

G.T.G.2' 12, 1960

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

BETWEEN

ROSETTA COOPER (PLAINTIFF) Appellant

and

- 1. GERALD NEVILL
- 2. KENYA EUROPEAN HOSPITAL ASSOCIATION
(DEFENDANTS) Respondents

CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal from the judgment of the Court of Appeal for Eastern Africa at Nairobi (Briggs V-P, Gould J.A. and Corrie A.G. J.A.) allowing the appeal of the First Respondent wholly and the appeal of the Second Respondent in so far only as it related to the amount of general damages from the judgment of the Supreme Court of Kenya at Nairobi (Miles J.) awarding the Appellant against both Respondents general damages in the amount of Shs 50,000/- and special damages in the agreed amount of Shs 5189.80 for injuries sustained by her as the result of an abdominal swab being left in her body in the course of an operation performed upon her by the First Respondent at a hospital managed and maintained by the Second Respondent. In so far as the Court of Appeal allowed the appeal of the Second Respondent it varied the decree of the Supreme Court by reducing the general damages from Shs 50,000/- to Shs 15,000/-.

p.170

p.125

2. Upon this Appeal the First Respondent does not dispute the finding of the trial Judge, which the Court of Appeal accepted, that an abdominal pack consisting of a piece of turkish towelling measuring some 9" x 7" or 10" x 8" with hemmed edges was left

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to 23
p.142 11.3
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in the Appellant's body at the time of the operation performed on her by the First Respondent.

3. So far as the First Respondent is concerned the questions which arise upon this Appeal are: First, did the First Respondent fail to take any due precaution or to use due care to prevent a pack being overlooked and left in the Appellant's body? Second, if the first question is answered in the Appellant's favour, was the Court of Appeal right in reducing the general damages awarded by the trial Judge from Shs 50,000/- to Shs 15,000/-.

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So far as the Second Respondents are concerned the only question upon this Appeal is as to whether the Court of Appeal was right in reducing the general damages as aforesaid.

p.36 1.30
p.48 11.9 - 11

4. At about 2.30 p.m. on the 1st February 1956 the Appellant was brought into the Second Respondents' hospital. Her doctors had diagnosed a ruptured ectopic pregnancy. Dr. Lawes stated that on arrival "she was comatose, pulseless, no blood pressure, grey faced, cold and sweating with sighing respirations and the heart could just be heard with a stethoscope. In short, she was dying". The First Respondent, who had not previously attended the Appellant, was called in and arrived at the hospital shortly after 3 p.m. He examined her on a bed in a ward and found that she was almost dead, had no pulse that could be felt, had a blood pressure which could not be measured, breathed very infrequently and was not in any sense of the word a reasonable operative risk. He diagnosed a very severe internal haemorrhage in her abdomen which in fact proved to be due to a ruptured uterus. The bleeding was killing her and it was therefore essential to operate to stop the bleeding if her life was to be saved.

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p.36 11.19-37

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p.36 1.51

p.36 11.45-50

5. The Appellant's condition was so grave that she could not be moved from the bed on to an operating table and the First Respondent had to operate on her as she lay on the bed which was brought into the operating theatre. Operating on a patient in bed causes the surgeon serious additional difficulties because it is much wider than an operating table, the surgeon has to stoop which is tiring, the patient is further from the surgeon, the ends of the bed get in the way and the patient cannot be

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p.13 11.30-36)
p.37 11.6-7)
p.73 11.5-20)

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tilted so as to control the flow of blood as is possible when an operating table is used. The First Respondent had never previously operated on a patient in bed.

p.37 1.5

10 6. When the First Respondent got into the abdomen it was full of blood. About 4 pints were sucked into bottles and, in addition to other blood, transfused into the Appellant, but much blood still remained in the abdomen as clots and fluid which had flowed into corners. The clots were scooped out by hand and the fluid blood was mopped up by means of about 17 abdominal packs. This mopping took 5 to 8 minutes and had to be done slowly and gently. Two or three abdominal packs were inserted as restraining packs to hold back the intestines. The operation involved the removal of a 3½ months foetus and plastic tubing inserted on the occasion of a previous operation and the sewing up of the ruptured uterus. The operation from the giving of the anaesthetic to the closing of the wound lasted about half an hour.

{ p.37 1.34
{ p.175 1.14
p.37 1.44 -
p.38 1.20

p.38 1.18

p.38 1.4
p.178 11.22-41

p.49 1.8

30 7. The operation was described by Mr. Barber (the surgeon called by the Appellant) as "an extremely difficult and hazardous operation", by the First Respondent as "an incredibly difficult and delicate operation" in conditions which had never faced him in his whole career, and by Mr. Ormerod (a surgeon whose status as an independent expert was described by the Court of Appeal as beyond argument) as "an operation of extreme difficulty", "one of the most difficult emergencies of surgery", and "one which requires a high degree of combination of dexterity and speed" while working under conditions of considerable stress.

p.17 1.33

p.38 1.3
p.47 1.47

p.51 11.28-31
p.52 1.18

p.54 1.48
p.58 1.32

40 8. Although at the close of the operation the condition of the Appellant was, in the words of the trial Judge, "very slightly improved", all the medical witnesses gave evidence to the effect that during the whole of the operation she remained in a condition of collapse and emphasised the paramount importance of speed in finishing the operation.

p.119 1.4

Mr. Barber said: "The patient may have been better but only relatively better. No patient who has lost six pints of blood will be 'better' for two or three days. The sooner an operation on a patient in that condition is finished the better". "It is correct that in Mrs. Cooper's condition at the operation by Mr. Nevill, the sooner the wound was closed the better".

p.20 11.11-16

p.19 1.37

RECORD

p.40 ll.18-23

The First Respondent said: "We were moving very swiftly all the time because our patient had been critically ill to start with and all operative manipulations, however gentle, cause an increase in surgical shock, and we knew that the slightest increase in this shock would kill our patient". "She had been exceptionally ill. As we were closing her up she was better. She was still critically ill although better than she had been. The longer you leave an abdomen open and the longer anaesthetic and other procedures are carried on the greater will be the shock imposed. Therefore you must close up a shocked patient at the earliest moment". Mr. Ormerod said: "If the patient was 'much better' before the abdomen was closed, I would say that that indicated that the surgeon had in fact achieved the object he set out to achieve. He had succeeded in stopping the source of the bleeding but that would not give the surgeon any right to take any liberties which might extend the time of the operation because such appearances of improvement are often only temporary appearances, i.e. having known the condition of the patient a few minutes before the improvement, no surgeon of experience would trade on that improvement. Definitely he would not be justified in slowing the improvement up. Speed is of paramount importance. I think in the hands of an inexperienced and slow surgeon such a patient might die on the table. In a 'cold' operation circumstances are of course entirely different".

p.36 ll.31-38

p.52 ll.22-39

In this case the search had to be a "rapid excavation of the site in which he had been working and in which he knew that he had deliberately placed a swab".

p.52 l.8

p.74 l.35 ff
p.80 l.11 ff
p.70 l.6 ff
p.14 ll.4-21,
p.16 ll.21-36

9. The hospital had in force a rigid system for the checking and counting by its staff of abdominal packs from their preparation as stock until after their use in an operation. This system was described in detail by Nurse Molloy, Sister Banks, Mr. Braimbridge (a Director of the Hospital Association) and Mr. Barber.

p.111 l.5 ff

The packs would be either new packs made in the sewing room or used packs which had been washed and dried. Each pack had to have a tape sewn on at the same corner. The system, as summarised by the trial Judge, involves a check of the packs when rolled into bundles of three and placed in a storage cupboard, a further check when these bundles of three are subsequently put into

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sterilising drums, and a further check when a bundle of three is laid out on the trolley ready for use in the operating theatre. The theatre Sister keeps a count of packs used by the surgeon. Those used as restraining packs have a Spencer-Wells clip attached to the tape either by the surgeon or the theatre Sister but not those used merely for mopping. As abdominal packs are discarded by the surgeon the 'dirty nurse' picks them up and lays them out in threes on a mackintosh where the Sister can see them. The 'dirty nurse' reports to the Sister when she has three packs and the Sister then checks that report. At the end of the operation the 'dirty nurse' reports the total number on the mackintosh and the Sister checks that the report is correct by reference to those left on the trolley.

10 Sister Banks stated that this system was strictly carried out on the occasion of the operation on the Appellant and that after the Appellant had been removed from the theatre she and the 'dirty nurse' re-checked the packs on the mackintosh with those on the trolley because of the large number used and found them correct.

p.83 1.30
p.83 1.38

20 Mr. Barber described this system as a good one on which he placed reliance.

p.16 11.36-40

30 10. Mr. Barber gave an account of the routine practice which he always carried out in order to avoid overlooking an abdominal pack which he had put into the patient and stated that a surgeon could not do any more.

p.14 1.30 -
p.15 1.25
p.17 1.5

40 The First Respondent gave an account of his invariable routine practice which he carried out on the occasion of this operation in order to avoid leaving a pack in the Appellant. It was the same practice as that approved and used by Mr. Barber and its soundness was not questioned. In particular it included a mental count of the restraining packs inserted into and recovered from the Appellant, a search of the area in which he had placed the restraining packs and had been working and an assurance by Sister Banks that the count was correct before he sewed up the wound. He stated that at no time did he depart from his careful and usual routine during this operation, that in carrying it out he regarded the removal of abdominal swabs placed in the patient as his personal responsibility and relied upon his own count in

p.45 11.16-32
p.33 11.1-6
p.40 1.31

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addition to Sister Bank's count .

p.53 1.18

Mr. Ormerod stated that in carrying out the routine as described by him the First Respondent went as far as he possibly could .

The quality of the First Respondent's work in the performance of this operation received tribute from all the medical witnesses. Mr. Barber said it reflected a great deal of credit on him. Dr. Lawes, the anaesthetist, described it as a "brilliant piece of surgery". Mr. Ormerod stated that the First Respondent was entitled to congratulate himself highly on an excellent result. 10

p.114 11.31 -
p.116 1.30

11. The trial Judge (Miles, J.) accepted the evidence of the First Respondent as to what he did by way of carrying out his usual routine practice in order to avoid leaving a pack in the Appellant but nevertheless held that the First Respondent had been negligent in the carrying out of such usual routine in failing to make such a search for packs in the Appellant at the end of the operation as was reasonable and necessary in the circumstances and in failing to carry out his routine practice with his usual care. The trial Judge arrived at this conclusion on the basis of the following findings:

p.119 1.20

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p.119 1.25

p.103 1.23

(1) That the evidence as to whether the pack left in the Appellant had or had not a tape was inconclusive one way or the other.

p.112 11.45-50
p.119 1.23

(2) That the system in force at the hospital for the checking and counting of packs and the usual routine procedure of the First Respondent for avoiding the leaving of a pack in the patient were proper but were in the last resort dependent on the human element and as such liable to human fallibility. 30

p.118 1.50 -
p.119 1.9

(3) That the condition of the Appellant in the final stages of the operation had improved very slightly and was not showing signs of collapse and therefore there was no need for special haste when the First Respondent was making his search. 40

p.118 1.16

(4) That there was no causal connection between the difficulties created by the special circumstances under which the First Respondent was operating and his failure to remove the pack.

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- 10 (5) That if the pack left in was a mopping pack the First Respondent or Dr. Wilson, his assistant for whom he was responsible, must have negligently lost control of it and left it in the body, and that if it was a restraining pack, having regard to the small number used and their obvious position, the absence of appreciable movement from the position in which they had been originally placed and the lack of need for any special haste, the First Respondent must have been negligent in failing to remember and remove it and must have unjustifiably departed from his usual routine. p.120 1.43 - p.121 1.6 p.119.11.25
- (6) That the First Respondent was in fact convicted of negligence out of his own mouth and that the whole circumstances of the operation were more consistent with negligence on the part of the First Defendant than the absence of it. p.119 1.30 p.121 1.3
- 20 12. The trial Judge held that it followed ex-hypothesi from the fact that a pack had been left in the Appellant that the count of Sister Banks or the 'dirty nurse' or both were wrong, that both Sister Banks and the 'dirty nurse' were negligent in making an erroneous count, and that the Second Respondents were liable for such negligence. In arriving at this finding the trial Judge stated that the greater the stress on the surgeon, the greater becomes the responsibility of the theatre staff, and that the count is the most important duty laid on the theatre Sister because although the surgeon may make a search himself and be reasonably sure in his own mind that he has removed everything, it is upon the Sister's count that he will finally depend. p.121.11.9 - 13 p.122 11.25-31 p.122 11.1-10
- 30 13. In assessing the Appellant's general damages in the sum of Shs 50,000 the trial judge took into account her pain and suffering and the probable effect of removal of seven feet of her intestine, as summarised in his Judgment. p.123 1.10 - p.124 1.5
- 40 14. Upon the First Respondent's appeal to the Court of Appeal for Eastern Africa the Court unanimously held that he had not been negligent and allowed his appeal. p.164 11.16-41
- The Court of Appeal unanimously held that the pack left in the Appellant's body was more likely to have been one of two old and thin packs with the tape of one between them which might easily feel and look like one fairly new and thick one and might be miscounted in haste, that if it was so included p.155 1.40 - p.156 1.5 p.156 1.50 - p.157 1.5 p.165 11.1-10

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p.164 11.42-47
p.165 11.43-47

p.168 11.37-41

in what should have been a bundle of only three packs the Second Respondent's employee who made up the bundle and their employee who checked it into the sterilising drum were negligent in so including it in the bundle, and that if the pack left in the Appellant was one of a proper bundle of three Sister Banks or the 'dirty nurse' or both were negligent in making a wrong count, and the Court accordingly dismissed the appeal of the Second Respondents on the issue of liability. 10
The Court allowed the Second Respondents' Appeal on the amount of the general damages on the ground that their assessment at Shs 50,000/- was a wholly erroneous estimate and so disproportionate to the general level of damages awarded in such cases that it ought to be reduced to Shs 15,000.

15. On behalf of the First Respondent it will be contended that the judgment of the Court of Appeal allowing his appeal and setting aside the judgment of the Supreme Court is right and should be upheld 20
for the following and other

R E A S O N S

- (1) Because on the evidence of the First Respondent as to what he did in the course of the operation, which the trial Judge accepted as true, he took all proper precautions and used due care in the circumstances to prevent a pack being overlooked and left in the Appellant.
- (2) Because on the evidence the more probable hypothesis as to how the pack left in the Appellant came to be overlooked notwithstanding the three independent counts of the First Respondent, Sister Banks and the 'dirty nurse' is that it was one of two old and thin packs with the tape of one between them which might easily feel and look like one pack, in which case the First Respondent could not be blamed for counting it as such. 30
- (3) Because on the evidence of all the medical experts the condition of the Appellant until the end of the operation was such that the search made by the First Respondent before closing the wound was a proper and reasonable one which in the circumstances could fail to result in the discovery of the pack left in the Appellant. 40

(4) Because on the evidence the said pack would be one of the seventeen or eighteen packs used for mopping in regard to which the First Respondent was entitled to rely and relied wholly on the count of Sister Banks who assured him that all used packs had been accounted for.

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(5) Because if the said pack was one of the two or three restraining packs and the First Respondent miscounted them, the conditions of stress under which he was operating were such that his mistake was an accident which is reasonably excusable because he in fact sought to carry out his usual and proper routine and was confirmed by Sister Banks in her belief that all packs used, including the restraining packs, had been accounted for.

(6) And upon the grounds stated in the reasons for the unanimous judgment of the Court of Appeal.

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16. On behalf of both Respondents it will be contended that the judgment of the Court of Appeal in reducing the general damages to Shs 15,000 is right and should be upheld for the following and other

R E A S O N S

(1) Because the assessment of the trial Judge was a wholly erroneous estimate of the damage and disproportionate to the general level of damages awarded in similar cases.

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(2) And for the reasons stated in the unanimous judgment of the Court of Appeal.

L.G. SCARMAN

FREDERICK HALLIS

