PERCY L. NESBITT (DEFENDANT) .....APPELLANT;

AND

MINA KATHLEEN D. HOLT, Administratrix of the Estate of Lee Robert Holt, deceased (PLAINTIFF) ..... RESPONDENT.

1952
*Oct. 9, 10
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*Jan. 27

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Physicians and Surgeons—Negligence—Evidence—Sponge lodging in patient's windpipe—Applicability of Res ipsa loquitur rule.

An action for damages was brought against the appellant, a dental surgeon, following the death of a patient. It was established that while the appellant was extracting a number of teeth under a general anaesthetic the patient collapsed and died from asphyxia. It was argued on behalf of the appellant that it had not been shown that one of the gauze sponges used in the operation had lodged in the windpipe during that operation, or that death was caused by that obstruction, and that even if the cause of death be taken as established, no negligence on the part of the appellant had been shown.

Held: That ordinary care and prudence had not been shown by the appellant in overlooking the fact—especially as no count of the sponges was kept—that a sponge in the windpipe might have been the cause of the patient ceasing to breathe and in making no effort to ascertain this, other than looking into the patient's mouth, and consequently making no attempt to remove the obstruction. The appellant therefore must be held to have been negligent.

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Held: also, that sufficient was shown by the evidence to call upon the appellant for an explanation. *Res ipsa loquitur* is not a doctrine but "The rule is a special case within the broader doctrine that courts act and are entitled to act upon the weight of the balance of probabilities". *The Sisters of St. Joseph of the Diocese of London* v. *Fleming* [1938] S.C.R. 172 at 177. The rule may apply in malpractice cases depending upon the circumstances and it applied here. *Clark* v. *Wansbrough* [1940] O.W.N. 67 over-ruled.

APPEAL from a judgment of the Court of Appeal for Ontario (1) setting aside the judgment of Aylen J. who dismissed the action, and fixing the amount of damages under *The Fatal Accidents Act* at $2,000 each for the widow and two children.

Gordon Watson, Q.C. for the appellant.

Michael Fram and *Lionel Choquette, Q.C.* for the respondent.

The judgment of the Chief Justice, Kerwin, Estey and Cartwright, JJ. was delivered by:

KERWIN J.:—Lee Robert Holt died in the office of a dentist, the appellant Dr. Percy L. Nesbitt, and this action is brought by the widow and administratrix of the deceased against the appellant to recover damages for the death of her husband. No evidence was led on behalf of the appellant at the trial so that the circumstances surrounding the death are found in the evidence of Detective Simms, who related the details as told to him by the appellant, and in extracts from the examination for discovery of the appellant put in by the respondent at the trial. On this evidence the facts are as follows.

The appellant had extracted ten out of an intended total of twelve or fourteen of Holt's teeth while the patient was under a general anaesthetic of nitrous oxide and oxygen. The appellant noticed Holt changing colour so he changed from the mixture to straight oxygen and Holt seemed to revive. The appellant was going to recommence the pulling of teeth when he noticed that Holt had relapsed so he and his assistant took Holt out of the chair, put him on the floor, and applied artificial respiration. The appellant said that a number of pieces of gauze called sponges had been placed in the patient's mouth and that he removed

(1) [1951] O.R. 601; O.W.N. 504; 4 D.L.R. 478.

the last of these. However, he also said that this was torn but in the evidence of the pathologist Dr. Klotz, who testified at the trial, it appears that another one must have been overlooked as it was found by Dr. Klotz in the trachea, folded but moulded to the shape of the trachea. This sponge was found to be intact and not torn. There appears to be no doubt, on the evidence, that the appellant kept no count of the sponges he inserted in Holt's mouth.

It was argued that Holt had died either of shock or of asphyxia caused by the gauze in the trachea and that it was not shown that the sponge lodged in the patient's trachea during the operation and that his death was caused by that obstruction. I agree with the Court of Appeal (1) that this contention cannot prevail. While an effort was made in the cross-examination of Dr. Klotz to show that death might have been caused by shock since the head of the deceased was not opened, Dr. Klotz adhered to the opinion he had expressed in direct examination that Holt had died of asphyxia caused by the sponge in the trachea. It would appear that the trial judge had the same view.

It was then argued that even if the cause of death be taken as established, no negligence on the part of the appellant has been shown. I agree with Hogg J.A. "that ordinary care and prudence was not shown by the respondent in his overlooking the fact—especially as there is the evidence that no count of the sponges was kept—that a sponge in Holt's windpipe might be the cause of his ceasing to breathe and in making no effort to ascertain whether this was the case other than looking into the patient's mouth, and as a consequence in making no attempt to remove the obstruction which terminated Holt's life. I think the respondent must be held to have been negligent." I also agree with all the members of the Court of Appeal that sufficient was shown by the evidence to call upon the appellant for an explanation. No issue is raised as to the competency of the appellant or as to the carrying out of the operation of pulling teeth. What is complained of is that anyone, even without the appellant's training, knowledge and experience, would have checked the sponges, and that when he noticed the patient turning pale, he would have looked to see if all the sponges were accounted for. I have

(1) [1951] O.R. 601.

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read all the reported cases in England and Canada on the subject which were referred to in the reasons for judgment of the Court of Appeal or by counsel on the argument and, in addition, decisions in other jurisdictions. It is unnecessary to refer to them except to say it is impossible to agree with the statement of McTague J.A., sitting as a trial judge, in *Clark* v. *Wansbrough* (1), that "The doctrine *res ipsa loquitur,* no matter how ingeniously put, has no application in malpractice cases." *Res ipsa loquitur* is not a doctrine but "The rule is a special case within the broader doctrine that courts act and are entitled to act upon the weight of the balance of probabilities." *The Sisters of St. Joseph of the Diocese of London* v. *Fleming* (2). It may apply in malpractice cases depending upon the circumstances and for the reasons already given, it applies here.

Counsel for the appellant did not question the amount at which the damages had been fixed in the Court below and the appeal should therefore be dismissed with costs.

LOCKE J.:—In their reasons for judgment delivered in the Court of Appeal Mr. Justice Laidlaw has found that in the circumstances disclosed by the evidence the respondent was entitled to invoke the rule *res ipsa loquitur,* while Mr. Justice Hogg has expressed the view that there was affirmative evidence of negligence upon which the appellant should have been found liable. I respectfully agree with both of these conclusions.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *S. C. Metcalfe.*

Solicitor for the respondent: *Lionel Choquette.*

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(1) [1940] O.W.N. 67 at 72. (2) [1938] S.C.R. 172 at 177.