EDWARD FRANK RADCLYFFE and HELEN RADCLYFFE (*Plaintiffs*) .. ..APPELLANTS;

AND

JAMES W. RENNIE and JOHN H. McBEATH (*Defendants*) ..... .RESPONDENTS.

1965

*May 5, 6, 7
June 24

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Physicians and surgeons—Malpractice action—Piece of gauze found in patient's body—Whether left there during operation performed by second defendant in 1959 or during one performed by first defendant in 1944.

*PRESENT: Cartwright, Abbott, Judson, Ritchie and Spence JJ.

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The plaintiffs, husband and wife, brought an action for malpractice against the defendants, R and McB, both doctors. The judgment of the trial judge dismissing the action was confirmed, by a majority, on appeal to the Court of Appeal. The question for determination was whether McB had left in the female plaintiff's body in an operation on November 19, 1959, gauze which he or others placed there during the operation, or whether such gauze had remained in the plaintiff's body from the time R performed an operation on her in 1944. An action upon the latter operation was statute barred. The plaintiff had a series of other surgical procedures in reference to her kidney area, i.e., an opening of the 1959 operative area on April 5, 1960, and again in November of the same year, but it was agreed that there was no evidence that the gauze could have been left on either of those occasions and in fact both of those surgical procedures were attempts to find the reason for the plaintiff's symptoms which reason was revealed on May 24, 1961, when in the third surgical procedure McB recovered the piece of gauze.

HELD (Cartwright and Judson JJ. dissenting): The appeal should be dismissed.

Per Abbott, Ritchie and Spence JJ. :The argument that R had excluded the possibility of the piece of gauze having been left at the site of the 1944 operation was not accepted. R had no more exact memory of the operation in 1944 than did McB of that in 1959. Both had to depend on their records and the record of the 1944 operation was very incomplete. Moreover, radi-opaque gauze had not been introduced into Canada in 1944 or for many years thereafter and the gauze found in the plaintiff's body in the operation of 1961 was not radi-opaque.

As to the argument that it was highly improbable that the plaintiff could have carried in her body from 1944 to 1959 this piece of gauze and remain symptom free and in good health, it was not plain that the plaintiff had remained absolutely symptom free. There had been expert testimony that a non-metallic foreign body could remain in a human body for such a long period symptom free.

The trial judge was ready to accept the evidence of the head nurse upon the all important subject of the type of gauze available in the operating room during the 1959 operation, and the correctness of the count of material available after the operation, and regarded it as part of the "completely credible evidence" given to indicate the improbability of the particular kind of gauze found in the plaintiff's body being used in an operation in 1959.

The site where the gauze was found was walled off from McB at the time of the 1959 operation by dense tissue through which in 1961 he had to cut in order to discover the gauze. An analysis of X-ray plates taken in 1947 suggested that there was a space-occupying lesion in or close to the exact place where the gauze was found. This lesion could have been the result of surgery, a tumor or foreign material. The operations in 1959 and again in 1961 revealed there was no tumor or abscess.

The conclusion reached, therefore, which was the same as that arrived at by the trial judge, was that not only had the plaintiff failed to prove that this gauze was inserted during the 1959 operation and not removed by McB, but considering all the factors the probabilities were

that the gauze had been left in the plaintiff's body since the operation of 1944 and had remained dormant until the 1959 disturbance. *Clarke v. Edinburgh & District Tramways Co.*, [1919] S.C. (H.L.) 35, applied.

Per Cartwright and Judson JJ., *dissenting*: The evidence made it clear that after recovering the gauze on May 24, 1961, McB was of the opinion that it had been left in the patient's body at the time of the 1959 operation. The reasonable inference from the whole record in the case was that the theory on which the defence succeeded was first evolved at some time after the examination for discovery. This was a circumstance which supported the view that the probability was that the gauze had been left in the patient's body in 1959 rather than in 1944.

As to the nature of the gauze used in the November 1959 operation, the head nurse had testified not from personal recollection but in reliance on her written record and that document did not indicate that only radi-opaque gauze was used. The allegation that only radi-opaque gauze was used in that operation was made by the defendants in the course of the trial and the onus of proving it would lie upon them not merely because they were asserting it but also because the subject-matter of the allegation lay particularly within their knowledge. This onus was not discharged.

Pleet v. Canadian Northern Quebec R.W. Co. (1921), 50 O.L.R. 223, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Maybank J. Appeal dismissed, Cartwright and Judson JJ. dissenting.

C. V. McArthur, Q.C., and *R. B. McArthur*, for the plaintiffs, appellants.

P. S. Morse, Q.C., and *R. J. Hansell*, for the defendants, respondents.

The judgment of Cartwright and Judson JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—The nature of the plaintiff's action and the course of the proceedings in the Courts below are set out in the reasons of my brother Spence.

The question that we are called upon to decide, while sufficiently difficult of solution to have caused differences of opinion in the Court of Appeal and in this Court, is easy to state. It is whether the piece of gauze which was admittedly left in the body of Mrs. Radclyffe was left there during an operation performed by Dr. Rennie in 1944 or during one performed by Dr. McBeath on November 19, 1959.

[1] (1964), 43 D.L.R. (2d) 360.

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The burden resting on the appellants at the trial was to shew that, on the balance of probabilities, it was on the later date that the mishap occurred.

On the hearing of the appeal we had the assistance of full and able arguments in which the evidence and the reasons given in the Courts below were carefully analysed. After deliberating at the conclusion of the argument of counsel for the respondents the Court informed counsel for the appellants that they need not reply on the question of negligence, as we were all of opinion that if it were held that the gauze was left in the patient's body during the operation of November 19, 1959, the appellants were entitled to succeed. Nothing can usefully be added to the reasons of Freedman J.A. on this point.

After an anxious consideration of the record, I find myself in full agreement with the reasons and conclusion of Freedman J.A. who dissented in the Court of Appeal and I wish to make reference to only two matters.

Dr. McBeath is a skilled and experienced surgeon. It was he who performed the operation of November 19, 1959, when the plaintiffs claim that the gauze was left in the patient's body, and the operation of May 24, 1961, when it was removed. He was in a better position than anyone else could be to determine whether or not the mishap had occurred at the November 1959 operation and the evidence makes it clear that after recovering the gauze on May 24, 1961, he was of the opinion that it had been left in at the time of the 1959 operation.

Mr. Radclyffe who was accepted by the learned trial judge as a truthful witness, gave the following answer to a question asking him to tell any conversation he had with Dr. McBeath on May 24, 1961, following the recovery of the gauze.

A. Yes, I had additional conversation with Dr. McBeath at that time and Dr. McBeath said that he had mixed feelings regarding my wife's case. He said he was highly elated for one reason and he was somewhat embarrassed for another reason. He said he was highly elated because he had been able to locate and successfully remove the gauze. He was elated because his diagnosis of the trouble had been correct and that the Mayo Clinic's diagnosis had been wrong but he was embarrassed because the gauze was there in the first place and he said to me "Ted, I take full responsibility for leaving it there".

There was no direct denial of this statement having been made. There was a suggestion in argument that this conversation might have occurred before the operation of May 24, 1961, but that could scarcely be so as it was the actual recovery of the gauze which, for the first time, demonstrated that Dr. McBeath's diagnosis was right and that made by the Mayo Clinic was mistaken.

Of course, I do not regard this statement of Dr. McBeath as a binding admission of liability on his part. Its importance is that it shews his opinion following the recovery of the gauze, an opinion which he would seem to have still held at the time when he was examined for discovery on June 5, 1962.

The statement of defence was delivered on January 30, 1962. It contains no hint that the gauze which it admits was removed from the patient's body on May 24, 1961, had been there since 1944. One of the purposes of pleadings is to define the issues to be tried. I think the reasonable inference from the whole record in this case is that the theory on which the defence succeeded was first evolved at some time after the examination for discovery. I wish to make it perfectly clear that in saying this I am not imputing any lack of good faith to the defendants or to their advisers but it is a circumstance which appears to me to support the view of Freedman J. A. that the probability is that the gauze was left in the patient's body in 1959 rather than in 1944.

The second matter to which I wish to refer is the evidence in regard to the nature of the gauze. The defence was founded to a substantial extent on the supposition that all gauze used in the 1959 operation was radi-opaque, and that no gauze of the kind removed in 1961 was used in the operation of 1959. In regard to this the learned trial judge said:

> Dr. McBeath was positive that he had never used the kind of gauze in question in his life.

With the greatest respect, I think this statement is in error.

Exhibit 3, at the trial, was the gauze which had been removed from the patient's body in May 1961.

At the commencement of the trial counsel for the plaintiffs read some questions and answers from the examination for discovery of the defendants and then called Dr.

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McBeath for cross-examination pursuant to the provisions of Rules 236 and 237 of the King's Bench Rules.

In the course of this cross-examination there are the following questions and answers:

Q. Did you use gauze like Exhibit 3 in your operation on November 19, 1959?

A. Gauze like this?

Q. Yes?

A. Definitely not.

* * *

Q. Now, I would like to ask you what it would be used for. I am talking of Exhibit 3 in this trial. What would it be used for in an operation, a kidney operation?

A. You don't use stuff like this in kidney operations, sir.

It may be observed in passing that the operation in 1944 was also a kidney operation.

If the answers quoted above stood alone they might justify the finding that Dr. McBeath "was positive that he have never used the kind of gauze in question"; but later in the trial when Dr. McBeath was called by the defence and under direct examination by his own counsel we find the following:

Q. Now, I show you Exhibit 3. I think you have seen this before?

A. Yes, sir.

Q. It is in three pieces now and I think the other day when Mr. McArthur was cross-examining you, or Mr. Scarth, I am not sure which, you said that you had not used gauze like that. I am not attempting to repeat exactly what you said but you hadn't used gauze like that in the operation that you performed in November, 1959?

A. That is so, sir.

Q. Why do you say that?

A. From information obtained within the last few days as to which gauzes I used *I don't know of my own memory which gauzes I used,* sir, but from information obtained in the last few days about the gauzes I used, this one—

THE COURT: This is hearsay, isn't it? This is purely hearsay. Your question I don't think can be allowed.

Mr MOFFAT: If it were information that came out here at the trial, my lord, I would think—that is if there is evidence.

THE COURT: What somebody told him either in Court or somewhere else I am quite sure is heresay. That is a ruling that is quite definite.

The words I have italicized in this passage indicate that far from being positive as a matter of his own knowledge or recollection Dr. McBeath was relying on information received from others. The only witness who gave evidence of

any weight to support the contention that only radi-opaque gauze was used at the operation of November 19, 1959, was the nurse Mrs. Woods. It is common ground that she testified not from personal recollection but in reliance on her written record, ex. 19, and that document does not indicate that only radi-opaque gauze was used. I agree with the comments of Freedman J.A. on this evidence.

The allegation that only radi-opaque gauze was used in the operation of November 19, 1959, was made by the defendants in the course of the trial and the onus of proving it would lie upon them not merely because they were asserting it but also because the subject-matter of the allegation lay particularly within their knowledge. In my view this onus was not discharged. On this point it is sufficient to refer to the following passage in the unanimous judgment of the Court of Appeal for Ontario in *Pleet v. Canadian Northern Quebec R.W.Co.*[1]:

> No doubt the general rule is that he who asserts must prove, and that the onus is generally upon the plaintiff, but there are two well-known exceptions:—(1) That where the subject-matter of the allegation lies particularly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character:

I would allow the appeal, set aside the judgments below and direct that judgment be entered against the defendant Dr. McBeath in favour of Mrs. Radclyffe for $15,000 the damages provisionally assessed by the learned trial judge. As the majority of the Court are of opinion that the appeal fails nothing would be gained by determining the amount of damages which should have been awarded to Mr. Radclyffe, to whom leave to appeal was granted at the opening of the argument in this Court. I would have directed that the plaintiffs should recover from Dr. McBeath one set of costs at the trial and in the Court of Appeal and their costs in this Court and that the action against Dr. Rennie should stand dismissed without costs.

The judgment of Abbott, Ritchie and Spence JJ. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Manitoba[2] which confirmed, by a majority (Freedman J.A. dissenting), the judgment of the

[1] (1921), 50 O.L.R. 223 at 227. [2] (1964), 43 D.L.R. (2d) 360.

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trial judge, the late Mr. Justice Maybank, dismissing the plaintiffs' action.

The action was one for malpractice against the defendants, both doctors. Although there was an appeal from the dismissal of the action against the defendant Dr. James W. Rennie, that dismissal was confirmed in the Court of Appeal, and at the opening of the argument in this Court counsel for the appellant stated that he did not wish to urge that Dr. Rennie be held liable. Schultz J.A. in his reasons for judgment in the Court of Appeal for Manitoba summarized the plaintiffs' grounds for appeal in four numbered paragraphs. For the purposes of these reasons, I need only consider the first, which was:

> The evidence clearly indicates that the gauze was left by Dr. McBeath in the body of Mrs. Radclyffe on November 19th, 1959.

During the hearing of the appeal in this Court, some argument was directed toward the submission that if the gauze were present in the female plaintiff's body at the time Dr. McBeath operated on November 19, 1959, he should have discovered it and removed it and that his failure to do so would render him liable. Reference was made to paras. 21 to 23 of the statement of claim. It would appear, however, that those paragraphs dealt solely with the allegation that during the operation on November 19, 1959, Dr. McBeath either directly or through the agency of someone for whom he admitted responsibility placed gauze in the plaintiff's body and failed to remove it.

I am of the opinion, therefore, that the plain question which must be decided upon this appeal is whether Dr. McBeath did so or not. As the evidence turned out, this question is really the determination of which of two alternative events occurred, i.e., did Dr. McBeath leave in the plaintiff's body in the operation of November 19, 1959, gauze which he or others had placed there during the operation, or had such gauze remained in the plaintiff's body from the time Dr. Rennie had performed the operation on her in the year 1944? The plaintiff had a series of other surgical procedures in reference to her kidney area, i.e., an opening of the 1959 operative area on April 5, 1960, and again in November of the same year, but counsel were all agreed that there was not the slightest evidence that the

gauze could have been left on either of the two last-mentioned occasions and in fact both of those surgical procedures were attempts to find the reason for the plaintiff's symptoms which reason was revealed on May 24, 1961, when in the third surgical procedure Dr. McBeath recovered the piece of gauze.

The late Mr. Justice Maybank, after a trial which lasted eight days and the transcript of evidence of which occupied 730 pages, gave written reasons for judgment in which he stated that it was not possible for him to give as comprehensive a review of the evidence as was his custom in judgments which he reserved. He did, however, give a judgment of a very considerable extent. The learned trial judge found that the defendants were not liable and in the course of doing so made what was, in my view, a clear finding of fact when he said, in part:

> This case, like all civil cases, has to be decided on the balance of probabilities. The question here is whether on balance of probabilities the piece of gauze was left in the operating wound made in November 1959, or whether, on the balance of probabilities, that gauze was left there in 1944 and remained dormant all of the time until it was disturbed by the 1959 operation. It is the responsibility of the plaintiffs to convince that the former is the more likely probability. I have come to the conclusion that the plaintiffs have not proven their case. In fact, considering all of the factors, I think the probabilities are that the gauze had been left there those 15 or 16 years ago, and had remained dormant until the 1959 disturbance. Hence judgment must be against the plaintiffs with costs to the defendants.

The learned trial judge's judgment was confirmed on appeal in carefully stated reasons given by Schultz and Monnin JJ.A. Freedman J.A. dissented. After quoting the learned trial judge's statement as follows:

> . . . So far as all parties are concerned I was greatly impressed by the moderation of the litigants. I rate the integrity of them all most highly. Similarly with respect to all witnesses I would say that everyone of them was fair and most careful in presenting what he or she considered to be the truth. It is one of those cases in which the presiding judge has no worry whatever about veracity. True, some witnesses gave evidence that such and such things were facts when he or she had concluded those things to be facts only by reason of what was the prevailing practice with regard to the matter at the time under discussion. However it was made clear in such cases that "truth" was so declared because such witnesses were reconstructing a happening by reason of the general practice with reference to same. For instance one nurse gave evidence that certain things were done but promptly admitted that she said so because such things were always done.

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and coming to the conclusion that like the learned trial judge he would not rely on the admission that Dr. McBeath allegedly made, he continued:

> This surely is a case for the application of what was so forcibly stressed by the House of Lords in *Benmax v. Austin Motor Co. Ltd.* [1955] 1 All E.R. 326, namely, the distinction between the perception of facts and the evaluation of facts. A trial judge makes a finding that a specific fact occurred. There is universal reluctance on the part of an appellate court to reject such a finding, particularly where it is founded on credibility. But the evaluation of facts is a different matter entirely. That involves no rejection whatever of the trial judge's finding. Rather his finding becomes the essential starting point from which the appellate court carries on its deliberations. Accepting the trial judge's finding, the appellate court then asks itself: what is the effect of this finding? What probative value does it possess? What inferences should fairly be drawn from it? In answering these questions the appellate court is properly entitled to arrive at its own independent opinion, even if it differs from that of the trial judge.

With all respect for the learned justice in appeal, I am of the opinion that this is an over-simplification of the situation. Although the learned trial judge had found in the clearest of terms in favour of the veracity of all witnesses, he was nevertheless required to exercise his critical faculty in weighing not whether they were telling the truth but the many other factors which go to the acceptance of their evidence as proving certain facts. Here I adopt, as did Schultz J.A. in the Court of Appeal for Manitoba, the words of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co.*[1], at p. 36:

> 'When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not'; and further, after commenting on the type of case and the advantage enjoyed by the trial Judge who hears the witnesses, he adds: 'In my opinion, the duty of an appellate court in those circumstances is for each Judge of it to put to himself . . . the question Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.'

In the particular instance, I think I might well go farther. The allegation made by the defendant McBeath at trial that the gauze was left in the plaintiff's body not during his

[1] [1919] S.C. (H.L.) 35.

operation of November 1959 but during Dr. Rennie's operation of 1944 (an action upon the latter is statute barred) is answered by many arguments. Firstly, Dr. Rennie, in the words used in the appellants' factum in this Court "has excluded the possibility of the piece of gauze having been left at the site of the operation of November 1960, and has to all intents and purposes excluded the possibility of the piece of gauze having been left there in the 1944-45 operation". I am of the opinion that it cannot be said that Dr. Rennie was so successful as to the 1944 operation.

Dr. Rennie's cross-examination as to the latter was, in part, as follows:

> Q. I take it at the time that you performed that operation that you took all of the ordinary precautions, you and Dr. Mackie, the surgeons would in the ordinary way to prevent any error on your part?
>
> A. I am sure I would have taken all the ordinary precautions that were in operation at that time.
>
> Q. And I suggest to you that when you sewed up the wound and the operation was complete that you were certain that there was no foreign material, gauze, in the wound at that time? . . .
>
> A. I was as certain as one could be at that time.

Since Dr. Rennie has no more exact memory of the operation in 1944 than did Dr. McBeath of that in 1959, both had to depend upon their records. The record retained and produced as to the 1944 operation was very incomplete since in the microfilming process only the front page had been copied and not all of the details.

It is moreover quite plain that radi-opaque gauze had not been introduced into Canada in 1944 or for many years thereafter and the piece of gauze found in the plaintiff's body in the operation of May 1961 was not radi-opaque. The second answer is that it was highly improbable that the plaintiff could have carried in her body from 1944 to 1959 a piece of gauze, the size of which was not accurately determined but which would certainly seem to be at least 2″ by 3″, and remain symptom free and in good health throughout.

Firstly, it is not plain that the plaintiff was absolutely symptom free. During the 15-year interval she did see a doctor on many occasions, had some surgical procedures performed which were not in the area in which the gauze was found, but she also did complain on occasion of low-back pain. Much more important, both the defendant Dr.

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McBeath and the five expert witnesses, David Swartz, Albert C. Abbott, Charles B. Stewart, Dr. C. W. Clark, and Dr. C. E. Corrigan, testified that a non-metallic foreign body could remain in a human body for such a long period symptom free and some of these experts gave, from either their personal knowledge or medical reading, graphic examples. It was argued strenuously in this Court that such evidence was largely hearsay. Perhaps some of it was but not all of it, and moreover, as Schultz J.A. pointed out in his reasons in the Court of Appeal for Manitoba, it is in accordance with medical writing, and an instance of it did occur in *Mondot v. Vallejo General Hospital*[1]. Freedman J.A. in his reasons, after referring to this evidence, continued:

> What should a civil court, deciding issues on the balance of probabilities, do in face of this testimony? Shall it conclude that Mrs. Radclyffe's case, characteristic though it is of the pattern, type, and consequences that normally follow the introduction of a foreign body, but yet fail because in the behaviour of foreign bodies there are rare exceptions and hers might be one of them? I say most emphatically that to judge her case in that way would be to require her to satisfy an inordinately high, indeed almost an impossible, standard of proof. Applying the accepted standard of the balance of probabilities, I would hold that what occurred in Mrs. Radclyffe's case was the normal, the usual, the expected consequence of the introduction of a foreign body, rather than something exceptional, bizarre, or freakish. In short, I would find that the gauze in question was introduced during the operation of November, 1959, rather than in that performed 15 years earlier.

However, even granting that the weight of the expert testimony on this subject only reduced the situation from an impossibility, or at any rate a great improbability, to a possibility and certainly not a probability, as Freedman J.A. indicated, there was other evidence which the learned trial judge had to weigh in order to come to his conclusion. Most important upon that issue and, in my view, absolutely decisive is the type of gauze which Dr. McBeath found in the female plaintiff's body in the operation performed in May of 1961. It is admitted by all that that gauze was not radi-opaque and it was admitted by all that no radi-opaque gauze was available in Canada in 1944. What is asserted by the defendants is that only radi-opaque gauze was used in the operating room available for urological surgery in the Misericordia Hospital in November 1959. Freedman J.A.'s statement on this subject is as follows:

[1] [1957], 313 P. 2d 78.

> Here certainly is a cogent submission, if it can be proved. Evaluating the evidence as fairly as I can, I am bound to say that it has not been proved. Indeed the evidence on this point is more remarkable for what it does not say than for what it does say. If it were really the case that in 1959, in operations performed at the Misericordia Hospital, nothing but radio opaque gauze was used, it would have been a matter of the utmost simplicity to establish the point. A qualified senior official of the hospital, with knowledge of the facts, could have been brought to the stand to so testify. But no such person was brought. Instead the defendants ask us to conclude from the testimony of other witnesses that only radio opaque gauze was available. . . .

The learned justice in appeal discusses the evidence of those other witnesses. The first one was the officer of the surgical supply firm of Johnson & Johnson who could only testify that in the year 1959 his company sold 35 cases of Raytex (radi-opaque) sponges to this hospital. I am in agreement with Freedman J.A. that such evidence is of negligible value. The second witness, however, Mrs. Christine I. Woods, is in a different category. She was the head nurse in charge of the operating room at the time the operation was performed in November 1959, and she had been such for 18 months prior thereto although not the supervisor of the operating room. She gave evidence from her knowledge of the procedures and techniques in the operating room that during the whole of the period she was in that operating room nothing but radi-opaque gauze was available therein. She further gave exact evidence that as was her duty she had before the operation commenced carefully counted all the "material", i.e., gauze and cotton sponges which were made available for the use of the surgeon, Dr. McBeath, in this operation and she had noted the count thereof in writing at that time on the operating room nurse's record produced at the trial as ex. 19, and then at the end of the operation she had counted the "material" there remaining in the operating room and while counting it had ticked off the entry she had previously made and reported her count to the surgeon as being correct, and then recounted it and then again reported it and finally circled the word "correct" on the said form. She swore that the material on that operating nurse's record was radi-opaque and she described in detail the radi-opaque feature of each type of it.

Now it is true that this evidence was given not as a first-hand memory of what had occurred because, of course, that head nurse like all the surgeons, had appeared in and

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taken part in very many operations between November 1959 and the date of the trial but she had available to her her own written record she could read and interpret and she knew the exact practice in the operating room. It is also true that the same written record, ex. 19, shows opposite the typed words "First Assistant" her hand-writing of the words "Dr. Rennie" and that she swore that she would not have written those words in the report unless Dr. Rennie had been the assistant. The witness even went further and swore that she had seen Dr. Rennie insert sponges in the plaintiff's body, yet it was proved adequately and accepted by the learned trial judge that in fact Dr. Rennie was not even scrubbed for this operation and that all he did was to enter the room when the operation was well-nigh complete, inquire as to progress, and then retire so that he could report to the male plaintiff. That obvious error undoubtedly shook the learned trial judge's reliance on Mrs. Woods' testimony and resulted in Freedman J.A. remarking "clearly she lacked the necessary qualifications to establish what was the precise policy of the hospital on the matter in question". The precise policy of the hospital was a relevant consideration but not the one of first importance. What was the one of first importance was what gauze was used in this operation. Here, Mrs. Woods had available her knowledge of general practice and her own written record checked at the time the operation ended and signed by her.

Although the learned trial judge had remarked during the course of the trial, "I would not pay too much attention to the nurse because she said, 'I am reconstructing' ", he also did say, "Credible evidence, completely credible evidence, was given to indicate the improbability of this particular kind of gauze being used in an operation in 1959 . . ."

As did Schultz J. A. in the Court of Appeal, I have come to the conclusion that the late Mr. Justice Maybank was ready to accept the evidence of the nurse Mrs. Woods upon the all important subject of gauze available in the operating room during the November 1959 operation, and the correctness of the count of material available after the operation, and regarded it as part of the "completely credible evidence".

Another important consideration in the determination of whether the gauze could have been left in the female

plaintiff's body in 1959 is its position when it was recovered in the operation of May 1961, some 19 months later. Dr. McBeath swore that although the incision made in 1959 was close to the incision made in 1944 on the surface of the female plaintiff's body, the course of his approach to the definitive operative site thereafter differed from the course of the approach to the definitive operative site of the 1944 operation and that the former could be described as "down and away from the site where the gauze was found in 1961". The surgeon's operative record was produced at trial and marked as ex. 18. Dr. McBeath read and interpreted that report and pointed out that he had noted that there was a sufficient degree of fixity of the posterior aspect of the kidney to prevent fully exposing the renal pelvis but that he had been able to expose sufficient of the renal pelvis to permit him to perform the "Y-V" Foley reconstructive pyeloplasty which was in essence an enlarging of the junction between the renal pelvis and the ureter. Dr. McBeath testified, and the many expert surgeons who were called as defence witnesses agreed, that if the capsule of the kidney had been incised in the 1944 operation for the removal of the kidney stone the fatty liquid inside the capsule and surrounding the kidney proper would be drained away so that the capsule would fasten itself to the posterior tissues. The process was even described as "cementing" itself. It was this fixity of the capsule to the posterior tissues which Dr. McBeath encountered and through which he incised only sufficiently to get to the junction of the pelvis and ureter. Dr. McBeath, therefore, swore that he never was at the exact site where the gauze was found in 1961, during the 1959 operation, and that in fact before he found it in the 1961 operation, he had to further incise through hard tissue in order to expose the gauze cemented between the capsule of the kidney and the posterior tissue. Schultz J. A., in the Court of Appeal, cites this evidence as supporting Dr. McBeath's position that he could not have left the gauze in the female plaintiff's body in the 1959 operation. I agree, as it would appear from this evidence, which is uncontradicted, that the site where the gauze was found 19 months later was walled off from Dr. McBeath by dense tissue through which in 1961 he had to cut in order to discover the gauze. It was emphasized by counsel for the appellant in argument made

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in this Court that this position taken by Dr. McBeath would seem to be a last minute revision of his evidence, as in examination for discovery he never outlined this defence. That might be true, but finding as the trial judge did, that there was complete veracity in all the testimony, the allegation can go no further than that Dr. McBeath only later realized the effect of the dense tissue affixation of the capsule to the posterior wall. There is no doubt that in his report made contemporaneously with the November 1959 operation he had noted that fixity. There was a good deal of other evidence which I need not detail but which certainly should have been considered, and I have no doubt was considered, by the learned trial judge in coming to his conclusion that the plaintiffs had not proved that the gauze was left in the body of the female plaintiff in the November 1959 operation. Much of that evidence consisted of the production and analysis of x-ray films. The position taken by counsel for the plaintiffs during evidence was that no x-ray film had revealed the possibility that a foreign body might be present in the plaintiff's kidney region prior to that of March 29, 1960, and that such x-ray only revealed an unfilled space. In the subsequent x-ray tests done by injection of fluid into the sinus in April 1961, a cloudy appearance on the film of that unfilled space prompted the radiologist to speculate that there might have been a gauze left in that area.

Since the failure of all x-ray films prior to 1959 to reveal any sign of this foreign body was emphasized, Dr. McBeath was moved to reconsider all the data including x-ray films which was available to him prior to the November 1959 operation. Amongst those he found one series consisting of four plates taken in 1947 and which had been analyzed by a Dr. McPherson. Dr. McBeath did this during the course of the trial. Dr. McPherson was absent in the Near East and an associate of his, Dr. Arthur Childe, was called to analyze the plates. He swore that these plates taken only three years after the 1944 operation and 12 years before the 1959 operation exhibited that the upper calyces on the right side of the kidney were displaced, the organ being slightly

distorted, and that there was some tissue displacement of some of the pelvis of the right kidney and he further gave as his opinion that there was a space-occupying lesion in or close to the upper pole of the right kidney, i.e., the exact place where the gauze was found in 1961. He said that the space-occupying lesion might have been distortion as a result of surgery or a tumor or foreign material adjacent to the upper pole of the right kidney. When confronted with Dr. McPherson's report and when it was pointed out to him that that report mentioned the possibility only of previous surgery or a tumor he observed that that difference was a matter of semantics as the space-occupying lesion could be a tumor or could be a foreign body.

It would appear that this evidence is most persuasive and is a very convincing answer to the argument of the appellant that no x-ray prior to 1959 ever gave any ground for ever suspecting the presence of foreign material. In argument in this Court, it was attacked as being altogether inadmissible. I do not think the evidence was inadmissible. The real evidence was there and unquestioned, i.e., the four pieces of x-ray film. The qualification of the radiologist who examined them whether he had seen them only a few minutes before or years before was undoubted and was in fact admitted by counsel for the plaintiff. His report was, as he pointed out, essentially the same as that made by the original radiological examination by Dr. McPherson in 1947. The operations in 1959 and again in 1961 revealed there was no tumor and no abscess, so certainly the existence of a space-occupying lesion of some kind in 1947 is of the greatest significance.

For these reasons, I am of the opinion that I am able to conclude, as did the learned trial judge, that not only has the plaintiff failed to prove that this gauze was inserted during the 1959 operation and not removed by the defendant Dr. McBeath but "considering all the factors I think the probabilities are that the gauze had been left there those 15 or 16 years and had remained dormant until the 1959 disturbance". I have used the learned trial judge's exact words.

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I would dismiss the appeal with costs.

Appeal dismissed with costs, Cartwright and Judson JJ. dissenting.

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