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Article 10

Lepine v. University Hospital Board &(and) Monckton (1966) S.C.R. 561

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> Hence the status of a land owner cannot per se affect the operation of a by-law implementing the statutory power without defeating the statutory power itself.[43]

Has the present Supreme Court reversed itself and defeated the statutory powers of zoning?

> The provincial legislature has imposed an important limitation upon the power of the council in requiring that by-laws such as these must be approved by this Board before they become effective, and on application for such approval the Board should be satisfied after due inquiry into the circumstances that council has in good faith decided to enact the by-law or amend to protect or promote public interest, after considering all aspects of the situation including the possibility of injury to private interests.[44]

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TORTS

Lepine v. University Hospital Board & Monckton [1966] S.C.R. 561.

NEGLIGENCE — EPILEPTIC PATIENT SUFFERING FROM POST-EPILEPTIC AUTOMATISM — LEAP FROM WARD WINDOW OF DEFENDENT HOSPITAL — REASONABLY FORESEEABLE WHERE BOTH DEFENDANTS KNEW OF PLAINTIFF'S VIOLENT AND UNCONTROLLED MENTAL ILLNESS.

In a recent decision the Supreme Court of Canada shortly disposed of a question, the merits of which, it is respectfully submitted, demanded a far more intensive examination than the court was prepared to give it. The problem which arose in the case of *Lepine v. University Hospital Board & Monckton*[1] is one of the degree of care to which a patient, suffering from a specific known ailment, is entitled to receive from a hospital which accepts the responsibility of his treatment. The plaintiff suffered from epilepsy, and in the seven days previous to the unfortunate accident had had a series of seizures, initially in his hotel room, where he resided while receiving treatment from defendant doctor, and then in the defendant hospital where he was taken by the police after becoming violent and mentally disoriented. Those seizures known of in the hospital were carefully documented by the nursing staff, as well as his previous epileptic history before entering hospital. More importantly, the staff of the hospital was well aware of his desire, while mentally uncontrolled, to escape the confines of his room on the fourth floor and the hospital

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[43] *Canadian Petrofina Ltd., supra,* footnote 15; see also *Spiers v. Township Toronto,* 1950] O.W.N. 427, at 431, where Ferguson, J. adopts the reasoning of Viscount Cave and states: "That judgment [*Separate Schools* case] makes it clear that the status of the building owner is not the test."

[44] *Is Zoning Wagging the Dog, supra,* footnote 1.

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1 [1966] S.C.R. 561, (1965) 54 D.L.R. (2d) 340 (Alta. C.A.), (1965) 50 D.L.R (2d) 225 (Alta Sup. Ct.).

entirely, since he had twice, within the span of several hours, run out onto the city streets; he was on both occasions found and returned only with the aid of the police. After he was taken back to his room on the fourth floor, and in the presence of several police constables, a hospital orderly, a nurse, and the defendant doctor who had just entered the room, the plaintiff jumped up on a chair and dove out the window, sustaining severe, but not fatal, injuries. Plaintiff subsequently brought separate actions against the hospital and the doctor based on the alleged negligence of the respective defendants, and these by agreement were tried together in this present action.

Clearly, it was known by the defendants that the plaintiff suffered from a form of epilepsy known as "Automatism", and was among a small number, perhaps no more than twenty per cent, who move about during a seizure, sometimes at considerable danger to themselves or others.[2] Moreover, the acting-out by the plaintiff while in this "automaton" condition, and the violent incoherence which he displayed as a result, were not only observed by those coming into contact with him, but were recorded in his file, and both defendants had access to these records. At trial, Farthing J. said:

> . . . the defendant from the start had definite knowledge of his tendency to dangerous post-epileptic automatism . . .[3]

After a lengthy review of both the evidence and the relevant authorities from Canada, England, and the United States, Farthing J. held that negligence against the defendant hospital had been shown clearly, but dismissed plaintiff's action against Dr. Monckton. As to the negligence of the hospital, Farthing J. said:

> In the instant case, his tendency to irresponsible moving about was well known to all concerned.[4]

> In my . . . opinion . . . the misfortune which befell the plaintiff resulted from the fact that . . . [the defendant] . . . placed him in the category of an ordinary epileptic.[5]

> The defendant undertook the care of the plaintiff who . . . suffered shattering injuries while in such care . . . In the light of the evidence . . . plaintiff is entitled to judgment.[6]

As for the action against Dr. Monckton, the court held that while the doctor agreed with the hospital policy, no culpable negligence was attributable to him.

> It seems to me clear that the only real ground of complaint against him was his failure — if any — to protect the hospital authorities against the policy by which his patient, afflicted with post-epileptic automatism of a type manifestly dangerous to himself, and perhaps to others, was subject to the same rules as to quarters and care as those suffering merely from non-automatic epilepsy.[7]

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2 (1965) 50 D.L.R. (2d) 225, 227.
3 *Ibid.* 273.
4 *Ibid.* 272.
5 *Ibid.* 273.
6 *Ibid.* 273.
7 *Ibid.* 254.

Farthing J. concluded that Dr. Monckton was guilty, at most, of an error of judgment, but not one amounting to negligence.

On appeal to the Court of Appeal for Alberta, the court unanimously dismissed the hospital's appeal, and by a majority of two to one allowed plaintiff's appeal against the defendant doctor. As to the negligence of the defendant hospital, Smith J.A. said:

> . . . there was ample evidence upon which the learned trial Judge . . . could find that the allegations of negligence against the hospital were established . . . [and] . . . that the lack of supervision was the effective cause of the accident to the respondent.[8]

Cairns J.A. more fully stated his findings by looking to the plaintiff's illness and came to the conclusion,

> that not only had the condition of Lepine worsened, but he became . . . psychotic . . . This condition was known by Nurse Collins and was known to Dr. Shea . . . The negligence which caused the plaintiff's damage was continuous . . . and is not confined to the incident when he jumped out the window. It should have been foreseen or anticipated that a patient in his changed condition might well do damage to himself.[9]

As to Dr. Monckton, Cairns J.A. in effect upheld Farthing J.'s view of the matter and dismissed Lepine's appeal because,

> The doctor knew nothing of the changed condition of Lepine until he went into the room on the 24th when the accident occurred . . . [H]e cannot be responsible for not knowing of the situation as it stood at that time, that is to say the changed condition of Lepine. He did not have any opportunity to take any steps to obviate the danger.[10]

The third member of the court, Johnson J.A. found negligence on the part of the hospital for their failure to supply constant supervision to the patient who was in extreme mental upset. As to liability attaching to Dr. Monckton, he found that,

> Dr. Monckton admitted that he had been given all the information that Dr. Shea and the hospital nurses had . . . He was the one most fully aware of the danger. He requested that Lepine be treated in that ward. The responsibility for seeing that extra care be provided was, at its very least, a shared responsibility. Therefore, . . . Dr. Monckton and the hospital should be held liable.[11]

Notwithstanding the disagreement over the merit of the plaintiff's claim as to the negligence of the defendant doctor, all four Judges in both courts found that, as a fact, the defendants were clearly aware of the plaintiff's condition, not just as an epileptic, but as one who suffered from the far more volatile condition of "automatism". It was because of this knowledge accruing to the defendants that the courts held it was negligent for both the defendants not to have provided the standard of care which would have prevented the plaintiff from suffering his damages, had it been provided.

On the appeal by both defendants to the Supreme Court of Canada, both appeals were allowed. The court, it is respectfully submitted, erroneously minimized the effect of the lower court's findings. Hall

8 (1965) 54 D.L.R. (2d) 340, 341.
9 *Ibid.* 356.
10 *Ibid.* 357-8.
11 *Ibid.* 362-3.

J., after a rather detailed review of judgments of the lower courts, said:

> . . . apart from the somewhat general finding that Lepine should have had but was not given continuous supervision on a round the clock basis from July 17 onwards, there does not appear to be a consensus on the part of the Judges below other than if such supervision had been provided Lepine would not have . . . jumped from the window.[12]

To arrive at the consensus apparently demanded by the Supreme Court, all four Judges, who had attached liability to the defendants, would have had to agree, somewhat unrealistically, to the type of supervision required, the number of participants, and the length of time they were to remain at the plaintiff's bedside. While this may be hair-splitting, it does seem clear that a definite finding of negligence was made, and if the cure suggested varies, it is not of primary importance.

Several criticisms may be made as to the manner in which Hall J. denied the plaintiff's remedy. Hall J. employed a two stage argument; in the first stage, he divorces the events preceding the jump from the jump itself:

> . . . all Judges below . . . seemed unable to visualize the situation as it developed towards its climax without being able to test the steps in the tragic occurrence except in the light of the final act of jumping.[13]

This statement in itself seems rather a hasty claim in the light of what Cairns J. said in the Court of Appeal:

> . . . [T]he negligence which caused the plaintiff's damage was continuous and is not confined to the incident when he jumped out the window.[14]

Notwithstanding this inconsistency, Hall J. continued on in the second stage where he said that the true test of liability lay in regard to the "tragic" events leading up to the jump. The test,

> . . . [as to] . . . [t]he question of whether there was or was not negligence . . . [o]ne principle emerges upon which there is universal agreement, namely, that whether or not an act or omission is negligent must be judged not by its consequences alone but also by considering whether a reasonable person should have anticipated that what happened might be a natural result of that act or omission.[15]

Hall J. then concluded that on this test, proposed in the case of *Glasgow Corporation v. Muir*,[16] Lepine's sudden leap through the window was not an event which a reasonable man would have foreseen and which would have required the defendants to take more precautions than were taken.

> . . . the injuries sustained by Lepine were the result of an impulse on his part which could not reasonably have been foreseen.[17]

It is unclear whether Hall J., by stating the "universal" principle, was inferring that the courts failed to apply the proper method to

12 [1966] S.C.R. 561, 578.
13 *Ibid.* 579.
14 (1965) 54 D.L.R. (2d) 340, 356, per Cairns J.A.
15 [1966] S.C.R. 561, 579.
16 [1943] A.C. 449.
17 [1966] S.C.R. 580.

deducing tort liability, or whether he merely stated the rule, and substituted his own conclusion for the one arrived at by the lower courts. Assuming that the *Glasgow Corporation* principle is based upon a determination of "foresight", it would clearly appear that both the trial judge and the Justices of Appeal employed the "foresight" test, after finding that the defendants did have knowledge of plaintiff's specific illness, and had seen an acting-out, in a violent form, of this illness. Had they not, of course, had notice of his mental unpredictability, then it would not be reasonable to assume they should have "foreseen" his jump or damage of a similar type. But the defendants *did* have actual knowledge of plaintiff's problem. Farthing J. in the trial clearly found this.[18]

In the Court of Appeal, Cairns J. spoke of a Nurse Collins who was concerned with the plaintiff's condition,

> . . . because on the chart which she made out on leaving she noted the words 'psychiatric assistance?' This certainly was a warning to the medical staff . . .[19]

Clearly then, where the court accepts the fact that the defendants are in possession of certain facts and ultimately finds negligence, they are impliedly finding that, on these facts, the defendants as reasonable men should have foreseen the events which caused the plaintiff to sustain his injury. Hall J., and his brothers in the Supreme Court,[20] employing the same test of liability, on the same reported facts, came to the exact opposite conclusion.

This conclusion of the Supreme Court of Canada, it is respectfully submitted, is erroneous. The decision is arguable in respect of two aspects: the first, shortly, being one of the advisability of an appellate court using the same principle of law in regard to the same facts and reversing the effect of these facts. The Court of Appeal in the present case unanimously held that the trial Judge had carefully weighed the evidence and come to the correct decision on his view of the facts. Smith J. in concluding his judgment said that to him,

> it would be unjustifiably interfering with the function of the trial Judge to weigh the evidence and come to the opposite conclusion in so far as the hospital is concerned . . . [and] . . . this case is one in which not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage against the trial Judges . . . [where] . . . it has not been shown that he has failed to use or has palpably misused his advantage . . . by failing to observe inconsistencies or indisputable fact or material probabilities.[21]

And further Cairns J. A. stated:

> . . . and I do not conceive it to be the function of this court to question his findings where they were based on ample evidence.[22]

As to the second aspect, it does not seem as difficult as the Supreme Court made it appear for the reasonable man to visualize the plaintiff,

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18 (1965) 50 D.L.R. (2d) 225, 245-6.
19 (1965) 54 D.L.R. (2d) 340, 348, per Cairns J.A.
20 Abbot, Martland, Judson, Ritchie and Hall J.J.
21 (1965), 54 D.L.R. (2d) 340, 341-2, per Smith J.A.
22 *Ibid.* 343.

mentally disoriented as he was, choosing the window as a means of escape when he saw the door was blocked by the police and some hospital staff. The defendants were, as was noted above, aware of both the plaintiff's tendencies to move about uncontrollably, and the seriousness of his illness. Therefore, it is submitted, that because of the violent consequences of his disease, and more importantly because his disease was of a mental nature, the defendants should have attached to them a higher standard of care, the breaching of which should have led to a finding of negligence by the Supreme Court.

In the case of *Stradel v. Albertson et al*,[23] the Saskatchewan Court of Appeal found that there was no liability on the part of a hospital for the suicide of a patient *where none of the deceased's symptoms, known to his doctor or to the hospital, suggested suicidal tendencies.* Gordon J.A. found that a reasonable man would not have anticipated the suicidal leap.[24] Unlike the *Stradel* decision, however, Lepine was known to have "epileptic automatism" and his mental aberrations were well known to the hospital, leading therefore, to the conclusion that, had the same degree of knowledge been available in the *Stradel* case, liability might clearly have attached. Furthermore, Lepine should not have been treated as a normal patient undergoing treatment, not even a normal epileptic patient, but as one whose mental condition rendered him liable to pursue any course of conduct, and therefore the plaintiff's leap should have been, if not anticipated, at least contemplated.

In *Cahoon v. Edmonton Hospital Board*,[25] although the plaintiff, who was burned by falling against an unenclosed radiator near his bed, was denied his remedy because the occurrence was found to be an accident rather than negligence on the part of the hospital, the trial Judge clearly expressed the view (although obiter) that mental disease or epilepsy does require some difference in standards:

> The medical superintendent of the defendant hospital said that there would be no indication to use side boards where the patient was under treatment for a chipped patella and *where there was no history or evidence of mental* illness.[26]

And further,

> It is clear from the evidence . . . *that the plaintiff was not suffering from any mental disease or disturbance* prior to being admitted to the defendants' hospital . . . there were no symptoms of any kind exhibited by the plaintiff to lead . . . [his doctor] . . . to believe that special precautions were needed. *There was no history of epilepsy.*[27]

Earlier decisions, it seems, have distinguished the situation where a hospital is faced with the admission of a person suffering from some sort of malady which may cause him to lose control of his actions from the ordinary situation, and the hospital is then put, not unreason-

23 [1954] 2 D.L.R. 328 (Sask. C.A.).
24 *Ibid.* 335.
25 (1957) 23 W.W.R. 131 (Alta. S.C.).
26 *Ibid.* 134.
27 *Ibid.* 133.

ably, on notice that the patient may not remain docile in his sick bed. Where there is this risk the hospital must clearly adjust its standards to meet additional extra-normal contingencies which may arise. In the *Lepine* situation, while it may be completely out of the question for a normal patient to dive out of a fourth storey window, it ought to be reasonably foreseeable that a man, without the normal mental control, who has attempted violent escapes previously, might conceive of jumping through a window, especially if other escape routes were cut off.

Further, it is arguable that liability may still be attached to the defendants notwithstanding the lack of a specific duty and breach, which leads to a finding of negligence, where, in general, the activity pursued by the defendant, albeit approved by custom, is not sufficient to provide the patient with the required standards of treatment. The proposition that procedures in accordance with general and approved conduct justifies activity which may otherwise be negligent has been upheld in several Canadian cases, so that a hospital imitating routines present in other hospitals may escape liability. It is submitted that, in the interest of the public at large, this justification of approved customary conduct is in specific cases untenable.

The leading case is *Vancouver General Hospital v. McDaniel et al*[28] where it was held that a defendant charged with negligence will not be liable if he has acted in accordance with general and approved practice. Here a diptheria patient contracted smallpox when he was placed on the same floor of a hospital with patients having smallpox. In the Privy Council Lord Alness said:

> . . . these medical men . . . affirm that the technique . . .is in accord with general if not with universal practice today in Canada and the United States . . . A defendant charged with negligence can clear his . . . if he shows that he has acted in accord with general and approved practice.[29]

The doctrine was again followed in the case of *Robinson v. Annapolis General Hospital & Kerr*[30] where the Nova Scotia Supreme Court held that no negligence was attributable to the defendant hospital for a lack of supervision by its nurses where the plaintiff fell from her bed. The nurses, it was found, were justified in believing that the supervision given was satisfactory, and that the practice, in fact followed, was standard approved practice.

This proposition of the invincibility of following the generally approved practice was further reinforced in the recent Ontario decision of *Murphy v. St. Catharine's General Hospital et al.*[31] In this case Gale C.J. found negligence where a piece of intravenous tubing became lodged in the plaintiff's arm because of the actions of an incompetent intern. Gale C.J. *inter alia* held:

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[28] [1934] 4 D.L.R. 593 (P.C.).
[29] *Ibid.* 596.
[30] (1956) 4 D.L.R. (2d) 421.
[31] (1964) 41 D.L.R. (2d) 697 (Ont. H.C.).

> . . . the hospital was clearly negligent, failing . . . to match the standard of care that ought to be maintained by any hospital of its size and importance.[32]

He continued on to compare the methodology of the operation in question with several large Toronto hospitals, implying that negligence would not have attached to the defendant hospital had their routine been the same as Toronto General Hospital, among others.

In the present case, notwithstanding that all elements may have represented the general routines of hospitals in regard to the treatment of epileptics, the court, it is respectfully submitted, could and should have struck down the practice of the hospital in treating as one class all epileptic sufferers, as it restricted the hospital from discharging its general obligation to sufficiently treat each patient individually. Farthing J., besides finding a definite breach of the defendant's duty to the plaintiff, also took cognizance of the "customary practice" proposition and found that if those in charge of hospitals can escape liability for negligence,

> simply on the plea that they have complied with the established practice, they can, in effect, in the course of time create enough customs to provide a good defence against almost any claim for damages for personal injuries.[33]

Where a customary practice denies a plaintiff his remedy, as in the present case, the court should express its disapproval of this unjust practice, and find the defendants negligent on a basis of a "protective" public policy.

Special circumstances may require the adoption of extraordinary precautions such that a common practice itself may be condemned as negligent if pregnant with obvious risks.[34]

"Neglect of duty does not cease by repetition to be neglect of duty."[35]

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[32] *Ibid.* 714.

[33] (1965) 50 D.L.R. (2d) 225, 272-3.

[34] FLEMING, JOHN G., THE LAW OF TORTS, 3rd ed., (Sydney: Law Book Co. of Australia Pty. Ltd., 1965) 122, 123.

[35] *Bank of Montreal v. Dominion Guarantee Co.*, [1930] A.C. 659, 666, per Lord Tomlin.

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