the negligence of the nurse. The majority of the Judges in the Court of Appeal —the Supreme Court of Canada — regarded the negligence of the nurse in her capacity as a servant of the hospital in a matter of ministerial ward duty if not of mere routine. They regarded the obligation undertaken by the hospital authority as an obligation not merely to supply qualified nurses, but to nurse the plaintiff, and that there had been a breach of duty in this respect. Two Judges agreed in a powerful dissent from this view, holding that assuming there were negligence in the nurses, it was the negligence of skilled persons who, in respect of their action or omission, were not at the time servants of the hospital Board.

A similar conclusion to that of the majority of the Canadian Court was arrived at in New Zealand in the case of *Logan v. Waitaki Hospital Board ((1935) N.Z. Law Reports, p. 385)*. In that case the patient collapsed under an operation performed in the Waitaki Hospital and had to be moved out of the theatre into a ward. The operating surgeon gave instructions to the house surgeon to apply usual restorative measures including the application of heat. The house surgeon decided that the appellant, who was unconscious, should be placed under an electrical radiant-heat cradle, a common device to keep up the heat

of the body, and left general instructions noted in the ward book as "Hot bath on; watch carefully and see that patient does not get too hot," and later "Bed temperature to be kept between 90 and 100 degrees, watch the heater very carefully." No one was told off to watch or sit by the patient continuously, and during the night the appellant was left for intervals of 20 minutes to half an hour without observation. A burn on the knee resulted, necessitating amputation of the patient's leg. It was held by the trial judge that the burn was due to the negligence of the nurse in the care and treatment of the patient while his temperature was being kept up by means of the heat cradle. Judgment was ultimately given for the plaintiff for £1350 damages. In the Court of Appeal two of the learned judges who formed the majority thought that the nurses in attendance on the patient were merely using routine methods of keeping him warm, and were, during the critical period without control from the operating surgeon or house surgeon, and were, therefore, servants of the hospital Board, which was liable for their negligence. The decision was dissented from in a powerful judgment by the Chief Justice.

In Scotland, on the other hand, the case already cited of *Reidford v. Aberdeen* expressly stated that "there is no difference in principle between the relations of the managers with a competent medical or surgical staff and their relations with the competent nursing staff. The qualified nurse in attendance on a medical or surgical case is no more under the orders of the managers than the doctors or surgeons. She is no doubt bound by the nature of her professional functions to carry out the doctor's or surgeon's orders, but again that is a very different matter."

The Scottish Courts arrived at a similar conclusion in the case of *Anderson v. Glasgow Royal Infirmary ((1932) Sc. Session Cases 245)*. There the director of the electrical department of the Infirmary prescribed ultra-violet ray treatment for a patient. He did not specify the time for which the patient was to be exposed, but the regular period for a first exposure was ten minutes. The first exposure

was supervised by a nurse, no doctor being present at the time. The patient was burned by the rays and she alleged that her injuries were due to the negligence of the nurse in allowing her to be exposed for 45 minutes. All the members of the Court were of opinion that the hospital did not undertake to treat patients, but merely undertook to procure for them the services of persons of skill to give them treatment, and that accordingly they were not responsible for negligent treatment by a duly qualified member of the staff.

In England the case of *Dryden v. Surrey C.C.* (referred to later) establishes that hospitals are not liable for the negligence of nurses in carrying out their skilled duties. Finlay J. in giving his judgment quotes with approval an earlier decision of *Horridge J.* in this language—

"The duties of doctors and nurses are the duties of skilled people to be carried out by skilled people, and the action of doctors and nurses cannot be controlled in my opinion by members of the committee who do not for one moment contend that they have the knowledge or the ability to perform those duties themselves. They do not seem to me to be there as the servants of the committee at all in the sense that the committee can control their method of carrying out their work. That being so, they are not responsible for any negligence of which they may be guilty in the way in which they carry out their work."

Strangways-Lesmere v. Clayton cited below is a further illustration of the same view.

In view of this conflict of opinion it is impossible to speak with certainty of the position here.

In considering the distinction made by *Kennedy L.J.* between skilled duties and purely ministerial or administrative or routine duties, some help may be got by reflecting upon the various stages of the nurses' work. Some of the nurses' duties are obviously to be performed in preparation for an operation or treatment. Others are performed in the course of the operation or treatment itself, and still others after the operation has concluded. The second stage

almost certainly involves conduct on the part of the nurses for which the hospital will not be liable. The case is not so clear in dealing with the pre-operation and the post-operation stages. It may well be that in each of those stages some of the actions of the nurses are of a merely routine or administrative nature. In such cases it may well be that the hospital is subject to liability for their acts or omissions, but no general guidance is possible in relation to these matters. Each case must be determined on the particular facts.

It will have been observed that the Courts which have held the hospital liable for the negligence of the nurse have expressed the view that the hospital has undertaken not merely to take all reasonable care to supply competent nurses, but actually to nurse the patient. In the last analysis their view may depend on the terms of the hospital's charter or the contract into which it has actually entered with the patient. We are familiar in these days with many printed documents containing conditions excluding liability, e.g., steamship tickets, and even dry cleaner's dockets. These when accepted by the other party constitute the contract. Hospitals which wish to exempt themselves from liability for the negligence of nurses may by this means find a method of relief. A properly framed condition on the admission card, provided the hospital has taken reasonable steps to bring it to the notice of the patient, may make the position in this regard safe for the hospital.

THE DOCTOR

The citation made from the Scottish case *Reidford v. Aberdeen* refers to the possible personal liability of the doctor or surgeon. This leads naturally to the consideration of the liability of the doctor. Where the doctor—whether surgeon or physician—has been negligent in his treatment and damage results to the patient, the doctor is liable to the patient. It may be broadly stated that the wrongdoer himself may always be made liable in damages; and he will be held to be negligent if in the matter he has undertaken

he falls below the average skill displayed in such matters by the profession or fails to exercise reasonable care. Let me illustrate from a recent case in England in 1936, *Dryden v. Surrey C.C.*, and *Stewart ((1936) 2 All E.L.R. p. 535)*. Plaintiff had entered the Surrey C.C. Hospital for a minor operation. After she left the hospital she complained of pains and upon examination by her doctor she was found to be suffering from pyelitis, and a wad of surgical gauze was found in and removed from her body. She brought an action against the County Council and the doctor for breach of duty and negligence. The trial Judge found that the doctor had negligently left the gauze in the plaintiff's body and he was held liable in damages. On principles which I have already indicated the County Council was held not to be liable. It is not necessary, I think, to illustrate further cases of the doctor's liability for personal negligence.

Operations Without Authority:

I have still to consider the case of an operation performed without the consent of the patient. Every operation involves some interference with the person of the patient, no matter how skilfully it be performed, but in general such interference is not unlawful because it is made with the consent of the patient. Without such consent, express or implied, the operation would constitute a trespass, an unlawful act of violence upon the person of another. The question in practice is only likely to arise (1) where for example during an operation for which consent has been obtained and when it is impossible to consult the patient the surgeon forms the opinion that in order to save the patient's life some extension of the operation is necessary and proceeds to remove some limb or organ; or (2) when the surgeon is called in to attend an unconscious patient.

A Canadian case affords the example of a surgeon operating for hernia and during the operation deciding to remove and removing one of the patient's testicles. The latter, on

recovery, not unnaturally, sued the surgeon for damages. (*Marshall v. Curry (1933) 3 D.L.R. 260*).

It has been, I believe, the accepted view of English law so far that for an operation performed without the patient's consent he may recover damages. But two observations may be added. If indeed the surgeon's view that the further operation was necessary to save the patient's life be accepted, it is difficult to see what damage the patient has sustained by the operation which saves his life. The second is that Courts would, I think, readily imply a consent where the patient has submitted to the original operation and has not expressly forbidden the extension which the surgeon has made. This is illustrated by the case of *Bratty v. Cullingworth,* noted in the *British Medical Journal 21st Nov., 1896*—as quoted in *Halsbury's Laws of England (1st Edn.) Vol. 20 p. 333*: The plaintiff underwent an operation for an ovarian cyst. Before the operation she told the defendant, a surgeon who was to operate, that she would not consent to the removal of both ovaries, as she was going to be married, saying "If you find both ovaries diseased you must remove neither." He replied: "You may be sure I shall not remove anything I can help." The right ovary was found to be cystic and was removed. The left was found to be in an early stage of the same process, and the defendant forming the opinion that it was necessary to remove it in order to save the patient's life did so remove it. She brought an action for negligence. In summing up *Hawkins J. observed*—

"If a medical man, with a desire to do his best for the patient, undertakes an operation, I should think it is a humane thing for him to do everything in his power to remove the mischief, provided that he has no definite instructions not to operate. There was here no question as to the propriety of the operation, and the defendant always told the plaintiff she must give him a free hand. If you think tacit consent was given you must find for the defendant." The jury found for the defendant.

The difficulty of obtaining consent where the patient is

unconscious is obvious. This consideration has led Courts in some jurisdictions to seek some other principle of justification for the surgeon's actions. In Minnesota (U.S.A.) the Court has said:—

"Without stopping to point out the fallaciousness of the premise that a surgical operation can be contracted for or performed according to plans and specifications, it is enough to say that the entire foundation of the supposed analogy is swept away by the surgical employment of anaesthesia which renders the patient unable to consent at the very time that the rule of the common law required that his consent be obtained. . . . . To meet this fundamental change in the condition of the patient it is imperative that the law shall in his interest raise up some one to act for him—in a word, to represent him in those matters affecting his welfare concerning which he cannot act for himself because of a condition that has become an essential part of the operation. . . .

"The conclusion therefore to which we are led is that when a person has selected a surgeon to operate upon him and has appointed no other person to represent him during the period of unconsciousness that constitutes a part of such operation, the law will by implication constitute such surgeon the representative *pro hac vice* of his patient and will, within the scope to which such implication applies, cast upon him the responsibility of so acting in the interest of his patient, that the latter shall receive the full benefit of that professional judgment and skill, to which he is legally entitled.

"Such implication affords no license to the surgeon to operate upon a patient against his will or by subterfuge, or to perform upon him any operation of a sort different from that to which he had consented, or that involved risks and results of a kind not contemplated . . . .

"If the surgeon transcends his implied authority as thus defined the question of his skill and wisdom is irrelevant, since no amount of professional skill can justify the substitution of the will of the surgeon for that of the patient."

But the Chief Justice of Nova Scotia, in a review of the authorities, holds that there is an unreality about this view and expresses his own view exculpating the surgeon:—

"I think it better, instead of resorting to a fiction, to put consent altogether out of the case, where a great emergency which could not be anticipated arises, and to rule that it is the surgeon's duty to act in order to save the life or preserve the health of the patient; and that in the honest execution of that duty he should not be exposed to legal liability. It is, I think, more in conformity with the facts and with reason, to put a surgeon's justification in such cases on the higher ground of duty, as was done in the Quebec cases." (*Marshall v. Curry, supra.*)

Whether this view will be accepted in English or our own Courts remains to be seen and I offer no opinion on its correctness.

Doctor's Liability for the Negligence of His Assistants

I have now to consider whether the doctor is liable for the negligence of nurses and other attendants who may be under his orders during the course of an operation or while the patient is under his treatment. As long ago as 1866 the matter arose in England before *Cockburn C.J.* and a jury. A patient at St. George's hospital alleged that the defendants, who were surgeons, had directed him to be placed in a steam hip bath in which the water was so hot that he was severely scalded. He alleged that the surgeons were present when he was actually forced into and kept in the bath. The Chief Justice directed the jury that "the defendants would not be liable for the negligence of the nurses unless they were near enough to be aware of it and to prevent it," and he added, "No doubt persons who went as patients into hospitals were not to be treated with negligence, but on the other hand medical gentlemen who give their services gratuitously were not to be made liable for negligence for which they were not personally responsible." (*Perionowsky v. Freeman, 4 F. & F. 976.*)

The matter, however, has been squarely raised and

determined in favour of the doctor in more recent cases by the Court of Appeal in New Zealand and by the Appellate Division of the Supreme Court of South Africa. The South African case is *van Wyk v. Lewis,* and the reference is *(1924) App. D.S. Af. 438.* In giving judgment in that case *Innes C.J.* said of a nurse in a public hospital assisting at an operation, "She was not the servant of the respondent. She was under his general control during the operation, but she was also a collaborator to whom, as already pointed out, it was reasonable to entrust the work of counting and checking swabs," and he added, "but the real position is that the respondent undertook an operation in the performance of which he was bound to exercise all reasonable care and skill, and, if it was consistent with the exercise of such care to rely upon the sister to check the swabs, thus setting himself free to devote all his energies to the surgical details of the operation, then he is not liable for her negligence, provided he made all search reasonably possible under the circumstances." *Wassells J.A.* said in the same case:—

"The relation of a hospital sister or nurse in a public hospital to a surgeon operating in that hospital is not that of master and servant, nor is it analogous to such a relationship. The sister or nurse is an independent assistant of the surgeon, though under his control in respect of the operation. In the opinion of the medical profession as disclosed in the evidence, the hospital sister is regarded as an important assistant. She has to prepare the operating theatre, to see that the instruments are sterilized, and that everything is made ready for the operation. She has her nurses under her, and she sees that they do what is required of them . . . It is true that during the actual operation it is the duty of the hospital sister or nurse to do what the doctor requires of them in the same way as it is the duty of an assistant surgeon to act under the principal surgeon's instructions, but it cannot be contended that such an assistant surgeon is the servant of the operating surgeon. The truth is that hospital sisters and nurses form a distinct branch of the hospital. They are members of an allied

profession, and have duties of their own to perform. They are subordinate to the surgeon but they are in no way his servants. The surgeon is not responsible for what the nurse does in the sense that a master is responsible for the acts of his servant. The surgeon does not insure that he will be responsible for every misfeasance of the nurse."

The facts of the New Zealand case are interesting. A surgeon advised a patient to have at the same time two distinct operations and she entered a private hospital for this purpose. In the course of the first operation iodised phenol was used for cauterizing purposes. It was the duty of the assistant sister to remove it after the operation to a safe place. She, however, returned it to a place where stock iodine was kept. The second operation involved by way of preparation the painting of the patient's abdomen with tincture of iodine, but instead iodised phenol was used and the patient badly burned. Negligence of the assistant sister was assumed. Damages were claimed by the patient against the surgeon. The judgment was delivered by *Kennedy J.* and he uses language which, with one qualification which I shall mention as to its application in this State, seems to set out accurately the law in this regard:—

"Under the conditions of modern surgery it is impossible for a surgeon himself to do the whole work involved in an abdominal operation, and he is consulting not his own convenience but the interests of the patient in following the usual course of having the work done by what is called 'a team.' The operating surgeon in truth can only do part of the work, and if an operation is to be completed quickly, the surgeon must be able to rely upon certain work being done by others, and such is the well-established practice. Thus, the preliminary painting, the preparation in the theatre and sterilizing of the instruments, and the final painting are generally performed by the nurses. The theatre sister and the assistant nurses are supplied by the private hospital where the operation is performed, and they have thus independent duties to perform. In the circum-

stances of this case we think the proper inference is that the defendant did not undertake personally to do all the work necessarily involved in the operation including the preliminary painting, changing the position of the patient in the theatre, and the painting prior to the second operation. He must rather have undertaken to perform the operation in the hospital selected and with the appliances there available and with the assistance and co-operation of qualified competent and experienced nurses attached thereto. It is true that he was in supreme control and that he had the right and duty to intervene and did so, but those subject to that control were skilled collaborators with independent duties, and he did not find it necessary nor would he expect to find it necessary to intervene to direct the manner in which they discharged those duties. They were not his delegates in the sense that they were there to do work which he had contracted to do or to have done. They were for general purposes the servants of the hospital, but in the theatre they were subject to his directions. In no sense, then, is it a proper inference from the facts that the doctor undertook personally to carry out that part of an operation which, in practice, falls to the nurses."

The qualification I make is in regard to the sentence, "they were for general purposes the servants of the hospital." Care must be taken not to read into that sentence a necessary liability on the hospital in this State for acts or omissions of the nurses. The subject has been treated already in this paper, and it has been indicated that in relation to the skilled duties of the nurses there is English and Scotch authority for the view that the position is analogous to that of the doctor.

The Nurses

The position which has now been disclosed exempting probably the hospital and certainly the doctor from responsibility for the negligent acts and omissions of the nurse in the performance of her skilled duties does not cover the whole field of liability. There still remains to be

considered the position of the nurse herself. This position I may deal with quite shortly. I have already pointed out, in dealing with the case of the doctor, that broadly speaking the wrongdoer himself is always responsible for the consequences of his wrongdoing. The rule finds another application in the case of the nurse. A very recent illustration is the case of Strangways-Lesmere v. Clayton (1936 2 K.B., p 11). There the plaintiff's wife had been admitted to the Weymouth and District Hospital to undergo an operation. She lost her life owing to an overdose of a dangerous drug administered to her just before the operation by two nurses at the hospital. The house surgeon wrote on the bed card instructions as to the preparation of the patient for the operation. He there stated that six drachms, indicated by a recognized symbol, of paraldehyde were to be administered. He communicated this to the day sister in charge. She gave evidence that she communicated the instruction to another sister. Another nurse came on duty and in the actual event, not 6 drachms, but 6 ounces, of paraldehyde was administered, with the result I have stated. The Judge found that the nurses were guilty of negligence and gave judgment against them for damages. This case illustrates, too, the English view that the negligence of the nurses is not to be imputed to the hospital authorities.

I have now covered the field contemplated in my survey and I leave those matters for your discussion.

DISCUSSION

Dr. Coppel, LL.D.: Mr. Chairman, Mr. Justice Lowe, and Gentlemen: I know that at the close of these discussions it is customary to move a vote of thanks to the lecturer, but I think I shall not be considered presumptuous by beginning the few remarks I wish to make by saying how I personally have been impressed by the paper which we have just listened to. Mr. Justice Lowe has covered with his usual accuracy and thoroughness a field which is of great interest to the medical members of this Society. The details of many of the cases to which he refers are probably of much greater interest to the medical members than to the legal

members of the Society. The problem for the lawyers is for the most part a problem of general principle which does not always emerge very clearly from the facts of the particular case. I myself have found it very difficult to appreciate what is the difference between the routine or administrative duty which is sometimes performed by a nurse in the hospital and that kind of duty which is regarded as one involving professional skill and one which, therefore, in accordance with legal principle, is not to be used as a basis of liability in the hospital authority. One might well have thought, coming to these matters as a layman, that in the last case to which His Honor referred, the giving of an injection prior to operation, the constituents of which and the quantity of which had been laid down by the medical man, was a mere ministerial act, that it was a mere routine job for a nurse to carry out detailed and definite instructions. It might well accord with the layman's idea of responsibility that the relatives of the deceased patient should have some recourse to the funds of the hospital rather than be limited to such satisfaction as the nurse's fortune might provide.

On the other hand, there was recently one other case* which His Honor did not mention as being rather beside the point he was discussing, a case in which it was found that a nurse in a hospital had administered a catheter to a patient and caused considerable damage by the unskilful way in which that was done. I was rather struck by the fact in reading the report that in that case, though the hospital authorities were sued, they do not appear to have attempted to disclaim responsibility. They seemed, as far as I could find out, to assume that the administration of a catheter was a mere matter of routine or administration for which, if it were negligently done, they might properly be held responsible. But I find it difficult as a lawyer to see any difference in principle between the action of a nurse who administers a catheter to a patient and the action of another nurse who administers an injection under detailed instructions from the medical adviser; those are the sort of things that appear to me to create difficulties of legal principles.

There is another difficulty in absolving hospital authorities which I might illustrate by a parallel which is not intended to cause any reflection upon either hospitals or the medical profession; but the notion that an employer should be responsible for the negligent or unskilful conduct of his

**Powell v. Streatham Nursing Home* (1935), *A.C.* 243.

employee, is firmly fixed in our law, and if the qualification of it as appears now to be established in the case of hospitals is to be more generally used there may come a time when an enterprising counsel may be heard to argue on the analogy of the hospital cases that the directors of a taxi-cab company in whose cab a passenger has been injured are in no position to direct, supervise or control the driver of the cab once it is out on the road; that they have put in charge of their cab a licensed qualified driver and that the passenger must look to him for such redress as the law would allow. I am conscious that there is an extension of the principle involved between the two cases but I see some danger in limiting the recourse of the injured person to the personal responsibility of the negligent wrongdoer. Those considerations are all I wish to add to what has already fallen from His Honor, with one slight exception; it may be mentioned that in the case which His Honour cited of the action against St. Bartholomew's Hospital by the gentleman who was hurt on the operating table, the plaintiff who failed in the case was a medical man; and that may have had something to do with the result of the action!

Mr. Arthur Dean: The legal members seem to be having a night out, in that the first two who introduced the discussion upon a case presented by a distinguished lawyer, are also lawyers!

The paper which His Honor has read to us will, I am confident, have appealed to every lawyer as a logical and reasoned one, setting out various problems that can arise and the stages by which the law has attempted to elucidate those problems. The medical man, no doubt, is looking at the same problem from the standpoint of the knowledge which he has of the particular case in hospital, and perhaps of cases of injury resulting within his own experience, and may or may not find it easy to place a case in which he has had personal experience or of which he has heard, into one or other of the groups of cases which His Honor has so admirably and clearly classified for us. I want to speak of one or two matters only.

The point taken by Dr. Coppel is one I wanted to take also, namely, that the hospital does seem to have been given in the line of authorities to which His Honor has referred, a degree of exemption which has not been extended, so far as I am aware, to any other branch of human endeavour, or to any other branch of business. Dr. Coppel took the case of a taxi-cab owner. In the case of a company which is

engaged in a very highly technical business under the guidance and direction of highly competent and qualified men, and scientific men, such as the manufacture of explosives, the directors have only a commercial knowledge of explosives, but let us imagine, owing to some failure or want of care, or want of precaution on the part of the scientists, a disastrous explosion results. In such a case one would suppose there would be no doubt but that the company manufacturing the explosives would be responsible for the negligence of its employees however qualified they may have been. Yet it might well be, by reason of the decision relating to the legal position of medical practitioners in hospitals that the explosive factory proprietors would not be responsible because they had discharged their duty in employing skilled and competent persons to supervise the business of manufacturing their product. I venture to suggest that no such extension would be accepted by the Court, no matter how skilfully or how intriguingly the matter was presented by those in charge of the case.

From the point of view of the medical practitioner His Honor has raised some very interesting problems as to the responsibility of the doctor for what goes on in the course of his treatment. Two separate problems at least seem to emerge and to merit further investigation and discussion here. One is the problem of the extent to which the medical man (and usually the case of a surgeon is taken) is responsible for the defaults of those who are under his immediate direction in the course of treatment. It might very well be contended where the hospital authorities have provided him with a competent staff, and some injury has been occasioned to the patient that circumstance might well show that the injury was the direct consequence of some act or order or neglect of his own. For example, if he were moving some part of the patient's body to a particular part of the table and it came into contact with, say, a hot water bottle, if such things are lying about, or one of the many instruments which he has which may have a sharp point and which injure the patient; these and matters of a like kind raise or suggest ways in which the surgeon conducting the operation may perhaps be responsible for such things.

In connection with the responsibility of the surgeon in the case of unauthorized operations where the patient is incapable by injury or sudden onset of illness of giving consent, I venture to suggest that however rigid the conclusions which His Honor has stated, the doctor would be

justified in the absence of direct proof of negligence in any act which he did, and it would not be held to be an assault.

In this gathering one does not, usually, look at matters from the point of view of the layman, but there is just one consideration which may be important and that is when a layman desires to know whom he is going to sue in respect of some injury which he sustains in the course of an operation or something which has taken place in the operating theatre; how is he to know whom to sue?

There is one further thing which perhaps I might mention, to which His Honor adverted and which lawyers will readily enough appreciate, and that is the principal problem which will present itself in all those cases of getting at the facts. A great part of a lawyer's duty is to find out the facts and to prepare those facts in such a way as would be likely to establish them in favour of his clients. Many of the cases to which His Honor has quoted depend on the facts and the inferences to be drawn in those cases. One of the cases to which His Honor has referred was the subject of the decision of the House of Lords which reversed the Court of Appeal and affirmed the trial Judge, and seems to come within what Lord Russell described as a careful examination of the records in order to be able to pick something out of the shorthand notes to justify the jury's verdict.

I desire to conclude by saying again that I am confident that every lawyer, and I believe every doctor, has thoroughly appreciated the complete exhaustive and logical manner in which His Honor has presented this subject for discussion.

Dr. Ostermeyer: I, too, would like to express my appreciation of the vast field of research which Mr. Justice Lowe has covered and the concise manner in which he has presented the conclusions to be drawn from that survey.

In obstetric hospitals some very nice problems arise. One problem is this: a nurse has to conduct twenty cases before she can get her certificate. Now who is responsible for damages incurred whilst she is conducting a case in conformity with the requirements of the law demanding that qualification? That is a point that comes up for consideration in this way: not merely in public hospitals but in private hospitals, when a patient comes in, the doctor is informed "This nurse has 19 cases to her credit and she only needs one more case to complete her 20 and get her certificate. Will you let her act?" What is the doctor to do? If he allows her to conduct the case and something happens, what

is his position? Of course, this is also a case where the patient is under an anaesthetic. Such problems do arise.

Dr. Coppel raised the question about a nurse unskilfully using a catheter on a patient. The use of a catheter by a nurse is a routine act and strictly comes within nursing.

Dr. Newman Morris: I would like to comment on what Dr. Coppel and Mr. Dean said in regard to the favourable position of hospitals. There is a very good reason for that in regard to public hospitals in the fact that the united overdraft of public hospitals in Victoria is £120,000, so they are not a very fruitful field for adventurers in the law courts. As a member of the Charities Board I have been very interested in the hospital point of view because there are many aspects which show how vulnerable hospitals may be to occasional actions for damages. Mr. Justice Lowe made some reference to the position of gratuitously treated patients. Their rights, I presume, are just as well established as are the rights of those who pay. In most of our hospitals the patient pays one-third of his maintenance.

His Honor also made reference to a certificate that might be signed by the patient as a dispensation which would absolve the hospital from some act on the part of a nurse, if that be left to the discretion of the nurse. There is a certificate signed by every patient in every hospital nowadays giving the surgeon complete discretion during an operation; but I am never quite sure just how far that certificate helps me. The validity of it has been questioned by an eminent K.C. of this State. I would like to know what form of certificate would completely cover a surgeon; I do not know of any yet.

The third point I wish to refer to is: We heard from the lecturer of the danger arising from the acts of the indiscreet or careless nurse or the surgeon; but the liability of the hospital for its dispenser is a matter which I have not yet seen brought to Court. As an instance: there was the case of a patient who had to have a local anaesthetic for a small operation, and the operator was asked to use a solution of adrenalin which had already been prepared. The patient had the ordinary dose of that solution injected under the skin, and promptly died. The dispenser was a locum tenens and the solution was made up under instructions to contain one part in 80,000 of adrenalin. The usual inquest was held and everybody was absolved from responsibility, but further enquiry elicited a fact which had not come out at the inquest, namely, that the temporarily employed dispenser had prepared a solution of

adrenalin consisting of one part in 8,000 instead of one in 80,000; that probably was the cause of the patient's death. I do not think the patient's relatives ever knew that. I would like to know whether a case of that sort would, if it came to Court, be against the dispenser or against the hospital who employed him.

Sir James Barrett: I should like to put a conundrum which occurred to me during the interesting address to which we have listened. It happened in my own practice when I was the acting surgeon of the Eye and Ear Hospital. I was going to remove an eye and I had a very large number of students present. When the anaesthetic was administered I noticed that the patient got worse and worse. I watched him and it became evident that he was nearly dead. However, he recovered on the application of artificial respiration, and we then started to find out what was the matter. I found that the anaesthetist had contracted a very bad cold and could not detect the smell of the anaesthetic. The anaesthetic in those days was administered by an enclosed inhaler. The nurse had been instructed to put in the correct quantity of anaesthetic. An accident was averted and legal proceedings did not occur; but should such an accident occur, who would be responsible? The anaesthetist who could not smell and relied on someone else, or the nurse who made the mistake, or the assistant who sent up the apparatus, or the surgeon himself?

There was another instance which came to my mind of a case when a doctor was sent for in a hurry to stop bleeding, apparently, from the uterus of a woman patient. When the doctor arrived the bed was covered with blood and he examined the vagina completely and discovered no bleeding. So he went home. He was called back in a hurry and then found that the bleeding was coming from a varicose vein in the thigh of the patient. Nothing eventuated in that case, either, but the doctor was quite a good man although he happened to be half asleep when he was called. In another two minutes that patient would have been dead; then would have come the question of assigning the responsibility somewhere, and justly so. A remedy which I follow in connection with operations is to have the table prepared with all the anaesthetic material on it and a notice on the table stating "No one is to touch anything on this table except the anaesthetist himself." But we very nearly had a tragedy in the case to which I

refer. I desire to add my expressions of appreciation of the instructive address to which we have listened.

Mr. P. D. Phillips: His Honor, Mr. Justice Lowe, has succeeded in presenting an extremely interesting paper which has provided new material for doctors to consider, which I think really revolves around what we call "vicarious liability," the liability of the employer or body employing people whom you would customarily call its servants. I think it is fairly clear that no great difficulty is presented by the doctor. The doctor in the hospital is clearly in the position of a person whom lawyers describe as "an independent contractor," and I think some of the early cases in which hospital problems were discussed made it very clear that the doctor was an independent contractor, and that all the hospital owed was to employ a person of reasonable skill and then rely upon his reputation. That is not an unusual situation from the point of view of the law. There are other business undertakings which employ independent contractors, and the entrepreneur, the conductor of the enterprise, is not liable for the negligence of the independent contractor unless it can be shown that they employed a person who was not reasonably skilful. It is interesting to examine why the Courts came to the conclusion that the doctor in the hospital was to be allotted the rôle of an independent contractor rather than a servant, and it was made abundantly clear from the judges that the reason was that otherwise you would create a legal situation in which the unskilled Board of Governors of a hospital would be put in the position of having to conduct a medical practice or to become engaged in the exercise of medical skill. In the earlier cases the Courts were very insistent that the position of the surgeon must be assimilated to that of the independent contractor in order to maintain the position that the lay members of the Board of Governors were in, and could not be expected themselves to display medical skill or knowledge.

I am not very perturbed by Dr. Coppel's suggestion that rules which have been applied to surgeons in hospitals might be applied to taxi-cab drivers. There is nothing anomalous about the position of the doctor in the hospital. It is a well known legal situation. The law simply says that he is not a servant but an independent contractor, decided by the obvious consideration of the manner in which he exercised his skill in the hospital. He has independent discretion in the exercise of his judgment and is not subject

to that detailed control, or, indeed, any control, but goes about his business as his own knowledge and skill dictates. That is the characteristic example of the independent contractor. So far, I think, no problem of legal theory is presented but a very interesting problem of legal theory is presented by the position of the nurse, because you will observe from the conflicting decisions which His Honor has quoted that the nurse, at any rate in the opinion of some jurisdictions, is, as to some parts of her duties, a servant, and as to other parts of her duties an independent contractor. So that the hospital authorities are absolutely liable for her personal negligence in regard to some of her activities and not responsible for her personal negligence as to others. This combination of a person occupying a dual rôle of servant and independent contractor is very unusual. The doctor and lawyer might be disposed to say that the Courts should be able to make up their minds once and for all which rôle the nurse occupies and apply it to all her activities. There is something to be said for the flexibility which permits a combination of those rôles and leaves the Court to determine on each occasion whether her duty on a particular occasion was relevant to her rôle as a servant or as an independent contractor.

I come now to a matter which is away from medico-legal interests, but it has reference to the opinions of lawyers. The problem, which deals with such an operator as a nurse, reminds us of the very curious way in which we have built up a lot of rules for vicarious liability in making employers liable for their servants, without any logical or reasonable description of the original basis at all. I think I am right in saying it was a rather recent development of the law, and before the nineteenth century there was little possibility of placing responsibility on all masters for the acts of their servants. This body of rules imposing vicarious liability on the masters grew up as industrial practices developed; as factories and industrial activities grew in size you have had a great many very impecunious individuals with potentialities for mischief towards the public of a substantial category, and the Courts felt the necessity of imposing the liability on some substantial masters who could answer for such responsibilities. At any rate, those vicarious responsibility rules advanced step by step and there are very few traces of that law much earlier than the beginning of last century. The objective basis of the rule appears to have been that as legitimate industrial enterprise developed you can impose the cost of making good

for the negligence of servants upon the enterprise without hurting anybody; you can make good to the injured person because there is a substantial fund in large enterprises. That is the way the things began, though it is obviously not confined to masters who have large funds. How far the law has gone from that original position is brought home to us by the kind of thing which His Honor has been discussing to-night. We have got so far away from the original reasonable basis that we now think of imposing a liability on a hospital gratuitously treating patients on account of the negligence of its servants. It may well be seen on closer examination that the whole reason for vicarious liability does not apply to the hospital which gratuitously treats patients, and if Courts were free from authority they might very well decide that in the gratuitous cases there was no logical reason why the hospital should be made liable for the negligence of its servants. We can see, however logical the reason for the law making the master liable for the neglect of his servant is, there is no reason for it except as a general social utility. It is a convenient way of distributing loss without inflicting too much harm. But if that is the logical basis of the rule, then there is a good deal to be said for the contention that the patient being treated for nothing in a public hospital cannot make any application for redress on an employer, a hospital body, on a sound legal basis. However, one is disposed to think that English lawyers have become so accustomed to imposing liability on masters for the negligence of servants, that once you establish that the negligence is clearly that in the rôle of a servant, the courts would impose liability on the governing body as the master.

I have to thank Mr. Justice Lowe for his very interesting lecture because of the very wide field that the labour has covered, and also because of the fundamental issues which His Honor has raised.

Dr. Murray Morton: I am sure every medical member of the Medico-Legal Society is grateful to Mr. Justice Lowe for his very comprehensive, informative and helpful address. We also appreciate very much indeed his kindly and sympathetic interest in our problems. In regard to the paper that has been delivered to-night we not only found it interesting but very consoling. We may be wrong, but I think the generality of medical men are of the opinion that the law in this State, at any rate, is that the medical man is responsible for everything that may happen to a patient while under his care, even so far as

this: A surgeon is in attendance at a hospital. A patient is admitted; the surgeon may not have seen the patient. A nurse may come along whom the surgeon may never have seen and she may put a hot water bottle in such a position that it burns the patient. It has been our impression that the state of the law here is that the surgeon whose name was over the bed will be responsible for the damage. We noticed that Mr. Justice Lowe has not quoted any cases in this country. In some of the cases that he cited we have had evidence, and it is not surprising, of course, that all judges do not express the same opinion. Some years ago Mr. Lockhart-Mummery was sued for damages by a lady who had this grievance: She was operated on by Mr. Lockhart-Mummery in London. It was a pelvic operation. She was later on operated upon in the north of France by a French surgeon and her gall bladder was removed. She still suffered very bad health and she had a third operation in the south of France by an English surgeon, and he found a forceps within her abdomen. Mr. Lockhart-Mummery was sued for damages. His defence was that as he had performed the first operation the forceps were probably left behind by the French surgeon, and, as it was not possible to call the second surgeon to give evidence, his evidence was taken on commission. Some stress was laid by plaintiff's counsel on the fact that they were English forceps. As against that it was pointed out that during the War many English instruments had been taken to France and used, and after the war was over they were sold locally and put into general use in France; but the most informative thing was that Mr. Lockhart-Mummery so impressed the Judge and jury by the fact that he did not trust to the sister counting the swabs and the instruments but he said he made it his personal concern to count every instrument and every swab used during an operation. The Judge, in effect, said that had Mr. Lockhart-Mummery simply pleaded "I told her and said 'Are the swabs correct? Are the forceps all out?' and she said 'Yes'," the Court would not have been satisfied with that, but as he had impressed the Judge that he had made it an invariable practice and it was the practice in this case, to count the swabs and instruments personally, he won his case.

Dr. Springthorpe: As the time is getting short, I will limit myself to asking two questions that have been not explicitly asked. One is in relation to the liability of nurses in this respect: One speaker referred to the liability of an individual nurse as an independent contractor. I would like

to ask Mr. Justice Lowe what the position of such a nurse is when she is a pupil nurse; that is to say, can a trainee act in any way as an independent contractor? And if she cannot, does any error or harm caused by her then devolve upon the nurse as a trained nurse or would it go back to the matron, or perhaps the hospital ward?

The other point that occurred to me is this: The question of a surgeon's liability in the performance of an operation where he has in his own judgment to extend the field of procedure. Mr. Justice Lowe used the phrase once or twice in quotations "it had been necessary to save the patient's life." We always like patients to think that what we do is always absolutely necessary to save his life on every occasion, and perhaps we all think we have done so, but in actual fact of course a great many operations are only done to improve the patient's health, and the extension of any operation might not merely be necessary to save life but it might be considered advisable to improve health. I would like to ask if there were any judgments given where such an extension was done without the patient's previous consent. I wish to thank Mr. Justice Lowe very heartily for his impressive and interesting paper.

Mr. Chairman: If there are no further questions to be asked, before calling upon Sir James Barrett to move and His Honor Judge Stretton to second a vote of thanks, personally I would like to express my gratitude to Mr. Justice Lowe. We have had very many interesting addresses in this hall at these meetings but to-night we have had not only an interesting address but a most helpful one—Dr. Murray Morton said a very consoling one. Mr. Justice Lowe has never failed materially to add to our discussions in this hall. He has been a very regular attendant and a most helpful member in the discussions. To-night he has placed us even more in his debt. There are very few phases of the question that His Honor has not touched on. We as a Society are very much in his debt and I will ask Sir James Barrett to move a vote of thanks, and His Honor, Judge Stretton, to second it, and Mr. Justice Lowe will then reply to the questions asked.

Sir James Barrett: I have very great pleasure in moving this vote of thanks to His Honor, Mr. Justice Lowe, for his valuable paper. To-night you have had an example of his capacity and I am sure we will all go away much better informed than we were regarding our position. We are very grateful for what he has done.

His Honor, Judge Stretton: I wish to add my word to what has been said by Sir James Barrett and I am sure many of the medical men would have been amazed at the painstaking endeavour which must have preceded the collating of the law and facts upon which Mr. Justice Lowe has based his very illuminating discourse. To those of us who know him it would have been somewhat amazing had it been otherwise; we know that Mr. Justice Lowe is a gentleman who has never been known to shirk the intellectual problem in whatever case it may have arisen, and whose greatest attribute we always feel is that of being a model of clarity. I have great pleasure at having been privileged to second the vote of thanks. I have heard it said all about me to-night that this is truly the most interesting lecture which has been delivered in this Society, and I subscribe to that view myself.

His Honor, Mr. Justice Lowe: Mr. Chairman, Sir James Barrett, Judge Stretton, and Gentlemen: I want to thank you first of all for your all too kindly references to myself. In this Society it is not so much a question of one member rendering a service to the others; we are here rather as fellow members of the same Society rendering mutual service to each other, and if it should happen that one member at a particular time is able to render some special service, you may be very sure that some other member at some other time will render some other special service. Having said so much, I want to say very briefly one or two things in answer to some matters which have been raised here; and those who have raised points to which I do not refer will please note that it is not because I do not appreciate the points that have been raised but rather that I am confining myself in my answers to those questions which have been raised and which are of more general interest to the whole of the members. If one were to deal simply with individual cases that would be an infinite task. What I prefer to do is to take those illustrations which have been stated, which illustrate some general principle, and by so doing I hope the particular instances will be made plain and the principle which lies at their base will also be clarified.

In passing, I would just say one thing in regard to the matter discussed by Dr. Coppel and Mr. Phillips, and that also by Mr. Dean, and that is the possible extension of the principle which has been laid down in regard to hospitals being applied to commercial companies. Of course, none of them thinks that there is any possibility of any such extension at all. They were rather concerned with what

appeared to be an anomaly if the principle laid down for hospitals were so extended. I suggest for their consideration, and for the consideration of other lawyers here, this position: I think it has been rather too much assumed that the basis of law or the absence of it depends on the contract which is to be imputed to the parties in a particular case. When we are dealing with matters of this kind it is not simply a question of contract but a question of tort and a duty which gives rise to the tort is a duty which has relation to the particular circumstances. It is not a very difficult thing to understand that the Court should have made a difference between the case of hospitals which are administered by a body of gentlemen who are governors, who are a committee, and who have no particular interest in the matter except serving the public in the administration of the hospital; it is not a very strange thing, I think, that the Courts have hesitated to impute a relationship which should impose a duty upon the governors or the committee for the breach of which they should be liable in damages to the particular patient. The Courts would ask themselves, I imagine, what is the proper implication from the facts? Is it the proper implication that the patient has understood on the one hand and the governing body has understood on the other hand that liability so arises if injury was suffered by the patient? That is the view which I venture to suggest lies at the basis of the decisions in regard to the non-liability of public hospitals. I have ventured to suggest to you that the position is not necessarily the same in regard to a private hospital. The undertaking there may be quite different.

I also venture to suggest for Mr. Phillips's consideration the reconstruction of his thesis that the nurse or the surgeon, as the case may be, is an independent contractor. It may very well be that there is no relationship or contract at all; what really happens is that there has been a dereliction of duty on the part of the nurse or the surgeon towards the particular patient, not based on a contract at all, and out of that there has arisen an obligation to do what has been undertaken, in a careful manner. However, I shall not pursue these matters further. I have thrown them out for the consideration of legal members.

I come to the problems raised by Dr. Newman Morris; he puts the position of the gratuitous patient and suggests that there is no difference between the obligation of the surgeon and nurse towards the patient treated gratuitously and one

treated for a fee, and I do not disagree with him. Both medical ethics and the law require that a surgeon or a person who undertakes a duty towards a patient shall exercise at least average skill and reasonable care towards that patient. My reference to gratuitous patients had no connection with special action. I was referring to a decision which had been given by the Supreme Court in Ireland which had come to the conclusion that the insufficiency of the staff of nurses was a ground of negligence which imposed a liability upon the hospital towards the patient who had been injured by that lack of sufficient staff. The judges who gave that decision put it on the specific grounds that the plaintiff was a paying patient, and my comment was that it was not at all clear that those judges would have come to the same conclusion had the patient been treated gratuitously; but I am not to be taken as suggesting for a moment that the duty that the surgeon owes to the patient varies as a fee or no fee is charged.

Dr. Newman Morris also raised the question of notice. I suggest that the difficulty of the position raised by the conflict between Canadian and New Zealand Courts on the one hand and the Scottish and English Courts on the other hand as to the liability of the hospital for nurses' negligence, hospitals might protect themselves by a form of notice properly brought to the attention of the patient specifying that the hospital would not be under liability for the acts or omissions of nurses, etc. Lawyers understand that that is quite a usual way of performing a contract exempting hospitals from liability; but it led Dr. Newman Morris to mention a contract which was a common form in certain hospitals, in which the patient signed some form of consent or licence to the surgeon to operate. I do not propose to offer an opinion as to the effect of that without seeing the licence, but I should think it would be very cogent evidence if action were ever brought against the surgeon for operating without the consent of the patient that the consent had been given; and that, I apprehend, is the purpose for which it is sought.

He next referred to the case of the dispenser at the hospital and asked what would be the liability supposing the dispenser had dispensed not in accordance with the prescription, and to the injury of the patient? Again, one must not be too dogmatic, but speaking quite generally I should think that the position could be shown to be that the dispenser was the paid servant of the hospital, and in carrying out his duties a dispenser I should think ordinarily

would be acting in place of the hospital and if he were negligent then his negligence causing damage to the patient would be imposing a liability upon the hospital. But it is a general answer and I insist, as I did at the beginning of my paper, that when one speaks of a principle of law it is always spoken of in relation to ascertained facts, and most of your difficulties arise before you have come to a conclusion as to what the facts are.

Sir James Barrett raised quite an interesting point, too. He spoke of the case of an anaesthetic which had been wrongly prepared and wanted to know where the liability would lie in that case if injury fell upon the patient, whether it would be on the surgeon in charge of the operation, the anaesthetist, the nurse or the dispenser. I suggest there is a lurking fallacy in putting that question in that particular form, because it assumes that if you have a liability to one person you necessarily exclude the liability to another person, which is not necessarily so. It may be so, but it is not necessarily so. Let me give you a very common illustration: supposing two motor cars come into collision it may very well be that the collision is brought about by negligence on the part of each of the drivers of the motor cars and in such a case liability would fall upon each of the drivers or their employers as the case may be; so it may be when you are dealing with team operations—I take that phrase from the New Zealand case cited. A team operation is where you have a number of persons, such as a surgeon, an anaesthetist, a nurse, and in the background a dispenser. In the case that he put the result would be that the surgeon would not be responsible. That would be part of the team work. Ordinarily it would not fall within his special scope and he would be justly entitled to rely upon a careful discharge of their duties by the other persons who were collaborating in that team work; putting the surgeon on one side, which gives you the anaesthetist, the nurse and the dispenser. This, I emphasize again, is a question of fact upon which different tribunals may come to different decisions and different minds may decide differently. I am not so sure that the fact that the anaesthetist had entered upon his duties as an anaesthetist in a condition which prevented him by the operation of the sense of smell from detecting that the anaesthetic was not in the form prescribed, would not be guilty of negligence. I think a jury might well hold so; and if they did, I think that very likely the Court of Appeal would uphold their verdict. The nurse very probably, I think, would also be

guilty of negligence, but that would depend upon the precise scope of the ordinary duties of a nurse. If it were no part of her duties to see that the drug prescribed was properly dispensed, then she might free herself of liability; but assuming it was part of her duties then I think the probable result would be that she would be liable in damages for negligence, with the dispenser. That looks to be the plaintiff's case. If he has a prescription before him prescribing certain ingredients in certain proportions and he dispenses those ingredients in other than those proportions at least there is a *prima facie* case of negligence against him.

Dr. Springthorpe put to me the case of the trainee nurse and he adopted a little too easily, I think, the theory that the nurse might be an independent contractor. I have some difficulty in saying that the nurse is an independent contractor towards the patient at all; but insofar as the duties of a trainee nurse arise I can quite conceive that a trainee nurse may be guilty of negligence. I can also conceive that those whose duties it is to supervise the actions of the trainee nurse might be guilty of negligence, too. But it is one of those questions the true answer to which will depend upon an investigation of the facts, and I cannot be dogmatic on the point.

Dr. Springthorpe also raised this question: suppose a surgeon in operating to an extent to which he has the consent of the patient thinks it wise to go further in the interests of the patient, although not necessarily to save his life; that raises a very interesting point of theory which I adverted to in the paper I read. The theory of English law so far is that if you operate upon a patient without his consent you are committing an assault or a personal trespass, and it is obvious that if that be the true basis of the authority to operate, then if you operate without consent and to an extent to which consent has not been given, you are committing an assault. I would only modify that by saying this, that it may be that what you do is so little beyond the actual consent as to be thought to be implied in it; if that be the case then I think the original consent would cover it. But I rather apprehend from the form of the question it was intended to suggest that the operation had gone substantially beyond the consent; if that be a correct assumption then, on the theory of English law, that would amount to an assault. But I think very likely that when the matter comes again to be discussed in an English Court of Appeal it may prefer the view which has now been

adopted in Canada, and that is substantially the view adopted in the U.S.A. The whole doctrine of consent assumes that you have a patient who is capable of consenting, and if through the exigencies of the operation at the critical time he is not able to consent because he is under the effect of anaesthesia, then the law has to, or will, find some other basis to justify the action of the surgeon, and it may well be that our Courts will adopt the view of the Canadian Courts, that there is a duty imposed by positive law upon the surgeon.