

60, 1934

In the Privy Council.

No. 19 of 1934.

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APPELLANT'S CASE.

ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE
OF BRITISH COLUMBIA.

BETWEEN

VANCOUVER GENERAL HOSPITAL (Defendant) *Appellant*

AND

ANNABELLE MCDANIEL an Infant, by MATHEW G.
MCDANIEL her next friend and the said MATHEW
10 G. MCDANIEL (Plaintiffs) - - - Respondents.

CASE FOR THE APPELLANT.

Record.

1. This is an Appeal from the Judgment of the Court of Appeal of p. 182.
British Columbia dated the 6th June, 1933, affirming by a majority
(dissentiente McPhillips, J.A.) the Judgment of Fisher, J., in the Supreme pp. 182-3.
Court of British Columbia dated the 13th January, 1933, whereby it was
ordered that the Infant Respondent and the Respondent Mathew G.
McDaniel should recover against the Appellant the sums of \$5,000.00 and
\$545.00 respectively and costs.

20 2. The sum of \$5,000.00 represents damages on account of personal
disfigurement caused to the Infant Respondent as a result of smallpox and
the sum of \$545.00 represents medical expenses incurred by her father the
Respondent Mathew G. McDaniel and general damages. These sums were
awarded on the ground that the Appellant negligently caused the Infant
Respondent to contract smallpox while she was a patient suffering from
diphtheria in the Appellant's Infectious Diseases Hospital in Vancouver
during the period from the 17th January to the 3rd February, 1932.
Smallpox did not actually break out on the Infant Respondent until about
the 12th February after she had left the Hospital but the incubation period p. 64, l. 33.

Record. for smallpox is from ten to fourteen days and it therefore must be assumed that she contracted the infection at a date when she was still in the Hospital. No dispute arises on this Appeal as to the amount of the damages awarded.

3. This Appeal involves two principal questions :—

(1) Whether the Infant Respondent contracted smallpox as a result of infection (technically described as “ cross-infection ”) from other patients who had been placed in the Infectious Diseases Hospital suffering from smallpox.

(2) Whether, if so, this was due to the negligence of the Appellant. 10

A further question arises :—

(3) Whether the failure of the Respondent Mathew G. McDaniel to procure the vaccination of the Infant Respondent is not a circumstance which disentitles the Respondents from obtaining damages from the Appellant.

4. All three questions were decided in favour of the Respondents. The issue which was dealt with at the greatest length in the judgments under appeal was that of negligence and this issue was decided against the Appellant upon the ground (shortly stated) that the system adopted by the Appellant for the prevention of cross-infection was inadequate for the purpose. It was not alleged that the Appellant or its staff had been negligent in working the system. 20

The Appellant’s submission on this part of the case (shortly stated) is and was that the system in question was adopted on the recommendation of its medical advisers, is in accordance with modern hospital practice, and is regarded by expert medical opinion as safe. The evidence upon these matters is, in the submission of the Appellant, conclusive and indeed is not questioned by the judgments under appeal which decided that in spite of these facts the Appellant was guilty of negligence because, as was held, the system had proved defective in practice on this occasion. 30

The system in question is known as the “ Unit ” or “ Consolidated ” system and under it the necessary isolation of patients suffering from infectious diseases including smallpox is effected by a careful technique of washing and sterilisation of persons or objects who or which have been directly or indirectly in contact with the patients. By this means the necessity of placing patients in separate buildings (as used to be done under the old practice in case of smallpox) is avoided.

5. The Appellant is a corporation incorporated by the Vancouver General Hospital Act (Chapter 69 Statutes of British Columbia 1902).

- 6.** On the 17th January, 1932, the Infant Respondent, being at that date nine years of age, on the application of her physician, Doctor Kennedy, was admitted into the Appellant's building known as the Infectious Diseases Hospital suffering from diphtheria. This is a building beside the Appellant's main administration building and was erected in or about the year 1927 for the purpose of treating infectious diseases generally. The Infant Respondent was placed in a separate room on the third floor. Record.
p. 9, l. 12
et seq.
p. 1, l. 20.
p. 81, l. 20,
l. 43.
p. 42, ll.
38-40.
- 7.** The Infant Respondent was admitted as a paying patient at the rate of \$2.50 a day. This entailed that she received medical attendance from her own Doctor, Doctor Kennedy, and nursing attendance from the nursing staff of the Infectious Diseases Hospital. p. 44,
ll. 40-44.
- 8.** At the time of the Infant Respondent's entry into the Infectious Diseases Hospital smallpox had broken out in the City of Vancouver. Doctor Kennedy was aware of this and he also knew that smallpox cases had been treated in the Infectious Diseases Hospital in the past. p. 142, l. 3.
p. 16,
ll. 18-33.
- 9.** On the 17th January there were no smallpox cases in the building but a case was admitted and placed on the third floor on the 18th January. On the 21st January another case was brought in and placed in a room adjoining that of the Infant Respondent. By the 28th January a total of three cases had been admitted and four more were brought in on the 29th January. All of them were placed in rooms on the third floor. p. 42, l. 24.
p. 42, l. 33.
p. 43, l. 1.
p. 43, l. 6.
p. 43, l. 9.
p. 43, l. 12.
p. 50,
ll. 1-2.
- 10.** On the 28th or 29th January Doctor Kennedy learnt for the first time that smallpox cases were being treated on the third floor having received his information from the Infant Respondent's mother. As a result of representations by him the Infant Respondent was moved, on the 29th January, into a room on the second floor of the building. No smallpox cases were treated on this floor during the relevant period. p. 9, l. 31,
l. 42.
p. 51, l. 24.
p. 50, l. 2.
- 11.** On the 3rd February, 1932, the Infant Respondent was discharged from the Infectious Diseases Hospital. On or about the 12th February she was diagnosed by Doctor Kennedy as suffering from smallpox. p. 10, l. 41.
p. 11, l. 2.
- 12.** The Appellant does not dispute that during the period from 17th January, to 29th January (I) patients suffering from smallpox were placed on the same floor and in one case in a room adjoining that of the Infant Respondent (II) nurses who attended these smallpox patients also attended her (III) there was no separate kitchen for the food and dishes of the smallpox patients. But, as the Appellant submits, the evidence establishes that its procedure in this respect governed as it was by proper regulations as to sterilisation and avoidance of contact, was in accordance with accepted modern hospital practice and is a normal feature of that

Record. particular system of treating and isolating infectious diseases in operation at the Infectious Diseases Hospital and other up-to-date hospitals in Canada and the United States.

13. The Appellant's evidence with respect to this system and its operation during the material period is substantially as follows :

p. 105, l. 28
et seq.

p. 111, l. 3
et seq.

p. 111, l. 11.
p. 105, l. 38.

(A) The Infectious Diseases Hospital was erected in or about the year 1927 as a building specially designed for treating infectious diseases generally. It was erected in pursuance of a report made to the Appellant's Board following on the investigations of a deputation from the Appellant and the Vancouver City Council 10 which in the year 1925 visited Oakland, San Francisco, Los Angeles and Portland (all in the United States of America) for the purpose of studying the systems of treating infectious diseases in operation at the hospitals in those cities. This deputation included Doctor Bell who was the Appellant's Superintendent at the time and Doctor Underhill who was then the Medical Health Officer for the City of Vancouver.

p. 105, l. 42.
p. 110, l. 41.

p. 59, l. 40.

(B) The system of treating and isolating infectious diseases for which the building was designed is known as the "Unit" or "Consolidated" System in contrast to the older "Pavilion" 20 system. Under the old system smallpox is treated in a separate building but under the "Unit" System infectious diseases (including smallpox) are treated in one general isolation building, the patients being placed in separate rooms or in cubicles or occasionally in open wards side by side. With reference to smallpox, Doctor MacEachern Associate Director of the American College of Surgeons and Director of Hospital Activities who, in the year 1931, inspected the Infectious Diseases Hospital in the course of his duties stated in evidence "It was the old custom of having smallpox treated in separate pavilions but those pavilions are being closed up more 30 and more and smallpox treated more and more in the general isolation building. That is the general prevailing custom." This evidence was confirmed by the other medical witnesses called on behalf of the Appellant.

p. 61, l. 11.

p. 61, l. 15.

p. 58, l. 16.

p. 62, l. 12.

p. 66, l. 28.

p. 61, l. 38.

The Third floor of the Infectious Diseases Hospital consists of a number of separate single bed-rooms with an eight bed ward at each end. A plan is contained in a folder at the end of the Record.

p. 113, l. 23.

p. 123, l. 31.

p. 110, l. 5.

p. 119, l. 43.

p. 117, l. 20.

(C) Smallpox as such was treated in the Infectious Diseases Hospital from about the end of the year 1930 onwards when the City of Vancouver's separate smallpox isolation hospital was 40 discontinued. During that period there had been no epidemic but a few separate cases had been treated.

(D) As already stated, under the "Unit" system isolation is effected by a technique of washing and sterilisation of persons and objects who or which have been directly or indirectly in contact with the patients. The Rules on this subject in operation at the Infectious Diseases Hospital during the material period are contained in Exhibits 3, 5 and 6 in the Record.

Record.
p. 60, l. 12
et seq.
pp. 186-193.
p. 111, l. 34.
p. 112, l. 24.
p. 113,
ll. 19-22.

(E) It will be seen that these Rules do not envisage a separate kitchen for any class of patient. Isolation in this respect is effected by a provision for sterilisation of the dishes and other utensils immediately after they have been used by the patients. This sterilisation was performed at the Infectious Diseases Hospital by a specially trained maid. There was a kitchen on each floor of the building. There was no suggestion that the provisions for sterilisation had not been properly carried out.

p. 193, l. 5.

p. 84,
ll. 38-41.

p. 45, l. 14.

(F) A staff of eight graduate nurses, ten student nurses, three orderlies, two maids and one cleaner was in attendance on each floor of the Infectious Diseases Hospital. But maids did not enter the patients' rooms and orderlies did not attend children. Therefore apart from Hospital Officials and House Doctors and cleaners the only members of the Appellant's staff who in fact came into the Infant Respondent's room and also attended smallpox patients on either the third or the fourth floor were the nurses. The nurses were under the control of Miss Fairlie, the Appellant's Director of Nursing, who acted under Doctor Haywood the Superintendent.

p. 44, l. 33.

p. 52, l. 11.

p. 93, l. 15.

p. 69, l. 43.

p. 66, l. 39.

p. 67, l. 1.

(G) Miss Fairlie gave evidence to the effect that the staff at the Infectious Diseases Hospital was efficient and well-trained. Neither Doctor Haywood nor Miss Fairlie came across any case of an infraction of the Hospital discipline and Rules. Doctor Wylde and Doctor Norine the Internes or House Physicians on duty during the material period stated in evidence that whenever they visited the Infant Respondent they had always observed the technique required by the rules for persons entering patients' rooms.

p. 69, l. 44.

p. 117, l. 20.

p. 73, l. 31.

p. 132, l. 19.

p. 133, l. 8.

(H) With respect to the possibility of air-borne transmission of smallpox Doctor MacEachern stated that he could not see that there was very much danger of this except in "a very filthy place where particles of dirt were carried around."

p. 65, l. 33.

(I) The Appellant's medical witnesses (Doctor MacEachern, Doctor Bell, Doctor Underhill, Doctor Haywood, Doctor Carder the Epidemiologist to the City of Vancouver and Doctor McIntosh, the Medical Health Officer for the City of Vancouver) all gave evidence to the effect that the system and technique of isolation in operation at the Infectious Diseases Hospital during the material period was in accordance with accepted modern Hospital practice.

p. 58.

p. 110,

p. 104,

p. 115.

p. 123.

p. 133.

p. 62, l. 39, l. 45.

p. 106, l. 30, l. 34.

p. 112, l. 7, l. 22.

Record.
 p. 116, l. 37.
 p. 117, l. 18.
 p. 124, l. 36, l. 41.
 p. 134, l. 13, l. 14.
 p. 62, l. 40, l. 46.

They specifically approved as satisfactory the placing of smallpox patients in rooms adjoining those of other patients and allowing nurses who had attended smallpox patients to attend to other patients provided the proper precautions were taken. Doctor MacEachern stated in evidence that this was "accepted practice."

p. 8, l. 31.
 p. 17, l. 2.
 p. 11, l. 13.
 p. 12, l. 14.
 p. 135, l. 20.
 p. 150, l. 30.
 p. 151, l. 4.

14. The only medical witness called for the Respondents was Doctor Kennedy a physician in general practice in Vancouver, who believed in a separate isolation building for smallpox cases and considered that the Appellant's system exposed patients to undue risk. There were however certain passages in a text book called "Preventive Medicine and Hygiene" 10 by Milton J. Rosenau which, while they sanctioned treatment of smallpox in the general isolation building of a Hospital, recommend segregation of nurses and a separate kitchen for smallpox patients. This text book was cited by Doctor McIntosh one of the Appellant's witnesses.

15. It is respectfully submitted by the Appellant that in the matter of selecting the proper system of treating and isolating infectious diseases a hospital is under the duty of obtaining and acting on the advice of its medical advisers and that if it does so, it cannot be held to be negligent for having operated the system so advised. It is further submitted that the evidence, summarised above, establishes that the Appellant fully discharged 20 this duty in that it maintained at the Infectious Diseases Hospital with a properly trained staff a well-recognised and extensively practised system of isolation recommended to it by its medical advisers and regarded by qualified medical opinion as safe and satisfactory and that therefore the Appellant has not been negligent towards the Respondents even if (contrary to the Appellant's respectful contention) the proper inference to be drawn from the facts of this case is that the Infant Respondent contracted smallpox as a result of the defects of that System. In the Appellant's contention it is immaterial that other medical opinion may prefer some other System.

16. The Appellant does not however admit that the Infant Respondent 30 did contract smallpox by cross-infection. A total of about 40 cases of smallpox were treated in the Infectious Diseases Hospital during the epidemic and a number of cases of cross-infection did occur. In fact Doctor Haywood and Miss Forrest who considered that, excluding the Infant Respondent about seven cases of cross-infection had occurred, considered that the Respondent's case was also one of cross-infection. Doctor Carder however who visited the Hospital daily as staff-physician was not prepared to agree with this and stated in evidence that the infection might have been brought in from outside. Doctor McIntosh stated in evidence that four cases had developed in the Appellant's general ward which could only 40 be attributed to infection brought in from outside by doctors or visitors.

p. 117, l. 41.
 p. 46, l. 38.
 p. 53, ll. 1-28.
 p. 118, l. 8.
 p. 124,
 ll. 13, 14.
 p. 127, l. 27.
 p. 128, l. 7.
 p. 143, l. 20.

- 17.** While the Infant Respondent was in the Infectious Diseases Hospital, Doctor Kennedy visited her daily and, in the Appellant's submission, he may have brought infection in with him from outside notwithstanding the fact that, as he stated in evidence, he had not treated a smallpox case for over a year. Further, the Infant Respondent's mother who visited her on visiting days and was only allowed to look at her through the glass door of her room admitted that she had, apparently on two occasions, opened her door. Record.
p. 10, l. 13.
p. 10, l. 32.
p. 36, l. 44.
p. 37, l. 1.
p. 38,
ll. 28-30.
p. 46,
ll. 7-18.
- 18.** It was common ground that while contact direct or indirect plays an important part in the transmission of smallpox the precise means by which the infection is transmitted has not yet been ascertained by medical science. It is respectfully submitted by the Appellant that the Infant Respondent may have become infected in some entirely unknown manner and that in any event the facts admit of too many possibilities to justify any conclusion as to how infection took place. p. 11, l. 43.
p. 64, l. 7,
l. 11.
- 19.** A further question arises out of the fact that the Infant Respondent had never been vaccinated when she was admitted into the Infectious Diseases Hospital. It is not entirely clear at what date the Appellant's officials became aware of this, since the House Doctor who examined the Infant Respondent on admission did not definitely ascertain whether or not she had been vaccinated. Doctor Kennedy however stated that subsequently on or about the date of her transfer to the second floor an Interne raised the question of vaccinating her and he replied, "Well, I suppose it should be done." Doctor Kennedy intimated in his evidence that the desirability of vaccinating the Infant Respondent while she was suffering from diphtheria was questionable. But according to the evidence of Mrs. McDaniel vaccination was forbidden by the Respondent Mathew G. McDaniel on the 28th or 29th January, 1932, on the ground that it was dangerous to vaccinate somebody who might already have become infected with smallpox. p. 21, l. 20.
p. 131, l. 22
et seq.
p. 132.
ll. 1-4.
p. 24,
ll. 8-21.
p. 24, ll. 1-8.
p. 37,
ll. 28-41.
p. 41,
ll. 35-40.
- 20.** Doctor Carder stated in his evidence that if the Infant Respondent had been vaccinated on the 27th, 28th or 29th January, this would have prevented her from catching smallpox and that there had been no smallpox patient in the Hospital who had been successfully vaccinated within fifteen years previously to his admission. According to the evidence of Doctor McIntosh, who stated that safe vaccination of the child was possible up to the 3rd February, nothing but vaccination had checked the epidemic. p. 125, l. 23.
p. 153, l. 30.
p. 141, l. 14.
p. 143, l. 7.
p. 143, l. 11,
ll. 41-48.
- 21.** The Appellant respectfully submits that the failure of the Respondent Mathew G. McDaniel to procure the vaccination of the Infant Respondent was an act of contributory negligence which in any event disentitles the Respondents from obtaining damages.

Record.
p. 1.

22. By their Writ issued on the 23rd May, 1932, the Respondents claimed damages on the ground that the Appellant by its lack of care had caused the Infant Respondent to contract smallpox.

pp. 1-2.

23. By their Statement of Claim of the same date as the Writ the Respondents alleged (paragraph 5) that "one or more patients suffering from smallpox was or were through the negligence and want of care of the Defendant and its servants, improperly placed and maintained in the ward or portion of the said hospital occupied by the Infant Plaintiff, thereby unduly and wrongfully exposing the Infant Plaintiff to contagion by reason of which the Infant Plaintiff " contracted smallpox. By paragraphs 6, 7 and 8 of the Statement of Claim they alleged that the Respondent Mathew G. McDaniel had incurred expenses to a total of \$445.00 and had suffered inconvenience from the quarantining of his house and that the Infant Respondent had suffered damages from disfigurement. By paragraph 9 the Respondent Mathew G. McDaniel claimed the sum of \$445.00 and general damages and the Infant Respondent claimed damages. 10

p. 3.

24. By a demand for particulars dated the 25th May, 1932, the Appellant demanded (inter alia) "2. As to paragraph 5 [of the Statement of Claim] (A) particulars of the negligence and want of care charged against the Defendant and its servants " and " (B) particulars of the allegation that the Infant Plaintiff was unduly and wrongfully exposed to contagion." 20

p. 4.

25. By the Respondent's Answer dated the 27th May, 1932, it was stated: " In answer to demands . . . 2 (A) and 2 (B) the Plaintiffs say: The negligence and want of due care of the Defendant and its servants and the undue and improper exposure of the Infant Plaintiff to the contagion of smallpox consisted of placing the Infant Plaintiff and causing her to remain in too close proximity to another patient or other patients suffering from smallpox and that the nurses, orderlies and attendants in the employ of the Defendant, after waiting upon, attending or serving such smallpox patients or doing work or rendering services to such smallpox patients . . . came into contact with, waited upon and served the Infant Plaintiff, thereby causing the Infant Plaintiff to contract the disease of smallpox." 30

pp. 5-7.

26. The Appellant's Defence was delivered on the 30th June, 1932. Paragraphs 3 to 12 of the Defence contain denials of the allegations of the Statement of Claim. In paragraphs 17 to 22 the Appellant alleged the modern and approved character of the technique of treating infectious diseases at the Infectious Diseases Hospital and the efficiency of the Hospital Staff. By paragraph 23 it was alleged that the Infant Respondent's injury, if any, was not caused by the negligence of Appellant or its servants but arose from the susceptibility of the Infant Respondent to contract smallpox owing to her not having been vaccinated within three years prior to the 7th February, 1932. Paragraphs 24 and 25 contain pleas of a cause beyond the control of the Appellant and inevitable accident. 40

27. In the course of the hearing of the trial on the 12th January, 1933, Counsel for the Appellant stated that the nurses, sweepers and maids attendant on the third floor of the Infectious Diseases Hospital were in Court but that since the Respondents' Statement of Claim did not allege negligence on the part of the Appellant's employees and on the assumption that the Respondents did not intend to ask for an amendment he did not propose to call them. Counsel for the Respondents then intimated that he did not propose to ask for an amendment and these witnesses were not called. Record.
p. 141,
ii. 20-36.

28. The Action was heard by Mr. Justice Fisher in the Supreme Court of British Columbia on the 11th, 12th and 13th January, 1933. The learned Judge delivered oral judgment at the conclusion of the argument on the 13th January, 1933. He found as a fact that the Infant Respondent had contracted smallpox by cross-infection and that the Appellant had caused her to contract it by placing her in too close proximity to other patients who were suffering from smallpox and by allowing nurses in the Appellant's employ after having attended smallpox patients to attend the Infant Respondent, the magnitude of the risk being increased by the fact that the Infant Respondent was not vaccinated and was weakened by diphtheria. He held that these acts of the Appellant unduly exposed the Infant Respondent to risk and constituted negligence on the Appellant's part. He stated that he accepted Doctor Kennedy's view that after the 28th January 1932 vaccination was undesirable and held that there was no contributory negligence. pp. 157-161.
p. 159, l. 31
et seq.
p. 161, l. 1.
p. 160, l. 33
et seq.
p. 161, l. 17.

29. By the order of the Court dated the 13th January, 1933, it was ordered that the Infant Respondent and the Respondent Mathew G. McDaniel should recover against the Appellant the sum of \$5,000.00 and \$545.00 respectively and their costs. pp. 162-3.

30. On 13th February, 1933, the Appellant gave notice of Appeal from the judgment of the learned Judge and the Appeal was heard by the Court of Appeal (MacDonald, C.J., and Archer Martin, McPhillips and M. A. MacDonald, J.J.A.) on the 30th and 31st March, 1933. pp. 164-166.

31. The learned Chief Justice and Archer Martin and M. A. MacDonald, J.J.A., were in favour of dismissing the Appeal and McPhillips, J.A., of allowing it. The Appeal was accordingly dismissed with costs by Order of the Court of Appeal dated the 6th June, 1933, on which day the judgments of the Court were delivered. p. 182.

32. The learned Chief Justice stated that he had no hesitation in saying that the Appellant had been negligent and that this negligence was the proximate cause of the Respondent's injury. He gave the following (amongst other) reasons for his judgment: (1) Knowing the unvaccinated condition of the Infant Respondent the Appellant took no other means to protect her than those furnished by regulations which the Appellant did p. 168, l. 20.
pp. 167-168:
p. 167, l. 25.

- Record.
p. 168, l. 3.
p. 168, l. 4.
- not know to be efficient. (2) The Appellant's system had been disclosed to be 20 per cent. inefficient. (3) Rosenau's text book "Preventive Medicine and Hygiene" recommended isolation of nurses and his views had been confirmed by the Appellant's medical witnesses.
- p. 168, l. 17.
- He referred to eight cases of infection as having occurred and stated that this fact almost tempted him to say *res ipsa loquitur* but that some of the factors giving that maxim application to the facts of the present case were wanting. The learned Chief Justice did not deal with the question of contributory negligence.
- p. 134, l. 14.
- 33.** The Appellant respectfully points out that Rosenau's text book was in fact referred to by only one of the Appellant's witnesses Doctor McIntosh and that Doctor McIntosh specifically approved as satisfactory the practice of allowing one staff of nurses to attend both smallpox and other patients. 10
- p. 169.
- 34.** Archer Martin, J.A., delivered a short judgment in which he stated that in his opinion upon the facts as found by the learned Judge in the Court below the right conclusion in law had been reached.
- pp. 174-181.
p. 175, l. 30.
- p. 177, l. 12.
p. 178, l. 19.
- p. 178, l. 26.
- p. 179, l. 20.
p. 179, l. 23.
- p. 179, l. 44.
p. 180, l. 5.
- 35.** M. A. MacDonald, J.A., in the course of his judgment said that it was impossible to interfere with the finding of the trial Judge that cross-infection had occurred. The Court of Appeal was not in the same position as the trial Judge but was restricted to the question whether there was reasonable evidence to support the Judgment. Smallpox was admittedly a very contagious disease and the learned Judge was at liberty to find that a system of isolation should have regard to the possibility of failure on the part of attendants to take all necessary precautions. Rosenau's text book recommended isolation of nurses and separate kitchens—with this view Doctor McIntosh, having cited the book, must be assumed to agree. There had been failure to follow a system approved by medical authority in two important aspects. He said "My conclusion is that, whatever view one might form at the trial of the action, when the trial Judge found that the failure to segregate nurses was negligence and in addition we find from the evidence failure to maintain a separate kitchen we cannot interfere." He held that, the Appellant having admitted the Infant Respondent unvaccinated, the omission so to vaccinate her had no bearing on the question of liability. 20 30
- pp. 169-174.
- 36.** McPhillips, J.A., was in favour of allowing the Appeal. He gave the following (amongst other) reasons for his judgment :—
- p. 171, l. 39.
- (1) There were so many possible sources of infection that it would be most dangerous to come to the conclusion by mere inference that the Infant Respondent had become infected by being in the same building as smallpox patients. 40

(2) The learned Judge ought to have accepted the Appellant's evidence that the most recognised mode of arrangement of patients in the most advanced and up-to-date hospitals was the separate room or cubicle system. Record.
p. 171, l. 19.

(3) The hospital must be carried on upon some system and that system must be determined by the best medical opinion. The hospital in the present case had been built, arranged, staffed and equipped under the best medical opinion obtainable and it could not therefore be said that there was negligence in any particular. p. 172, l. 18.

- 10 **37.** The Appellant submits that the Appeal ought to be allowed and the judgments of the trial Judge and the Court of Appeal ought to be reversed and this action dismissed with costs for the following (amongst other)

REASONS.

- (1) BECAUSE the facts of this case do not justify the inference that the Infant Respondent contracted smallpox by cross-infection from other patients who had been placed in the Appellant's Infectious Diseases Hospital suffering from smallpox.
- 20 (2) BECAUSE the Appellant adopted and carried out a well-recognised and widely practised system of isolation, recommended to it by its medical advisers and regarded by competent medical opinion as satisfactory, and, in the absence of any allegation or proof of carelessness on the part of the Appellant's servants in carrying out that system the Appellant cannot be held to have committed any breach of contract or act of negligence.
- 30 (3) BECAUSE the failure of the Respondent Mathew G. McDaniel to procure the vaccination of the Infant Respondent constitutes an omission and act of contributory negligence which disentitles the Respondents from obtaining damages.
- (4) BECAUSE the reasons given by McPhillips, J.A., in his dissenting judgment were right.

WILFRID GREENE.

G. C. DUNBAR.

In the Privy Council.

No. 19 of 1934.

*On Appeal from the Court of Appeal for the
Province of British Columbia.*

BETWEEN

VANCOUVER GENERAL
HOSPITAL (Defendant) *Appellant*

AND

ANNABELLE McDANIEL
an Infant, by MATHEW G.
MCDANIEL her next friend
and the said MATHEW
G. McDANIEL (Plaintiffs) *Respondents.*

CASE FOR THE APPELLANT.

BLAKE & REDDEN,
17 Victoria Street, S.W.1.