[VASSILIADES, P., JOSEPHIDES, HADJIANASTASSIOU, JJ.]

KATINA HADJI THEODOSSIOU,
*Appellant-Plaintiff,*

*v.*

1. PETROS KOULIA,
2. EVLALIA EFSTRATOUDAKI,
*Respondents-Defendants.*

(*Civil Appeal Nos.* 4780 & 4691).

*Negligence—Medical negligence—Burns caused to the patient's lower limbs by hot water bottles through the negligence of surgeon's assistants—Case of* res ipsa loquitur*—Burden on defendant of disproving negligence not discharged—Liability of doctor who runs a private clinic for negligence of his assistants, either servants or agents—Doctrine of* respondeat superior*—Doctor held liable for negligence of his assistants.*

*Medical negligence—See* supra.

Res ipsa loquitur*—Doctrine of—Applies in the circumstances of this case—No satisfactory explanation given by the defendant of the injuries (burns) suffered by the patient-plaintiff—Onus on defendant to disprove negligence not discharged—See also* supra.

Respondeat superior*—Doctrine of—Applies to this case—Surgeon held liable for the negligence of his assistants—See also* supra.

*Civil wrongs—Negligence—Section* 51 *of the Civil Wrongs Law, Cap.* 148*—See also* supra.

*Torts—Negligence—See* supra.

*Statutes—Codification—Construction—Statutes purporting to codify the English Common Law in a particular field—Construction and application of such statutory provisions—Section* 51 *of the Civil Wrongs Law, Cap.* 148 *purporting to codify the Common Law regarding negligence—Principles applicable and approach of the Judge to such statutory provisions, their construction and application.*

The appellant-plaintiff, a married woman, aged 35 years, was admitted to the private clinic of the first defendant, an Obstetrician and Gynaecologist, on September 2, 1965, as an emergency case to be delivered of her second child. The

patient was taken to the operation theatre on the following day for a caesarian section to be performed. The operation started at about 2 p.m. of September 3, 1965. Present were the first defendant who was in charge of the case ; Dr. Arg. a surgeon as his assistant ; Dr. Nik. as anaesthetist ; defendant's No. 1 wife helping the anaesthetist ; the second defendant, a qualified and experienced nurse called by the first defendant from another clinic to assist him with the instruments in the operation theatre ; and another nurse. In the course of the operation, while the patient was still unconscious under the anaesthetic, a probable complication appeared. After a very brief consultation with his assistant, the defendant doctor decided on a " hysterectomy ". Towards the end of the operation which took some 2–2 1/2 hours, the patient presented symptons of severe shock. Her condition became critical. To meet this development, the defendant doctor and his assistant used, *inter alia*, two hot water bottles which, wrapped up in a flannel, were placed by the nurse (second defendant) on the patient's lower limbs where she (the nurse) kept them for five to six minutes. The hot water bottles caused a " redness " on the skin of both limbs where they had been placed. On the second or third day the redness developed blisters which the defendant doctor opened with sterilized scissors. The injuries were burns, obviously caused by the hot water bottles. When the defendant doctor discharged the plaintiff from his clinic about a fortnight later, on September 18, 1965, the plaintiff still had injuries of burns on both lower limbs.

The extent and consequences of those injuries, and whether they were caused by the negligence of the first defendant or any of his assistants, in the performance of their professional duty to the plaintiff-appellant, is the dispute in this case.

As to the nature of the injuries, there can be no doubt that they originated in burns caused by the hot water bottles. This was accepted by the trial Court who, moreover, unanimously held that in the circumstances, the rule of *res ipsa loquitur* applies. The trial Court, also unanimously, held that the defendant doctor is in law responsible for the persons who were assisting him in the operation, regardless of their individual liability. This brings us to the two main issues in this case : First the question of liability for negligence ; and secondly the quantum of general damages to which the plaintiff (now appellant) may be entitled for the burns on her lower limbs.

On both these issues the two Judges constituting the bench of the trial Court did not reach agreement. The Presiding Judge (*Georghiou, President*) was of the opinion that the burns were caused by the negligent use of the hot water bottles by the defendant doctor and his assistants ; and that for the injuries suffered therefrom the plaintiff is entitled to £1,000 general damages in addition to special damages. The other member of the trial Court (Kourris, District Judge) was of the opinion that the burns were not due to any negligence on the part of the defendant doctor or his assistants ; that such burns have been sufficiently explained under the rule *res ipsa loquitur ;* and, in any case, the compensation payable, in case negligence were established, is £500 general damages in addition to the special damages incurred. As a result of this disagreement the plaintiff's action was dismissed with no order as to costs. It is from this dismissal that the plaintiff lady took this appeal, both as to the issue of liability and that of the quantum of the general damages.

Allowing the appeal, the Court :—

*Held, I. As regards the question of liability :*

(1)—(*a*) There is no doubt that the injuries in question originated in burns caused by the hot water bottles. This is accepted by the trial Court who, moreover, unanimously held that in the circumstances the rule of *res ipsa loquitur* applies. We find ourselves in agreement with this view. The facts in this case speak for themselves, calling for a satisfactory explanation on the part of the defendant, failing which the responsibility for the consequences must rest upon him.

(*b*) In our view such explanation was not given. The defendant and his assistants owed a duty to the plaintiff-appellant to use such skill and take such care in the use of the hot water bottles, as to avoid causing to the plaintiff the burns found upon both her lower limbs on September 19, 1965 ; burns which were caused by the heat of the bottles. Such burns, in our view, could undoubtedly be avoided, if the defendant doctor (first respondent) and his assistants had not failed to exercise the skill and care which a reasonable and prudent surgeon and his team would, in the circumstances, have taken.

(*c*) This Court being in as good a position as the trial Court to draw inferences from the evidence on the record (see

*Athanassiou* v. *The Attorney-General* (1969) 1 C.L.R. 160, at p. 165), we take the view that the only reasonable conclusion in the circumstances, is that the burns in question could be avoided ; and that they occurred because of the negligence of the defendant and his assistants. This being a case of *res ipsa loquitur*, the burden of disproving negligence for the burning of the patient (plaintiff-appellant) has not been discharged.

(2)—(*a*) The defendant doctor (now first respondent) as the person who ran a private clinic of his own, is liable for the negligence of his assistants under the doctrine *respondeat superior*. His assistants, who were involved in the burning of the appellant lady, were his wife, who is also a qualified medical practitioner and the nurse (second defendant—second respondent) who applied the hot water bottles to the appellant. Now, the first respondent is the doctor who runs the private clinic where the appellant was admitted for treatment and who was also in charge of the operation ; his assistants were at the time under his directions and the patient (appellant) was entirely in their hands.

(*b*) It has been held that a hospital authority is under a duty to its patients which it does not discharge simply by delegating its performance to someone else, no matter whether the obligation be to a servant or to an independent contractor.

(*c*) A person accused of a breach of the obligation not to be negligent 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 whether or not the obligation involves the use of skill.

*Held, II. As regards the amount of general damages :*

(1) Here, the two trial Judges went together as far as £500 ; but could not agree on a figure above that amount (Note : *The learned President of the District Court would have awarded* £1000 *general damages*). Had they agreed on the issue of liability the award of the trial Court as to damages would have been £825 i.e. £325 special damages and £500 general damages. The figure of £500 is rather low ; but not so low as to justify intervention by this Court (see *Antoniades* v. *Makrides* (1969) 1 C.L.R. 245, at p. 250 ; *Andronikou* v. *Kitsiou* (reported in this Part at p. 8 *ante*).

(2) We would, therefore, allow the appeal and give judgment for the plaintiff (appellant) against both defendants-respondents for £825.

*Held, III. As regards costs.*

We make an order for costs in the action on the scale applicable to the amount recoverable, from the filing of the action until and including the tenth day of trial plus the costs for attending Court to hear judgment. Beyond ten days (from the opening of the trial until the closing of the addresses) we would consider as due to unnecessary protracting of the proceedings, as reflected in the observations of the trial Court regarding costs, which we consider fully justified (Note : *The record shows no less than* 43 *hearings including adjournments*).

The appellant will have her costs in the appeal on the scale applicable to the amount recoverable.

*Appeal allowed. Order for costs as above.*

*Per* VASSILIADES, P. : The matter of negligence is undoubtedly governed by the statutory provisions in section 51 of the Civil Wrongs Law, Cap. 148. These provisions originate and purport to codify the English Common Law regarding the tort of negligence (see *The Universal Advertising and Publishing Agency* v. *Vouros*, 19 C.L.R. 87). But here in Cyprus, being statutory provisions, they must be read, interpreted and applied in such a manner as to give effect to the will and intention of the legislator ; same as all other statutory provisions are construed and applied by the Courts, in their function of fitting the law of the country to the living conditions therein ; and of developing it, under the accepted rules of construction, so as to keep pace, wherever possible, with the developing conditions in the particular field which the legislator intended to serve by making the statute ; until such statutory provisions be amended or replaced by subsequent legislation. How similar provisions are construed and applied in another jurisdiction, is extremely helpful to the Judge ; but he must never lose sight of the fact that the statutory provisions which he is called upon to construe and apply were made by the country's legislator with the object and intention of serving the people of this country ; and they must, therefore, be construed and applied accordingly.

I would refer in this connection, with great respect, to the statement of Mr. Justice Scarman, Chairman of the British Law Commission as reported in the New Law Journal (June 11, 1970) (see this statement *post* in the Judgment of the learned President of the Supreme Court).

Cases referred to :

*The Universal Advertising and Publishing Agency* v. *Vouros*, 19 C.L.R. 87 ;

*Athanassiou* v. *The Attorney-General* (1969) 1 C.L.R. 160 at p. 165 ;

*Gold and Others* v. *Essex County Council* [1942] 2 All E.R. 237; [1942] 2 K.B. 293 at p. 301 per Lord Greene, M.R. and at p. 309 per Goddard, L.J.;

*Hillyer* v. *Governors of St. Bartholomew's Hospital* [1909] 2 K.B. 820 ;

*Roe* v. *The Ministry of Health* [1954] 2 All E.R. 131 ; [1954] 2 Q.B. 66 ;

*Cassidy* v. *The Ministry of Health* [1951] 1 All E.R. 574 ; [1951] 2 K.B. 343 at pp.362–365 per Denning, L.J.;

*Antoniades* v. *Makrides* (1969) 1 C.L.R. 245 at p. 250 ;

*Andronikou* v. *Kitsiou* (reported in this Part at p. 8 *ante*) ;

*Short* v. *J. and W. Henderson, Ltd.* (1946) 62 T.L.R. 427 at p. 429 ;

*Stevenson Jordan and Harrison, Ltd.* v. *MacDonald and Evans* (1952) 1 T.L.R. 101, at p. 111 per Denning L.J. ;

*Bank Voor Handelen En Scheepvaart N.V.* v. *Slatford* [1952] 2 All E.R. 956, at p. 971 per Denning L.J.;

*Ready Mixed Concrete* v. *Minister of Pensions and National Insurance* [1968] 1 All E.R. 433, at pp. 439–440 per MacKenna J. ;

*Karavallis* v. *Economides and Economides and Another* v. *Karavallis* (reported in this Part at p. 271 *ante*).

**Appeal.**

Appeal by plaintiff against the order and judgment of the District Court of Famagusta (Georghiou, P.D.C. and Kourris, D.J.) dated the 13th January, 1968 and 13th September 1968, respectively, (Action No. 6/66) whereby the defendant was allowed to amend the statement of defence and the plaintiffs' claim for special and general damages for injuries sustained by her whilst under treatment in the clinic of defendant No. 1 was dismissed.

*Y. Chrysostomis*, for the appellant.

*Chr. Mitsides* with *E. Vrahimi (Mrs.)*, for the respondents.

*Cur. adv. vult.*

The following judgments were read :—

VASSILIADES, P.: The appellant-plaintiff, a married woman of the age of 35, was admitted to the private clinic of the first defendant, an obstetrician-gynaecologist, in

the evening of September 2, 1965, as an emergency case, to be delivered of her second child. She was a patient known to the doctor who had delivered her of her first child by a caesarian section, some three years earlier, in June 1962. She presented on that occasion a rather complicated case and she was kept in the clinic for twenty days, for which her husband, a macaroni manufacturer of Famagusta, paid a bill of £177. She was strongly advised at that time, by the defendant, to avoid a second pregrancy, at least for several years, as it might bring with it dangerous complications. She was also developing some varicose veins for which she was given proper treatment and was made to wear elastic supports.

Less than three years later, in April 1965, the plaintiff called again at the clinic of the first defendant. She was running the 4th month of a second pregrancy ; and she went to place herself in the hands of her doctor. The defendant examined her on April 22nd ; prescribed for her medicines ; gave her appropriate advice ; and kept her under regular observation as her state advanced towards child-birth. It was arranged that she was again going to have her baby in defendant's clinic. He is a specialist obstetrician-surgeon practising as such in Famagusta since 1957, running his own private clinic with the assistance of his wife, who is also a qualified physician.

In the evening of September 2, 1965, the plaintiff started losing prenatal fluids. She informed her husband who telephoned to the defendant. His advice was to take her to the clinic, which the husband did forthwith. The defendant describing her condition in his chief examination, said :—

> " The plaintiff came to my clinic (at 8 p.m.) accompanied by her husband after a premature rupture of the membranes. She was at the end of the eighth month of her pregnancy. She had no labour pains and she had no dilatation of the cervix of the womb. (She) was placed in a room of the clinic and I examined her again at 10 p.m. and at midnight. She still had no labour pains, no dilatation of the cervix."

The following morning, September 3, preparations for an operation started at 6 a.m. A little later the defendant informed plaintiff's husband that although he had " some hopes of a natural delivery ", as there was no progress he was afraid that a second caesarian section would be necessary. After some consultation it was decided to have the patient examined by a second doctor of the husband's

choice. Dr. Argyrides, the Government Hospital surgeon, was called in by the defendant ; he examined the patient in the delivery room ; and " after consultation—the defendant stated in evidence—about the case and its seriousness, we decided that in spite of the risks involved in this second caesarian section, the operation should be performed." This was at about 1 p.m. of September 3rd. Dr. Argyrides was to assist the defendant in the performance of the operation.

The husband then arranged for volunteer blood donors ; the defendant called in a qualified and experienced nurse from another private clinic (the second defendant in the action) to assist him with the instruments in the operation theatre ; and defendant's wife arranged for Dr. Nikias to act as an anaesthetist. The patient was taken to the operation theatre. The two surgeons were getting ready when—according to the defendant—either his wife or Dr. Nikias " or both of them " called the surgeons to hurry as the patient had felt a very strong pain at the scar of the old caesarian section and they were afraid of a rupture of the uterus. Both surgeons immediately hurried to the theatre and the operation started at about 2 p.m. Present were : The defendant in charge of the case ; Dr. Argyrides as his assistant ; Dr. Nikias as anaesthetist ; defendant's wife helping Dr. Nikias ; the second defendant and another nurse.

The defendant gave evidence as D.W.4 ; Dr. Argyrides as D.W.7 ; Dr. Nikias as D.W.8 and defendant's wife as D.W.5. The second defendant who was sued jointly with the first defendant put in no appearance and did not defend the case. She left the island ever since ; and exhibited no interest in the matter. She was not available at the trial.

The first defendant described in his evidence in chief, the material events during and after the operation as follows :

> " After we opened the abdominal walls I found the abdominal cavity full of blood. After draining the blood . . . . . I took out the embryo . . . . . It was anomalous and complete rupture. I had a consultation for one or two minutes with Dr. Argyrides . . . . . We decided on a hysterectomy. By that I mean removal of the uterus, ovaries and fallopian tubes. After the hysterectomy the anaesthetist said that the

patient was not going well, the blood pressure dropped, the pulse almost became imperceptible and he interrupted the narcosis and he was giving oxygen under pressure ..... Towards the end of the operation, after we had closed the abdominal walls and I was stitching the section, the anaesthetist said that the woman was completely cold ..... and he directed for two hot water bottles to be brought (he) gave instructions to hurry. I did not interrupt the stitching ..... my wife gave the hot water bottles to the second defendant whom I did not need any more as we were at the end of the operation, and asked her to put the hot water bottles on the legs of the plaintiff. I finished the stitching, I covered the wound ..... and went to the adjacent room to change my dirty clothes and wash. Dr. Argyrides also came out ..... As soon as I changed I returned to the operation theatre. The patient continued to be in a very serious condition ..... at that moment, the second defendant was saying to my wife and Dr. Nikias 'look how long have we put the hot water bottles and her legs became red ?' ..... the hot water bottles were removed and ..... I saw the redness. The plaintiff was removed to her room on a stretcher ..... I remained for the whole night in attendance because she was in danger until the following morning ..... The use of hot water bottles is indicated in a case of shock. (They) could not have remained more than six or seven minutes on the legs of the plaintiff ..... she remained in my clinic until the 18th September, 1965 ..... On the second or third day some blisters appeared which I opened with sterilized scissors and I covered ..... with special antibiotic powder .... (the patient) remained unconcious until 4 a.m. next morning ..... the patient started walking in her room on the 3rd day after the operation ..... On the 18th September, 1965, (when the plaintiff was discharged from the clinic) she had two small crusts, one on the left leg near the heel and another crust of approximately the same size ..... and I gave her a special antibiotic powder and advised her not to bandage her legs and told her that in case ..... the crusts became damp she should dust them with some powder ..... I handed the powder to her husband and ..... explained to both how to use it and what to do."

To a question whether the plaintiff ever complained to him about her burns during her stay in the clinic the defendant replied :

> " No, with the exception of one occasion on the second day after the operation when she told me that she was feeling a little pain at the lower part of her feet . . . . . I explained to her how this had happened."

When asked whether he saw " the scar on the middle of her left leg ", which the plaintiff showed to the Court during the trial, the defendant replied :

> " I was astonished when I saw it because when she left my clinic she had no scar or wound, or burn at that place and of that extent. I cannot say how this scar was caused but I may infer that it may have been caused because of the varicose veins."

As it has already been stated, the second defendant who placed the hot water bottles on plaintiff's lower limbs, did not give evidence. The other eye witnesses who testified about it, are the defendant's wife (D.W.5) and Dr. Nikias (D.W.8). Their evidence, with some variations which are not unnatural, practically confirms the above version. Dr. Nikias added the particular that the operation lasted for about 2–2 1/2 hours ; and that when towards the end of the operation the patient was under a critical shock, her hands were chilled. " To meet this—the doctor said—I immediately ordered for hot water bottles to be brought." The nurse put them on the patient's lower limbs and kept them there for " five to six minutes." She then remarked on the redness, somewhat surprised that it occurred so soon ; and the doctor directed the removal of the hot water bottles immediately.

The position emerging from the evidence of these witnesses, all called by the defendant, is this : The plaintiff was the patient of the defendant for some time. He was well aware of her condition. She was completely in his hands. In consultation with another doctor, it was decided that the plaintiff was in need of a serious, major operation. The defendant made all the necessary preparations for it and called in all the professional assistance required. In the course of the operation, while the patient was unconcious under the anaesthetic, a probable complication appeared. After a very brief consultation with his assistant, the defendant decided on a " hysterectomy." Towards the end of the operation which took some 2–2 1/2 hours, the patient

presented symptoms of severe shock. Her condition became critical. To meet this development, the defendant and his assistants used, *inter alia*, two hot water bottles which wrapped up in a flannel, were placed on the patient's lower limbs where the nurse held them—it is said—for five to six minutes. The hot water bottles caused a "redness" on the skin of both limbs where they had been placed. On the "second or third day" the redness developed blisters which the defendant opened with sterilized scissors. The injuries were burns, obviously caused by the hot water bottles. When the defendant discharged the plaintiff from his clinic about a fortnight later, on September 18, 1965, the plaintiff still had injuries of burns on both lower limbs. The extent and consequences of those injuries, and whether they were caused by the negligence of the defendant or any of his assistants, in the performance of their professional duty to the plaintiff, is the dispute in this case.

A great deal of medical and other evidence was called on these issues. The plaintiff stated from the witness box the pain and inconvenience which she suffered from those injuries ; their actual consequences to her health and life in general; and exhibited to the Court the scars and markings of a permanent nature, which they left on the lower part of her legs. In support of her claim, she called one of the doctors who examined and treated her injuries on September 19, 1965, *i.e.* the day following her discharge from defendant's clinic. The expense incurred for the treatment of her injuries (which took considerable time) and the cost of domestic assistance which the plaintiff had to have while she was partly incapacitated, amounting in all to £326.570 mils, is not disputed ; and constitutes the item for special damages in plaintiff's claim.

The case for the defendant is :—

(*a*) that the use of hot water bottles at the time, was necessary for saving plaintiff's life ;

(*b*) that the danger to cause such injuries was a legitimate risk which should have been taken in the interest of the patient ;

(*c*) that in any case the burns were caused by persons for whose acts the first defendant was not responsible ;

(*d*) that such burns as they may have been caused by the hot water bottles were of a very mild nature, practically healed by the 18th September when the defendant discharged the plaintiff from his clinic ; and,

(*e*) that subsequent deterioration of their condition should be attributed to defective treatment by persons unconnected with the defendant ; and to plaintiff's " idiosyncracy " and varicose veins. The defendant, therefore, entirely repudiated liability.

In support of this defence, besides the defendant and the three doctors who assisted him in the operating theatre, counsel on his behalf called not less than 13 other medical practitioners and 5 non-medical witnesses. Their evidence constitutes most of the bulky record before us, and could probably compile a whole book on burns, besides piling up enormously the costs of the case. The trial Court had some very appropriate comments to make in this connection, which we think are well justified.

As to the nature of the injuries, there can be no doubt that they originated in burns caused by the hot water bottles This is accepted by the trial Court who, moreover, unanimously held that in the circumstances, the rule of *res ipsa loquitur* applies. We find ourselves in agreement with this view. The facts in this connection speak for themselves, calling for a satisfactory explanation on the part of the defendant, failing which the responsibility for the consequences must rest upon him.

The trial Court, also unanimously, held that the first defendant is in law responsible for the persons who were assisting him in the operation, regardless of their individual liability. After giving his reasons for doing so, the learned District Judge concluded :—

> " To sum up, if negligence is proved against any one from those who were in the operation theatre, *viz.* Dr. Nikias, Mrs. Koulia and defendant 2, then the first defendant is responsible in law for their negligence."

The presiding Judge reached the same conclusion. We think that their conclusion is correct. Apart from the general responsibility which may attach to him as proprietor of the private clinic where the plaintiff was admitted for treatment, the first defendant was in charge of the operation ; his assistants were at the time under his directions ; while the patient was entirely in their hands. He is responsible for the consequences of any professional negligence on their part.

The extent of the injuries caused by the hot water bottles was unfortunately considerable. The attempt on the part

of the defendant to present it as consisting of very light burns, almost healed by the 18th September, when he discharged the plaintiff from his clinic, collapses completely in the face of real evidence and of facts beyond dispute. The attempt to blame others for the serious developments which followed ; or to attribute them to the " idiosyncracy " of the patient and her varicose veins, is equally devoid of legal or moral merit.

The defendant was fully aware of his patient's varicose veins ; and having been her doctor for some time, he should have known of any adverse peculiarities in her idiosyncracy. In any case, in law, he takes his patient as he finds him. When the plaintiff left his clinic a fortnight after the application of the hot water bottles, her condition must have been as found by the doctor who examined her injuries on the following day, September 19, 1965, when she went to him to Nicosia for the purpose. He was her Nicosia physician for some time in the past. We find it unnecessary to repeat here his description so full of detail, measurements, etc. He was cross-examined about them at great length. He found injuries from burns of the size given to the trial Court from the note kept at the time, on both lower limbs of the patient. The scars and skin surface resulting from such injuries, which were shown to the Court at the trial more than two years later, are a reliable indication of the seriousness of the injuries.

Her Nicosia doctor (P.W.3) recommended to the plaintiff to return with her complaints to the defendant. On returning, however, to Famagusta where she lives, the plaintiff decided to go to a different doctor, a surgeon in her town, Dr. Mavromatis, who was not available at the trial. He left the island to settle abroad late in December 1965. The patient continued under treatment in the hands of both these doctos at first, and later on occasional visits to her Nicosia doctor—once or twice a month, as her condition seemed to require—until the following summer (1966) when her injuries practically stabilised to what was shown to the Court at the trial in December 1967. That condition is not likely to improve unless the plaintiff decides to undergo plastic surgery.

The treatment of her injuries cost the plaintiff £120 in medical fees ; £26.570 mils in medicines ; and £180 in domestic help while incapacitated. In her statement of claim she claims £325, confining the item for medicines to £25. While on this aspect of the case, the particulars may be added that the defendant's bill for plaintiff's second

confinement amounting to £200 (including the operation) was settled early in December 1965 ; and that apart of verbal complaints made to the defendant and his wife while she was in their clinic and a few weeks later, the plaintiff's first claim for compensation was made through her advocate on December 14, 1965. The defendant entirely declined any liability ; hence this action, filed on January 4, 1966.

This brings me to the two main issues in this case : First the question of liability for negligence ; and secondly the compensation to which the plaintiff may be entitled for the burns of her lower limbs. On both these issues the two Judges constituting the bench of the trial Court did not reach agreement. The presiding Judge (Georghiou, P.D.C.) was of the opinion that the burns were caused by the negligent use of the hot water bottles by the defendant and his assistants ; and that for the injuries suffered therefrom, the plaintiff is entitled to £1,000 general damages in addition to the special damages to which I have already referred. The other member of the trial Court (Kourris, D.J.) was of the opinion that the burns were not due to any negligence on the part of the defendant or his assistants ; that they have been sufficiently explained under the rule of *res ipsa loquitur* ; and that the compensation payable, in case negligence were established, is £500, in addition to the special damages incurred. As a result of this disagreement plaintiff's action was dismissed with no order for costs.

I propose to deal first with the question of negligence. The matter is undoubtedly governed by the statutory provisions regarding negligence in section 51 of the Civil Wrongs Law, Cap. 148. These provisions originate and purport to codify the English Common Law regarding the tort of negligence. (See *The Universal Advertising & Publishing Agency* v. *Panayiotis Vouros*, 19 C.L.R. 87). But here in Cyprus, being statutory provisions, they must be read, interpreted and applied in such a manner as to give effect to the will and intention of the legislator ; same as all other statutory provisions are construed and applied by the Courts, in their function of fitting the law of the country to the living conditions therein ; and of developing it, under the accepted rules of construction, so as to keep pace, wherever possible, with the developing conditions in the particular field which the legislator intended to serve by making the statute ; until such statutory provisions be amended or replaced by subsequent legislation. How similar statutory provisions are construed and applied in another jurisdiction, is extremely helpful to the Judge ;

but he must never lose sight of the fact that the statutory provisions which he is called upon to construe and apply were made by the country's legislator with the object and intention of serving the people of this country ; and they must, therefore, be construed and applied accordingly.

I would refer in this connection, with great respect, to the statement of Mr. Justice Scarman, Chairman of the British Law Commission, as reported in the New Law Journal (June 11, 1970) on the occasion of the completion of the first five years' work of the Commission (1965–1970) :

> " An effective code (the Judge-Chairman of the Law Commission said) will of course incorporate the earlier case law, but the case law that develops by way of interpretation of the code itself will be an integral part of the law. I see judicial interpretations of the code as a vitally important source of law. If therefore, a phrase used in the code subsequently received judicial interpretation, lawyers would have to have regard to that interpretation, until such time as the code was itself reviewed. One of the functions, as I see it, of the Law Commission would be to keep the code under constant review in the light of judicial Decisions and changing needs."

In his codification of the law governing civil wrongs —known to the English Law as torts—in 1933 the ligislator of Cyprus must be presumed to have had in mind not only the relevant principles which he purported to codify in the statute, but also the case law in point, as it stood at that time. With that material in mind, as well as all other relevant matter which in his view would best serve the people of Cyprus as their law, the legislator—in dealing with the duty and responsibility of persons in the position of the defendant towards persons in the position of the plaintiff—enacted the provisions in section 51 of the statute, which we find unnecessary to repeat here.

In the case in hand, it is common ground that the plaintiff was, at the material time, a person to whom the defendant owed a duty to use such skill and take such care in the performance of the operation as a ***reasonable*** and ***prudent*** surgeon would in the circumstances use or take. And the trial Court held, quite rightly in my opinion, that the persons assisting the defendant in the operation, were doing so under his responsibility. Towards the end of a long and dangerous operation, when the defendant was putting " the last 2–3 stitches on the skin " of the mouth

of the operation, the patient developed shock ; which soon became very serious. The limbs chilled. The use of hot water bottles became, in the opinion of the defendant and his assistants, necessary. They were ordered immediately and very urgently. The patient was unconcious, completely in the hands of the defendant and his assistants.

In these circumstances one of the medically qualified assistants went to get them. She tried on the back of her hand, she said, the temperature of the hot water at the tap near the operating theatre. She filled two rubber hot water bottles wrapped them in flannel cloth, brought them into the theatre and handed them to the nurse attending the patient, with instructions to place them on her feet and hold them there as " there was not enough space on the operating table and they would fall off." The witness added that the nurse took a chair and sat near the operating table, holding the bottles on the patient's feet, under the sterilised sheet which was covering them. Her evidence conveys the impression that the hot water bottles were not very hot. And yet the same witness stated that 5–6 minutes later the nurse pointed out to Dr. Nikias, who had ordered them, the redness which the bottles had caused to the patient's feet, remarking that they had not been there for " even 5–6 minutes " and the patient's legs had become red. Dr. Nikias ordered the bottles away " immediately ". The nurse's alleged remark also conveys the impression that having held the hot water bottles with her naked hands for such a short time on the patient's legs, she was surprised at the redness.

But these statements are hardly consistent with real evidence and undisputable facts. The hot water bottles were ordered urgently to combat a dangerous shock. They were needed as hot as they could be without burning the patient. They were wrapped in cloth because they were hot. The nurse who according to these witnesses had been holding them on the patient's feet never said that she felt them hot ; and yet in " 5–6 minutes " they caused the redness which on the second or third day developed into blisters which the defendant opened with scissors ; and treated as burns. Indeed they were the burns which under constant medical care took considerable time to heal ; and left the " ugly scars " and markings which the Court saw on the plaintiff's lower limbs at the trial, more than two years later. The defendants attempted to attribute these burns to defective treatment in the hands of others ; and to plaintiff's " idiosyncracy " and varicose veins. The trial Court quite rightly, I think, discarded these defences.

What, therefore, remains to meet the position created by the application of the rule of *res ipsa loquitur*—which the trial Court quite rightly, I think, held that it does apply in the circumstances—is the contention of counsel for the defendant, that having to choose between the risk of burning the patient with the hot water bottles and letting her die under the shock by not using them, the defendant and his assistants rightly chose the former ; and actually saved the patient's life when she was on the verge of death. One of the two Judges of the trial Court accepted this argument ; and went as far as even to formulate the dilemma which faced the patient ; and the latter's natural choice, as the Judge saw it.

But with all respect, this is not what the defendant thought, said or did, according to his own evidence. The defendant does not say that between the two alternatives he preferred the risk of burning the patient ; making a professional decision in the matter, as he had done when he decided perform the second caesarian section notwithstanding the risk involved ; or, when he decided on the serious hysterectomy which apparently caused the almost fatal shock. What he says, is that he used the accepted method of hot-water bottles, where giving the proper care burns are the rare exception ; not the rule. That is the effect of the medical evidence in the case. Not only burns were not chosen as the better alternative, but every precaution was taken, the defendants say, to avoid the burns ; such as testing the temperature of the hot water ; wrapping the bottles with cloth ; and sitting the nurse by the patient to hold them with her hands. The nurse who was surprised, it is said, to see the redness caused by the hot-water bottles in such a short time. In fact the defendant says that the burns caused, were very light, that the patient only complained to him once ; and that the injuries were almost healed when the patient left his clinic about a fortnight later ; only two small crusts were left. But is that believable ? Is it an acceptable explanation of the established serious consequences of the burns ? The other Judge on the trial Bench answered both these questions in the negative.

" The evidence of the two witnesses (D.W.5 and D.W.8) is in my opinion—his judgment reads—contradicted by the ultimate results." And after dealing with their testimony the P.D.C. concludes :

> " From the whole evidence, I am satisfied that the burns, which I found to be deep second degree or light third degree, were the original burns caused

by the hot water bottles placed on plaintiff's legs during the final stages of the operation. I find that these burns were caused by the negligence of the three servants of the first defendant in that they failed to test and ascertain that the temperature of the hot water bottles was such that they could safely be used, or that (the nurse) had failed to keep constant attendance to the hot water bottles as she should have done, or both these faults."

I find this to be a correct assessment of the effect of the evidence on record ; and I reach the same conclusion. The defendant and his assistants owed a duty to the plaintiff to use such skill and take such care in the use of the hot-water bottles, as to avoid causing to the plaintiff the burns found upon both her limbs on September 19, 1965 ; burns which were caused by the heat of the bottles. Such burns could undoubtedly be avoided, if the defendant and his assistants had not failed to exercise the skill and care which a reasonable and prudent surgeon and his team would, in the circumstances, have taken.

This Court being in as good a position as the trial Court to draw inferences from the evidence on the record (*see Savvas Athanassiou* v. *The Attorney-General* (1969) 1 C.L.R. 160 at p. 165), I take the view that the only reasonable conclusion in the circumstances, is that the burns could be avoided ; and that they occurred because of the negligence of the defendant and his assistants.

The responsibility of hospitals and clinics towards their patients is a matter of vital importance to all parties concerned. It was considered by the Court of Appeal in England in *Gold and Others* v. *Essex County Council* [1942] 2 All E.R. 237, with the assistance of counsel including Denning, K.C. as he then was. Earlier cases were discussed ; and the position was put on the basis which governs this kind of case ever since. Reversing the judgment of the trial Court, the Court of Appeal presided by Lord Greene, M.R., held that the public authority running the hospital, were responsible for the injuries caused to an infant patient by the negligence of the radiographer in the hospital service, under the doctrine of *respondeat superior*. One of the cases considered was the *Hillyer case* decided some thirty years earlier, in 1909, which was critically examined and confined strictly to its facts (*Hillyer* v. *Governors of St. Bartholomew's Hospital* [1909] 2 K.B. 820). The case is of great interest, but we do not find it necessary to deal further with it in this judgment.

Some nine years later, in 1951, the Court of Appeal in England (with Lord Denning now on the Bench) had to consider again the responsibility of hospital authorities for the negligence of members of their staff, in *Cassidy* v. *The Ministry of Health* [1951] 1 All E.R. 574. In an action by a patient against the public authority running the hospital, for negligence in the post-operational treatment which he received, it was held that as " the evidence showing a *prima facie* case of negligence on the part of the persons in whose care the plaintiff was had not been rebutted, the defendants, in view of the terms of the employment of (the house surgeon and his assistant) were liable to the plaintiff, whether the negligence was that of (the surgeon or his assistant) or of a member or members of the nursing staff ".

The opening passage of Lord Denning's judgment presents, if I may say so with great respect, clearly the position under the law of England ; and, in my view, under the law of Cyprus as codified in the relevant provisions of the Civil Wrongs Law, Cap. 148. The passage (at p. 584) reads :—

> " If a man goes to a doctor because he is ill, no one doubts that the doctor must exercise reasonable care and skill in his treatment of him, and that he is so whether the doctor is paid for his services or not. If, however, the doctor is unable to treat the man himself and sends him to hospital, are not the hospital authorities then under a duty of care in their treatment of him ? I think they are."

In Cyprus, under section 51 of the Civil Wrongs Law, the measure of the duty of care owed to the patient is that of a *reasonable prudent* person skilled in the branch of the medical profession which the doctor holds out himself to be so skilled, by undertaking the treatment of the patient. And it is in the interest of all concerned, I think, that where the doctor does so with the assistance of other persons, same as in the case in hand, the rule of *respondeat superior* should apply.

Another useful case to which we were referred during the argument before us, is *Roe* v. *The Ministry of Health* [1954] 2 All E.R. 131, where the responsibility of the hospital authorities was again in question ; and where the *Gold case* (*supra*) and the *Cassidy case* (*supra*) were again considered by the Court of Appeal. The plaintiffs in two separate actions (later consolidated) were operated on the same day at a public hospital under the control of the Ministry of Health. After the operation, each plaintiff developed

spastic paraplegia which resulted in permanent paralysis from the waist downwards. The trial Court found that the injuries to the plaintiffs were caused by the perforation of phenol through molecular flaws or invisible cracks in the ampoules of nupercaine used by the anaesthetist before the operation. It was held that " having regard to the standard of knowledge to be imputed to anaesthetists (at the time of the operation) the anaesthetist could not be found to be guilty of negligence in failing to appreciate the risk of the phenol percolating through molecular flaws in the glass ampoules and, a fortiori, there was no evidence of negligence on the part of any member of the nursing staff ". Since the plaintiffs had been unable to establish negligence on the part of any of the defendants, they were precluded from recovering damages. In that case also, the Court of Appeal approached the question of liability on the footing that the hospital authorities and the anaesthetist were called on to give an explanation of what had happened. But in the end the Court found that they had done so.

I can now come to the question of damages. The item for special damages is not in dispute. The plaintiff produced proofs for £326.570 mils. But the claim is for £325 ; and the plaintiff cannot recover more. As to general damages one of the two members of the trial Court assessed them at £1,000, considering the " ugly appearance " of both scars " distinctly visible under ladies' stockings " which the Judge thought that it " must create a permanent inferiority complex to a married woman of the age and social standing of the plaintiff ". The other member of the trial Court found himself unable to reach that figure. His decision on the point is expressed in these words :—

> " I have considered the evidence on (the question of permanent disability) carefully, and I have come to the conclusion that the plaintiff has some incapacity by way of itching, numbness and tension of the skin round the scars. Having taken into consideration also the pain and suffering and incovenience caused to her as well as the ugly scars and having taken into account that the skin is now inferior, I have decided that I would have awarded to the plaintiff the sum of £500 ".

This difference of opinion on both the main issues in this case — the question of liability and the amount of damages—points strongly to the desirability of a bench of three judges where important issues are likely to arise in a Full District Court case. Be that as it may, however,

here the two judges went together as far as £500 for general damages ; but could not agree on a figure above that amount. Had they agreed on the issue of liability, the trial Court would have awarded £825.– damages to the plaintiff (£500 & £325). The question now arises : Has the appellant been able to show that such an award is either wrong in principle, or is such an erroneous estimate of the loss sufferred by the plaintiff as to justify intervention by this Court? (*Antoniades* v. *Makrides* (1969) 1 C.L.R. 245 at p. 250 ; *Andronikou* v. *Kitsiou*, (reported in this Part at p. 8 *ante*). I must confess that the question gave me considerable difficulty. I do not think that the appellant has shown that the trial Court measured the general damages on wrong principle. But I do think that £500 is rather low, in the circumstances. That, however, does not answer the question. Nor is it sufficient to justify intervention.

Considering that the plaintiff gets by way of special damages the full amount of the cost of the medical treatment of her injuries and also what she had to pay for domestic help while she was partly incapacitated, I cannot reach the conclusion that £500.– albeit low, is such an erroneous estimate of the general damages to which the plaintiff is entitled, as to justify intervention by this Court. I would, therefore, allow the appeal and give judgment for the plaintiff against both defendants for £825 with costs on the scale applicable to the amount recovered, from the filing of the action until and including the tenth day of trial plus the costs for attending Court to hear judgment. Beyond ten days (from the opening of the trial until the closing of the addresses) I would consider as due to unnecessary protracting of the proceedings, as reflected in the observations of the trial Court regarding costs, which I consider fully justified. The record shows no less than 43 hearings including adjournments. The cross appeal of the defendant (under 0.35, r.10, filed on October 29, 1969) covered by this decision, is dismissed without costs.

There are two other matters which must be cleared before concluding this case:

1. The appeal (No. 4691) of the plaintiff against the order of the District Court made on January 13, 1968, on the application of the defendant, for the amendment of the defence ; and

2. The application of the respondent, filed on October 30, 1969 for leave to adduce further evidence at the hearing of the appeal.

Neither of these two proceedings was in the end pursued, and they stand dismissed without costs therein. In fact the latter was actually abandoned at the opening of the appeal.

JOSEPHIDES, J.: I agree. This is a case of *res ipsa loquitur* and the burden of disproving negligence for the burning of the patient has not been displaced. The respondent doctor (first respondent), as the person who ran a private clinic of his own, is liable for the negligence of his assistants under the doctrine of *respondeat superior*. His assistants in this case, who were involved in the burning of the appellant, were his wife, who is also a qualified medical practitioner, and the nurse (second respondent) who applied the hot-water bottles to the appellant.

The first respondent ran the private clinic where the appellant was admitted for treatment and he was also in charge of the operation ; his assistants were at the time under his directions and the patient was entirely in their hands. The hot-water bottles were applied urgently to combat a dangerous shock while the appellant was being operated upon by the first respondent. They were needed as hot as they could be without burning the patient. This is an accepted method to combat shock, and when the proper care is given no burns should be caused to the patient.

The findings of the learned President of the District Court, to the effect that the first respondent's wife failed " to test and ascertain that the temperature of the hot-water bottles was such that they could safely be used ", and/or that the nurse (second respondent) failed to keep a constant attendance to the hot-water bottles as she ought to have done, are amply supported by the evidence on record. I am further of the view that the argument advanced on behalf of the first respondent that the burns were due to the " idiosyncracy " of the patient was neither pleaded nor proved before the trial Court. I, therefore, agree with the conclusion that, in the circumstances of this case, the burns could be avoided and that they occurred because of the negligence of the assistants of the first respondent.

It has been held that a hospital authority is under a duty to its patients which it does not discharge simply by delegating its performance to someone else, no matter whether the obligation be to a servant or an independent contractor : See *Gold* v. *Essex County Council* [1942] 2 K.B. 293, 301, per Lord Greene M.R. ; per Goddard L.J. at p. 309 ;

*Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343, 362–365, per Denning L.J.; and *Roe* v. *Minister of Health* [1954] 2 Q.B. 66, 82, per Denning L.J.

A person accused of a breach of the obligation not to be negligent 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 whether or not the obligation invlolves the use of skill (per Lord Greene M.R. in *Gold's* case, *supra*, at page 301). In *Gold's* case it was held that a local authority carrying on a public hospital owed to a patient the duty to nurse and treat him properly, and was liable for the negligence of its servants even though the negligence arose while a servant was engaged on work which involved the exercise of professional skill on his part.

*Cassidy's* case, quoted above, would seem to support the propositions that (*a*) if a person is admitted as a patient to a hospital and suffers injury through the negligence of some member of the staff, it is unnecessary for him to pick upon any particular employee ; and (*b*) that the law applies the principle of *respondeat superior* in the case of a hospital just as it does in the case of master and servant in any other sphere of activity, professional, industrial or otherwise. It matters not that the servant does work of a skilful character for which he is specially qualified. The hospital is responsible for all those in whose charge the patient was. The decision in *Cassidy's* case was applied in the case of *Roe* v. *Minister of Health* [1954] 2 Q.B. 66, where it was held by the Court of Appeal that the anaesthetist was the servant or agent of the hospital, and the hospital was liable for his acts on the principle of *respondeat superior*. But it was furhter held that neither the anaesthetist nor any member of the hospital staff had been guilty of negligence.

As regards the amount of general damages (£500), I am not convinced that the trial Court acted upon some wrong principle of law, or that the amount awarded is so very small as to make it in my judgment an entirely erroneous estimate of the damages to which the plaintiff (appellant) is entitled. For these reasons we would not be justified in disturbing the finding of the trial Court on the question of the amount of general damages.

Finally, I agree with the order as to costs proposed in the judgment of the learned President of this Court.

HADJIANASTASSIOU, J.: I agree that the appeal should be allowed, but because this case is of some general importance,

affecting, as it undoubtedly does, the medical profession, I propose giving the reasons and the considerations which led me reach this result.

The plaintiff is a married woman of 35 years of age, and the defendant is a gynaecologist, surgeon and obstetrician, who is running his own private clinic at Famagusta. Defendant 2 is a qualified nurse.

On September 2, 1965, the plaintiff Katina Hadjitheodossiou who was pregnant, had a rupture of the membrane, and was taken to the clinic of defendant 1, Dr. Petros Koulias, for her confinement. On the following day, as it was found by the doctor that she could not deliver her baby by means of a natural birth, defendant 1 had a consultation with Dr. Argyrides and decided to carry out a caesarian section. When defendant and his assistant were preparing for the operation, Dr. Nikias the anaesthetist, called out to both surgeons to hurry, because the patient felt an intense pain at a scar which had remained because of an earlier caesarian section three years ago when she delivered her first baby in the clinic of defendant 1. Immediately, defendant 1, who was assisted by Dr. Argyrides, carried out a caesarian section, when it was found that there was a rupture of the uterus. After having delivered the baby, they carried out a hysterectomy operation, and the uterus was removed ; but towards the end of the operation the patient presented symptoms of shock and her condition became critical. Dr. Nikias immediately gave instructions for two hot-water bottles to be placed on the legs of the patient in order to combat the shock. These bottles were wrapped in flannel material, were filled with hot-water and placed by a nurse, defendant 2, on the patient's legs. The bottles remained there for a period of 5–6 minutes whilst the patient was still unconcious, and when they were removed, the hot bottles caused a redness on the skin of both legs of the patient, which later on developed into blisters. These injuries were burns, and it was clear that they were caused by the hot-water bottles which were prepared and filled with water by the wife of defendant 1, who is also a doctor.

The plaintiff in her statement of claim alleged that the burns were caused to her because of the negligence of the defendant, and has invoked the maxim of *res ipsa loquitur*. The defendants in their defence denied negligence, and alleged that the placing of the hot bottles was necessary in order to save the life of the plaintiff.

There is no doubt that in the present case defendant 1 undertook to treat and nurse the plaintiff in his clinic, and that if the burns were caused by the hot bottles because of his failure to use such skill or take such care in the exercise of his profession as a reasonable prudent person qualified to exercise such a profession he would be negligent within the meaning of section 51 (1) (*b*) of the Civil Wrongs Law, Cap. 148. The trial Court accepted that these injuries were within the maxim of *res ipsa loquitur*, and the burden to rebut the inference of negligence for the burning of the plaintiff remained on the defendants to explain it. Moreover, the Full District Court of two Judges found that Dr. Nikias, defendant 2 and Mrs. Koulias, were at the material time the servants of defendant 1, and that he was responsible in law for the negligence of the persons who were his assistants at the time when he was carrying out the caesarian section, relying on the authority of *Gold* v. *Essex County Council* [1942] 2 All E.R. 237.

With regard to the question of whether or not defendant 1 was negligent for the burning of the plaintiff, the learned Judge of the District Court, in his dissenting judgment, had this to say at p. 536 :—

> " They decided to place hot-water bottles on the feet of the plaintiff which not only is not negligence because it is a recognized method of treatment of shock, but was also necessary in the circumstances. They have also taken the necessary precautions before placing the hot-water bottles by deciding the temperature of the bottles before Mrs. Koulia filled them with water and also wrapped them up with flannel handing them to defendant 2, who instructed her to keep a watch on the hot-water bottles which were striped. Defendant 2 placed them on the feet of the patient and she was checking them from time to time, but due to the serious condition of the plaintiff and her idiosyncracy the hot-water bottles caused burns. In these circumstances, I do not find negligence on the part of the defendant 2 or anyone of them, or negligence on the part of anyone for whose negligence the defendant 1 is responsible in law."

It would be observed that the finding of the learned trial Judge that burns were caused because of the " idiosyncrasy " of the patient was neither pleaded nor, indeed, in any way proved by evidence before the trial Court. See also on this point the finding of the learned President of the District Court at p. 549, which he described as an afterthought contention by counsel for defendant 1.

On the contrary, the learned President of the trial Court took the opposite view and said in his judgment at p. 545 :—

> " When the hot-water bottles were applied on the legs of the plaintiff, she was still unconcious on the operation table and, therefore, plaintiff could not have possibly reacted, if burned. Her body was still covered with a sterilised sheet and hot-water bottles were placed on her legs and covered over by the sterilised sheet. The evidence of Mrs. Koulia is to the effect that when Dr. Nikias ordered hot-water bottles, she rushed to a tap of hot water in an adjoining room and filled two rubber hot-water bottles with stripes with warm water, the temperature of which she properly tested by touch. She wrapped each, as she said, in a piece of flannel, went back to the operating room, and she handed them to defendant 2 to place them on the legs of the plaintiff. Defendant 2 placed them on the legs of the plaintiff and holding them in position with her hands, covered them under the sheet : Dr. Nikias had said that from the place he was standing, he had an interrupted view of the body of the plaintiff on the operation table and what was going on in the operation room. He testified that after defendant 2 had placed the hot-water bottles on the legs of the plaintiff, defendant 2 held them with her hands to remain on the legs of the plaintiff, this holding by defendant 2 being necessary because of the width of the operation table. He testified that defendant 2 raised the sheet once or twice and had a look at the bottles."

He goes on :

> " However, according to Dr. Nikias' testimony, after the hot-water bottles remained on the body of the plaintiff for 5–6 minutes, the defendant 2 lifted the sheet and she noticed an erythema on the legs of the plaintiff and she remarked to Dr. Nikias ; ' Look doctor, for how short a time we have kept the hot-water bottles, they have remained not even 5–6 minutes, and her legs have become red ', whereupon Dr. Nikias instructed defendant 2 to remove them immediately, which she did."

Finally, he made this finding at p. 549 :—

> " From the whole evidence, I am satisfied that the burns, which I found to be deep second degree or light third degree, were the original burns caused by the hot-water bottles placed on plaintiff's legs during the final

stages of the operation. I find that these burns were caused through the negligence of the three servants of defendant 1, namely, Dr. Nikias, Mrs. Koulia, or defendant 2, acting collectively or separately, in that they have failed to test and ascertain that the temperature of the hot-water bottles was such that they could safely be used, even though such hot-water bottles might have been striped and each wrapped in a piece of flannel, or that defendant 2 had failed to keep a constant attendance to the hot-water bottles as she should have done, or to both these defaults. I find that it was the duty of Dr. Nikias, as an anaesthetist who had the care of the general condition of the patient (plaintiff) during the operation, to see to both, that is, to the proper temperature of the hot-water bottles and to their constant attendance ".

Counsel for respondent 1 has contended before this Court, that the assistants of Dr. Koulias were not his servants, and, therefore, he could not be found in law liable for their negligence.

I agree that the various theories as to the justification for imposing vicarious liability on a master, pre-suppose the existence of a contract of service and can only be used to explain why, given that a contract of service exists, the master is vicariously liable for his servants' torts. With regard to the criteria for distinguishing servants and independent contractors, the formula regularly used by the Court to mark the distinction is " control ". However, in deciding whether enough " control " is exercised over another to make him a " servant ", one must take into account several factors, no one of which is conclusive.

I would, therefore, propose referring to some of these cases, in order to show the trend of the authorities : In *Short* v. *J. & W. Henderson, Limited* (1946) 62 T.L.R. 427 at p. 429, Lord Thankerton, delivering the leading speech in the House of Lords, said that he would recapitulate the four indicia of a contract of service derived by the Lord Justice Clerk from the authorities to which the Lord Justice Clerk has referred. Lord Thankerton listed the four as follows :—

" (*a*) the master's power of selection of his servant ;
(*b*) the payment of wages or other remuneration ;
(*c*) the master's right to control the method of doing work ; and
(*d*) the master's right of suspension or dismissal ".

Then Lord Thankerton went on to say :—

> " The learned judge adds that a contract of service may still exist if some of these elements are absent altogether or present only in an unusual form, and that the principal requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, and that this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship. Modern industrial conditions have so much affected the freedom of the master in cases in which no-one could reasonably suggest that the employee was thereby converted into an independent contractor that, if and when an appropriate occasion arises, it will be incumbent on this House to reconsider and to restate these indicia."

However, the inadequacy of this test was expressly stated in *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343, by Somervell L.J. at p. 352 :—

> " . . . . . one, perhaps, cannot get much beyond this : Was his contract a contract of service within the meaning which an ordinary person would give to the words ? "

It would be observed that, in short, " control " became a legal fiction rather than a technical reality.

In *Stevenson, Jordan & Harrison Ltd.* v. *MacDonald & Evans* (1952) 1 T.L.R. 101 at p. 111, Denning L.J. said :—

> " It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference (between a contract of service and a contract for services) lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service ; but a ship's pilot, a taxi man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business ; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it ".

In a later case, decided shortly after the Stevenson case (*supra*), Denning L.J. said in *Bank Voor Handel en Scheepvaart N.V.* v. *Slatford* [1952] 2 All E.R. 956 at p. 971 :—

> " In this connection I would observe the test of being a servant does not rest nowadays on submission of

orders. It depends on whether the person is part and parcel of the organization ".

See also the case of *Ready Mixed Concrete* v. *Minister of Pensions and National Insurance* [1968] 1 All E.R. 433 at p. 439–40 per MacKenna, J.

Having reviewed some of the authorities and applying these principles to the facts found by the trial Court, I would like to state that I find myself in agreement with the finding of the Court that Dr. Nikias, defendant 2 and Mrs. Koulia, were clearly the servants of respondent 1, being part and parcel of the organisation seen by Dr. Koulias. I would, therefore, dismiss this contention of counsel.

With regard to whether a master is vicariously liable for his servants torts, it appears that as regards the liability of regional hospital boards for the injuries caused to their patients, from the trend of the earlier authorities it is shown that the conflict between the demands of certainty and justice is a recurrent theme in case law. The claims of certainty have been less pressing in the case of torts, and it appears that until the decision in *Gold* v. *Essex County Council* [1942] 2 K.B. 293, it was less important that the law should settle precisely and for all time the limits of liability of hospital boards. No doubt, in the *Gold* case (*supra*), the Judges have adapted legal doctrines to new situations, and they have given them new content.

In the *Gold* case (*supra*), Lord Greene had this to say at pp. 301–2 :—

> " 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 whether or not the obligation involves the use of skill. It is also true that, if the obligation is undertaken by a corporation, or a body of trustees or governors, they cannot escape liability for its breach, any more than can an individual, and it is no answer to say that the obligation is one which on the face of it they could never perform themselves. Nor can it make any difference that the obligation is assumed gratuitously by a person, body or corporation which does not act for profit : *Mersey Docks Trustees* v. *Gibbs* (1866) L.R. 1 H.L. 93. Once the extent of the obligation is determined the ordinary principles of liability for the acts of servants or agents must be applied.

In *Cassidy's* case (*supra*), Somervell, L.J., after reviewing *Hillyer's* case and *Gold's* case said in his judgment at p. 351 :—

" The first question is whether the principles as laid down in *Gold's* case cover them. In considering this, it is important to bear in mind that nurses are qualified professional persons. It is also important to remember, and MacKinnon L.J., in *Gold's* case emphasized this, that the principle *respondeat superior* is not outsted by the fact that a ' servant ' has to do work of a skilful or technical character, for which the servant has special qualifications. He instanced the certified captain who navigates a ship. On the facts as I have state them, I would have said that both Dr. Fahrni and Dr. Ronaldson had contracts of service. They were employed, like the nurses as part of the permanent staff of the hospital. In *Gold's* case Lord Greene, M.R. in considering what a patient is entitled to expect when he knocks at the door of the hospital, comes to the conclusion that he is entitled to expect nursing, and therefore the hospital is liable if a nurse is negligent. It seems to me the same must apply in the case of the permanent medical staff. A familiar example is an out-patients' ward. One may suppose a doctor and a sister dealing with the patients : It seems to me that the patient is as much entitled to expect medical treatment as nursing from those who are the servants of the hospital. I agree that, if he is treated by someone who is a visiting or consulting surgeon or physician, he will be being treated by someone who is not a servant of the hospital : He is in much the same position as a private patient who has arranged to be operated on by ' X '.

Hilbery, J., in *Collins* v. *Hertfordshire County Council* [1947] K.B. 598, found that there had been negligence on the part of a house surgeon and a surgeon who had undertaken part-time attendance at the hospital. He found the defendants liable by reason of a negligent system but he considered the question of the defendants' liability for the surgeons. He found that they were liable for the negligence of the house surgeon. He thought on the whole that they were not liable for the part-time surgeon, but his exact relationship to the hospital was obscure. As will be seen, I agree with his conclusion as to the house surgeon whom he regarded as covered by the *ratio decidendi* in *Gold's* case ".

Dening, L.J. had this to say in the same case at pp. 365 and 366:—

"....the hospital authorities accepted the plaintiff as a patient for treatment, and it was their duty to treat him with reasonable care. They selected, employed, and paid all the surgeons and nurses who looked after him. He had no say in their selection at all. If those surgeons and nurses did not treat him with proper care and skill, then the hospital authorities must answer for it, for it means that they themselves did not perform their duty to him. I decline to enter into the question whether any of the surgeons were employed only under a contract for services, as distinct from a contract of service. The evidence is meagre enough in all conscience on that point. But the liability of the hospital authorities should not, and does not, depend on nice considerations of that sort. The plaintiff knew nothing of the terms on which they employed their staff: All he knew was that he was treated in the hospital by people whom the hospital authorities appointed; and the hospital authorities must be answerable for the way in which he was treated.

This conclusion has an important bearing on the question of evidence. If the plaintiff had to prove that some particular doctor or nurse was negligent, he would not be able to do it. But he was not put to that impossible task: He says, 'I went into the hospital to be cured of two stiff fingers. I have come out with four stiff fingers, and my hand is useless. That should not have happened if due care had been used. Explain it, if you can'. I am quite clearly of opinion that that raises a *prima facie* case against the hospital authorities: See per Goddard, L.J. in *Mahon* v. *Osborne* [1939] 2 K.B. 14 at p. 50. They have nowhere explained how it could happen without negligence. They have busied themselves in saying that this or that member of their staff was not negligent. But they have called not a single person to say that the injuries were consistent with due care on the part of all the members of their staff. They called some of the people who actually treated the man, namely Dr. Fahrni, Dr. Ronaldson, and Sister Hall, each of whom protested that he was careful in his part; but they did not call any expert at all, to say that this

might happen despite all care. They have not therefore displaced the *prima facie* case against them and are liable to damages to the plaintiff."

In *Roe* v. *The Minister of Health* [1954] 2 K.B. 66 Somervell, L.J. said at p. 81 :

> " As the Judge has found there was no visible crack and the nursing staff had no reason to foresee invisible cracks, the nurse would reasonably assume no harm had been done and would let the ampoule go forward. The duty which the nursing staff owed to the plaintiffs was to take reasonable care to see that cracked or faulty ampoules did not reach the operating theatre."

See also the judgment of Denning, L.J. in the same case, who contented himself in reiterating the principles he had enunciated in *Cassidy's* case (*supra*).

In *Cassidy's* case the three Judges in the Court of Appeal stated (obiter) that where a plaintiff established negligence on the part of some one or more of several employees of the defendant—hospital authority, the defendant authority was vicariously liable although plaintiff could not prove which of these servants committed the negligent act. Further, the *ratio decidendi* of *Cassidy's* is that where the plaintiff has been injured as a result of some operation in the control of one or more servants of a hospital authority (and he cannot identify the particular servant who was in control) and in all other respects the requirements of the *res ipsa loquitur* rule in respect of the act are established, the hospital authority is vicarously liable unless it proves that there has been no negligent treatment by any of its servants.

In the present case, nursing, as I have said earlier, is just what the patient was entitled to expect from the private clinic of defendant No. 1, and instead she found herself burned with hot water bottles. I find, therefore, myself in agreement with the view of the trial Court that in these circumstances the maxim *res ipsa loquitur* applies ; but with due respect to the decision of the learned District Judge, I hold a different view that the defendants have rebutted the inference of negligence. It is true, of course, that a lot of evidence was heard, but defendant No. 1 did not call any expert to say that this might happen despite all care. I would, therefore, affirm the findings of the learned President of the District Court that one who employs a servant is liable to another person if the servant does an act within his scope of employment so negligently as to injure that other person. This, of course, is the

rule of *respondeat superior* which applies even though the work which the servant is employed to do is of a skilful or technical character as to the method of performing, which the employer sometimes is himself ignorant.

My conclusion, therefore, is that the liability of the defendants is established because the defendants have failed to displace the *prima facie* case of negligence against them. I agree that in the circumstances the duty of the assistants of defendant No. 1 to the plaintiff was to take reasonable care to see that the patient's legs were not burned in the operating theatre and that the burns could have been avoided with more diligence. I, therefore, find that the defendants are liable to damages to the plaintiff.

The learned Judge of the District Court has fixed the general amount of damages which he would have awarded to the plaintiff if liability was established at £500. Having given this question of assessment my best consideration, and although I feel that it has been on the low side, nevertheless, I have taken the view that an Appellate Court is not justified in disturbing a finding of the Court of first instance, unless the trial Court acted upon a wrong principle of law or that the amount awarded is so inordinately low as to make it in my judgment an entirely erroneous estimate of the damages to which the plaintiff is entitled. See the case of *Karavallis* v. *Economides and Economides and Another* v. *Karavallis* (reported in this Part at p. 271 *ante*).

For these reasons, I would not be justified in disturbing the finding of the trial Court on the assessment of the general damages.

With regard to the costs, I also agree, in the circumstances, with the order proposed in the judgment of the learned President of this Court.

VASSILIADES, P. : In the result the appeal (No. 4780) is allowed ; and we give judgment for the plaintiff against both defendants for £825 with legal interest from today and costs in the action and in the appeal on the scale applicable to the amount recovered, up to and including the first ten days of trial plus costs for attending Court to hear judgment. No costs in the District Court thereafter.

There will be judgment and order for costs accordingly.

Appeal No. 4691 stands dismissed.

*Appeal No.* 4780 *allowed.*
*Order for costs as above.*
*Appeal No.* 4691 *dismissed.*