THE LIABILITY OF A HOSPITAL FOR THE NEGLIGENT ACTS OF A NURSE *

The question of the liability of a hospital for the negligent acts of its nurses is one that has given the courts a great deal of difficulty. Unfortunately, although cases upon this branch of the law have been quite frequent in recent years, the question has never come squarely before the House of Lords or the Privy Council. In Canada we have had two decisions by the Supreme Court. It would be passing strange if, after the matter had been twice before this Court, the basic rules, at least, were not settled. In this short paper it is proposed to look at the hospital situation apart from authority and then to examine some of the leading cases and attempt to determine how the law stands since the recent decision of the Supreme Court in the *Fleming* Case.[1]

Essentially the hospital situation is one of B supplying accommodation and the services of a nurse, C, to A. To determine B's liability to A for injuries caused by the negligence of C two relationships may have to be examined or, to put it another way, liability may arise under either of two relationships. First there is the contract express or implied between A and B. For example, under this contract B may have undertaken to provide the very services during the performance of which the negligence occurred. Or it may be that B merely undertook that C should be properly skilled and capable of performing the services in question. Or it might even be stipulated in the contract that B should not be liable for injury caused by the negligence of C. In these instances attention is directed to the contractual relationship between A and B. But this is not the whole picture. It may be necessary to consider also the relationship between A and C. An illustration will make this clear. Suppose that A contracts with B for a capable chauffeur and that B sends his servant C who is in fact a duly capable chauffeur. If subsequently, through C's negligence A is injured, B is not liable. The test would be what was the contract between the parties. The relationship between B and C is, for the purpose of determining liability, immaterial. Now let us change the facts a little. Suppose that A's object in obtaining C is to have the car driven to a certain place. B goes along, tells C to drive by a different route, orders him to drive at certain speeds and

* A student essay for the Sir Joseph Chisholm prize at Dalhousie Law School, 1939.

[1] [1938] S.C.R. 172, [1938] 2 D.L.R. 417.

generally takes control. In this case liability would attach to B. The contract is the same but the contract alone does not govern. Here the relationship between B and C at the time the negligence occurred is the important factor. The point is that while in certain cases liability for the negligence of an employee may be founded or negatived by the contract between the employer and the person to whom the service is rendered, in other cases it will be necessary to consider the relationship between the employer and the employee. Applying this reasoning to the hospital situation it may be that in certain cases an examination of the contract between the hospital[1A] and the patient will end the case. In other cases the relationship between the hospital and the nurse at the time the negligence occurred will have to be looked at. And *a fortiori* this will be so where the exact terms of the contract are unascertainable or are of such a nature as to leave the question open.

It may be remarked in passing that the contract between the hospital and the patient is often extremely difficult to determine. The cases show that there is usually no express contract and the court often has great difficulty in reading in the terms of an implied one. Then too there are the cases when the patient is admitted to the hospital while wholly unconscious. By contrast the contract between the hospital and the nurse is relatively easy to determine and the relationship existing can usually be gathered from written regulations and general practices which are easily established.

This outline is true, however, only so long as the doctor remains out of the picture. The doctor can and does in certain circumstances take complete control of the situation. When he does so all nurses are bound to obey him and, generally speaking, no one can interfere with him or countermand his orders. It is obvious, therefore, that when the doctor is in control the principles of liability outlined must be modified. The court in such a case will have to examine the relationship between the doctor and the nurse at the time the negligence occurred.

Keeping in mind these general principles of liability we may examine some of the cases. The modern line of authorities begins with *Hall* v. *Lees*.[2] In that case an association, which had been formed for the purpose of supplying qualified nurses in the parish of Oldham, sent two nurses into the home of the plaintiff

[1A] For convenience the general term hospital is used rather than the various terms of trustees, directors, board, etc. as those controlling the hospital are called in different cases.

[2] [1904] 2 K.B. 602, 73 L.J.K.B. 819.

at the request of the plaintiff's doctor. Due to the negligence of one of them the female plaintiff was burned. The contract between the association and plaintiff was contained in several documents which set forth the terms of employment, required a confidential report, etc. On construction of these documents the Court decided that the contract was to supply nurses who were to be under the control of the plaintiff's medical man. And since they had supplied duly qualified nurses they were not liable. In this case the nurses passed completely out of the control of the association. As Collins M.R. put it,[3] "the nurse passes under the control and instructions of the medical man, and is not, so far as nursing is concerned, the servant of the association". Or as put by Matthew L.J.,[4] "I cannot see that the association had any right to follow their nurses into the houses of the patients to see how they discharged their duties". The point to notice is that here the Court had to concern itself only with the contract because, *qua* the nursing, no relationship of master and servant existed and no right of control rested with the defendants. It was therefore quite correct to say that in this case the test was to determine the contract between the association and the plaintiff. The case is no authority for saying that that test is equally applicable where the nurse is under the control of the hospital authorities.

The next case is *Evans* v. *Liverpool Corporation*.[5] The case is not strictly in point because it concerns a doctor, not a nurse, but the reasoning is instructive. The facts were that a medical man attached to the defendant's hospital discharged a son of the plaintiff while still in an infectious condition with the result that others of his family became infected. It was held that the hospital was not liable. Walton J. held that there was no liability on the principle of *Rylands* v. *Fletcher*.[5A] Then he defined the contract of the hospital authorities as an undertaking that their patients should have "competent medical advice and assistance".[5B] Since the doctor was duly qualified there was no liability on this ground. Then he considered the question whether or not the doctor was the servant of the defendants and decided that he was not. At page 166 he says : "It is contended that the doctor was the servant of the defendants for the purpose of discharging the child, and that they are liable

[3] 73 L.J.K.B. at p. 824.
[4] 73 L.J.K.B. at p. 825.
[5] [1906] 1 K.B. 160.
[5A] (1868), L.R. 3 H.L. 330.
[5B] [1906] 1 K.B. at p. 166.

for the negligence of their servant but the terms of his appointment and the rules under which he acted do not bear out this contention." In this case the judge found it necessary, after considering the undertaking of the hospital to the patient, to go on to the question of the relationship between the hospital and the doctor.

In *Hillyer* v. *The Governors of St. Bartholomew's Hospital*[6] the plaintiff was an impecunious medical man. After consulting Mr. Lockwood, a consulting surgeon attached to the defendant's hospital, he was admitted to the hospital for an examination by Mr. Lockwood. For the purpose of the examination he was put under an anaesthetic and placed on the operating table. Several surgeons, nurses and carriers assisted. While under the anaesthetic the patient was severely burned. Graham J. refused to put the question of negligence to the jury on the ground that, even if there was negligence, the hospital was not liable. The Court of Appeal upheld this view. Farwell L.J. after stating that "it is now settled that a public body is liable for the negligence of its servants, in the same way as private individuals would be liable under similar circumstances"[7] goes on to hold that at the time the negligence occurred the nurses were not servants of the hospital. The *ratio* of his decision is stated at page 526 : "The three nurses and the two carriers stand on a somewhat different footing, and I will assume that they are the 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. If and so long as they are bound to obey the orders of the defendants, it may well be that they are their servants, but as soon as the door of the theatre or operating room has closed on them for the purposes of an operation (in which terms I include examination by the surgeon) 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; the surgeon is for the time being supreme and the defendants cannot interfere with or gainsay his orders."

Kennedy L.J. took a broader view of the situation and proceeded in sweeping terms to lay down the liability of a hospital in all cases. At page 828 he says:

"The legal duty which the hospital authority undertakes towards a patient, to whom it gives the privilege of skilled

[6] [1909] 2 K.B. 820.
[7] [1909] 2 K.B. at p. 825.

surgical, medical, and nursing aid within its walls, is an inference of law from the facts. In my opinion it is not the ordinary duty of a person who deals with another through his servants or agents and undertakes responsibility to that other person for damage resulting from any injury inflicted upon him by the negligence of those servants or agents. In my view, the duty which the law implies in the relation of 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 whilst 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, attendance 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 patient for their sufficiency, their propriety, and observance of them by the servant."

While Lord Justice Farwell's decision is carefully restricted to the facts of the case Kennedy L.J. used broader terms. We have seen that in *Hall* v. *Lees* the *ratio* was the contract between the patient and the association. In *Evans* v. *Liverpool Corporation* both the contract between the hospital and the patient and the

relationship between the negligent doctor and the hospital were examined. In both cases the Court used the normal approach to any agency or master and servant situation. Now in the judgment of Kennedy L.J. a new element is introduced. A distinction is drawn between "professional" and "routine" duties. Unfortunately these terms were not defined as to their content except in a general way, nor is the basis of the distinction between them in point of law made clear except by reference to the control exercised by the hospital. Obviously some such basis is necessary because it is trite law that there is no legal distinction between routine and professional acts *per se*. The nature of the work may be important as showing the relationship of the hospital and the nurse at the time the negligence complained of occurred. Or it may be important as evidence of the terms that should be read into an implied contract between the patient and the hospital. Thus Kennedy L.J. may have considered that when the nurses were engaged in matters of professional skill they were independent contractors and not servants of the hospital. On the other hand he may have based his decision on the contract between the hospital and the patient, reading in a term that the hospital would not be liable from the fact that the nurse was engaged in work requiring professional skill. It is interesting to note that in 1938 the Court of Appeal in England split on this very question,[8] the majority adopting the latter and the dissenting judge the former view. A third possible view is that when Kennedy L.J. spoke of professional duties he was speaking of a very restricted field of activity and that he regarded most nursing as routine. This case has been discussed in virtually every case of similar facts that has since arisen and it is most imoprtant when the case is discussed to understand just what effect the court reviewing it gives to it. When they approve it, or as in the *Fleming Case*,[8A] apparently overrule it, we must be careful to find just what they are overruling or approving.

[8] *Wardell* v. *Kent County Council*, [1938] 3 All E.R. 473. Per MacKinnon L.J. at p. 482: "The truth is that, as between the hospital and the nurses, the nurses are so manifestly in the service of the hospital that for that very reason it becomes necessary to inquire whether, as between the hospital and the patients, the hospital is liable for the negligence of those who are in their service".

Per Greer L.J. at p. 476: "It seems to me that the meaning of the decisions in the cases referred to is that in so acting doctors, matrons and nurses are not acting as servants of the proprietors of the hospital. If they were the hospital would be liable for their acts".

Both of these statements were made after reference to the *Hillyer Case* and cases following it.

[8A] [1938] S.C.R. 172, [1938] 2 D.L.R. 417.

After the *Hillyer Case* there followed a long break in the English cases so that the case stood as the leading English authority for many years. It is interesting to note its treatment by the Canadian courts during this period. The first Canadian case after the *Hillyer Case* was *Thompson* v. *Columbia Coast Mission.*[9] In a judgment "characterized by masculine common sense as well as a deep knowledge of the law",[10] MacDonald J. held that the defendants were liable in contract for the negligence of the doctor employed by the hospital where the plaintiff had paid a monthly fee to the defendants for hospital treatment and medical attention. The *Hillyer Case* was distinguished on the grounds of the contract between the plaintiff and the defendants.

The next case is *Lavere* v. *Smith's Falls Public Hospital.*[11] The facts were that the plaintiff was burned by a hot brick placed in her bed to warm it after an operation. The brick had not been properly covered as it should have been. In this case the plaintiff agreed to pay a certain sum per week which was to nclude her board, attendance and nursing. It was held that the hospital was liable in contract. Riddell J. says at page 363: "We proceed on the grounds of an express contract to nurse and express no opinion as to the law in the ordinary case of a patient entering the hospital without such contract."

Latchford J. at page 363 says: "The contract between the parties expressly included nursing of the plaintiff, and the damage she sustained resulted undoubtedly from the negligence of a person employed by the defendants to do that nursing".

Kelly J. at page 372 says: "In that view the defendants are liable, the case resting on the defendants' contract which included nursing the plaintiff."

It is clear that in this decision the express contract to nurse is the ground upon which the hospital was held liable.

Elk v. *Board of High River Municipal Hospital*[12] is very similar in its facts and in this case also the judge found a contract to nurse. The *Hillyer Case* was distinguished on this ground. It is interesting to note that the judge applied a second test of control or lack of control and found the hospital liable on this ground also "for the negligence of an employee."[13]

[9] (1914), 15 D.L.R. 656.
[10] Per Riddell J., 26 D.L.R. at p. 360.
[11] (1916), 26 D.L.R. 346.
[12] [1926] 1 D.L.R. 91.
[13] *Op. cit.* at p. 92.

In 1927 the question came before the Supreme Court of Canada in *Nyberg* v. *Provost Municipal Hospital Board*.[14] The facts were that the plaintiff had been operated on and was placed in bed while still unconscious. To combat the shock the bed had been previously heated by two hot water bottles which had been filled by one of the nurses. When the plaintiff recovered consciousness it was found that he had been severely burned. The negligence consisted in filling the bottles with water that was too hot and also in the failure of one of the nurses to check up after noticing a marked reddening of the skin of the patient from one of the bottles. It was held by the majority of the Court that the hospital was liable. Anglin C. J. C. who delivered the judgment of the majority held that the negligence of the nurse was in regard to a matter of routine duty and that therefore the defendants were liable. In his view the *Hillyer Case* is confined to narrow limits. "That case (*i.e.* the *Hillyer Case*) is authority for the propositions (a) that the relation of master and servant does not exist between a hospital board and the surgeons and physicans whom it may supply for the treatment of patients in the hospital; (b) that the nurses on the staff of the hospital while they are actively engaged in assisting a surgeon during an operation . . . are so immediately subject to his orders and control that they are for the time being not to be regarded as servants of the hospital authority; and (c) that in regard to them while so engaged, as in regards to the surgeon himself whom they are assisting (should he also be supplied by the hospital management), the only undertaking of the hospital authority is that they are qualified for the duties assigned to them and not that they will not be negligent in their performance".[15] The *Hillyer Case* therefore did not apply to the facts before him. Then he goes on to say that even assuming that the nurse was under the control of the doctor at the time she filled and placed the hot water bottles in the bed the hospital was still liable because of the failure of the nurse to check up when she saw that one of the bottles had reddened the skin on the plaintiff's chest. At page 232 he says, "I regard the failure of the nurse, after the appearance of the skin on the plaintiff's chest had aroused her suspicions, to make sure that the hot water bottle against his leg was not a source of danger, as inexcusable and as negligence in her capacity as servant of the hospital corporation in matter of ministerial ward duty,

[14] [1927] S.C.R. 226.
[15] [1927] S.C.R. at p. 229.

if not of mere routine, which entailed responsibility on that body for its consequences. The obligation undertaken by the hospital authority (apart from the operation itself and the services of surgeons and nurses in the operating room) was not merely to supply properly qualified nurses, but to nurse the plaintiff. *Hall* v. *Lees*. It was negligence of their servant in the discharge of that contractual obligation that caused the severe injury of which the plaintiff complains." The case in his view is indistinguishable from the *Lavere Case*.

Mignault J. held that the hospital was not liable because the nurses were under the control of the surgeons when the alleged negligence occurred.

In *Logan* v. *Colchester County Hospital*,[16] the negligence complained of (the plaintiff was burned by a hot water bottle) was that of a special nurse and much of the argument centered around this point. It was argued that this nurse had been employed by the doctor as the agent of the plaintiff. The Court held, however, that she was employed by the defendants. On the point of the hospital's liability Carroll J., with whom the other members of the Court agreed, said :[17]

" The Supreme Court of Canada in *Nyberg* v. *Provost Municipal Hospital Board* accepted the dictum of Kennedy L.J. above noted and held that a public hospital board is liable for the negligence of even duly qualified nurses employed by it in the performance of all duties other than those done under the direct orders of a physician or surgeon in the course of an operation."

The statement of law just quoted probably represents the highest liability attached to a hospital by the Canadian courts. But it is only representative of the judicial opinion expressed by the preceding Canadian cases. In not one of the reported cases, all of which purport to approve the *Hillyer Case*, was the hospital freed from liability. The decisions are somewhat unsatisfactory because the basis of liability is not always clear. In the *Lavere Case*, for example, the *Hillyer Case* is distinguished and the case decided on the basis of an express contract to nurse. Later cases purport to follow both the Lavere and the Hillyer cases. But while it is difficult to find a common basis for the decisions the delimitation of Lord Justice Kennedy's wide dictum is clear.

[16] [1928] 1 D.L.R. 1129 (N.S.C.A.)
[17] *Supra* at p. 1132.

It is interesting to contrast the narrow limits within which the *Hillyer Case* was confined by these decisions with the broad effect given it by the English cases.[17A] In *Strangeways-Lesmere* v. *Clayton*,[18] where the negligence complained of was the misreading of the instructions as to the dose of medicine to be administered, Horridge J. said:[19] "I have had a number of authorities cited to me but the one which gave me the most assistance was *Hillyer* v. *St. Bartholomew's Hospital* . . . . (he then quotes the judgments in that case) . . . . I do not think this is a matter of the nurse's routine, but one in which she is to use professional skill and the only duty on the hospital is to see that the nurses they engage are duly qualified persons." He then quoted[20] with approval the judgment of Swift J. in *James* v. *Probyn*[21] in which the latter said . . . . "They (*i.e.*, the hospital authorities) also contract that they will supply or engage competent doctors and competent nurses, but I do not think that they undertake in any way to be responsible for the way in which the doctors or nurses perform their duties. The duties of doctors and nurses are the duties of skilled people to be carried out by skilled people, and the actions of doctors and nurses cannot be controlled in my opinion by members of a committee who do not for one moment pretend that they have the knowledge or the ability to perform those duties themselves." This passage was also quoted with approval by Finlay J. in *Dryden* v. *Surrey County Council*.[22]

In *Lindsey County Council* v. *Marshall*,[23] the decision was based on grounds that the hospital was a dangerous place and the plaintiff should not have been admitted without warning. Referring to the *Hillyer* line of cases Lord Hailsham said:[24] "It is true that the correctness of the earlier decisions is still open to review in your Lordships' House. But that review should take place only in a case in which the point is directly raised."

[17A] In *Powell* v. *Streatham Manor Nursing Home*, [1935] A.C. 243, the facts were that two nurses attempting to relieve the plaintiff of urine punctured her bladder. The hospital was held liable. The only point of law discussed was as to the power of higher courts to review findings of fact. It seems clear that the nurses were carrying out professional duties. However the point does not seem to have been pressed in argument and certainly the later cases do not treat it as an authority for holding the hospital liable. It is therefore not included in this review of the cases because it does not seem to affect the point under discussion.

[18] [1936] 2 K.B. 11.

[19] At p. 15.

[20] At p. 16.

[21] Noted in (1935), 1 British Medical Journal 1245.

[22] [1936] 2 K.B. 535 at p. 538.

[23] [1937] A.C. 97.

[24] *Supra* at p. 107.

The other members of the House of Lords took the same view.

Both these views were before the Court when the first Canadian case relieving the hospital of liability for the negligent act of a nurse was decided. In *Vuchar* v. *Trustees of Toronto General Hospital*,[25] the facts were that the female plaintiff was admitted to the defendant hospital as a free patient. After examination by a doctor certain treatment was prescribed including an express order "to use the electric cradle continuously".[25A] The negligence found by the jury was that too much heat had been applied causing the burn of which the plaintiff complained. It was held that the hospital was not liable. Rowell, C.J.O. after a lengthy review of the authorities comments on the decision in the *Nyberg Case* as follows:[26]

"It was not necessary for the decision of the case that the majority should have held that 'the obligation undertaken by the hospital authority (apart from the operation itself and the services of surgeons and nurses in the operating room) was not merely to supply properly qualified nurses, but to nurse the plaintiff'."

"They might have accepted the statement of Kennedy L.J. . . . . as correctly setting forth the nature of the obligation the hospital assumed, and upon the facts as found by them, have held the hospital liable on the ground that these facts brought the case within the class of purely ministerial or administrative duties referred to in the said judgment."

He then goes on to define the liability of a hospital and says (*inter alia*): ". . . . . that the hospital is not responsible to patients for mistakes in medical treatment or in nursing on the part of its professional staff of doctors or nurses, of whose professional skill it has assured itself, nor for the negligent use by them of the apparatus or appliances which are at their disposal." But, he continues, assuming that the *Nyberg Case* requires him to hold that there is an implied contract to nurse the same result will be arrived at. Such a contract must, from the nature of the case, he says, "mean that the nurse is to exercise her professional skill under the instructions of the surgeon in charge. I am of the opinion that when the nurse is so acting under the direct instructions of the surgeon, she is not under the direction and control of the defendants but of the surgeon. . . . . I am further of the opinion that the defendants are not liable for the negligence of the nurse when so acting. . . . ."

[25] [1937] 1 D.L.R. 298 (Ont.).
[25A] At p. 299.
[26] At p. 321.

". . . . . The question in this case therefore is was the nurse in using the electric cradle carrying on her professional duties under the instruction of the surgeon or was she merely performing a routine or administrative duty under the direction and control of the defendants. "The nurse in using the cradle was carrying out the express wishes of Dr. Brien. In the absence of instruction from Dr. Brien, or from other superior authority it was the duty of the nurse to exercise her own judgment as to the amount of heat to be applied to the patient and the learned trial judge has so found". After emphasizing the factors that enter into the amount of heat to be applied he continued: "It appears to me, therefore, the nurse in determining the number of lights to be lighted and the degree of heat to be applied was necessarily exercising her professional knowledge and skill and not performing a routine duty."

Middleton J.A. agreed with the Chief Justice. Masten J.A. also agreed but added reasons of his own. He first distinguished the *Lavere* and *Nyberg* cases on the ground that the negligence there complained of occurred during the performance of routine duties and that the contract to nurse as referred to by the Court meant nurse in the sense of including only routine or administrative duties. Having decided that this was not a routine act he held that the hospital was not liable, therefore, on the basis of contract. Since there was no liability on contract the next question was, was the hospital liable on the grounds that the nurse was their servant. He held that she was not.

"In my view, the true position is that the nurse is lent by the hospital gratuitously to the doctor as a trained assistant for carrying out the details of surgical or medical treatment so that in that capacity she may exercise her professional skill as a nurse."[27] He then refers to the case of *Donovan* v. *Laing Warton and Dawn Construction Syndicate Ltd.*,[28] and a comment on that case by the House of Lords[29] as establishing the liability of the person in immediate control rather than the general employer. At page 330 he says: "Here the nurse, while remaining throughout a general employee of the hospital, employed by it and paid by it, is lent to the surgeon or physician for his assistance in performing professionally as a nurse the details of surgical and medical treatment prescribed by the surgeon or physician, and, while so doing is not subject to the direction,

[27] At p. 329.
[28] [1893] 1 Q.B. 629.
[29] Per Lord Shaw of Dunfermline in *A. H. Bull and Co.* v. *West African Shipping Co.*, [1927] A.C. 686 at p. 691.

orders or control of the hospital while exercising the professional functions of a nurse."

The view which Masten J.A. takes is that when the doctor prescribes a treatment in specific terms and the nurse in carrying it out is following his instructions, she is not the servant of the hospital. The doctor is himself considered as doing or supervising the work and the nurse is his skilled assistant in carrying out the details. In other words the control of the doctor is not confined to those situations where he is actually present and in control but extends also to the cases where the nurses are carrying out the details of specific instructions. Rowell C.J. seems to agree with this view: "I see no logical ground for holding that the nurse is under the direction of the surgeon in the operating room and not under the direction of the surgeon in the ward when she is acting under his instructions in both cases. The defendants would have no greater right to interfere with her in one case than in the other."[30]

In 1938 the question again came before the Supreme Court of Canada in *Sisters of St. Joseph* v. *Fleming*.[31] The facts were that the plaintiff was admitted under "contract for board, nursing and attendance".[32] The plaintiff's physician (who knew nothing about such treatment except that it was recommended as a relief for pain) ordered a diathermic treatment to be given to the plaintiff. The treatment was administered by a nurse who did this work. The hospital owned the apparatus and made a special charge for it. In administering the treatment she inserted the plug in the wrong socket so that too much current was applied and the plaintiff burned. The Court held the hospital liable. After noting the *ratio* of the decision of the Court of Appeal holding that the hospital was liable because the case fell within the basis of the decision in the *Lavere* and *Nyberg* cases "that is to say, 'routine treatment' ",[33] Mr. Justice Davis who delivered the judgment of the Court says:[34] "The judgment in effect, gives recognition to a different consequence in law in hospital cases between a routine or administrative act of a nurse, on the one hand, and the act of a nurse in a matter of professional care or skill on the other hand."

"The act of putting a plug in one or other of the two sockets is in itself, of course, the merest sort of routine act not

[30] At p. 322.
[31] [1938] S.C.R. 172, [1938] 2 D.L.R. 417.
[32] Per Davis J., quoting from defendant's statement of defence.
[33] Per Masten J.A., [1937] 2 D.L.R. 121 at p. 128.
[34] [1938] 2 D.L.R. at p. 421.

to be dignified by such words as "professional" or "skillful" but the determining fact in point of law must be the character of the employment in which the nurse was engaged at the time that the putting of the plug into the socket was a mere incident in her work. One might, without using the words in any strict sense, speak of ascertaining the status of the nurse during the period of time in which she was giving the diathermic treatment to the patient." At page 422: "In the case before us, there being no suggestion of any defect in the equipment used and no lack of reasonable competence in the nurse to use the equipment, we are faced squarely with the issue, what, in point of law, is the proper determining fact in arriving at the conclusion whether or not the hospital is liable to the patient for the act of negligence of the nurse? This raises pointedly the question of the correctness of the broad rule stated by Lord Justice Kennedy in *Hillyer's Case* or the limitations within which the scope of such a rule can be confined." After reviewing the cases and after special reference to the dissenting judgment of Lord Alness in the Scottish case *Anderson or Lavelle* v. *Glasgow Royal Infirmary*[34A] he concludes :

"After the most anxious consideration we have concluded that, however useful the rule stated by Lord Justice Kennedy may be in some circumstances as an element to be considered, it is a safer practice in order to determine the character of a nurse's employment at the time of the negligent to focus attention on the question whether or not, in point of fact, the nurse, during the period of time in which she was engaged on the particular work in which the negligent act occurred, was acting as a servant or agent of the hospital within the ordinary scope of her employment or was at that time outside the direction and control of the hospital and had in fact for the time being passed under the direction and control of a surgeon or physician or even the patient himself." He then applied this test to the facts of the case and held that the hospital was liable because on these facts the relationship of master and servant was established between the hospital and the nurse.

In this judgment the Court, it is submitted, definitely overruled the dictum of Kennedy L.J. which has been the source of so much confusion in this branch of the law. To determine just how the law now stands it is necessary to examine both the rules laid down by the case and also its effect on the

[34A] [1932] S.C. 245.

previous decisions. In the first place the *Fleming Case* stands for two propositions :

(1) There is no legal distinction *per se* between routine acts of nurses and acts requiring professional skill.

(2) The basic test in determining the liability of the hospital is whether or not the relationship of master and servant existed between the hospital and the nurse at the time the negligence complained of occurred.

The question of the effect of this decision on the previous cases is more difficult. It must be noted that "professional" and "routine" were not considered as tests in themselves in many of the cases. In the type of case in which the reasoning was that, because the act was professional the hospital does not contract to perform it, or because the act was professional the hospital did not exercise control and the nurse was not a servant, the character of the employment was the basic test and these cases must be considered as overruled. But it does not follow that the decisions which are based on an examination of the control exercised by the doctor or on an express contract between the hospital and the patient do not still hold.

The real effect of the decision seems to be that, apart from express contract or control by a doctor, the hospital is not relieved from liability merely because the nurse was exercising her professional skill at the time the negligence occurred. An implied contract or inability to control cannot be predicated merely because the nurse was engaged in work requiring skill. But it must be noted that the court envisioned the possibility of cases arising where the hospital would not be liable. As Davis J. puts it:[35] "There may be cases, we can readily conceive that there may be, where the particular work upon which the nurse may for the time being be engaged is of such a highly professional and skilled nature and calling for such special training and knowledge in the treatment of disease that other considerations would arise." The Court did not attempt to define the limits of this exception but it seems clear that they had in mind very special cases, probably something beyond what the ordinary nurse is expected or trained to do. In such cases the nurse will be an independent contractor and not a servant, and the hospital will not be liable. But there is no suggestion that a different test should be applied to such cases. This dictum follows immediately after a consideration of the

[35] [1938] 2 D.L.R. at p. 434.

factors which led the court to hold that in this case the nurse was a servant of the hospital. The "considerations" referred to, therefore, must be the factors which in the hypothetical case might induce the Court to hold that the nurse was not a servant.

In the *Fleming Case* the contract between the hospital and the patient was, on the hospital's admission, for board, nursing and attendance. Following the *Nyberg* and *Lavere* cases it would seem that the hospital would be liable on this ground. Yet the Court did not consider this view. Perhaps the reason was that by the method of distinguishing these cases adopted in the *Vuchar Case* the contract to nurse had become tied down to the distinction there drawn between professional and routine acts. Because of this the Court was forced to deal with this distinction. But it would seem that implied contract is at best a very uncertain basis upon which to predicate liability because inevitably any attempt to spell out the terms of such a contract, or even to define the terms of a vaguely expressed contract, must involve an examination of the relationship between the hospital and the nurse. It is better to go straight to the latter relationship first. Indeed, it may be suggested that the great confusion that has surrounded this question is due to this approach, for Kennedy L.J. tried to spell out the undertaking of the hospital in the *Hillyer Case* by reference to the control exercised by the hospital over the nurse. To complete the picture one need only contrast the judgment of Farwell L.J., who dealt only with the relation between the hospital and the nurse and did not consider the contract with the patient at all. It is submitted, therefore, that where the contract must be implied or defined from the relationship of hospital and patient it is not a safe guide. But where the contract is clearly defined as in *Hall* v. *Lees* it will of course govern. If, for example, the hospital authorities contracted with the patient that they would not be liable for the negligence of nurses employed by them the contract would govern regardless of the relationship between the hospital and the nurse at the time the negligence occurred.

The decision in this case has no bearing on the question of non-liability by reason of control being exercised by doctors. The uniform decisions in the hospital cases which have dealt with the point are that the hospital is not liable where the doctor has control. This is only in accordance with ordinary master and servant law and is clear in the cases of operations and the like. It may present extremely difficult questions of

fact, for example, the dissenting judges in the *Nyberg Case* differed from the majority in that they held that the nurse was under the doctor's control whereas the majority took the opposite view.

A more difficult question arises in the case where, although the doctor is absent, the nurse is carrying out his instructions. This was the situation in the *Vuchar Case*, and there Masten J.A., basing his judgment clearly on that ground, held the hospital not liable. Rowell C.J.O. indicated[36] that he took the same view. The only distinction between this case and the *Fleming Case* was that in the latter the doctor knew nothing of the details of the treatment and left the carrying out of his order to the nurse. In the latter case the hospital, as we have seen, was held liable. As was suggested above it is possible to say that in the *Vuchar Case* the doctor may be considered as administering or supervising the treatment and that the nurse is his assistant to carry out the details of the work. In the *Fleming Case* no such analysis is possible. These cases are relatively easy because they represent extremes, but what of a case that involves control by both. Suppose, for example, that a doctor prescribes a certain treatment and in addition the patient has to be given other treatment not expressly authorized by the doctor but which is according to good medical practice. It is quite probable that this is what happens in most cases. How far does the reasoning of Masten J.A. apply in such a case? The whole question really comes down to the basic test of what amounts in law to a transfer of control. It would seem that there should be clear evidence that the nurse is following specific and express orders of the doctor before she passes under his control. The *Fleming Case* shows that merely carrying out the doctor's order is not enough. There must be a specific direction as to how the order is to be executed as in the *Vuchar Case*. When there is such an order and the nurse is actually carrying it out, it seems incontrovertible that she is under the control of the doctor.

It has been suggested that the hospital should be liable for the negligent acts of its nurses even when they are under the control of the doctor. Goodhart[37] takes this view and argues that if the nurse obeys the doctors order she is not in fact negligent. If she is negligent the only ground for relieving the hospital is that she has become the servant of the doctor, but

[36] See his remarks, [1937] 1 D.L.R. at p. 322.
[37] Article: *Hospitals and Trained Nurses* (1938), 54 L.Q.R. 553 at pp. 566 *et seq.*

no one has suggested that he becomes her employer. As Wright points out[38] no decided case has gone that far. The broad answer would appear to be that vicarious liability is an extension of fundamental principles, probably based on public policy, and that, while it may be just to fasten the employer with liability while he has control of the servant, it would seem to be an unwarranted extension to impose the same liability where the servant is carrying out the instructions of a third party.

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[38] (1938), 16 Can. Bar Rev. 654.