CASE AND COMMENT.

EVIDENCE—HEARSAY—DECLARATIONS IN THE COURSE OF DUTY.—The judgments in the recent Ontario case of *Palter Cap Co. Ltd.* v. *Great West Life Assurance Co.*[1] not only manifest a difference of opinion on the admissibility of an important type of hearsay evidence, but may well cause us to wonder whether our law of evidence is not becoming so refined and rule-bound that the very purpose for which it exists is forgotten.

There seems no reason to doubt, as Dean Wigmore has pointed out,[2] that justice could be done, as indeed it is done in continental countries, without our complicated set of exclusionary rules of evidence. Due, however, to the traditional prominence of jury trials in common law systems, and the fear that a juryman might be influenced by evidence which, although relevant, cannot be tested in the orthodox manner as to trustworthiness, the exclusionary rules of evidence have assumed a paramount position in the eyes of the common law lawyer at the expense of the general rule of admissibility that everything that is logically probative should be admitted unless barred by some principle of law.[3] Thus, the moment evidence is stigmatized as hearsay it must fight its way through a most confusing maze of case law in an endeavour to be classified, grudgingly, as an exception. No one can deny that hearsay evidence as a rule is unreliable, the reasons usually given being that the statement of the third person which is proferred was not made under oath, and secondly that there is no opportunity to cross-examine the declarant. Whether a witness under oath is more likely to tell the truth has never been demonstrated.[4] On the other hand,

[1] [1936] O.R. 341.

[2] WIGMORE, EVIDENCE, (2nd ed., 1923) Vol. I, p. 123

[3] It is significant that in the past, certainly, and probably today, the entire attention of students was directed towards a study of the exclusionary rules. Professor Wigmore's treatise on THE PRINCIPLES OF JUDICIAL PROOF AS GIVEN BY LOGIC, PSYCHOLOGY, AND GENERAL EXPERIENCE AS ILLUSTRATED IN JUDICIAL TRIALS, (2nd ed., 1931) is an effort to teach problems of proof freed entirely from the exclusionary rules. Work of this kind is invaluable to the trial lawyer. It is not surprising that judges trained to regard the exclusionary rules as the "great bulk of the law of evidence" (see STEPHEN, DIGEST OF EVIDENCE, *Introduction*, quoted by MACRAE, EVIDENCE, 4 C.E.D. (Ont.) p. 389) should express dislike at cutting these rules down. If, however, it is appreciated that the exclusionary rules are exceptions to the general rule of admissibility, i.e., logical relevancy, "in accordance with the general principle of limiting exceptions, such exclusionary rules are to be restricted rather than extended." (MACRAE, *op. cit.*)

[4] Compare some of the remarks of T. E. CRISPE, K.C., in his book, REMINISCENCES OF A K. C., quoted in WIGMORE, SUPPLEMENT 1923-1933 TO EVIDENCE, p. 773-4: "The value of an oath is not nowadays of much

while cross-examination has been proved efficacious in eliciting the truth in hundreds of instances there are just as many situations where cross-examination avails nothing. If, then, a person who has made statements of the greatest importance to an issue before the court has died and cannot be called,[5] why should it not be possible to leave a discretion in the judge to determine whether, from the circumstances under which the statement was made, it is more or less likely to have been true, and admit or reject it accordingly? At the present time, while there are cases where such evidence is allowed, they are usually considered as coming under some rigid rule of exception which, at all costs, must be construed strictly.[6]

The exceptions to the hearsay rule are all, in the main, based on two facts: first, the necessity of admitting statements made out of court since the declarant is unavailable, and the option of admitting or permitting a miscarriage of justice is squarely raised; secondly, there is a guarantee from the circumstances of the manner of making the statement that it is trustworthy. As Wigmore puts it,[7] "if a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy . . . . . in a high degree of probability, it would be pedantic to insist on a test [cross-examination] whose chief object is already secured." The diffi-

account. A man swears that he will tell the truth, the whole truth, and nothing but the truth—and he calls upon God to help him; with what result we frequently know. Such an appeal seems quite unnecessary from the witness who is a witness of truth—he will tell the truth, whether he is sworn or not. . . . . To my mind a man is as likely to tell the truth without kissing an unsavoury Testament, holding up his hand in affirmation, going through the Quaker's formula, or crashing a teacup, as the Chinese do. It is said that some persons are born liars. I don't know; I fancy some are. I have known a few who have justified the promise of their youth." The author then points out that in large cities, where witnesses stand less chance of detection, some judges have stated there is sure to be perjury on one side or the other.

[5] The English cases which insist on death and will not allow other kinds of unavailability of the witness in the recognized exceptions to the hearsay rule seem unduly harsh. What matter whether a man be dead, insane, or in Africa if his declarations satisfy the other tests and his evidence is important. American courts do not insist on death, but allow illness, absence from the jurisdiction, insanity, etc. See WIGMORE, EVIDENCE, sec. 1521.

[6] *Cf.* Macdonnell J.A. in *Palter Cap Co. Ltd.* v. *Great West Life Assurance Co.*, [1936] O.R. at p. 376: "the hearsay rule and the exceptions . . . . should be faithfully observed." And see Masten J.A. in the same case at p. 362: "If I thought that in so deciding I was extending in the smallest degree the ambit of this exception to the general rule barring hearsay, I would have the greatest hesitation in so holding." Quaere whether the hearsay "rule" is not an exception to the "general rule" of logical relevancy. If so, should not the exception to the exception be extended? See note 3, *supra*.

[7] EVIDENCE, sec. 1420.

culty is, however, that with successive courts attempting to explain why they were allowing in certain hearsay evidence, there has, as frequently occurs in any system of case law, been an accumulation of words, which subsequent courts feel bound to discuss in turn, with the result that the main reason underlying the whole business becomes obscured, and we enter into a land of unreality where certain word groups are strung together as formulating a "rule" and the game is either to include or exclude the present case from the words of a given rule. Sometimes a situation seems awkward to handle under the "word-rules." In such cases there are three alternatives. (1) Fall back on the paramount rule against hearsay, letting the chips—in this case the parties to the action—lie where they fall. This may mean a judgment which the court knows is based on false evidence; but then there is always solace in realizing that "hard cases make bad law." (2) Struggle against rejecting evidence which the court believes to be true, but do so by ingeniously fitting the case into the word formula of a given "rule." Such a method will usually go so far as is sufficient to achieve a sound result in the case before the court, but may provide difficulties in future actions due to the elaborate—and unnecessary—discussions, expansions or restrictions placed on the formula purported to be followed. Judgments of this type are probably most common, because the court feels that while it must decide the case before it, it must also do something to elaborate for future litigants the true rule. This type of judgment may be characterized as one to salve the judicial conscience. Having attempted to achieve justice between the parties, the phenomenon must be justified in terms used by a former judge who, on a quite different occasion, was himself involved in the same process. (3) Realize that all previous formulations are based on exactly similar basic principles, and if those principles are present, follow them. Sometimes this involves an attempt to justify the result in the old terms, sometimes not. This requires more courage, because the judgment may become a difficult case to "reconcile", and a court of appeal proceeding on the first two methods may reverse the judgment. All three methods are discernible to some extent in the *Palter Case.*

In that case Palter had applied for life insurance in 1930, his application stating that he was in good health, had not been treated or examined by a doctor and had no affection of the heart. On Palter's death, the insurance company denied liability on the ground that Palter had misled them by making statements known to be false concerning his health. Dr. Perlman, a brother-

in-law of Palter's and the latter's attending physician at the time of his death, told the insurance company in the certificate filed along with proof of loss, that Palter had been suffering from angina pectoris, and that this diagnosis was made by Dr. Murray, a heart specialist, to whom Palter was referred by Dr. Perlman, in 1928. Subsequently, Dr. Perlman wrote the company that he was mistaken in that date, and that Dr. Murray had diagnosed the case in 1931. He repeated this story in the witness box, with various reasons for his first error, and the trial judge held that he believed him when he said the date of the diagnosis was in 1931. Unfortunately, Dr. Murray had died before the action was brought. However, the defendant company offered in evidence (a) a medical history sheet made by Dr. Murray, (b) electro-cardiograph pictures taken by Dr. Murray, (c) a screen tracing of Palter's heart made by Dr. Murray, (d) a letter sent by Dr. Murray to Dr. Perlman reporting his findings, and (e) an entry in Dr. Murray's cash book under date of June 8th, 1927, as follows: "Palter, $20.00." The letter to Dr. Perlman was dated May 27th, 1927, and there were dates of May 26th, 1927 on the medical history, electro-cardiograms, and screen tracing in Dr. Murray's handwriting.

Unless all these records were fabricated, it seems self evident that Palter had made false statements in his application, and furthermore that Dr. Perlman's evidence, on oath and subject to cross-examination, could not be relied on. Outside a court of law the writer believes any reasonable person would have fixed the date of Dr. Murray's diagnosis as in May, 1927. However, there is a rule of evidence excluding hearsay, and at the trial, Kingstone J. refused all these items as "inadmissible and irrelevant." Now irrelevant they certainly were not. This is shown by the fact that once admitted by the Court of Appeal they were automatically acted on to the exclusion of all other evidence. They were inadmissible unless they could be brought under some formulated rule of exception, or, unless as suggested above, the circumstances under which they were made guaranteed their trustworthiness. Kingstone J., with his eye on one exception only, that which admits declarations of a deceased person against his interest—a rule which covers at best the entry in the cash book—refused all the proffered evidence, saying "it is unwise and dangerous to broaden or extend this rule to allow hearsay evidence, though it has been permitted in certain cases under very different circumstances to these here." Was it dangerous to admit this hearsay? Does a doctor ordinarily falsify dates, medical histories, reports and electro-cardiograms? The answer

seems to be definitely no, but under the present rules of the game, we are faced with the necessity of finding some formulated "rule" into which this type of thing can be placed.

On appeal, the Ontario Court of Appeal unanimously reversed the trial judge's verdict for the plaintiff, but the two written judgments, one by Masten J.A., concurred in by Mulock C.J.O., and the other by Macdonnell J.A., reached different results on different parts of the proferred testimony. As similar situations involving medical testimony have arisen in both England and the United States and are likely to recur in this country, a detailed examination of the judgments seems called for.

The two things all members of the court agreed on admitting were, (1) the letter of Dr. Murray reporting to Dr. Perlman, and (2) the entry of the cash book. Concerning the latter, the "rule" that declarations made by a person against their pecuniary or proprietory interest are admissible, was sufficient to allow its introduction.[8] In this instance the battle was waged as to the sufficiency of the entry, it in itself being quite inconclusive. However, all members of the court agreed that although its probative value alone was slight that in no way prevented its admissibility, and along with the other evidence admitted it undoubtedly acted as corroboration. The main contest centred around the other evidence, because it is plain that once admit Dr. Murray's letter to Dr. Perlman the plaintiff's case disappears. In this connection the "rule" appealed to was that which admits under certain circumstances statements made in the ordinary course of a person's occupation. It is fairly simple to understand the underlying rationale of this exception. Like the other exceptions it is based on the broad principle that there are grounds for believing such statements trustworthy. It is difficult to state accurately such grounds, but the most important is probably that "the habit and system of making such a record with regularity calls for accuracy through the interest and purpose of the entrant."[9] In the early case of *Price* v. *Torrington*,[10] that is all that is required. However, as many cases arose dealing with entries by clerks etc., it was seen that the motive to carry out one's obligations or duty to an employer would

[8] This exception is well established and requires no further comment. Like the other exceptions to the hearsay rule it is based on the ground that it is unlikely that statements against the declarant's interest would be deliberately false. See WIGMORE, *op. cit.*, secs. 1455 *ff.*, and MACRAE, EVIDENCE, 4 C.E. D. (Ont.) sec. 59.

[9] WIGMORE, EVIDENCE, sec. 1522.

[10] (1703), 1 Salk. 285.

undoubtedly prompt the declarant to be truthful,[11] and hence arose the talk in the cases of "declarations in the course of duty." It is only natural that these various motives would be considered in the situations coming before the courts, and anyone who has looked into the cases can readily agree with Masten J.A. in the *Palter Cap Case* when he said, "I find it beyond my powers to reconcile all the various decisions and dicta."[12] Taking the cases as illustrations of courts satisfying themselves as to the trustworthiness of a given statement, there seems no necessity for a reconciliation of dicta. There is no doubt, however, that the English cases have placed tremendous emphasis on the "duty" aspect. As stated by Blackburn J. in *Smith* v. *Blakey*,[13] it is essential "that not only it should have been made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates, and then to make a report or record of it."

This concept of "duty" and its refinement of duty "to do the very thing" is responsible for all the litigation involved around this problem. In the case of clerks or employers, it is fairly simple to understand. Thus, a solicitor's clerk is under a "duty" to his employer to indorse on papers served the facts of service. When, as in *Doe d. Patteshall* v. *Turford*,[14] the solicitor serves the papers himself, and indorses, is such indorsement made in the performance of a "duty"? Duty to whom? Surely not to himself, yet in *Cockle's Cases on Evidence*[15] the headnote states that a "duty may be temporarily assumed . . . . . if it be proved that there was in fact a duty upon another person whose duty was thus assumed for the occasion." Just how a person assumes a duty to himself is unexplained. The true basis of the decision seems to lie in the remark of Littledale J. that "it must be assumed that he would do what he required his clerk to do," and of Taunton J. that a statement made "in the ordinary course of his business, corraborated by other circumstances which render it probable that the fact occurred, is admissible in evidence." Here is a seeking of guarantees without tying those guarantees to a form of words under the guise of a "duty to make".

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[11] See, for example, Tindal C.J. in *Poole* v. *Dicas* (1835), 1 Bing. N.C. 649: "The clerk had no interest to make a false entry; if he had any interest, it was rather to make a true entry; . . . . . *a false entry would be likely to bring him into disgrace with his employer*".

[12] [1936] O.R. at p. 359.

[13] (1867), L.R. 2 Q.B. 326 at p. 332.

[14] (1832), 3 B. & Ad. 890.

[15] 4th ed., p. 201.

There is no doubt, however, that the English cases keep reiterating this talk of "duty", and so long as Canadian courts feel bound to discuss every statement of an English court they are faced with the problem of discussing "duty." Hence in the *Palter Case* we have an elaborate discussion of duty, particularly by Macdonnell J. A. Such a discussion shifts the whole emphasis. The question ceases to be whether these statements can be trusted, and instead becomes the academic one of "duty" or "no duty." It is significant that no case known to the writer attempts to define "duty." Without entering into difficult legal analysis, it seems sufficient to take Salmond's definition of duty as "an obligatory act, that is to say, it is an act the opposite of which would be a wrong."[16] In the present case there was evidence of other doctors that it was a consultant's "duty" to furnish a report to the doctor referring the patient to him. Does this mean that the consultant commits a "wrong" if he does not? Is he under liability to the referring doctor? So far as the case shows, the patient pays the consultant. Is there, then, a contract between the two doctors? Probably not. However, this may be what is referred to as a "professional duty." Just what is meant by this is hard to define. Does it impose an obligation the breach of which results in suspension from practice? The difficulties inherent in such inquiries, and the fact that they were not apparently made, indicate that the "duty" concept is not only difficult but impracticable. It is strange that in a recent English case, where the court admitted a doctor was under contract to a solicitor who had sent him a patient for examination, it nevertheless refused to admit the doctor's findings presented to the solicitor saying there was no "duty" to report.[17] If a contract does not involve "duty" what does? One can understand that statements by a doctor to a patient may not be admitted,[18] but this is on the quite reasonable ground that doctors often, for the patient's good, do not tell him the truth, and therefore the statement furnishes no guarantee of truthfulness.

However, whatever "duty" may mean, both Masten and Macdonnell JJ.A. said there was a "duty" to report to another doctor and hence the letter was admissible. This of course was enough to meet the ends of justice in the present case. The interesting point is, however, that whereas Masten J.A. (and Mulock C.J.O.) would admit all the proferred evidence, Mac-

[16] SALMOND, JURISPRUDENCE, 7th ed., p. 236.
[17] *Simon* v. *Simon*, [1936] P. 17.
[18] *Dawson* v. *Dawson* (1905), 22 T.L.R. 52.

donnell J.A. refused to admit the medical history, the electro-cardiogram and the screen tracing.

Macdonnell J.A. did this by a strict adherence to the formula of "duty." He refused the medical history because Dr. Murray was under no "duty" to make it. It might be customary, "but custom is not duty." If custom be not duty, then what is the "professional duty" so often referred to?[19] While the writer can make no profession of a knowledge of medicine, he has been informed by several medical men that the making of a case history is the most important part of a diagnosis. Macdonnell J.A. admitted it was Dr. Murray's "duty" to adopt "what he considered proper means to ascertain the patient's condition." Surely one of these means was the medical history? To say that an electro-cardiogram and a screen tracing were made in performance of a duty while a history was not is to overlook the fact that all of these things are done as much for purposes of future reference as present diagnosis.[20] A screen tracing in particular is only a memorandum by means of drawing of what the doctor sees. Why is it done any more in the line of duty than the memorandum in writing styled a medical history? It is true that in *Mills* v. *Mills*,[21] an English court refused to admit entries from a deceased doctor's case book as to the nature of a complaint for which he treated a patient. Aside from the merits of the decision, it would seem doubtful to say, adopting the language of the cases, that the doctor was under no "duty" to the person consulting him. Would a doctor not be remiss in his "duty" to his patient if he did not know he had given a week ago such a quantity of a drug that further dosage might be fatal? Must he remember this? Or remember that a month ago his patient had an attack that is related to the present condition? Surely this is the function of a medical history. The main point, however, is that there is absolutely no reason in the world to believe that such a history is falsified. It is a routine matter, made with a view to a correct diagnosis now and in the future, and if it becomes important in determining

[19] In *Mills* v. *Mills* (1920), 36 T.L.R. 772 the court speaks of a "binding rule of his profession" in connection with a physician. No attempt is made to discuss the question of "binding." Does it mean any more than following a practice so customary among physicians that failure to observe it might be said to be unusual, or irregular?

[20] Macdonnell J. A. was willing to admit the screen tracing and electro-cardiogram but for reasons to be mentioned later, he refused to admit the dates on them—the only matter relevant to the present case.

[21] (1920), 36 T.L.R. 772. Similarly entries of a solicitor in his diary or day-book have been excluded. See *infra*, however, for the recent treatment of such entries by an Irish court.

an issue of fact there seems to be no serious objection to its admissibility. Case histories are much more common than the other evidence here tendered, and their exclusion is likely to cause serious hardships. The following language of an American Federal court in admitting them as exceptions to the hearsay rule seems equally applicable to this country.

> It is a well known fact that many physicians take notes and make an office record of examinations and treatment of their patients. The purposes and the usefulness of such records in their practice is obvious. There is as much reason for verity in such records as in books of account. In fact, there is more reason for verity, because dishonesty might prompt false entries in books of account, while there is no reason why a physician making a record to aid him in treating a patient should consciously make a misstatement therein.[22]

It is true that the American courts have discarded the "duty" concept.[23] To the writer the distinctions made in the present case indicate that the "duty" concept adds nothing to the real solution of a problem, and merely furnishes litigants with an opportunity of securing an unmerited judgment.

It is strange that while Macdonnell J.A. admitted the electro-cardiograms and screen tracings were made by Dr. Murray as part of his "duty," he refused to admit them for the only purpose they were required in the present case: namely the date. His reasons on this point were to the effect that there was no proof that they were put on at the time of the examination and "they are not any integral part of the electro-cardiograms and the tracing, as in the case of the report." Why a date in a letter is any more an "integral part" than a date on the cardiogram is hard to see. Both are means of identification. Presumably if there were proof of contemporaneous making (although this seems no more required in the one case than the other, especially in the case of a heart specialist who must do something to identify dozens of these cardiograms etc. as soon as they are made) the judge would have admitted them. But why? If they were not an "integral part" where was the "duty"? On an ultra-refinement of the "duty" concept, why, even if an integral part, should the date on the letter be admitted, since it has been said that "unlike the case of a statement against interest, the exception does not extend to collateral matters stated in the declaration, however closely connected with the thing which it was the declarant's duty to do and record."[24] Commonsense

[22] *Adler* v. *New York Life Insurance Co.* (1929), 33 Fed. (2d.) 827. See also *New York Life Insurance Co.* v. *Bullock* (1932), 59 Fed. (2d.) 747.

[23] WIGMORE *op. cit.*, sec. 1524.

[24] MACRAE, EVIDENCE, 4 C.E.D. (Ont.) p. 539, citing *O'Connor* v. *Dunn* (1877), 2 O.A.R. 247.

rebels at rejecting the date of a letter, because everyone is familiar with letters. Should judicial unfamiliarity with electro-cardiograms result in splitting a complete record into component parts?

What the writer believes to lie at the foundation of the admissibility of all this proferred testimony was put succinctly by Masten J.A. when he stated that "if Dr. Murray were now alive and in the witness box it is impossible to imagine that with the records . . . . . before him, he could possibly be shaken in cross-examination as to the date when he examined the late Harry Palter."[25] This we believe to be the crux of the matter, and although the judge felt compelled to say that this "will not assist the appellant company unless the case falls within the recognized exceptions to the inadmissibility of hearsay evidence", and therefore to embark upon a discussion of "duty," it is not surprising that his judgment was in favour of admitting all the evidence. Without intending to be disrespectful, one might say that being satisfied that the statements satisfied the tests for truthfulness, it was easy to find a "duty," particularly when the phrase is capable of so many shades of meaning.

In view of the fact that it is admittedly impossible to reconcile all the formulae of the English cases dealing with this exception to the hearsay rule, it is a little surprising to find Macdonnell J.A., after insisting on a rigid adherence to the "duty" concept, saying the "it is necessary to avoid using the rules in such a way as to follow the shadow and miss the substance."[26] With respect, one would think the substance was a determination by the court as to the trustworthiness of the statement and to that end "duty" might be an element to be considered. To elevate the "duty" notion involved in entries by clerks, into a rule to be applied to doctors, requires considerable legal ingenuity.

As an illustration of a more realistic approach to the problem involved and one which, without entering into quibbles over the term "duty", places the reception of hearsay evidence on a broad discretionary principle, the decision of Meredith J. in the Irish case of *Harris* v. *Lambert*[27] is worth study. The question before the court concerned the rectification of a family settlement. The defendants sought to put in evidence entries in the diary of Mr. Giltrap, the solicitor for the defendants in arranging the settlement (who had since died), covering interviews with the plaintiff's solicitor. The question arose in the cross-examination

[25] [1936] O.R. at p. 357.
[26] [1936] O.R. at p. 376.
[27] [1932] I.R. 504.

of the plaintiff's solicitor, Mr. Mills, covering these interviews. The following remarks of Meredith J.A. indicate his approach to the problem:

> If the notes are inadmissible as evidence then there is a very serious hiatus between the law of evidence inherited from the English system and science and common sense, because Mr. Mills, ... repeatedly admitted that after the lapse of so many years his memory did not go beyond the notes. He just remembered what was in the notes themselves. Consequently his notes and his evidence and Mr. Giltrap's notes are all reduced to a common denominator, and to attach any importance to the one and to reject the other would not be in the interest of justice, and would really be a travesty of the laws of evidence.

Here is the same notion mooted by Masten J.A. in the *Palter Case*. It is a facing of realities. What is added by swearing a witness who has no independent recollection of the facts and can only testify from a record he made at the time? Does not this cover the situation of all busy medical practitioners? Surely the identification of the notes is equally good when made by someone other that the person making them.

Meredith J. next mentioned the "duty" concept and his remarks on that seem particularly appropriate to the lengthy discussion of "duty" in the *Palter Case*. He stated, in part:

> I would further observe that the question of whether the duty was to do this specific thing or whether the notes were merely kept in discharge of what was generally advisable, is really a question which, from the point of view of science, logic and common sense, can only be one of the weight and value of the evidence, not a question of whether the note are evidence at all. Only a peculiarity of the law of evidence would make the distinction vital.

After referring to the remarks of Tindal C.J. in *Poole* v. *Dicas*[28] to the effect that "the clerk had no interest to make a false entry: if he had any interest, it was to make a true entry: it is easier to state what is true than what is false", Meredith J. continued:

> The Chief Justice there really looks behind any mere arbitrary rule and looks to logic and common sense and sees whether the circumstances of the entry were such as to lead to a presumption of truth rather than one of falsehood.

He therefore admitted the diary entries, saying merely,

> I think . . . . . that it is not necessary that there should be an absolute duty to do this particular thing or that an action of negligence would lie if the particular thing was not done. If the solicitor, having a duty to perform, and no end in view but the discharging of

[28] *Supra*, n. 11.

> his duties in the ordinary and usual way of business as a solicitor, makes notes of what transpired at an interview in order to do what is necessary for a client, I think that is sufficient.[29]

It is the writer's opinion that this approach, simple and direct as it is, is far preferable to the subtleties involved in the elaborate discussion of "duties" in the *Palter Case*. The *Palter Case* will undoubtedly become a leading case merely because, to use Wigmore's alliterative phrase, the judges "refused to justify with jejunity their judgments."[30] It is doubtful, in the writer's opinion, whether elaborately worded rules and subtle refinements assist in producing either safeguards to the establishment of truth, or, what is equally important, in establishing respect for law in the minds of the public. It is not without significance that many other fact-finding bodies would hear evidence of the kind discussed without question. Further, we believe that any reasonable individual would act on such evidence in the conduct of his own affairs. It is not healthy to encourage the belief that courts exist for the purpose of playing a legal game, and certainly many of our rules of evidence are sadly in need of a rigorous pruning to remove artificial growth.

C. A. W.

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HOSPITALS — LIABILITY FOR NEGLIGENCE OF NURSES AND DOCTORS — RESPONDEAT SUPERIOR.—Rules of law as they are found in text books are very frequently beguiling in their simplicity and clarity of expression. When removed from their academic surroundings and made to perform their true function of deciding the rights and liabilities in a given set of facts, their inadequacy frequently becomes apparent. In such case there is often a tendency to avoid the issue by saying the law is clear but there may be difficulty in its application. It is doubtful, however, whether this clear-cut distinction between law and its application can be made. If the law be simple, on recurring sets of similar facts, one should imagine the application of the rule would yield similar results. Such is not always the case, as may be seen from a comparison of three recent cases, one English, one Canadian, and one from New Zealand, dealing with the application of the maxim *respondeat superior* to facts involving the negligence of nurses employed in hospitals.

[29] The reader will not fail to observe how, after reaching a conclusion on broader grounds, Meredith J. slips back to the "duty" concept to justify that result. The latter adds nothing to the discussion.

[30] SUPPLEMENT, 1925-1935, TO EVIDENCE, *Author's Preface*, p. vii.

It is elementary text-book law that a master is liable for the acts of a person over whom he has control or the right to control, and whose acts are done within the course of the employment. All the law of master and servant can be summed up under these two heads, but when one comes to examine what is meant by control or right to control and what is deemed to be included within the scope of one's employment, all simplicity in the law, or its application, disappears. Sometimes from the very nature of the act in question the presence or absence of actual control is self-evident. Illustration of this is found in such a case as *Hillyer* v. *The Governors of St. Bartholomew's Hospital,* [1] which held that the surgeon in charge of an operation has complete control of that operation and of the persons assisting him at that time. Thus, even though the surgeon be one employed by a hospital, there is no liability on the hospital board for any act of negligence on his part in the course of an operation, nor is there any liability in the hospital board for neglect on the part of their nurses while engaged in assisting such surgeon. In such cases the notion of possible interference or exercise of a right to control by the hospital board is clearly excluded by the necessity of the case. [2] There are other situations, however, which cannot be disposed of so easily, and in which discussions concerning the right to control may be used to obtain one of two diametrically opposed results. [3] Of such a nature are the

[1] [1909] 2 K.B. 820.

[2] Another instance where the facts themselves postulated a right to control, may be seen in *Bain* v. *Central Vermont Railway Company,* [1921] 2 A.C. 412, where two railways with connecting lines ran trains over each other's line. When an employee of the A Railway was on the B Railway's lines it was held he *must* be subject to signals, etc., of the B Railway, and hence there was actual control which made him the servant, temporarily, of the B Railway, which must respond for his negligent running of trains while on that line.

[3] Compare the case of *Katz* v. *Consolidated Motors Ltd.,* [1930] 2 D.L.R. 241, in which the British Columbia Court of Appeal expressly denied that the defendant company had control over persons attempting to sell one of its cars, but nevertheless held the defendant liable for such salesman's negligence. The whole question of liability of employers of salesmen who use their own cars in going from place to place is fraught with difficulty concerning the question of control. An English Court recently in *Egginton* v. *Reader,* [1936] 1 All E.R. 7, held that there being no control the employer was not liable. This case might just as easily have been decided the other way and the amazing diversity of opinions in the United States indicates that the control concept can yield the most diverse results. See Leidy, *Salesmen as Independent Contractors,* (1930), 28 Mich. L.R. 365, where the suggestion is made that control should be expanded to mean control of the situation of which the act in question is a part. On this view salesmen using their own cars would be treated as exposing their employers to liability for negligent driving. The extent to which the control concept can be used to impose liability may be seen in *Parker* v. *Miller* (1926), 42 T.L.R. 408, where defendant was held liable for damage caused the plaintiff by the negligent parking of the defendant's car by a friend to

cases dealing with the liability of hospitals for negligent acts of nurses done outside the confines of the operating room and in what might be called the ordinary course of her nursing duties.

For example, in the New Zealand case of *Logan* v. *Waitaki Hospital Board,*[4] and in the recent Ontario case of *Vuchar* v. *The Trustees of the Toronto General Hospital,*[5] the facts were very similar. In both a patient, received free of charge by the hospital, was badly burned by an excessive application of heat from what is known as an electric cradle. The problem in both was whether, assuming the nurse in charge of the operation of the cradle to have been negligent, the hospital board should respond for the negligence of the nurse. In the English case of *Strangeways-Lesmere* v. *Clayton,*[6] two nurses employed by the defendant hospital misread certain written instructions requiring a six drachm dose of paraldehyde, and administered six ounces of paraldehyde, with the result that the patient died. Again the question of the hospital's liability was involved. The judgment of Horridge J. in the English case exonerated the hospital. In the Ontario case, the trial judge, Kingstone J., held the hospital liable. In the New Zealand decision, which contains a most elaborate discussion of the whole doctrine, the trial judge and one of the three members of the Court of Appeal were in favour of exonerating the hospital, while the two members of the Court of Appeal, composing the majority, held the hospital liable. All of these cases purported to follow English precedent, and the diverse results should, in themselves, indicate either that the rules of law are unsatisfactory, or that their application depends upon some other factor which does not appear in the text-book rules.

It seems to be admitted in all judgments that a doctor employed by a hospital does not render the hospital liable for any negligence in his treatment of a patient. This proceeds on the ground that the board has no control or right to control a physician or surgeon in the course of his treatment. Difficulties, however, arise in the case of nurses. In terms of control, has the hospital the right to control a nurse employed by it in her care of a patient? The difficulty in the cases begins with a dictum of Kennedy L.J. in *Hillyer's Case* when he made

whom he had loaned it. Such straining of agency principles is obviated in this country by statutes making the owner of a car respond in damage for the negligence of anyone operating the car with the owner's consent.

[4] [1935] N.Z.L.R. 385.

[5] [1936] O.R. 387.

[6] [1936] 2 K.B. 11; [1936] 1 All E.R. 484.

a distinction between "the conduct of the hospital staff in matters of professional skill, in which the governors of the hospital neither do nor could properly interfere", and "purely ministerial or administrative duties, such as, for example, the attendance of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food and the like". The fact that the dictum presupposes liability in the latter case and not in the former, together with the fact that nurses have a diversity of duties to perform, has led to differences in the cases. Kingstone J. in the Ontario case, and the majority of the Court of Appeal in the New Zealand case, thought that the use of a heat cradle was a ministerial or administrative duty, whereas Horridge J. in the English case took the view that the following of instructions regarding medicine was not a matter of routine, "but one in which she is to use professional skill". This distinction does not seem satisfactory. Surely the use of an electric heat cradle requires the professional skill mentioned in the English judgment just as much as, if not more so than, reading instructions for medicine and the preparation of a given dose. The difference in result between the judgments of the two Dominion courts and that in the English case seems to be based on something more fundamental.

That the question of professional skill alone cannot decide these questions is indicated in the following language of Lord Dunedin as President of the Court of Session in Scotland in *Scottish Insurance Commissioners* v. *Edinburg Royal Infirmary* :[7]

> The test is, I think, ... control in the matter of service rendered. There are many cases where there is a proper control of service and yet, when you come to the details of how that service is carried out, there is no practical control, because there may be skill in the servant which the master does not possess; indeed the servant is often engaged solely because he happens to possess skill which the master does not possess, but nevertheless, in the general direction of what the servant is or is not to do, the master is supreme. Now if the business of the infirmary managers was to treat the patients, then there might be control; but that is not the business of the infirmary managers, as is pointed out in the case of *Hillyer* v. *Governors of St. Bartholomew's Hospital* which was quoted to us. The managers of a hospital do not go to the public with a profession of themselves operating on or nursing or treating patients. They only hold themselves out as providing an institution where patients will be able to meet with skilled persons who will do those things.

In other words, while control still remains the test of liability in obedience to the oft-quoted rule of *respondeat superior*, the

[7] [1913] S.C. 751 at p. 756.

test of control depends on an answer to a broader question, does a hospital board undertake to supply properly qualified nurses to assist in carrying out the treatment prescribed by medical officers? A close examination of the Scottish, English and Canadian cases, all of which were carefully considered in the judgment of the New Zealand Court, indicates that the Scottish and English cases tend towards the view that a hospital agrees only to supply competent nurses and that therefore any act of a nurse done in the course of a treatment, or to use the language of a Scottish Court "any curative operation conducted by the staff" entails no liability on the hospital whatsoever. On this view, the dissenting judges in the New Zealand case held that the use of an electric cradle, being part of a professional treatment, was not an act done for the hospital, inasmuch as it did not undertake to treat. The majority of the New Zealand Court of Appeal, however, preferred to follow the Ontario case of *Lavere* v. *Smith's Falls Public Hospital,* [8] in which the court held expressly that the hospital undertook to nurse its patients, and the decision of the Supreme Court of Canada in *Nyberg* v. *Provost Municipal Hospital Board,* [9] in which the *Lavere Case* was approved. In no English or Scottish case has this view been taken, save in the dissenting judgment of Lord Alness, in *Lavelle* v. *Glasgow Royal Infirmary.* [10] It is the writer's opinion that this attitude with respect to the functions which a hospital undertakes, furnishes the explanation for the difference of judicial opinions. In the main the English and Scottish cases are consistent with the view that a hospital only agrees to supply competent nurses to give the treatment which a doctor prescribes. Canadian and New Zealand Courts apparently tend to the view that some treatments are non-professional and involve the hospital in liability. Just what is professional is hard to say. For example, in the New Zealand case the testimony of medical witnesses was to the effect that "everything the nurse does is professional", including the handling of hot water bottles. The Canadian Courts and the majority of the New Zealand Courts seem to place emphasis on the skill which is required for the performance of a given act. If this be the test it is hard to see how there was no liability in the *Strangeways Case.* Further, Johnston J., speaking for the majority in the New Zealand case, adopts the reasoning of Lord Alness to the effect that a nurse is at all times under someone's control. She is either

[8] (1915), 34 O.L.R. 216; 35 O.L.R. 98.
[9] [1927] S.C.R. 226.
[10] [1932] S.C. 245 at p. 257.

under the direct control of a physician, as for example in the operating room, or she is under the control of the hospital exercised by the matron or superintendent. This view certainly has much in it that deserves attention, despite the fact that its application would, we suggest, have determined the issue in the *Strangeways Case* in a contrary manner. On the other hand Myers C. J. solves this conundrum, in what possibly accords with the English view, when he says: [11]

> It is an incident of her contract that she shall take her part in the work of nursing the patients in the hospital, and no doubt she is bound to perform her duties in such wards and at such times as may be directed by the superintendent or matron, but it is also incidental to her contract that, once in the ward as directed, she will perform her duties as a professional nurse in respect of each patient, subject to the directions and control of the doctor or doctors in attendance on that patient.

These approaches show the futility of arguing pure control, and Reed J.'s illustration in the *Logan Case* [12] to the effect that the nurse was under the control of the hospital in applying the heat machine because, had the matron ordered her out of the ward she would have been compelled to comply, does not seem to carry us much further. Had the physician who ordered the heat machine appeared on the scene and requested the nurse to remain with the patient, it is likely that his control would have been paramount. In other words did not the physician still retain the "right to control"?

With such a difference of opinion on a topic of fundamental importance, it is earnestly to be hoped that the Privy Council may be furnished an opportunity of deciding between two divergent views. The view stated by Johnston J. in *Logan* v. *Waitaki Hospital Board*, to the effect that

> The purpose of a hospital is the same whether it be a public institution or a private institution and if the care of the sick is its purpose, it carries it out through the people it employs, and the employment of nurses permanently, apart from other considerations, leads to an almost irresistible conclusion that a term of an implied contract with any patient is to nurse. [13]

is one which commends itself, apparently, to the Dominions. The English rule on the other hand has the merit of simplicity insofar as every act done in treatment is done in an individual

[11] [1935] N.Z.L.R. at p. 413.
[12] *Op. cit.* at p. 424.
[13] *Op. cit.* at p. 448.

or professional capacity of the nurse.[13A] The Canadian and New Zealand decisions require a distinction to be made between different types of nursing and different types of treatment. This imposes a terrific strain on any court and is bound to result in uneven treatment by the courts of injured patients in various situations. Perhaps we can do no better in concluding than to quote the language of Myers C.J. in *Logan* v. *Waitaki Hospital Board:*

> As long ago as 1892 Mr. Justice Williams, delivering the judgment of the Court of Appeal in *District of Auckland Hospital and Charitable Aid Board* v. *Lovett*, where the alleged negligence was that of a medical superintendent, spoke of the question as being one not only of extreme difficulty but of great public importance, and he suggested the desirability of legislation to define precisely the liability of Hospital Boards in all cases. During the forty-three years that have elapsed since then, the statute-law relating to hospitals has been many times amended and has thrice been consolidated, but no effect has ever been given to the suggestion made by the Court. I need only add that the question is certainly of no less importance to-day than it was when the original suggestion was made in 1892.[14]

* * * *

The recent decision of the House of Lords in *Lindsey County Council* v. *Marshall*,[15] while a little difficult to classify, does show that a hospital board may in some circumstances be liable for the negligence of doctors and nurses in matters involving professional skill. In that case, a woman was admitted into a small maternity hospital conducted by the defendants without either her, her husband or physician having been informed that there had been a recent case of puerperal fever in the hospital. The woman (as well as some five others) contracted the disease, and after her recovery, commenced action against the hospital board. The committee of the county council which administered the hospital was advised in the management of the home by two physicians, one of whom was the medical superintendent of the hospital. These physicians were informed of the cases of

[13A] An unreported decision of Swift J. in *James* v. *Probyn* (See (1936), 55 Law Notes at p. 313) seems to bear out this statement. In that case, which was one for negligence of a nurse in leaivng a tube in a patient's body after an operation, Swift J. in speaking of the duties of a hospital said: "I do not think they undertake in any way to be responsible for the way in which the doctors or the nurses perform their duties." This statement would seem to deny the distinction made by Kennedy L.J. in *Hillyer's Case* between professional and administrative duties, but if, as the expert evidence in the New Zealand case stated, all a nurse's duties in connection with patients are professional, that distinction is of little importance.

[14] *Op. cit.* at p. 421.

[15] [1936] 1 All E.R. 1076.

puerperal fever in the hospital, and while advising certain disinfectant methods, it was not until after the plaintiff and four other women developed puerperal fever that they decided to close the hospital against further admissions.

The jury found that it was a breach of duty not to inform the plaintiff or her husband or her medical adviser of the case of puerperal fever existing at the time of her admittance. On this finding the trial judge entered judgment for the plaintiff, and that judgment was upheld by the Court of Appeal (Greer and Roche L.JJ., Maugham L.J. dissenting) and by the House of Lords.

The argument of the hospital board throughout was based on the *Hillyer* v. *Governors of St. Bartholomew's Hospital* line of cases, to the effect that a hospital board is not liable for negligence of doctors, matrons or nurses "while acting in the exercise of their professional functions and knowledge".[16] It was argued that as the decision whether the home was or was not free from infection was a medical question, this was a matter falling within the professional skill of the advising physicians for whose negligence or wrong advice the board should not be responsible. It seems quite correct to classify the advice given by physicians in such circumstances as the exercise of professional skill, and, in view of the fact that the hospital was held liable, it should be clear that under some circumstances a hospital board *is* liable for negligence in such matters. Without deciding anything as to the correctness of the decision in *Hillyer's Case*,[17] the House of Lords held that it could have no application to the facts in the present case. It was admitted that it was the duty of a hospital board "to provide a home reasonably fit and to provide accommodation in it, and if there have been circumstances known to them which might render the home not so fit, it is their duty to warn a person proposing to enter the home of such circumstances".[18] This being so, to determine liability one had only to ask two questions: Did the hospital board know, or have reason to know of conditions rendering the hospital unfit? If so, did the hospital board warn entering patients? Now clearly, the hospital board employed two physicians for the purpose of

[16] See this summary approved by Lord Sankey at p. 1086.

[17] Lord Halisham L.C. stated that "the correctness of the earlier decisions is still open to review" by the House of Lords. Lords Sankey and Macmillan apparently accepted, at least for the purpose of the case, the decision in the *Hillyer Case*. Lord Wright expressly reserved the correctness of the distinction made in the *Hillyer Case* for further decision.

[18] Lord Sankey at p. 1087.

advising them as to medical conditions at the hospital. Just like a solicitor employed to search a title to real estate, they were, to use the language of Lord Halsbury in *Blackburn, Low and Company* v. *Vigors*,[19] "agents to know". Being agents to know, their knowledge, or negligent failure to acquire knowledge, must, on well-recognized agency doctrine be imputed to the board, and as the board then acted by admitting patients with this knowledge, liability must follow.

Such an analysis of the case does not necessitate denying the doctor's work in advising regarding infections as professional. It undoubtedly is. Nor is it necessary to style the medical officers "servants", as Lord Wright did.[20] Both Lord Sankey[21] and Lord Wright,[22] advert to the extreme difficulty of drawing the line between acts done by nurses or doctors in a professional capacity and those which are clearly administrative. Both admit, however, that it was not necessary to discuss or apply such a distinction even if valid. It is not correct, therefore, to say, that the decision establishes that the doctors were not acting professionally, and hence their negligence resulted in liability. The *act* complained of was in admitting the plaintiff as a patient. This act could be done by the matron, or for that matter by a doorman, either of whom would undoubtedly be under the control of the board for that purpose. That act involved liability because of knowledge the board possessed through its agents—not necessarily servants. The diversity of opinion regarding *acts done by nurses in the course of treatment* still awaits authoritative settlement.

In the writer's opinion the decision of the House of Lords in *Lindsey County Council* v. *Marshall* when viewed in the manner here suggested, raises grave doubts as to the correctness of the decision of Walton J. in *Evans* v. *Liverpool Corporation*.[23] In that case a visiting physician to a hospital for infectious diseases was, under the terms of his employment by the hospital, responsible for the treatment of patients and "for their freedom from infection when discharged". The physician negligently discharged a young patient while still in an infectious condition, with the result that three other children were infected when the patient returned home. In an action brought against the hospital board for damages, Walton J. disposed of the case in the following words :

[19] (1887), 12 App. Cas. 531.
[20] At p. 1095.
[21] At p. 1087.
[22] At p. 1094.
[23] [1906] 1 K.B. 160.

> 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. In my opinion there was in the present case no ground of complaint—no cause of action—against the defendants.

As suggested above, it is probably correct to say that a hospital board has no control over the opinion or advice of its medical agent, but that does not seem the decisive factor. It is submitted that if a hospital board undertakes to conduct a hospital for persons suffering from infectious diseases, they owe some duty to the public to see that all reasonable precautions have been taken in permitting patients to leave the hospital and return to contacts with members of the public. Even as a hospital admits patients, so it discharges patients, and if a hospital board discharges a patient with the knowledge that such patient is likely to cause harm to third persons, and harm of the type contemplated results, there seems no reason why the hospital board should not respond. Again there is no question of a doctor's act being under the control of a board. The act of the hospital board in discharging a patient, however, should be affected by the knowledge of an agent they employ to advise them when this can safely be done. It is perhaps unfortunate that the House of Lords in *Lindsey County Council* v. *Marshall* did not deal specifically with the *Evans Case*. Suppose that a hospital negligently admitted a person suffering from puerperal fever with the result that other patients contracted the disease? Surely liability would follow along the lines suggested in the *Marshall Case*. If that be so, there seems no reason for distinguishing between the negligent admission of patients and their negligent discharge.

C. A. W.