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*Feb. 12, 13, 14, 18, 19.
*May 12.

THE VANCOUVER GENERAL HOSPITAL (DEFENDANT) ..... } APPELLANT;

AND

ELIZABETH MILDRED FRASER, executrix of the estate of GORDON ARTHUR FRASER, Deceased (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Master and servant—Hospitals—Liability of hospital for negligence of interne—Patient discharged with broken neck—Interne incompetent to read X-rays and failed to consult radiologist—Whether discharge was the cause of the death of the patient.

The respondent's husband, following an automobile accident, was admitted at night into the emergency ward of the appellant hospital. There, he was examined by the internes on duty and X-rays were taken. The films were not submitted to a radiologist who was on call, but the internes, although not competent to read them, proceeded to do so and advised the family physician that they had found nothing abnormal, with the result that the patient was discharged from the hospital with a dislocated fracture of the neck. The following day, he was re-admitted to the hospital by his own physician after the X-ray films had been examined by a radiologist, but died a few days later.

The jury rendered a general verdict against the appellant and this was affirmed in the Court of Appeal for British Columbia.

Held (Locke J. dissenting), that the appeal should be dismissed and the action maintained.

Held: The hospital undertook to treat the patient and was responsible for the negligence of its internes; and there was evidence on which the jury might properly find that the death of the patient resulted from his discharge from the hospital due to the interne's negligence either in not reading the X-ray films correctly or in not calling a radiologist.

Per Locke J. (dissenting): The hospital undertook to give the patient both nursing and medical attention, and the negligence of the interne would render the hospital liable for any resulting damage; there was however no evidence from which the jury might properly draw the inference that the ileus, which caused the death, resulted from his failure to properly diagnose the nature of the original injury or from anything done by or on behalf of Fraser in reliance upon his advise. (*Ryder* v. *Wombwell* (1868) L.R. 4 Ex. 32 referred to).

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming a judgment rendered pursuant to the general verdict given by the jury in favour of the plaintiff-respondent in an action for damages.

*PRESENT: Kerwin, Rand, Kellock, Cartwright and Fauteux JJ.

(1) [1951] 4 D.L.R. 736; 3 W.W.R. (N.S.) 337.

Alfred Bull Q.C. and E. A. Burnett for the appellant. The responsibility for the discharge of the patient was assumed by the deceased's own doctor as appears in the evidence. But if it could be said that there was evidence on which the jury could find that that responsibility was passed back to the interne and that he accepted such responsibility, the following submissions are made: (*a*) the responsibility was still that of the patient's physician but if he delegated it to someone else that was merely his method of discharging his responsibility; (*b*) if the interne accepted the responsibility to use his own judgment on the instructions of the physician, such action would not be within the course of the interne's employment so as to make the hospital responsible for his actions; (*c*) *The Sisters of St. Joseph* v. *Fleming* (1), *C.P.R.* v. *Lockhart* (2), *Plumb* v. *Cobden Flour Mills Co.* (3), *Bugge* v. *Brown* (4), *Dallas* v. *Home Oil Distributors* (5) and *Goh Choon Seng* v. *Lee Kim Soo* (6); (*d*) if the patient's own physician was not called by the respondent as a witness, the inference is that his evidence would not have been in favour of the respondent.

The discharge from the hospital was not the cause of the death. To show that it was is an extremely heavy burden and if closely examined would appear incapable of proof. The respondent had to show by a preponderance of evidence that the deceased would not have died had he not been discharged. The respondent's expert witness failed completely to connect the discharge with the death, and the witnesses for the appellant did not attribute the death to that cause.

There is no evidence of any negligence on the part of the appellant. The case is put on the basis of the decision in *Vancouver General Hospital* v. *McDaniel* (7), because this case is one of vicarious responsibility and not one of direct attack on the system of the hospital.

The negligence alleged i.e. that the hospital discharged the patient when the interne ought to have known that he had suffered a dislocated fracture of the neck is not

(1) [1938] S.C.R. 172.
(2) [1942] A.C. 591.
(3) [1914] A.C. 62.
(4) (1919) 26 Can. S.C.R. 110.
(5) [1938] S.C.R. 252.
(6) [1925] A.C. 550.
(7) [1934] 4 D.L.R. 593.

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negligence in law. It is submitted that the interne made a careful examination of the X-ray films and consulted with the other interne on the reading. He did not perceive that there was a dislocated fracture because he did not have the expert knowledge necessary properly to read the film. If he did not have such expert knowledge he could not be negligent in his reading. *Abel* v. *Cooke and Lloydminster and District Hospital Board* (1), *Rich* v. *Pierpont* (2) and *Seare* v. *Prentice* (3).

There is no dispute that the interne was an employee of the appellant and if negligent that the hospital would be liable.

Paul D. Murphy for the respondent. There was evidence to support the jury's finding that the appellant was negligent in discharging the deceased and that the employees of the hospital knew or ought to have known that the deceased at the time of the discharge had a dislocated fracture of the neck: the patient's complaints and the observed and observable symptoms of his condition, the failure of the interne to call the radiologist, etc. The charge of the trial judge has not been challenged on the issue of negligence and there was evidence upon which the jury could find that the appellant was negligent; *McConnel* v. *McLean* (4).

There was evidence to support the jury's finding that the deceased was discharged by employees of the appellant and not by his own physician. It is common ground that the physical discharge was by the hospital. That established a prima facie case against the hospital. The onus was then on the appellant to prove that the patient's physician discharged him. No doctor can have a patient in his care without seeing and diagnosing him and only the interne saw him. Therefore, Dr. Blair was not his doctor in this case. Dr. Blair could rely on the information given by the interne who was fully competent as a duly qualified practitioner and servant of the hospital. If Dr. Blair told the interne: If you think he can be discharged, go ahead. Then it becomes the discharge by the hospital.

There was evidence to support the jury's finding that the

(1) [1938] 1 W.W.R. 49.
(2) (1862) 3 F. & F. 305.
(3) 103 E.R. 376.
(4) [1937] S.C.R. 341.

deceased's discharge caused his death. There was direct evidence of nerve injury or cord pressure arising out of his discharge. There was also evidence from which this could be inferred by the jury. There was also evidence that the discharge caused other fractures and dislocation i.e. additional injury contributing to nerve injury or cord pressure.

In the particular facts of this case the appellant is legally liable for the negligence of its internes: *Evans* v. *Liverpool Corp.* (1), *Hillyer* v. *St. Bartholomew's Hospital* (2) and *Sisters of St. Joseph* v. *Fleming* (3).

The facts were put to the jury, no attack was made on the charge to the jury and the jury could reasonably come to the conclusion to which they arrived.

KERWIN J.:—There can be no question but that the appellant hospital undertook to treat Fraser. The latter was entitled to expect that the hospital would have someone in attendance who could correctly read the X-ray film or who would call in assistance for that purpose, as was provided for by the constitution of the hospital. The appellant's system is not attacked as provision was made therein for an interne, if he considered it necessary or advisable, to call in a radiologist. Before this Court the appellant advanced no claim that if Dr. Heffelfinger were at fault it would not be responsible for the results of his negligence.

I agree with the conclusions of my brothers Rand and Kellock that, upon a charge that has not been objected to, it was open to the jury to find (*a*) that Dr. Heffelfinger was negligent either in not reading the X-ray film correctly or in not calling in a radiologist; (*b*) that the appellant through Dr. Heffelfinger negligently discharged Fraser; (*c*) that such negligence caused Fraser's death.

The appeal should be dismissed with costs.

RAND J.:—The respondent is the widow of a ship's officer who died in the Vancouver General Hospital in the following circumstances. Shortly after 11:00 o'clock on the night of March 8, 1949, following an automobile accident, the deceased was brought by ambulance to the emergency ward of the hospital. There were lacerations on his forehead,

(1) [1906] 1 K.B. 160. (2) [1909] 2 K.B. 293.
(3) [1938] S.C.R. 172.

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and he complained of pain and stiffness in his neck. At the time the ward was in the charge of Dr. Davies, serving as an interne. At midnight, Dr. Heffelfinger, also an interne came on duty. Before he arrived, Dr. Davies had communicated with Dr. Blair whose name had been given by the injured man's wife as the family doctor, and had ordered an X-ray to be taken of the injured neck. Later a general examination, including movements of the head and a neurological test, was carried out by Dr. Heffelfinger

The X-ray plates were received shortly afterwards, and Dr. Heffelfinger, with Dr. Davies who had remained in the ward, examined them. Dr. Heffelfinger then telephoned Dr. Blair, with a result that can best be indicated by the entry in Dr. Heffelfinger's record: "Dr. Blair aware, and agreed to discharge and to see about eleven next a.m.", meaning the discharge of the patient, who was to see Dr. Blair the next morning.

Dr. Heffelfinger thereupon instructed the patient to return home. At this time stiffness of the neck prevented a flexion reaching closer than one inch from the chest: the patient was in pain; and as he left the hospital, approaching 3:00 o'clock a.m. to enter a taxi, he was holding his head in his hands, somewhat bent forward. He was 31 years of age, over six feet in height, and had to stoop to enter and leave the taxicab; and the route home passed over a number of railway tracks.

During the remaining hours of the night he was restless and about 9:00 a.m. Dr. Rennie was called, who reached the home around 2:00 o'clock in the afternoon. Later in the evening, after receiving, apparently, a report on the X-ray plates, Dr. Rennie ordered the patient back into the hospital which, approximately 24 hours after his discharge from the emergency ward, he reached shortly after 1:00 a.m., March 10.

He was then suffering from pain in the back of the neck, his neck was held rigid, and his face was flushed, and he was at once placed on a fracture board. Morphine was administered at 1:30 and at 2:00 he was asleep. At 5:00 a.m. there was less pain in his neck but pain in midback was becoming troublesome. At 10:00 a.m. he was more comfortable but extremely thirsty.

On the re-admission, there was abdominal distension evidencing in fact the early stages of a condition described as an adynamic ileus; and as this is one of the vital facts in the case, it must be made intelligible. The intestinal tract is controlled by two sets of nerves, the sympathetic and the parasympathetic. The latter furnish the stimulus of contraction and the former the reactive correlative of dilation or relaxation. At points in the tract there are valves that control the passage of matter along it, one of which is at approximately the junction of the small and large intestines. When the muscles of the former are contracted, this valve tends to open, and when they relax it tends to close. These nerves, as they proceed from the brain, pass the area of the injury laterally within the spinal cortex, emerging somewhat farther down. When they are damaged or irritated, their functioning may be disrupted. In that case, the intestinal muscles remain relaxed and the valve closed, and in the course of time putrefaction sets up in the matter retained. This produces gas, distension occurs, and the contents become forced back into the stomach and up through the esophagus; some may enter the lungs through the respiratory passages, and some be expelled as vomit. In short, a virtual reversal of the intestinal process may result with serious effects on other functions.

The X-ray plates actually revealed a fracture dislocation of the axis or second cervical or neck vertebra. The fracture was vertical and slightly behind the center line of the canal. There was a complete separation and a forward dislocation, involving the atlas and the skull, of one-third of a centimeter, on the right side of the arch or ring of the vertebra through which the cord passes; and on the left side there was a fracture commencing in the arch and running into the body of the vertebra, which is the front portion. It has not been made clear whether the latter originated or splintered on the inside or outside of the arch; Dr. Fahrni, an orthopaedic specialist, called in by Dr. Rennie, spoke of the loose portion on the right side as moving on a hinge, and that would seem to imply a split on the inside. As disclosed by the autopsy, a forward displacement of the axis on the third vertebra could be

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elicited by moving the head, which might mean a movement of the entire axis. Dr. Fahrni spoke of the vertebra as being "unstable." There was hemorrhage where the ligaments of the neck had been torn on the right side; and the brain tissue and the upper segments of the cord were found to be watery with oedema.

At 12:30 p.m. Dr. Fahrni made his first visit. He did not then consider it safe to put the patient through the motions of another X-ray picture. In addition to what the X-ray plates indicated, and the abdominal distension, there was an absence of borborygami, the normal gurgling sound from the intestines, with the abdomen tympanitic to percussion. What the situation demanded was obvious, to restore the intestines to their normal functioning, and to remove any possible complication by eliminating the dislocation in the axis. The patient's body was thereupon placed in extension, that is, so that the head, by its own weight, would tend to fall back: later, at 6:00 p.m., traction was applied, which means that extra weight was added to the downward drag of the head itself. The usual neurological reaction tests for evidences of nerve disturbance were made, but none found.

As a similar test had shown a similar result in the emergency ward, this is taken by Mr. Bull as demonstrating that there had not, up to the time of the re-admission, been any nerve injury resulting from the fracture. But this view takes no account of the significance of distension and the other conditions present upon re-admission. It disregards also the fact that from 1:15 a.m. until 12:30 p.m. when the test by Dr. Fahrni was made, the patient had lain on the fracture board; and from the medical evidence it was open to the jury to infer that in that time, through the automatic reaction of the muscles, the dislocation might have been reduced sufficient to mitigate pain and nerve irritation provoked between the discharge and the re-admission. That there was such an irritation is deduced by the respondent from the fact of the ileus; Dr. Kempt draws that conclusion: and Dr. Naden, an orthopaedic specialist, agreed that the conditions on re-admission could be evidence of nerve injury or irritation notwithstanding there appeared to have been no physically demonstrable neurological change.

But Mr. Murphy is not confined to nerve injury trauma as the instigating factor of the ileus. Admittedly the causal agencies in that derangement are obscure. Dr. Fahrni was emphatic that here was a case, from the beginning, for the utmost care in treatment and the immediate immobilization of the injured area. The fact that on one occasion after the dislocation had been eliminated, the patient had got up and walked across the room involved so much risk of displacement that Dr. Fahrni had an X-ray taken as the patient lay in bed, indicates the importance he attached to eliminating any possible effect on the ileus of the dislocation. He agreed that the shock of such an accident would undoubtedly disturb the autonomous nerve systems, including those controlling intestinal action; and that its onset could have been hastened by the 24 hours' neglect. He hesitated significantly in speaking of the watery or oedematic condition of the cord, the "degeneration" mentioned in the death certificate: it indicated pathological change which he thought more likely to be a circulatory change than an injury, if ante mortem; and the "moot point" was whether it was post or ante mortem.

Neither Dr. Fahrni nor Dr. Naden presented any theory of the cause of the ileus. Dr. Fahrni admitted frankly that he had none. Dr. Naden speculated somewhat between a range from the patient's lying on his back on the fracture board to any degree of pathological change or involvement of the nerves, including nerve irritation, of which the ileus itself could be evidence. He played with the idea of dehydration of the patient's body on the footing of his alcoholic breath. This, in a proper case, would produce an imbalance in the equilibrium of vital processes; but in the situation here his suggestion could properly be treated by the jury as quite beyond any relevancy to the task before them. In relation to the posture on the bed, what he apparently meant, although he did not trace the sequences, is that in the case of such a man, well built and physically vigorous, to arouse notions of injury and to place him under a regimen of such constraint might in some way set up functional nerve irritability. But the ileus was in its first stages before such a posture or the fracture board had appeared.

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On the other hand, the medical evidence is convincing that the case was one that from the beginning called for the strictest care until the condition had been fully diagnosed. The stiff neck—the broken neck, with the skull itself displaced—and the pain, were danger signals of unmistakable nature and called for only one mode of treatment. Dr. Naden at one point gave it as a considered judgment that if at that moment the patient had been told to go home and forget that he had been in an accident, he "would have been alive today"; but this was followed by the admission that in all likelihood he would have followed the same course of treatment as Dr. Fahrni, and by such other concessions and qualifications as, in the light of the stark facts, most likely nullified his evidence in its entirety.

It was agreed that in the absence of a destructive lesion to the cord, a broken vertebra is not in these days, as formerly, looked upon as a grave injury, and the normal prognosis is recovery. There may, of course, be cases in which the fracture and even dislocation may be such as to call for no treatment whatever; the bone, in such cases, adapts itself to the new position and may have either no or slight effects thereafter. But even where great care and competent treatment are called for, recovery is normally to be expected.

The jury must then have looked for some circumstances out of the ordinary of such a character as could properly be taken to be the significant factor in the situation before them. What must be kept in mind is that finding the cause is for the jurors and not the experts. These specialists are to assist the jury, not to direct them and much less to determine the fact to be found. And that finding is to be gathered by the jury from all of the circumstances, including the opinions of the professional men, but weighing them in the total complex of the controversy.

Viewing that complex as a whole, then, how can it be said that the jury could not here adjudge the unique circumstance that this man was subjected to a deprivation of initial vital care and treatment for 24 hours to be the essential and operative factor in bringing about what followed? No other factor has been seriously suggested. Fatal consequences in injuries of this kind, as the evidence indicates, have too frequently been traced to just such initial

failures; and that they could find that this delinquency most probably led to the onset of the ileus in an aggravated degree that steadily deepened until death in five days, is, I think, undoubted. The alternatives, that this man was of a type peculiarly susceptible to ileus or that death would inevitably have ensued the accident, have not in the evidence the support of a syllable.

But there are two remaining grounds. Mr. Bull argues, first, that there was no negligence on the part of the interne, Dr. Heffelfinger, and secondly, that the discharge of the patient was by his own doctor and not by the hospital. These really merge into one question: was there any negligence on the part of the hospital which caused or contributed to the day's absence from the hospital? and that I now examine.

At the threshold of the enquiry stands this question: what did the hospital undertake toward the deceased when he entered the emergency ward for treatment? As can at once be seen, various matters enter into that determination. Mr. Bull introduces the regulation of the hospital dealing with the procedure in that ward; it is contained in the Hospital Manual, and is as follows:—

> Any member of the house staff called to the emergency department must respond promptly. It is imperative that every emergency case be examined immediately and given such first aid treatment as is necessary on admission for making him as safe and comfortable as possible. After this, get in touch with the patient's physician and act under his orders. Specific instructions are posted in the emergency department. Report forms are to be completed in each case.

This was supplemented by the evidence of Dr. Seymour, the assistant medical director. Interneship is a preliminary hospital experience for young doctors, but whether voluntary or required does not appear. In this case, Dr. Heffelfinger was under a contract which had run for approximately nine months, and during that time he held a temporary license to practice medicine within the confines of the hospital.

That primary undertaking, symbolized in the scope of real or apparent authority of the interne, is to be gathered from all the circumstances of the entrance of the patient into the hospital, of what is sought by him and the nature of what is done to and for him. There is first the fact that he enters a hospital to which sick or injured persons

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resort for treatment; the patient would see both a doctor and a nurse; a preliminary examination is made of him, in which all the usual questions of a physician are put to him; there is an enquiry as to the family physician, who is spoken to on the telephone: there is the order for the X-ray, the interpretation of it, and the report made to the physician: all the ritual and paraphernalia of medical service. From all this it is clear that although the hospital indicates the interposition of the family physician, the interne is to be more than a mere untutored communicant between him and the patient. By the terms of the regulation, he is to "examine immediately and get in touch with the physician and act thereafter under his orders;" but for that examination and report he must use the undertaken degree of skill, and that cannot be less than the ordinary skill of a junior doctor in appreciation of the indications and symptoms of injury before him, as well as an appreciation of his own limitations and of the necessity for caution in anything he does.

Dr. Heffelfinger's evidence is all we have on his report. He says: "I only gave him my findings and let him decide what to do with it—I described my findings in examination —and the X-ray findings, and asked him what he wanted to do about it, and the outcome of it was that he asked me to discharge him and come around in the morning"; and, speaking of the work of an interne generally, "also for the reason to report the results of my examination as well . . . . it is part of the routine under circumstances such as that to look at the films and report them to the attending doctor." He claims to have warned Dr. Blair that he had had only a limited experience with X-ray plate reading; but he had come to the opinion that there was no fracture; and that he may have expressed that opinion, and also that it would be safe to allow the patient to leave, could be drawn from his evidence.

Now, was that opinion one that ought to have been given here by Dr. Heffelfinger without such qualifications as would have nullified it in the ears of Dr. Blair? The indications on the plates were perfectly clear to him at the trial; would the jury be warranted in concluding that holding such an opinion he would be unlikely to convey a true picture of the patient's condition, including that

evidence of it which was described to the jury by his wife? The stark facts, the danger signs, that should have demanded verification to any doctor, interne or not, were the rigid neck and the pain. In the presence of these, to be able to minimize the injury as he did on the departure from the hospital, when the victim of it was suffering from a displaced skull, would justify the inference that his report to Dr. Blair must have been a pallid or deprecatory description of the clinical facts; and even though there may have been sufficient as it was to arouse the suspicions of Dr. Blair, that would not excuse its inadequacy or its falsity in fact.

Dr. Heffelfinger went beyond the mere communication of Dr. Blair's advice or instructions to the patient. On the wife's evidence, he actively reasured both the deceased and her, notwithstanding her hesitant acceptance of it, that there was nothing seriously wrong and no ground for anxiety. He was, of course, acting in good faith, but he failed, not, it may be conceded, in reading the plate incorrectly, but in not being more acutely sensitive to the grave symptoms that stood out before him and in not exercising caution against his inexperience, in not seeking verification. That misreading, concurred in apparently by Dr. Davies, and, on the communication, by Dr. Blair, created in him a settled opinion of the worst possible error. In these reassurances he was not exhibiting the skill and care which the hospital undertook would be exercised in the ward; and that insufficiency, regardless of whether or not he was acting on behalf of Dr. Blair, was the agency that gave rise to the fatal event that followed. On those assurances, the husband and the wife placed reliance and acted. The jury had before it evidence from which it could conclude that his duty as the representative of the hospital toward the patient was not, in the circumstances, performed by allowing the injured man to leave in the condition in which he was: and for that the hospital must answer.

I would therefore dismiss the appeal with costs.

KELLOCK J.:—Contrary to the appellant's contention, there was evidence, in my opinion, upon which the jury were entitled to find that the hospital did undertake to treat the deceased and negligently discharged him in what was actually a serious condition.

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The deceased was admitted at 11:10 p.m. of March 8, and shortly after, his wife, upon being notified and asked the name of the family doctor, gave the name of Dr. Blair. Dr. Davies, the interne in charge of the emergency ward at the time, had already ordered an X-ray to find out whether or not there was any fracture of the cervical vertebrae when Dr. Heffelfinger came on duty, about midnight, and the patient had been X-rayed. Shortly thereafter, he and Dr. Davies examined the films, concluded that there was "no gross abnormality," and telephoned that information to Dr. Blair. According to the report prepared by Dr. Heffelfinger, Dr. Blair "agreed" to the discharge of the patient. Dr. Blair had previously been spoken to on the telephone by Dr. Davies, but as neither was called it is not known what passed in this conversation.

Dr. Heffelfinger at first took the position in evidence that he was not qualified to read X-ray films. This he subsequently modified by saying that neither he nor Dr. Davies was qualified to give an "expert" opinion. There was on call at the hospital at all times, however, a radiologist who could have given such expert opinion had either Dr. Heffelfinger or Dr. Davies thought it necessary, and I think it was quite open to the jury to find that the two internes undertook to read and felt quite competent to read the particular films. Dr. Heffelfinger testified:

Q. Why did you look at them at all, Doctor?

A. It is part of the *routine* to, under circumstances such as that, to look at the films and report them to the attending doctor.

Q. Then you wish the jury to believe that you were qualified to read X-ray films?

A. In a sense, yes.

Q. Qualify it all you want. What kind of sense? We want to understand this, please.

A. Under the circumstances, I was qualified to read the films, yes, as an interne, but I was not qualified to give an expert opinion on the films.

I think there was quite sufficient evidence for the jury to find that what occurred was in accord with that which the hospital well understood was its undertaking to the public, namely to examine the deceased, including examination by X-rays as a matter of routine, to read the films, and to report the findings to the deceased's physician. I do not think the evidence precluded the jury from finding that the

situation was other than one in which the deceased's physician was in charge of the whole procedure and was accepting sole responsibility for what occurred.

I think it was open to the jury to conclude that if X-rays of the particular area of the spinal cord here in question are difficult to read and require a person with more training than either of them had, the internes were negligent in failing to use the means at hand, namely, to call the radiologist to obtain a proper reading. The whole purpose of the X-rays was to ascertain whether or not the deceased had sustained a fracture. In fact he had, and Dr. Heffelfinger, on his examination for discovery admitted it was obvious from the X-ray films that such was the case. In my opinion, therefore, there was ample evidence upon which the jury could find negligence on the part of the appellant in connection with the discharge of the deceased from the emergency ward.

Coming to the question as to whether or not the respondent sufficiently established that the negligence was the cause of death, it is to be borne in mind that

> Conclusions of fact embodied in the verdict of the jury cannot be subjected to the same degree of re-examination (as in the case of appeals from a judge sitting alone) for the course of reasoning by which the verdict has been reached is not disclosed, and consequently, the verdict of the jury on fact must stand if there is any evidence to support it and if the conclusion is one at which a reasonable jury when properly directed, might reasonably arrive.

Watt v. *Thomas* (1), per Viscount Simon.

It is common ground that the deceased had no involvement of his nervous system at the time of his discharge from the emergency ward in the early hours of March 9. Further, all the medical witnesses agree that an injury such as that here in question need not be serious provided early treatment is received. It is true that Dr. Naden gave it as his opinion that the deceased might well have been alive today had he received no treatment, but he also said that had he been attending the case he probably would have followed the procedure which was in fact followed. The jury on this point, as on all others, were entitled to discriminate as between witnesses and as between different parts of the evidence of the same witness.

(1) [1947] 1 All E.R. 582 at 584.

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Kellock J.

The certificate of death, the contents of which, we were given to understand, constitute by statute *prima facie* evidence, discloses the cause of death as "Bronchopneumonia, paralytic ileus. Fracture dislocation of axis and atlas. Contributory: Softening and edema (degeneration) of medulla and cervical cord." According to the autopsist, the lungs were edematous and were typical of bronchopneumonia. These conditions he described as "terminal," that is, resulting from the paralytic ileus. He also found edema of the medulla and the upper segments of the spinal cord as well as a softening in the cord as a result of the edema. He testified:

Q. Now, so far as the time element is concerned in these injuries, is it correct that you say the condition, I think you said it, the conditions were caused by the fracture of the axis, the fracture dislocation of the axis?

A. That is correct, or an injury to the neck, which resulted in the fracture dislocation.

This answer was understood by all counsel concerned as a statement that the edema both of the lungs and of the cord were "terminal" in the same sense, that is, as resulting from the ileus. Dr. Kemp, called for the respondent, testified in chief as follows:

Q. Assuming . . . he dies of a paralytic ileus which, as Dr. Harmon says, caused at least two terminal conditions, bronchopneumonia—I have forgotten the other—

A. Edema of the lung.

Q. Thank you, doctor. Edema of the lung, and *softening of the cord and edema of the cord.*

Counsel for the appellant proceeded on the same footing.

Before dealing further with the respondent's evidence, it will be convenient to refer to evidence adduced by the appellant. Dr. Fahrni, who was called to attend the deceased on his re-entry to the hospital, but who did not see him until approximately 12:30 p.m. of March 10, made a neurological examination similar to that conducted by Dr. Heffelfinger when the patient was in the emergency ward. Dr. Fahrni, after stating that this examination indicated "no sign of any neurological involvement," then gave the following answers:

Q. When you say that, do you mean not only the spinal cord but the nervous system? Generally speaking, the nervous system?

A. Yes.

Q. And when you say the nervous system, do you mean including the central nervous system—not only the central nervous system but the sympathetic and *parasympathetic* nervous system?

A. *That is a difficult question to answer,* in that anyone who has had any injury has nearly always obvious upsets in their automatic nerve system.

It is clear, I think, on the evidence, that when the deceased returned to the hospital in the early morning hours of March 10, his abdominal condition indicated that the ileus had already set in. Dr. Fahrni says that the "first symptom" he observed of the ileus was distension of the abdomen, and Dr. Naden, who was called on behalf of the appellant, testified that when the deceased got back to the hospital, it was his understanding that the condition then existed. That this was accepted at the trial appears, I think, from the following cross-examination of Dr. Kemp by counsel for the appellant:

Q. Speak up.

A. It was read to me in evidence that the man on re-entering hospital had abdominal distention, and what is known as meterism, or gas, which correctly means a swelling which would indicate an early ileus.

Q. *What you say, of course, appears in the medical chart. There was some distention of his abdomen.*

A. Yes, sir.

The medical chart referred to is the "history sheet" which discloses the condition referred to, with respect to which, in the course of his cross-examination of Dr. Fahrni, counsel for the respondent stated, without correction from any quarter,

That history sheet is obviously made up when Mr. Fraser comes back.

The case was expressly put to the jury on this footing by the learned trial judge in his charge, and there was no objection on this point by counsel for the appellant. I think, therefore, it is too late for the appellant to take any other position.

With respect to the activities of the deceased subsequent to his discharge from the emergency ward and prior to his re-entry to the hospital, Dr. Fahrni testified that these could bring about a speeding up of the onset of shock, and further,

Q. Yes?

A. The other thing is that the cervical spine was obviously unstable, and *it could have gone on* with further displacement and put pressure on the spinal cord.

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In answer to the question as to whether or not there was any evidence of that happening, the witness said there was none. However, Dr. Naden testified:

Q. There were no neurological signs of any kind or description whatsoever?

A. Not when he was discharged from the hospital or at any other time.

Q. Except the bowel distention.

A. That's not a neurological sign.

Q. It might be a sign of neurological injury, or nerve injury?

A. Yes, I think one would have to say that that is a possibility, but once again in this patient, and it is this patient we are speaking of, in this patient as far as it has been *physically* possible to demonstrate there was no evidence of neurological change.

He subsequently said with respect to the bowel distention:

There is no evidence that this was caused by nerve injury. It is evidence of nerve irritation, but the evidence could be from nerve irritation by traction on the sympathetic plexus and lower dorsal and upper lumbar region, which is the reason you get a paralytic ileus in abdominal—post-operative abdominal conditions from traction of the sympathetic plexus which is not—which one cannot call injury apart from traction and not injury in the interpretation I make of your question.

There had been, of course, no traction by external means to which the deceased had been subjected prior to his re-entry into the hospital, and no evidence at all of any other traction. Without explanation, and the witness gave none, this reference to traction was quite irrelevant. Dr. Naden also said:

Q. Well now, doctor, what I want to know is—and what I want the jury to know—is this, can, in your opinion, a paralytic ileus be brought about by reason of an injury (*a*) to the spinal cord; (*b*) by an injury to the sympathetic nervous system?

A. It can be. It can be.

Dr. Fahrni expressed the view that the type of fracture from which the deceased suffered was not one which tended to close the canal of the spine as the head is carried forward, but rather which opened the canal the further the head was taken forward,

and unless the head is taken extremely far forward, there would be no pressure on the cord at all.

Dr. Fahrni also said that when he was called into the case and met the deceased's doctor, Dr. Rennie, at the hospital, he was shown the X-rays which had already been

taken. When he testified, therefore, that there would be no pressure on the cord of the deceased unless the head was moved "extremely far forward," he was aware of the nature of the fracture and the dislocation, and with that knowledge he had already testified that the cervical spine of the deceased was "obviously unstable" and "it could have gone on with further displacement and put pressure on the spinal cord."

Dr. Fahrni also said that, according to the X-ray, the dislocation "went one third of a centimetre," which, however, was not the maximum extent of the dislocation; it probably went "a little bit further," at the time of the accident, and "could be pushed forward again by forward flexion of the neck," which was one of the dangers to be avoided. So much so was this the case that when Dr. Fahrni took charge of the deceased, he did not consider it "safe" to put the latter through the motions of having X-rays taken to see whether, as a result of the deceased's activities, any increase in the displacement had occurred. He said that whether or not a greater dislocation had occurred could have been ascertained exactly by taking an X-ray picture, and that on his re-admission he would want to know whether any change either in the dislocation or the extent of the fracture had occurred "for one reason only," and that was "to ascertain whether there had been any pressure on the cord."

Q. That is very important, isn't it?

A. Yes.

He further testified:

Q. There wasn't anything particular about his condition, was there, that prevented you from taking an X-ray?

A. No, except that I didn't want him moved.

Q. Why didn't you want him moved?

A. I wouldn't want anyone moved in a condition of that nature, unless there was a particular indication for it.

Q. You mean, doctor, that you wouldn't want him to indulge in any activity at all? Is that what you mean?

A. Yes.

* * *

Q. Yes, but you could have got the portable machine in?

A. The movements are not in moving his bed along the hall there, but in actually taking the film and placing the cassettes behind his head and so forth.

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Q. You mean any moving of his body at all? That was what you wanted to avoid, moving his body at all?

A. Moving his neck.

Q. All right, moving his neck at all?

A. Yes.

Q. You wanted to avoid that?

A. Yes.

I think it was quite open to the jury to infer from this evidence that if Dr. Fahrni, with his knowledge of the patient, including his history and the nature of the fracture dislocation from which he suffered as disclosed by the X-rays, knew there was a very real danger of the cord being subjected to pressure by movements of the head, even in the course of taking X-rays which he would assume would be done with the greatest care by servants of the hospital under his direction, there was much more likelihood that pressure had been put on the cord by the uncontrolled movements of the patient while he had been absent from the hospital.

The language which Dr. Fahrni had used in the early part of this evidence was, as already mentioned, that he did not consider it "safe" to take X-rays. Subsequently he went on to say that one reason he did not want the deceased to indulge in any activity was that he was in pain. The connection between pain and being "safe" was not explained and is not obvious unless the witness meant that pain caused by uncontrolled activity on the part of the patient could itself bring about an upset in the automatic nervous system. The witness, however, did not say this. A further reason he gave was that he wanted to reduce the fracture and keep it reduced. Thus the patient would have a better neck than if left the way it was. He then said he had "no other reasons" for not wanting the patient to indulge in activities. This was, however, immediately followed by the following evidence:

Q. Well, isn't there another reason for reducing the dislocation, so that no pressure will be caused on the cord?

A. That is all included in my qualification.

Q. All right, doctor, I am just trying to take the lid off, if I may. That is one reason for reducing a dislocation, to prevent injury of the cord, or pressure on the cord, isn't it?

A. In the way your question came to me, no. You asked me—we had him lying on his back in bed. Once he is there, no possible damage to the cord can take place.

Q. I know that, yes, all right; and you want to reduce the dislocation and reduce it so no damage can occur to the cord, is that correct?

A. Yes, in a way.

Q. What do you mean, in a way?

A. I would say to diminish the danger of damage to the cord.

Q. All right, thank you, to eliminate damage or danger of damage to the cord.

A. Yes.

Q. Now, we have that. That is one reason for reducing dislocation, correct?

A. Yes.

Q. In other words, it is highly important, and that is one reason for your immobilization, isn't it?

A. What?

Q. One reason for immobilizing is so that the dislocation won't become any worse, or the bones won't move?

A. Yes.

Q. So that there won't be any damage to the cord?

A. To diminish the danger of damage to the cord.

The witness continued:

Q. Now, if you want to increase that danger, you tell him to get up and go home, don't you? If you deliberately wanted to increase the danger of damage to the cord, you would tell him to get up and go home?

A. Yes.

Q. And, of course, you know that was done in this case?

A. Yes.

Q. So that that was a highly dangerous thing, at least?

A. Yes, I will admit it was a dangerous thing to do.

Q. A very dangerous thing to do, doctor, wasn't it?

A. Yes.

Q. Because it might have caused injury to the cord?

A. Yes, it might have.

Q. And, in fact, he did have injury to the cord at death?

A. You are asking me?

Q. I am asking you.

A. I don't know.

Dr. Fahrni also said with respect to the cause of the ileus that he could not say "that the fracture dislocation of his axis did not cause it."

Dr. Kemp, called on behalf of the respondent, said that the treatment generally accepted was extension, the purpose being two-fold: first, to prevent flexion of the neck and spine to avoid damage to the cord; second, to allow the fractured bones to heal. The danger to be guarded against above all things was flexion. He testified that in his opinion the activity of the deceased after discharge from the emergency ward "must have" caused pressure upon the cord.

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Mr. Bull for the appellant found a good deal, and properly so, upon the admission of this witness that, when testifying in chief, he had not known of Dr. Fahrni's neurological examination of the deceased. I think the fair reading of this witness's evidence is, however, that notwithstanding the results of that examination, Dr. Kemp considered that the abdominal distention in evidence some hours earlier on the patient's re-admission to the hospital was itself evidence of nerve injury or nerve irritation.

Q. And you had no information when you gave your answer to Mr. Murphy's hypothetical question what the result of that examination was?

A. Except I believe it was read there was a meterism and distention in the man's abdomen.

Q. Speak up.

A. It was read to me in evidence that the man on re-entering the hospital had abdominal distention, and what is known as meterism, or gas, which correctly means a swelling which would indicate an early ileus.

Q. What you say, of course, appears in the medical chart. There was some distention of his abdomen.

A. Yes, sir.

Q. I think it was the first day he got back to the hospital. I am not referring to that at all. Just leave that out. I am referring to the neurological examination which Dr. Fahrni would make when he was called in on the case.

A. I have no knowledge of Dr. Fahrni's examination.

Q. And you had no knowledge of the result of that, if he made one, when you gave that answer yesterday?

A. No, unless it was a part of what was read.

Q. And that is, of course, very important?

A. Oh, yes, definitely.

Q. Dr. Fahrni would know, I presume, when he attended the man on his re-entry in the hospital, whether there was any apparent nerve damage?

A. Not necessarily. Dr. Fahrni is an orthopedic specialist. They are not known for their knowledge of the nervous system.

The witness was further cross-examined with respect to the effect of the activities through which the deceased went while out of the hospital, and he said:

Q. Even being home. What would those activities result in, scientifically?

A. Scientifically they could result in a further increase of the dislocation, eventually leading up to pressure on the cord.

Q. You don't suggest they did that.

A. They must have.

Q. What you say is they could do that.

A. They could do that and they probably did.

This witness would not agree with the evidence that the maximum dislocation had occurred at the moment of impact.

In my opinion, on the whole of the evidence, the relevant parts of which I have endeavoured to review, I do not think it can be said that there was no evidence upon which the jury could have reached the finding they did. I would therefore dismiss the appeal with costs.

LOCKE J. (dissenting):—This is an appeal from a judgment of the Court of Appeal for British Columbia (1), dismissing the appeal of the Vancouver General Hospital from the judgment of Coady, J. following the verdict of a jury.

The respondent is the widow and the personal representative of the late Gordon Arthur Fraser and in that capacity brought the action on behalf of herself, her infant son and the mother of the deceased.

In so far as they are relevant to the issue of negligence, the facts are as follows: shortly after 11 o'clock on the evening of March 8, 1949, Fraser, who had been injured in an automobile accident, was admitted into the emergency ward of the Vancouver General Hospital for treatment. The Vancouver Hospital contains some 1,200 beds and is equipped with all the usual accessories of a first class hospital, including an X-ray department. The emergency ward consists of 7 beds for the reception of accident cases and is staffed with nurses, orderlies and internes and, at the time of Fraser's admission, Dr. Davies was the interne on duty. The emergency accident report shows that Fraser was suffering on admission from a ragged laceration to his right forehead and pain and stiffness in the posterior portion of the neck. Dr. Davies, who was not called as a witness at the trial, signed a requisition for an X-ray some time prior to midnight, this stating that the patient might be taken to the X-ray department on a stretcher, that the part to be radiographed was "the neck, the cervical vertebrae" and in the space provided on the form for "Information desired" there appeared the following: "? fracture." According to the respondent, one of the nurses telephoned to her shortly after 11 o'clock, informing her of the accident

(1) [1951] 4 D.L.R. 736; 3 W.W.R. (N.S.) 337.

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and asking who was their family doctor, in response to which she gave the name of Dr. Harold Blair. In the space reserved for the name of the patient's doctor on the X-ray requisition form, the name J. H. Blair appears. At midnight Dr. R. M. Heffelfinger, an interne, a graduate of the Manitoba Medical College, who held a temporary licence from the College of Physicians and Surgeons of British Columbia entitling him to practise medicine, surgery and midwifery within the confines of the Vancouver General Hospital, came on duty, apparently to relieve Dr. Davies.

Mrs. Fraser arrived at 11.40 p.m. before the X-rays were taken and found her husband in bed complaining that his neck was very stiff and sore. According to her, she asked Dr. Heffelfinger:

> if there was going to be a doctor who was in charge

saying that it was supposed to be Dr. Blair, who had been phoned by Dr. Heffelfinger, and asked if Blair was coming to the hospital and was told that he was not coming until he (Heffelfinger):—

> had taken the X-ray and given him a report of the X-ray plates.

Thereafter she says that Dr. Heffelfinger sutured the cut on her husband's forehead and she then apparently waited in the ante room while her husband was taken to the X-ray department. After a wait of some 45 minutes Mrs. Fraser said that she was told that her husband could go home. She thereupon went to the ward where he was in bed and gives the following account of what then took place:

> Dr. Heffelfinger . . . . stood at the foot of the bed and I on the right side of the bed and my husband, Mr. Fraser, said to Dr. Heffelfinger that his neck was very stiff and he couldn't move it and it was extremely sore and he said, "There must be something wrong with my neck," which (sic) Dr. Heffelfinger in turn assured him it was merely strained ligaments, muscular or glandular trouble, at the time.

While her husband was being dressed by the nurse she said that she felt that he should not be leaving the hospital and went and talked to Dr. Heffelfinger again, saying:

> Dr. Heffelfinger, are you sure that there is no more serious injury than what you have stated in your conversation at Gordon's bedside?

and had been assured that there was not. She had telephoned for a taxicab to take them home and while they were waiting for this to come she says that Dr. Heffelfinger

came and said to her husband that he was to go down to Dr. Blair's office at 11 o'clock that morning, to which her husband had replied that if he was no better first thing in the morning Dr. Blair or some other doctor was coming to see him.

According to Dr. Heffelfinger, when he came on duty he conducted a neurological examination of Fraser to ascertain if there was any evidence of injury to the nervous system and found none. He was asked by Fraser if Dr. Blair had been notified and he said that this had been done. Fraser then asked if Dr. Blair was coming down, to which he replied that he did not know whether he was or not. Apparently, it was Dr. Davies who had telephoned to Dr. Blair and there is no evidence as to what took place between them. There appears, however, on the emergency accident report, which was signed by Dr. Heffelfinger, a notation that the family physician was notified at 12.05 a.m. this apparently being before the X-rays were taken. Following the taking of the X-rays, Dr. Heffelfinger says that he examined the prints together with Dr. Davies. After this he telephoned to Dr. Blair describing the patient's condition, the results of the examination, and:

> the results of the X-ray as interpreted by the other interne and myself.

and told Dr. Blair that the patient was most insistent about going home and asked him (Blair) what he wanted to do and was told to discharge the patient and have him see him at the office "the following morning." In chief, asked whether he was qualified to read X-ray plates, he said he was not, that his only experience in that field was the usual teaching received in a medical school and instructions received in the hospital as an interne up to that time but that he had not taken any post graduate or special training in radiology. Asked as to whether he had told this to Dr. Blair, he said: "I informed him to that effect." Cross-examined, he said that internes were permitted to order X-rays when required and read them and give a report "after first contacting the attending doctor." As neither Dr. Davies nor Dr. Blair gave evidence, whether the latter asked for the X-ray was not disclosed. Dr. Heffelfinger said that their examination of the X-rays disclosed no gross

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abnormality. He said that he had been requested by Dr. Blair to examine the films, and again:

> We were requested by him to look at the films and to report to him our findings.

The latter statement apparently referred to Dr. Davies and himself and as, so far as the evidence shows, Dr. Heffelfinger had only spoken once to Dr. Blair, the request last referred to was presumably made to Dr. Davies. When he was asked again if what he had told Dr. Blair was that he and Dr. Davies could find nothing grossly abnormal and confirmed this, he again said that he had told Dr. Blair that he (Heffelfinger) "had not very much experience in reading X-ray films." While the doctor could not remember whether or not he had assured Mrs. Fraser that her husband's condition was not serious or that the injury might be a strained ligament or some glandular strain which caused his neck to be stiff, he denied that he had advised Dr. Blair that, in his opinion, Fraser could be discharged. In concluding the cross-examination Dr. Heffelfinger was asked if he had said in his examination for discovery that he had not expressed to Dr. Blair any opinion regarding discharge of the patient but had only given the latter his findings and let him decide what to do, and that after describing his findings on his examination and the X-ray findings he had:

> asked him what he wanted to do about it, and the outcome of it was that he asked me to discharge him and come around in the morning.

he confirmed having done so.

Dr. R. A. Seymour, the Assistant Medical Superintendent of the hospital, gave evidence as to the hospital rules regarding the emergency department, one of which provided that:

> Any member of the house staff called to the emergency department must respond promptly. It is imperative that every emergency case be examined immediately and given such first-aid treatment as is necessary on admission for making him as safe and comfortable as possible. After this, get in touch with the patient's physician and act under his orders. Specific instructions are posted in the emergency department. Report forms are to be completed in each case.

It was apparently in accordance with this rule that Dr. Davies and Dr. Heffelfinger telephoned to Dr. Blair and obtained his instructions and that Dr. Heffelfinger made the emergency accident report. The Vancouver General

Hospital has a large X-ray department and, while there were only technicians on duty at night, there was a radiologist who was always on call and for whose opinion Dr. Blair might have asked. Unfortunately in the result this was not done. It was made clear by Dr. Seymour that the internes were permitted to order X-rays to be taken and, if requested, to report what they disclosed to the patient's doctor.

It is now common ground that the X-ray films disclosed a fracture dislocation of the second cervical (axis) vertebra and that this was not detected by Dr. Heffelfinger. There was also evidence which, if believed, would indicate that it was a dangerous thing to send Fraser home in a taxicab in this condition. The allegations of negligence are that the defendant, its servants or agents so negligently and unskilfully diagnosed or treated Fraser that he thereafter died. It is contended that the activities carried on by Fraser in reliance upon Dr. Heffelfinger's advice in the interval between his leaving the hospital to go home and the time of the discovery of the nature of his injury resulted in his death.

At the conclusion of the trial and following a most careful charge by the learned trial judge the following questions dealing with the matter of the alleged negligence of Dr. Heffelfinger were submitted to the jury:

(1) Were the internes the servants or agents of Dr. Blair in discharging the deceased?

(2) Were the internes, if your answer to (1) is "no", were the internes the employees of the defendant in discharging the deceased?

(3) Were the internes negligent in discharging the deceased?

(4) If your answer to Question (3) is "yes", did that negligence cause the deceased's death?

(5) If your answer to Question 4 is "yes", what damages do you find were suffered by:

(*a*) Mrs. Fraser Sr.;
(*b*) Mrs. Fraser Jr.;
(*c*) Brock Fraser?

The jury did not answer any of the questions but returned a general verdict in favour of the respondent and assessed damages.

Since a general verdict was given, it must be taken that all the issues of fact properly before the jury are determined in favour of the respondent. The negligence found is that

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of Dr. Heffelfinger and the first question to be determined is whether there was any sufficient evidence of negligence upon his part and, if there was, whether in the circumstances disclosed by the evidence the appellant is liable if damage resulted.

It was shown that under an agreement in writing made between Dr. Heffelfinger and the Vancouver General Hospital dated June 1, 1948, he agreed to act as junior interne, in accordance with the rules existing or which might be issued from time to time, and agreed not to practise medicine in any of its forms or branches outside the Vancouver General Hospital for the period that the contract was in force. In consideration of his services he was to be paid $25 per month and it was provided that the agreement might be cancelled by the hospital without notice, in consequence of neglect of duty, misconduct or continued failure to observe the hospital regulations. The temporary licence granted to him by the College of Physicians and Surgeons above referred to had been granted on May 31, 1948. The evidence is not clear as to the previous experience of Dr. Heffelfinger, though it appears to me a fair inference from the evidence that he had but recently graduated in medicine. That he was engaged as an interne would probably convey to medical men that this was so, but there is nothing in the evidence to indicate that this knowledge was shared either by Fraser or the respondent. It is apparently common ground that the appellant operates a public hospital at the city of Vancouver to which injured persons such as Fraser, *inter alia*, might obtain admittance, presumably on the footing that they are to pay for services rendered. As to this and as to whether the appellant corporation is by statute or otherwise required to receive all sick persons presenting themselves for admission, no reference was made either in the evidence or in the arguments addressed to us.

At the root of the matter lies the question as to the duty owed by the appellant to Fraser in the circumstances disclosed by the evidence. In the absence of any direct evidence as to what took place upon his admission, there is sufficient evidence from what took place thereafter that when admitted he was taken in charge by Dr. Davies and the nurses in the emergency ward and such steps taken by

them immediately as they considered necessary in view of his condition. That Dr. Davies did examine Fraser is apparent since it was he who signed the requisition for the X-ray, the form indicating that he suspected or wished to be informed with certainty as to whether there was a fracture of any of the cervical vertebrae. Upon Dr. Heffelfinger's arrival he undertook what appears to have been a most thorough and careful neurological examination of the patient. It is thus made plain that the hospital undertook to give Fraser both nursing and medical attention. The duty of the hospital in these circumstances was to exercise reasonable care in the treatment given to the patient, this involving, to the extent that such treatment consisted of medical treatment by the doctors, that they should exhibit reasonable skill. It was unfortunately the fact that the X-ray films which were taken disclosed a fracture of the second cervical vertebrae and that Dr. Heffelfinger, who on his own statement had little skill or experience in reading such films, failed to detect it. There was a skilled radiologist on call at night to whom Dr. Heffelfinger might have referred the matter and the jury may well have considered that it was a negligent act, in view of his own lack of experience in such matters, not to refer the matter to this man. For the hospital it is said that the responsibility was not that of Dr. Heffelfinger since, by the rules which governed his conduct, he was required to get in touch with the patient's own doctor and to act on his instructions and that this was done. The only evidence as to what took place between Dr. Heffelfinger and Dr. Blair is that of the former. The evidence concerning this conversation may well have been regarded by the jury as not entirely satisfactory. While the doctor said that he had advised Dr. Blair of his limited experience, they may have considered that the evidence as to the extent of this disclosure was not clear and that if Dr. Blair had been aware that, as stated by Dr. Heffelfinger in evidence, he was not qualified to express an opinion as to what the films disclosed the latter would not have agreed to the patient being discharged. I think further that, in arriving at a conclusion as to who had taken part in the decision to discharge Fraser, they may have attached importance to the emergency accident report in which Dr. Heffelfinger had said that

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Dr. Blair had "agreed" to discharge rather than he had directed the discharge. The language of this entry, plus the fact that (since it must be assumed that the jury believed the evidence of Mrs. Fraser) Dr. Heffelfinger did not merely convey to them Dr. Blair's instructions but, in answer to inquiries of both Fraser and his wife, the latter of whom was apparently reluctant to have her husband leave the hospital, he assured them that the injuries to his neck were not serious, lends some support to the view that he took an active part in the decision to discharge the patient and in his discharge. Assuming, as I do, that Dr. Heffelfinger was a recent graduate in medicine, that his experience was thus limited and that he was not competent to read the X-ray films, had he informed Fraser and his wife of these facts and, after full disclosure to Dr. Blair, simply conveyed to them the doctor's advice and instructions and acted upon them, the situation would, in my opinion, have been different. The jury may well have considered that there had not been full disclosure made to Dr. Blair of the lack of experience of Dr. Heffelfinger and that assuming to advise Fraser that he could safely leave the emergency ward and go to his home, without having obtained the opinion of a radiologist as to whether there was a fracture of the vertebra, was a failure on the part of Dr. Heffelfinger to exercise that reasonable degree of care and skill and treatment, which it was the duty of the appellant to afford to Fraser in the circumstances disclosed.

Facts were disclosed by the evidence from which the jury might properly draw the inference of negligence on the part of Dr. Heffelfinger. The nature of the obligation which the hospital assumed towards Fraser must be inferred from the circumstances disclosed by the evidence and here the inference may properly be drawn that it was to afford both nursing and medical attention. The decision in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1), does not, in my opinion, touch the present matter and the views expressed by Kennedy L.J. must be considered in the light of the comments made upon them in this Court by Davis J. in delivering the judgment of the majority in *Sisters of St. Joseph* v. *Fleming* (2), and of Lord Greene M.R. in

(1) [1909] 2 K.B. 820.

(2) [1936] S.C.R. 173, 190.

Gold v. *Essex County Council* (1). Dr. Heffelfinger was an employee of the appellant and if there was negligence on his part in the present matter it was, in my opinion, in the course of his employment and if damage resulted the appellant is liable (*Cassidy* v. *Ministry of Health* (2), Denning L.J.).

There remains the question as to whether there was evidence from which a jury might properly draw the inference that what was done by Fraser, in reliance upon Dr. Heffelfinger's advice, caused or contributed to his death which occurred on March 14th.

Fraser had been brought to the hospital in an ambulance but left in a taxicab to go home. He was a big powerful man, 6 ft. 3 inches in height, and entering and getting out of the taxicab no doubt required him to stoop. There was evidence from which the jury might conclude that there were places in the street which would be traversed on his way home which were rough and would give the passengers a shaking-up. It was necessary for him to walk up some fifteen steps to enter the door of his home and on entering he undressed himself and lay down in bed, was given a hot drink and his head propped up on pillows. He had left the hospital at about 3 o'clock in the morning of March 9 and at 9 o'clock that morning his wife, at his request, telephoned Dr. C. S. Rennie and on his advice a hot water bottle was placed at the back of Fraser's neck. Dr. Rennie arrived at Fraser's home at about 2 o'clock, staying nearly an hour. According to Mrs. Fraser, he examined her husband but the nature of this examination is not disclosed in the evidence and Dr. Rennie was not called as a witness at the trial. When he left he apparently obtained a report on the X-ray films that had been taken during the previous night and returned shortly before eleven o'clock that evening with the plates or films taken from them and informed the respondent, and presumably her husband, that they disclosed a fracture of the second cervical vertebra and advised that Fraser return to the hospital. The hospital reports put in evidence by the plaintiff indicate that he entered the private ward pavilion at 1.15 a.m. on March 10,

(1) [1942] 2 K.B. 293.

(2) [1951] 1 T.L.R. 539 at 548.

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the attending physician being shown as Dr. C. S. Rennie and the nature of his injury being stated as fracture-dislocation cervical spine.

It is common ground that the cause of Fraser's death was an ileus, a paralysis of the small intestine, and resulting complications, and it is the respondent's case that the activities carried on by him between 3 o'clock on the morning of March 10 and either the time when Dr. Rennie discovered the nature of the injury or the time of Fraser's re-admission to the hospital were responsible for the development of this condition.

In view of the medical evidence that a paralysis of the small intestine may result from a number of causes, the burden resting upon the respondent upon this issue was a difficult one. While it was stated in argument before us that her case was that the condition was brought about by an injury to the nervous system resulting from Fraser's activities during this period, I do not think the respondent should be restricted to this. If there were in fact no injury to the autonomic nervous system but there was other evidence connecting Fraser's actions, in reliance upon Dr. Heffelfinger's advice, with its development, the respondent's claim should be sustained.

As has been stated, Dr. Heffelfinger gave Fraser a thorough neurological examination shortly after midnight on March 9. Dr. J. R. Naden, a highly qualified orthopaedic surgeon who was called as a witness for the appellant, referred to this as "the examination that was so minutely carried out by Dr. Heffelfinger" and the respondent adopts the same position and contends that this established that the shock of the accident and the fracture of the axis vertebra had caused no injury to the nervous system. That the forward dislocation of the axis resulted in a displacement of 3/16th of an inch was disclosed by the X-ray examination and, according to Dr. Harmon who conducted the autopsy on March 15th, there could be elicited a forward displacement of the second vertebra on the third.

It was the contention of the respondent that pressure thus brought to bear upon the spinal cord at the site of the fracture had caused an injury to the nervous system controlling the functioning of the small intestine and this was the opinion expressed by Dr. W. N. Kemp. According to

him, Fraser should not have been permitted to move about or to leave the emergency ward; he considered that he should have been put to bed and extension applied for the purpose of reducing the fracture, saying that the important thing in such cases was to prevent flexion of the neck and upper spine "thus preventing further damage or any damage to the cord." Dr. Kemp said that an ileus resulted from some interruption in the function of the parasympathetic nervous system and that in the majority of the cases which he had heard of or seen they had been functional, there having been "some imbalance in the function of the parasympathetic system without any anatomical destruction of the nerves." While an ileus, functional in origin, was, in his opinion, curable, one caused by injury to the nerves in the cervical region was not "because spinal nerves like nerves in the brain once they are destroyed never recover." Answering a hypothetical question propounded by counsel for the respondent, which assumed that the examination of the patient at the emergency ward had been very carefully and thoroughly done and showed no sign of nerve injury and that thereafter the injured person had followed the course which had in fact been pursued by Fraser between the time of his leaving the emergency ward and his re-entry into the hospital and which asked his opinion as to the cause of death, Dr. Kemp said that it was almost a certainty that at some stage of the various activities enumerated:

> the pressure of the dislocation would be such that the softening which is reported in the cord and the edema, indicating as they do destruction of the nerve tissue, assuming all these to be correct . . . . I would say there is a very direct connection between the resulting paralytic ileus and all these various activities subsequent to leaving the hospital.

In answer to a further question he said that, in his opinion, the paralytic ileus:

> was directly due to injury suffered by the nerve filaments, probably largely parasympathetic, located in the cord at the cervical area.

and that:

> it would be reasonable to assume that the symptoms, not being present when he was discharged from the hospital, it must have occurred subsequent to his departure from the hospital.

The latter answer clearly shows that, according to the witness, if there had been any injury to the nerves or nervous system such as he described at the time Fraser was examined by Dr. Heffelfinger the examination would have disclosed it.

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The question propounded to Dr. Kemp was incomplete since a most relevant fact, of which the doctor was unaware, was omitted. At some time during the morning of March 10, presumably after Fraser had been readmitted to the hospital, Dr. Rennie on his behalf retained the services of Dr. W. H. Fahrni, an orthopaedic surgeon who had carried out a thorough neurological examination of Fraser that day and found "no sign of any neurological involvement" and who said that while he examined him thereafter, at least once a day, there was never any evidence of any nerve injury. The following passage from the cross-examination of Dr. Kemp deals with this aspect of the case:

Q. Now, when he came back to the hospital on the 10th and was attended by Dr. Rennie and Dr. Fahrni, the ordinary routine thing for a specialist like Dr. Fahrni, to do, is to again check his nervous system? A. I think so, especially with a neck injury, with this history.

Q. And you had no information when you gave your answer to Mr. Murphy's hypothetical question what the result of that examination was? A. Except I believe it was read there was a meterism and distension in the man's abdomen.

Q. Speak up. A. It was read to me in evidence that the man on re-entering the hospital had abdominal distension, and what is known as meterism, or gas, which correctly means a swelling which would indicate an early ileus.

Q. What you say of course appears in the medical chart. There was some distension of his abdomen. A. Yes, sir.

Q. I think it was the first day he got back to the hospital. I am not referring to that at all. Just leave that out. I am referring to the neurological examination which Dr. Fahrni would make when he was called in on the case. A. I have no knowledge of Dr. Fahrni's examination.

Q. And you had no knowledge of the result of that, if he made one, when you gave that answer yesterday? A. No, unless it was a part of what was read.

Q. And that is, of course, very important? A. Oh, yes, definitely.

and again, after reference was made to the fact that Dr. Fahrni was an orthopaedic specialist and Dr. Kemp having said that "they are not known for their knowledge of the nervous system", the following appears:

Q. They have the knowledge of how to make a neurological examination? A. Apparently. It is just about the equivalent of what a general practitioner has.

Q. You agree that Dr. Heffelfinger who was then an interne made the proper one? A. According to this record.

Q. And you would at least give an experienced orthopaedic surgeon credit for having a similar knowledge? A. Oh yes, at least.

Q. And you agree then that the conclusion which Dr. Fahrni would draw from the examination when he was attending would be highly important? A. Oh, definitely.

Later, having been asked in the course of cross-examination about Fraser's activities, he said that:

> Scientifically they could result in a further increase of the dislocation, eventually leading to pressure on the cord.

and when asked if the activities had done that, Dr. Kemp said that they must have. Dr. Kemp was not re-examined, the respondent's case being closed at the termination of this cross-examination. What he would have answered to an hypothetical question, in which the facts upon which his opinion was to be based included the all important one that no trace of injury to the nervous system could be found on March 10, when Dr. Fahrni examined Fraser, is unknown.

There was no other evidence given on behalf of the respondent directed to sustain the contention that the development of the ileus was attributable to Fraser's activities during the period mentioned. It was part of the assumed statement of facts contained in the hypothetical question answered by Dr. Kemp that the ileus had already commenced to develop when Fraser was readmitted to the hospital in the early morning of March 10. The respondent had sought to establish this fact by introducing into the evidence as part of her case the nurse's notes and the history sheet prepared by the employees of the hospital. The nurse's notes consist of entries apparently made at the time to record the course of the illness and show the time of admission as being 1.15 a.m. on March 10, at which time the patient was suffering from a pain in the back of the neck extending to the level of the shoulders. Dr. Rennie is shown to have visited Fraser at 1.30 a.m. and again at 10 a.m. At 12.30 p.m. an entry shows that extension was applied to the neck by Dr. Fahrni and that at this time Fraser was complaining of pain in his back and hips. There is no entry in the nurse's notes of March 10 of there being any distension of the abdomen which, according to medical evidence, might indicate the commencement of an ileus, the first entry of this being at 2 a.m. on March 11. No nurse was called to give evidence as to this. The hospital record further included a history sheet, apparently prepared by Dr. W. G. Walker. This document is not dated nor the time of day when it was made known. Since, however, the first entry says that the patient was involved in a traffic accident "today", it may perhaps be inferred

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that Dr. Walker compiled this document on the day that Fraser was readmitted to the hospital. The sheet contains an entry to the effect that the abdomen was very extended. Dr. Walker, who could have cleared up the matter, was not called. Dr. Fahrni, however, who apparently first saw the patient at 12.30 p.m. on March 10, as indicated in the nurse's notes says that there was some distension at that time and that he regarded this as a symptom of an ileus. There is thus no evidence of distension at the time, some eleven hours earlier, when Fraser entered the hospital. Indeed, the absence of any mention of the fact in the nurse's notes is some evidence, however slight, that the contrary was the case.

The question as to what had brought about the paralysis of the small intestine was not one which, in the circumstances of this case, could be dealt with by a jury without the assistance of medical opinion. In my view, the opinion of Dr. Kemp based upon an incomplete, and in one part inaccurate, statement of the facts was valueless. On this aspect of the case, the respondent's action must fail unless sufficient support can be found in other evidence. The evidence for the appellant on this issue was that of Dr. Fahrni and of Dr. J. R. Naden, both practising in Vancouver and specializing in orthopaedic surgery. Their evidence made it apparent that the condition of ileus might be produced in a variety of manners and that at times it is impossible to diagnose the cause. Dr. Fahrni gave no evidence as to what information, if any, he obtained from Dr. Rennie as to Fraser's symptoms at 2 o'clock on March 9 when the latter had examined him. He had met Dr. Rennie at the hospital and had seen the X-ray plates taken on the requisition of Dr. Davies and had Fraser immobilized on his back in bed, in the usual manner adopted in treating an injury of the nature disclosed, and applied head traction to reduce the fracture. It was important, in his opinion, to ascertain whether the plaintiff had suffered any damage to the spinal cord and he thereupon conducted the neurological examination already referred to. According to him, there are a great many causes for an ileus: some may occur for no obvious reason but may, as he expressed it, develop spontaneously, though this is rare. The condition, he said, may be produced by a direct irritation of the nerves to the

bowels, which would be obvious on examination, and that any severe injury may bring on an ileus or any very severe psychic upset. Further he said that the condition was one which was very poorly understood and that:

> As yet it is not known the exact mechanism of the onset of an ileus, except that the nerves to the bowel are obviously interrupted, but there are many times when they are definitely not interrupted when an ileus does arise.

and that simply lying in an unaccustomed position on one's back might cause an ileus. While saying in cross-examination that in the case of a fracture such as this it was a very dangerous thing to send Fraser home from the emergency ward, as has been done, because it might have resulted in injury to the spinal cord, he could find no evidence of any such injury or that driving to his home from the hospital had caused any harm. Asked if his reason for wishing to reduce the fracture was to prevent pressure on the spinal cord, he said that there was no such pressure on the cord or evidence of injury to the cord. Then asked as to what had caused the ileus, he said he did not know. Later, in his cross-examination, he was asked if he could suggest some contributory factors which might have produced the condition and after he had said that he could not say that the fracture dislocation of the axis did not cause it, the cross-examiner abandoned the subject and it was not thereafter revived.

Dr. J. R. Naden, the chief of the orthopaedic section of the Vancouver General Hospital since 1936, who had been in court and heard both Dr. Fahrni's and Dr. Heffelfinger's description of the neurological examinations that they had made, was of the view that they showed that there was no evidence of injury to the spinal cord or to the nervous system in any way, and further that Dr. Harmon's evidence as to his finding at the autopsy did not disclose any damage to the spinal cord. Dr. Naden said that an ileus might develop from a number of causes, that he had seen the condition develop in patients who had been put to bed suffering merely from a pain in the back, that the most common cause was an infection such as peritonitis, that the condition developed also at times from a stomach operation and that the "mechanism of paralytic ileus is not completely known." The condition, he said, could be

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brought about by an injury to the spinal cord or to the autonomic nervous system but the existence of such injury could be demonstrated by a neurological examination such as that conducted by Dr. Fahrni, who had found no evidence of injury to the spinal cord or the sympathetic nervous system or the parasympathetic nervous system in relation to the spinal cord. Dr. Naden agreed with Dr. Fahrni that the evidence given by the autopsist did not disclose any injury to the spinal cord. He further was of the opinion that Fraser's activities after leaving the emergency ward had no connection with the development of the ileus.

No rebuttal evidence was tendered by the respondent and thus the evidence of Drs. Fahrni and Naden as to the variety of causes which might produce an ileus is unchallenged. The question as to whether there was any evidence of injury to the nervous system at the time Dr. Rennie took charge and at the time of Fraser's re-entry into the hospital, which might have produced the condition, was of the most vital importance to the respondent's case. It is true that apparently Dr. Fahrni's first neurological examination of Fraser was some eleven hours after his readmission to the hospital. This makes available to the respondent the argument that his findings do not, of necessity, establish that there was not some evidence of injury or disturbance of the nervous system which might bring about the paralysis apparent at 1.15 that morning and which was not evident at 12.30 p.m. As to this, Fraser's own physician, Dr. Rennie, and Dr. Walker, if in fact he examined Fraser shortly after his admission, might have given some evidence but neither were called. Dr. Fahrni was Fraser's doctor, so that whatever was known to him was available to the respondent, including the fact that at 12.30 p.m. on March 10 no evidence of any nervous injury was detected by him and, if the respondent proposed to contend that his condition was different several hours earlier, I think the onus of establishing that fact lay upon her.

No evidence was given as to the exact manner in which Fraser sustained the injuries that brought him to the emergency ward of the hospital, other than that he had been involved in an automobile accident. The medical evidence shows that such a fracture of the second cervical

vertebra might be caused in a motor accident by the vehicle in which a person was travelling being brought to a sudden and violent stop. While Dr. Rennie was consulted six hours after Fraser left the hospital and examined him five hours later and might thus be charged with the responsibility for his treatment thereafter, it is not unfair to the appellant to deal with this aspect of the case upon the basis that if the ileus resulted, as the respondent contends, from Fraser's activities between 3 a.m. on the morning of March 9 and 1.15 a.m. on the following morning, the cause was the negligence complained of. Dealing with the matter on this footing, there was, in my opinion, no evidence from which the jury might properly draw the inference that the ileus resulted from anything done by or on behalf of Fraser, in reliance upon Dr. Heffelfinger's advice. Dr. Kemp's theory as to the cause of the development of the ileus was based upon a misconception of the facts and in the belief that the shaking-up which Fraser would receive in driving home in the taxicab, the forward flexion of his cervical spine in getting into and out of the taxicab and his movements after he arrived home and while there until he re-entered the hospital, had caused an injury to his nervous system and that such injury had not existed when he left the emergency ward. That any such injury would have been disclosed by the examination conducted by Dr. Fahrni follows, of necessity, from Dr. Kemp's evidence and was the considered opinion of both Dr. Fahrni and Dr. Naden, and there is no other evidence on the matter. Other than that these activities would, in his opinion, bring about an injury to the nerves or nervous system, Dr. Kemp did not hazard any opinion as to what might have caused the ileus. On the other hand, Dr. Fahrni, who was Fraser's own doctor, and Dr. Naden were of the opinion that what was done by Fraser in the period mentioned had nothing to do with the development of the condition. The case is thus left in this position that the undisputed evidence is that the ileus might have been developed from a variety of causes, including the injury sustained at the time of the accident, the shock Fraser then suffered, or from some other unknown cause. That it was caused by an injury to the nervous system during the period in question is disproved by the evidence.

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That damage resulted from what the jury evidently considered to have been a negligent act on the part of Dr. Heffelfinger was a fact which the respondent was required to prove. This does not mean, to adopt the language of Earl Loreburn, L.C. in *Richard Evans and Company* v. *Astley* (1), that she must "demonstrate her case" and, if the more probable conclusion is that for which she contends and there is anything pointing to it, there was evidence for the jury to act upon. I do not think this statement was intended to differ with what had been said by Willes, J. in *Ryder* v. *Wombwell* (2), where, delivering the judgment of a court which included Byles, Blackburn, Montague Smith and Lush, JJ., he quoted with approval what was said by Williams, J. in *Toomey* v. *London and Brighton Railway Company* (3):

> It is not enough to say that there was some evidence . . . . A scintilla of evidence . . . . clearly would not justify the judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence.

In the present matter the jury might, if they saw fit, reject the opinions of Dr. Fahrni and of Dr. Naden, that what occurred during the interval in question had nothing to do with the development of the ileus, and it is to be assumed that they did so. There was, in my opinion, a complete absence of any other evidence from which they might reasonably and properly draw a conclusion as to whether the cause was something done in reliance upon Dr. Heffelfinger's advice, or in consequence of his failure to diagnose the true nature of the injury, or that it was the physical injury sustained in the collision or the resulting shock or some other reason unknown. If it were to be said that from the fact that they rendered a general verdict it is to be taken that the jury found, in the face of all the evidence, that some injury to the nervous system did result during the interval in question, such a verdict would, in my opinion, be perverse and should be set aside.

I would allow this appeal and direct that judgment be entered dismissing the action. The appellant is entitled to its costs throughout if they are demanded.

(1) [1911] A.C. 674 at 678. (2) (1868) L.R. 4 Ex. 32 at 39.
(3) (1857) 2 C.B. (N.S.) 150.

CARTWRIGHT J.:—I agree with the conclusion of my brothers Rand and Kellock that there was evidence in this case on which the jury might properly find that there was negligence on the part of the appellant in connection with the discharge of the deceased from the emergency ward and that such negligence caused the death of the deceased and I would accordingly dismiss the appeal with costs.

FAUTEUX J.:—I agree with my brothers Rand and Kellock that the appeal should be dismissed.

There was before the jury material on which they could, acting judicially, find that the death of Gordon Arthur Fraser resulted from an unwarranted discharge of this patient from the hospital consequential (*a*) to a negligence of Dr. H. to read in the X-ray plates—or, if unqualified in the matter, to call for the assistance of the hospital's available expert to do so—the fracture of the axis which, admittedly suspected by him, was indicated in the X-ray films, and (*b*) to a failure on his part to adequately inform the family physician as to the real situation with respect to the condition of the patient as well as with respect to his capacity to appreciate it, a failure which, in the result, lead the family physician to "agree" to the discharge.

Appeal dismissed with costs.

Solicitor for the appellant: *E. A. Burnett.*

Solicitor for the respondent: *Paul D. Murphy.*