Evidence in Malpractice Cases: Funk v. Bonham

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EVIDENCE IN MALPRACTICE CASES: *FUNK v. BONHAM*

Malpractice cases often involve difficult questions of proof. The general rule of evidence is that no particular kind of evidence is necessary to prove the allegations of the plaintiff. In the field of scientific learning, however, there is a fixed rule of evidence that causal relations, which can not be understood by one who is not scientifically trained, can be proven on trial only by expert witnesses. This is of the first importance in malpractice cases since the effect of the physician's acts and medicines fall within the field of scientific learning which only an expert can interpret. It is conceded that a case of malpractice may involve such clear instances of neglect that it will not be necessary to employ expert testimony to establish the causal relations involved. Especially in cases where the patient has undergone a major operation, however, an instance in which the proof of negligence would not be dependent upon expert testimony would be extremely rare.

This rule requiring expert testimony in these cases is all the more important in practice when we consider that in the usual instance where a surgeon is sued for malpractice, the surgeon himself or those working under his direct orders and in sympathy with him are the only witnesses whose testimony will be competent. The plaintiff has the burden of proving negligence. In the absence of proof to the contrary, the defendant is presumed to have used reasonable care. It is rare in the general field of litigation for the plaintiff, in the establishment of his case, to be entirely dependent upon the testimony of the defendant, or those who are employees of the defendant, or those who from professional esprit de corps are likely to be favorable to the defendant. In the usual malpractice case, however, this is the situation. Thus the plaintiff must look forward to proving his case if at all by the evidence of the defendant or the evidence of those witnesses that the defendant will call.

In the case of *Funk v. Bonham*, appellee was a woman who had been operated on for appendicitis and during the course of the operation considerable other surgical work was found to be

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1 Wigmore on Evidence, Section 2090.
4 Wigmore on Evidence, sec. 2489, 2490, 2507.
5 *Funk v. Bonham* (No. 1229, Appellate Court of Indiana, March 10, 1926), 151 N. E. 22.
necessary. This operation was the kind that is known as a "deep abdominal" operation. In the course of its performance it was necessary to "wall off" the intestines by the use of "surgical sponges." These sponges were made of gauze folded to about four thicknesses of cloth and about eight inches long by four inches wide. It appeared by the evidence of the defendant and by the nurses who aided in the operation that these surgical sponges were counted when inserted in the wound and were again counted when taken out. The evidence of other physicians as to the professional practice in this regard clearly established that the count of the sponges had been made in the approved way. In this particular operation a number of these sponges were used and in fact one of the sponges was left in the cavity and the wound closed with the sponge inside. The only witnesses at the trial were the appellant surgeon, the nurses that aided in the operation, and other physicians called to establish the professional practice of counting the sponges when used in surgical operations. Appellee called no witnesses. From the nature of the case, the operation was performed in the operating room where friends of the patient were not allowed. It was inevitable, therefore, if appellee were to establish her case, that she must do so by the evidence of appellant and his witnesses.

On the trial below appellee was given a verdict and judgment for $9,000. On review before the Appellate Court this judgment was reversed on the ground that there was not sufficient evidence to sustain the verdict. In reaching this conclusion, the Appellate Court considered three main questions in its opinion. (1) Whether or not the work of removing sponges was an integral part of the operation; (2) whether or not appellant surgeon was liable for the negligence of the nurses in leaving the sponge in the cavity when he inquired about the removal of the sponges in the proper way and the nurses answered him in the approved way that the count had been made of the sponges put in and taken out of the wound, and that by this count it was established that all the sponges were out. (3) Whether or not negligence in the appellant surgeon could be shown apart from this proper count of the sponges by the application of the doctrine of *res ipsa loquitur*, on the theory that since the sponge had been left in the wound and appellee had been injured thereby, it must be presumed from the facts that appellant was guilty of negligence in so conducting the operation that the sponge was not removed from the cavity. The court entered into the authorities with considerable care to show: (1) that the
removal of the sponges was an integral part of the operation,\(^6\) (2) that appellant was not responsible for the negligence of the nurses in incorrectly informing him that the sponges were removed when he was operating in a public hospital which he did not control, when the nurses were the employees of the hospital, and when he employed the nurses and the operating room in accordance with the regulations of the hospital;\(^7\) and (3) that negligence in appellant physician could not be presumed from the fact that an error was made in the course of the operation. This last point was considered in great detail. It could be said incidentally that some may not be surprised at the error of counsel in thinking the doctrine of \textit{res ipsa loquitur} applied to this case, when they consider that the object left in the wound was a surgical sponge—four thicknesses of gauze, eight inches long and four inches wide. But it seems quite clear that the court has reached the right conclusion on this issue. The doctrine of \textit{res ipsa loquitur} does not apply.\(^8\) A physician is held responsible for reasonable care in the exercise of his duties. What this reasonable care is will depend upon the nature of the operation and the general standard of skill of physicians in that community. A man is presumed to have acted with reasonable skill until it is proven otherwise. Appellee could not recover in this case unless she could establish affirmatively that appellant surgeon had been guilty of some negligence regardless of the fact that a surgical sponge of this size was left in the wound. As the courts so often say, "A physician does not guarantee a cure nor is he the insurer of the results that flow from his services."

After reaching these conclusions on the three points set forth above, the court decided that the judgment of the trial court


"The naked facts that defendant performed operations on her eye, and that pain followed, and that subsequently the eye was in such a bad condition that it had to be extracted, established neither the neglect and unskillfulness of the treatment, nor the casual connection between it and the unfortunate event. A physician is not a warrantor of cures. If the maxim, \textit{res ipso loquitur} were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to.'" From the opinion of Mr. Justice Taft in Ewing v. Goode, 78 Fed. 442.
could not be affirmed because "the verdict of the jury in this case was not sustained by competent evidence." It seems to the writer that the conclusions of the court are correct on all the points discussed, but that the decision they reach does not follow from these conclusions. Appellee was under a burden affirmatively to prove appellant negligent; in view of the conditions under which the operation was performed and the requirement of expert testimony in malpractice cases, appellee was largely dependent upon the evidence of appellant himself to establish her case. The court says "the verdict of the jury in this case was not sustained by competent evidence." The only evidence admitted in the case was evidence by appellant, the nurses, and other physicians who testified as to medical practice. It is submitted that on the court's own analysis all of these witnesses are "competent" and the evidence that they submitted was "competent." The question at issue then is whether this evidence which was by experts and entirely competent had the effect of proving negligence in appellant as alleged in the complaint. The following principles are basic in the law of evidence and are of general application.

(1) The rule that "the jury shall find in accordance with the preponderance of the evidence in civil cases" does not require any mechanical or numerical counting of witnesses under which the jury must find for the defendant if three witnesses testify for him and only two for the plaintiff. If one witness for either the plaintiff or the defendant submitted evidence from which the jury could reasonably find for the plaintiff, then a verdict in favor of the plaintiff must be upheld although there were a hundred witnesses for the defendant and although their testimony was in conflict with that of the one witness. (2) A single witness for the defendant may give testimony which brings out sufficient evidence for the plaintiff to warrant the jury in finding for the plaintiff on the basis of that evidence alone. (3) The verdict of the jury in the trial court must be sustained on appeal where the only ground of attack is the lack of sufficient evidence to justify the verdict, unless the Appellate Court can find affirmatively that there was insufficient

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10 Wigmore on Evidence, sec. 2033. Also see sec. 2033, note 3 in which a comment on this principle by Napoleon is quoted from Bonnier, Traite, Des Preuves (ed. 1888), sec. 293. The epigram of Napoleon was as follows: "Thus one honorable man by his testimony could not prove a single rascal guilty though two rascals by their testimony could prove an honorable man guilty."
11 Wigmore on Evidence, sec. 2034, rule 2.
Thus it is constantly asserted that the Appellate Court will not “weigh the evidence,” but that it will sustain the verdict of a jury—or the finding of a judge on questions of fact—unless it feels that no reasonable jury nor reasonable judge could reach such a conclusion on the facts contained in the record.

If we may assume that appellee had competent legal advice, it follows inevitably that she could hope to establish her case only through testimony of appellant and adverse witnesses, since the court correctly points out that the doctrine of res ipsa loquitur does not apply and appellant is not liable for the negligence of the nurses employed by the hospital. Putting appellee’s case in the most unfavorable light, it must be conceded that it was at least possible for the evidence of appellant or appellant’s witnesses to establish negligence in appellant himself. There is no statement or indication in the court’s entire opinion which indicates that the court found from the record that no such evidence of negligence in the defendant was deducible from appellant’s own testimony or that of his witnesses. Since appellant and other witnesses called on his behalf were the only ones who testified, since the verdict of the jury must be presumed to be

12 State ex rel. Drudge v. Davisson, 174 Ind. 705, 93 N. E. 6; Ray v. Baker, 165 Ind. 74; Seiberling & Co. v. Porter, 165 Ind. 7; Karges Furn. Co. v. Amalgamated, etc., Union, 165 Ind. 421. See this last case annotated and the case discussed in 2 L. R. A. (N. S.) 788. See also Trinkle v. Wallis, 167 Ind. 382; Parkison v. Thompson, 164 Ind. 609; Hudelson v. Hudelson, 164 Ind. 694.

The provision in Act of 1903, p. 338, being section 8 of the Act of the Legislature “concerning proceedings and civil procedure,” does not apply here. It gives the Superior and Appellate Courts power to weigh the evidence in cases that are not subject to jury trial. The issues involved are discussed in Parkison v. Thompson, 164 Ind. 609 at 618. See Burns 1926, sec. 723, and cases there cited.

“If then there is any evidence to support the verdict we cannot reverse the judgment, because we must suppose it was that evidence which convinced the jury and the court, and the evidence which contradicted it was not credible and therefore disregarded.” Christy v. Holmes, 57 Ind. 314 at 315.

“The general doctrine is declared and enforced in the many scores of cases which hold that it will be assumed that the verdict is supported by the evidence.” Eliot on Appellate Procedure, p. 680.

“It is, therefore, presumed that the decision of a court is correct until the contrary is affirmatively shown. This presumption is one of the strongest known in the law and can only be overcome by a record which shows unequivocally that an error was committed. It follows that the person attacking a judgement on appeal must present a record which affirmatively shows that such judgment is erroneous; and wherein such record fails to show error the appellate tribunal will presume that it does not exist.” Ewbank’s Manual on Practice (2nd ed.), sec. 198.
based on sufficient evidence in the absence of a finding by the appellate court to the contrary, it follows a fortiori that the judgment below should have been affirmed.

The only direct reference which the court gives to the evidence in support of appellee's claim is in the course of its consideration of the doctrine of res ipsa loquitur. "Several surgeons of wide experience in surgery also testified that the method used by appellant as to keeping track of the sponges used, was the method which was accepted among surgeons generally as being "standard," and "approved" method in the handling and removal of sponges used in the operation such as that performed upon appellee, and there was no testimony to the contrary." 13 In other words, there was no testimony to the contrary in regard to the approved method of counting the sponges. The court does not here or in any other place find affirmatively that there was no testimony of negligence in the appellant apart from the counting of the sponges. On the contrary, earlier in the opinion, the court concludes that the doctor is not liable for the negligence of the nurses and then says "the only question which therefore remains is as to the personal negligence of the appellant herein." 14

It will not seriously be contended that any rules of evidence require the appellant to be found not guilty of negligence merely because he follows the approved method of counting the sponges. If this were true, he could perform an operation in a manner which all his professional associates would term negligent, but could save himself from liability merely by going through the form of requiring a count of the sponges. 15 The medical pro-

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13 Funk v. Bonham, 151 N. E. 22 at p. 26. It will be noted that all the cases which the court cites as indicating that the doctrine of res ipso loquitur does not apply set forth affirmatively that there was no actual evidence of negligence in the defendant from which the jury could find for the plaintiff.

14 Funk v. Bonham, 151 N. E. 22 at p. 24. It is clear that the court does not refer to the evidence of affirmative negligence or of evidence of negligence at all except to say that there was evidence that the method used by the doctor was the approved method of counting sponges and that "there was no evidence to the contrary." This is not a finding that there was no evidence of affirmative negligence in the appellant apart from the count of the sponges.

15 Wigmore on Evidence, sec. 2034, and cases there cited. Also sec. 2090. It may well be that if appellee in this case did not produce affirmative evidence of appellant's negligence, there was no proper case to go to the jury and the trial judge might have directed a verdict for appellant. Appellee was dependent upon the testimony of appellant and his witnesses. It might have been necessary, therefore, for appellee to call appellant and his witnesses in order to secure sufficient testimony to go to the jury in the first place. This point is not considered on appeal, however. We may assume,
fession has fixed upon the counting of sponges as a reasonable precaution. If, therefore, the appellant required the counting of sponges in the usual way it would appear that he was not negligent in the absence of evidence to the contrary. Parenthetically one might suggest that the nurses were perhaps grossly incompetent if they failed to count a sponge of that size, especially when using a particular method for counting which was calculated to insure against any possible error. It would fairly be expected, therefore, not only that their evidence in behalf of appellant surgeon did not favorably impress the jury, but also that their own testimony on cross examination might well have brought out evidence of negligence in performing the mechanical count in addition to positive evidence of negligence apart from this mechanical count. In any case, expert evidence of his negligence may have appeared in the testimony of appellant or his own witnesses. We have the verdict of the jury that appellant was negligent; and unless the Appellate Court can find affirmatively that there was no evidence of such negligence, the judgment of the lower court on the verdict should have been sustained.

Under the Indiana Constitution “the Supreme Court shall, upon the decision of each case, give a statement in writing of each question arising in the record of such case and the decision of the court thereon.” Under our court interpretation of this provision it is clear that the court is obligated to give its opinion in writing of each point which is material to the decision of the case. By statute the Appellate Court of Indiana is required to do the same thing in every case where the Appellate Court reverses the judgment of the lower court. It should be noted that this is a decision of the Appellate Court in which the judgment of the lower court is reversed; and hence under our law the court was obligated to set forth in writing its opinion on every point “material to the decision of the case.” It is submitted in this instance that the one question material to the decision of this case is the presence or absence of sufficient evi-

therefore, that appellant did not ask for a directed verdict at the completion of appellee’s evidence. This reasonable objection is, therefore, waived; and if there is affirmative evidence of appellant’s negligence in the record as presented to the appellate court, the appellate court is bound to consider this evidence in determining the question of whether or not there was sufficient evidence to sustain the verdict of the jury. See the comment by Mr. Justice Taft in Ewing v. Goode, 78 Ind. 442.

16 Burns 1926, sec. 172.
17 Willets v. Ridgeway, 9 Ind. 367.
18 Burns 1926, sec. 1361.
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dence to sustain the verdict of the jury in finding that appellant had been guilty of negligence as alleged in the complaint.\textsuperscript{10}

The writer realizes that it may be very improbable that the evidence of appellant or his witnesses was such as to establish appellee's case. It must be conceded also, however, that when one sues a surgeon for malpractice, and the defendant and his associates are the only experts present, it is extremely unlikely that the plaintiff will be able to establish his case regardless of its merit. From these two admissions, it would seem to follow that the court should be especially vigilant to secure to the plaintiff such rights as he has to prove his case under the difficult situation involved. It seems that the rules of evidence applying to malpractice cases are sound and that they are properly rigorous in protecting the defendant surgeon against the unbridled sympathy of the jury in awarding damages to a plaintiff who has unfortunately suffered from the error of the surgeon. It will be noted that in no other field of the law of evidence are the rules so stringent in the requirements for competent testimony in order to prove the allegation of the complaint. Once the rules of law have been fully complied with, however, the plaintiff is done a serious injustice if he is unable to use the meager evidence which is likely to be available.

In this case it seems clear that the court rested its reversal of the lower court's judgment on three main grounds: (1) that appellant was not liable for the negligence of the nurses, (2) that he had employed the usual professional requirement of counting the sponges in the proper way, and (3) that the doctrine of \textit{res ipsa loquitur} did not apply. The truth of all these propositions laid down by the court may be conceded in full without in any way justifying its decision. After completing its discussion of legal points involved, the court puts its decision squarely on the ground "that the verdict of the jury in this case was not sustained by any competent evidence." It can not be questioned but what the evidence submitted by appellant and

\textsuperscript{10} When the court finally bases its decision on the ground "tested by the authorities, we must hold that the verdict of the jury in this case was not sustained by any competent evidence," it is clear that the court is referring to the evidence which it has discussed, especially since it says "tested by the authorities," which must mean the authorities it has referred to directly or indirectly. It certainly has not set forth any authorities which hold that evidence of appellant's negligence could not be found in the testimony of appellant and his witnesses. It clearly indicated that it has disregarded the possibility of such evidence, since it concludes that appellant is not a warrantor of the result of the operation and hence evidence incidental to this theory or the theory of \textit{res ipsa loquitur} is not competent.
his witnesses was "competent"; there is no specific finding that this competent evidence did not support the allegation of appellee. It is submitted that there might have been competent evidence of appellant's negligence from the testimony of appellant himself apart from the question of the mechanical count of sponges. Unless the court could find that there was no such evidence upon which a jury reasonably could have found for appellee, the court was required as a matter of law to affirm the judgment on appeal.

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