Joint Liability of Surgeons in Sponge Case—Evidence

(Spears et al. v. McKinnon (Ark.), 270 S. W. R. 524)

The Supreme Court of Arkansas says that the gist of the complaint was that after an operation for ectopic pregnancy, performed on plaintiff McKinnon at a hospital, the defendants, who were the operating surgeon and his assistant, left in the abdominal cavity a sponge or gauze which dropped into the culdesac, where it began to rot the tissue and membranes until it found its way to a point about 5 inches above the anus, where it sloughed into and out through the rectum nine months after the operation. The sufficiency of the evidence to sustain the verdict was challenged on several grounds, but, in giving the strongest probative force to the testimony of the plaintiff, all reasonable possibilities must be taken into account, and when that was done the evidence was sufficient to support the verdict in her favor.

None of the witnesses remembered having made a personal examination of the grade or size of the mesh of the gauze used in the operation, and while there was some difference between that which passed from the plaintiff and that generally used in the hospital, it might be that on the occasion of this operation the hospital had run out of the kind it generally used and procured and used the kind that passed from the plaintiff. From the circumstances in the case the jury might have so inferred. As the gauze passed out of an abscess which emitted a large quantity of pus, it could not be said, as a physical fact, that the blood stains would have remained on the gauze during its passage through rotting, sloughing tissue from the abdomen into the rectum. It was contended that the gauze would have traveled the route of least resistance, which would have been through the wall of the vagina instead of through the wall of the rectum; but, as the court interprets the testimony of the physicians, they all admitted that the route of the passage of the gauze from the abdomen to the rectum was a possible way but hardly a probable route. Before the judgment and verdict for the plaintiff could be set aside on this ground, the undisputed testimony would have to show that the route of elimination through the wall of the rectum was an impossible route.

This court cannot agree with the contention that because one of the defendants was assisting the other and was not instructed by the latter to search the abdomen for sponges after the operation, he was exempt from liability if gauzes were found in the abdomen. The record revealed that the assistant's part in the operation was to insert and withdraw the sponges. If through carelessness or negligence he failed to withdraw any of them, he could not escape liability on the ground that he was an assistant. Such a rule would have the effect of acquitting one of civil liability growing out of his own negligence.

Again, it was the contention of the defendants that no liability rested on them as physicians and surgeons on account of sponges or gauzes being left in the abdomen of the plaintiff, because the duty of counting them before and after the operation was imposed on the attendant nurse who was in the employ of the hospital where the operation was performed. In other words, that it was a rule or custom of the hospital and among physicians for the attendant nurse to ascertain by count whether any sponges or gauzes had been left in the body of the patient, which count entirely relieved operating surgeons from such responsibility, and consequently from liability growing out of a failure to remove sponges and gauze from the openings or cavities in the body. But there was no error in a refusal of the trial court to give requested instructions which expressed this idea. Nor was error committed in excluding testimony offered by the defendants tending to establish a rule or custom of the hospital or of physicians making the count by the attending nurse of sponges conclusive evidence that all of them used in the operation had been accounted for and that none of them had been left in the wound or body of the patient.

The jury found for the plaintiff the sum of $3,500 against each of the defendants. This action was against them jointly to recover damages against them as tort-feasors. There was only one operation and one damage. Both of the defendants participated in it and, according to the verdict, both were liable. Under the testimony they were liable as joint tort-feasors, if at all, and the verdict must be construed as a finding of joint and not several liability. The only way that this could be done was to construe the verdict as a joint finding against the defendants for $3,500, and the trial court should have so interpreted the verdict and rendered a joint judgment against the defendants for $3,500; and a judgment for $3,500, instead of $7,000, is here rendered against them.