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Torts—Surgeon's Liability for Patient's Death Is Jury Question

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time. As for interest inflating the verdict, the damage was suffered at the time of the negligence, and from that time on the defendant had something of the plaintiff's. Were justice swift he would have had his money at once. It is not and so he did not receive his damages until the case was decided. Since then he has been denied the fair market value for the use of his money, and that is interest. It is not as if he were asking for something more than what he lost. The inherent justice of the award of interest must not be denied to an injured party merely because of infirmities in the judicial system.

The Court here has failed to make use of an opportunity provided by the Appellate Division, in accordance with what seemed to that court to be the wishes of the Court of Appeals. The issue will very likely remain in its present unsatisfactory state until the legislature overcomes its obstacles and rectifies this court-made injustice.

D. R. K.

SURGEON'S LIABILITY FOR PATIENT'S DEATH IS JURY QUESTION

In the case of *Weiss v. Rubin*[27a] death of plaintiff's intestate resulted from the transfusion of incompatible blood administered during the course of an operation. Plaintiff recovered a verdict and judgment against the hospital, anesthetist, and attending surgeon in Supreme Court, which was affirmed by the Appellate Division.[28] On appeal to the Court of Appeals the liability of the anesthetist and hospital was conceded and the only issue was whether there was sufficient evidence of negligence on the part of the surgeon to send the case to the jury.

Defendant surgeon herein was a specialist in urology and was in complete charge of the operation on the decedent. It was hospital procedure that the surgeon in charge, prior to the operation, prepare a written order if he wanted blood available during the operation. Except in an emergency situation, which was not present in this case, this was the only way that blood might be procured for transfusion purposes during an operation. Through the conceded negligence of the nurse assigned to the operation by the hospital, and the anesthetist whose duty it was to administer transfusions upon instructions from the surgeon in charge, a pint of blood prepared for a previous patient was brought into the operating room and administered to plaintiff's intestate. After the blood was produced in the operating room the anesthetist said, "Doctor, I have blood ready for this lady. Shall I give it?" Defendant surgeon, knowing that he had not prepared a written order for the blood, and knowing that this was the only manner in which blood could be procured during an operation answered "Yes." The incompatible blood was administered and decedent developed an anaphylactic reaction and died.

The Court of Appeals in a five to two decision held that the jury had a

27a. 9 N.Y.2d 230, 213 N.Y.S.2d 65 (1961).
28. 11 A.D.2d 818, 205 N.Y.S.2d 274 (2d Dep't 1960).

right to find that the defendant surgeon breached his duty of reasonable care to plaintiff's decedent in ordering the blood transfused without question under the above mentioned circumstances.[29]

This case appears to add nothing to the substantive law of New York regarding malpractice of physicians and surgeons. The law is well settled on the standard of care which a physician owes to his patient. A physician is not liable for a mere error of judgment as long as he exercises that degree of learning and skill that is ordinarily possessed by the average member of the medical profession in good standing in the locality where he practices.[30] Defendant had not prepared a written order for the blood and was aware that no emergency existed under these circumstances. Therefore, he was under an obligation to his patient to make a reasonable inquiry as to the manner in which the blood appeared in the operating room. Failure to make this inquiry cannot be called an error of judgment. It is a question of fact whether the defendant exercised the degree of care of the ordinary physician and is clearly within the province of the jury.

The dissenting opinion in the Appellate Division[31] is based upon the case of *Baidach v. Togut*[32] which in some respects is similar to the case at bar. In that case plaintiff was injured as the result of a negligently administered intravenous injection which was administered by a hospital attendant pursuant to order of the attending surgeon. The Appellate Division held that the surgeon was not liable because he had the right to rely upon the competency of the hospital staff. But the *Baidach* case is easily distinguished on its facts from the case at bar. In the *Baidach* case the surgeon was at home when he was called and he gave instructions over the phone that the injection be given. It would be foolish to require the surgeon to be present every time that an injection was given to a patient, and the surgeon is justified in this situation in relying upon a hospital attendant to give the injection. But in the case at bar the defendant was present and in control of the operation, and thus he had complete responsibility for ordering blood which might be needed during the course of the operation. Therefore defendant was not justified in relying on the hospital staff to produce the correct blood without a written order from him.

The position of the dissent in the Court of Appeals[33] is that by holding the surgeon liable the court must deviate from the concept of *Bing v. Thunig*[34] which held that the attending surgeon in an operation is not liable for the negligence of the hospital in medical matters. But as the facts of the instant case

29. Supra note 27.

30. Pike v. Honsinger, 155 N.Y. 201, 49 N.E. 760 (1898); Cunningham v. State of New York, 10 A.D.2d 751, 197 N.Y.S.2d 542 (3d Dep't 1960); Piscano v. State of New York, 8 A.D.2d 335, 188 N.Y.S.2d 35 (4th Dep't 1959).

31. Supra note 28.

32. 8 A.D.2d 838, 190 N.Y.S.2d 120 (2d Dep't 1959), aff'd, 7 N.Y.2d 128, 196 N.Y.S.2d 67 (1959).

33. Supra note 27.

34. 2 N.Y.2d 656, 163 N.Y.S.2d 3 (1957).

show, the surgeon's liability has not been imposed on him vicariously. He is liable by reason of his own negligence. Therefore, the case is not a deviation or extension of the *Bing* case. It merely holds that where the surgeon in charge of the operation, as well as the hospital and the anesthetist, is negligent, all three are liable as joint tortfeasors.

W. L.

ACTIVE NEGLIGENCE BY CROSS-COMPLAINANT BARS INDEMNITY AGAINST CO-DEFENDANT

In *Bush Terminal Buildings Co. v. Luckenbach S.S. Co.*,[35] plaintiff sued three corporations, Luckenbach, Atlantic and Muehlstein for alleged negligent injury to property caused by a fire and explosion upon a Brooklyn pier. The defendant Atlantic had been hired by the pier operator Luckenbach to repair cargo-handling equipment, and in the course of the repairs, Atlantic used oxyacetyline torches. The fire and explosion resulted when sparks from the torches ignited foam rubber scraps on the pier, and these in turn touched off a shipment of explosives that were nearby. The scrap rubber had been delivered by Muehlstein about a month previously and it is alleged that it was so poorly packed that it had spilled onto the dock.

Defendant Luckenbach, seeking indemnity, filed a cross-complaint against defendant Muehlstein. Muehlstein seeks to reverse an order of the Appellate Division,[36] which modified an order of the Special Term dismissing Luckenbach's cross complaint.[37] The Appellate Division certified the following question: "Is the cross-complaint against the defendant Muehlstein . . . [by Luckenbach], sufficient in law?" The answer to that question involves a determination of whether Luckenbach may seek indemnity. Luckenbach alleged the primary active negligence of Muehlstein and claims that if it is held liable it will be due to Muehlstein's active fault.

It has been held in New York that the culpability of the person seeking indemnity determines whether recovery will be allowed against a joint tortfeasor and that a right to implied indemnity does not exist if a defendant's conduct was active.[38] Moreover, acts of omission constitute active negligence as well as acts of commission,[39] and where the defendant is alleged, as here, to have participated in the wrong which caused the damage, there is no right of recovery over.[40] Where there is a charge of notice, failure to perform the duty to inspect may not be deemed mere passive negligence. But where a complaint

35. 9 N.Y.2d 426, 214 N.Y.S.2d 428 (1961).
36. 11 A.D.2d 220, 202 N.Y.S.2d 172 (1st Dep't 1960).
37. 22 Misc. 2d 791, 196 N.Y.S.2d 515 (Sup. Ct. 1959).
38. Berg v. Town of Huntington, 7 N.Y.2d 871, 196 N.Y.S.2d 1001 (1959); Bernardo v. Fordham Hoisting Equip. Co., 6 N.Y.2d 733, 185 N.Y.S.2d 817 (1959); Putvin v. Buffalo Elec. Co., 5 N.Y.2d 447, 186 N.Y.S.2d 15 (1959).
39. Putvin v. Buffalo Elec. Co., supra note 38.
40. Oceanic Steam Nav. Co., Ltd. v. Compania Transatlantica Espanola, 134 N.Y. 461, 31 N.E. 987 (1892).