TORTS—MASTER AND SERVANT—HOSPITAL AND SURGEON.

Collins v. Hertfordshire C.C.[1]

The liability of hospital authorities has been before the courts again. This time it was necessary to consider the negligent conduct of a consulting surgeon, a resident house surgeon and a pharmacist. A lethal dose of "cocaine," which was prepared by mistake after a telephonic order for "procaine," caused the death of a patient.

Hilbery J. held that the hospital was liable for the negligence of the resident house surgeon and the pharmacist but not the consulting surgeon.

As the tendency has been to increase the liability of hospital authorities this decision causes no surprise, at least as far as the liability of the pharmacist was concerned, as his position could not be distinguished from that of a radiographer.[2] The position of house surgeons had been left open by Lord Greene M.R. in *Gold v. Essex C.C.*[2] and Hilbery J. was not greatly troubled in deciding this issue against the hospital. However the care with which he examined the position of the consulting surgeon seems to indicate that other *dicta* by Lord Greene to the effect that consulting surgeons were in a different category were not as acceptable to him. Indeed the distinction between consulting surgeons and house surgeons who often perform identical professional acts, if it is a valid distinction, requires justification in principle or authority.

An examination of the authorities shows a development in this branch of the law. In *Evans v. Liverpool C.C.*[3] where a visiting physician prematurely discharged a patient Walton J. thought that a hospital was under a duty to employ a competent staff but was not liable for their negligence. "They cannot control his opinion in any kind of way." In *Hillyer's case*[4] a patient was injured while on the operating table but the Court of Appeal refused to hold the hospital liable. The judgments caused difficulty and the distinction between administrative acts and professional acts was accepted by the profession as meaning almost the exclusion of liability for doctors and nurses. The distinction between contracts for service and contracts for services further indicated the attitude of the courts. In *Lindsey C.C. v. Marshall*[5] Hailsham L.C. showed a different attitude. "There is no trace of any authority in those cases or elsewhere for the view that where a corporation acts by an agent its liability for the mistakes of that agent is any less where the agent is a medical man than where the agent belongs to any other profession or calling." In *Gold v. Essex*[6] Lord Greene extended this lead. "The first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once this is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person whether a servant or agent to discharge it on his behalf; and this is equally true

1. [1947] 1 All E.R. 633
2. [1942] 2 All E.R. 237.
3. [1906] 1 K.B. 160.
4. [1909] 2 K.B. 820.
5. [1937] A.C. 97, at 109.
6. [1942] 2 All E.R. 242.

whether or not the obligation involves the use of skill." Despite these remarks the learned Master of the Rolls later stated that as far as consulting surgeons were concerned " the nature of their work and the relationship in which they stand to the respondents precludes the drawing of an inference that the respondents undertake responsibility for their negligent acts."

Now the nature of the work done by a consulting surgeon in many cases will not materially differ from the nature of the work done by a house surgeon and it is submitted that no valid distinction can be found on that ground. Hilbery J. seems to have relied on the relationship between hospital and consulting surgeon as providing the basis of a special category whose negligence did not involve the hospital. The distinction between contracts of service and contracts for services is perpetuated and the degree of control, " control as to the manner in which the work is done," is used by the learned judge to relieve the hospital from responsibility. " I do not think they could say what he was to do. I am certain that they could not say how he should do it. The same is not true of " the resident house surgeon. " I think that to a very large extent the hospital authorities could say how she should perform her work."

It is submitted that this distinction based on the degree of control is inconsistent with the proposition that once the extent of liability is discovered the delegation of performance of that obligation to a servant or agent cannot relieve from responsibility. Again the degree of control exercised over consulting surgeons and house surgeons varies greatly among public, intermediate and private hospitals and this test can only lead to uncertainty in practice.

Collins v. Hertfordshire C.C. therefore adds little to *Gold v. Essex C.C.* and it may well be that, if the House of Lords is ever seised of this problem, it may see fit to extend the liability of a hospital to cover negligence of all members of its staff.

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