Van Wyk *Appellant* v Lewis *Respondent*
1924 AD 438

Citation	1924 AD 438
Court	Appellate Division, Bloemfontein - Cape Town
Judge	Innes CJ, Kotzé JA and Wessels JA
Heard	March 31, 1924; April 1, 1924
Judgment	May 28, 1924

Flynote : Sleutelwoorde

Negligence — Medical practitioner — Swab left in patient — Duty of surgeon — Negligence of nurse.

Headnote : Kopnota

Defendant, a surgeon, performed an urgent and difficult abdominal operation upon plaintiff. The operation took place in a hospital at night and defendant was assisted by an anaesthetist and a qualified nurse on the hospital staff who acted as theatre sister. At the conclusion of the operation one of the swabs used by defendant was overlooked and remained in plaintiff's body from which it passed after a lapse of twelve months. The evidence showed that in accordance with the usual practice at the hospital defendant had relied upon the sister to count and check the swabs used, that at the conclusion of the operation he made as careful a search as the critical condition of the patient permitted and, that both he and the sister believed that all the swabs were accounted for before the wound was sewn up.

In an action against defendant for damages for negligence in failing to remove the swab,

Held, that negligence could not be inferred from the mere fact that the accident happened but that the *onus* of establishing negligence lay upon plaintiff.

Held, further, that though defendant in performing the operation was bound

to exercise all reasonable care and skill as it was a reasonable and proper practice to leave the duty of checking the swabs to the theatre sister,. defendant in following that practice was not guilty of negligence.

Held, further, that assuming, without deciding, that the sister was negligent in checking the swabs, defendant was not liable for the result of such negligence.

The decision of the Queenstown Circuit Local Division in *Van Wyk v Lewis*, confirmed.

Case Information

Appeal from a decision of the Queenstown Circuit Local Division (VAN DER RIET, J.).

Plaintiff sued defendant, a surgeon, for £2,000 damages for negligence in that defendant at the close of an operation upon plaintiff had left one of the swabs used in the operation in plaintiff's body.

The trial court entered judgment for the defendant and plaintiff, appealed.

The facts appear from the judgment of INNES, C.J.

A.J. Pienaar, for the appellant: The *onus* was on the respondent to show that there was no negligence on his part or on the part of the nurse. Once it is proved that the swab was left in the patient's body the burden is shifted on to the defendant. See Beven on *Negligence* (3rd edit.), Vol II., p. 1161.

As to the standard of care that should have been exercised by the defendant see *Mitchell v Dixon* (1914 AD 519). As there was very great danger, very great care must be proved and the use of the best method.

The defendant is liable for the mistake of the nurse. He undertook to perform the operation and the checking of the swabs is part of the operation. The work done by the nurse in checking the number of the swabs was the work of the defendant. See *Hillyer v Governors of St. Bartholomew's Hospital* (1909, 2 K.B. 820). Apart from custom or consent a surgeon cannot delegate his duties as the contract with the patient is one in which the patient relies on the personal skill of the surgeon. The nurse is the surgeon's servant because she is under his control. *Perionowsky v Freeman* (4 F and F. 977), is distinguishable on the facts. See *Sadler v Henlock* (4 E iod B. 570, and 119 E.R. 209).

The surgeon must at some stage accept responsibility even for the mistakes of the anaesthetist.

On the question of control: see *Donovan v Laing Wharton and Downe Syndicate Ltd.* (1893, 1 Q.B. 629), and *Addis v Schiller Lighting and Plumbing Co.* (1906 T.H. 210).

On the question of custom our law and the English law are the same. See *Van Breda and Others v Jacobs and Others* (1921 AD 330). The practice of leaving the counting of the swabs to the nurse is a trade or professional usage and not an ordinary custom. It must be notorious. See *Devonalt v Rosser & Sons* (1906, 2 K.B. 728). The right to delegate the duty must be known to the patient or at least notorious, and it must be reasonfact. Control and not selection by the master is the true test. See Halsbury's *Laws of England*, Vol. X X., p. 64, sec. 131.

See Taylor's *Medical Jurisprudence* (1920, ed.), Vol. I., p. 102.

H.G. Lewis, K.C. (with him *F. B. van der Riet*), for the respondent: As to the standard of care required of a medical man and I submit of a theatre sister: see *Mitchell v Dixon (supra*).

The *onus* is throughout on the plaintiff. See *Mitchell v Dixon (supra*, at p. 525), and the case there cited. See *Coppen v*

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Impey (1916, C.P.D., at p. 320); Halsbury's *Laws of England*, Vol. XX., secs. 814 and 815; *Rich v lierpont* (3 F. and F. at p. 40); and *Webb v Isaac* (1915, E.D.L. 273).

Even if the nurse made a mistake in counting the swabs, it did not necessarily constitute negligence; it may constitute misadventure according to the circumstances. The element of industrial fatigue must be taken into account.

The custom relied on is really practice, system or usage. For definition, of usage see Halsbury's *Laws of England*, Vol. X., sec. 464 and secs. 469, 470, to 472. See also *Sewell v Corp* (1 C and p. 392), Halsbury's *Laws of England*, Vol. X., sec. 491; *Pollock v Stables* (12 Q.B. 765 and 116 E.R. 1057). The system was reasonable. See *Chapnian v Walton* (10 Bingham at p. 63 and 38 R.R at p. 401).

The nurse was a skilled collaborator. She had an independent duty to the patient. She was not under the control of the defendant in counting the swabs. *Hillyer v Governors of St. Bartholomew's Hospital (supra*), did not lay down that the nurse is the servant of the surgeon. The nurse was not engaged by the surgeon, and he had no control over her engagement, dismissal or selection. The position would have been different if the nurse had acted on the express orders of the surgeon. The power of dismissal is the most important element in control of master over servant. As to the independent responsibility of two or more skilled persons working together and employed separately:, see Halsbury's *Laws of England,* Vol. XXT., sec. 636; *Glavin v Rhode*

Island Hospital (34, Am. Rep., at p. 680), is distinguishable on the facts. See *Hall v Lees* (1904, 2 K.B., at p. 617). The case of *Byrne v Thom*, cited by Taylor on *Medical Jurisprudence* (6th ed.), p. 97, is distinguishable, as the nurse was in defendant's employ in a private nursing home. See *Huyton v Frazerhurst* (a New Zealand case reported in Auckland Weekly News for July 5th, 1923). *Perionowsky's* case *(supra)*, is a strong case, as there had been a direct order. See *Chatwin v C.S.A.R.* (1909 T.H. 33), and case cited at p. 50. See *The Halley* (18 L.T.R. 879); *Hedley v Pinkney & Sons S.S. Co.* (1892, 1 Q.B., at p. 62); *Martin v Temperley* (4 Q.B. 298 and 62 R.R. 377); *Dewar v Tasker & Sons Ltd.* (23 T.L.R. 259); *Cameron v Nystrom* (1893, A.C., at p. 312); Thomson on *Negligence*, Vol. II., p. 892.

As to the relationship of master and servant generally see *Pothier* on *Obligations (Evans' Translation*), Vol. I., p. 72, sec. 121; *Voet* 9.4.10 *Maasdorp's* translation of Schorer's *Notes* to Grotius, p. 550 *f*.

Pienaar in reply: The fact that the swab was found in the patient's body throws the *onus* on the respondent to prove that it was not left there negligently or at least to explain the presence of the swab. See Beven on *Negligence* (3rd edit.), Vol I., p. 118.

Misadventure is a term only used in criminal cases. The proper term is inevitable accident. See Beven on *Negligence*, Vol. I., pp. 561 and 565. The burden is on the respondent to prove that the accident was inevitable and in what respect there was an accident. It must be shown that what happened could not have been foreseen.

A man cannot assign a purely personal contract except with the consent of the principal.

Cur adv vult.

Postea (May 28th).

Judgment

Innes, C.J.:

On the 3rd February, 1922, the respondent, a physician and surgeon practising at Queenstown, received a telegram from Dr. Louw of Sterkstroom asking him to meet the appellant who was arriving by train, with a view to an operation. He arranged on her behalf for admission to the Frontier Hospital, where he examined her the same afternoon. He found her condition

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so critical as to necessitate an immediate operation. This he performed at 8 o'clock the same evening. The operation was, conducted under the conditions and in accordance with the practice prevailing at the hospital. The anaesthetic was administered by Dr. Thomas, and Sister Ware, a qualified nurse on the hospitai staff, acted as theatre sister. The matron and nurse De Wet were also in attendance. The appendix, being inflamed and adherent, was removed. The gall bladder he found in a state of acute inflammation, much distended, with necrosis on the surface and he decided to drain it. Having packed off the field of operation with swabs handed him by the sister, he made an incision and inserted a tube. This was attended with difficulty. There was a rush of highly septic matter to he dealt with and owing to the friability of the bladder, it was impossible to sature the opening so as to draw it round the tube. He put in more packing to prevent the spread of sepsis. At this stage he was warned by the anaesthetist that the patient should be got off the table as soon as possible. The operation having concluded, he removed all the swabs be saw or felt, and being satisfied, on grounds presently to be discussed, that they had all been accounted for to the satisfaction of the sister, be proceeded to stitch up. The appellant, a young woman of 26, made a rapid recovery; she was discharged from hospital on the 19th February, the wound having by that time healed over. Between that date and January of the following year the respondent saw her on several occasions. Some time after the operation the wound opened slightly, there was an oozing of pus, and she informed him that several gall stones had come through the opening. She complained of discomfort, but not of pain. The last occasion on which she consulted him was in January, 1923; he found on examination a slight swelling and tenderness in the region of the gall bladder, which pointed, he thought, to a recurrence of the old trouble. But on the 15th of the following month the appellant states that she evacuated a piece of muslin of the shape and dimensions of a small sized packin swab, with tape attachment. Under those circumstances she did not pay the respontlent's account which had just been rendered, but commenced an action for £2,000 damages. Judgment was given for the defendant by VAN DER RIIET, J., in the Queenstown Circuit Court; and the present appeal is against that finding.

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The declaration alleges that the respondent was negligent and unskilful in failing to remove that swab. And the first question

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which presents itself is whether the appellant's account of what occurred in February, 1923, is to be accepted. If So, it follows that the swab which she produced at the trial must have been used at the operation. For in no other way could it have found entrance. Her story, implying as it does a lesion of the bowel by ulceration or otherwise, and the consequent passage of the muslin into the alimentary system, is in itself remarkable; and it is rendered still more remarkable by the absence of high temperature and other symptoms which might be expected to accompany the process. The medical evidence, however, shows that, though in the highest degree improbable, her account of what took place cannot be dismissed as impossible. And the trial judge, whose full and careful reasons show that he appreciated the difficulties surrounding this part of the case, came to the conclusion that the appellant was speaking the truth. He was impressed by her demeanour, and he accepted her statement. That disposes of the preliminary question, and we must deal with the case on the basis that at the conclusion of the operation one of the swabs was overlooked and remained in the patient's body.

So dealing with it the legal nature of the claim calls at once for attention. There was some discussion during the argument as to whether the action had been framed in contract or in tort. One of the appellant's contentions indeed assumed that the basis of her claim was contractual. Now the line of division where negligence is alleged is not always easy to draw; for negligence underlies the field both of contract and of tort. Cases are conceivable where it may be important to decide on which side of that line the cause of action lies. But the present is not such a case; no mere omission is relied on, nor is the basis upon which damages should be Calculated in dispute. But as the point has been raised I must sa that, in my opinion, the claim is based on y tort. The compensation demanded is in respect of injury alleged to have been sustained by reason of the respondent's negligence and lack of skill. No doubt the duty to take care arose from the contractual relationship between the parties; but it was a duty the breach of which was actionable under the Aquilian procedure. The respondent's liability therefore depends on whether it was

due to negligence or unskilfulness on his part that the swab was allowed to remain in the wound. That can only be decided on a consideration of the facts surrounding the operation. But before referring to those it will be convenient to enquire what standard of diligence it was the respondent's duty to observe, and to determine where the *onus* of proof lay.

It was pointed out by this Court, in *Mitchell v Dixon* (1914, A.D., at p. 525), that "a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care." And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs. The evidence of qualified surgeons or physicians is of the greatest assistance in estimating that general level. And their evidence may well be influenced by local experience; but I desire to guard myself from assenting to the principle approved in some American decisions that the standard of skill which should be exacted is that which prevails in the particular locality where the practitioner happens, to reside. The ordinary medical practitioner should, as it seems to me, exercise the same degree of skill and care, whether he carries on his work in the town or the county in one place or another. The fact that several incompetent or careless practitioners happen to settle at the same place cannot affect the standard of diligence and skill which local patients have a right to expect.

The question of *onus* is of capital importance. The general rule is that he who asserts must prove. A plaintiff therefore who relies on negligence must establish it. If at the conclusion of the case the evidence is evenly balanced, he cannot claim a verdict; for he will not have discharged the *onus* resting upon him. But it is argued that the mere fact that a swab was sewn up in the appellant's body is *prima facie* evidence of negligence which shifts the *onus* so as to throw upon the respondent the burden of rebutting the presumption raised a difficult task in view of the lapse of time between operation and trial. The maxim *res ipsa loquitur* is invoked in support of this contention. Now that maxim means simply what it say - that in

certain circumstances the thing - that is the occurrence - speaks for itself. It is frequently employed in English cases where there is no direct evidence of negligence. The question then arises whether the nature of the occurrence is such that the jury or the court would be justified in inferring negligence from the mere fact that the accident happened. See *Hammack v White* (11 C.B.N.S., p. 588); *Byrne v Boadle* (2 H and C., p 722); *Wing v London Omnibus Co.* (1909, 2 K.B., p. 652, etc.). It is really a question of inference. No doubt it is sometimes said that in cases where the maxim applies the happening of the occurrence is in itself *prima facie* evidence of negligence. If by that is meant that the burden of proof is automatically shifted from the plaintiff to the defendant then I doubt the accuracy of the statement. The general principles on which the *onus* is transferred from One party to another, during the course of a trial were examined in *Frankel v Ohlsson's Breweries* (1909, T.S., p. 957), and I do not desire to add to what was then said. For clearly in the present case there has been no shifting of *onus*. The plaintiff alleged a lack of reasonable care and skill, and the correctness or otherwise of that allegation can only be determined on a consideration of all the facts; there is no absolute test; it depends upon the circumstances. The nature of the occurrence is an important element, but it must be considered along with the other evidence in the case. Indeed it is impossible to appreciate the position, and to visualize, even imperfectly, the circumstances attending an abdominal operation of this nature without studying the mass of medical evidence placed before the Court. In my opinion the *onus* of establishing negligence rested throughout this case upon the plaintiff. And the question which now awaits consideration is whether that *onus* has been discharged.

The charge against the respondent is not really one of incompetence; it is not alleged that he did not possess or that he failed to exercise due surgical skill. Nor could it have been. For it is clear that he performed a difficult operation under trying circumstances, and that he saved the patient's life. The real contention is that he was careless. Mr. *Pienaar*, who argued the appellant's case with conspicuous ability and candour contended that he was guilty of *culpa* in two respects. First, in that the muslin left in the body was a mopping and not a packing swab.

For that contention he relied upon the respondent's own statement: "I have never used a swab like that for an internal operation; not as small as this. I have never known one of that size with a tape. I always use the large size and this would he useless for packing purposes." Thus on his own showing it was said the respondent had packed into the wound a small swab intended for a different purpose, and more easily overlooked than a packing swab proper; and that was negligence.

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The argument is more ingenious than forcible. As a fact the respondent's attention was not directed to the point that if this was a mopping swab used at the operation it should not have been packed into the wound; nor was that point made at the trial. In the box he maintained that he had not left any muslin behind. End the statement relied on was made in connection with and in support of that contention. It cannot be pushed too far and used as an admission of a matter not present to his mind at the time. It is clear that the swab in question, though somewhat undersized, corresponded with the swabs used mainly for packing, but also for internal mopping at the Frontier Hospital. But, apart from the statement above quoted, there is nothing to indicate that it was actually used for the latter purpose. There is no need to say more on this Point; and I turn to the second and more weighty allegation: namely, that the respondent was negligent its failing to exercise due care to ascertain that every swab had been accounted for before he, closed up the wound.

The evidence shows that in abdominal operations the free use of swabs is necessary. These are pieces of muslin or gauze, made in two sizes. Small for mopping up blood and liquid matter, larger for packing into the wound to isolate the sphere of operation, or for other purposes. In a hospital the theatre sister, or nurse in charge generally has in readiness a number of sterilized swabs varying with the nature of the operation. These she hands to the surgeon as he requires them; the small ones he throws down after they have been used, the packing swabs remain in the wound until the conclusion of the operation. They must then be removed; and I gather from the testimony of a number of skilled and experienced witnesses that this is by no means a simple matter. The number of swabs employed is often considerable; and a swab packed into a small space, saturated with blood, an (I of the same colour as its surroundings may easily escape detection

especially when hidden by an intestinal coil. The removal is not so much a matter of surgical skill as of careful search, conducted sometimes under critical conditions, as when the strength and endurance of the patient has been taxed to the limits of safety. Indeed the danger of an undiscovered swab has been described as one of the bugbears of abdominal surgery. Various devices have been adopted for guarding against this danger. At the Frontier Hospital every packing swab, whether used for that purpose, or as sometimes happens for internal mopping, has a tape, to which a forceps is attached by the sister before she bands it to the surgeon. Provided that routine is observed, and provided the forceps does not become detached, the safeguard should be complete; but the strain of a long operation is severe on all concerned, and we are told that no check has yet been devised which is infallible even in the hands of surgeons and assistants of the greatest skill and experience. As already explained medical practitioners are required in their professional work to exercise reasonable skill and care. In regard to the removal of swabs at the conclusion of an operation therefore they are bound to make such search and take such precautions as are reasonable under the, circumstances. In view of the consequences involved the search must be careful and the precautions strict; anything legs would not be reasonable. But it is undesirable to endeavour to define the steps which should be taken or the care which should be observed, even if it were possible for a court of law to do so. These would vary with the circumstances, for diligence, like negligence, can never be disentangled from the facts. Where it is necessary to undertake an abdominal operation without skilled assistance, it might be proper for the operator to exercise a more than ordinary degree of personal precaution, as for instance, by keeping an accurate mental tally of every swab employed, or by using a contiguous roll instead of separate pieces of gauze. The examples are merely, illustrative; others could doubtless be suggested. Each would have its drawback; the effort of keeping unaided an accurate count is liable in some degree to interfere with that mental concentration upon the operation which is in the best interests of the patient; and the use of a continuous roll gives rise to mechanical difficulties which are obvious. Yet, in view of the balance of advantages it be right to adopt one or other of these precautions. The testimony of experienced

members of the profession is of the greatest value on a question. of this kind. But the decision of what is reasonable under the, circumstances is for the Court; it will pay high regard to the view of the profession, but it is not bound to adopt them. In this: instance the operation was performed in a properly equipped hospital with the assistance of a trained staff. And it was conducted in accordance with the practice there prevailing which was as follows: - The swabs of both sizes were kept in sterilized drums, the smaller ones being made up in packets containing as uniform number. In preparation for an abdominal operation three or four of these packets were taken out and placed on the table together with from 12 to 20 large swabs which were carefully counted. The sister handed the swabs to the surgeon as required, attaching forceps to the larger ones as already described. She kept a mental record of these, checking it by reference to the number left on the table. And when at the conclusion of the operation the surgeon had removed all he could find she informed him whether the number taken out was correct. When satisfied an this point he sewed up the patient, while the sister made a final count of the mopping swabs which had been thrown down. If any discrepancy was revealed, even at the final stage, the stitches would be taken out and further search made. But neither the respondent nor the sister had ever known this to occur. Now the main feature of this procedure is that the duty of counting all the swabs, and more particularly of keeping a tally of those used inside the body and checking them as they come out is entrusted to the sister. There is ample medical testimony that that is a proper practice, and one largely followed in present-day surgery. And I have come to the conclusion that it is reasonable, on grounds presently to be mentioned. And reasonableness is the sole test. This is not the case of a trade or professional custom which may or may not be imported into contractual relationships, though the language of the plea rather looks that way. The enquiry here is whether the respondent has exercised due care in the performance of an operation, which he conducted on certain lines. If the precautions involved were reasonable under the circumstances then due care was exercised, provided he observed them. Now the practice itself is consistent with the surgeon either counting or not counting the swabs himself. The respondent

who gave his evidence very candidly stated that he was not in the habit of attempting any count, where he had a competent sister as a collaborator. His use was, at the conclusion of the operation to remove all the swabs he could find; and if the sister intimated that they had all been accounted for he made no further search. To do so would, in his opinion, be to expose the patient to unnecessary risk. And he admitted that on this occasion he followed that course; he left the counting to the sister. In connection with this part of the case regard must be had to the conditions under which operations are performed in a modern hospital. These may be gathered from the medical evidence. The surgeon is assisted by an anaesthetist who is a qualified specialist, and who within the limits of his task undertakes a personal responsibility. The theatre sister, though her work is largely mechanical also has important duties to discharge. She sees to the preparation of

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the theatre, the sterlizing of the instruments, the laying, out of the swabs and other details. She stands ready to anticipate or to supply the needs of the operator, and she undertakes the counting and checking of the swabs. She is, as a rule - and she was in this instance - not only a duly certified but a highly experienced nurse, upon whom during the period of her instruction and training the importance of keeping a correct tally has been authoritatively impressed. In a general sense she is under the orders of the surgeon, but she also has independent duties to discharge, and checking the swabs is one of the most important. I am unable to say, that a surgeon who leaves that task to a competent sister, under such conditions as prevailed at the Frontier Hospital is on that account guilty of negligence. Fortunately we are not called upon to decide between the two courses. But I would venture, with diffidence, to remark that it seems to me a matter which each operator should determine for himself. His duty is to do his best for his patient; and he should, in this respect, follow the course which his judgment tells him is in his own case the preferable one. It is largely a matter of temperament. The task of keeping a in mental record of swabs used, a record valueless if not accurate, would distract one man more than another from that concentration upon the problems of the operation which the interests of the patients demand. But a further point was made by Mr. *Pienaar*; he suggested that a verbal assurance as to the correctness of the swabs should have been

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obtained from the sister; that this was not done, and that, in that respect, at any rate, the respondent was negligent. Here, again, Dr. Lewis gave his evidence with great candour. He satisfied himself that the sister found all the swabs accounted for, but how he did so he was not prepared to say. He could not swear that the sister spoke to him, or he to her; it might possibly, he Said, have been done by a look or a nod, for they understood each other and had often worked together. The sister said that she checked, the swabs and found them correct, and that she told the respondent so before he sewed up; but she admitted that her knowledge of the usual practice had an influence upon her memory. It was of course difficult for either the surgeon or the nurse to speak with confidence on a matter of that kind after so long an interval. The learned judge found that it was not established whether a question was put or not, but he was satisfied that the sister did not intimate that anything was wrong. After considering all the evidence the position seems to be this: the respondent relied upon the sister to count and check the swabs; at the conclusion of the operation he made as careful a search as the critical condition of the patient permitted; the sister believed that all the swabs had been accounted for; the respondent came to the same conclusion, but whether from her silent assent, or from her words it is impossible to say; and he therefore proceeded to sew up the wound. I am not prepared to differ under these circumstances from the finding of the learned judge that the charge of personal negligence has not been made out.

Finally it was urged that the respondent Was answerable for the negligence of the sister. I do not propose in a case to which Miss Ware is not a party to express any opinion as to her liability. It is not necessary to decide exactly how this unfortunate accident came about. But assuming (without determining) that she was negligent in her check, it does not follow that the surgeon is liable for the consequences. The contention is in effect disposed of by the opinion already expressed as to the independent part in the operation played by the sister, and as to the reasonableness of relying upon her count. She was not the servant of the respondent; she was under his general control during the operation, but she was also a collaborator to whom as already pointed out it was reasonable to entrust the work of counting and checking the swabs. It was urged that the respondent contracted

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to do work which required special skill, and that he could not, without the consent of the patient, devolve that work on any third person. That argument would make the surgeon liable for every default of the anaesthetist also. But the real position is that the respondent undertook an operation in the performance of which he was bound to exercise all reasonable care and skill. And if it was consistent with the exercise of such care to rely upon the sister to check the swabs - thus setting himself free to devote all his energies to the surgical details of the operation, then he is not liable for her negligence, provided he made all search reasonably possible under the circumstances.

I think therefore that the finding of the trial court cannot be disturbed. It is impossible to withhold one's sympathy from the appellant, though the consequences to her were fortunately far less serious than they might have been. But to uphold some of the contentions so strenuously urged on her behalf would render it difficult for a surgeon to concentrate all his energies upon the surgical problems of a critical operation, and might render practitioners slow to undertake them. And that would hardly be in the interests of the particular patient or of the general public.

The appeal must be dismissed.

Judgment

Kotzé, J.A.:

In this case the plaintiff claims damages from the defendant, a surgeon, for injury sustained through his alleged carelessness during the performance of an operation on her. It is, therefore, incumbent on her to prove such facts which, if not rebutted or satisfactorily explained, go to establish a case of negligence. She must show an absence of such care as under the circumstances it was the duty of the defendant to have observed in the performance of the operation. A medical man treating a patient has to exhibit reasonable care and skill, and if it appear that he has failed in so doing, and that through his want of such care or skill a patient has been injured be will undoubtedly be liable. The fact was found by the learned judge below that the defendant, during the operation, in removing the swabs which he had used and placed in the wound left one swab in the plaintiff's body when he proceeded to stitch up the wound. The placing of a foreign substance in the patient's body and leaviny it there when sewing up the wound, unless satisfactorily explained,

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establishes, in my opinion, a case of negligence. I find a similar view expressed in *Hillyer v The Governors of St. Bartholomew's Hospital* (1909, 2 K.B., at p. 828 of the Report), where KENNEDY, L.J., observed: "It appears to me that, subject always to the reservation I have stated in respect of tfre nature of the defendant's legal liability for the negligent acts or omissions of their professional staff, there was, apart from the statements which two of the surgeons made subsequently to the plaintiff, and which were admitted in evidence without objection on the part of defendant's counsel, a

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prima facie case on the issue of negligence in the facts which I have briefly set forth. I think that so far the plaintiff might, in the circumstances, invoke the application of the maxim *res ipsa loquitur*." With this expression of opinion the Master of the Rolls concurred. The facts in the above case were briefly these. A patient, whilst lying on the operating table in St. Bartholomew's Hospital in an insensible state through the administration of the necessary anaesthetics, had his left arm burned by contact with a heating apparatus under the table, and his right arm was also bruised during the operation. The action was sought against the governors of the hospital, the plaintiff's case being that they were responsible in law for the negligence of the surgeons employed at the hospital. The Court of Appeal, however, held that under the circumstances no liability attached to the governors of the hospital for negligence or unskilfulness of the surgeons in attendance at the operation.

The actual decision in *Hillyer's* case has no direct application to the present case; but the above observations of KENNEDY, L.J., support the view that, where a plaintiff has proved certain facts from which, if not satisfactorily rebutted or explained, the conclusion may reasonably be drawn that there has been an absence of the necessary care or skill on the part of the medical man, a case of negligence against the defendant has been established, rendering him liable in damages. It is no doubt true that negligence may be manifested in many and various ways, and in complicated instances the difficulties usually are in respect of the *onus probandi*. Not infrequently a plaintiff may produce evidence of certain facts which, unless rebutted, reasonably if not necessarily indicate negligence, and in such cases the maxim *res ipsa loquitur* is often held to apply. It seems to me that the legal view, in a case like the present, has been well summed up by

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Beven in his standard treatise on *Negligence* (Vol. 2, at p. 1161, 3rd Ed.). According to him to sew up a sponge or an instrument in a patient after an operation is evidence of negligence. "Very great care and method," he adds, "are to be observed in accounting for all appliances used, and this in proportion to the easiness with which they may escape observation; but even here the fact that some needles or portion of an instrument has been left in a wound is not conclusive, but a conclusion from the fact must be deteririined by a jury on a view of the whole circumstances." If, therefore, negligence has been led on both sides, the question of negligence or no negligence must be ascertained from a consideration of all the facts viewed as a whole. This in substance, was the contention of the learned counsel for the respondent in the present appeal.

A case of negligence having been established which, if not met and rebutted, would justify a finding in the plaintiff's favour, it rests upon the defendant, on whom the *onus probandi* has been shifted, to prove such facts as will show that no negligence or want of care is under the circumstances to be attributed to him. This he proceeded to do by means of the testimony of numerous professional witnesses, whose evidence is of importance and value. His own evidence was also very frankly given by him.

All this evidence, together with the special circumstances connected with the operation, have been fully set out and dealt with by the CHIEF JUSTICE and my brother WESSELS, and I need not now repeat them. I agree with the other members of the Court that, under the particular circumstances of this case, the leaving of the swab in the body of the patient should not be regarded as negligence on the part of the defendant. There can be no doubt that the operation which Dr. Lewis had to perform was a most serious and critical one, involving her life, which depended upon the immediate sewing up of the wound. The skilfulness of the operation was not questioned by the plaintiff; her case rests simply and entirely upon negligence. It was very ably conducted and argued on her behalf by Mr. *Pienaar*; but a careful consideration of the proved facts, taken as a whole and the well reasoned judgment of the Circuit Court satisfy me that we should not now disturb that judgment.

In regard to the contention that, according to the defendant's own statement, a mopping swab and not a packing one was left

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by him in the wound when he stitched it up, I do not think that the evidence of Dr. Lewis rightly considered bears that construction. And in regard to the liability of the operating surgeon for any negligence or omission on the part of the sister or nurse in attendance at the time, I do not deem it necessary or expedient to enter fully into this question. The operating surgeon no doubt, as laid down in the case of *Hillyer (supra*), has control of the operating room or theatre, and circumstances may arise where he may become liable for the acts of the nurse or sister in attendance. But it is sufficient in the present instance to observe that the defendant cannot, upon the evidence of record, be held to be responsible for hex not having kept a correct count or tally of the number of swabs used and actually removed from the patient's body. Her duty in counting and checking the swabs is quite independent of the operating surgeon.

I, therefore, concur in the opinion that the appeal should be dismissed.

Judgment

Wessels, J.A.:

The salient facts in this case are briefly as follows: -

The plaintiff, a young woman, residing on a farm in the district of Sterkstroom was advised by her local doctor to undergo an operation for appendicitis and gall stones. It was decided that she should be operated upon by the defendant at the Frontier Hospital, Queenstown.

She arrived at Queenstown about seven in the evening of February 3rd, 1922, and was taken to the hospital. She arrived there in a state of collapse and the defendant came to the conclusion that the operation should he begun as soon as possible and carried out with the greatest despatch. The operation was therefore done about eight o'clock that night by artificial light.

The hospital had been advised of the operation and everything was placed there in readiness by Sister Ware and the hospital nurse. When everything was ready Dr. Lewis operated. Dr. Thomas acted as anaesthetist, whilst Sister Ware, Nurse de Wet and another nurse were in attendance. The laying out and counting of the swabs to be used in the operation

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were done by the sister. During the operation Dr. Lewis obtained the necessary swabs from Sister Ware. The defendant himself did not count the swabs. He was hurried on by the anaesthetist and before sewing up the wound looked carefully for swabs and when he

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thought that he had extracted them all he is satisfied that he referred to the sister who signified that the number taken out corresponded with the number put in. The defendant then sewed up the wound. The plaintiff was in hospital from February 3rd to February 19th. She recovered very quickly. Her temperature was normal on the ninth day. The drainage tube was taken out about the 8th day. The wound had completely healed when the plaintiff left the hospital. Later on the wound opened up slightly and a little pus came out. She told Dr. Lewis that gall stones came out of the wound, and that, according to the medical evidence, would account for the wound opening and pus coming out. In January, 1923, the wound had quite closed but the plaintiff complained of pain and discomfort on the right side. Dr. Lewis thought that these symptoms arose from the fact that she had a diseased gall bladder and gall stones, for the doctor had not thought it advisable to take the gall bladder away. At this time there were no signs of an abscess. She had no temperature nor an increased pulse. After this Dr. Lewis did not see the plaintiff again professionally.

On February 15th, 1923, or about a year after the operation, the plaintiff alleges that she passed one of the swabs inserted in her abdomen per anum (this statement was accepted by the Judge). The plaintiff sued the defendant for damages on account of his negligence in leaving the swab in the wound. The Judge of first instance found that the defendant had used reasonable care and was not responsible for the, accident. The question for us to decide is whether the Judge was right in coming to this conclusion. I shall deal more fully at a later stage with the question whether the Judge's finding that the plaintiff passed the swab per anum ought to be reversed, and shall also consider at length the details of the operation when I have dealt with the questions of law which arise in this case.

Assuming the above facts to be correct I shall first consider the various legal questions which present themselves for solution. The case is couched in tort not in contract. The claim is based on an injury done to the plaintiff by the negligent act of the defendant. Though the case is not founded on a breach of contract it is one of those cases where the relationship between the parties arises out of a contract but where the act complained of is an injury or delict done in consequence of carrying out the contract. The

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delict grows out of a breach of duty which the law implies from the contract between the parties the duty of the surgeon, who contracts to operate, not to do so negligently. (Voet 9.2.23: Addison, *Torts* 8th Ed p. 15). I think the law necessary for the decision of this case may well be stated in a series of propositions.

(1) The contract between a patient operated upon in a hospital and the operating surgeon is that the surgeon will perform the operation with such technical skill as the average medical practitioiner in South Africa possesses and that he will apply that still with reasonable care and judgments. There is ample authority for this proposition. This court decided in *Mitchell v Dixon.* (1914 AD 519) that a medical practitioner is not expected to bring to bear on a case entrusted to him the highest possible professional skill but is bound to employ reasonable skill and care and is liable for the consequences if he does not.

In *Rich v Pierpont* (3 F. & F. 35) it was held that to render a medical man liable for negligence or want of due care, or skill, it is not enough that there has been a less degree of skill than some other medical men might have shown or a less degree of care than even he himself might have bestowed; nor is it enough that he himself acknowledged some degree of want of care: there must have been a want of competent and ordinary care and skill and to such a degree as to have led to a bad result. The American cases are to the same effect. "A surgeon must exercise towards his patient such reasonable care and skill as is usually exercised by surgeons of good standing in the community in which he resides." *London v Scott* (12 A.L.R. (annotated) p. 1487). See also *Smothers v Hanks* (11, Am. Rep. 141 and note to case). *Gillette v Tucker* (93, Am. State R. 639) and notes.

"The cases are agreed upon the foregoing main propositions that a reasonable and not the highest or greatest amount of care, skill and diligence, is required of a medical man: that he does not warrant a cure nor is he liable for a mere error in judgment in cases of reasonable doubt: but on the question of the meaning of 'reasonable care and skill' there is some diversity of opinion. The great weigt of authority is in favour of the rule that the standard should be that reasonable care, skill and diligence as is ordinarily exercised in the profession generally." *Pike v Honsinger* (63, Am. St. Rep. 655: note p. 482, 11 Am. Rep.). These principles I take it are the principles that obtain in our law. They are merely the application of the principles of the

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Lex Aquilia to surgeons and physicians in relation to their patients. The case of *Loudon v Scott* was decided as late as 1920 though it has been questioned whether the locality in which a medical man practises can be taken in account: see *Beven* (Vol. 2, 3rd Ed p. 1162). It seems to me, however, that you cannot expect the, same skill and care of a practitioner in a country town in the Union as you can of one in a large hospital in Cape Town or Johannesburg. In the same way you cannot expect the same skill in these towns as you will find with the leading surgeons in the large hospitals of London, Paris and Berlin. You can only expect of surgeons in South Africa that degree of skill and that degree of care which is generally to he found in surgeons practising in this country. It seems to me therefore that the locality where an operation is performed is an element in judging whether or no reasonable skill, care and judgment have been exercised. This principle has been recognised in the case of *Small v Howard* (35 Am. Rep. 363) and kindred cases.

(2) The general method or general system of operating in a modern hospital is an important factor in judging whether a surgeon operating in a hospital has exhibited a reasonable degree of skill, care and judgment.

The Court must, ascertain from the medical profession what is the usual practice adopted in modern hospitals in this country when a surgeon conducts an abdominal operation. The Court cannot lay down for the profession a rule of practice. It must assume that the generally adopted practice is the outcome of the best experience and is that which is best suited to attain the most satisfactory results. This is not only common sense but it is supported by legal authority.

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The general rule of law is that where a reasonable trade usage is of universal application in a community or where a form of professional practice is generally adopted by a particular profession, a person who deals with the trade or profession is impliedly bound by the usage, or the practice of the profession.

In *Sewell v Corp* (1 C. & p. 392) the Court decided that if there is a particular usage applicable to a trade or profession, persons employing one in such a trade or profession will he taken to have dealt with him according to that usage. In Halsbury's *Laws of England*, Vol. 10, 491, it is put thus: "If there is a general usage applicable to any particular profession, parties employing an

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individual engaged in that profession are supposed to deal with him according to that usage." It is after all only common sense that if a person subjects himself to an operation he impliedly agrees that the doctor will perform the operation in accordance with the practice approved of by the great body of medical men. In America it has been decided that a physician is entitled to have his treatment of his patient tested by the rules and principles of the school of medicine to which he belongs: *Force v Gregory (38 Am. St. Rep. 371); Pattin v Wiggins* (81 Am. Dec. 593).

In *Perionowski v Freeman* (4, F. & F. 997), the Court relied entirely upon the evidence of medical men to guide it in the practice of the profession and based its judgment on the usual course of hospital practice as stated by the medical practitioners. COCKBURN, C.J., p. 981, said: "It was indispensable that such (minor) matters should be left to nurses who were necessarily familiar with them: and it had been satisfactorily proved by the testimony of some, of the most eminent medical attendants of our hospitals that such was the ordinary and usual course of hospital practice."

(3) The relation of a hospital sister or nurse in a public hospital to a surgeon operating in that hospital is not that of master and servant nor is it analogous to such a relationship. The sister or nurse is an independent assistant of the surgeon though under his control in respect of the operation. In the opinion of the medical profession as disclosed in the evidence, the hospital sister is regarded as an important assistant. She has to prepare the operating theatre to see that the instruments are sterilized and that everything is made ready for the operation. She has her nurses under her and sees that the do what is required of them. She receives y her diploma from the State and is employed not by the operating surgeon but by the hospital authorities. The surgeon has no power to appoint her and she receives from him no fees. He has no right to dismiss her. Before and after the operation the doctor has no. active control over her. It has been decided in several cases that the doctor is in no way liable for what she does after the operation to a patient in the ordinary course of those duties which are usually entrusted to nurses (*Perionowski v Freeman*, 4. F. & F. 977).

It is true that during the actual operation it is the duty of the hospital sister or nurse to do what the doctor requires of her in the same way as it is the duty of an assistant surgeon to act under

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the principal surgeon's instructions but it cannot be contended that such an assistant surgeon is the servant of the operating surgeon. The truth is that hospital sisters and nurses form a distinct branch of the hospital. They are members of an allied profession and have duties of their own to perform. They are subordinate to the surgeons but they are in no way their servants. The surgeon is not responsible for what the nurse does in the sense, that a master is responsible for the acts of his servant. The surgeon does not insure that he will be responsible for every misfeasance of the nurse. To make him so would make his position intolerable.

The case of *Hillyer v Governor of St. Bartholomew's Hospital* (1909, 2. K.B. 820) was cited as an authority that the nurses during an operation are so completely under the control of the operating surgeon that the latter are responsible for their acts. The case decides nothing of the kind. It decides no more than that when nurses are employed at an operation they are under the control of the operating surgeons and not of the governing body of the hospital. They cease for the time being to be the servants of the corporation: but it is a far cry from that to say that the nurses become the servants or even analogous to servants of the operating surgeons. In regard to those, matters in which the surgeon instructs her the nurse carries out the orders of the surgeon and he is responsible for what she does, but the medical evidence in this case shows clearly that in many matters the nurse acts on her own initiative and that it is her duty to do so. Though she is under the surgeon's direction she is there as an assistant not as a servant or agent. This was the view expressed in the American case of *Runyan v Goodrum* (13. A.L.R. (an.) p. 1403 at p. 1408) with regard to an X-ray operator who was not a qualified medical practitioner. It was stated in that case that though Miss Green the operator was negligent the physician was not liable for her negligence. "Such being our conclusion it inevitably follows under the doctrine of our own cases that the relation of master and servant cannot exist between physicians and surgeons, who are not X-ray specialists themselves, and the X-ray specialist whom they employ to assist them in the diagnosis and treatment of disease." It is true that the relationship between a surgeon and a hospital sister in the operating theatre is not identical with that of an X-ray operator and physician but I think it is certainly analogous and

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that the doctrine of *respondeat superior* cannot apply to the relationship of the surgeon and the hospital nurse.

(4) In determining whether a surgeon conducting an abdominal operation in a hospital is entitled to place reliance on the counting of the swabs by a qualified and competent hospital sister and whether by so doing he has exercised a reasonable degree of skill, care and judgment, we must consider the prevailing practice of the profession and all the circumstances surrounding the operation. The Court can only refuse to admit such a universal practice if in its opinion it is so unreasonable and so dangerous that it would be contrary to public policy to admit it. In determining whether such a practice is reasonable or not the Court must take into consideration the advance of medical science and modern practice. Thus in the present aseptic treatment of patients it is difficult for the surgeon to do all the work alone: all possible germs must be. destroyed which may be deleterious to the patient: the rooms, the instruments and all the other appliances must he rendered aseptic as far as possible. If the doctor were required to do all these things personally it would not be for the benefit of patients generally but to their detriment. Important and necessary work preliminary to an operation and upon which the success or failure of the operation may depend must necessarily be left to the hospital sister and her nurses. We must therefore admit that in operations some team work, as it has been called by several witnesses,: Is essential. The work has become

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specialized so as to enable the surgeon to devote all his energy and attention to the highly skilled and difficult work of isolation, dissection and purification. To what extent the doctor should or should not rely upon the team work of the hospital assistants depends entirely on the nature of the particular case.

On general principles this view seems to me sound in law though I have not been able to find many cases that deal crisply with the proposition. There is, however, an American case referred to in the notes to *Loudon v Scott* (12 A.L.R. (an.) p. 1487, 1495) where a District Appeal Court held that it is not negligence, for a surgeon to entrust the administration of ether to an advanced medical student of experience especially where it is customary to do so in the place where the operation takes place. *Levy v Vaughan* (42 App. D. C. 146.) The case itself is not available. There are a number of cases in which it has been decided that a surgeon is

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not liable for the negligence of a nurse who is told to put hot irons or hot water bottles to a patient and who then burns or scalds him *Perionowski v Freeman*, (7 F. & F. 977); *Malkowski v Graham* (4 A.L.R. (an.) 1524) and cases there cited. In these cases, however, the, hot appliances were placed by the nurse to the patient after the operation, but in a case quoted in the notes to *Malkowski v Graham* at p. 1528, it is stated that the Court at Quebec (1910, Rep. Jud. Quebec 39 S.C. 49: The report is not available) decided that when immediate emergency requires all the doctor's attention it is clear that he must leave minor details to the nurse. Thus a physician who, with his confrére, after an operation, is working ever the patient to save him from heart failure, is not responsible for the negligence of a nurse who burns the patient with overheated bricks. Here the bricks were placed against the patient in the presence of the doctors and whilst they were engaged with the patient, though the actual cutting and sewing up was apparently over. The annotator of that case in commenting on the cases says: "It is the duty of the attending physician and surgeon to use reasonable care for the safety and well-being of the patient. There seems to be little in the books on the, subject of warning or instructing nurses and attendants. If those taking care of the patient are ignorant or inexperienced it is conceived that the doctor should instruct them. On the other hand if the surroundings are those of the modern hospital, with experienced nurses and attendants the doctor ought to be entitled to take for granted that they will attend to their ordinary duties without instruction."

This seems to me both common sense and sound law in this country (it appears to be so in America) faking into consideration modern conditions and modern methods of operating in hospitals.

(5) Not only must we take into consideration the practice of the profession, the place where the operation is conducted, the qualifications of the attendants, but the nature of the operation and the circumstances surrounding it.

We cannot determine in the abstract whether a surgeon has or has not exhibited reasonable skill and care. We must place, ourselves as nearly as possible in the exact position in which the surgeon found himself when he conducted the particular operation and we must then determine front all the circumstances whether he acted with reasonable care or negligently. Did he act as an average surgeon placed in similar circumstances would have acted,

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or did he manifestly fall short of the skill, care and judgment of the average surgeon in similar circumstances? If he falls, short he is negligent.

(6) This brings us to the question of the burden of proof in such cases. Does the fact that a surgeon leaves a swab in the body after an abdominal operation performed in a hospital and with qualified nurses in attendance, throw throughout the case upon him the burden of showing that he was not negligent or does the burden of proving negligence rest upon the plaintiff to the very end of the trial? If the surgeon is only liable for reasonable skill and care and if the question of whether he acted reasonably or not depends upon all the accompanying circumstances it seems to me that in as much as the term "reasonable" is relative, the onus of proof must necessarily lie upon the plaintiff all the time. The maxim *res ipsa loquitur* cannot apply where negligence or no negligence depends upon something not absolute but relative. As soon as all the surrounding circumstances are to he taken into consideration there is no room for the maxim. The plaintiff asserts negligence and bases his claim upon it and this can only be determined by an examination of all the circumstances.

It was pointed out by WILLIS, J. in *Grill v General Iron Screw Colliery Co.* (L.R. 1 C.P. 600, 612) and in *Vaughan v Taff Vale. Ry. Co.* (5 H. & N. 688) that negligence does not express a positive but a negative idea and that it means the absence of care according to the accompanying circumstances. In other words you cannot judge, whether reasonable care has or has not been exercised until you know all the circumstances of the case. If you know all the circumstances then and then only can you say whether a surgeon was negligent in omitting to do something which he ought to have done.

It is therefore necessary for a plaintiff who, seeks to recover compensation for the damage done to him to show that the defendant was in all the circumstances of the case in the wrong when he left the swab in the abdomen after he sewed it up and that in so doing he had failed to use that reasonable skill, care and judgment which it was incumbent upon him to employ. "If at the end he leaves the case in even scales and does not satisfy the Court that it was occasioned by the negligence or default of the other party he cannot succeed, or, in the terms of the Latin maxim *ei incumbit probatio qui dicit: non qui negat*, per Lord WENSLEYDALE in *Morgan v Sim*, (11. Moo. P.C.C. 307, 311). This is the

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view of the law laid down by the Transvaal Supreme Court in *Frenkel v Ohlsson's Cape Breweries* (T.S. 1909 p. 957). In that case the present CHIEF JUSTICE was called upon to determine upon whom the onus lay in a case of negligence. He used the following words, p. 961: "When a litigant applies to a court for relief the burden is upon him to show that he is entitled to the remedy which he seeks; and the plaintiff must invariably begin, and must establish his case, except where the pleadings contain admissions which render the defendant liable unless the inferences to which they give rise are rebutted by him. In the majority of actions the plaintiff's claim depends upon a single fundamental issue; and if he successfully establishes his contention upon that issue, then he succeeds. In such a case the onus throughout remains upon the plaintiff. There are, however, cases in which the onus rests in turn first upon the one and then upon the other of the contending parties during the progress of the inquiry. But I think it will be found that all those are cases in which the litigation passes through different stages, each of them governed by the operation of a distinct legal principle or inference. The plaintiff proves facts which entitle him to succeed, unless the defendant can escape their consequences by invoking the aid of some special

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defence. The onus then rests upon the latter of establishing the facts necessary to prove that defence. It may be that the defence in question in turn capable of being destroyed by a special reply. The onus is then transferred to the plaintiff of laying the foundation of fact upon which that legal reply is to he based. The point is that the burden is shifted only at distinct stages of the inquiry, when the inference to be drawn from the facts established at that moment would entitle the party in whose favour it operates to succeed. unless a further position is developed."

The same view was adopted by this Court in *Mitchell v Dixon* (1914 AD 519). In this case a doctor inserted a steel needle in his patient. The needle broke and was not extracted although an attempt was made to do so. It was contended that this was *prima facie* negligence and that the maxim *res ipsa loquitur* applied. The Court decided that in a case of this kind the onus of proof of negligence rests through-out the trial on the plaintiff. "The burden of proving that injury," said the CHIEF JUSTICE, "of which he complains was caused by defendant's negligence, rested throughout upon the plaintiff. The mere fact that the

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accident occurred was not in itself *prima facie* proof of negligence. Because the needle might have been fractured by causes beyond the control of the operator - by the movements of the patient for instance."

The mere fact that a swab is left in a patient is not conclusive of negligence. Cases may he conceived where it is better for the patient, in case of doubt, to leave the swab in rather than to waste time in accurately exploring whether it is there or not, as for instance where a nurse has a doubt but the doctor after search can find no swab, and it becomes patent that if the patient is not instantly sewn up and removed from the operating table he will assuredly die. In such a case there is no advantage to the patient to make sure that the swab is not there if during the time expended in exploration the patient dies. Hence it seems to me that the maxim *res ipsa loquitur* has no application to cases of this kind. There is no doubt that often what the decision in a case ought to be at a particular period of the trial sways from side to side: if at any one moment the decision had to be given upon the evidence led it would have to be in favour of the plaintiff though at a later stage it would be in favour of the defendant, but this does not mean that the plaintiff can stop when he has brought some evidence from which negligence should be inferred and require the defendant to proceed until it has again swayed in his favour. It was pointed out in *Frenkel v Ohlsson's Cape Breweries (supra* that this fact, does not mean that in a case, of negligence the *onus probandi* is shifted on to the defendant as soon as sufficient evidence of negligence has been proved. The onus therefore of proving negligence in a case of this kind is on the plaintiff from the beginning of the trial to the very end.

The, learned Judge in the court below has found as a fact that the swab produced in court was left in the plaintiff's abdomen after the operation, that it passed into her intestine and was evacuated. We have been urged to reverse that finding and to hold that it has not been proved that the swab produced was one used by Dr Lewis. If the plaintiff is truthful, then however remarkable her story may be, there can be no doubt that the swab evacuated by her was one used by Dr. Lewis during the operation for besides that one operation she underwent no other. To imagine, that she swallowed a swab unconsciously is out of the question.

Although almost all the doctors think it improbable that in the

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circumstances of this case the swab could have worked its way out through the bowel in the way it did and at the same time caused so little disturbance to the plaintiff, yet none of them is prepared to say that it is impossible. Dr. Drury says: "I have never known or read of a case where a swab has behaved like this did except in a pelvic operation: I cannot find such a case in the published cases and I have not been able to match this case with another," and again, "I do not think it is probable. There are improbabilities from a medical point of view. I mentioned some. On the other hand there are probabilities. If I strike a balance I should not feel prepared to discard the story. If you balance the probabilities against the improbabilities I say it is possible but improbable." The bulk of the medical evidence is to the same effect though Dr. Sharp stated that he had heard of such a case. The learned Judge who saw the plaintiff and heard her story came to the conclusion that she spoke the truth. In those circumstances it is difficult for this Court to reverse the finding even though it must be admitted that the circumstances are peculiar. If a forceps were attached to the tape it must have become loose, the tape must have slipped into the opening, the swab must in all probability have been septic and this septic swab must have escaped observation, it must have remained for a year in the abdomen without causing much physical disturbance and it must have ulcerated through the bowel without producing more marked disturbance than some pain immediately before evacuation. Dr. Lewis who saw her about a month before the swab was evacuated had no suspicion that there was a foreign body in her but thought that her indisposition was due to the state of her gall bladder which though diseased at the time of the operation could not then be excised. The medical evidence is clear that the occurrence is possible though improbable. Before, therefore, we could reject the story we must be prepared to say that we do not believe the plaintiff and that the tale has been deliberately concocted. It is impossible to do this when the learned Judge, who had a better opportunity than we have to judge of her veracity, saw no reason to doubt her story. We must therefore decide this case on the basis that the swab was left in her after the opening had been sewed up.

The next question of fact which we must determine is whether the swab was used as a packing swab or as a mopping swab. This is important because if it had been used as a mopping swab it had

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no business to be in the abdominal cavity: it ought to have been thrown away and not left inside at all. A mopping swab would in all probability be septic, it should never leave the surgeon's hands, and to leave such a swab in the opening would be a careless act on the part of the surgeon. This point if taken in the court below was certainly not emphasised because in the very careful judgment of the learned Judge no mention is made of it. Mr. *Pienaar* bases his contention that the swab was a mopping one upon the evidence of the, defendant who said: "I have never used a swab like that in question for an internal operation, not as small as this. I have never known one of that size with a tape. I always use the large size and this would be useless for packing purposes. I do not remember seeing one that size. If she gave it to me I should have thrown it an one side because it is useless." From this we are asked to infer that if the swab was used it was used as a mopping swab and not as a packing swab.

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Nurse Ware in giving her evidence had stated that she did not think that the swab in question was one of the hospital swabs because it was not the size usually employed in the hospital. Dr. Lewis also doubted whether a swab of that size would have been used for an abdominal operation. He was not asked whether in fact he used a swab with a tape attached as a mopping swab. A mopping swab as used in the Frontier Hospital was produced. It has no tape attached to it and is simply a small piece of gauze of irregular shape. Dr. Lewis after stating that when the incision is first made, blood flows, proceeds: "To mop it up you use an ordinary piece of gauze. It has no tape attached to it. Once the cut is made and the surgeon goes on with his work in the interior of the abdomen swabs are used for two purposes, mopping and packing. For internal purposes I always use a swab with a tape attached and one with the edges stitched.... The mopping swab does not leave my hand - I throw it away after using it. The ones used for packing remain in the wound until the operation is completed. Packing is the exposing of the field of operation and pushing other organs aside and the gauze keeps them out of the road and it clears the field of vision. The idea is to prevent sepsis spreading."

Now the swab in question is not an ordinary piece of gauze, it is an oblong piece, shorter by a couple of inches than those generally used at the Frontier Hospital but of the same shape, stitched

round, and with a tape attached to it. In appearance it is in every way similar to the packing swab exhibited and quite different from the mopping swab. Dr. Lewis, however, states that a swab with tape attached may be used for mopping internally. "When I ask for a swab she does not know what I need it for. Whenever it is handed to me it has always a tape and forceps attached. That does not leave my hand. I throw it down but the forceps are taken off before I throw it on the floor by the sister or the assistant."

The other doctors draw the same distinction between mopping swabs and packing swabs. It seems to me, therefore, that the evidence comes to this. For purely mopping purposes Dr. Lewis uses as a rule an ordinary piece of gauze but if he has to mop internally he may use a packing swab, but then the swab will have a tape attached to it and a forceps to the tape. When, however, such a swab is used for mopping it does not leave his hands but is thrown on the floor. Several of the other doctors refer to the swab in question as a packing swab. All that the learned Judge in the court below says about the use of swabs is that the small ones are for external use and the large ones for internal use. He has not found as a fact that this swab was used for mopping. From the fact that Dr Lewis says he would not use a swab the size of the one in question for packing we are asked to infer that he must have used it as a mopping, swab. It is of course possible that the, swab may have been so used and may have been left in the abdomen but it seems to me unlikely, and it certainly has not been proved to have been so used. If it was used as a mopping swab there seems to me, no point in leaving it in the cavity. The object of internal mopping is to get rid of fluid which in a case like this would be highly septic for a great deal of pus was taken from the gall bladder. The surgeon would naturally get rid of it as soon as it has served his purpose. It would require strong proof that this particular swab was used for mopping. If the swab in question was used by Dr. Lewis and if it was left in the abdomen of the plaintiff, as we must assume it was, then the probabilities are greatly in favour of its having been used as a packing swab. In size it does not differ very much from the packing swab exhibited and in structure it is identical. It may well have escaped the notice of the defendant during the stress and strain of this difficult operation that it was not of such a size as he usually employs. It

is impossible for us to find as a fact that this swab was used as a mopping swab and not as a packing swab merely because the doctor at the trial doubted whether he would have used it for packing. What was in his mind at the time he was giving his evidence was a doubt whether such a swab was in fact used at the operation as it was not the usual hospital size for packing swabs. I think we must hold that it has not been shown that this particular swab was used as a mopping swab: if it was used it was used as a packing swab.

This brings me to the very important question whether it was negligence on the part of the defendant to leave a packing swab in the patient's abdomen under the circumstances of the case. As I have said before we must place ourselves as nearly as possible in the very circumstances under which the operation was conducted.

The plaintiff was in a very parlous condition when she entered the hospital. She arrived after a train journey. She was in a state of collapse. She was suffering from an appendix in a chronic state of inflammation which was adherent and had one or two concretions in it. Her gall bladder was acutely inflamed: there was dead tissue in it and mortification. It was therefore necessary to operate both on the appendix and on the gall bladder. No swabs, were put inside for the removal of the, appendix. In order, however, to operate on the gall bladder it was packed off with swabs (about half a dozen packing swabs were used). A lot of pus rushed out when the incision was made in the gall bladder. Its walls were in a bad state so that it could not be sutured. Swabs were used for mopping the bladder. "I expected a discharge and there was a rush and it poured out under great pressure. Tarry looking matter came out as though there had been haemorrhage and pus and mucus. That was highly septic. I mopped the septic matter up but it went all round the field of operation.... I could not fix the suture: it tore out owing to the friability of the gall bladder. The strings came away twice and I made two attempts at it. I did not try to suture the gall bladder to the peritoneum and I could not for the same reason..... I tried to prevent the spread of sepsis by putting a tube in and I packed round the gall bladder with my gauze."

"It was a very critical operation indeed. It was doubtful whether she would come through it: it was doubtful the whole way through and I was very anxious the whole time and I asked

my anaesthetist how she, was and he said: 'Get her off as soon as possible.' It was very much against her interest that the surgeon operating should have his attention distracted to count swabs. It would be impossible to count afterwards because he would have to pick up any swabs he had thrown on the floor and it would mean he would have to re-sterilize before stitching her up and that would not be in the interest of the patient. It would mean a delay: considerable delay. In such an operation delay would probably be fatal."..... "I removed all the swabs I discovered myself. I exercised reasonable care and skill in so doing. So far as I am concerned it is possible in such an operation using due skill and care to miss a swab inside. The causes which may induce that are first of all the forceps may have become detached; the swab may become so discoloured as not to be recognised from the, surroundings; a loop of bowel may cover it: the swab may shift and become

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displaced. In any one of these (circumstances) a careful surgeon may miss a swab."

After this lapse of time the defendant cannot recollect whether be actually asked the nurse about the swabs. It certainly was his usual practice to refer to her either by asking or by nodding. Sister Ware bears him out in this. If the swabs are not correct the nurse should caution the doctor. Sister Ware gave him no caution and that in itself Dr. Lewis would consider equivalent to saying that the swabs were in order. Sister Ware states that she always counted the swabs and never had a case where her count was incorrect. She does not remember the details of the operation but she is certain Dr Lewis asked her if the swabs were correct. The reason she is so positive is because it was his universal custom to ask the question. The, learned Judge in the court below saw no reason to doubt the fact that the usual system had been followed - that the nurse counted the swabs and told the doctor that then, were correct and that he could sew up the wound.

Was it negligence on the part of Dr. Lewis not to count the swabs himself?

In order to judge of this we, must consider whether it is the approved practice of the medical profession in the South African hospitals to leave the counting of the swabs to the theatre sister. Of this there can be no doubt. Of all the surgeons called - and many are surgeons of great reputation in this country - Dr. Sharp alone deposed to making it a practice to count the swabs himself

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and even he states: "The sister usually counts the swabs after the operation is finished or before it is finished and I myself usually turn round and enquire if all the swabs are there and if she says 'Yes' one proceeds to close up."

It seems quite clear to me that the usual practice in hospitals is for the theatre sister to keep count of the swabs and to inform the doctor before he proceeds to sew up that all are accounted for. An exceptionally able surgeon may be able to do so difficult an operation as the one we are dealing with and himself count the swabs but the average surgeon is bound to rely to a great extent upon the counting of the nurse. In the stress and strain of the operation he cannot think of the number of swabs: all his attention is fixed on the operation and on getting it over as soon as possible. Delay often means death to the patient. This is the universal practice vouched for by the dozen or so surgeons called, as well as by the matrons, sisters and other hospital nurses. I have therefore come to the conclusion that no negligence can be attributed to Dr. Lewis for not counting the swabs.

Was it negligence on his part not to have extracted a swab which he himself placed in the abdomen? Now there is no doubt that it is the duty of an operating surgeon to use reasonable skill and care to remove all swabs from the body of his patient before he proceeds to sew up. He cannot of rely implicitly on the count of the nurse, he must search and make as sure as possible that all swabs have been removed. If he shows any indifference in such a matter he is guilty of negligence. But we must bear in mind that a surgeon is a human being and not a machine. We must take into consideration the nervous anxiety which almost every surgeon must have in conducting a difficult and what Dr. Lewis calls a ticklish operation. On the one hand it is his duty to search very carefully for swabs, on the other hand it is no less his duty to get over the operation as quickly as possible for, often delay spells death.

Almost all the surgeons called, even the most eminent of them, state that a swab may be overlooked even though a high degree of care is shown, and the more difficult the operation, the nearer the patient is to death, the more easily such an accident may happen. Now there is no doubt that this was a very difficult operation conducted by artificial light and one in which it was imperative to get the patient off the operating table as soon as

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possible. Swabs may hide themselves in the intestines in such a way that they are difficult to find if perchance, as must have happened in this case, the forceps is not attached or becomes detached and the tape slips into the cavity. The swab is after all a bit of thin gauze and is easily discoloured so as to take on the colour of the surrounding intestines and tissues and thus escape detection. If a surgeon has used due care in endeavouring to extract all swabs and is told by the nurse that they are all out he is justified in placing reliance upon her count and in proceeding to sew up the wound and remove the patient. The more exacting and difficult the operation the more likely such an accident may happen. The Judge in the court below has found as a fact that the defendant has used all reasonable care and skill and we, are not in a position to say that the facts do not justify this finding. There is no doubt that the plaintiff owes her life to the skill of the defendant and the mere fact that in this exceedingly difficult operation, under the circumstances in which it was performed, he failed to find one of the, swabs is not enough to justify us in coming to the conclusion that he has not exhibited such reasonable skill, care and judgment as an average surgeon would have displayed. In these circumstances the appeal must be dismissed.

Appeal accordingly dismissed.

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