Privy Council Appeal No. 19 *of* 1934.

The Vancouver General Hospital - - - - - *Appellants*

v.

Annabelle McDaniel and another - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1934.

Present at the Hearing:

LORD BLANESBURGH.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
LORD ALNESS.
SIR SIDNEY ROWLATT.

[*Delivered by* LORD ALNESS.]

This is an appeal from a judgment of the Court of Appeal of British Columbia, dated the 6th June, 1933, affirming, by a majority, the judgment of Fisher J. in the Supreme Court of British Columbia, dated 13th January, 1933.

The facts which gave rise to the appeal are in brief as follow. On the 17th January, 1932, the respondent, Annabelle McDaniel, hereinafter termed "the respondent," who was then suffering from diphtheria, was admitted, on the advice of her doctor, Dr. Kennedy, as a paying patient, to the appellants' Infectious Diseases Hospital in Vancouver. She was to be attended there by the appellants' nurses and by Dr. Kennedy. At that date there was smallpox in Vancouver. On the 18th January, 1932, a smallpox patient was admitted to the hospital, and was placed in an adjacent room to the respondent. On the 21st January another smallpox patient was admitted to the hospital, and was also placed in a room adjacent to the respondent. On the

28th January yet another smallpox patient was admitted, and was placed in a room nearly opposite to that occupied by the respondent. On the 29th January four more smallpox patients were admitted to the hospital, and were placed in rooms on the same floor as the respondent, viz., the third floor of the hospital. On the 29th January, Dr. Kennedy, having been informed by the respondent's mother that smallpox patients were being treated on the same floor as the respondent, requested that she should be transferred to another floor, and she was thereupon removed to the second floor, where there were no smallpox patients, and where another set of nurses was in charge. On the 3rd February the respondent was discharged from hospital, cured of diphtheria, and returned home. On the 12th February the respondent was diagnosed by Dr. Kennedy to be suffering from smallpox. The incubation period for smallpox is 10–14 days. Counsel for the appellants avowed his willingness to assume, for the purposes of argument, that that disease had been contracted by the respondent, in virtue of what is termed cross-infection, while she was in a room on the third floor of the appellants' hospital, and while she was attended by the nurses assigned without discrimination to the patients on that floor.

In the circumstances recited this action of damages was raised by the respondent, and her father, as her next friend, against the appellants, claiming damages from them on the ground that the respondent had contracted smallpox, with its consequent disfigurement, while in the appellants' hospital, owing to their negligence.

It is important *in limine* to note the precise nature of the negligence imputed by the respondent to the appellants. That negligence is set out in the answer made by the respondent to a demand by the appellants for particulars of the negligence complained of by her in her statement of claim. The negligence charged by the respondent against the appellants is based upon :—

1. The juxtaposition of smallpox patients, on the third floor of the hospital, to the respondent.

2. The attendance upon the respondent by nurses who also nursed smallpox patients.

It is to be observed that no charge of negligence on the part of anyone in the employ of the appellants is made. The complaint is one relating to the technique of the hospital. The complaint is that the technique was adopted by the appellants, not that it failed in execution. In other words, the case made against the appellants is one, not of vicarious, but of direct responsibility.

Now the *onus* is on the respondent to prove beyond reasonable doubt the negligence of which she complains. The question in the case is whether she has discharged that *onus*.

The substantive evidence adduced by the respondent in support of her case is meagre in the extreme. The only medical witness adduced by her, apart from certain witnesses for the appellants who were examined on discovery, is Dr. Kennedy, who, " in spite of recent teachings," as he phrased it, expressed a preference for the old system of isolation in a separate building of smallpox cases, and who expressed distrust of the new system, whereby in effect sterilization is substituted for isolation. Dr. Kennedy avowed that he was " a disciple of the old school of segregation for smallpox." It is consistent with the evidence adduced by the respondent that, in modern practice, the system adopted by the appellants, including the technique complained of, is in vogue throughout the rest of Canada, and also in the United States. No instance was given of a hospital which now follows the technique desiderated by the respondent. Dr. Kennedy's medical experience was confined to Vancouver. No evidence was adduced by the respondent to the effect that the technique followed by the appellants had earned the condemnation of medical opinion generally, or of any medical man in particular, except Dr. Kennedy. It is not surprising, in these circumstances, that, at the end of the respondent's case, the appellants' counsel should have moved for a non-suit. That motion was refused, and evidence for the appellants was led.

That evidence was of this nature. In April, 1925, the City Council of Vancouver and the authorities of the Vancouver Hospital discussed the erection of a new infectious diseases hospital in Vancouver. A deputation was sent to visit certain up-to-date hospitals of the United States and to report. On that deputation both the City authorities and the Vancouver hospital were represented. The deputation visited a variety of hospitals, and made a report. That report was tendered in evidence by the appellants, but, objection having been taken to its production by the respondent's counsel, it was excluded. This their Lordships regard as unfortunate. What followed is, however, not left in doubt.

The new infectious diseases hospital was completed and opened in 1927. Although the old smallpox pavilion belonging to the City was not closed down till about 1930, the evidence shows that from the outset the new hospital was intended to deal with smallpox as well as with the other infectious diseases. The plans of the new hospital were approved by Dr. Bell, who was a member of the deputation referred to, and who moreover at the time of their approval was General Superintendant of the hospital. A set of rules was drawn up by Dr. Bell, dealing with the sterilization technique imposed upon the staff of the new infectious diseases hospital.

The defence propounded by the appellants in argument to the claim of the respondent is two fold. It was maintained

(1) that the technique of which complaint is made by the respondent was adopted by the appellants on competent medical advice, and (2) that it is in accord with approved modern practice.

(1) This defence is not definitely established. No witness was put in the box by the appellants to say that, following on the report of the deputation, the hospital authorities, on medical advice tendered to them, adopted what is termed the unit system, including the technique complained of. But what *is* proved is this—that the appellants' technique which, be it remembered, in two particulars and two only is attacked by the respondent, is in these two particulars endorsed by every medical witness adduced by the appellants. Their testimony is unambiguous, and is contradicted by no one but Dr. Kennedy. That being the state of the evidence, it seems to their Lordships difficult to affirm that, in a matter relating solely to medical technique, the appellants were proved to be guilty of negligence.

It may be worth while to recall the views expressed by the medical witnesses examined on behalf of the appellants regarding this matter. Dr. McEachern, who is associate director of the American College of Surgeons, and director of hospital activities, and who in that capacity is responsible for an annual survey of 3,464 hospitals in the United States and Canada, affirms that the appellants' technique, of which he has knowledge, is in accord with the most approved hospital practice, and that it is the best system known to medical science to-day. He states that the proximity of smallpox patients to other patients in an infectious diseases hospital is quite an accepted procedure in the modern method of handling infectious disease. As regards a common nursing staff, he describes that as also accepted procedure in all modern systems. Miss Fairley, the director of nursing in the appellants' hospital under Dr. Haywood, states that the practice of putting smallpox patients in rooms adjoining those of other patients has been in vogue for the past 15 years in the various institutions in which she nursed—that it is the ordinary practice. And she cites many instances. Dr. Underhill, who was for 26 years a medical health officer for the City of Vancouver, and who was a member of the deputation of inquiry referred to, approves in terms of the juxtaposition of smallpox patients with other patients in an infectious diseases hospital, and of their attendance by nurses who attend also to other infectious cases. Dr. Haywood, the General Superintendent of the Vancouver General Hospital, Dr. Carder, the City Epidemiologist, and Dr. McIntosh, Medical Health Officer to the City of Vancouver, express in evidence concurrence with this view.

(2) That, however, is not all. Not only do these medical men approve in terms of the appellants' technique, but they affirm, as will be observed from the passages cited *supra*, that the technique challenged by the respondent is in accord with general if not with universal practice to-day in Canada and the United

States. If that be so, it is, in their Lordships' opinion, again difficult to affirm that negligence on the part of the appellants is proved. A defendant charged with negligence can clear his feet if he shows that he has acted in accord with general and approved practice. The appellants, in their Lordships' opinion, even if the *onus* rested on them of doing this, have in this case done so by a weight of evidence that cannot be ignored.

Their Lordships, however, cannot make it too clear that they are offering no opinion of their own as to the relative merits of what is termed the unit system in contra-distinction to the isolation system for the treatment of smallpox, nor are they offering any opinion of their own upon the two points in the technique of the appellants which the respondent challenges. Such problems are not submitted to them for decision. Theirs is the simpler task of deciding whether, upon the evidence submitted in this case, the respondent has succeeded in proving that the appellants were negligent. Having regard to the favourable opinion expressed by all the appellants' medical witnesses regarding the technique followed in the Vancouver Hospital, and to the accepted practice in regard to that technique appearing from the same evidence, their Lordships are constrained to hold that the charge of negligence brought by the respondent against the appellants in this case is not established. That is all the length that their Lordships are prepared to go, that is all the length it is necessary to go, in deciding this appeal.

It may be proper in conclusion to refer to one or two subsidiary matters. The first is this—that the respondent, when infected by smallpox, was unvaccinated. It was originally claimed by the appellants that this amounted to contributory negligence on the part of the respondent, and barred her claim. Counsel for the appellants, however, frankly admitted in argument that the omission to vaccinate the respondent could not be regarded as barring her claim, though it might have a legal bearing on the claim made by her next friend. But, in the end, as their Lordships understood, even this modified contention was not seriously pressed by the appellants. So the question of contributory negligence really disappears from the case.

Another subordinate question was of this nature. The appellants' counsel put to Dr. McIntosh, a witness for them, a text book by one Rosenau, which that witness himself produced as one of the highest authority. Indeed certain passages from it were cited in evidence by the witness as authoritative. In cross-examination for the respondent, it was put to Dr. McIntosh that the author expressed the view that nurses waiting on smallpox patients should be segregated. The witness, by an oversight on the part of the respondent's counsel or otherwise, was not asked whether he agreed with the author's view. That being so, the view expressed by Rosenau seems to their Lordships to be in this case of relatively small importance. Assuming the

competence of having regard to that view—expressed, as it is, in a text book, and not therefore subject to cross-examination —the overwhelming medical evidence in favour of the contrary view adduced by the appellants in this case excludes the possibility of affirming their negligence in this particular, even although an isolated author of high authority held a different view.

It is proper to add that none of the learned judges in the Court below whose views were hostile to the appellants, with the possible exception of Mr. Justice Macdonald, appear to have addressed their minds to the question of sterilisation, which is affirmed by the medical witnesses for the appellants satisfactorily to replace the old system of isolation, or to the approved practice in regard to the technique adopted by the appellants, as to which the evidence tendered by the appellants was so strong. The cases cited by the appellants and by the respondent are not, in their Lordships' opinion, apposite or helpful. The decision of this case rests and rests solely upon the evidence adduced in its course.

Their Lordships will humbly advise His Majesty that the appeal be allowed, the judgments of the Courts below reversed, and the action dismissed. The respondents must pay the costs both here and in the Courts below

In the Privy Council.

THE VANCOUVER GENERAL HOSPITAL

v.

ANNABELLE McDANIEL AND ANOTHER.

DELIVERED BY LORD ALNESS.

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