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## In the Privy Council

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

BETWEEN :

THE VANCOUVER GENERAL HOSPITAL

(Defendant) Appellant,

AND:

ANNABELLE McDANIEL, an Infant, by  
Matthew G. McDaniel, her next friend, and the  
said MATTHEW G. McDANIEL,

(Plaintiffs) Respondents

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# CASE FOR RESPONDENTS

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RESPONDENT'S CASE.

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#### CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal by the Defendant from a Judgment of the Court of Appeal for British Columbia affirming, (Hon. Mr. Justice McPhillips dissenting), the trial Judgment of The Honourable Mr. Justice Fisher awarding the infant Plaintiff \$5,000 and the male Plaintiff \$545.00 damages against the Defendant for negligence, as a result of which the infant Plaintiff contracted smallpox while in the Defendant's Hospital as a diphtheria patient.

2. On the 17th of January, 1932, the infant Plaintiff, then a child of 9 years of age, was admitted as a paying patient, to the Defendant's Infectious Diseases Hospital for isolation, care and treatment for diphtheria, from which she was then suffering. She was attended by Dr. W. D. Kennedy, the regular family physician. Dr. Kennedy was not on the Defendant's staff.

3. The infant Plaintiff was not vaccinated. There were no smallpox patients in the Hospital at that time and neither Dr. Kennedy nor the parents of the infant had any idea that there would be or might be any exposure of the infant to smallpox contagion in the Hospital, nor were they aware that the Defendants proposed or intended to receive smallpox patients. The method of treatment of smallpox patients prior to 1930, at least was that of complete segregation and isolation in a separate building. No notice was ever given to the medical profession or to the public that smallpox patients would be admitted to the General Hospital, infectious diseases branch.

p. 9, l. 26  
p. 21, l. 40  
p. 24, l. 27

p. 109, l. 30  
p. 47, l. 26

- p. 51, l. 8      4. The infant was, on entry, allocated by the Supervisor of the Hospital to room 314, on the third floor of the Hospital.
- p. 48, l. 38      5. On the 18th day of January, 1932, a patient suffering from smallpox was admitted to the Hospital and was allocated by the Supervisor to Room 308, on the same floor as the infant Plaintiff.
- p. 48, l. 1  
p. 50, l. 45      6. On the 21st January, 1932, a second patient suffering from smallpox was admitted to the Hospital and was allocated by the Supervisor to Room 316, immediately adjoining that occupied by the infant Plaintiff. 10
- p. 48, l. 8      7. On the 28th January a third smallpox patient was admitted to the Hospital and was allocated to Room 317, immediately across the corridor on the third floor from Room 316.
- p. 32, l. 28      8. On the afternoon of the 28th January the mother of the infant discovered for the first time that smallpox patients were being admitted to the Hospital and allocated to the third floor in close proximity to her child.
- p. 33, l. 16      9. On the evening of the 28th January the mother reported to Dr. Kennedy that smallpox patients were being taken in by the Hospital and placed in close proximity to the infant Plaintiff. 20  
Dr. Kennedy did not at first credit the mother's story. On the morning of the 29th the Doctor, on making inquiries, found the complaint was well founded, and on his insistence the child was removed to a lower floor that day.
- p. 19, l. 43  
p. 24, l. 27  
p. 10, l. 4      10. On the 29th January four more smallpox patients were admitted to the Hospital, two more on the 30th January and still another on the first of February, all of whom were allocated by the Supervisor to rooms on the third floor. All the patients so admitted were suffering from a particularly virulent and severe type of the disease. 30
- p. 43, l. 11  
p. 45, l. 40  
p. 78, l. 40  
p. 101, l. 30  
p. 121, l. 18  
p. 142, l. 30      11. On Wednesday, the 3rd of February, 1932, the infant Plaintiff was discharged from the Hospital, free from the attack of diphtheria, and was taken home.
- p. 33, l. 37      12. On Monday, the 8th day of February, the infant Plaintiff complained of pains in her shoulders and head; this continued through Tuesday, the 9th, and she became quite ill on Wednesday, the 10th, and on Thursday, the 11th, Dr. Kennedy diagnosed her complaint as smallpox, which subsequently developed into a very virulent attack, causing severe and permanent disfigurement of the infant Plaintiff. 40
- p. 10, l. 40  
p. 13, l. 5  
p. 154, l. 37      13. The infant Plaintiff contracted the smallpox on or about the 27th of January, while in the Defendant's Hospital.
- p. 11, l. 15  
p. 125, l. 16      14. The duties of the Supervisor are the supervision of the nursing and the housekeeping and generally to carry out the administration of the building under her charge, in accordance with the Rules and Regulations handed down by the governing authorities of the Defendant.
- p. 48, l. 10

15. The Rules and Regulations applying to infectious diseases (Ex.'s 3, 5 and 6) had been adopted in 1927-1928 and had been prepared by Dr. Bell, the then Superintendent. Before and at the time these Rules were promulgated all smallpox patients were taken to a separate building outside the Defendant's Hospital for complete segregation and isolation. The admission of smallpox patients to the building in question in this action was an innovation brought about in Dr. Haywood's time, after 1930. The Rules and Regulations did not mention smallpox and  
 10 made no special provisions for smallpox, and were not in any way altered or amended to meet the new conditions resulting from indiscriminate acceptance and treatment of smallpox patients along with other patients.
16. The actual allocation of smallpox patients to the third floor was a matter of convenience and was the system authorized by the governing body of the Hospital.
17. There were 24 attendants on the third floor—8 graduate nurses, 10 student nurses, 3 orderlies, 2 maids and 1 cleaner. These were on duty on that floor alone. In addition to the above  
 20 there were the Supervisor and two resident doctors for the whole building. That staff circulated through all the rooms indiscriminately as their duties called them. There was no segregation of attendants for smallpox patients.
18. There was a common kitchen for each floor and the dishes and equipment for feeding the patients were used indiscriminately for all the rooms on each floor, smallpox patients as well as others.
19. Under the conditions above there was an alarmingly excessive number of cross infections of smallpox in the Defendant's Hospital, the case of the infant Plaintiff being one.  
 30
20. The "Hospital Act", R.S.B.C. (1924) Cap. 106, inter alia, provided for grants in aid of Hospitals throughout the Province. The Public Policy with regard to strict segregation and isolation of smallpox patients was expressed in Section 6 of that Act, which reads as follows:-
- 40 "6. No money shall be paid under this Act to any Hospital where smallpox patients are admitted, unless a Certificate has been filed with the Provincial Secretary, signed by a medical officer of the Hospital, to the effect that there is, in the Hospital, a distinct and separate ward or building set apart for the exclusive accommodation of patients afflicted with smallpox."
21. The Hospital authorities made searching investigation into the cause of this excessive cross infection, but were unable to discover any explanation. The only remedy they could conceive was to refuse to admit patients for relief who were not thoroughly

p. 111, l. 32  
 p. 112, l. 24  
 p. 113, l. 10  
 p. 186 to 193

p. 69, l. 31  
 p. 113, l. 22

p. 114, l. 40  
 p. 128, l. 17

p. 42, l. 31  
 p. 43, l. 20  
 p. 50, l. 6  
 p. 76, l. 45  
 p. 119, l. 23

p. 44, l. 26

p. 52, l. 5  
 p. 49, l. 35

p. 45, l. 13  
 p. 93, l. 43

p. 118, l. 4  
 p. 127, l. 41

p. 97, l. 11  
 p. 128, l. 17

p. 143, l. 14  
p. 148, l. 33

protected against smallpox contagion by vaccination, or, alternatively, to take a written waiver of all claims for damages arising from the exposure to contagion.

p. 11, l. 42  
p. 64, l. 6  
p. 108, l. 45  
p. 113, l. 26  
p. 114, l. 8  
p. 115, l. 2  
p. 118, l. 27

22. It is admitted by all the witnesses with any experience of smallpox that the one clearly known method of transmission of that disease is contact, direct or indirect. That in the case of smallpox there are other means of transmission not yet understood or ascertained is also the common view of all the witnesses having had experience with this disease. The Defendant's system or technique was not framed to meet dangers of contagion from smallpox. 10

p. 12, l. 14  
p. 20, l. 11  
p. 22, l. 10  
p. 108, l. 17  
p. 109, l. 15  
p. 113, l. 26  
p. 118, l. 22  
p. 126, l. 1

23. It is also common ground with all these witnesses that the prime necessity in preventing the spread of contagion in smallpox cases is to procure the most effective possible break in contact.

p. 150, l. 13  
to p. 151, l. 26

24. Experience and research indicate that special care is required to prevent spread of contagion in smallpox cases. No such special care was exercised by the Defendants here.

25. The learned trial Judge finds as follows (and there is satisfactory evidence to support such finding):- 20

p. 159, l. 32

(a) That there was cross infection in Defendant's Hospital.

p. 159, l. 33

(b) That the infant Plaintiff was a victim of this cross infection.

p. 159, l. 34

(c) That this cross infection of the infant Plaintiff arose from the exposure to the contagion of smallpox by placing her and causing her to remain in close proximity to other patients suffering from smallpox and that the employees of the Defendant, after waiting or attending upon such smallpox patients came into contact with and waited upon the infant Plaintiff and so caused the infant Plaintiff to contract smallpox. 30

p. 160, l. 33

(d) This was an exposure of the infant Plaintiff to a risk of harm unjustified by the objects or reasons given.

p. 160, l. 38

(e) The damage to the infant Plaintiff was thus caused by the negligence and want of due care by the Defendant and its servants.

26. The foregoing findings of the learned trial Judge are not only left undisturbed but are affirmed by the majority judgments in the Court of Appeal. 40

27. The dissenting judgment of the Honourable Mr. Justice McPhillips sets out compendiously the argument of the Defendant as developed in the Courts below. This judgment would appear to the Plaintiffs to be based upon the following findings:-

(a) That the infant Plaintiff contracted the disease of smallpox *after* she left the Defendant's Hospital.

(b) That there was no danger of contagion in the system of the Defendant as carried out.

(c) That the Defendant's system had the universal approval of the highest authorities on the hospitalization of infectious diseases.

10 (d) That the principles laid down in *Hillyer vs. The Governors of St. Bartholomew's Hospital* (1909) 2 *K.B.* 820; *Thompson vs. Columbia Coast Mission* (1914) 20 *B.C.R.* 115; and *Footo vs. Directors of Greenock Hospital* (1912) *Sessions Cases* 69, apply to the adoption by the governing body of the Hospital of a system of administration of the Hospital.

(e) That the Plaintiffs have failed to establish by proof the particular defect in the system so adopted by the Defendant or the particular failure to carry out the system so adopted.

#### CONTENTIONS OF THE PLAINTIFFS

28. The Plaintiffs contend, with due deference, that the 20 above findings relied upon by the Defendant are not capable of support, for the following reasons: (Plaintiffs' contentions are lettered to correspond with the findings in paragraph 28 of this case).

##### A.

29. It is common ground with all the witnesses that the incubation period in smallpox is from 10 to 14 days from the time of original infection. Dr. Carder, Epidemiologist, for many years in the employ of the City of Vancouver, (a witness called for the Defence, and especially commended by the learned trial 30 Judge), states in his examination in chief, that the Infant Plaintiff must have been definitely infected on or about the 27th January. She was in the Defendant's Hospital from the 17th day of January till the 3rd day of February. No attempt was made to trace the infection to any source other than from exposure in the Hospital. The learned trial Judge (p. 159, line 32) finds in these words, "I would find that what has been called cross infection did occur, and it did occur with respect to the infant Plaintiff, and I find that the damage thus caused to her arose through the exposure of the infant Plaintiff to the contagion of 40 smallpox . . . (etc)." The majority Judges in the Court of Appeal not only accept this finding but affirmatively agree with it.

The Plaintiffs therefore contend that the place and time of the infant Plaintiff's infection is definitely and clearly established.

## B.

30. It is common ground with all the witnesses that contact, direct or indirect, with smallpox is dangerous. It is also common ground that the most effective means of avoiding the danger of contagion is to break or prevent contact of any kind. Until the end of 1930, at least, this break in contact was procured by the maintenance of a wholly separate building with a separate staff and accommodation for smallpox patients. The Defendant, for convenience in hospital administration, decided in January, 1932, to admit smallpox patients to the Infectious Diseases Hospital and mix them indiscriminately amongst patients suffering from other diseases and have them attended by the general staff and served from the common kitchen with food, dishes and utensils used in common on the same floor. The proximity of the disease and the facilities for contact necessarily ensuing from this innovation were to be counteracted by the adoption and observance of a "technique." Defendant's officials were fully aware that a failure on the part of anyone or more of a large staff to observe the "technique" would be a constant source of danger, and they were also aware that the cause of smallpox and the methods of its transmission are not sufficiently well known to medical science to ensure a complete and perfect "technique." The immediate and direct result of this venture on the part of the Defendant was an excessively alarming number of cross infections from smallpox to other patients, including the infant Plaintiff. The Defendants were at a total loss in locating the defect causing the trouble and the only remedy they could devise was to refuse admittance to any patient not immune from smallpox by effective vaccination, or to take from these a signed waiver of any claim for damages due to smallpox infection. This is a practical admission by the Defendants of the danger resulting from their method of handling smallpox patients. The situation was so startling that the learned Chief Justice of British Columbia was tempted to use the term "res ipsa loquitur." When it is considered further that the Defendant had at the time of her admittance to the Hospital noticed that the infant Plaintiff had not been vaccinated the magnitude of the risk to which the infant Plaintiff was exposed becomes still more apparent.

It is contended, therefore, on behalf of the Plaintiffs, that the risk to which the infant Plaintiff was exposed was an undue and improper hazard as found in the judgments now in appeal.

## C.

31. The defence theory, accepted by the Honourable Mr. Justice McPhillips in his dissenting judgment, is that the modern

p. 47, l. 1  
p. 65, l. 9  
p. 66, l. 15

p. 168, l. 17

system of indiscriminate centralization, housing and attendance on infectious diseases can be safely carried out in respect to all infectious diseases. Whatever support for this theory can be obtained from authorities on the subject with respect to diseases other than smallpox, it would appear that the theory does not apply to that particular disease. It is an exception to the general rule. The following points seem to be commonly and universally accepted by all the expert witnesses.

10 (1) Smallpox is one of the most contagious and most dreaded of contagious diseases.

(2) The cause and methods of transmission of smallpox are not sufficiently well known to medical science to determine how it is transmitted.

(3) That the most effective means of preventing the spread of this contagion is complete break in means of opportunities of contact, either direct or indirect, or, as simply put by Dr. Kennedy, the Plaintiff's physician, "the closer the case the greater the danger."

20 (4) The only medical work or technical treatise referred to was "Preventive Medicine and Hygiene", by Milton J. Roseneau, Professor of Preventive Medicine and Hygiene, Harvard Medical School, Professor of Epidemiology, Harvard School of Public Health, 5th Edition, published in 1928 and declared by Dr. J. W. McIntosh as "the best authority in the text books" and "the best up to date book we can get in the City Hall." Dr. McIntosh is Medical Health Officer for the City of Vancouver and as such exercises control over the Hospital in all cases of contagious diseases. This text book, under the sub-heading or  
30 title of "Isolation and Smallpox Hospital" contains the following:-

p. 135, l. 19

p. 135, l. 17

p. 135, l. 27

p. 146, l. 28

40 "Isolation and disinfection are only secondary measures in preventing smallpox. Isolation should be carried out with strictness, for the reason that smallpox is one of the most contagious of communicable infections. While the patient should be isolated, it is not necessary to isolate the hospital by banishing it to an inconvenient or undesirable location. There is, in fact, no good reason why a smallpox hospital should not be one of the units of the general hospital for communicable diseases."

p. 150, l. 22

and at page 32, continuing the same subject:

"The nurse attending a case of smallpox should also be segregated; all visiting should be strictly interdicted. A separate kitchen should be provided and care taken

p. 151, l. 4



that the dishes be scalded and remnants of food burned.”

“Isolation of the more readily communicable diseases as smallpox and measles call for special measures.”

No special measures were provided for in the system of the Defendants. There was no segregation of patients, nurses or attendants, no separate kitchen and no separate food dishes or utensils, nor was there any special reference in the “Rules and Regulations” as to smallpox.

32. The Provincial Legislature, as would appear from 10  
Section 6 of “The Hospital Act” quoted in paragraph 23 of this case, definitely refused, as a matter of Public Policy, to grant financial aid to any hospital which did not exercise a systematic segregation of smallpox patients from other patients being served thereby.

It is therefore contended on behalf of the Plaintiffs that there is no foundation in fact for the claim that the Defendant’s system, when applied to smallpox, had universal approval of the highest authorities. The converse is true. It was contrary to common knowledge and belief, contrary to the highest authority 20  
produced and vouched for by the chief of the Defence witnesses, contrary to the Public Policy of the Province and was undertaken blindly and without any assurance as to its workability. The unfortunate results amply justify the condemnation in the judgments now sought to be set aside.

#### D.

33. The authorities, relied upon by the Defence and followed by the Honourable Mr. Justice McPhillips in his dissenting judgment, are all instances of slips or errors by staff physicians or surgeons in their professional duties to the patient. In the 30  
exercise of professional skill or care the surgeon or physician is not in any sense the servant or agent of the hospital. In fact, he is master of the situation, and in such matters is not in any way under the control or management of the hospital. The sole duty of the hospital, in such a case, is to exercise due care and judgment in the selection of its staff physicians and surgeons.

When the matter, however, is one of general administration or policy in the management and conduct of the hospital, different considerations apply. It is the duty of the hospital, acting through its governing body, to adopt the system, make the regulations and 40  
see to the operation of such by its employees. In so doing the hospital exercises control and discretion, and must, as a consequence, accept responsibility for errors and mistakes either on its own part or on the part of the employees under its management.

It is contended, therefore, on behalf of the Plaintiffs, that the authorities upon which the dissenting judgment is founded are wholly inapplicable and do not meet the case here presented.

E.

34. The Honourable Mr. Justice McPhillips finds in his dissenting judgment that no particular defect in the Defendant's system was established and that no particular failure to carry out that system was proven. This, it is submitted, is erroneous. The system adopted clearly failed in its operation. The burden  
10 was then upon the Defendant to shew that such failure in operation was not due to their fault, and not upon the Plaintiffs to establish the cause of the failure.

*Chaproniere vs. Mason* (1905) 21 *T.L.R.* 633;  
*Pronek vs. Winnipeg & Selkirk Ry.* (1933) *A.C.* 61, at 68.

The Plaintiffs have established beyond a question that proximity to smallpox was in itself dangerous. Contact, direct or indirect, with the disease was the most acute danger. Indiscriminate attendance on smallpox patients and the infant Plaintiff could only lead to contact, direct or indirect, with the disease.  
20 A common kitchen and common use of feeding dishes and utensils must intensify the danger of contagion. The actual result of the system was an excessively large number of cross infections from smallpox. The Plaintiff was infected while a patient in Defendant's hospital and under the system controlled by the Defendants. The Defendant adduced no facts to exonerate themselves from responsibility for the infant Plaintiff's infection. There was thus only one inference to be drawn from the circumstances and that was the inference drawn by the learned trial Judge and affirmed by the majority of the Judges in the Court  
30 of Appeal.

*Beven on Negligence, 4th Ed., Vol. 1., p. 127.*  
*Angus vs. London, Tilbury etc. Ry. Co.* (1906) 22 *T.L.R.* 222 at 223.

35. With regard to the suggestion that the non-vaccination of the infant Plaintiff was in some way contributory negligence, may it be pointed out:

(a) There was no knowledge on the part of the infant Plaintiff, her parents or physician, that there was any chance of exposure to the contagion of smallpox until the late afternoon of the 28th of January, and even then Dr. Kennedy would not and did not credit the report until the morning  
40 of the 29th.

(b) Dr. Carder, Epidemiologist for the City of Vancouver, called by the Defence, fixes the date of the definite infection of the infant Plaintiff as the 27th January.

(c) The non-vaccination of the Plaintiff had nothing to do with bringing the contagion to the infant Plaintiff nor with the Defendant's management of the Hospital in admitting smallpox patients and providing for indiscriminate service to all patients on the third floor of the Hospital, smallpox as well as others, nor with the maintenance of a common kitchen and common food dishes and utensils on that 10 floor.

p. 24, l. 1  
p. 37, l. 26

(d) The physical condition of the infant Plaintiff was such, at the time of the discovery of her exposure to contagion, that her physician doubted the efficacy or wisdom of vaccination at that time. There was therefor no failure on the part of the Plaintiffs to take reasonable care under the circumstances.

The Plaintiffs therefor contend that any suggestion of contributory negligence should be disregarded.

In conclusion, the Plaintiffs submit that this appeal is not 20 well founded and should be dismissed for the following

#### REASONS

1. The infant Plaintiff was a victim of cross infection in Defendant's Hospital.

2. This cross infection was due to the negligence of the Defendant in accumulating around and about the infant Plaintiff smallpox contagion, without taking proper or effective means to prevent the spread of the contagion.

3. The Defendant exposed the Plaintiff to a risk wholly unjustified under the circumstances or for the reason given. 30

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