1966

Drexel B. Dickinson, a Minor, by Dell B. Dickinson, Guardian Ad Litem and Dell B. Dickinson, Individually v. William Mason, M.D. : Respondent's Brief

Utah Supreme Court

In the Supreme Court of the State of Utah

DREXEL B. DICKINSON, a minor, by DELL B. DICKINSON, Guardian Ad Litem and DELL B. DICKINSON, individually,

Plaintiffs-Appellants,

- vs -

WILLIAM MASON, M.D.,

Defendant-Respondent.

Case No. 10591

RESPONDENT'S BRIEF

Appeal from District Court
of Garfield County, Utah
Honorable Ferdinand Erickson, Judge

JOHN H. SNOW and
SKEEN, WORSLEY, SNOW
& CHRISTENSEN
701 Continental Bank Building
Salt Lake City, Utah
Attorneys for Respondent

FRANK E. DISTON and
JOHN W. LOWE of Brayton,
Lowe and Hurley
1001-5 Walker Bank Bldg.
Salt Lake City, Utah
Attorneys for Plaintiffs-Appellants

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NATURE OF CASE

This was an action alleging medical malpractice.

DISPOSITION IN LOWER COURT

At the conclusion of plaintiffs' evidence, District Judge Ferdinand Erickson, sitting with a jury at Panguitch, Utah, granted defendant's motion to dismiss with prejudice, for insufficient evidence of negligence or causation.

STATEMENT OF FACTS

Defendant does not accept plaintiffs' abbreviated statement of facts because the essential portion of plaintiffs' evidence — the testimony of their medical expert — is set forth merely in summary of some of the direct examination, and the effect of the testimony following cross-examination is completely ignored.

As was pointed out by this Court in its affirmance of a dismissal of a negligence action at the end of plaintiffs' evidence, it is fundamental that "testimony of a witness on his direct examination is no stronger than as modified or left by his further examination or by his cross-examination. A particular part of his testimony may not be singled out through the exclusion of other parts of equal importance bearing on the subject." *Alvarado v. Tucker* (1954), 2 Utah 2d 16, 268 P. 2d 986.

With full recognition of the rule that inferences favorable to plaintiffs must be indulged in this Court's review of an involuntary dismissal, the record fairly shows the following facts:

The minor plaintiff, a resident of Salt Lake County, sustained a severe laceration from a butcher knife on his right index finger while on a visit in the Panguitch area. The laceration was long, curving and oblique and was deep enough to sever the bone in the middle phalanx

of the finger. Arteries and capillary vessels supplying blood to the distal one-third of the finger were also severed, as were the nerves and muscle fibers and the flexor and extensor tendons which enable the finger to be flexed or extended (TR. 16, 17, 71, 72).

The child was taken to the Panguitch L.D.S. Hospital where the finger was treated by the defendant, a physician and surgeon engaged in general practice in Panguitch. He "folded the skin over," according to one lay witness, and stated he was trying to make a "graft," in the hope the finger could be saved. The injury and treatment occurred on August 11, 1959, and the boy returned to his home in the Salt Lake City area on August 13, 1959 (TR. 100). On the evening of August 14, more than 72 hours after the original injury and treatment, the child's mother telephoned Dr. Glenn Wilson, a general practitioner in Salt Lake County, requesting medication for pain, which the doctor refused to supply until he saw the child. He urged the mother to bring the child to the office even though it was after 6:00 p.m., but the mother stated she had no means to go to the office. The doctor thought this was strange inasmuch as his office was only two blocks from plaintiffs' residence (TR 46, 53).

The child was presented to Dr. Wilson the morning of August 15, approximately 96 hours after the injury, and he noted the finger was heavily bandaged and there appeared to be swelling at the base of the finger and on

the dorsum of the hand proximal to the first knuckle. He removed the bandage and determined the finger was black, without feeling or sensation, and that it probably would require amputation (TR. 16, 19). The child was hospitalized the following day and amputation was effected by Dr. Boyd Holbrook, Salt Lake City orthopedic surgeon (TR. 51).

On direct examination Dr. Wilson expressed the opinion that the treatment afforded by the defendant was not proper in that the finger was bandaged too tightly, which cut off the circulation, and the bandage used was not "the same type as a reasonable prudent doctor" would apply in treatment of such an injury (TR. 24, 34).

Dr. Wilson further testified on direct examination that when he first saw the finger, there was "no loss in the total length of the finger" and that the entire length of the finger was still present except for the fingernail and some "bony tissue" (TR. 34).

Upon cross-examination he admitted that upon deposition in 1964, which deposition had been read, corrected and signed under oath by him, and which had been taken at a time when his office chart was before him, he had testified that the end of the finger, including the nail, was intact at the time he first saw the finger, and he therefore admitted, upon trial, that he did not know which was the correct statement (TR 52).

On direct examination, Dr. Wilson testified the finger "should have been a normal functioning finger if it had been properly treated" (TR. 42). However, upon cross-examination the doctor conceded that he had testified upon deposition, and it was still his opinion, that "this finger was almost completely amputated by the injury and I think any doctor would have felt fortunate in getting a normally function finger from this." (TR 61). Upon trial he further conceded that when there is but two-thirds of a finger remaining after injury, the probabilities are the remaining portion of the finger would have required amputation, and he conceded that his statement upon deposition was still true.

> "I would have recommended an amputation, anyway, because he had two areas of the finger that were severed, one at the tip and one at the middle of the second digit, so that he would have had approximately two-thirds of the finger left and two-thirds of the right index finger get in the way." (TR. 63).

Dr. Wilson was firm in his opinion that the gangrene in this case occurred because the bandage was too tight. In this connection he also contended, at one point in his testimony, that the finger would not swell inside the bandage (TR. 68).

However, this portion of his testimony was in conflict with his other testimony that the amount of swelling

depends "on the amount of soft tissue in the injury. Some of these injuries swell a lot and some of them swell a little" (TR. 37). Concerning the treatment which an injury of this severity would require, the witness conceded that whether the remaining portion of the finger should be immediately amputated, or an attempt be made to save the finger, depended upon "the clinical knowledge" of the attending physician, and then he testified:

"Q. And so when you say clinical knowledge of the doctor, does this mean the sum total of what he's learned and what his judgment is from treating other patients?

A. That's right. The age of the patient, the presence of absence of infection, and the amount of sluffing of the tissues would influence your decision in this.

Q. This would be a decision that the doctor makes using these faculties of judgment based upon what he sees before him at that time?

A. That is correct.

Q. And you would agree, would you not, doctor, that the judgment of one doctor might differ in that respect from the judgment of another doctor?

A. Undoubtedly." (TR. 73, 74).

The witness conceded that, speaking generally, three doctors of approximate equal training and knowledge in the field might all arrive at a different conclusion from each other and then, with reference to this specific injury, he testified:

"Q. . . . So then getting back to this finger, the question before the doctor at the time of this treatment, from the time of seeing the original injury required exercise of clinical judgment based upon his experience for one, right?

A. Right.

Q. And a determination by him as to whether or not in his judgment the circulation of the finger would be or had been sufficiently impaired that it would be impossible to save the tip of it, that's what he had to consider?

A. That's right.

Q. And that is a matter that you might differ with any doctor — right?

A. That's right." (TR. 75).

At the conclusion of the cross-examination of Dr. Wilson, the trial court asked whether or not there would have been any difference in the hand "as we now find it" if the boy had gone to a surgeon for immediate treatment,

and although the transcript is somewhat garbled at this point, the answer of the witness was clear:

> "The end result would have been identical." (TR. 79).

Defendant's motion for involuntary dismissal was based, and was granted by the court, upon the contention that expert testimony was required to establish the standard of care, the claimed deviation from the standard, and the effect of the alleged negligence upon the end result, and that in each of these areas of evidence, the evidence given by Dr. Wilson on cross-examination either refuted, contradicted or explained the principal evidence he had given upon direct examination concerning liability or had merely produced a choice of probabilities and that the cumulative effect of his testimony, viewed as a whole, was that neither the deviation from the standard of care nor the causal connection had been established by expert testimony (TR. 122 to 126).

ARGUMENT

THE TRIAL COURT CORRECTLY GRANTED DEFENDANT'S MOTION FOR INVOLUNTARY DISMISSAL BECAUSE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH EITHER NEGLIGENCE OR PROXIMATE CAUSE.

The injury in this case involved not only an extensive laceration of the skin and underlying tissues, but also severance of the bone, finger arteries and capillaries, nerves and tendons. There can be no doubt that the determination of the proper medical care to be afforded such an injury depends upon scientific knowledge and is beyond the scope of the knowledge of lay persons. In such cases, plaintiff has the burden of establishing, by expert medical testimony, not only the standard of care, but the claimed deviation from that standard. *Huggins v. Hicken,* 6 Utah 2d 233, 310 P. 2d 523; *Marsh v. Pemberton,* 10 Utah 2d 40, 347 P. 2d 1108.

In the present case, the only testimony admitted on the standard of care was that of Dr. Wilson, who stated his opinion that the proper care to be given an injury of this kind was to immobilize it and to bandage the finger loosely, and that the bandage he removed was not "the same type" that a reasonably prudent doctor would have used.

However, on cross-examination, he conceded he had not seen the original injury and that the method of treatment a physician might use would necessarily depend upon his clinical judgment applied to the injury as he saw it. In his opinion, the bandage had been applied too tightly, but that opinion was based upon what he saw 96 hours after the original treatment.

Further upon cross-examination, he refused to concede that the finger might swell beneath a bandage, after application, so that the act of swelling would have made the bandage too tight, but this testimony was in direct contradiction to that given earlier when he stated that the amount of swelling depends "on the amount of soft tissue in the injury. Some of these injuries swell a lot and some of them swell a little" (TR. 37). No fact was presented from which he could determine the exact nature of the original injury or the exact treatment that was afforded by the defendant.

Thus the situation is analagous to that which was before this Court in *Marsh v. Pemberton,* previously cited. In that case the contention was made that the defendant surgeon had been negligent in applying, too tightly, the underlying padding and a cast following a surgical procedure. On that phase of the case, this Court stated:

> "Evidence was introduced to the effect that the swelling accompanying such an operation could be different with every individual; therefore the tightness of the cast and the amount of padding necessary is a matter of judgment exercised by the physician. A physician is generally liable for misjudgment only when he arrived at such judgment through failure to use ordinary care and skill or was guilty of misattention or neglect."

The case at bar is, of course, not identical with *Marsh v. Pemberton,* particularly because that case in-

volved continuing treatment and attention by the surgeon following the operation, whereas in this case, the defendant was administering only the original treatment in view of the fact that the minor plaintiff shortly intended to return to his home in Salt Lake City. Nevertheless, the principles involved are analagous and plaintiffs' entire case here is grounded upon a result seen by Dr. Wilson rather than upon a judgment and opinion on the propriety of the defendant's actual treatment of this injured finger.

Although the defendant was in court, and could have been called to establish exactly what problems he faced with the injury and the procedures he followed to solve them, as was done in *Marsh v. Pemberton,* he was not asked to testify, and thus the only evidence of what he actually did, and the problems with which he was faced and on which his judgment was brought to bear, came from testimony from plaintiff Dell Dickinson, who reported that the defendant told him he had attempted to bandage the finger so that a graft would take and that the finger could be saved (TR. 104).

No evidence was offered that this procedure constituted a deviation from the standard of care or that the defendant arrived as such a judgment through lack of ordinary care and skill or through misattention or neglect.

If, as stated by Dr. Wilson, "some of these injuries swell a lot and some of them swell a little," then the fact that the finger was tight against the bandage, when Dr. Wilson saw the finger more than 96 hours later, and that the circulation had thus been cut off, does not establish that the original application of the bandage was too tight. Of further significance was the fact that the doctor admitted that when a bandage is placed too tightly upon a finger, gangrene begins almost at once, and pain would soon become apparent. In such event, the doctor agreed that in this case the pain would have been apparent by the morning of August 13 and at that time the pain would be "fairly severe pain" and of a kind that would require attention (TR. 83).

However, as appeared without contradiction from the testimony of the minor plaintiff and his parents, there was no pain on the morning of the 13th, at which time, defendant briefly saw the boy before he began the trip to Salt Lake City. At that time, defendant evidenced his interest and concern for the boy by stating, as quoted by the boy's grandmother, that he "sure would have liked to have undone (the bandage) and looked at it," but he did not want to disturb it (TR. 120). Obviously nothing then appeared to the defendant to be wrong and nothing was related to him by the patient or the family indicating the presence of the trouble which Dr. Wilson described as the aftermath of the application of an excessively tight bandage on a finger.

There was no evidence that Dr. Mason's apparent judgment to leave the bandage undisturbed was wrong or that the standard of care required him to do other than he did, under the circumstances with which he was faced.

From the portions of testimony and the state of proof set forth in the preceding three paragraphs, it is clear that, on the critical issue of negligence, two probabilities arose from plaintiffs' proof: either the bandage was applied too tightly in the first instance or, since some of these injuries "swell a lot," the finger began to swell beneath the bandage and thus the bandage became too tight.

Under such circumstances, to submit this issue to the jury would be to permit the jury to engage in a form of speculation, which is not permitted by the decisions of this Court. *Marsh v. Pemberton, supra; Forrest v. Eason,* 123 Ut. 610, 261 P. 2d 178, and cases therein cited.

Although plaintiffs stoutly insist in their brief that they do not concede that the amputation of the finger would have been inevitable, because of the extent of the original injury, the evidence they presented overwhelmingly establishes that the amputation would have been required. On direct examination, Dr. Wilson testified the finger could have been saved and could have been

functional but, as will be apparent from a reading of the entire record, Dr. Wilson was not prepared for testimony in this case and he was forced to concede, both to the defendant's counsel and to a question from the court, that the amputation would have been required because only two-thirds of the finger actually was left after the original injury, and two-thirds of an index finger is considered by the medical profession to be insufficient in length for functional purposes.

The basic damage issue in the case revolved around the loss of the index finger, but since plaintiffs' own proof established that the finger would have been lost in any event, there was a failure of proof establishing a causal connection between any misconduct of the defendant and the ultimate result.

Therefore, even if plaintiffs' proof had established defendant's negligence, there was no competent and acceptable proof of causation. Under such circumstances, plaintiffs are confronted with the principles set forth in *Anderson v. Nixon,* 104 Ut. 262, 139 P. 2d 216.

In that case, which involved the alleged failure to give blood transfusions in treatment of osteomyelitis, this Court stated:

> "As to blood transfusions, one expert did testify that it was beneficial in blood stream infections, but did not testify that had there been

> transfusions the end result might have been avoided. Osteomyelitis being a disease the cause and cure of which is peculiarly within the knowledge of medical men and not a matter of common knowledge, it is necessary to have expert testimony on the effect of the negligence of a doctor on the end result. In this case there was no evidence that anything Dr. Nixon did or failed to do after osteomyelitis developed caused the end result. In the absence of such expert testimony there is nothing on which a jury can base its finding on the proximate cause of the injury. A jury may not conjecture or speculate, but must have substantial evidence upon which to base a verdict."

In this Court, plaintiffs contend that regardless of whether the finger would have required amputation in any event, they were entitled to go to the jury on the question of the pain suffered by the boy as a result of the gangrene, and also upon the question of recovery of Dr. Wilson's bill for $20 which bill, they claim, would not have been incurred except for defendant's conduct.

The difficulty with that position is, as has already been pointed out, contradictions arose from their own evidence on the basic issue of whether or not the bandage was applied too tightly in the first place or whether it later became tight as the result of swelling. Since no evidence was produced concerning exactly what Dr. Mason saw and did, and since the jury would therefore have been required to speculate as to which of the probabilities occurred, and since gangrene results when

circulation is restricted, the jury would have been required to select from the same two probabilities to determine whether anything the defendant did or failed to do caused the gangrene.

Under this state of proof, plaintiffs were not entitled to go to the jury on either of the damage issues claimed in their brief.

CONCLUSION

Plaintiffs' entire case stands or falls upon the testimony of Dr. Wilson. As is apparent from the transcript of testimony, he testified in court without benefit of his notes or chart, which he stated he had not been asked to bring. He was testifying strictly from memory, and almost as soon as his cross-examination began, he was forced to make the first of a series of changes, corrections and explanations of his direct testimony when he was shown contradicteory testimony from his deposition or from the hospital chart itself (Exhibit 1).

Further, the lay witnesses who testified were excluded from the courtroom during the testimony of other witnesses, and as will be shown from the transcript of their testimony, there was little agreement among them.

In view of the entire record, the jury would have been required to speculate on the basic issues of negligence and causation and would have had extreme difficulty in selecting which of the probabilities arising from plaintiffs' proof they should adopt.

The burden of proof was upon plaintiffs to prove their cause of action. As was stated in *Alvarado v. Tucker, supra,* a finding of negligence

> ". . . could not be based on mere speculation or conjecture, . . . this means . . . such degree of proof that the greater probability of truth lies therein. A choice of probabilities does not meet this requirement. It creates only a basis for conjecture, on which a verdict of the jury cannot stand."

Upon that state of the record, the judgment of the trial court was clearly correct and it should be affirmed.

Respectfully submitted,

JOHN H. SNOW and SKEEN,
WORSLEY, SNOW &
CHRISTENSEN

Attorneys for Defendant-
Respondent