CIVIL LIABILITY ARISING OUT OF HOSPITAL TREATMENT

By The Honourable Sir Charles Lowe,
Senior Puisne Justice of the Supreme Court of Victoria.

Delivered at a meeting of the Medico-Legal Society held on Saturday, 17th May, 1952, at 8.30 p.m., at the British Medical Association Hall, Albert Street, East Melbourne.

IT comes as something of a shock to me to realize that it is now some fifteen years since I first addressed you on the subject of this paper. Though we have since passed through the Second World War and are now living in a period of uneasy peace, such conditions would not normally affect the law I am dealing with except to provide new illustrations of its application. In some respects, however, as the discussion recorded in Vol. III of the proceedings of this Society discloses, the law as then formulated in courts of authority was anomalous, and there was a clear divergence of views between the courts of Canada and New Zealand on the one hand and those of England and Scotland on the other. Moreover, the English courts had acted on a view that there was a distinction in point of liability of the hospital where the wrongful act complained of was the act of a member of the hospital staff in an administrative or ministerial capacity and where it was in the exercise of the particular professional skill of the member of the staff. In the former case it was said that the hospital was liable, but in the latter case that it was not. The intervening years have shown that the view of the Canadian and New Zealand courts has been preferred to that of the English and Scots courts, and they have also shown that the distinction between administrative and professional acts of the staff is for the purpose of imposing liability, as illusory as it was difficult to work out in practice. It is because of this further clarification of the law that I have again come before you after so many years to speak on the same subject as I then chose, and not, as Browning's thrush, to sing each song twice over lest you should think it never could recapture the first fine careless rapture.

At the outset, I would repeat from my earlier paper that "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 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. And I may add, as matters which arose in discussion after the earlier paper, injury inflicted on a patient because of the ignorance or lack of skill of a trainee nurse or the blunder of a dispenser. In a Canadian case a nurse negligently supplied the doctor with adrenalin instead of novocaine (Bugden v. Harbour View Hospital, (1947) 2 D.L.R. 338). These are the kinds of action or omissions I propose to consider further as the basis of legal liability and to indicate to what extent the exposition of the law I gave when last before you needs to be modified.

I venture, too, to repeat what I then said as to difficulties of law and fact and the difference in the approach to a particular problem of the medical man and the lawyer. I then said: "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 emphasize 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 facts constantly occur, and conflicting opinions are given in evidence, and the conflicts 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 of you who remember the case of Hocking v. Bell and the recent case in Sydney against Mr. Warwick Stenning will need little reminder that the view of a jury may differ greatly from that of responsible medical men. I shall now deal in turn with the position of (a) the hospital, (b) the doctor, and (c) the nurses.

The Hospital

When I last dealt with the matter, for the sake of completeness I dealt with both the direct and vicarious liability of a hospital. I pointed out that as the occupier of premises inviting persons to come upon those premises for business purposes or purposes in which the hospital and the invitee had a common interest there was no special law for the hospital and the duty of the hospital was the same as that of any other occupier of premises, viz., to use reasonable care to prevent damage to the invitee from unusual danger of which he knew or ought to know, and I instanced the case of an invitee falling on a highly polished linoleum and breaking her thigh and recovering damages from the hospital. I also illustrated that liability in damages fell upon the hospital in a case where an expectant mother had been negligently put into a ward in a hospital where puerperal fever had occurred, with the result that she too acquired puerperal fever. A further instance has recently occurred in which the hospital was held liable to a patient who

contracted meningitis involving complete paralysis following an operation. The learned judge held the hospital liable for the negligence of the nursing staff, even though it was not possible to trace the condition to a specific act or omission of any particular individual. (Voller v. Portsmouth Corporation, (1947) 203 L.T. Jour. 264.) Perhaps it is as well to recall, too, that the hospital may be negligent because of its failure to provide a sufficient staff of nurses as decided in the Irish case I cited.

What I then said in regard to direct negligence I think still accurately states the law, and I shall not follow this aspect further. No doubt in the interim there have been further instances where liability has been imposed on the hospital, but the criterion has not altered. One thing, however, I should make clear. I said in regard to the Irish case that it was the case of a paying patient and that it was not clear whether the same result would follow where the patient was treated gratuitously. I was there referring only to the court's reasons for its decision. I should like to say that in my opinion, as I said after the discussion in 1937, it is immaterial to the liability of the hospital for a negligent act or omission on its part towards the patient whether the patient pays for his treatment or is treated gratuitously. (See inter alia per Denning, L.J., Cassidy v. Ministry of Health, (1951) 2 K.B., at p. 359, and per Wolff, J., Henson v. Perth, 41 W.A.L.R., at p. 27, and per Greene, M.R., (1942) 2 K.B., at p. 302.)

I now come to the vicarious liability of a hospital for the wrongful conduct of its staff and I may say at once that the authorities I relied on in 1937 and the exposition of the law I then gave can no longer be treated as correct. Let us recall that the comprehensive term "staff" may comprehend many different classes of persons—matron, nurses, carriers, dispensers and medical men of various kinds, e.g., the superintendent, surgeons, physicians, radiologists and anaesthetists. Let us recall further that the superintendent and some of the physicians and surgeons are residents and probably under a contract of service, and that the honorary surgeons and physicians are in no sense the servants of the hospital. It is still not possible to say with confidence that the hospital is liable indifferently for the wrongful acts of all these members of the staff, though there is some sign that this may be the ultimate position established. It will be better, however, I think, instead of speculating what the end of the

journey may be, to see how far the courts have gone and what the present position is.

Let us bear in mind, for purposes of contrast, that the opinion previously acted on was that the hospital was not liable in damages if members of its professional staff, of whose competence there was no question, acted negligently towards a patient in some matter of professional care or skill or in the use of apparatus or appliances at their disposal, but that the hospital was legally responsible to patients for the due performance by their servants within the hospital of their purely ministerial or administrative duties. In accordance with this opinion, hospitals were not liable for the wrongful acts of doctors whether they were residents and under a contract of service with the hospital or honoraries who certainly were not servants. In regard to the wrongful acts of nurses who were the servants of the hospital, in order to determine the hospital's liability one had first to determine whether what they were doing was in their professional capacity as nurses or in the course of administrative or ministerial duties. Farwell, L.J. (in Hillyer v. St. Bartholomew's Hospital, (1909) 2 K.B., at p. 826) put the position of nurses graphically in the following words: "I will assume that they are . . . servants of the defendants. But 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 they cease to be under the orders of the defendants and are at the disposal and under the sole orders of the operating surgeon until the whole operation has been completely finished," and he went on to say that they cease for the time being to be the servants of the defendants. There are traces that this doctrine has not quite been abandoned in Canada yet. (Bugden v. Harbour View Hospital, (1947) 2 D.L.R. 338.)

Such a view of the law treated the hospital in relation to its servants who were exercising their profession differently from the general position of a master in relation to wrongs committed by his servants and the anomaly was emphasized both by Dr. Coppel and Mr. Dean who opened the discussion, while another member of the legal profession, Mr. P. D. Phillips, Q.C., emphasized the point that in relation to nurses such a view of the law treated the nurse as at one time a servant of the hospital and as at another time not a servant, while all the time she was under a contract of service to the hospital. These objections to

the current opinion found expression in many quarters and it was felt that that opinion was contrary to sound principle. In 1939 Mr. Justice Wolff in Western Australia found that both doctor, staff nurse and pupil nurse were negligent in the treatment of plaintiff in the casualty ward of a public hospital and he awarded damages to the plaintiff against the hospital. In doing so he said: "The contract which the defendant board made with the plaintiff clearly included an obligation to supply whatever actual treatment was necessary by the nurses, and it would be quite a fiction to assert that it was limited to supplying the hospital and its equipment and the appointment of competent nurses." He criticized Hillyer's case from which the prevailing view had been taken and said that while it had not been expressly dissented from in the Dominions, it had not been unhesitatingly accepted as an authority. In Alberta, for instance, the court described the hospital as "an institution for the care and nursing of sick people in which full responsibility is accepted by the owners for the acts of all their servants." (Abel v. Cooke, (1938) 1 D.L.R. 170.) Then came the case of Gold v. Essex County Council, (1942) 2 K.B. 293, where a child was injured in treatment at a county hospital through the negligence of a radiographer who was a whole-time employee of the hospital. The hospital was held liable. The Court of Appeal said that the currently held view based on the opinion of Kennedy, L.J., in Hillyer's case ought not to be followed. The Master of the Rolls at p. 301 said: "Apart from any express term governing the relationship of the parties, the extent of the obligation which one person assumes towards another is to be inferred from the circumstances of the case. This is true whether the relationship be contractual (as in the case of a nursing home conducted for profit) or non-contractual (as in the case of a hospital which gives free treatment). In the former case there is, of course, a remedy in contract, while in the latter the only remedy is in tort, but in each case the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once this is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or agent, to discharge it on his behalf, and this is equally true whether or not the obligation involves the use of skill. It is also true that, if the obligation is undertaken by a corporation, or a body of trustees or governors, they cannot escape liability for its breach, any more than can an individual,

and it is no answer to say that the obligation is one which on the face of it they could never perform themselves. Nor can it make any difference that the obligation is assumed gratuitously by a person, body or corporation which does not act for profit: Mersey Docks Trustees v. Gibbs. Once the extent of the obligation is determined the ordinary principles of liability for the acts of servants or agents must be applied."

It is plain from this decision that where the professional person is a servant of the hospital it is liable for his wrongs committed within the scope of his employment. In 1947 there was another action by a patient against a county hospital based on the negligence of a resident junior house surgeon and an honorary surgeon of the hospital who was also joined as a defendant. (Collins v. Herts C.C., (1947) K.B. 598.) The judge, Hilbery, J., held that both medical men were negligent but that the obligation undertaken by the owners and managers of the hospital to the patient was to be responsible for the acts of the resident junior house surgeon but not for those of the visiting surgeon, since in the case of the resident junior house surgeon they had, and in the case of the visiting surgeon they had not, the power to direct him or her what to do and how to do it.

It thus appears to be established by Gold's and Collins' cases that the hospital is, like any other employer, responsible for the negligence of a medical man in the performance of his duties as an employee. And this position was put even more plainly in a case decided by the Court of Appeal last year. The plaintiff had suffered from a contraction of the third and fourth fingers of his left hand and was treated at the Walton Hospital, Liverpool, by a whole-time assistant medical officer. An operation was performed and the hand put in splints for the requisite time. At the time of the trial the two fingers were not improved and two others were similarly affected. The Court of Appeal found the condition to be due to the doctor's negligence and turned to consider the law. It held that a hospital authority is liable for the negligence of doctors and surgeons employed by the authority under a contract of service arising in the course of the performance of their professional duties. This was the decision of all three judges of the court. Two of their lordships recognized a distinction found in other cases between a contract of service, i.e., one which creates the relationship of master and servant and a contract for services in which the person contracting with the authority is what the law calls an independent contractor—one who contracts to give particular services, but

not to become the servant of the authority. Into this latter class come the honorary surgeons and physicians. In epigrammatic form those who hold this view say that the hospital authority is liable for the wrongful acts of professional men, when they are under a contract of service with the authority, but not where the professional man has contracted with the authority for services—in short, there is liability in case of a contract of service and no liability in case of a contract for services. The third member of the Court, Denning, L.J., would have none of this distinction. Occasionally a judge, greatly daring, makes a generalization which covers the whole ground and discloses a pathway through a jungle. There have been cases where such a generalization has been universally accepted, but for the most part it can only come safely from the court of final appeal, for as Sir John Madden once said, they speak with authority—for indeed they speak last. Denning, L.J., thought that the hospital was liable for the negligence of all the professional men employed by it whether under a contract of service or under a contract for services—i.e., whether residents or honoraries. He thought the matter so clear on principle that one wondered why there should ever have been any doubt about it. He thought the distinction between a contract of service and a contract for services a fine one and of no importance in the class of cases he was dealing with. "I take it to be a clear law, as well as good sense," he said, "that where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services." The L.J. regarded it as unfortunate that this broad and plain basis for its decision was not drawn to the court's attention in Gold's case, but that he said was his own fault, because as counsel in Gold's case he had failed to do so. No court in its decision has yet taken so broad a ground. I note it as a danger signal to hospital authorities and as a risk which they may think proper to insure against. I cannot say yet that it is the law, but it may yet be declared by a court in its decision to be the law. In New Zealand, indeed, this result has been reached by legislation, for the Act No. 50 of 1936 provides that an action lies against a hospital board for any damage suffered "by any person as the result of any wilful or negligent act or omission of any medical practitioner, dentist, matron, nurse, midwife attendant or other person employed or engaged

(whether in an honorary capacity or otherwise) by any board acting in the course of his or her employment," and the board's liability is expressly equated to an employer's liability for the acts or omissions of his servants in the course of their employment. (See Cook v. Nelson etc. Board, (1945) N.Z.L.R. 110, and (1946) N.Z.L.R. 287.)

In 1937 I thought that when the vicarious liability of a hospital was in question there might be a distinction between the case of a private hospital run as a proprietary business and the case of a public hospital. The intervening years have shown that no such distinction can be maintained and that the principle on which liability is imputed is the same in each case.

I can now state categorically that as the law now stands the hospital is liable for the wrong committed by its servants—whether medical men (of whatever rank) or nurses or dispensers or persons exercising any other professional skill, so long as the wrongs are committed in the course of performing their professional duties. So far as decisions have gone the hospital is not liable for wrongs committed in like circumstances by medical men who, like honoraries, are not the servants of the hospital but contract with it to give certain services, but it is possible that their exemption from this liability may not continue.

The Doctor

As to the general responsibility of the doctor, the position is still as I stated it in 1937: "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.

Operations without authority. Nothing that I know of has happened since 1937 to make inaccurate what I then said on this topic. I would only draw attention to an article which I contributed to *Res Judicatae* in September, 1941, with the title "A Medico-Legal Problem. The Unconscious Patient" (*Res Judicatae,* vol. II, p. 179). I will only here summarize the conclusions of that article.

1. Where a surgeon is authorized by the patient to operate for one condition and, while the patient is unconscious under

the influence of the anaesthetic, the surgeon discovers a further condition making it, in his opinion, necessary to carry out a further operation to save the patient's life, and the surgeon performs the further operation and the patient recovers, in my opinion the surgeon could not be successfully sued for operating without the patient's consent.

2. Where the further condition was such that the further operation was not necessary to save the patient's life but merely to improve his health and where the further operation was not impliedly within the authority given, in my opinion the surgeon might well be held to have committed an assault on the patient. This view now seems to have the support of the Supreme Court of British Columbia (Murray v. McMurchy, (1949) 2 D.L.R. 442).

3. Where a surgeon is called to attend a person rendered unconscious in an accident and operates on him without negligence, he is under no liability for assault.

The grounds for these opinions appear in the article cited but I do not repeat them here.

Doctor's liability for the negligence of his assistants. Here, again, I do not find it necessary to qualify what I said in 1937. If the only negligence is that of those assisting the operator, the latter is under no liability for the acts of those assisting him, be they anaesthetists, assistant surgeons, nurses, or any other persons. But it is possible to consider a case in which the operator is personally negligent—where he observes some act or omission of his assistants, knows it to be wrong or harmful, and takes no step to remedy the position. But, while such a position may be conceived of, I find it hard to see where the evidence to show such negligence could be obtained save from the operator himself. Practically I should not think it created a danger to the operator.

The Nurses

The last topic I dealt with in 1937 was the liability of the nurse. On principles which I have already referred to the nurse is always personally liable for damage caused by her own negligence. Whether the injured person will pursue his remedy against her is another question.

And now, once again, I have covered the field upon which I have entered and leave the matters I have raised for your discussion.