THE UNIVERSITY HOSPITAL BOARD (*Defendant*) .....APPELLANT;

AND

GERALD LEPINE (*Plaintiff*) .....RESPONDENT.

1966

*May 17, 18

June 28

GEORGE MONCKTON (*Defendant*) .....APPELLANT;

AND

GERALD LEPINE (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Hospitals—Physicians and surgeons—Negligence—Epileptic patient leaping through window of fourth floor ward—Injuries result of impulse which could not reasonably have been foreseen—Actions against hospital and doctor dismissed.

The plaintiff who suffered from a form of epilepsy known as automatism was admitted to the defendant hospital, where he was placed in a ward on the fourth floor. This procedure was followed because he was a patient of the defendant doctor and this was the medical ward which the doctor used for his patients. While in the hospital the plaintiff suffered a number of epileptic seizures, the majority of which were automatisms. He was not given continuous supervisory care and at times would wander out of his room during a seizure. One morning, after having been found wandering on a street some distance from the hospital and after having been returned to his ward by three police officers and an orderly, the plaintiff asked if he could go to the washroom which was located inside the ward room. On emerging from the washroom, he was walking towards his bed when he suddenly jumped up on to a chair and leaped through the window and as a result received serious injuries. The defendant doctor, a nurse and the

PRESENT: Abbott, Martland, Judson, Ritchie and Hall JJ.

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three police officers were in the ward when the plaintiff made his unfortunate leap.

Two actions claiming damages as a result of the injuries that he sustained were commenced by the plaintiff against the hospital and the doctor. The trial judge dismissed the action against the doctor and allowed the claim against the hospital. On appeal, the Appellate Division unanimously dismissed the hospital's appeal and allowed the plaintiff's appeal, one member of the Court dissenting, against the doctor and as required by *The Contributory Negligence Act* of Alberta determined that each of the defendants was at fault to the extent of 50 per cent. The defendants then appealed to this Court.

Held: The appeal should be allowed and the actions dismissed.

Whether or not an act or omission is negligent must be judged not by its consequences alone but also by considering whether a reasonable person should have anticipated that what happened might be a natural result of that act or omission. *Glasgow Corporation v. Muir,* [1943] A.C. 448, referred to.

The plaintiff's sudden leap through the window was not an event which a reasonable man would have foreseen and have been required to take more precautions than were available in this case. Short of having put the plaintiff in some restraining device or of keeping him at ground level, both of which were rejected by the Appellate Division as being necessary or required, the injuries sustained by the plaintiff were the result of an impulse on his part which could not reasonably have been foreseen.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], dismissing an appeal by the appellant hospital and allowing an appeal by the respondent from the respective trial judgments in two actions heard together by Farthing J. Appeal allowed and the actions dismissed.

C. W. Clement, Q.C., for the defendant, appellant, University Hospital Board.

W. A. McGillivray, Q.C., for the defendant, appellant, Monckton.

A. G. Macdonald, Q.C., for the plaintiff, respondent, Lepine.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from the Appellate Division of the Supreme Court of Alberta[1] in which two appeals from two judgments of Farthing J. were heard together. Two actions were commenced by the respondent Lepine against The University Hospital Board and Dr. Monckton claiming damages as a result of injuries sustained by the

[1] (1965), 53 W.W.R. 513, 704, 54 D.L.R. (2d) 340.

respondent on July 24, 1962. These two actions were tried together, and at the conclusion of the trial Farthing J., in an oral judgment, dismissed the action against Dr. Monckton. Later he handed down a written judgment dated December 16, 1964, awarding Lepine damages in the sum of $46,689.50 and other relief against the hospital.

The main facts are not in dispute. They were set out at length in the judgment of the learned trial judge and by Cairns J.A. in his reasons for judgment on the appeal.

The respondent who was 26 years of age at the time of the trial was an Indian residing at Hay River in the Northwest Territories where he was employed as janitor of the public school there. To quote Farthing J.:

> From the age of thirteen plaintiff has been suffering from epilepsy which had been kept under control by medication so that it had interfered with his performing his duties to a negligible degree. He was a co-operative patient and conformed to the rules prescribed by his doctors so faithfully that, despite his troublesome and trying disease, he led an active and useful life. In the summer of 1961 he had come to Edmonton, on the advice of his physician in Hay River, to be examined and treated by Dr. Monckton, a neurologist. In the following summer he came to Edmonton again for the same purpose, arriving on Tuesday, 10th July. At first he stayed with relatives or friends, as a holiday, apparently.
>
> The two most important rules laid down for his guidance with which, apparently, he almost invariably complied, were to abstain completely from any alcoholic beverage and to take prescribed medication several times a day. During his first few days in Edmonton he departed from his rule of total abstinence and took a few glasses of beer sometimes. On the evidence I am satisfied that he drank nothing except beer and the quantity he took would not, for a person in normal health, be in any way excessive. But, of course, as a victim of epilepsy, he should not have taken any beer at all. However, I am satisfied that he drank none after Friday 13th July.
>
> Moreover, his supply of medicine ran out on Monday 16th July. He testified that he did not think it would do him any harm to be without it for a day, as he expected to see Dr. Monckton on the 17th.
>
> On the evidence I am satisfied that the events of 24th July were not in any way or in any degree attributable to beer or lack of his customary medication.
>
> Plaintiff suffered from a form of epilepsy known in medical parlance as automatism. The great majority of those suffering from that disease do not move about when having epileptic seizures. A minority, estimated, according to the evidence, at not more than twenty per cent, move, under seizure, from place to place sometimes at considerable danger to themselves or even others. Such patients are in no way responsible for their actions, while so moving about, of which they are quite oblivious.

The respondent had come to Edmonton in 1961 to consult Dr. Monckton to whom he had been referred by his own physician, Dr. Norman Douglas Abbey, of Hay River. Dr. Monckton was a neurologist. The treatment of epilepsy

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was part of Dr. Monckton's specialty as a neurologist. Dr. Monckton saw the respondent in the summer of 1961. He reported to Dr. Abbey on August 4, 1961, in part:

> Physical examination showed no significant abnormality, excepting for some right facial asymmetry. I thought that an electroencephalogram ought to be done here and I am arranging for this to be carried out and I took the liberty of increasing his medication by the addition of Mysoline grams 0.25 b. i. d.
>
> As soon as the E. E. G. is back I will, of course, let you know its result.

and again on August 14 as follows:

> Dear Doctor Abbey:
>
> Re: Mr. Gerald LEPINE—Age 24 years.
>
> Further to my letter of August 4th, Mr. LePine's electroencephalogram is now to hand and does show quite a well developed right fronto-temporal, sharp wave, focal abnormality. This is seen against a background of a fair amount of slow delta activity in the same region. This clearly must indicate some structural abnormality of an epileptogenic nature which, I would think, is probably a birth injury or something of that kind. It does, I think, in the long run, warrant further investigation by air studies and perhaps angiography at some more convenient time since Mr. LePine, as you know, is just finishing his holidays and is very anxious to get back home. I have, however, increased his medication to Mysoline grams 0.25, b. i. d., together with his Dilantin and Phenobarbital. If this should be inadequate, it might be worth increasing the Mysoline a further dose to three times daily. If the attacks are still persistent, then I feel he should come down for a more prolonged stay so that we can study him in hospital. I hope this will meet with your approval.

Lepine returned to Hay River. In July 1962, he returned to Edmonton to see Dr. Monckton. He arrived in Edmonton on July 10. As stated by Farthing J., Lepine stayed with relatives or friends until he moved into the King Edward Hotel on July 16. Meanwhile, he had consumed some beer and ran out of his supply of medicine. Farthing J. found that whatever beer he had consumed did not in any degree contribute to what happened on July 24. The medical evidence supports this finding.

As stated, Lepine moved into the King Edward Hotel on July 16. Shortly after midnight Mr. W. Pitt, a security officer on the staff of the hotel, found respondent on the roof thereof where he had gone while under a seizure. He sent for the police and stayed and talked with respondent on the roof until they arrived. After talking to Lepine, the police recognized that he was an epileptic and had had a seizure and they told Pitt of his condition and that he now appeared to be all right. He was returned to his room. Pitt

kept him under observation and about 3:00 a.m., when he had another seizure, the police were sent for again. This time they took him in an ambulance to the Royal Alexandra Hospital where he was given medicine and then returned to the King Edward Hotel. Before long, he had another attack and the police were called a third time. Meanwhile they had learned that Lepine's Edmonton physician was Dr. Monckton who told them to take him to the University Hospital. He arrived there by ambulance about 4:45 a.m. on July 17. During his second seizure at the King Edward, Lepine left his room and headed towards the fire escape. Mr. Pitt put himself between Lepine and the fire escape door and persuaded Lepine to return to his room, and once in the room Mr. Pitt says Lepine tried to go to the window but he had him sit on the bed and he stayed there until the police came and took him away in the ambulance. The information as to heading for the fire escape and trying "to go for the window" was not communicated to the hospital or to Dr. Monckton.

On arrival at the hospital, he was admitted and placed in Room 402 which was on the fourth floor. This procedure was followed because he was a patient of Dr. Monckton and this was the medical ward which Dr. Monckton used for his patients. He remained a patient in the hospital from the morning of July 17 until the forenoon of July 24 when the events which gave rise to this action took place. During the period from the 17th to the 23rd, Lepine was kept in Room 402 which was a medical ward along with several other patients and he received the supervision that the other patients in the same ward were given except that on two occasions he was moved to a room near the nurses' station where more supervision could be given. The second of these occasions was on the morning of July 24 with which I will deal separately. During this period, and including the morning of the 24th, Lepine suffered about 28 epileptic seizures which were noted by the nurses and he had other seizures not noted by the nurses but mentioned by the witness Hertel who was a patient in the same room. Of these seizures about 8 or 9 were *grand mal* and some 17 automatisms. He would at times wander out of his room and once went as far as the X-ray room which was some distance from Room 402.

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In the early morning of the 24th, Lepine became difficult and noisy. The night supervisor, on becoming aware of this, assigned Nurse Collins to supervise Lepine and she remained with him until 7:30 a.m. that morning and to facilitate the supervision Lepine was taken from Room 402 to a room adjoining the nurses' station. He had a seizure there and climbed over the side rail of his bed. He had another seizure about six o'clock in the morning and his speech was incoherent. This was reported to Dr. Shea by the charge nurse who had been advised of the situation by Nurse Collins, and this doctor prescribed sedation which was given about six in the morning. Later, around seven o'clock, Lepine was up in bed and appeared unaware of what he was doing. His speech was rapid and he was making odd movements and used the expression "That is the man". It was quite obvious that something was troubling him at this time. Nurse Collins appeared concerned with his actions, because on the chart which she made out on leaving she noted the words "psychiatric assistance?". When Nurse Collins left, no other special nurse was put on to replace her nor was an orderly detailed to attend the patient. Dr. Shea visited Lepine about 8:00 o'clock that morning. He read the entries made by the nurse prior to his visit and so was aware of what had transpired during the night, including the entry "psychiatric assistance?" made at about 7:10 a.m. Dr. Shea who, at the time in question, was associate resident in the Department of Medicine attached to the service of neurology had seen and examined Lepine several times in the period from July 17 until July 24, and dealing with the morning of the 24th he testified:

Q. And, why on the morning of the 24th was he on vital signs?

A. I placed him on vital signs being notified of this fall because of any possibility of injury having occurred to his head so that if anything were going wrong this would quickly become evident.

Q. And, what sedation did you order by telephone?

A. Mr. Lepine had been placed on oral dilantin in the regular dose for a person of his age and weight. In addition to this, in an instance such as this, however, it was felt prudent to increase the amount of dilantin he was given with one what we call a stat dose. This is a boost over and above the level that would be circulating in his system and in addition to this he was given a barbiturate which we term sodium amytal, s-o-d-i-u-m a-m-y-t-a-l. The amount was two to three grains, I would honestly have to refer to the order sheet for the actual amount. These were given in the form of an intermuscular injection.

Q. Now, when did you next see Lepine?

A. I next saw Mr. Lepine on my way to the neurology clinic and the hour that I recorded or at least that is recorded in the nurses' notes is in the vicinity of eight fifteen.

Q. And, prior to seeing Lepine did you have an opportunity to see the notes? The nurses' notes?

A. Yes, I did, sir.

Q. So, you were aware of their contents?

A. That is correct.

Q. Where was Mr. Lepine at that time?

A. Mr. Lepine was in his bed, in his usual ward.

Q. That would be 402?

A. 402.

Q. And, what was his condition?

A. A nurse was in company with me, we approached his bed, I recall asking him pertaining to the events of the previous night for which he had no recollection. His responses to me at that time seemed quite normal. He was clear, he was lucid, his replies were in context with the questions and in general he was much as the Court saw him in the stand the other day.

Q. And, at the time you saw him at eight fifteen he seemed to have no trouble from his epilepsy or any of the aftereffects?

A. None.

Q. When you saw him where was he, was he in bed or in a chair?

A. As I recall he was sitting on his bed with his legs dangling over the side.

Mr. Lepine had been brought back to Room 402 at 7:45 a.m. on the 24th and he remained there until approximately 9:05 when the nurse on duty left the room to look at his chart, and on her return about 9:15 she discovered that the patient had gone.

Lepine was found by three police officers at about 9:51 a.m., wandering at Saskatchewan Drive and 116th Street, Edmonton, dressed in a housecoat, pajamas and socks with no shoes. He told the police "The nuts in the hospital have a bomb". He did not appear to know what was going on. He was taken to the hospital by the three police officers who had found him, entering through the emergency entrance. They reported to the person in charge there and were asked to wait until an orderly was summoned to take Lepine back to his room. An orderly arrived and was about to escort Lepine and the officers to Room 402 when he ran out the main door, knocking over a little girl who was coming into the hospital at the time. The police officers and the orderly followed him and they caught up to him when he fell. The evidence is clear that he was particularly violent and mentally unbalanced at this time. He told the

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police to go ahead and shoot him, that he had nothing left. The hospital orderly was there and saw what had occurred. Lepine was taken back into the hospital by the orderly and the three police officers and taken to Room 402. Staff Sergeant Robertson, who was one of the police officers who brought Lepine back to the hospital, testifying for Lepine, described the events immediately preceding the accident as follows:

> We went up to Room 402 and Lepine's bed was there and it was located near the window of the room that would be against the east wall.
>
> He walked over there, sat down on a chair near his bed, asked if he could put on his shoes. We had no objection, he seemed quite calm then.
>
> He then asked if he could go to the washroom which is located right inside the ward room itself; he was allowed to go there but Ostapowich and myself remained at the door while Sergeant Strate lingered near the window of the room.
>
> There were two other bed patients in the room. I believe the orderly had gone to get a nurse and the nurse in turn had gone to get a doctor to come to attend to Mr. Lepine.
>
> The nurse was a Miss Wallace if I recall correctly. Just before Mr. Lepine came out of the washroom Dr. George Monckton came in with Miss Wallace. Lepine then came out of the washroom and he sort of had a half grin on his face. The doctor asked—said words to the effect, hello Gerald how are you feeling, and to my recollection Lepine answered, just fine doctor, and started walking towards his bed.
>
> Near the—right against the windowsill was a chair. As Lepine started walking towards his bed he suddenly took two steps, leaped up on the chair and just dove right out through the window of the fourth floor.

It is for the injuries then and there sustained that the actions against the hospital and Dr. Monckton were brought. Negligence was alleged against Dr. Monckton as follows:

> (*a*) in failing to have the Plaintiff kept and treated in Station 14, an area of the said hospital especially designed for treatment of such patients with unbreakable windows and located on the lower floor of the said hospital;
>
> (*b*) in failing to cause the Plaintiff to be restrained;
>
> (*c*) in failing to advise the aforesaid police officers that in his condition the Plaintiff was dangerous to himself and others;
>
> (*d*) in failing to keep the patient on the ground floor of the said hospital until he had recovered his reason;
>
> (*e*) in failing to recognize that the Plaintiff was obsessed by the idea of escaping from the said hospital and that he might cause himself injury in attempting so to do and in failing to take any or any adequate precautions to prevent such injury;
>
> (*f*) in failing to see that both the windows and doors of the said public ward were guarded after the Plaintiff was placed in the said ward;

(*g*) in failing to administer a drug which would render the Plaintiff immobile;

(*h*) in holding himself out to provide care and treatment to members of the public and holding himself out to provide proper care and treatment for members of the public and in failing to provide the care and treatment necessary for the Plaintiff;

(*i*) in failing to issue instructions to the staff and persons in charge employed by the said hospital as to the proper requirements for the care and treatment of the Plaintiff and more especially the precautions to be taken with the Plaintiff when the Plaintiff was suffering from an epileptic seizure;

(*j*) in failing to provide the medication and care necessary for the Plaintiff in the circumstances and more especially in failing to warn the hospital staff that would be dealing with the Plaintiff on his return to the hospital after the Plaintiff had left the hospital herein set forth;

Allegations (*a*) to (*g*) above were made against the hospital with four additional allegations as follows:

(*h*) in operating a hospital to which Plaintiff and other members of the public were invited for care and treatment and in failing to provide the care and treatment necessary for the Plaintiff;

(*i*) in failing to issue or to enforce regulations or give proper instructions to the hospital staff of the Defendant for the care and treatment of patients in the Plaintiff's condition and in failing to take such steps as were necessary for the protection of patients such as the Plaintiff who required care beyond that offered ordinary patients in that they could injure themselves, or alternatively, if such instruction was given and regulations were promulgated they were not followed or were neglected in the case of the Plaintiff;

(*j*) in taking or directing the Plaintiff to be taken to a ward on the fourth floor of the hospital;

(*k*) generally in failing to appreciate the probable consequences of Plaintiff's conduct and illness and to take proper or any steps for his safety when they ought to have done so.

In dismissing the action against Dr. Monckton, the learned trial judge, Farthing J., said:

My own view is that as far as Dr. Monckton is concerned—and I am expressing no opinion about the Hospital Board as yet so don't please anticipate what I might say—so far as Dr. Monckton is concerned the plaintiff has singularly failed to establish a cause of action. I can't see any possible basis of claim against Dr. Monckton. I don't think that he has been guilty of anything except possibly, at the very most an error of judgment and that in itself is no cause of action and I doubt very much even if that were the test that the plaintiff would have succeeded in establishing a case against him. The doctor obviously, a physician and surgeon and especially a man of eminence in his own branch of the profession, can't devote his whole time to any one patient and it seems to me that there is no evidence of any negligence on the part of Dr. Monckton throughout this whole matter. He certainly was not responsible for anything that occurred on the morning of the 24th of July, though he did happen to be in the room when, apparently when the unfortunate jump took place.

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In the action against the hospital, Farthing J. said:

> In the instant case the present plaintiff was in the hospital precisely because he was suffering from epilepsy with post-epileptic automatism and his tendency to irresponsible moving about was well known to all concerned.

Counsel for defendant stressed very strongly the statement of the Judicial Committee in *Vancouver General Hospital vs. McDaniel* [1], expressed tritely in the judgment: "A defendant charged with negligence can clear his feet if he shows that he has acted in accord with general and approved practice."

There is evidence as to the present customary treatment of ordinary epileptics. There is little or no definite or specific evidence concerning the modern treatment of those epileptics—not more than one in five of them—afflicted with automatism. This repeated reference through the evidence presented on behalf of the defendant to "epilepsy" and "epileptics" *per se* only, in my view, served to emphasize the fundamental basis of this action, *i.e.* that defendant treated plaintiff as it would have treated any other epileptic, quite overlooking the totally different and much more dangerous implications of his automatism.

Moreover, for patients to jump out of hospital windows while extremely rare is not unknown, as the foregoing instances, show. Whatever may be the established practice in Canada and the United States regarding certain contagious diseases, it certainly does not seem to be true that the established practice in the United States is to refuse damages to every person who, because of mental upset, temporary or permanent, has jumped through a hospital window; and with genuine respect to a very strong court in Saskatchewan [2] I venture the opinion that there have not yet been sufficient Canadian decisions to establish such practice in Canada.

Like so many other people I am personally under a great debt of gratitude to the medical profession and to some hospitals, which I will never forget. But if those in charge of hospitals—who are not solely physicians and surgeons—can escape liability for negligence simply on the plea that they have complied with the established practice, they can, in effect, in the course of time create enough customs to provide a good defence against almost any claim for damages for personal injuries.

It is now thirty years since the Privy Council delivered its judgment in *Vancouver General Hospital vs. McDaniel, supra.* From the quotations, *supra,* from Lord Denning M.R. and Lord Nathan, it would seem that in much more recent years it has been reiterated in definite terms that in England common law based on custom will continue to be declared by the courts.

In my humble but convinced opinion, after many hours of considering with my utmost care the evidence in this somewhat lengthy trial, the misfortune which befell the plaintiff resulted from the fact that, though the defendant from the start had definite knowledge of his tendency to dangerous post-epileptic automatism, it placed him in the category of an ordinary epileptic. The only persons in the hospital who seemed to realize

[1] [1934] 4 D.L.R. 593. [2] [1954] 2 D.L.R. 328.

the risks attendant upon his particular form of epilepsy were some of the nurses who, on two occasions before the disaster of 24th July, tried to give him the protection his safety required. It is not my responsibility to say just what officials or employees were at fault. The defendant undertook the care of plaintiff who, through no fault of his own, suffered shattering injuries while in such care.

All changes are not necessarily improvements to the benefit of all affected by them. Had the armorplated glass not been removed from Station 14 on the ground floor of the hospital and had plaintiff been placed therein, this accident would never have occurred. It is noteworthy that in Dr. Snell's explanation as to why this change was made as given above, he referred to "psychiatric patients", not even specifically to epileptics, much less to those afflicted with post-epileptic automatism. This change may have been beneficial to those suffering from ordinary epilepsy. But, with all respect, it would appear obvious to any intelligent high-school student that it was dangerous to automatists. The opinion of Dr. Easton, who knew as much and probably more than any other medical witness about epileptic hospitalization, that, without these safeguards, the only proper course was to keep plaintiff under the care of a competent orderly or nurse at all times, would also seem, to an high-school student to follow in logical sequence.

In the light of the evidence and for the above reasons it seems clear to me that plaintiff is entitled to judgment.

The hospital appealed the finding of liability so made against it and Lepine appealed the dismissal of the action against Dr. Monckton.

The Appellate Division unanimously dismissed the hospital's appeal and allowed the appeal, Cairns J.A. dissenting against Dr. Monckton and as required by *The Contributory Negligence Act* of Alberta determined that each of the defendants was at fault to the extent of 50 per cent.

Cairns J.A. in his reasons for judgment upheld liability against the hospital, holding that it was the negligence of the hospital on July 24 that caused the damage. He said:

After a careful consideration of all of the evidence in this case, some of which I have quoted, I have come to the conclusion that not only had the condition of Lepine worsened, but he became, as I have already indicated, psychotic on the morning of the 24th of July. This condition was known by Nurse Collins and was known to Dr. Shea, or should have been appreciated because he read the chart that morning before seeing Lepine at about 8 a.m. The evidence of the doctors which I have quoted indicated this change in the patient's condition. It was recognized by the hospital authorities and Nurse Collins was put on duty as a special the morning of the 24th, and did, in fact, supervise him. In my view it was negligent conduct not to continue this or other supervision by orderlies, after she went off duty at 7.30 that morning, because of the condition of the patient. The negligence

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which caused the plaintiff's damage was continuous from that time, and is not confined to the incident when he jumped out the window. It should have been foreseen or anticipated that a patient in his changed condition might well do damage to himself. The doctors' evidence is clear that a psychotic patient requires constant supervision, and this was not supplied. I think Dr. Easton's opinion and the other evidence can only lead one to the conclusion that if there had been supervision by a trained person, Lepine would not have been allowed to escape from the hospital and run away to Saskatchewan Drive. The traumatic experience of his recapture by the police and his becoming violent, and his fight with the police, made his condition much more acute and I have no doubt had some influence on his later mental state and behavior when he jumped out of the window shortly after being returned to his room. As I have said, I do not think that it is necessary to decide whether there was negligence before the 24th, because even if there was, it was not actionable. There certainly was negligence and it was continuous, commencing on the 24th. I think also that the hospital authorities were negligent in not having supervision when Lepine was returned to his room, in view of what was known to have occurred that morning and the knowledge of the orderly who saw the fight, and the fact that this could have been reported to the person in charge before he was taken back to his room, or the orderly should have stayed with him in the room. I base my conclusion, as I have stated, on the continuous negligence commencing prior to his being taken to the room.

Johnson J.A., with whom the Chief Justice of Alberta concurred, found negligence against both Dr. Monckton and the hospital as follows:

It is, I think, obvious that the learned trial judge considered the lack of provision for special care for Lepine throughout his stay in the hospital up to the time of the accident to be the principal negligence of the hospital, for he says later in his judgment:

> "The liability of the present defendant hospital is not to be determined solely by what occurred at the time of the jump but is based throughout upon its persistent refusal to recognize any difference between the care of a patient suffering from severe attacks of automatism and of the vast majority of epileptics who never have such attacks."

In the argument before us, many suggestions were made as to how the accident could have been prevented. Looking at all the evidence in the light of what happened, certain evidence that no one considered particularly significant at the time, assumed much greater importance after the accident had happened—one fact which comes to mind is Lepine's movement towards the window when he was in the King Edward Hotel on the early morning of July 17th. An approach to the determination of the liability of both the doctor and the hospital which looks at events in the light of what subsequently happened, is not a sound one. Liability must be determined upon the knowledge of the dangers inherent in the condition of Lepine when and after he entered the hospital. What form the accident took is only important when it is necessary to determine if the accident is

one which was caused by the failure to take the kind of care which was required, based upon the knowledge which the doctor and the hospital possessed or should have possessed.

The learned trial judge's finding that the hospital should have provided special accommodation for epileptics who also suffered from automatism, coupled with the suggestion that such accommodation be on the ground floor and provided with "armor-plated glass" is not a finding that is supported by the evidence. The hospital had several psychopathic wards—one ward, number 14, was on the ground floor but it had for some time before the accident only ordinary glass in the windows. Epileptics were, on occasion, admitted to this ward, but it was made quite clear by Dr. Easton, whose evidence the learned trial judge accepted, that the responsibility for placing an epileptic in such wards was entirely that of the doctor in charge who alone had the requisite information on which such a decision could be made.

* * *

Having admitted Lepine to a medical ward, the learned trial judge found that special precautions in the form of round the clock supervision should have been provided. This was to prevent the patient from injuring himself while in a state of automatism and to prevent him leaving the hospital and going where he might have been injured. At the close of the argument I was in some doubt how a breach of duty to have constant supervision could be said to have caused the accident because when he dove through the window there was present in the room the doctor, a nurse and three policemen, all of whom had been alerted to the danger that this man might attempt to leave the room unless he were restrained. There was at the time of the accident more protection than a single orderly or nurse would have afforded. Of course, an orderly might have prevented him from leaving the hospital earlier in the morning and if he had been run over by a car while away from the hospital, the absence of supervision which an orderly would have given would have had a causal connection with Lepine being run down and injured. Unless it could be shown that the leaving of the hospital caused or contributed to the accident, there would be no nexus between the negligence and the injury. Lack of supervision could only be a cause of the accident if there were evidence to show that during the escape from the hospital something happened to him which either caused or contributed to the mental unbalance that caused him to leap from the window—by either aggravating an existing condition or creating a new one.

and he cites evidence not relied on by the learned trial judge which, in his opinion, provided the nexus between the failure to provide round the clock supervision and the injury. That evidence was given by Dr. Easton and was as follows:

Q. Well, now, you say that the fact that the man was brought back by the police had something to do with causing him to jump out the window?

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A. This is at least implied. What I think is this, that a man who suffers from epilepsy, is a known epileptic, and is subject to the traumatic experience of being returned to hospital by these police is more likely to have serious effects than if he hadn't had that experience. The experience in itself is a traumatic thing for this patient with his chronic epilepsy. In other words, these people are much more likely to do something. Now, you can't say what, but they are volatile, irritable, highly sensitive, and he is brought back by the policemen. This in itself might have been a precipitating factor. It certainly was against his best interests.

Later, he said:

A. Well, I can't accept the fact that this episode did not have an upsetting effect on the patient. I think it did.

and an answer by Dr. Monckton:

Q. Yes, Doctor, is it not also true that in a post-epileptic state of automatism that the patient may become violent if the environment changes, that is if he finds himself in strange surroundings, that this is not a good thing to keep his epilepsy under control?

A. Yes, I believe it was Dr. Easton who raised the question of a foreign media for the patient and suggested that this might act adversely, and under some circumstances in certain patients this may be so.

and continues:

This evidence of the traumatic effect of Lepine's escape from the hospital and his return in police custody, expressed though it be as a possibility, is sufficiently strong to warrant a finding that it caused or contributed to the mental state which brought on the accident and thus supplied the link between the lack of proper supervision and the accident and its consequent injuries.

Then, in relation to Dr. Monckton, having referred to Farthing J.'s remarks in dismissing the action against Dr. Monckton previously quoted, Johnson J.A. said:

Against this finding the respondent Lepine appeals. It becomes necessary to determine which was responsible—the hospital or the doctor—for not supplying "round the clock" supervision. I have quoted from the evidence of Dr. Easton that it was for the doctor in charge who had full knowledge of his patient to decide the type of care that he should receive. It is true that he was discussing the choice of institutional care, care in a psychiatric ward and medical ward care, but as the doctor was the only one with the training and experience to determine where he should be treated, it was also he who would know what kind of supervision was necessary for his safety. Dr. Shea, an employee of the hospital, was also in close touch with Lepine but he was not a qualified neurologist and was at all times working under Dr. Monckton. Dr. Monckton admitted that he had been given all the information that Dr. Shea and the hospital nurses had. He also stated that he issued no instructions that Lepine should not be allowed to leave the hospital. He was aware of the staff on duty in Ward 14. He was

the one most fully aware of the danger. He requested that Lepine be treated in that ward. The responsibility for seeing that extra care be provided was, at its very least, a shared responsibility. If therefore, the breach of the duty to see that extra round the clock help was provided for Lepine is the basis of liability in this case, both Dr. Monckton and the hospital should be held liable.

And in dealing further with the question of negligence, Johnson J.A. continued:

As I have mentioned, the learned trial judge made another finding of negligence against the hospital. A further possible ground of negligence was urged upon us during the hearing. Having found evidence to support one finding of negligence, it would not ordinarily be necessary to discuss these other heads of negligence. Because of the involvement of Dr. Monckton it is necessary to consider them.

The acts complained of can be stated thus:

(i) There was a change in the condition of Lepine during the twenty-four hours which preceded the accident and these changes, known to the hospital staff, should have alerted the hospital to a new danger that had arisen and have caused them immediately to take added precautions, either by having him removed to the psychiatric ward or by putting on an additional nurse or orderly to look after him.

(ii) (As found by the learned trial judge), on his return to the hospital Lepine should have been met by a doctor instead of an orderly and he should have been given immediate treatment.

The first of these grounds was not mentioned by the learned trial judge so we do not have the benefit of any finding of fact by him. My brother Cairns has fully discussed the events of that morning. From the nurses' notes it appears that Nurse Collins raised the question whether psychiatric assistance might be required. Dr. Shea saw the notes and the memorandum of his examination appears among these notes:

> "8:15 A.M. Dr. Shea visited. At this time patient was cheerful, laughed and joked at humorous comments and incident. Talking to patient in next bed. Patient refused to lie in bed while it was being made (said he'd rather sit in chair) but returned to bed after it was made and side rails which had been let down while bed was being made were put up again. Asked for his other pillow (had one under his head when bed was brought into room) so this was given to him. Foot of bed was elevated."

Having found the patient in the same state mentally as he had been during the previous week and having satisfied himself that a transfer to a psychiatric ward was not necessary, I cannot see that it was negligence not to have him placed in that ward.

As to the suggestion that the hospital should have been alerted and put on extra help, I do not think that this point requires to be determined. The learned trial judge has held that there should have been extra help in the

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form of either an extra nurse or an extra orderly to look after Lepine for all of the period that he was in the hospital, which would include the period up to the time he escaped. This evidence, if it establishes anything, confirms that the need for such a nurse or orderly had at that time become more apparent. Instead of being negligence, it merely increased the degree of negligence that the hospital was guilty of from that time onwards.

The learned trial judge's final finding of fact was made by apparently adopting an argument of Lepine's counsel that Lepine, instead of being taken back to his old ward, should have been met by a physician and given treatment presumably treatment that would have immobilized him and prevented further escape. With respect, I am unable to find any evidence suggesting that such a procedure was usual or warranted. If it is an inference from the facts, the facts, I suggest, do not warrant such an inference. It is not enough to say that if this had been done no accident would have happened. In order to support such a finding surely there should be evidence that these procedures are a common and accepted practice in such cases. As I have said, no such evidence was given.

In summary, Farthing J. and Cairns J.A. found no negligence on the part of Dr. Monckton. Farthing J. held the hospital negligent because it placed Lepine in the category of an ordinary epileptic and that had the armor-plated glass not been removed from Station 14 on the ground floor of the hospital and had the plaintiff been placed therein, this accident would not have occurred and that, having regard to Lepine's post-epileptic automatism, the only proper course was to keep him under the care of a competent orderly or nurse at all times. Cairns J. A. did not adopt Farthing J.'s approach, saying:

As I have said, I do not think that it is necessary to decide whether there was negligence before the 24th, because even if there was, it was not actionable. There certainly was negligence and it was continuous, commencing on the 24th. I think also that the hospital authorities were negligent in not having supervision when Lepine was returned to his room, in view of what was known to have occurred that morning and the knowledge of the orderly who saw the fight, and the fact that this could have been reported to the person in charge before he was taken back to his room, or the orderly should have stayed with him in the room. I base my conclusion, as I have stated, on the continuous negligence commencing prior to his being taken to the room.

Johnson J. A., referring to Farthing J.'s findings against the hospital, said:

The learned trial judge's finding that the hospital should have provided special accommodation for epileptics who also suffered from automatism, coupled with the suggestion that such accommodation be on the ground floor and provided with "armor-plated glass" is not a finding that is

supported by the evidence. The hospital had several psychopathic wards —one ward, number 14, was on the ground floor but it had for some time before the accident only ordinary glass in the windows. Epileptics were, on occasion, admitted to this ward, but it was made quite clear by Dr. Easton, whose evidence the learned trial judge accepted, that the responsibility for placing an epileptic in such wards was entirely that of the doctor in charge who alone had the requisite information on which such a decision could be made.

and:

At the close of the argument I was in some doubt how a breach of duty to have constant supervision could be said to have caused the accident because when he dove through the window there was present in the room the doctor, a nurse and three policemen, all of whom had been alerted to the danger that this man might attempt to leave the room unless he were restrained. There was at the time of the accident more protection than a single orderly or nurse would have afforded. Of course, an orderly might have prevented him from leaving the hospital earlier in the morning and if he had been run over by a car while away from the hospital, the absence of supervision which an orderly would have given would have had a causal connection with Lepine being run down and injured. Unless it could be shown that the leaving of the hospital caused or contributed to the accident, there would be no nexus between the negligence and the injury. Lack of supervision could only be a cause of the accident if there were evidence to show that during the escape from the hospital something happened to him which either caused or contributed to the mental unbalance that caused him to leap from the window—by either aggravating an existing condition or creating a new one.

and, having taken that position, went on to find a nexus between the alleged failure to provide round the clock supervision and the leap from the window relying on an hypothesis expressed only as a possibility that the traumatic effect of Lepine's escape from the hospital and his return in police custody caused or contributed to the mental state which brought on the accident. Then, dealing with the appeal against Dr. Monckton, Johnson J.A. said:

It becomes necessary to determine which was responsible—the hospital or the doctor—for not supplying "round the clock" supervision.

and:

Dr. Monckton admitted that he had been given all the information that Dr. Shea and the hospital nurses had. He also stated that he issued no instructions that Lepine should not be allowed to leave the hospital. He was aware of the staff on duty in Ward 14. He was the one most fully aware of the danger. He requested that Lepine be treated in that ward. The responsibility for seeing that extra care be provided was, at its very least, a shared responsibility. If therefore, the breach of the duty to see that extra

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round the clock help was provided for Lepine is the basis of liability in this case, both Dr. Monckton and the hospital should be held liable.

Johnson J.A. also held it was not negligence not to have placed Lepine in the psychiatric ward at 8:15 a.m. on July 24, and dealing with the allegation that Lepine, instead of being taken back to his old ward when returned to the hospital by the police, should have been met by a physician and given treatment that would have immobilized him, Johnson J.A. said:

> ...I am unable to find any evidence suggesting that such a procedure was usual or warranted. If it is an inference from the facts, the facts, I suggest, do not warrant such an inference. It is not enough to say that if this had been done no accident would have happened. In order to support such a finding surely there should be evidence that these procedures are a common and accepted practice in such cases. As I have said, no such evidence was given.

Smith C.J.A., agreeing with Johnson J.A., stressed that Lepine required "continuous supervisory care" from July 17 forward and the hospital was negligent in not providing that care and that that negligence was the effective cause of Lepine's injuries. This was contrary to the view taken by Cairns J.A. as previously quoted.

I have gone into the reasons for judgment somewhat extensively in order to discover the points upon which the judges of the Appellate Division were in agreement in respect of the negligence found against the two defendants, and, apart from the somewhat general finding that Lepine should have had but was not given continuous supervision on a round the clock basis from July 17 onwards, there does not appear to be a consensus on the part of the judges below other than if such supervision had been provided Lepine would not have been permitted to leave the hospital as he did between 9:05 a.m. and 9:15 a.m. on July 24, and that if he had not left the hospital and been returned to Room 402 he would not have jumped from the window.

No one suggests that after being returned to Room 402 and pending Dr. Monckton's arrival that Lepine was without adequate supervision or that the presence of an additional orderly or nurse would have prevented Lepine's totally unexpected leap on to the chair and through the

window which was higher than usual from the floor and closed at the time.

I am left with the distinct impression that the fact that Lepine jumped through the window greatly influenced the testimony of Dr. Easton, relied on so strongly by all judges below, who seemed unable to visualize the situation as it developed towards its climax without being able to test the steps in the tragic occurrence except in the light of the final act of jumping. It is to be noted that Dr. Easton, in referring to the final act of jumping, said:

> A. I do not think from the evidence given, and this was given in the evidence, that anyone could have prevented him going through the window at that time.

The case for Lepine was argued with great persuasion and sincerity. He is a most unfortunate young man and one who evokes sympathy. Farthing J. said:

> Despite his severe and permanent disabilities plaintiff impressed me as being sincerely honest and quietly courageous in his outlook on life without any tendency to self-pity.

This is one of those "hard cases" which could easily make bad law unless one adheres to established principles of responsibility in the face of the actual situation as it developed and moved to a rapid and unexpected climax when Lepine emerged from the bathroom, having given no prior sign of wanting to destroy himself.

The question of whether there was or was not negligence in a given situation has been dealt with in many judgments and by writers at great length. One principle emerges upon which there is universal agreement, namely, that whether or not an act or omission is negligent must be judged not by its consequences alone but also by considering whether a reasonable person should have anticipated that what happened might be a natural result of that act or omission. As was said by Lord Thankerton in *Glasgow Corporation v. Muir*[1],

> The court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect,

[1] [1943] A.C. 448 at 454-5.

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and not to give undue weight to the fact that a distressing accident has happened. . . . .

Applying this principle and recognizing the duty which a doctor and a specialist such as Dr. Monckton owes to his patient and the duty which a hospital owes to a given patient as an individual, I am impelled to the conclusion that Lepine's sudden leap through the window was not an event which a reasonable man would have foreseen and have been required to take more precautions than were available in this case. Short of having put Lepine in some restraining device or of keeping him at ground level, both of which were rejected by the Appellate Division as being necessary or required, the injuries sustained by Lepine were the result of an impulse on his part which could not reasonably have been foreseen. To hold otherwise would, in my judgment, make doctors and hospitals insurers against all such hazards which they are not.

The appeal should, therefore, be allowed and the actions dismissed with costs throughout.

Appeal allowed and the actions dismissed with costs.

Solicitors for the appellant Hospital Board: Clement, Parlee, Irving, Mustard & Rodney, Edmonton.

Solicitors for the appellant Monckton: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan & Fraser, Calgary.

Solicitors for the respondent Lepine: Macdonald, Spitz & Lavallee, Edmonton.