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Tomei v. Henning

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[S. F. No. 22511. In Bank. Sept. 18, 1967.]

LUPE TOMEI, Plaintiff and Appellant, v. BERTHOL
HENNING, Defendant and Appellant.

- [1] **Negligence — Evidence — Res Ipsa Loquitur — Conditions of Application.**—Res ipsa loquitur generally applies where the occurrence is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible.
- [2] **Id. — Evidence — Res Ipsa Loquitur — Probability of Negligence: Physicians—Malpractice—Opinion Evidence.**—To constitute a res ipsa loquitur situation where the question whether the accident was probably the result of negligence is not a matter of common knowledge among laymen, such as one involving the inadvertent suturing of a ureter in a hysterectomy operation, such probability must be based on expert testimony, not in any particular language, but sufficient to support an inference of negligence from the happening of the accident alone.
- [3] **Id.—Appeal—Reversible Error—Instructions—Res Ipsa Loquitur: Physicians — Malpractice — Reversible Error.**—In a medical malpractice action in which plaintiff had lost a kidney following the inadvertent suturing of the ureter in two places during a hysterectomy operation, it was prejudicial error (Cal. Const. art. VI § 13) to refuse her requested conditional res ipsa loquitur instruction, where it was undisputed that the surgeon was responsible for the accident and that plaintiff did not contribute thereto, and where it was the expert opinion of a specialist in obstetrics and gynecology that, although there are unavoidable risks to the ureters in any hysterectomy, the suturing and closing of the wound without exercising any technique to determine the condition of the ureters was not the

[1] See Cal.Jur.2d, Negligence, § 307; Am.Jur., Negligence (1st ed § 295).

[3] Physicians and Surgeons: res ipsa loquitur, or presumption or inference of negligence, in malpractice cases, note, 82 A.L.R.2d 1262. See also Cal.Jur.2d, Physicians, Dentists, and Other Healers of the Sick, §§ 98, 105.

McK. Dig. References: [1] Negligence, § 133(5); [2] Negligence, § 135(4); Physicians and Surgeons, § 56(2); [3, 4] Negligence, § 248; Physicians and Surgeons, § 62; [5] Appeal and Error, § 1431.

exercise of proper care in such an operation, thus leaving the probability of negligence a question for the jury.

- [4] **Id. — Appeal — Reversible Error — Instructions — Res Ipsa Loquitur: Physicians—Malpractice—Reversible Error.**—In a medical malpractice action involving the inadvertent suturing of a ureter during a hysterectomy and in which no conditional res ipsa loquitur instruction was given, the fact that the jury found the surgeon not guilty of negligence established, not that they had rejected the evidence that could have supported a finding of negligence under the doctrine of res ipsa loquitur, but only that they could not identify any specific negligent conduct, and such an instruction would not have been superfluous, where, had it been given, the jury might reasonably have concluded that regardless of how the accident happened, or how it could have been avoided, its happening alone supported the inference of negligence.
- [5] **Appeal—Disposition of Cause—Grounds for Reversal—Verdict on Cross-complaint Influenced by Verdict on Complaint.**—On reversal of a judgment for defendant in a medical malpractice action, the part of the judgment against him on his cross-complaint to recover the value of his professional services must also be reversed, where it was possible that the verdict on the cross-complaint was influenced by the jury's decision in his favor on the complaint itself.

APPEALS from a judgment of the Superior Court of the City and County of San Francisco. Edward F. O'Day, Judge. Reversed.

Action for damages for medical malpractice and cross-action to recover the value of professional services and reimbursement for other medical expenses paid by defendant. Judgment for defendant denying recovery of value of services and reimbursement for payments of other medical expenses reversed.

Belli, Ashe, Gerry & Ellison and Jack G. McBride for Plaintiff and Appellant.

Peart, Baraty & Hassard, Salvatore Bossio, John I. Jefsen and Allan H. Fish for Defendant and Appellant.

TRAYNOR, C. J.—Plaintiff appeals from the part of a judgment entered against her upon a jury verdict on her complaint to recover damages for medical malpractice. Defendant appeals from the part of the judgment entered upon the verdict against him on his cross-complaint to recover

the value of his professional services and reimbursement for payments of other medical expenses made by him on plaintiff's behalf.

Defendant performed a hysterectomy on plaintiff. During the operation he accidentally sutured her right ureter in two places. The accident was not discovered until four days later. A urologist attempted corrective surgery, which failed, and thereafter it became necessary to remove plaintiff's right kidney.

At the trial defendant admitted that he had unintentionally sutured plaintiff's ureter. He presented evidence, however, that the misplacing of the sutures and the failure to discover it during the operation were an unavoidable accident and not the result of negligence on his part. Both sides introduced expert testimony on the questions whether defendant should have identified the ureters by sight or touch to avoid them during the operation and whether before closing the wound he should have conducted tests to determine whether the ureters had been injured. Defendant testified that he took none of these precautions. All the experts agreed that damage to the ureters is a hazard of a hysterectomy that should always be present in the mind of the surgeon and that such damage can occur no matter how carefully the operation is conducted. On direct examination, plaintiff's expert, Dr. Edmund F. Anderson, a specialist in obstetrics and gynecology, was asked, "Doctor, during the course of a hysterectomy, where the ureter is tied off in two places, and the abdominal wound is closed without exercising any technique to determine the condition of the ureters, would you consider that the exercise of proper care and skill of a surgeon?" He answered, "No, I would not." On cross-examination, Dr. Anderson testified that surgeons generally try to stay away from the ureters as much as possible, avoiding any contact with them. Consequently the passage of a catheter through the ureter to test it is not done in all cases, but only when the surgeon suspects some damage to the ureter. Dr. Anderson further testified that there is considerable risk of involving the ureters during a hysterectomy: "Q. And the reason for this concern is because gynecologists and surgeons understand that the urinary tract can be damaged no matter how careful the surgeon is; isn't that true, doctor? A. That does happen, yes. Q. It happens in a certain, almost recognized percentage of cases, doesn't it, doctor? A. Yes, I guess so."

reasonable care would have prevented it. Properly instructed, the jury could pursue the answer to that question along two distinct routes. It could ask what did defendant do or fail to do that might have caused the accident. Under a *res ipsa loquitur* instruction it could ask whether it is more likely than not that when such an accident occurs, the surgeon was negligent. Since the verdict was reached without the benefit of a *res ipsa* instruction, it establishes only that the jury could not find negligence along the first route; it could not identify any specific negligent conduct. Had the instruction been given, however, the jury might reasonably have concluded that regardless of how the accident happened or how it could have been avoided, its happening alone supported an inference of negligence. We conclude that it is reasonably probable that a result more favorable to plaintiff would have been reached had the instruction been given. The error was, therefore, prejudicial. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)

[5] Since it is possible that the verdict against defendant on his cross-complaint was influenced by the jury's decision in his favor on the complaint, the part of the judgment on the cross-complaint should also be reversed. (See *Hamasaki v. Flotho* (1952) 39 Cal.2d 602, 609 [248 P.2d 910]; *Sun Oil Co. v. Union Drilling etc. Co.* (1929) 208 Cal. 114, 119 [280 P. 535]; *Bird v. McGuire* (1963) 216 Cal.App.2d 702, 718 [31 Cal.Rptr. 386].)

The judgment is reversed. Plaintiff shall recover her costs on these appeals.

McComb, J., Peters, J., Tobriner, J., Mosk, J., Burke, J., and Sullivan, J., concurred.