Lost Sponge: Expert Evidence Not Essential

(Laughlin v. Christensen (U. S.), 1 Fed. R. [2d Series] 215)

The United States Circuit Court of Appeals, Eighth Circuit, in affirming a judgment in favor of plaintiff Christensen, says that she contended that the defendant negligently left a gauze sponge in her abdomen when he operated on her. Counsel for the defendant pointed out that there was no expert testimony offered on the question of negligence and insisted that the only admissible evidence on that question would be the testimony of medical experts. That conclusion was apparently reached by arguing that medical experts were the only persons qualified to testify whether the operation was negligently performed, and that the handling of the sponges was only a part of the operation. The argument was ingenious, but it failed to persuade this court.

It is true that there is a large class of malpractice cases in which the question or matter under investigation is so intricate and abstruse, or so little understood, that ordinary jurors would in all probability know nothing about it, but must be guided by opinions of witnesses having special knowledge. In this class of cases the plaintiff fails to make a case for the jury in the absence of testimony of a properly qualified expert witness. There are, however, at least two other classes of cases dealing with the admission of expert testimony on the issue of negligence: (1) Those in which the question or matter under investigation is so simple that the jurors are as well able as experts to pass on it. Admission of expert testimony in this class of cases is error. (2) Those cases in which the question or matter under investigation is of such character that the opinion of expert witnesses thereon, though not indispensable, may yet be of material assistance to the jury. In this class of cases the admission or rejection of expert testimony rests in the sound discretion of the court. Furthermore, it is not a universal rule, even when the alleged negligence of medical men is under consideration, that testimony by experts is indispensable. A number of so-called "sponge" cases were called to the attention of this court; but in no one of them was such a rule laid down or applied.

The reason for the rule, that in certain cases the testimony of experts is indispensable to establish negligence, is that in order to reach an intelligent conclusion on the question of negligence in those particular cases a scientific exposition of the subject is obviously necessary; but when the reason for the rule ceases, the rule itself ceases. In this court's judgment, no such scientific knowledge was necessary in order to pass on the question whether the sponge was negligently left in the plaintiff's abdomen by the defendant, in the instant case. No question of science was involved. The defendant himself testified that a sponge would not be left in the plaintiff purposely, and that in fact it was dangerous to leave a sponge in the abdominal cavity after an operation. The method pursued by the defendant and his assistant to learn whether a sponge had been left in the patient was explained to the jury. The jury was competent to say whether this method was of such a kind as to constitute due care; also whether the method was carried out with due care in the instant case: in other words, whether the defendant and his assistant did in fact count the sponges after the operation and find the same number as they had before the operation. These questions required no technical skill or special training to decide.

This court was not called on in the present case to decide whether expert testimony would have been admissible, if offered, on the part of the plaintiff. The court holds that such evidence was not indispensable, and that there was sufficient evidence to go to the jury on the question of negligence on the part of the defendant.

With regard to hypothetic questions, it is the general rule that all the material facts should be embodied in a hypothetic question, if only one question is to be asked. It is also the rule that if some of the facts are in dispute, then each party

may frame his hypothetic question to include the facts as he claims the evidence shows them to be. The defendant invoked the latter rule, but it was not applicable to the hypothetic question to which it was sought to be applied because certain testimony embodied in the question was not testimony as to a fact, but consisted of the opinion of an expert who had very recently examined the plaintiff. It is the rule that it is not allowable in asking a hypothetic question to incorporate into it the opinion of another expert.