[1936] 2 All ER 1076

Lindsey County Council v Marshall

HOUSE OF LORDS
VISCOUNT HAILSHAM LC, VISCOUNT SANKEY, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN AND LORD WRIGHT MR

Edward W Cave KC and Walker Carter for the appellants.
T Norman Winning and Geoffrey Smallwood for the respondent.
14 July 1936. The following opinions were delivered.

VISCOUNT HAILSHAM LC.

My Lords, this is an appeal from an order of the Court of Appeal affirming the judgment of Lawrence°J in favour of the respondent for £750 damages pursuant to the verdict of a jury in her favour. The appellants own and control a maternity home known as the Cleethorpes Maternity Home, which is carried on by them under statutory powers. Cleethorpes Maternity Home is a comparatively small three-storey building containing in all 16 beds for patients. Some of the beds are in single rooms and are known as "private wards" and for these a charge is made of four guineas a week. The remaining beds are in public wards, and the charge for admission to these is two guineas

[1936] 2 All ER 1076 at 1078

a week. The patients in the home are attended by their own doctors; the appellants provide a nursing staff, three of whom are certified midwives. The appellants administer the home through their maternity and child welfare committee, which consists partly of members of the appellant council and partly of co-opted members. That committee has a sub-committee which meets at Cleethorpes every two months for the management of the home. The committee are advised in the management of the home by a Dr Campbell, who is county medical officer of health, and a Dr Stott, who is an assistant medical officer of health for the county and the medical superintendent of the home. Both these doctors described their duties as purely administrative, by which I understand them to mean that they performed no clinical duties and took no part in the treatment of any of the patients.

In the month of January 1933, the respondent interviewed the matron at the home with a view to admission for confinement in the following July. She explained that the date at which she expected to be confined was about 4 July, and she arranged with the matron that she should have a private ward at a cost of four guineas a week and that she should be attended by her own doctor. On 30 June 1933, a Mrs Franklin was admitted to the home. On 4 July, Mrs Franklin developed a high temperature and her doctor diagnosed her as suffering from appendicitis and she was removed by ambulance to Grimsby General Hospital. On her removal the ward in which she had been lying and the nurses who had been in contact with her were disinfected in accordance with the ordinary routine when a temperature case arises. On arrival at the hospital it was ascertained that Mrs Franklin was in fact suffering from acute puerperal fever. Puerperal fever is a very dangerous and highly infectious disease. On 5 July the authorities at the home were

informed by Grimsby General Hospital of their diagnosis and thereupon a further disinfection took place. Normally, the proper course to adopt on the appearance of a case of puerperal fever is for swabs to be taken of the throats of all persons who have been in contact with the patient in order that it may be ascertained by bacteriological examination whether any such person is a carrier. In Mrs Franklin's case no swabs were taken as it was thought that the disinfection on 4 July would have rendered that precaution useless for the purpose of ascertaining whether a carrier was present. On 9 July, a Mrs Fleming was admitted to the home; she developed a temperature of 100.6 on the following day after her confinement and a similar temperature again on 11 July. Her case therefore became notifiable as a case of puerperal pyrexia, and in fact it was subsequently ascertained that there were present in her case the germs which cause puerperal sepsis. On the evening of 12 July the plaintiff was very near her confinement, and accordingly her husband communicated by telephone with the home and was instructed to bring

his wife. On their arrival late that night they were informed that there was no private ward available and that she would have to go into one of the other wards. After some hesitation they decided that the plaintiff should go into an ordinary ward on the understanding that she would be removed to a private ward as soon as possible. No information was given to the plaintiff or her husband or her doctor at any time before her admission about the case of Mrs Franklin or of Mrs Fleming, and nothing was said to any of them to indicate that there had been any recent case of infection at the home. On 13 July, the plaintiff's child was born; on 16 July, four other patients in the home developed puerperal fever; on 17 July, the plaintiff herself developed the fever. She was ultimately removed to an infirmary and suffered a very severe attack of the disease. On 17 July, Dr Campbell and Dr Stott decided to close the home against any further admissions.

The case was heard before Lawrence°J and a special jury at Lincoln Assizes in June 1934. A series of questions were left to the jury, which with their answers are as follows:—

> '(i) Was the contract to supply a private room subject to there being one available?—No.
>
> '(ii) Was the contract to supply such a private room on July 4 or when she presented herself?—When she presented herself.
>
> '(iii) Was it varied by the plaintiff agreeing to enter public ward?—No.
>
> '(iv) Was it a breach of duty not to refuse admission to the home to new patients from July 5 onwards?—Yes.
>
> '(v) Was there any breach of duty in the administration of the home from July 4 to 20?—Yes.
>
> 'In what respects?—Swabs should have been taken from the whole of the

staff immediately on the report of Mrs. Franklin's case.

'(vi) Was it a breach of duty not to inform the plaintiff or her husband or her medical adviser of Mrs. Franklin's case?—Yes.

'(vii) Did plaintiff's illness flow from the breach of duty specified: (a) in question (iv)?—Yes. (b) in question (v)?—Yes. (c) in question (vi)?—Yes.

'(viii) Damages.—£750.'

On these findings judgment was entered for the respondent for £750 with the costs of the action. The appellants appealed to the Court of Appeal. In that court it was unanimously held that there was no evidence to support the answers of the jury to the first three questions. Maugham LJ further held that there was no evidence to justify the answers to the remaining questions; the other two members of the court held that the answer to the fifth question afforded no cause of action because the responsibility was shown to lie with Dr Stott and not with the defendants, but they held that there was evidence to justify the answers to the sixth and seventh questions and that these answers justified the judgment in favour of the plaintiff. It is not very clear what view the majority of the Court of Appeal formed about the answer

to the fourth question. Greer LJ, with whose judgment Roche LJ agreed, expressed the opinion that the decision as to the closing of the home rested with Dr Campbell and Dr Stott, and that in taking their decision they were not acting as servants of the defendants, but at the conclusion of his judgment Greer LJ said that there was evidence on which the jury could find that the matron was negligent in admitting the plaintiff to the home when she knew, or ought to have known, that there was danger to the plaintiff if so admitted. At the hearing at your Lordships' bar, counsel for the respondent did not challenge the decision of the Court of Appeal upon the answers to the questions as to contract, and the result of the appeal, therefore, must depend upon the question whether there was evidence to justify the findings of the jury with regard to the latter questions. I think these answers must be read together, and that it is a reasonable interpretation of those answers that the jury must have considered that it was unsafe to receive new patients into the home after it had been ascertained that Mrs Franklin was suffering from puerperal fever, without ascertaining whether or not there was a carrier in the staff by taking swabs from all the nurses who had been in contact with Mrs Franklin; and that if new patients were admitted before that fact was ascertained their doctors should have been informed of the facts, in order that they might decide whether or not their patients should be allowed to enter the home and what precautions against infection should be taken if they were admitted. The questions for your Lordships to consider are (i) whether there was evidence to justify these findings of fact, and (ii) if there was such evidence, whether those facts constitute an actionable wrong by the appellants as against the respondent. It was not disputed that if those questions were answered in favour of the respondent, the damages as found by the jury were occasioned by the breach of duty. Medical evidence was called on both sides at the trial. I propose only to remind your Lordships of such evidence as bears directly on the question of the taking of swabs.

The plaintiff's own doctor, Dr Thompson, said that after a case of puerperal fever the first step was to swab all throats and that the matron and staff should not be allowed to attend other patients until it had been ascertained that the swabs gave a negative result. Dr Stott said that he would find out by swabs taken from the nurses throats whether there was a carrier there, that there was always the possibility of a carrier, and that for that reason swabs ought to be taken. Dr Alison an eminent gynæcologist, who was called for the appellants, said that swabs should be taken from the noses and throats of all contacts, including nurses and friends, and sent for bacteriological examination, and all contacts up to 48 hours after the woman's child was born. In view of that evidence, it seems to me that the jury were amply justified in thinking

that without taking swabs there was a grave risk that a carrier might be present, and that until that risk had been eliminated it was a dangerous thing to admit a new patient to the home. Counsel for the appellants explained that the reason why swabs were not taken was that when Mrs Franklin was removed from the home on 4 July the nurses were disinfected in the ordinary routine, and that when it was ascertained on 5 July that the case was one of puerperal fever, the disinfection on the previous day rendered the taking of swabs impossible. The jury might well have reached the conclusion that, while those circumstances explained the reason why swabs were not taken, they afforded no justification for admitting new patients until it had been ascertained whether there was a carrier in the home. They may well have thought that if the appellants chose to admit new patients into the home, without having been able to ascertain whether a carrier was present, they ought at least to have warned those patients, or their medical advisers, of the facts so that they might decide for themselves whether they would face the risk and, if so, of the precautions they would take to avoid the risk. Dr Thompson, for example, was emphatic in his view that, had he known the facts, even if his patient had been admitted into the home, he would have insisted that no one who had been in contact with Mrs Franklin should be allowed to take any part in her nursing. I am therefore clearly of opinion that there was ample evidence to support the conclusions of fact and that the first question must be answered in favour of the respondent. But it was contended on behalf of the appellants that even if there was negligence in continuing to admit new patients, and in not informing them of the facts, the responsibility rested upon Dr Campbell and Dr Stott and the defendants were not liable in law. I am unable to accept that view of the law. The appellants were carrying on a maternity home, and they were inviting prospective mothers to make use of the home for the purpose of their confinement. In those circumstances they owed a duty to those whom they invited into the premises to make those premises reasonably safe, or if there was any hidden danger of which they or their agents were or ought to have been aware, to give the persons so invited due warning of its existence. The appellants are, of course, a corporation and they can only act by agents. They appointed as their agents to manage this home the sub-committee of the maternity and child welfare committee, and that committee in turn looked to Dr Campbell and Dr Stott to advise them upon medical questions. But the duty is laid by law upon the appellants and they were responsible in law for the mistakes of their agents. I can see no difference in principle between the employment of a doctor to advise on medical questions and the employment of any other skilled person to advise upon other questions. In my judgment, the jury were amply warranted in finding that the home was dangerous, for the reasons

which I have indicated, and that the plaintiff should have been warned of the danger, and it is no excuse in law for the appellants to say that they were misled by the mistakes of the agents whom they employed.

Reliance was placed by the appellants upon a series of cases in English and Scottish courts, in which it has been decided that where a public authority carries on a hospital that authority is not responsible to patients for mistakes in medical treatment or in nursing, provided that they have taken reasonable care to appoint competent doctors and nurses. The respondent challenged the correctness of these cases, and referred your Lordships to the recent case of Powell v Streatham Manor Nursing Home, to show that your Lordships' House gave judgment against the proprietor of a nursing home where the nurses employed by him had been guilty of negligence. It is true that the correctness of the earlier decisions is still open to review in your Lordships' House. But that review should only take place in a case in which the point is directly raised; the question as to the correctness and as to the limits of the doctrine is obviously one of great importance, both to those who are charged with the responsibility of carrying on hospitals and nursing homes, and to the public who make use of such hospitals and homes. In my judgment, those questions are not raised by the facts in this case and nothing that I have said must be taken as throwing any doubt upon the correctness of those decisions. The principle upon which those cases were determined is well stated in Hillyer v St Bartholomew's Hospital (Governors), in the judgment of Kennedy LJ at pp 828 and 829. Kennedy LJ expresses the opinion that the legal duty which the hospital authority undertakes towards a patient, to whom it gives the privilege of skilled surgical, medical and nursing aid within its walls, is an inference of law from the facts, and he holds that the responsibility of the hospital authorities is limited to undertaking that the patient 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. It is obvious that, if that is the correct view of the relationship between the hospital authorities and their patients, there is no breach by the authorities of such duty by reason of the fact that a competent doctor or nurse is guilty of negligence or lack of due care or skill in their treatment of a patient. My Lords, it seems to me that this principle can have no application to the facts of this case. The appellants were not providing any medical attendance for the respondent and there is no complaint that the nurses were guilty of any lack of skill or care in attending her. The complaint is that the appellants invited the respondent to a home, which they ought to have known was in a dangerous condition, and that

they did not inform her of the facts which constituted the danger. In my judgment, there is nothing in the principle of the cases on which reliance is placed to absolve the appellants from their responsibility for that breach of duty. The reason why the hospital authorities were held not liable in Hillyer's case is because the doctors and nurses were held not to be acting as their agents or servants in the giving of medical treatment. There is no trace of any authority in those cases or elsewhere for the view that where a corporation acts by an agent, its liability for the mistakes of that agent is any less where the agent is a medical man than where the agent belongs to any other profession or

calling. It follows that in my judgment the appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

VISCOUNT SANKEY.

My Lords, this is an appeal by leave of the Court of Appeal from an order of His Majesty's Court of Appeal (England) dated 8 February 1935, ordering the verdict given and judgment directed to be entered for the plaintiff on the trial of the action before Lawrence°J, to be affirmed.

The judgment of the Court of Appeal was a majority one, Greer and Roche LJJ, being for affirming the judgment and Maugham LJ, for entering judgment for the defendants.

The action was one for damages alleged to have been sustained by the plaintiff by reason of her contracting puerperal fever whilst in a maternity home at Cleethorpes belonging to the defendant county council. It was admitted on behalf of the defendants that the plaintiff contracted puerperal fever while she was in the home.

About January 1933, the plaintiff called at the nursing home, saw the matron, and told her that her doctor had recommended her to go to the home to be delivered of her baby, which she expected on 4 July, that she wanted a private ward, and that her own doctor would attend her. It is unnecessary to state in great detail the other facts of the case, but I take such as are necessary for my opinion from the judgment of Maugham LJ. They are as follows:

On 12 July at 11.30 pm, the plaintiff's husband rang up to say that she was expecting a proximate delivery. Someone on the telephone told them to come along, and she arrived with her husband shortly before midnight on that day. She was delivered on the following day, and a few days later she was found to have contracted puerperal fever, and thereby suffered substantial damage. Now, a Mrs Franklin had been a patient at the home. She was admitted on 30 June and delivered on 1 July. On the morning of 4 July she had a temperature of 100.4 deg, and suffered from pain. This was a case of puerperal pyrexia, which might be due to many causes, puerperal fever being one of them. She was being attended by her own doctor, Dr Deighton. He diagnosed

the case as one of appendicitis. In the evening the fever rose to 105 deg and Dr Deighton, after attending the case with his partner, who agreed with his diagnosis, had the patient removed to the Grimsby and District Hospital. This was duly reported to Dr Stott and the disinfection precautions of fumigation and spraying, usual in every case of puerperal pyrexia, were taken on that day. On the patient reaching the hospital the case was diagnosed by Dr Chapman as one of puerperal fever. On 5 July that opinion was reported to the matron of the home and by her to Dr Stott and by him in turn to Dr Campbell. Dr Stott called himself at the home and gave detailed instructions on 5 July as to what was to be done as regards disinfecting the wards, the clothes, and so forth. The whole staff had already had disinfectant baths and were gargling their throats with disinfectant. Nurse Siddle, who had delivered Mrs Franklin, was put off her duty for 48 hours and came back on 8 July. It is important to observe that Dr Stott was quite satisfied

with the precautions taken, and directed special precautions to be taken as regards the Gray Ward, where Mrs Franklin had been while she had a temperature, and it was kept closed till 11 July. He never suggested closing the home to further patients and has given evidence that he thought such a course, as also the giving of a warning to anyone, was quite unnecessary.

On 12 July another patient, Mrs. Fleming, who had been admitted on 9 July and delivered shortly afterwards, had a temperature which was diagnosed by her doctor, a Dr Montgomery, as due to erosion of the cervix. The case was reported to Dr Stott and the usual disinfectant precautions were taken as in every case of temperature over 100.4 deg, whatever its cause. The illness of Mrs Fleming was never diagnosed at the time as a case of puerperal fever, and the fever was a not unusual symptom, and Dr Stott saw nothing alarming about it. It is, however, possible that it was a case of mild puerperal fever.

On the evening of 12 July at about 11.30 pm, the plaintiff's husband rang up the home and said she was coming in at once and she and her husband arrived at the home a little before midnight. She said that she was expecting a private ward, but she was told there was not a private room available, and after some conversation she agreed to share a room with other patients and was put in ward 7 (the separation ward) with Mrs Fussey and Mrs Ladlow, who had both arrived on that day. The home was then full. The plaintiff was expecting immediate confinement and was taken to the labour room, the name given to the surgical room where all confinements take place, but was brought back when it became apparent that the birth was not quite imminent. Her doctor was Dr Williamson, but he was not available, and his locum tenens, Dr Thompson, delivered her on the night of 13 July, the matron and another nurse (Holmes) being present. After confinement she was

removed to the Grant Ward, where Mrs Fussey and Mrs Ladlow were by that time. By that time and on 15 July everything was normal in the home. Mrs Towle and Mrs Cudmore, who had been in the ward with Mrs Franklin, had developed no symptoms of fever or illness. The matron, Dr Stott and Dr Campbell did not think that any risk of infection from Mrs Franklin was left after the various measures of disinfection. That unfortunate lady, however, died on 13 July, in Grimsby Hospital; the jury was plainly taking the view that she died of puerperal fever and there was ample evidence to justify that view. On the morning of 16 July, Mrs Fussey and Mrs Ladlow developed temperatures and in the afternoon Mrs Johnson and Mrs Hardy also did so. Mrs Fussey and Mrs Ladlow were taken out of the Grant Ward, leaving the plaintiff alone there. It was a Sunday. The matron first spoke to Dr Montgomery, who was visiting a private patient. She then telephoned to Dr Stott, who was out, and then to Colonel Stephen, a consulting obstetrician appointed by the defendants. He came and recommended that the four ladies mentioned should be taken by ambulance to the Scarthoe Road Infirmary. On 17 July the plaintiff had a temperature of 102.4 deg. Her own doctor, Dr Brown, a partner of Dr Williamson, came in and gave instructions as to her treatment. Dr Stott and Dr Campbell both came on the morning of 17 July and it was decided to close the home to fresh patients for the time, for the events of 16 July had showed that they had to deal with an outbreak of puerperal fever. The plaintiff had contracted the disease and was removed on the 20th. It may be added that between the time Mrs Franklin was delivered and the plaintiff was delivered there were 17 women delivered at the home. Of these

women five, including Mrs Franklin, had puerperal fever, and Mrs Fleming may possibly have had it. Two died, Mrs Franklin and Mrs Fussey (and her baby). Ten were free from any illness.

These being the facts, the trial judge left a number of questions to the jury. Question (iv): Was it a breach of duty not to refuse admission to the home of new patients from 5 July onwards? The jury answered "Yes."

(v) Was there any breach of duty in the administration of the home from 4 to 20 July? If so, in what respect? Answer: "Yes. Swabs should have been taken from the staff immediately after the report of Mrs Franklin's case."

(vi) Was it a breach of duty not to inform the plaintiff or her husband or her medical adviser of Mrs Franklin's case? Answer: "Yes."

(vii) Did the plaintiff's illness flow from a breach of duty under questions (iv), (v) or (vi)? Answer: "Yes."

(viii) Damages. Answer: "£750."

Now, the Court of Appeal were unanimous in thinking that there was

[1936] 2 All ER 1076 at 1086

no evidence upon which the jury could answer questions (iv) and (v) in the affirmative, Greer LJ stating, before dealing with the last two questions: "I think I ought to deal with the learned judge's decision that the defendants were responsible for any negligence which might be established on the part of Dr Stott." The learned Lord Justice then discussed the case of Evans v Liverpool Corpn, and said that in his judgment the decision of Walton°J in that case applied to the present case. He added that the decision of Walton°J was approved in the Court of Appeal in Hillyer v St Bartholomew's Hospital. We had the advantage of having these cases cited to us, together with the case of Hall v Lees.

The learned counsel for the appellants in my view correctly summed up the law as laid down in those cases in the following way: "In the case of a nursing home conducted by local authorities, the local authority is not responsible for negligence of doctors, matron or nurses while acting in the exercise of their professional functions and knowledge." He added that each of the matters found against the defendants in the present case were matters involving exercise of professional knowledge or skill, and that even if it can be said it was an act resulting from the exercise of purely administrative duty, there was no evidence upon which the jury could find a breach of duty or negligence.

Speaking for myself, throughout the case I have felt considerable embarrassment flowing from the fact that the Court of Appeal found that there was no evidence to support the verdict of the jury under question (iv), but there was evidence on which they could come to the conclusion they did in answer to question (vi). But as the learned counsel for the respondents told us that he did not rely upon the answer to question (iv), it is unnecessary to pursue that matter further. The appeal in your Lordships' House must, therefore, depend upon the position caused by the evidence and the answer to question

(vi). In these circumstances it is not necessary for me to go at length into the decisions to which I have already referred. I should like, however, to point out that great care must be taken in considering those decisions and bearing in mind the consequences which flow from a breach of contract and the consequences which flow from a tort. In some cases it may make no difference whether the action is laid in contract or tort, as in the familiar one of a passenger travelling by a train and being injured by the negligence of the railway company, he can rely on the contract to carry safely or upon the tort caused by the negligence of the railway company in not carrying him safely.

In Hall v Lees, I doubt whether any general principle was involved. The question really turned upon the documents—what was the contract? Was it a contract to nurse or a contract to provide competent nurses? Evans v Liverpool Corpn was approved and followed.

[1936] 2 All ER 1076 at 1087

Hillyer v St Bartholomew's may be said to establish the doctrine that a defendant is not liable for the negligence of a doctor while acting in the exercise of his professional functions and knowledge. Indeed, Farwell LJ puts it rhetorically as an example, that when once the doors of the operating theatre are closed upon them for an operation the doctors and nurses present in the operating theatre are no longer the servants of the authority. I am far from saying that this is not the proper legal result, but I should add that it may be necessary to de-limit the frontiers of liability. There may be some cases where a doctor, a matron, or a nurse is clearly doing an act in his or her professional capacity: there may be other cases where a matron or nurse, and as I think even a doctor, may be doing an act not in his or her professional capacity. It may be that on one side of the line you may have acts which are clearly professional for which a local authority would not be liable. On the other side, acts which are clearly administrative or of some other character than professional which might make the authority liable: and there may be difficult cases on the border line. But it is not necessary to discuss or lay down the law on these subjects, having regard to the answer of the jury to question (vi).

The jury have found that it was a breach of duty not to inform the plaintiff, or her husband, or her medical adviser of Mrs Franklin's case. Can that be supported either in law or fact?

In cases of this character, so far as they are based on negligence, the plaintiff has to show that she contracted the disease by reason of negligence of persons for whose acts the defendants were responsible, and this requires proof that the plaintiff has suffered injury by reason of a breach of duty amounting to negligence on the part of some person or persons employed at the home, and consequently that the acts amounting to breach of duty were acts done as the servant to or agent of the defendants.

What, then, is the duty cast upon a local authority in a case like the present? In my view it is their duty to provide a home reasonably fit and to provide proper accommodation in it, and if there have been circumstances known to them which might render the home not so fit, it is their duty to warn a person proposing to enter the home, of such circumstances. There is no absolute warranty that the home shall be fit. The question whether there has been negligence or breach of that duty is one for the jury on proper evidence. Was there in this case evidence upon which the jury could find as they did? I

think there was. First it is suggested that it was quite impossible to give the lady any warning when she arrived at midnight on 12 July. If the only fact had been that she arrived as an emergency case, without any previous notice, different considerations might arise, but those are not the facts in the present case. The plaintiff had given notice that she was coming in

[1936] 2 All ER 1076 at 1088

months before, and that she was coming in early in July, and upon 5 July the matron knew that Mrs Franklin was suffering from puerperal fever, and there was no reason why notice should not have been sent then.

It may then be asked to whom ought they to have sent notice? To have sent notice to a woman herself in such circumstances might have made her unduly nervous, but it was open to the jury to find, as I think they must have found, that notice ought to have been sent to her husband or to her medical adviser, and they probably did come to the conclusion, from the evidence of her doctor, that if such notice had been given she would never have come to the home at all.

As Roche LJ put it in his judgment:

> 'I confess, however, that when I consider what in comparable circumstances would be expected, and would I think generally be done by private hosts and by those responsible for private nursing homes, and even by agisters and livery stable keepers in the care of infectious animal disorders, I cannot regard the difficulties (i.e., the difficulties of giving notice) as serious, still less as insuperable. Speaking for myself, I should think that communication to the doctor or husband, or both, was the proper course, and that any time would do—the earlier the better—before admission. With regard to the difficulty the plaintiff would have been in, this, I should imagine, could have been overcome by the adoption of the method employed by countless women in all circumstances of life—namely confinement in her own home and attendance by a doctor and a private or district nurse, or in an extreme emergency by an experienced friend or neighbour.'

Again, it might be asked: “Would a local authority always have to give notice of a case of puerperal fever having occurred in their home?” That again is a question of fact for the jury. There may be cases where it was said that there was no evidence upon which the jury could come to the conclusion that there had been circumstances which made the home not reasonably fit. For example, supposing 20 years before the patient arrived there had been a case of puerperal fever, but that there had never been another case since. Or, again, supposing there had been a case of puerperal fever, say, two or three months before the plaintiff came in, and supposing that the local authority had then shut up the house for some weeks and had it fumigated, it might well be that there was no evidence upon which a jury could find that there were circumstances which rendered the home not reasonably fit for its purpose, or that the failure to warn a person who proposed to enter the home was negligence or a breach of duty but everything depends upon the facts of the case, and I cannot help thinking that, having regard to the incident of Mrs Franklin, and all the surrounding circumstances connected with it, it was a case where

the jury could rightly and properly find that it was a breach of duty and neglect on behalf of the defendants not to give the plaintiff notice of Mrs Franklin's case. It seems to me

[1936] 2 All ER 1076 at 1089

they took the risk of things being all right, and they were not entitled to take that risk.

Then it was said that they are covered by the professional advice of the doctors that fumigation had been properly resorted to. In my view that does not affect the liability under this head. I agree with the majority of the Court of Appeal in thinking the matron ought to have given warning, and I further think that the doctors ought not necessarily to have given notice themselves to incoming patients, but to have caused notice to be given.

For these reasons I think the appeal should be dismissed. I need not refer to the application for a new trial. It was not seriously pressed, nor should it succeed.

LORD RUSSELL OF KILLOWEN.

My Lords, as this case was presented in the courts below, I would have said that not one of the findings of the jury in answer to questions (iv), (v) and (vi) was supported by any evidence: and I would have agreed with the judgment of Maugham LJ. Your Lordships, however, think that the findings of the jury read together may be interpreted as meaning that there was negligence on the part of those who represented the defendants at the home, in admitting the plaintiff without first informing her doctor that in fact no swabs had been taken from the staff. If the answers can be so interpreted and there was any evidence upon which the jury could come to that conclusion, this appeal must fail. For myself I feel grave doubts whether this is the true interpretation of the jury's answers, but I am not prepared to say that it is not a possible interpretation. I feel the same doubts as to the existence of any evidence to support such a finding. The majority of your Lordships, however, have been able to detect some such evidence in the shorthand notes; and in view of this fact I find it difficult, if not impossible to say that the jury were entirely without materials upon which to base their finding. In the result I am prepared to concur, but without enthusiasm, in the motion proposed.

LORD MACMILLAN.

My Lords, the appellants are responsible in law for the due administration of the institutions which they carry on in the performance of their statutory duties or in the exercise of their statutory powers. This responsibility extends to the actings of those through whose agency they perform their duties or exercise their powers. Consequently if the respondent's unfortunate experiences in the Cleethorpes Maternity Home were due to the negligence of the appellants' agents or servants in the conduct of the home the appellants are answerable. It must be shown that the appellants owed a duty to the respondent, that the agents whom the appellants employed to perform that duty on their behalf were negligent in the discharge of it and that the injury

[1936] 2 All ER 1076 at 1090

suffered by the respondent was directly attributable to such negligence. The respondent was received into the appellants' maternity home when, as the event proved, it was not safe owing to the existence of infection. It was undoubtedly owing to the presence of that infection that the respondent contracted puerperal fever in the home. These facts by themselves are not sufficient to impose liability on the appellants to compensate the respondent. The appellants do not warrant that their maternity home is safe. It must further be shown that the appellants through their agents or servants acted negligently in the matter of the admission of the respondent to the home while it was in an infected condition. If the appellants' medical officers or matron thought that there was any risk of infection in the premises—and I include, of course, any risk of infection from the nurses and attendants in the premises—I think it was plainly their duty to warn the respondent or her husband or her doctor of the possible danger. They had taken what they conceived to be adequate precautions to ensure disinfection, and no doubt honestly believed that there was no danger in admitting the respondent and consequently no necessity to give any warning. There was, however, evidence to the effect that the precautions taken were not adequate and that the medical officers and matron ought to have known of the element of danger present, and ought to have given warning of it. If the jury believed this evidence, as they appear to have, they were entitled to find that there had been negligence on the part of the appellants' representatives in admitting the respondent to the home without any warning. There was also evidence that if such warning had been duly given the respondent would not have sought admission to the home.

The appellants' main defence was that the question whether the home was or was not free from infection was a medical question upon which they were not competent to pronounce and upon which they had necessarily to rely on their professional advisers. If the latter advised wrongly, the appellants claimed that they were under no liability for the consequences of such wrong advice. Now, I do not doubt that in matters relating to the medical or surgical treatment of patients in a home or hospital the lay administrators of the institution cannot be held liable for the mistakes or negligence of the physicians or surgeons whom they employ, provided that they have been selected with due care. There are authoritative decisions to that effect. But the present case does not relate to a matter of professional treatment. The question was one of the safety of the premises for the admission of the public, and while the appellants may well say that they could not themselves as laymen know whether there was any danger of which intending inmates should be warned, nevertheless I do not think that they can escape responsibility for the negligently mistaken view of their medical officers and matron on this point, any more than they could escape responsibility

for a dangerous state of the drains in the home merely because their sanitary inspector had reported them to be in order. The appellants have a duty to take by themselves or their officers all proper steps to keep the premises safe for the admission of the public, or if they have not done so either to exclude the public altogether or at least to warn them of the danger.

There being evidence on which the jury could find that there was negligence on the part of those for whom the appellants are responsible in not knowing, as they ought to have known, that in admitting the respondent to the home they were exposing her to the risk

of infection and consequently that there was negligence in not giving warning of that risk, I am of opinion that the verdict of the jury, so far as upheld by the Court of Appeal, must stand.

LORD WRIGHT MR.

My Lords, I agree with the opinion of Viscount Hailsham LC. I shall merely add a few observations out of respect to those who have taken a different view.

The case on behalf of the appellants is that in the matters in question the appellants owed no duty to the respondent, and that accordingly the findings of the jury must be set aside. I disregard the further contention that in any case the findings were without any evidence or any evidence on which a reasonable jury could find as they did. No doubt the evidence was conflicting and no doubt the jury might have come to a different conclusion on the evidence. But in my opinion there was reasonable evidence on which they could find as they did. I am here only dealing with the answers to questions (iv) and (vi) and also to question (vii) which deals with damage.

Now, it is true that the answers (iv) and (vi) and each of them cannot stand if the duty which the answers presuppose did not exist between the appellants and the respondent. Whether the duty did or did not exist is a matter of law, which the court must decide on all the relevant facts.

Answer (iv) I understand to mean that according to the view of the jury the appellants by themselves or their agents knew or ought to have known that the home was not in a fit state to receive the respondent and involved a risk of infection because the premises or fittings or the staff or all of them had not been properly disinfected and hence she should not have been admitted.

Answer (vi) I understand to mean that in any case the appellants by their servants or agents knew or ought to have known of the risk of infection, and should have warned the respondent's doctor (and perhaps herself or her husband) of the risk, so that the doctor and the respondent could decide whether to take the risk. The jury obviously believed the evidence of the respondent, her husband and her doctor, that if warned

they would not have entered the appellants' home but would have sought accommodation elsewhere for the birth.

As to answer (iv), it might at first sight seem that on general principles there was a duty on those who operate a home such as that of the appellants for the reception of patients in order to be delivered, to exercise due care and skill by themselves and their servants to avoid receiving patients into their home so long as there was danger of which they knew or ought to have known of infection of puerperal fever, a serious disease which is extremely infectious and liable to be attended with grave and perhaps fatal consequences. I do not put the obligation as high as that of a warranty; but the gravity of the risk must emphasise the gravity of the precautions proper to be taken to guard against it. The existence of the duty seems to follow from the general rules of the law of

negligence now that the forms of action have been abolished and it is recognised that negligence is an independent tort, it is not necessary to consider if the duty is to be based on contract (there was a contract in this case between the appellants and the respondent) or whether it is based simply on the relationship between the parties, that is, on the respondent placing herself in the home and the appellants undertaking to receive her. I merely refer to this matter because of certain arguments addressed to your Lordships. I shall only add that though there was consideration in the facts of their case, the position would have been the same if the service had been voluntary. The duty arises from the fact that the respondent entrusted herself to the appellants' care and custody as regards hospital accommodation and nursing, which the appellants were holding themselves out as prepared to furnish; similarly a surgeon who undertakes a gratuitous operation owes in performing the operation a duty of care and skill to the patient.

Answer (vi) deals with a duty which though analogous in principle is narrower in content. The appellants, who knew or ought to have known of the risk, should have given the respondent or her doctor the opportunity of deciding whether or not to run the risk. If they knowingly took the risk, they could not as against the appellants have complained of the consequences of their own act and volition. If the answer to question 6 is supported, it is enough by itself to justify the judgment for the respondent.

But on behalf of the appellants it has been contended they are free from all liability in the matter because the decision not to close the home or not to warn the patient before she is received, depended on questions of medical or hygienic skill and knowledge, in regard to which the appellants or their sub-committee were not competent to form an opinion, but were necessarily guided by their professional advisers, Dr Campbell, the county medical officer of health, and Dr Stott, the assistant county medical officer of health, who was medical superintendent

of the home, and the matron and nurses, about all of whom no reflection was made as to their competence.

In general, those who engage in an undertaking the actual conduct of which involves expert scientific or professional skill and knowledge which the principals do not possess, cannot escape liability to outsiders who are injured by the negligence of those who advise or act for the principals, on the ground that they, as principals, are laymen and must necessarily be guided by or act through experts. Most big concerns are managed by committees of business men who neither have nor profess expert knowledge: if this contention were to prevail in general, it would practically nullify liability of principals for their agents over a large area. But it is claimed that this is so in regard to hospitals and similar institutions. That immunity cannot be claimed by such institutions because of their character as such. I need only quote a short passage from the judgment of Farwell LJ in Hillyer v St. Bartholomew's Hospital Governors, at p 825:

> 'It is now settled that a public body is liable for the negligence of its servants in the same way as private individuals would be liable under similar circumstances, 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.'

But the appellants rely on the statement of the duty of the hospital to the patient in the facts of that case as applying to the circumstances of the present case. It is important to observe exactly what that case decided. The plaintiff underwent an operation, a surgical examination under an anaesthetic, at the hospital; there was evidence sufficient to be submitted to a jury if the defendants could in point of law properly be held responsible to the plaintiff for injury caused to him by negligence on the part of the surgeons and nurses engaged in the surgical examination to which the plaintiff submitted in the hospital of which the defendants are the governors. I quote from the language of Kennedy LJ at p 828. Kennedy LJ, dealing there with a surgical operation, held that the defendants were not responsible for negligence of the experts, surgeons, physicians or nurses in the actual conduct of the operation, because in such matters they could not be deemed to be the servants or agents of the hospital authorities. But he went on to limit the immunity in this way, at p 829:

> '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.'

Kennedy LJ later states, by way of distinction, his view:

[1936] 2 All ER 1076 at 1094

> 'that the hospital authority is legally responsible to the patients for the due performance of their servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendances of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like.'

Lawrence°J, in directing the jury in this case did, I think, correctly apply the principles laid down by Kennedy LJ: he directed the jury:

> 'that the administration of the home was done by the County Council through a sub-committee who employed Dr. Stott and Dr. Campbell and the matron and the nurses as their servants, and that they are responsible for the neglect and default of those persons in the carrying on of the home.'

As I read the direction as a whole, I think that it amounts to a direction that the duty of seeing that the home was reasonably fit to receive the patient or in the alternative of warning the patient of the risk, was a matter of administration, for which the home was responsible; it was not like the actual conduct of a surgical operation or the prescribing of medicines or medical treatment but was analogous to the provision of fit and proper

apparatus and appliances or the supplying of proper food.

In my judgment the facts in this case are to be distinguished from those in Hillyer's case. It is not necessary to express here any opinion one way or the other about the correctness of that decision. That can be reserved until it comes, if it ever does, before this House: and the same may be said of Evans v Liverpool Corpn, which presents some differences from Hillyer's case. Nor is it necessary to consider what difficulties may arise in delimiting the respective frontiers of ministerial or administrative duties on the one hand and matters of professional care or skill on the other hand, if it ever becomes necessary to apply the distinction which Kennedy LJ draws.

In the present case the duty of the appellants is in my opinion not different in principle from their duty if (for instance), there was good reason to suspect that the drains of the home were defective and involved a risk of causing typhoid to the patients. In that case the appellants would have to be guided by sanitary and hygienic experts and would be responsible for their negligence: similarly if a defective ceiling was negligently left unrepaired so that it collapsed and injured a patient in her bed. In these and many such cases the duty of the appellants is not different in essence from that of a householder who has to take care that persons invited into her house are not negligently exposed to danger, or at least are duly warned of the risk, as, for instance, if there has been scarlet fever in the house, so as to involve risk of infection. In the present case it was well known that puerperal fever was both infectious and dangerous. To apply Hillyer's case to facts like these would involve a great extension of the rule which the Court of Appeal there

[1936] 2 All ER 1076 at 1095

laid down and indeed would contravene the limitations which Kennedy LJ placed upon it. Such a result would be very hard on the respondent: there would be no one whom she could sue for the damage she has suffered, whereas the plaintiff in Hillyer's case could sue the surgeon for misfeasance.

It is not necessary to add that in all these matters not only the matron and nurses but the medical officers were in my opinion the servants of the appellants, as Lawrence°J ruled. The fact that the appellants necessarily relied on their knowledge and judgments does not the less render them the appellants' agents to carry out the responsibility which rested on the appellants as operating the home.

Powell v Streatham Manor Nursing Home was referred to, but no question of law as to responsibility was raised in that case and it may for this purpose be disregarded.

I agree in the motion proposed.

Appeal dismissed with costs.
Solicitors: Taylor Jelf & Co, Agents for Eric W Scorer, Lincoln (for the appellants); Maude & Tunnicliffe, Agents for James Young, Grimsby (for the respondent).
Michael Marcus Esq Barrister.
[1936] 2 All ER 1076 at 1096
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