Sponge Left in Vagina After Childbirth

(Burk et ux. v. Cress (Minn.), 233 N. W. 317)

The defendant, a physician, attended one of the plaintiffs in childbirth, March 9, 1927. The physician made an incision about 1½ inches long "in the lower portion of the perineum," the child was delivered, and the physician proceeded to sew up the incision. To keep the field of operation clean, he packed gauze sponges into the vagina. When the incision was sewed up, he removed such sponges as he could remove with his fingers only; he did not think it advisable "to probe for other concealed sponges." The physician made professional calls several times during March, during which period his patient had some fever. Six or thirteen days after delivery a sponge was discovered, being discharged by natural processes, and it was removed by the physician. April 1, a second physician, Thorson, was summoned and examined and prescribed for the patient, but three days later the physician first in attendance was again called. Just what happened at his visit at that time is a matter of controversy. The physician-defendant claimed that when he was told that Dr. Thorson had been there and that they were waiting for him to call again, he left without making any examination or giving or prescribing treatment. The plaintiffs claimed, however, that he was not told that another physician had been called and did not leave until after he had made an examination and advised with respect to treatment. Dr. Thorson continued to treat the patient, but she remained in poor health. Oct. 10, 1927, she was operated on by a physician in Sioux Falls, S. D. The patient and her husband brought suit against the physician who had attended her during childbirth. A verdict was rendered in their favor, and the physician-defendant appealed to the Supreme Court of Minnesota. There the order of the court below was reversed and a new trial granted.

Under the Minnesota statute of limitations, actions for malpractice must be commenced within two years from the time when treatment by the physician or his employment ends. The plaintiffs did not commence their suit until April 3, 1929. The last visit of the physician-defendant to the patient's residence was made April 4, 1927. Whether the action in this case was or was not commenced within the statutory period depended, therefore, on the character of the defendant's visit on that date. The patient had summoned another physician, April 1, but, suggested the Supreme Court, it might have been that two physicians were desired. If the physician-defendant at the time of his visit, April 4, made an examination and gave the advice attributed to him by the plaintiffs, the jury might conclude that he was acting professionally. He came in response to a call, and, said the court, it can hardly be supposed that he was asked to come some distance into the country only to be informed that his services were no longer desired. The issue was properly submitted to the jury. The evidence was sufficient to support the finding that the relation of physician and patient existed April 4, 1927.

While the physician-defendant was in attendance, his patient had at times a high temperature. He attributed her unfavorable condition to the presence of a cold or "flu" and prescribed treatment. The plaintiffs, however, alleged that the patient's condition was due to a puerperal infection, caused by failure to remove the sponge from the vagina, and that this was negligence. This claim, said the court, had no support by medical expert witnesses. It rested entirely on the theory that laymen may infer negligence from failure to remove the sponge. No liability can be impressed on the defendant on that theory; his negligence must be established by competent witnesses, who are qualified to speak in relation to such an important and delicate subject. So far as the record shows, the removal of the ovary and the tube, of which the plaintiffs complained, may have been necessary for reasons foreign to any conduct on the part of the physician-defendant. The surgeon who operated was not called as a witness, and no witness was produced to show what was done at the operation. There are cases wherein laymen

may draw a permissible inference in relation to causal connection, without the aid of medical expert testimony, but this is not such a case.

The physician-defendant, in assigning errors by the trial court, complained of the admission of the testimony of Dr. Thorson, a graduate of an eclectic school of medicine. The record does not disclose, said the Supreme Court, whether this is a distinct school of medicine, but it seems clear that the witness was recognized "as outside the allopathic school of medicine." Dr. Thorson, to show his qualifications, testified that he knew the practice of allopathic doctors in childbirth cases, because in the medical school from which he graduated one of the obstetric textbooks used was an allopathic book. He did not know, he said, of any difference between his method and the method of the school of allopathy in the treatment of obstetric cases. On such a showing, said the Supreme Court, it was error to permit Dr. Thorson to testify. The rule is that a physician's standard of conduct is to be established by the evidence of those who are trained and skilled in his particular school of medicine. The fact that Dr. Thorson studied a single allopathic textbook is insufficient. Whether such a book is all-inclusive is for a member of the allopathic school to state. The fact that a witness of one school does not know any difference in the treatments of the two schools is meaningless. Because there were expert allopathic witnesses who covered much the same ground as was covered by the eclectic witness, Dr. Thorson, in his general testimony, it was urged on behalf of the plaintiffs that even if Dr. Thorson's testimony was erroneously admitted it was without prejudice, because the testimony of the other witnesses may have been sufficient to make a case against the defendant. The difficulty with such an argument, said the Supreme Court, is that the court has no way of knowing how Dr. Thorson's testimony may have influenced some or all of the jurors.