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[IN REVIEW.]

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wendt, and Mr. Justice Middleton.

ATTORNEY-GENERAL *v.* SMITH.

D. C., Colombo, 20,723.

Crown, claim against—Admission into hospital—Implied undertaking—Non-liability of Crown for negligence of servants of the hospital—Point not argued in the lower Court taken for the first time in appeal.

Where the Government provides a hospital, and admits patients into it on the terms that they shall have the use of the rooms and the instruments and medicines and appliances and the services of physicians and surgeons and nurses and attendants gratuitously, with only a charge for admission, there is no implied undertaking on the part of the Government to be liable for the negligence of any of the servants employed in such hospital.

Where in an action by the Attorney-General on behalf of the Government for certain charges in respect of the defendant's wife, who was admitted into the Government hospital at the defendant's request, on his undertaking to pay such charges, the defendant claimed damages in reconvention, on the ground that the agents and servants of the Government who were performing or assisting in the operation on the defendant's wife in the hospital acted in so unskilful and negligent a manner that the defendant's wife was so severely scalded and sustained such grave injuries that she died from their effects,—

Held, that there being no express or implied undertaking on the part of the Government to be liable for the negligence of its servants employed in the hospital, the defendant had no cause of action against the Government for damages.

Judgment in appeal, (*1907*) *10 N. L. R. 263*, reversed.

HEARING in review of the judgment reported in (*9107*) *10 N. L. R. 263.*

Walter Pereira, *K.C.*, *S.-G.* (*Maartensz*, *C.C.*, with him), for the Attorney-General.

Elliott (*B. F. de Silva* with him), for the defendant.

Cur. adv. vult.

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The plaint alleges that at the request of the defendant and on his undertaking to pay the charges, Mrs. Smith (the defendant's wife) was admitted into the General Hospital at Colombo, the property of the Government of Ceylon, as a patient, and that she remained there as a patient from May 17 to June 8, 1903; and the plaintiff, who is the Attorney-General, suing for the Government, claims payment of the charges, amounting to Rs. 131.70.

The defendant says in paragraphs 2 and 3 of his answer that his wife was admitted on the undertaking on the part of the Government that all due care and reasonable skill should be exercised by the agents and servants of the Government, who comprised the staff of the hospital, in the treatment, nursing, and care of the defendant's wife; that it was on that undertaking that he agreed to pay the charges; and that while she was a patient in the hospital, and in the course of an operation performed on her, the agents and servants of the Government who were performing or assisting in the operation acted in so unskilful and neglectful a manner that she was severely scalded, and sustained such grave injuries that she died from the affects of them. He accordingly denied his liablity to pay the charges, and claimed damages from the plaintiff for the loss and damage which he had sustained by reason of her death.

The plaintiff, in reply, joined issue as to the facts set out in paragraphs 2 and 3 of the answer, and specifically denied the alleged unskilfulness and negligence, or that the death of the defendant's wife was " attributed to scalding " and denied that the defendant had sustained any damage, or that, if he had, he was entitled to recover it from the plaintiff.

The action was commenced in the Court of Requests; but after the answer was filed, it was by order dated September 14, 1904, transferred to the District Court.

As I read the answer, the defendant founds his claim on the alleged undertaking by the Government that their servants in the hospital should exercise care and skill, and on the alleged negligence and unskilfulness of some one or more of the servants in breach of that undertaking. The plaintiff has contended that the defendant's claim is really for a tort and not for a breach of contract, and that it is therefore not maintainable against the Government; but I will for the present assume that it is for a breach of contract. As the plaintiff had joined issue on the allegation as to the alleged undertaking by the Government, one would have expected that there would have been an issue settled as to whether there was such an undertaking or not, and that the parties would have asked the Court, or that the Court without being asked would have determined, to try that issue first before embarking on the long and costly inquiry as to whether there was negligence, and if so, whether it was the cause of, or contributed to, the lady's death. No such issue, however, was specifically settled. The Court settled an " issue of law "—whether the answer disclosed a defence to the claim (with which we are not now concerned),—and four " issues of fact agreed upon by both parties, " viz.:—

(1) Did the agents and servants of the plaintiff (meaning, of course, of the Government) in the course of an operation on Mrs. Smith on May 23, 1903, act so unskilfully and negligently that she was scalded in three places?

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(2) Was her death due to the scalding?

(3) What damages did the plaintiff suffer by the death of his wife?

(4) Is he entitled to recover such damages from the plaintiff?

The fourth issue was obviously framed with reference to the plaintiff's averment in the replication that if the defendant suffered any damage he was not entitled to recover it from the plaintiff.

The District Court gave judgment at once for the plaintiff on his claim as to which there is no question now; and the trial of the defendant's claim then proceeded on the above four issues. The defendant's counsel first asked for an additional issue as to whether the scalding was a " probable " or " contributory " cause of death, which, however, the District Judge rejected, because it did not arise on the pleadings. Evidence was then given by the defendant and his witnesses at some length, the trial lasting twelve days; and on December 7, 1904, the District Judge, Mr. Weinman, gave his judgment. He found that the burns on Mrs. Smith were due to carelessness on the part of some servant of the Crown, amounting to negligence, and said that he was unable to particularize the individual responsible for the negligence; that the death of Mrs. Smith was not due to the burns; and that it was unnecessary for him to adjudicate on the third and fourth issues. He therefore gave judgment for the plaintiff on his claim, and dismissed the defendant's claim.

The defendant appealed against this judgment, and on May 25, 1905, the Supreme Court, composed of Layard C.J. and Moncreiff J., ordered a new trial. This was done, as appears from the judgment of the Chief Justice, because they thought that the District Judge ought to have accepted and tried the issue which was suggested by the defendant, whether the scalding contributed to Mrs. Smith's death. Moncreiff J. gave no reason, but he concurred in the order proposed by the Chief Justice, and doubtless for the same reason. The Chief Justice also said that the plaintiff had suggested that the defendant's claim was an action on a delict, but that he thought it should be treated as founded on contract, that is, on the implied undertaking alleged in the answer, and he expressed his opinion that the admission of a person into the General Hospital for treatment involves an implied undertaking on the part of the Government that due and reasonable skill will be exercised by the staff of the hospital, *i.e.*, by the servants of the Government, in the treatment, nursing, and care of the person admitted. Moncreiff J. made no reference to this point. His judgment is entirely devoted to the discussion of the question—What was the cause of Mrs. Smith's death; and having arrived at the conclusion that, on the materials then before the Court, the burns contributed to the death, he simply agreed to the order suggested by the Chief Justice without noticing the fourth

issue. The formal order of the Court was that the judgment of the District Court be set aside, and the case remitted to the said Court for a new trial and for fresh adjudication.

The case then came on for a new trial before another Judge, Mr. Dias, in September, 1906, when by consent the following additional issue was framed: Did the scalding contribute to Mrs. Smith's death in any way? By consent all the depositions of the first trial were taken as part of the proceedings, and additional evidence was taken on both sides, and evidence which had been taken on both sides on commission in England was also read. Upon objection being taken by the defendant to any evidence being adduced on the question of negligence, the District Judge quite rightly ruled that, as this was a new trial, he considered that all the issues were open for decision by him, and he over-ruled the objection. On November 5, 1906, he gave judgment. He said that the main questions at the first trial were whether the servants of the Crown had negligently scalded the defendant's wife, and whether her death was caused by such scalding, and that the case had been sent back for the determination of the further issue, whether or not the scalding in any way contributed to the death. He came to the conclusion that the scalding was due to a pure accident, and that the death was caused by exhaustion consequent on the lumbar abscess (for which the operation took place) complicated with dysentery and acute mania, and that the burns in no way contributed to it. Having been asked to assess the damages to which the defendant would be entitled if he had succeeded, he assessed them at Rs. 10,000. And he gave judgment for the plaintiff on his claim, and dismissed the defendant's claim.

The District Judge makes no reference to the fourth issue, except his ruling that all the issues were open for decision by him. In view of his finding on the additional issue, it was not necessary for him to decide the fourth issue. The defendant appealed against the judgment of Mr. Dias. The appeal was heard by Middleton J. and Wood Renton J., and judgment on it was given on August 11, 1907. On the questions whether the burns on Mrs. Smith were caused by the negligence of some servants or servant of the Government, and whether the burns contributed to her death, the Court came to a different conclusion from the District Judge. They were of opinion that upon the evidence the burns were caused by negligence, and contributed to the death as the defendant had contended; the negligence being, according to the finding of Middleton J., that of one of the hospital nurses. And they assessed the damages at Rs. 15,000. With regard to the question of the liability of the Government, they held that the plaintiff was no longer at liberty to contest it. Middleton J. said: "As regards the question whether the Government would be liable for any negligence on the part of the surgeon and nurses of the hospital, it was admitted that this was

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not argued in the Court below, and there is no issue which directly raises the question. If this point had been taken at the inception of the case, it might have been raised by a special issue of law as provided under the Civil Procedure Code, and a decision in favour of the plaintiff before the commencement of the trial might have been taken to the highest Court of the Empire, and, if affirmed, would have prevented the enormous expense which the two trials of the issues of fact in this case have involved. . . . . In my opinion the whole case has been fought on the principle that if the defendant proved negligence, and that negligence caused or contributed to the death of the deceased, the Government were prepared to pay the damages the Court might award. Without, therefore, expressing any opinion as to the legal position of the Government in its relation to the employès of the hospital, I am prepared to hold that it has waived its legal rights in this respect, if such exist, and must be held now bound to make that reparation which it impliedly admitted must be made if the issues agreed upon were decided unfavourably to it."

And Wood Renton J. said: "It was contended by the learned Solicitor-General, on the argument before us, that the appellant has no cause of action on the two-fold ground, that by the common law of the Colony a husband has no right to sue for damages in consequence of the death of his wife owing to the tortious act of a third party, and also that, even if such a right of action existed, it would not lie against the Attorney-General, against whom, in his official capacity, the appellant's claim in reconvention has been presented. I do not think that either of these points can avail the Crown in this action." He then discussed the general right of a husband to recover damages for the death of his wife owing to the tortious act of a third party, and then proceeded: "But even if I were in doubt whether the present action is maintainable on the ground with which I have been dealing, I should still hold that the point was not open to the Crown in this case. . . . . No materials are now before us on which it would have been possible for us to determine the real contractual relationship between the Crown, the hospital authorities, and patients admitted into the hospital. Such materials, however, could readily have been obtained. But I am clearly of opinion that no opportunity of adducing such evidence ought at this stage to be given to the Crown. . . . . From start to finish the attitude of the Crown towards the present appellant, since the plea of delict was disposed of, has been to court full inquiry and to accept the responsibility, if the appellant proved the allegations in his claim in reconvention. . . . . It would be highly inequitable now to permit the Crown, at the eleventh hour, after the case has been fought exclusively on the issues of fact, to fall back on a plea in law which would render the proceedings abortive."

I agree with the judgment under review that the burns of Mrs. Smith were caused by the negligence of a nurse, and that they contributed to her death. I cannot agree that the plaintiff was not entitled to have a decision on the fourth issue. Mr. Weinman did not decide it because, after his finding on the second issue, it was not necessary. At the second trial Mr. Dias did not again decide it, because again it was not necessary. And it appears to me that when that judgment came up on appeal, the Appeal Court, if it decided the other issues adversely to the plaintiff, was bound to give a decision on the fourth issue. I cannot infer from the proceedings at the trials that the plaintiff abandoned that issue. It would clearly have been the duty of Mr. Dias, if he had decided the other issues differently, to decide the fourth issue also. It is true that the proceedings were badly managed; that it would have been better to decide first the fourth issue, the decision of which might have rendered the others unnecessary; the District Judge might have taken upon himself to take this course, or either of the parties might have asked him to do so; but I do not see that the plaintiff is any more to blame than the defendant for not having done so. Nor can I agree with Wood Renton J. that we have no materials for deciding what was the contract between the Crown and the patient. I think it is probable that we have all the materials which we could have had; at any rate, if we have not, it was for the defendant to provide them; and there is no hint anywhere that the plaintiff ever asked for an opportunity of adducing any further evidence on the point. In my opinion, therefore, we must decide the fourth issue: " Is the defendant entitled to recover the damages from the plaintiff ? "

The plaintiff in his plaint alleges, and the defendant in his answer admits, that at the request of the defendant and on his undertaking to pay the charges the defendant's wife was admitted into the General Hospital, the property of the Government, as a patient; and the charges which the plaintiff claimed, and which the defendant has been held liable to pay, are: costs of her subsistence at Rs. 5 per diem, entrance fee Rs. 10½, ambulance hire Rs. 5½, and 70 cents extra. The defendant adds that there was an undertaking on the part of the Government that all due care and reasonable skill should be exercised by the agents and servants of the Government, who comprised the staff of the hospital, in the treatment and care of his wife. There is no evidence of any express understanding, and it may be taken as certain that there was none; so that the defendant must rely on an undertaking implied from the above facts. All that he says on the point in his evidence is that his wife was ill; that his private medical advisers said that a serious operation was necessary, and wanted him to take her to the hospital, and at his suggestion Dr. Garvin was called in, and recommended that she should go to the hospital. There is no other evidence on the point. Is it possible to say from these facts that there was

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such an implied undertaking as the defendant alleged? An implied undertaking is one which is not expressed, but which we infer from the circumstances that the parties intended, or, in other words, which they would have expressed if they had put down fully in writing the whole of the terms of their agreement. Would any Government or any association providing a hospital and admitting patients into it on the terms that they shall have the use of the rooms and the instruments and medicines and appliances and the services of physicians and surgeons and nurses and attendants gratuitously, with only a charge of Rs. 10½ for admission, bind itself to be liable for any negligence on the part of any physician, surgeon, nurse, dispenser, or bottle washer employed in the hospital? Would any patient expect the Government or association to undertake such a liability? In my opinion, certainly not. If any patient were to ask for such an undertaking, the answer would certainly be a refusal. The question, however, is probably covered by authority either here or in England; for amongst the thousands of cases which are admitted into hospitals every day, since hospital staffs are human beings and liable to occasional lapses into negligence, there must be multitudes of cases in which the patient suffers through the negligence of some of them.

In *Powers v. Massachusetts Homœopathic Hospital* [1] the defendants were a charitable corporation; the plaintiff had been a "paying patient," paying 14 dollars a week, and sued for damages for injuries caused by the negligence of a nurse employed in the hospital; the liability of the defendants for which the plaintiff contended was the liability of a master for the torts of his servants, and the Court treated the action as one for a tort. The Court first discussed the general question of the liability of a political or municipal body or trustees of a charity for the torts of their servants, and referred to several cases in which it had been held that a railroad company, having in its regular employ physicians and surgeons, whose duty to the company requires them to care for the sick and injured among the company's servants, is not liable to those servants for the negligence of those medical men. They then refer to the American case of *Macdonald v. Massachusetts General Hospital*, in which it was held that a patient could not recover for damage caused by the negligence of a hospital interne or surgeon. And they held that an agreement by the plaintiff to hold the defendant harmless from the acts of his servants arose by necessary implication from the relation of the parties. They said: "One who accepts the benefit of either a public or private charity enters into a relation which exempts its benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants . . . . . it would be intolerable that a good

[1] (1901) 65 *Law Rep. Ann.* 372.

Samaritan who takes to his house a wounded stranger for surgical care should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able not only to provide for one wounded man, but to establish a hospital for the care of a thousand, it would be no less intolerable that he should be held personally liable for the negligence of his servant in caring for any one of those thousand wounded men. We cannot perceive that the position of the defendants differs from the case supposed. . . . . If a suffering man avails himself of their charity, he takes the risk of malpractice, if their charitable agents have been carefully selected." They accordingly held that the defendants were not liable, without deciding whether they would have been liable upon proof that a nurse was incompetent, and that her incompetence was or ought to have been known to the defendants.

In *Hall v. Lees*[1] the claim for damages for injuries caused by the negligence of a nurse, the defendants were an association whose object was to provide for the supply of duly qualified nurses to attend on the sick in a certain neighbourhood; they supplied two nurses to attend on the plaintiff during an operation, and the plaintiff was burnt through the negligence of one of the nurses in the use of a hot water bottle. The Master of the Rolls said that the question depended on the true effect of the contract between the association and the patient, and held that what the association undertook was merely to find and supply nurses, using all reasonable care and skill in order to ensure their being competent and efficient; and the Court held that the defendants were therefore not liable. That case depended on what was the contract to be implied from the circumstances, and especially from the rules and regulations of the association, and is therefore not conclusive of the present case.

In *Evans v. Mayor, &c., of Liverpool*,[2] the defendants, a local authority, acting under statutory authority, provided a hospital for the use of the inhabitants of their district. The plaintiff's son was treated in the hospital for fever, and the action was for damages caused by his premature discharge from the hospital. At the trial certain issues of fact were tried (as in the present case), and the jury found, in answer to questions put to them by the Judge, that there was a want of reasonable care and skill on the part of the visiting physician of the hospital in or about the discharge of the boy; that in consequence of such want of skill and care the plaintiff suffered the damage complained of; and that there was an undertaking by the defendants with the plaintiff that their visiting physician should act with reasonable care and skill in and about the discharge of the boy. The Judge, however, on further consideration, held that there was no evidence of such an undertaking. He said that the

[1] *(1904) 2 K. B. 602.*

[2] *(1906) 1 K. B. 160.*

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defendants in such a case undertake the duties of persons who undertake to manage and carry on the business of a hospital with all skill and care; that they do not undertake the duties of medical men, but only that the patients shall have competent medical advice and assistance. And he gave judgment for the defendants.

In the first of the above cases, the claim was put as being in respect of a tort, the claimants seeking to make the defendants liable for the wrongful act, independently of any contract, of the servants. In the last, as in the present case, it was put in as in respect of a contract. The Attorney-General's counsel contended that the claim is really for a delict, for which he contended that the Crown cannot be sued. I think, however, that as Layard C.J. said, it is founded on contract; and Mr. Smith's counsel stated, on the argument before us, that his claim is on the implied undertaking. If there was no such implied undertaking, the claim against the Government must fail.

Whether there is such an implied or " tacit " undertaking is a pure inference of fact, the question being whether the conduct of the parties has been such that a reasonable man would understand from it that there was such an undertaking. In my opinion, there is no evidence of such an undertaking. The Government did not undertake to perform the operation on Mrs. Smith and nurse and attend to her while she was in the hospital, but only to supply proper rooms and appliances and competent surgeons and physicians and nurses; and there is no evidence of any breach of that undertaking

I would therefore set aside the decree which is under review, and restore the decree of the District Court, with costs of this hearing in review.

WENDT J.—

This is a hearing of this case in review preparatory to an appeal to the Privy Council. The decision under review is that pronounced by this Court (Middleton and Wood Renton JJ.) on August 11, 1907, whereby the judgment of the District Judge dismissing the defendant's claim in reconvention was reversed and judgment entered for defendant for Rs. 15,000 as damages. The action was originally brought in the Court of Requests of Colombo, but, in consequence of the claim in reconvention exceeding the jurisdiction of that Court, was transferred, after the close of the pleadings, to the District Court for trial. The plaintiff, who was the Attorney-General suing in his official capacity, sought to recover from defendant certain charges in respect of defendant's wife, on the allegation that at defendant's request and on his undertaking to pay the charges Mrs. Smith had been admitted as a patient into the General Hospital of Colombo, the property of the Government of Ceylon. The charges were for admittance (Rs. 10.50), costs of subsistence (Rs. 115.70), and ambulance hire (Rs. 5.50). In answer to that claim, defendant

admitted the undertaking alleged by plaintiff, but averred " that his said wife was so admitted on the undertaking on the part of the Government that all due care and reasonable skill will be exercised by the agents and servants of the said Government, who comprised the staff of the said hospital, in the treatment, nursing, and care of the defendant's said wife, and that it was on that undertaking that he agreed to pay the charges. " Further answering, the defendant said (paragraph 3) that while his wife was a patient in the hospital, and in the course of a certain operation performed on her, " the agents and servants of the Government who were performing or assisting in the said operation acted in so unskilful and negligent a manner that defendant's wife was severely scalded in three places, and sustained such grave injuries that she died from the effects thereof. " Defendant then (paragraph 4) set forth that his wife had jointly with him been carrying on a school, which in consequence of her death had to be closed, and (paragraph 5) pleaded that by reason of the facts set out in paragraph 3 he was not liable to pay plaintiff's claim, and further said that by reason of the said acts he had sustained loss and damage to the extent of Rs. 100,000, which he claimed from the plaintiff in reconvention. In his replication plaintiff first pleaded that the answer disclosed no valid defence to his claim. He then joined issue with defendant as to the facts set out in paragraphs 2, 3, 4, and 5 of the answer; denied the unskilfulness and negligence alleged; and that " the death of defendant's wife was attributed to scalding. " As to paragraph 5 of the answer, plaintiff denied " that the defendant sustained loss or damage to the extent of Rs. 100,000 or at all, or that if he had sustained any damage he was entitled to recover the same from plaintiff. "

At the first trial on November 22, 1904, the record began as follows:—

Issues of Law (agreed upon by both Parties).

Do the allegations in the answer disclose a valid defence to plaintiff's claim?

Issues of Fact (agreed upon by both Parties).

(1) Did the agents and servants of the plaintiff in the course of a certain operation which was performed on the defendant's wife on May 23, 1903, act so unskilfully and negligently that she was scalded in three places?

(2) Was her death on June 9, 1903, due to such scalding?

(3) What damages did defendant suffer by the death of his wife?

(4) Is he entitled to recover such damages from the plaintiff ?

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To these issues there was added by consent of parties at the second trial the following issue suggested by the judgment of this Court upon the first appeal, viz., " Did the scalding contribute to Mrs. Smith's death in any way? "

I have set out the pleadings and issues at length, because both at the hearing before Middleton J. and Wood Renton J. and at the argument before us counsel for the plaintiff contended under issue (4) that (1) the defendant's claim was founded on delict and not on contract, and could not therefore be maintained against the Crown; and (2) that, even if the claim was founded on contract, there was no liability on the part of plaintiff, because the facts did not establish any such undertaking by the Government to answer for the unskilfulness or negligence of its servants as the defendant relied upon. For the defendant it was argued that the basis of his claim was contract and not delict; that at all events this Court had finally settled it to be contract by its judgment on the first appeal, which was binding on plaintiff; that the facts did establish the undertaking by the Government which defendant pleaded in reconvention; and that as regards both branches of the objection to the competency of the claim, the Crown had waived its right to object, if any, by its conduct throughout the action, which it was said amounted to an undertaking to compensate the defendant if he established that by the negligence or unskilfulness of its servants he had been damnified. The plaintiff's objections, if well founded, go to the root of defendant's claim, and it is therefore necessary to examine the proceedings in the action in order to determine whether plaintiff is now precluded from taking advantage of them.

The fourth issue, although placed among issues of fact, was " clearly not a pure issue " of fact, nor was it a pure issue of law. It partook of both characters. I am unable to accept the suggestion thrown out by defendant's counsel that issue (4), read with issue (3), was intended merely to raise the question whether a man could recover damages for the loss of his wife. I think the plain object of the issue was to ask for a ruling whether, assuming defendant had suffered the damage alleged, the plaintiff was liable to indemnify him. At the first trial this question was not disposed of as a preliminary one, as it might conveniently have been, and as was in fact done with the question whether there was a good defence to the claim in convention. Neither party moved the Court so to dispose of it, and the defendant, as plaintiff in reconvention, proceeded to call his witnesses. Plaintiff called no witnesses in rebuttal, and the District Judge held on the first issue that the burns on Mrs. Smith's person were due to the " carelessness on the part of some servant of the Crown assisting in the operation, and such carelessness amounted to negligence; " on the second issue that death was not due to the burns; and it was unnecessary for him to adjudicate on the third and fourth issues.

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On appeal by the defendant, the Solicitor-General, on behalf of the plaintiff, presumably depending upon issue (4), argued, as I gather from the judgment of Layard C.J., that the claim in reconvention was founded on a delict, and could not therefore be maintained against the Crown. The Chief Justice, however, thought—Mr. Justice Moncreiff did not deal with the point—that " we ought to treat the claim as one founded on contract, and not as an action on a delict. " He also said: " I understand the answer alleges that the contract on which the plaintiff sues contains an implied undertaking on the part of the Government, the proprietor of the hospital, to use due care and reasonable skill in the treatment and nursing of the defendant's wife. " The plaintiff's action is undoubtedly and admittedly founded on the contract, and I think that the admission of a person into the General Hospital for treatment involves an implied undertaking on the part of the Government that due and reasonable skill will be exercised by the staff of the hospital, *i.e.*, by the servants of the Government, in the treatment, nursing, and care of the person so admitted into the hospital. If there was any negligence on the part of the servants of the Government in treating his deceased wife, the defendant has a claim in reconvention for damages on the implied contract set out by him in his answer. Later on the Chief Justice remarked that the implied contract was not specifically denied in the replication, and that no issue was raised at the trial as to whether the plaintiff's contract included the implied undertaking alleged by defendant; but in view of the expression of his own finding on the point, which I have already quoted, I do not think that the learned Judge treated the question as not in dispute. Indeed, in view of plaintiff's joinder of issue with defendant as to the facts set out in paragraphs 2, 3, 4, and 5 of the answer, I do not see how he could have regarded the implied contract as admitted on the pleadings. That it was not admitted on the issues I think I have shown in my remarks on the scope of issue (4); in the result this Court ordered a new trial, being of opinion that the District Judge ought to have framed the additional issue suggested to him by defendant, viz., as to whether the burns contributed to Mrs. Smith's death. At this new trial the whole case was open, and the new District Judge so dealt with it, framing the additional issue I have mentioned. He held that the burns were caused by the shifting of the towels in which a hot water bottle had been wrapped, and that this was due to a pure accident, for which no one could he held culpable, and that the burns in no way contributed to the patient's death. He, therefore, dismissed the claim in reconvention with costs, but having been asked to assess the damages which defendant would have been entitled to in the event of success, he estimated them at Rs. 10,000. That would fall under issue (3). Issue (4) was not mentioned at all in the judgment. It was admitted before us by the Solicitor-General that

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it was not argued because (he suggested) the plaintiff felt that defendant was making out no case on the facts. He stated, however, that it had never been withdrawn or abandoned; and that when the Appeal Court seemed disposed to take a view of the facts adverse to plaintiff, he pressed this fourth issue, and asked the Court to hold that, assuming the truth of the facts relied upon by the defendant, there was no liability on the part of the Crown to compensate him.

The Judges hearing the appeal held the plaintiff not entitled to take up the position. My brother Middleton said that it was admitted that the question whether the Government would be liable for any negligence on the part of the surgeons and nurses of the hospital had not been argued in the Court below, and remarked that there was no issue which directly raised that question. That is only accurate if he meant that the point was not formulated in so many words. As I have pointed out, issue (4) was large enough to include that question. He was of opinion that " the whole case has been fought on the principle that if the defendant proved negligence, and that that negligence caused or contributed to the death of the deceased, the Government were prepared to pay the damages the Court might award. Without, therefore, expressing any opinion as to the legal position of the Government in its relation to the employés of the hospital, I am prepared to hold that it has waived its legal rights in this respect, if such exist, and must be held bound to make that reparation which it impliedly admitted must be made if the issues agreed upon were decided unfavourably to it." I am unable to concur in this reasoning. I think the question of the Crown's liability was distinctly raised both in the replication and in issue (4), and that there was no implied waiver of that question. The District Court might no doubt, if it considered that the action could be disposed of upon that issue of law, have taken it up and determined it in the first instance, but the fact that it did not do so does not, in my opinion, debar plaintiff from relying upon that issue in appeal.

My brother Wood Renton expressed substantially the same view as his colleague. He appears to have considered that the onus of proving the contractual relation between the Crown, as proprietor of the hospital, and the patients admitted thereto lay on the Crown, and he expresses the clear opinion that no opportunity ought at that stage to be given the Crown of adducing such evidence. I think, however, that the onus of establishing the contract, out of which his claim arose, was on the defendant, and it is he that must suffer if it be not proved.

Mr. Elliott, in his very able argument before us, relied upon the decision in the House of Lords in the " Tasmania,"[1] but that is

[1] *15 App. Cas. 223.*

not exactly in point. It was an action brought by the owners of the " City of Corinth " against the owners of the " Tasmania " to recover the loss and damage sustained by a collision between the two vessels. In the situation in which the two vessels were, it was the duty of the " City of Corinth " to get out of the way of the " Tasmania, " whilst the latter vessel was bound to keep her course. It was not contested that the " City of Corinth " had starboarded and so brought herself across the bows of the " Tasmania " and caused the collision, but it was attempted at the trial to justify this manœuvre by the allegation that the " Tasmania " had luffed. The Judge who tried the action held that the " City of Corinth " had wholly failed to establish this case, and he accordingly found that she was to blame for the collision. The Court of Appeal was of the same opinion, but it upheld a contention, put forward before it for the first time, that the " Tasmania " had also been to blame, in that she had kept on her course too long, and it reversed the judgment of the Court of first instance on this ground. The House of Lords held that that was not an admissible ground of decision, inasmuch as, in the circumstances of that case, the Court of Appeal could not be sure that it had before it all the evidence which the plaintiffs might have placed before the Court if aware that negligence was attributed to them, and that, therefore, it would not be safe to rely upon that ground. In the present case the point in question is one which goes to the root of the whole claim. If it be based on contract, it is impossible to contend that the contract was not put in issue. But whether founded on contract or on tort, there being a distinct issue as to the plaintiff's liability for the damages claimed, the defendant acted at his own peril in proceeding to call his witnesses without asking for a preliminary ruling upon that issue. Nothing whatever that had transpired before that could be said to preclude plaintiff from taking the point. It is true he did not for himself ask the Court to decide the fourth issue first, but, in my opinion, that is not enough. In appeal the Chief Justice held that the action was *ex-contractu* and not *ex-delicto*, and that from the facts proved an implied contract on the part of the Crown could be inferred to answer for the negligence or want of skill of the hospital officers. That decision is open to review by us, as we have now upon the whole case to pronounce " judgment according to law. "

I hold, therefore, that the Crown is entitled now to have the question of its liability determined. Taking the action as one founded on contract, and therefore maintainable against the Crown, has defendant shown that Government impliedly (for it has not been suggested that it did so expressly) undertook " that all due care and reasonable skill should be exercised by the agents and servants of the said Government, who comprised the staff of the hospital, in the treatment, nursing, and care of the defendant's wife? "

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The hospital is a very large one, entirely supported by the Government. While an entrance fee of Rs. 10.50 is charged for the admission of a patient into the ward in which Mrs. Smith was treated, and Rs. 5 a day for the patient's subsistence, there is no charge whatever for the services of the medical and surgical and nursing staff or for medicines. Can it be inferred from the acceptance and treatment of a patient under such circumstances that the proprietors of the hospital not only provide a competent staff, but also guarantee that they shall use due care and reasonable skill, or, in other words, undertake that, if they fail in their duty, such proprietors shall indemnify the patient against loss? I agree with my Lord in thinking that that is not a reasonable inference, and that the undertaking relied upon cannot be implied from the acts of the parties. I agree also in thinking that the parties have in substance placed before the Court all the materials at their command relevant to the question of the relation between them. My brother Middleton tells me that at the argument before him the Solicitor-General, in meeting a remark from the Bench, offered to produce the hospital regulations, but that the Bench refused at that stage to look at them. There is nothing in the record, nor was there anything in the argument of counsel before us, to suggest that the contract (if any) between the parties was entered into with reference to those regulations, or that the defendant had ever seen them. It is perhaps to this incident that my brother Wood Renton refers, when he expresses the opportunity of adducing further evidence should be given to the Crown. There are very few cases in the English reports of actions brought by patients against the proprietors of hospitals, but in the United States of America this would seem to be a by no means uncommon description of action. In *Evans v. Mayor, &c., of Liverpool*[1] the plaintiff claimed damages consequent upon his children having been infected with scarlet fever by a patient whom the defendants had improperly discharged from their hospital while he was still in an infectious condition. The defendants were the Corporation of Liverpool, and the hospital was one provided by them under the Public Health Act, but this circumstance was not material. They had appointed a competent physician, who was responsible for the treatment of the patients from the beginning to the end of their stay, and also for their freedom from infection when discharged. The plaintiff's case was that this physician had been guilty of negligence in directing the discharge of the patient, and the jury found that there was want of reasonable skill or care on the part of the physician, that in consequence plaintiff suffered the damage complained of; and that "there was an undertaking by the defendants with the plaintiff that their visiting physician should act with reasonable care and skill in and about the discharge of the

[1] *(1906) 1 K. B. 160.*

boy from the hospital." Upon further consideration it was argued for the defendants that there was no evidence to support this latter finding of the jury. Walton J., in giving judgment, asked the question, " What is the obligation or duty imposed upon or undertaken by the defendants in a case like the present? In my opinion," he said, " they undertake the duties of persons who manage and carry on the business of a hospital, that is, the duties of persons who undertake to manage and carry on the business of a hospital with all skill and care." After deciding that it made no difference that defendants were entitled under the Act to charge the plaintiff for his son's residence and treatment in hospital, he proceeded: " They do not undertake the duties of medical men or to give medical advice, but they do undertake that the patients in their hospitals shall have competent medical advice and assistance, and it is admitted that Dr. Archer was a competent medical man, and that no blame attaches to the defendants for employing him. Assuming that he made a mistake, I do not think that the defendants are liable for its consequences. They have done all that the parent himself could have done. Had he been able to have his son treated in his own house, he could not have done more than provide a proper home for the boy, and provide nurses and good medical attendance. The defendants have not failed in any of these respects, and I think that they are not liable for the mistake, if there was a mistake, of Dr. Archer." I think the principle thus laid down is equally applicable to the case now before us.

Lees v. Hall[1] was an action against a nursing association, which had supplied a nurse whose negligence had caused the injury to the plaintiff. The Court of Appeal held that the association had not undertaken to nurse the patient, but only to supply her with a competent qualified nurse, and that for the nurse's negligence the association was not liable.

In the American case of *Powers v. Massachusetts Homœopathic Hospital*,[2] which was an action by a patient for damages caused to her by a nurse having negligently placed a hot water bottle against her side and left it there for some time, the United States Circuit Court of Appeal, after an exhaustive examination of all the cases, both American and English, said: " We assume there was evidence competent to establish a tort on the part of the nurse, for which the plaintiff could recover against the nurse. We assume that there was evidence that the nurse was the servant of the defendants, and that her tort was committed in the course of the defendant's service. If this be true, it is hard to see that the plaintiff need allege or prove any contract in order to recover against the defendant (because the defendant in that case could be sued in tort)..... The absence of a contract made with the defendant does not exempt it from

[1] *(1904) 2 K. B. 602; 73 L. J. K. B. 819.* [2] *(1901) 65 Law Rep. Ann. 372.*

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liability. If, indeed, there can be shown an agreement by the plaintiff to hold the defendant harmless for the acts of its servants, then it follows that this action cannot be maintained, and we agree with the learned Judge of the Court below that this agreement arises by necessary implication from the relation of the parties. That a man is sometimes deemed to assume a risk of negligence, so that he cannot sue for damages caused by the negligence, is familiar law..... Such is the case at bar. One who accepts the benefit either of a public or a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity, at any rate if the benefactor has used due care in selecting those servants." The evidence as to the character of the hospital in the present case brings it within the category of a " public or private charity " in the sense intended by the American Court, and their reasoning applies to the course before us. So far, therefore, are the facts from supporting the implication that the proprietors of the hospital undertook to insure the patient against the consequences of negligence or want of due skill or care on the part of the hospital staff, that they rather raise the inference that the patient, in taking advantage of the institution, " entered into a relation which exempts his benefactor from such liability."

I have assumed that the defendant's claim is based on contract. Defendant was obliged to put it so, because the Crown was not ordinarily liable for the torts of its servants, and I think he was entitled to put it in that way, although the damage caused him flowed from the tort of the Crown's employé. He alleges that the Crown in the present instance in effect contracted to answer for the torts of its officers. That allegation he has failed to substantiate.

I would note that, upon the question whether in fact there was negligence on the part of one or more of the hospital staff engaged in the treatment and nursing of defendant's wife, we did not call upon Mr. Elliott to support the judgment under review, and I have assumed that such negligence was established. In the view which I have taken it is unnecessary to consider any further question. I think the judgment under review should, so far as affects the claim in reconvention, be set aside, and the decree of the District Court dismissing that claim restored, and that defendant should pay the plaintiff's costs in both Courts, so far as they have not already been disposed of by the judgment of this Court upon the first appeal.

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After hearing the argument in review, I still adhere to the opinion I expressed in my judgment upon the appeal on the question of negligence and its contribution to the death of the deceased and damages. I would only wish to add, upon the question whether

dysentery had been proved by the plaintiff to exist, that I adopt the theory put forward for the defendant that Dr. Garvin might have believed originally when he told Smith so, that dysentery was present, but that he abandoned that view at the date of his report, and subsequently put it forward to support the conception he now presents of the case. If I have treated the case in my judgment upon the lines that a juryman ought to approach the decision of questions of fact, I did so on the footing that the verdict of the District Judge was, in my opinion, wrong, and with a view to show that the opinion I had formed was right. If on the hearing of an appeal upon facts it appears to the Appeal Court that the decision of the Court below cannot be supported, it must in intricate cases inevitably demonstrate by a detailed examination and criticism of the evidence the grounds of that opinion, and I do not feel that in doing so I have improperly dealt with the case. This is the position which I understand was adopted by my brother Wood Renton, who, thinking the verdict of the District Judge clearly wrong on the facts, acted as a jury in saying so. I think I ought to say that I fully accept the explanation offered by the Solicitor-General on behalf of the Attorney-General as to the way in which he came to make the statement I have commented on in my first judgment, but at the same time I feel that, even as a mere expression of opinion, it must have great weight attached to it as coming from the nominal plaintiff in the action, *though even not supported by information* received from the Principal Civil Medical Officer. The only other question which, in my opinion, calls for any further consideration on my part in this case is the contention of the learned Solicitor-General that no such action as defendant's claim in reconvention discloses will lie against the Government. In support of this the Solicitor-General says the point was taken in the District Court, and relies on the fourth issue settled at the first trial: Is defendant entitled to recover such damages from the plaintiff? This issue remained on the pleadings at the second trial apparently without comment or objection from one side or the other. It is contended by the learned counsel for the defendant here that the fourth issue must be read in conjunction with the third, and that it was intended to and did only raise the question whether defendant was entitled to recover damages for the death of his wife, and did not include the question whether the plaintiff was liable at all. I think it is impossible, however, to deny that it goes further, and does in fact raise the question whether the plaintiff, as representing the Government of Ceylon, is liable at all, although, as I said in my former judgment, it is scarcely a direct issue on the question of implied undertaking. In the plaintiff's replication to the defendant's answer and claim in reconvention it was denied (paragraph 4), if defendant had sustained any damage, that he was entitled to recover it from the plaintiff. This plea and issue if raised in argument would have gone to the root of the matter,

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and might have settled the case without resort to the heavy expense which has been entailed by the trial of the issues of fact as to negligence and its contribution to the death of the deceased.

On the hearing of the case in appeal, when the learned Solicitor-General was concluding his argument on the point, I have it noted that he admitted he did not argue the point in the Court below. In sending the case back for a new trial after the first hearing on appeal, Sir Charles Layard, C.J. expressed the opinion that the plaintiff's action, undoubtedly and admittedly founded on contract, involved an implied undertaking, that due and reasonable skill should be exercised by the staff of the hospital upon the admission of a person for treatment. The late Chief Justice further held that the implied contract was not specifically denied in plaintiff's replication, and that no issue was raised at the trial as to whether the plaintiff's contract included the implied undertaking alleged by defendant, and that therefore the defendant's claim in reconvention ought to be treated as one founded on contract and not on delict, as had been suggested on the argument. The learned Chief Justice then went on to say, "it is admitted that if the action is based on contract, the defendant can maintain such an action against the plaintiff. The question remains to be decided whether the defendant has substantiated the negligence alleged by him."

With this judgment staring them in the face the parties went to a new trial, and not a word was ever advanced on behalf of the plaintiff in support of the objection which he is now upholding. The plaintiff's attention must have been drawn to the fact that the Chief Justice held that the contract was not specifically denied in his replication, and yet no attempt was made to amend either the pleadings or issues. To settle the fourth issue it was, in my opinion, the obvious duty of the plaintiff to meet the averment by the defendant of an implied contract, and to put him to the proof of it at the very inception of the case. As this was not done it seems to me most inequitable at this stage, as, indeed, it did upon the hearing of the appeal, to hold that the defendant has failed to support an issue, which in fact the plaintiff had utterly disregarded or waived by his failure to raise the question of implied contract put forward by the defendant. It may be that the reason why *Hall v. Lees*[1] was not relied on for the plaintiff was that it was felt that if the facts in regard to the regulations governing the admission of paying patients into Government hospitals in Ceylon were proved, it would be found, in accordance with the ruling of the Master of the Rolls, that they undertook to nurse the patient, and not only to supply a competent nurse. If that were not so, it is surprising that that case was not availed of even on the argument before us to support the plaintiff's objection to liability. It is further contended by the

[1] (1904) 2 *K. B.* 602.

Solicitor-General that it was not necessary under the Civil Procedure Code to deny the implied contract. This was an action commenced in the Court of Requests and transferred to the District Court apparently after the replication of the plaintiff was filed, as that document bears the caption of the Court of Requests, Colombo, and is dated September 6, 1904. Under section 811 of the Civil Procedure Code, where a defendant pleads a claim in reconvention with his answer, the plaintiff, shall be called upon to deny or admit the same. If he denies the claim, he shall be required to plead thereto. The plaintiff filed a written replication under section 809 (*b*), in which he joined issue on the facts set out in paragraphs 2, 3, 4, and 5 of defendant's answer. He did not specifically deny the implied contract alleged in those paragraphs, and no issue was in fact settled raising the question of its existence, unless the fourth issue can be said to do so. If the case had been instituted in the District Court under section 75 (*e*), the defendant's claim in reconvention would have the same effect as a plaint in a cross action, and the plaintiff's replication as the answer to it should have admitted or denied the several averments in it.

When Sir Charles Layard's judgment was delivered, the action was in the District Court under section 81 of the Courts Ordinance (No. 1 of 1889), and he directly called attention to a defect in the pleadings, which, if it were so, and the Chief Justice had held it was, might have been amended when the case went back, by the framing of an issue which would have clearly raised the question of implied undertaking. No such issue was settled, and the question was not even raised, but the case went to trial for the second time on the old issues, plus the new one as to contribution. The defendant's case was entirely heard, and no objection was taken at the close of it that the defendant had established no cause of action on implied contract. The plaintiff's evidence was heard, and no objection on the question of contract is to be found on the record on the part of the plaintiff. The District Judge reserved his decision, and in his lengthy judgment never touches on the question whether the defendant was entitled to maintain his action on the ground of implied contract, and the point is not raised until the case came again in appeal before my brother Wood Renton and myself, and then, not as a preliminary objection, but at the end of the argument of the learned Solicitor-General, and after he had fully discussed the merits of the case and formulated all his arguments on those merits from the point of view of the plaintiff. During the argument also on the second appeal my brother Wood Renton observed that we had not the materials before us for deciding whether here was such an implied undertaking as the claim in reconvention averred, and the learned Solicitor-General, apparently acquiescing, suggested that we might even now take evidence on the point, and offered to put in the hospital regulations. But we thought it was then too

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late. My brother Wood Renton thought also, and I agreed with him, that if the plaintiff contended that the position of a Government hospital relieved the Crown from the ordinary result of such a contract, *i.e.*, the duty of reasonable care, it was for the plaintiff to raise the point specifically and to establish it. The burden, it seems to me, was specially on the plaintiff after Sir Charles Layard had pointed out that the replication did not specifically deny the implied contract, and had stated that "it was admitted" that action, if founded on contract instead of on tort, lay. Moreover, I do not think that there are sufficient materials before us to enable us clearly to infer that a Government hospital must of necessity be deemed exempt from the obligation of due and reasonable care as averred in the claim in reconvention. It may be irrational to suppose that a Government hospital would accept patients on the terms of being responsible for the negligence of its surgeons and nurses, but I think it was incumbent on the plaintiff to rebut the averment by the pleading and production of the hospital regulations, or some other evidence showing on what terms patients were admitted. The fact that the point was not taken during the whole of the second trial shows an acquiescence in the dictum of Sir Charles Layard, which induced the defendant to act to his own prejudice, and deprived him of the benefit of suing the hospital authorities instead of, alternatively with, the Attorney-General.

I must hold, therefore, that the plaintiff is estopped by his conduct at the second trial from now denying his liability to the defendant (section 115, Evidence Ordinance, 1895). In my opinion the appeal in review should be dismissed with costs. If, however, I am wrong on this point and on the question of sufficiency of materials, I feel the force of the opinion expressed by my Lord and my brother Wendt, whose judgments I have been privileged to peruse, that the plaintiff is not liable to the defendant on his claim in reconvention.

Judgment in appeal reversed.