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Insufficient Evidence as to Who Left Gauze—Ruling as to Surgeon for Part of Operation

(De Rose et ux. v. Hirst (Pa.), 127 Atl. R. 776)

The Supreme Court of Pennsylvania, in affirming a judgment of nonsuit in this action brought by husband and wife, says that the plaintiffs' regularly employed physician engaged the defendant to perform an abdominal operation on Mrs. De Rose. The defendant did not perform the entire operation, but, after making the necessary incisions and opening the abscess which was the seat of trouble, left the operating room, with the wound open. The duty to clean it out and sew it up so far as sewing was required was on said other physician, who assisted in the operation. Called as a witness, the latter testified, without contradiction, that the gauze pads which were used were counted by the defendant before they were introduced into the plaintiff's body and that when the defendant completed his part of the operation they were removed and again counted by the defendant, and that the prior and subsequent computations agreed. He further said that following the operation it was necessary to place in the wound a piece of gauze several feet in length for drainage purposes, and that in sewing up the wound, after the defendant had left the operating room, having completed the surgery he was engaged to do, it was necessary to use pads for the purpose of sopping up blood. Some fifteen months afterward, another physician removed from the body of Mrs. De Rose a piece of gauze, which was brought to her in a jar filled with alcohol, and which was subsequently thrown away. This physician said that the substance removed was a very closely packed piece of gauze, so closely packed in the incision

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that to pull it out took force, but he could not recall the size of it, or whether it was the kind of pack used in the performance of operations by surgeons.

Under the circumstances here manifest it could not properly or reasonably be held that the plaintiff's designation of the substance as a "pad" was sufficient on which to place the defendant's liability. She asked that, from this statement, the inference be drawn that it was one of the pads used by the defendant when he operated on her. In view of the fact that the physician who extracted the gauze from her body, and the physician who completed the original operation (to whom she exhibited the gauze), could not identify it, and, in the light of the further facts that the latter physician in closing the incision after the defendant had departed also used pads of gauze to sop up the blood in her abdomen and that admittedly several feet of gauze were purposely and properly left in the wound after the operation for the purpose of drainage, no such compelling inference arose. The facts that a woman who was present when the substance was removed designated it as a "big long piece of packing," and another witness, who accompanied the plaintiff when she took the material in the jar to the physician to whom she exhibited it, spoke of it as a pad, were not sufficient to establish the conclusion necessary to the plaintiff's right to recover damages from the defendant.

The plaintiffs sought to bring this case within the rule of *Davis* v. *Kerr,* 239 Pa. 351, 86 Atl. 1007, and consequently to impose on the defendant the burden of rebutting the presumption of negligence arising from the fact that a foreign object was allowed to remain in the body of Mrs. De Rose without any plan for its removal. Manifestly, the rule of the cited case could not be applied here in view of the defendant's part in the operation. He did not, as did the defendant in that case, carry the operation through to completion; others, for whose actions he would not be responsible, were involved, and, so far as the evidence showed, it was just as probable that they committed the act on which this case was founded, as that he was guilty of it. Starting, as the court did, with the presumption against the defendant's negligence, and having only testimony which showed that the plaintiff's injuries were caused by an act either of the defendant or of some one else not connected with him (the defendant not having undertaken by contract or otherwise to see that the entire operation was performed with due care), the plaintiffs' case was not proved with that degree of certainty which the law requires to warrant submission to a jury.

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