Lost Sponge—Liability of Subsequent Physician

(Parker v. Bowen (Vt.), 126 Atl. R. 522)

The Supreme Court of Vermont says that the defendant in this action for alleged malpractice had professional charge, as a physician, of the plaintiff after an abdominal operation performed by another physician or surgeon. It was admitted that, so far as this case was concerned, the defendant's responsibility did not begin until such surgeon turned the patient over to him after the operation. Gauze sponges were used during the operation, and when the patient was turned over to the defendant one or more cigaret drains, made of rolled gauze and gutta percha, were left sticking out of the wound to take care of the drainage. The plaintiff contended that there were two of these drains, while the defendant insisted that there was only one. The plaintiff did not make a good recovery, and it turned out that, without the fault or knowledge of the defendant, a sponge had been left in the cavity at the time of the operation, and some fifteen weeks later worked to the surface and was removed.

The plaintiff contended that one of the cigaret drains had been allowed to sink into the wound and disappear, and that it was the cause of her trouble, and that it was this drain that finally appeared and was removed. When it appeared at the trial that the defendant contended that this object was a sponge, and not a cigaret drain, the plaintiff was allowed to amend her complaint so as to charge malpractice in not discovering the presence of a sponge in the wound, and in not sooner removing it. The defendant excepted, urging that the new count set up a new cause of action, which was not allowable. The established rule is that the true test is whether the proposed amendment is a different matter or the same matter more fully or differently laid. The term "matter" as here used refers to the substantial facts which lie at the basis of the plaintiff's claim, and not those orig-

inally alleged. Applying this rule, it becomes very apparent that this amendment was properly allowed. The basis of the plaintiff's claim throughout was the defendant's failure to discharge his professional duty in caring for her as his patient. The plaintiff by the amendment did not change the basis of her claim; she adhered to the injury originally declared on, and altered only the mode in which the defendant caused the injury. The jury found by a special verdict that the object removed was a sponge, and brought in a general verdict for the plaintiff.

The trial court charged the jury to the effect that the defendant was liable if he failed to use the requisite care and skill in discovering the presence of a foreign body in the wound, whether it was a drain or a sponge. To this instruction the defendant excepted on the ground that there was no medical testimony tending to show that the defendant was at any fault in connection with the presence or removal of a sponge in the patient's body. The plaintiff frankly admitted that if such medical evidence was lacking the defendant was entitled to a reversal. It is a well known rule of appellate practice that the excepting party takes the burden of making error appear. But when the excepting party takes the position that there is no evidence to establish a material fact, and on that question tenders the transcript, it becomes the duty of the other party to point out such evidence. The plaintiff attempted to comply with this requirement, and pointed to the testimony of a physician as supplying the evidence that the defendant said was lacking; but the court cannot sustain this contention. The physician testified to the effect that the defendant's treatment was medically and surgically proper. The nearest he came to making the defendant chargeable for malpractice was when he testified as to what he would have done in circumstances shown by the evidence. But the defendant was not to be judged by what that physician would have done. The standard by which the defendant's work was to be judged was the care and skill usually exercised in like cases by physicians and surgeons in the same line of practice in that general neighborhood. The witness's methods might have been above that standard, and could not be substituted therefor.

Nor did the result afford evidence of malpractice. There being no competent evidence tending to establish liability on the basis of the sponge, it was error to submit that issue to the jury. The defendant's motion to set aside the general verdict and for a judgment for the defendant on the record should have been granted. Judgment reversed, and cause remanded.