1926 *Oct. 7, 8. 1927 *Jan. 4.

KARL NYBERG (PLAINTIFF) .... APPELLANT;

AND

PROVOST MUNICIPAL HOSPITAL BOARD (DEFENDANT) .... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Negligence—Hospital—Public institutions—Injury to patient—Negligence of nurses—Liability of board created by Municipal Hospitals Act, R.S.A., 1922, c. 116—Regulation as to non-liability—Validity—Notice to patient.

The respondent is an hospital board organized under *The Municipal Hospitals Act*, R.S.A., 1922, c. 116. Late in the night of April 8th, 1924, the appellant was brought to the hospital by his family physician to be operated on for a ruptured appendix. The latter assisted his partner who performed the operation, the anaesthetic being administered by a third physician. Two qualified nurses were in attendance, Mrs. T. the matron of the hospital and Miss S. As a part of the treatment and to combat the shock of the operation, the bed in which the appellant was to be placed after the operation required to be heated, and for that purpose two rubber hot water bottles, placed inside flannelette bags, were filled in the kitchen by Mrs. T., the water according to her statement being "quite hot." The appellant was removed from the operating table and put in the bed which was placed in the hall outside. The next morning, when he recovered consciousness, it was discovered that his left leg had been severely burned near the ankle by one of these hot water bottles which was found lying next to his skin and inside the blanket which was still tucked around his legs and feet and apparently had not been disturbed during the night. The appellant sued for damages. The trial judge gave judgment for $5,182, finding that the proximate cause of the accident was the filling of the bottle with water that was much too hot without any testing of it and the failure to investigate and see if any adjustment was necessary. The appellate court reversed this judgment, holding on the authority of *Hillyer* v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, that the respondent hospital was not liable in damages.

Held that the respondent hospital cannot claim exemption from liability on the ground that it was "a government agency not liable for the negligence of its servants" or "a public body carrying on work not for profit but for the benefit of the residents of the district." *Mersey Docks and Harbour Board Trustees* v. *Gibb* (1 Eng. & Ir. App. 93) foll. *The Sanitary Commissioners of Gibraltar v. Orfila* ((1890) 15 A.C. 400) dist.

Held, also, Idington and Mignault JJ. dissenting, that the decision in *Hillyer* v. *St. Bartholomew's Hospital* ([1909] 2 K.B. 820) was not

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

applicable to the circumstances of this case. That decision is not authority for non-responsibility of an hospital corporation for neglect by a nurse occurring after the patient has left the operating room and in regard to matters which fall within the scope of her ordinary duties as the heating of a patient's bed and the placing of hot water bottles in it. Even assuming that the placing of the hot water bottle which burned the appellant took place while the appellant was still in the operating room under the orders and control of the operating surgeon and his assistants, it is in evidence that, some time after the appellant had been removed to the hall, the nurse S. noticed a marked reddening of the skin about his chest where another hot water bottle had been placed; and the failure of the nurse to make sure that the other hot water bottle against the leg was not a source of danger is inexcusable and amounts to negligence in her capacity as a servant of the hospital in a matter of ministerial ward duty which entailed responsibility of that body for its consequences. The obligation undertaken by the hospital was not merely to supply properly qualified nurses but to nurse the appellant; and it was the negligence of its servant in the discharge of that contractual obligation that caused the severe injury of which the appellant complains.

Per Idington and Mignault JJ. dissenting.—The present case falls within the *ratio decidendi* of the *Hillyer Case*. The respondent hospital cannot be held liable for the result of a treatment professionally administered to a patient by physicians and nurses placed under the orders of the physicians when the hospital board have exercised proper care in the employment of the physicians and nurses.

Amongst the regulations enacted for the government of the respondent hospital was regulation no. 9 which provided that "patients accepting such service or treatment, personally assume all risk and responsibility for any accident, injury or casualty of any kind which may happen to befall any patient, visitor or other person, in the exigencies of such an institution, whether caused by the acts of any of the employees, staff or otherwise."

Held, that the regulation no. 9 invoked by the respondent as relieving it from responsibility to the appellant is ineffectual for that purpose, both because as a regulation it transcends any power of regulation and management conferred by s. 49 of the statute (R.S., Alta. (1922), c. 116), and because such notice to the plaintiff of its existence as might, under some circumstances, make it an implied term of a contract between the respondent and a patient, has not been shewn. Idington and Mignault JJ. expressing no opinion.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of the trial judge, Ives J., and dismissing the appellant's action for damages for injuries sustained by him while a patient in the respondent hospital.

(1) (1926) 22 Alta. L.R. 1; [1926] 1 W.W.R. 890.

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The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

Eug. Lafleur K.C. and *H. A. Friedman* for the appellant.

A. A. McGillivray K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Newcombe and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—I have had the advantage of reading the carefully prepared opinion of my brother Mignault.

His statement of the material facts of the case as disclosed by the evidence before us is complete. There is no need to repeat it, or to comment upon it. The hot water bottle, which burned the plaintiff's leg, was found on the morning following the operation lying next to his skin and inside the blanket which was still tucked around his legs and feet and apparently had not been disturbed during the night. These circumstances exclude any suggestion that this admittedly wrong and dangerous position of the bottle might be accounted for by any movement, voluntary or involuntary, of the patient. They afford strong *prima facie,* if not conclusive, proof that the bottle had been placed as it was found either when the unconscious patient was wrapped in the blanket in the operating room or immediately afterwards when he was covered up in bed and that it had been allowed to remain there during the night. There is nothing to cast the slightest doubt on the correctness of these inferences of fact and the case must be disposed of on the assumption that they are correct.

The learned trial judge found that:

> The proximate cause of this accident was, as I say, in the first place the filling of the bottle with water that was much too hot without any testing of it; then the failure to investigate and see if any adjustment was necessary.

The evidence fully justifies these findings and also the finding that the latter fault—the failure to investigate—was attributable to the nurse Switzer. The sole question is whether for that neglect and its consequences the defendant is legally responsible.

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I fully agree with my learned brother's rejection of the respondent's claim to exemption from liability on the ground that it was "a government agency" or

a public body carrying on work not for profit but for the benefit of the residents of the district,

and with his opinion of the inapplicability of the decision in *The Sanitary Commissioners of Gibraltar* v. *Orfila et al* (1). As put by Farwell L.J., in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (2):

> 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 under similar circumstances, notwithstanding that it is acting in the performance of public duties, like a local board of health, or of eleemosynary and charitable functions, like a public hospital.

I am also satisfied that the regulation no. 9 invoked by the defendant as relieving it from responsibility to the plaintiff is ineffectual for that purpose, both because as a regulation it transcends any power of regulation and management conferred by s. 49 of the statute (R.S.A. (1922) c. 116), and because such notice to the plaintiff of its existence as might, under some circumstances, make it an implied term of a contract between the defendant and a patient has not been shewn. The plaintiff entered the hospital for an operation without any special contract, but as a paying patient at the special rates to which, as a municipal ratepayer, he was entitled. Nothing else appears as to the footing on which he was received.

I am, however, unable to accede to the view of my learned brother that the present action is concluded against the plaintiff by the decision of the English Court of Appeal in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (2). That 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 physicians 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 actually engaged in assisting a surgeon during an operation (in the *Hillyer Case* (2) it was a physical examination under an anaesthetic) 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 regard to the

(1) (1890) 15 A.C. 400.

(2) [1909] 2 K.B. 820, at p. 825.

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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. But, as Farwell L.J., says, in the *Hillyer Case* (1), at p. 826,

so long as they (the nurses) are bound to obey the orders of the defendants (the Board of Governors) it may well be that they are their servants;

and as Kennedy L.J. says (in the same case), at p. 829:

It may 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 (*sic*) the 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.

In *Hillyer's Case* (1) the injuries complained of, so far as appeared, were in fact sustained during the physical examination. In the case at bar the burning of the plaintiff occurred after the operation had been completed and he had been removed from the operating room to the adjoining hall, then in actual use as a ward owing to the regular wards being crowded.

The *Hillyer Case* (1) is not authority for non-responsibility of the hospital corporation for neglect by a nurse occurring after the patient has left the operating room and in regard to matters which fall within the scope of her ordinary duties, as admittedly does the heating of a patient's bed and the placing of hot water bottles in it to ward off danger from shock and chill. On the contrary, the learned judges in that case are careful to exclude from the application of their decision such duties of nurses as

their attendance in the wards * * * the supplying of proper food, and the like.

For matters such as these—for matters in regard to which

the management of a hospital ought to make and does make its own regulations * * * it is in my judgment (says Kennedy L.J., at p. 829), legally responsible to the patients for their sufficiency, their propriety, and observance of them by their servants.

The judgments in *Hillyer's Case* (1) were carefully considered and their effect was, I think, correctly appreciated by the Ontario Appellate Division in *Lavere* v. *Smith's Falls Public Hospital* (2), and I am unable to distinguish,

(1) [1909] 2 K.B. 820. (2) (1915) 35 Ont. L.R. 98.

in principle, between the Ontario case and that now before us.

It was the admitted duty of the nurse to see that hot water bottles were safely placed in the patient's bed, not as a matter of special instruction for the occasion, but as a matter of routine duty under a "standing order." It is common ground that an elementary rule of nursing required that the hot water bottles should have been placed outside the blanket and should not have been in contact with the patient's skin. That rule is of special importance when the patient is under the influence of an anaesthetic and its neglect is an unpardonable fault.

Assuming, in favour of the defendants, that the placing of the hot water bottle which burned the plaintiff took place while he was still in the operating room and at a time when the nurse might be regarded as so much under the orders and control of the operating surgeon that negligence on her part would not entail responsibility of the hospital authority, the evidence clearly establishes that some time (one-half or three-quarters of an hour) after the plaintiff had been removed from the operating room to the ward (the hall) the nurse Switzer (then a "circulating nurse") noticed a marked reddening of the skin about his chest, where another hot water bottle had been placed. Both bottles had been filled at the same time, from the same source, and their temperature had not been tested. The nurse thus had distinct warning that the bottles were dangerously hot; it then became her immediate and imperative duty to make sure that the second bottle, which was concealed by the bed covering, was so placed that it could do no harm. That duty she admittely did not discharge. She attempts to excuse herself by stating that she had some casual assurance from Dr. York, the plaintiff's physician, who was standing by, that "they (the hot water bottles) were now all right." Dr. York, who was examined at length, was not asked to corroborate or to deny this particular statement. He had, however, said, referring to this occasion, that he

didn't see the nurse because there was no nurse with the doctor (Sarvis) when I came down there.

But, assuming that some such observation was made to the

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nurse, that, I agree with the learned trial judge, would not suffice to excuse her failure, under the circumstances, to investigate personally the situation in regard to the hot water bottle under the bed covering and to assure herself, as was her admitted duty, that it was not so placed that it might burn the patient.

Dr. York also said that he left no instructions whatever with the nurse in regard to hot water bottles and he added on cross-examination, that it is always customary in all operations to have the bed warmed—we never give any orders—it is a standing order—it is always done. Dr. Sarvis gave similar testimony.

I regard the failure of the nurse, after the appearance of the skin on the patient'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 a servant of the hospital corporation in a matter of ministerial ward duty, 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. *Hull* v. *Lees* (1). It was negligence of their servant in the discharge of that contractual obligation that caused the severe injury of which the plaintiff complains.

I would, for these reasons, allow this appeal with costs here and in the Appellate Division and restore the judgment of the trial judge.

The amendment of the style of cause giving the defendant its correct name "Provost Municipal Hospital District, No. 12" should be made before the judgment issues.

IDINGTON J. (dissenting).—This is an appeal from the Appellate Division of the Supreme Court of Alberta, which reversed the judgment of the learned trial judge which held the plaintiff (now appellant) entitled to recover. Having considered fully the judgment of my brother Mignault J., I entirely agree with his reasoning and his conclusion that the appeal herein should be dismissed with costs.

(1) [1904] 2 K.B. 602 at p. 615.

MIGNAULT J. (dissenting).—The appellant obtained a judgment against the respondent in the Supreme Court of Alberta for $5,182, damages resulting from a burn suffered by him after an operation for appendicitis in the defendant's hospital. This decision was reversed by the appellate divisional court, Mr. Justice Walsh dissenting, and the appellant now seeks to have the judgment of the trial court restored.

Late in the night of April 8, 1924, the appellant was brought to this hospital by his family physician, Dr. W. O. York, to be operated for a ruptured appendix. The operation was performed by Dr. York's partner, Dr. Ewart Sarvis, assisted by Dr. York, the anaesthetic being administered by Dr. Knoll. The nurses in attendance, and they were duly qualified nurses, were the matron of the hospital, Mrs. Mary W. Taylor, and Miss Elizabeth Switzer, now Mrs. Hale. As a part of the treatment, and to combat the shock of the operation, the bed in which the appellant was to be placed after the operation required to be heated, and for that purpose two rubber hot water bottles, placed inside flannelette bags, were filled in the kitchen by Mrs. Taylor, the water, according to her statement, being "quite hot." The appellant was removed from the operating table and put in the bed which was placed in the hall outside. The next morning, when he recovered consciousness, it was discovered that his left leg had been severely burned near the ankle by one of these hot water bottles.

The appellant alleges that he was received as a patient in the hospital by the respondent which undertook for reward to furnish him all necessary and proper hospital treatment, nursing and appliances, and that the application of the hot water bottle was carelessly and negligently made by the respondent, in that the bottle was at an excessively high temperature and its application was continued for an excessive length of time. He further states that the respondent was negligent in failing to supply him, while he was in the hospital, proper, careful and sufficient attention, nursing and care, but this last ground, irrespective of the application to the appellant of the hot water bottle, was not entertained by any of the judgments.

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In substance, the plea of the respondent is that the hot water bottle was applied by or under the direction of Doctors Sarvis and York, they being qualified medical practitioners employed by the appellant, that the treatment of the appellant was under the direction and supervision of these physicians, who were solely responsible for the results, and that the respondent fulfilled its obligations by furnishing the appellant with the services of duly qualified and certificated nurses and supplying the requisite apparatus.

The trial judge found the respondent liable for the appellant's injuries, holding that the heating of the bed was no more than the daily making of beds.

This judgment was reversed by the Appellate Divisional Court. Mr. Justice Hyndman, with whom the other judges, with the exception of Mr. Justice Walsh, agreed, expressed the opinion that the hospital was created and existed purely for governmental purposes, and that the board was not liable unless it had failed to discharge its statutory duty to employ competent and qualified nurses. He also considered that, independently of this ground, the action failed on the authority of the decision of the English Court of Appeal in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1), to which further reference will be made.

The first ground of the judgment appealed from rests on the statute under which the respondent operated its hospital, *The Municipal Hospitals Act,* chapter 116 of the Revised Statutes of Alberta, 1922.

This statute authorizes the Minister of Health to divide the province into hospital districts upon petition of a contributing council or of twenty-five ratepayers and to fix the number of members of the hospital board for the district. These members are elected by the ratepayers at the next municipal election and they hold office for two years. Upon organization, the board prepares a hospital scheme, which is duly advertised, and submitted for ratification to a vote of the municipal voters. This scheme may be referred by the Minister, before its adoption, to the Board of Public Utility Commissioners. If two-thirds of those voting approve the scheme, it is held to be adopted. The

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

statute provides for the levying of a tax to defray the necessary expenditure, called the hospital tax, which is in addition to all rates levied for municipal purposes, and all moneys so raised by a municipality in respect of the hospital tax are forwarded by it to the secretary-treasurer of the hospital district. The board is also authorized to borrow by debentures an amount equal to the capital expenditure involved. Upon the ratification of the scheme, the board of the hospital district becomes a body corporate, and at its first meeting chooses a name and a corporate seal. It is empowered to make such rules and regulations for the maintenance and management of its hospital as it deems fit, and in addition to the usual staff it may employ one or more district nurses. The Lieutenant-Governor in Council may also make regulations not inconsistent with the Act covering *inter alia* the equipment, control and management of the hospital, and it is the duty of the Minister to see that every hospital is always in a high state of efficiency, failing which it is within his power to dismiss the members of the board and appoint an official administrator in their stead, who holds office until a new board is elected upon the order of the Minister at the next municipal election. The hospital is supported by means of the taxes imposed on the ratepayers and moneys paid by them or other persons other than hospital supporters for hospital treatment, the hospital supporters being entitled to a minimum rate calculated at an amount which equals, with the taxes paid by them, the amount fixed for persons who are not hospital supporters. There is no provision in this statute for the support of the hospital by means of the public funds of the province, save that the board of any hospital may make an agreement with the Government as to cost and methods of specially training any number of nurses so as to better fit them to become superintendents of the hospital district, by which agreement the Government may assume a proportion of such cost.

I do not think that the provisions of this statute warrant the conclusion that the municipal hospital or the hospital board is a government agency not liable for the negligence of its servants. Nor can it be contended, in my opinion, that, as a public body carrying on work not for

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profit but for the benefit of the residents of the district, the board is free from such liability. Such a contention seems hopeless in view of the decision of the House of Lords in *Mersey Docks and Harbour Board Trustees* v. *Gibbs and Penhallow* (1). The judgment of the Privy Council in *Sanitary Commissioners of Gibraltar* v. *Orfila* (2), relied on in the Appellate Divisional Court, does not support the claim of immunity of a board such as this respondent, for the only question there was whether the Sanitary Commissioners were liable for mere nonfeasance.

I will therefore approach the consideration of this case upon the basis that this respondent comes within the general rule of liability of masters for the negligence of their servants within the scope of their employment. The whole question, to my mind, is whether the relation of master and servant existed between the respondent and the physicians and nurses who treated the appellant at the time of his operation and of the burn suffered by him. For it is clear, in the words of Baron Parke, in *Quarman* v. *Burnett* (3) that

> liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist.

In order to determine whether this relation existed at the time of the appellant's injuries, it now becomes necessary to refer in some detail to what took place during the operation, especially with regard to the application to the appellant of the hot water bottles. There were present at the operation the three physicians, Drs. Sarvis, York and Knoll, and the two nurses, Mrs. Taylor, who was what is called a circulating nurse, and Miss Switzer, who was the "scrub nurse," that is to say she wore a sterilized gown and gloves and assisted the operating surgeon. The operation began about 12.30 a.m., and lasted an hour. When it was over, Dr. Sarvis and Mrs. Taylor went out into the hall to bring in the appellant's bed which had been already prepared, but they discovered that it was made up wrongly. There was on the bed a special frame, which was used in similar cases, but it was found that "it was on wrong end to and the bed had to be remade." In remaking the

(1) (1864) 1 Eng. & Ir. App. 93.
(2) (1890) 15 A.C. 400.
(3) (1840) 6 M. & W. 499.

bed Dr. Sarvis assisted Mrs. Taylor, and the bed clothes were thrown on the floor while the gatch frame was being properly set. It may be here mentioned that Mrs. Taylor had already placed the two hot water bottles in the bed, while the operation was going on. When Dr. Sarvis first noticed these bottles, they were on the floor of the hall with the bed clothes. The bed was remade, the covers being folded back, and the bed was pushed into the operating room by Dr. Sarvis and Mrs. Taylor. Dr. Sarvis—and Mrs. Taylor says the same thing—testifies that when the bed was brought in he saw the hot water bottles lying in the centre of the bed. Dr. Sarvis and Dr. Knoll, with the assistance of Miss Switzer, then proceeded to transfer the patient from the operating table to the bed, which had been placed alongside the table. While the bed was being prepared, Miss Switzer put a binder, a pneumonia jacket and a gown on the patient, and then covered him with a blanket wrapped close to his chin and extending entirely over his feet and down under his side where it was tucked in as much as it was possible to do. Thus dressed and covered with the blanket from head to feet, the patient was carried from the operating table to the bed, the coverings of which were then lifted up from the foot of the bed and placed over him. The bed with the patient was afterwards wheeled into the hall where it remained the rest of the night, there being then no available room elsewhere. Dr. Sarvis states that the hot water bottles, which he had seen in the centre of the bed when it was being brought into the operating room, were either left there when the patient was moved over into the bed, or placed back there immediately afterwards while he and Dr. Knoll were present. No witness however can say that he or she put back the bottles in the bed after the patient was placed there. Their proper place was in the bed, but outside the blanket which had been tucked around the patient.

After the patient's bed was moved into the hall, Dr. Sarvis assisted by Miss Switzer proceeded to administer to the patient what is known as an interstitial, that is to say a saline solution which had been prepared and heated by Mrs. Taylor. The interstitial was injected into the breasts of the patient on both sides from a needle attached to a

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tube, and its object, as well as the object of the heating of the bed, Dr. Sarvis says, is to combat the shock of the operation. This took about half an hour, for, after making the injection, Dr. Sarvis waited to see that the saline solution was fully absorbed by the patient, and while the interstitial was being administered, or near the close of this operation, Dr. York, who had gone upstairs to see a maternity patient, came down and stood by the bed.

It was a part of the nurse's duty to see to the hot water bottles, and Miss Switzer testifies that she went to see where they were. Dr. Sarvis was standing by the bed and she said to him: "How about the bottles?" Dr. Sarvis answered: "They are all right, they have been on the floor long enough to cool off." She then considered that she was relieved from responsibility with regard to the hot water bottles. Dr. Sarvis was called in rebuttal and would not deny that this conversation took place, although he said he had no recollection of it.

Miss Switzer further states that while Dr. York was standing near the bed, she noticed one of these bottles next to the patient's skin on the left side. The skin was getting red. She said to Dr. York: "What about the bottles, this one is getting red," and he answered "Now they are all right." She did not again bother about the bottles during the night, and apparently this one did no harm, for the patient's chest was not burnt. The next morning the only bottle she noticed was the one which burned the patient's leg; it was inside the blanket, and next to his skin.

I have given as complete an account as possible of what took place during the operation and subsequent treatment of the appellant according to the statements of the physicians and nurses. Dr. Knoll, who administered the anaesthetic, was not called. The learned trial judge was satisfied that each and every one of the witnesses gave to the best of his or her ability the best recollection he or she had of the occurrences. Nevertheless all possible explanations of the accident were not investigated. For instance, none of the physicians were asked whether the patient could have moved his leg while under the anaesthetic, and thus bring it into contact with a properly placed hot water bottle. Nor do we know what length of time of contact with the bottle would have caused the burn. From the way the patient was wrapped up and covered with the blanket, it does not seem probable that the bottle was placed inside the blanket in the operating room when the patient was moved to the bed. Nevertheless it is clear on the evidence that the hot water bottle which caused the burn was put into the bed, we cannot say by whom, in the operating room and in the presence of the physicians, unless the two bottles remained in the centre of the bed where Dr. Sarvis saw them and the patient was placed on top of them, which is unlikely. The physicians were afraid that the patient might develop pneumonia, for he was in a chilly condition when he was brought to the hospital, and it was a necessary part of the treatment that his bed should be thoroughly warmed. The important fact for the decision of this case is that all this was done within the operating room, while the nurse in attendance was under the orders of the surgeon, and when she afterwards inquired as to the bottles, she was assured by both Dr. Sarvis and Dr. York that they were all right. This would naturally lead her to believe that she did not have to remove the bed clothes to see whether the bottles were properly placed.

After full consideration, my opinion is that this case comes well within the *ratio decidendi* of *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1). The plaintiff there was admitted into the hospital for the purposes of an examination under anaesthetics by an eminent surgeon, Dr. Lockwood. While he was on the operating table and unconscious, one of his arms was bruised and the other burnt. His action claiming damages was dismissed and the judgment of the trial court was affirmed by the Court of Appeal.

In his reasons for judgment, Farwell L.J., said at page 825:—

> The first question then is, were any of the persons present at the examination servants of the defendants? It is, in my opinion, impossible to contend that Mr. Lockwood, the surgeon, or the acting assistant surgeon, or the acting house surgeon, or the administrator of the anaesthetics, or any of them, were servants in the proper sense of the word; they are all professional men, employed by the defendants to exercise their profession to the best of their abilities according to their own discretion;

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but in exercising it they are in no way under the orders or bound to obey the directions of the defendants. * * * The only duty undertaken by the defendants is to use due care and skill in selecting their medical staff. * * * 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 term 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 or gainsay his orders. * * * The nurses and carriers, therefore, assisting at an operation cease for the time being to be the servants of the defendants, inasmuch as they take their orders from the operating surgeon alone, and not from the hospital authorities.

Cozens-Hardy M.R., agreed in the dismissal of the appeal for the reasons contained in the judgments of Farwell L.J., and Kennedy L.J. The latter said, p. 829:

In my view, the duty which the law implies in the relation of the 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.

In the *Hillyer Case* (1), the patient was treated gratuitously. But although Kennedy L.J., referred to the gratuitous benefit of the hospital's care, I do not think, in regard to an action based on negligence, that the duty and corresponding liability of the governing board of a hospital differ according as a fee is or is not charged to the patient. In either case they cannot be held liable for the result of the treatment professionally administered to the patient by the physicians and the nurses placed under the orders of the physicians, provided of course that they have

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

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exercised proper care in the employment of the physicians and nurses. Here the appellant employed his own physician Dr. York, and the latter no doubt chose the surgeon, Dr. Sarvis, who was his partner. The nurses were properly qualified and certificated nurses, and their competence is in no wise questioned. The hot water bottles were placed in the bed in the operating room in presence of Dr. Sarvis and Dr. Knoll, the nurses then being subject to the orders of the physicians, and when the nurse in charge inquired as to the bottles, both Drs. Sarvis and York, she testifies, assured her that they were all right. In my opinion, if there was negligence in placing the hot water bottle, the person who committed the negligence was not at the time the servant of the hospital board.

But the appellant contends that he made a contract with the respondent for hospital treatment and nursing, and that the latter is liable for breach of this contract. The respondent paid the minimum rate of one dollar per day to which as a hospital supporter he was entitled, others than hospital supporters being charged four dollars and a half per day.

There was no express contract, and if an implied contract can be inferred, it would involve, in my opinion, no liability of the hospital board for what was done by the physicians acting in the discharge of their professional duties or by the nurses when placed under the orders of the physicians, both selected with due regard to their competence and capacity. I do not think the case need rest on the regulations of this hospital board, duly posted and published, by one of which the patient assumed all risk of injury through the acts of the employees of the hospital. The board, in my opinion, discharged any obligation imposed on it by law or by any implied contract resulting from the admission of a paying patient into the hospital. There is no room for liability in the circumstances.

I have not failed to consider the Ontario case of *Lavere* v. *Smith's Falls Public Hospital* (1), strongly relied on by the appellant. There the patient, who entered the hospital under an express contract, had her heel burned by a hot brick placed by a nurse in her bed for heating purposes

(1) 35 Ont. L.R. 98.

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after an operation. The circumstances of that case may have justified a judgment against the hospital, a point on which it is unnecessary to express any opinion, but the Ontario decision certainly cannot prevail against the rules laid down in the *Hillyer Case* (1), which, in my opinion, should be applied here.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Friedman, Lieberman & Gallaway.*

Solicitors for the respondent: *Milner, Matheson, Carr & Dafoe.*

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*Nov. 17.
*Dec. 1.

THOMAS HOLLAND (PLAINTIFF) .... APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT) .... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Negligence—Municipal corporation—Highway—Icy condition of sidewalk —Injury to pedestrian—Liability of municipality—"Gross negligence" —Consolidated Municipal Act, 1922, Ont., c. 72, s. 460 (3)—Reversal of concurrent findings of fact.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (2) affirming judgment of Mowat J. dismissing the plaintiff's action to recover damages from the defendant city for personal injury sustained in a fall on an alleged icy sidewalk on Doel Avenue in the city of Toronto.

The main question involved was whether, on the evidence, there was "gross negligence" within s. 460 (3) of *The Consolidated Municipal Act, 1922*, c. 72, for which the city was responsible.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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

(2) (1925) 59 Ont. L.R. 628.