Rosetta Cooper - - - - - - - - - - - *Appellant*

v.

Gerald Nevill and another - - - - - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH MARCH, 1961

Present at the Hearing:

LORD TUCKER
LORD DENNING
LORD MORRIS OF BORTH-Y-GEST

[*Delivered by* LORD DENNING]

On 1st February, 1956, Mrs. Cooper underwent an abdominal operation in the Nairobi European Hospital. A swab was left inside her, and was removed on 1st November, 1956. On 29th June, 1957, Mrs. Cooper and her husband sued the surgeon, Mr. Nevill, and the hospital authorities, the Kenya European Hospital Association, for negligence. On the 17th February, 1958, the trial Judge (Miles, J.) found against both defendants. He awarded special damages to both Mr. and Mrs. Cooper and also general damages to Mrs. Cooper amounting to 50,000/- (that is, £2,500) and ordered the defendants to pay the costs. Both defendants appealed. On the 24th November, 1958, the Court of Appeal for Eastern Africa (Briggs, V-P., Gould, J.A., Corrie, Actg. J.A.) allowed the surgeon's appeal and entered judgment for him. They upheld the finding against the hospital authorities but reduced the general damages from 50,000/- to 15,000/- (that is, £750). They made consequential orders as to costs. Mrs. Cooper now appeals to their Lordships' Board.

The history starts with a previous operation on Mrs. Cooper. She had been anxious to have children but, owing to some obstruction, was unable to have any. On 24th January, 1955, she went into the Princess Elizabeth Hospital, Nairobi, and was operated on by a surgeon, Mr. Preston. He removed the blocked parts and inserted new. The operation was successful. She afterwards conceived a child, but unfortunately, on 1st February, 1956, when she was three-and-a-half months' pregnant, she suffered a very severe internal haemorrhage. It was due to what the doctors call a "ruptured ectopic pregnancy". She was taken to the Nairobi European Hospital, where she arrived almost dead, pulseless and grey-blue in colour. And there, by the most remarkable efforts of all concerned at the hospital, her life was saved. It is worthy of the highest praise. Everyone did well, but the greatest credit was due, one would think, to Mr. Nevill the surgeon. It was he who found the rupture in the uterus and stopped the bleeding. It was his dexterity and speed that made the difference between life and death.

It must here be noticed that Mr. Nevill was not the servant or agent of the hospital authorities. Mr. and Mrs. Cooper employed him and his assistant (Dr. Wilson) themselves. The hospital authorities provided the theatre sisters and nurses and other facilities.

Two or three months later Mrs. Cooper suffered severe pains inside. Her doctor thought it was adhesions. He admitted her to a nursing

home for observation for a day or two but could not find the cause. She continued to have very severe pain. "It was a long nightmare", she said, "I thought it might be cancer." In October she was admitted to the European Hospital again. She was so depressed that she actually thought of committing suicide and was only stopped by a nurse. Eventually the X-rays showed an intestinal obstruction. On 1st November, 1956, she was operated on by a surgeon, Mr. Barber. He found much of the bowel inflamed and had to cut away seven feet of it. And inside this piece of bowel there was found a piece of towelling material some nine or ten inches long and seven or eight inches wide—just the sort of material which is used in hospitals as a swab. Mr. Barber rang up Mr. Nevill and told him what he had found. He also told Mr. Cooper. Mrs. Cooper gradually recovered. She still has some pains, but not of the same intensity. They are presumably due to adhesions. The doctors do not think it would be wise for her to attempt to have a child now. That is not because of the swab but because of the grievous trouble she had when she previously became pregnant. It would not be wise to risk the same again.

Mr. and Mrs. Cooper decided to sue Mr. Nevill and the hospital authorities claiming damages for negligence in leaving a swab inside her body. In defending the action, Mr. Nevill and the hospital authorities firmly asserted that it was not their swab at all. No swab, they said, was left in Mrs. Cooper's body when Mr. Nevill operated on her in February, 1956. It must have been left when Mr. Preston operated on her in January, 1955. This was a difficult defence to establish because, according to the medical evidence, symptoms would appear within a few weeks or a few months, and here well over twelve months had elapsed since Mr. Preston's operation, whereas only a few months since Mr. Nevill's. Miles, J. negatived the contention. "I see no escape", he said, "from the conclusion that this pack was left in Mrs. Cooper's body at the time of the operation performed by Mr. Nevill." Mr. Nevill and the hospital authorities appealed to the Court of Appeal for Eastern Africa. They again put in the forefront of the appeal that it was not their pack. But the Court of Appeal affirmed the trial Judge on the point. And with two concurrent findings of fact on the point, it is no longer disputed.

But this line of defence left an indelible impact on the rest of the case. In order to show it was not their swab, both Mr. Nevill and the staff of the hospital were at pains to show that they took so much care that no swab could possibly have been left in her body unawares. To take five specific points made by them:

(1) There was no chance of a mistake being made on the "check-in" of the swabs, as, for instance, by reason of one being stuck to another. Sister Molloy said: "Packs are made up in bundles of three. There are always three. A bundle has never contained four to five packs to my knowledge. One of the sisters rolls up the packs. It has never happened that four packs have been rolled up."

(2) There was no chance of a restraining (or packing) swab being left in Mrs. Cooper's body. "It is my duty", said Mr. Nevill, "to see that there is a clip attached to every pack used for restraining purposes . . . I personally removed them. I removed them by catching the actual swab. I wouldn't have needed any guidance to the swab, they were quite obvious."

(3) There was no chance of a mopping swab being left in Mrs. Cooper's body. "At the mopping stage", said Mr. Nevill, "you would not leave them in the body, you don't let go . . . no mopping swab left my hand at this operation. I cannot say that a mopping swab never left my assistant's hand. It would be an improper thing to happen as a general rule. In this operation it would not have been necessary. I never observed Dr. Wilson letting go a mopping swab."

(4) Mr. Nevill carried out his routine check before sewing up. "This is not a case which made the routine check impossible. By the time for sewing up, Mrs. Cooper was very relatively better."

(5) There was a check-out of the swabs and a re-check; and the count was found to be correct on both. "We re-checked", said Sister Banks, "because the packs were still in the theatre and because of the large number that were used. When we did this final check we had no doubt at all as to whether our original check had been correct."

Now once it is held that a swab *was* left in the body, some of those points break down. There must have been some mistake made both by Mr. Nevill and the hospital authorities. So far as Mr. Nevill is concerned there must have been a swab left by him or his assistant, either a restraining swab or a mopping swab. So far as the hospital authorities are concerned, there must have been a mistake either on the check-in or the check-out.

Although there must have been some mistake, it does not follow there was negligence. The whole team were engaged in a race against time. They were under extreme stress. A mistake which would amount to negligence in a "cold" operation may be no more than a misadventure in a "hot" one. Mr. Thompson urged their Lordships to accept this as the explanation here. But the difficulty is there is no evidence to suggest what kind of mistake this would be: for the simple reason that it was inconsistent with the defendants' case for them to admit of any mistake at all. This difficulty so much impressed Miles, J. that he could not see his way to overcome it. "It seems to me", he said, "that the conditions which might reasonably excuse a surgeon overlooking a pack were excluded by Mr. Nevill in his evidence." He found him to be negligent in leaving a swab and the hospital authorities negligent in making a wrong count.

The course taken at the trial may thus be summarised in a few sentences: Mrs. Cooper said: "A swab was left in my body. I ask the Judge to infer negligence." Mr. Nevill said: "No swab was left in your body. I took every possible care so that none should be left", and he added in effect: "It would have been negligent for me or my assistant to leave one in: and we were not negligent." To which the Judge found: "A swab was left in her body. So Mr. Nevill is convicted out of his own mouth of negligence." The Judge used, indeed, that very phrase.

But the Court of Appeal while upholding the finding against the hospital authorities reached a different conclusion with regard to Mr. Nevill. "The only probable source of error disclosed in the evidence", said Briggs, V-P., "is that one of the bundles (on the incoming count) contained, not three, but four packs . . . It appears to me that two old and thin packs, with the tape of one between them, might easily feel and look like one fairly new and thick one and might be miscounted in haste . . . If two packs were handed together to Mr. Nevill or Dr. Wilson, and if a corner of one as well as its tape was folded inwards, and if the surgeon's grip was only on the corner of one, it would seem possible that the other might detach itself unseen as it became wet in the body and might never been seen again."

Whilst their Lordships fully appreciate the reluctance of any tribunal to arrive at a finding of negligence against a highly skilled surgeon who has successfully performed a most difficult operation, they feel bound to say that it was not open to the Court of Appeal to speculate in this way without any evidence to support it. This possibility of two packs being stuck together was never suggested as an explanation by anyone. The only evidence on the point (that of Sister Molloy) was that it had never happened. If this possibility had been put to Mr. Nevill, he might have rejected it, and given good reasons for rejecting it.

Their Lordships find that the trial Judge was justified in his finding:

"To sum up", said Miles, J., "if the pack was a mopping pack, it was negligence on the part of the person who used it, whether it

was Mr. Nevill or Dr. Wilson, to lose control of it and leave it in the body. If it was a restraining pack, having regard to the small number used and their obvious position, the absence of movement and the lack of any particular need for haste at the conclusion of the operation . . . it was negligence on the part of Mr. Nevill not to remove it, the responsibility being, as he admits, upon him to do so, and there being no justification for the departure from the normal routine."

Their Lordships are of opinion that the Court of Appeal ought not to have reversed the trial Judge on this point.

There remains the question of damages. Their Lordships have felt much difficulty on this score. It is not suggested that the trial Judge misdirected himself on the facts or the law. But it is suggested that he made a "wholly erroneous estimate", and the Court of Appeal have accepted this view. Their Lordships think that he may have erred on the high side, but not so much as to make it wholly erroneous. It must be remembered that Mrs. Cooper suffered for months much physical pain, and acute mental distress. She had to undergo a major operation which ought never to have been necessary. She has lost seven feet of her bowel and is left only, said Mr. Barber, with "the borderline amount which might lead to ill effects". In all the circumstances their Lordships do not think it is a case where the Court of Appeal should have interfered with the assessment made by the trial Judge.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the judgment of the Court of Appeal for Eastern Africa set aside, and the judgment of the Supreme Court of Kenya restored. The respondents must pay the costs here and below.

(39460) Wt. 8109—53 100 3/61 D.L.

In the Privy Council

ROSETTA COOPER

v.

GERALD NEVILL and another

DELIVERED BY LORD DENNING

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1961