THE MAXIM OF "RES IPSA LOQUITUR" AND ITS APPLICATION TO HOSPITAL CASES.

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DEDICATED WITH LOVE TO MY PARENTS.

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INTRODUCTION

This is an attempt to examine the application of res ipsa loquitur as it applies to cases arising out of hospitals. Application of the maxim to ordinary cases of negligence is based very much upon common sense. It is based upon the assumption that the injured (plaintiff) knows nothing how he was injured but the defendant knows. And so he should explain in order to avoid liability. But the development in surgery and the introduction of numerous powerful drugs and antibiotics makes us to doubt the wisdom of this fundamental assumption so far as its application to hospital cases in the modern times is concerned. In some cases it is quite likely that the defendant also does not know how a particular thing has happened or, the defendant (surgeon) is just helpless. However, we are still applying this maxim to hospital cases in the old, out-dated fashion. And so, an attempt has been made to reconsider the application of the maxim to hospitals in this work.

Even from the times when English law was made applicable to East Africa not many cases have been reported. Though attempt has been made to cover the East African reported cases and digests of unreported cases reliance on the English cases was felt unavoidable. In order to consider the liability from the hospital standpoint, reference to standard works on medicine was necessary. However, care has been taken to see that the dissertation should not become lop-sided.

In the absence of case law from East Africa on different aspects of the maxim it is not possible to present the discussion as an essential part of the East African Jurisprudence. It is treated as a part of the common law jurisprudence.

The rule that every dissertation of this type should necessarily be within 8,000 words is another major factor in limiting the scope of this study.

CHAPTER 1.

THE NATURE AND SCOPE OF RES IPSA LOQUITUR IN GENERAL.

In every tort, the policy of law decides as to who should introduce evidence leading to the establishment of a case. The general rule of evidence is, "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."(1) Usually, it is the plaintiff who seeks the aid of the court in enforcing a legal right which the defendant has breached. It therefore, follows that, the burden of introducing evidence lies on him.(2) The learned author Best observes:

> " A person asserts that a certain event took place not saying when, where, or under what circumstances, how am I to disprove that, and convince others that at no time, at no place and under no circumstances has such a thing occurred? - Indefinitum aequipollet universali."

Strict adherence to this rule may result in a lot of injustice to the plaintiffs under certain circumstances. This is particularly true in cases where a plaintiff who has suffered injury but he is not in a position to prove how injury befell him. Since the plaintiff knows nothing about how the injury has been caused except a few facts surrounding the occurrence of the injury, it is therefore, proper to have him adduce only those and thereafter, ask the defendant to complete the whole story. Indeed, this is what the maxim of res ipsa loquitur is. Its literal meaning in English is that the thing speaks for itself.(3) When it is relied upon by the plaintiff in the court, he asks the court to infer negligence from the mere fact of the facts he is able to adduce in court about the incident that caused him injury.

The whole object of the maxim is based on a very sound policy i.e. any rule must obey the circumstances of each particular case if justice is not to be sacrificed to formalism.(4) For instance, in Byrne v. Boadle, where the plaintiff while walking in a street was injured by the fall of a barrel of flour from an upper window of premises occupied by the defendants.

The defendants called no evidence to prove that they were not negligent but contended that since the plaintiff had not proved the negligence he asserted, he was not entitled to succeed. But, the plaintiff was allowed to succeed on the mere proof of the accident. POLLOCK C.B. is known to have remarked that "there are certain cases of which it may be said res ipsa loquitur, and this seems to me to be one of them."

In Scott v. London and St. Katherine Dock Co.,(5) the plaintiff was only able to relate the evidence that the defendants were possessed of certain docks and warehouses therein, and that he was lawfully therein, that the defendants by their servants were lowering bags of sugar by means of a crane or hoist, and a bag of sugar fell upon him. He did not adduce any evidence leading to the establishment of negligence. The trial court decided in favour of the defendants. On appeal, ERLE C.J. observed:

> " There must be reasonable evidence of negligence but, where, the thing is shown to be under the management of the defendant, or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management of the machinery use proper care, it affords reasonable evidence, in the absence of explanati by the defendants, that the accident arose from want of care" (6)

Ever since, the maxim of res ipsa loquitur has been pegged on this dictum in Scott's case. It is conceded that it imports into the law, nothing new, because it is wholly based on common sence. The common sense here is that, if the accident that happened is of such a nature and the circumstances attendant on that accident are of such a character as to enable or justify the judge or the jury to arrive at the apparently obvious conclusion that it was the result of the defendant's fault, it is reasonable to infer negligence on the part of the defendant where the defendant fails to offer any explanation or rebuttal.

RES IPSA LOQUITUR AS A RULE OF EVIDENCE.(7)

"Burden of Proof"(8) as found in the Law of Evidence has two distinct meanings namely; the burden of establishing a case and the burden of introducing evidence. The burden of establishing a case remains on the

plaintiff throughout, while the burden of introducing evidence may shift constantly as evidence is introduced. The latter is more or less an equivalent of res ipsa loquitur because it is said to be a process of helping the court to arrive at a fair conclusion. The maxim as observed by LORD NORMAND in Barkway v. S.W. Transport Co. Ltd; (9) is " no more than a rule of evidence affecting onus."

It is however doubtful that if, the maxim is a rule of evidence, does it operate as a presumption or as an inference? (10) Stroud's Dictionary defines a presumption as " a probable consequence drawn from the facts (either certain, proved by direct testimony) as to the truth of a fact alleged but of which there is no direct proof." Woodroffe (12) in his book goes further than this. He says that presumptions are of two kinds - presumptions of law and presumptions of fact. A presumption of law is an inference which the court draws as a matter of law and is conclusive, unless the party against whom thepresumption arises gives evidence sufficient to rebut it. And, a presumption of fact is an inference which the mind naturally and logically draws from given facts irrespective of its legal effect, and is always rebuttable.

Stroud's Judicial Dictionary (13) defines an inference as an implication that a given set of facts gives. It goes further to say that it is comparable to a presumption one draws from a given set of facts. In Hughes v. Atlantic City & S.R. Co., (14) the maxim of res ipsa loquitur was discussed at length. It was held to be a legal inference of negligence which is deduced from the mere happening of an accident, and it is a legal inference in the sense that it is permitted by law and not that it is required to!

From the foregoing, it is submitted that, generally speaking, a presumption and an inference are more or less one and the same thing. Res ipsa loquitur viewed either as an inference or a presumption it does not matter much.

CONDITIONS THAT BRING THE MAXIM INTO OPERATION.

The maxim of res ipsa loquitur can operate if the following conditions (15) are satisfied:-

I. The thing that caused the injury must be proved to be under the defendant's control or management.

II. The accident must be such that in the ordinary course of things does not happen if those who have the management or control use the proper care.

III. Absence of explanation.

1- THE DEFENDANT'S CONTROL OR MANAGEMENT.

If the thing that caused the damage or injury to the plaintiff is under the control or management of the defendant, it is logical that he stands in a better position to explain the cause of the accident as compared to the plaintiff. The degree of control or management need not be actual. For instance, in Parker v. Miller, (16) the defendant was the owner of a motor car and frequently allowed a friend of his to drive it. On the occasion in question, the defendant got out of the car and allowed his friend to drive it to the latter's house, which was in ar road with a very steep gradient. The defendant's friend left the car on the road outside the house, and after half an hour, the car started down the hill and crashed into the area of the plaintiff's house. The plaintiff sued the defendant in negligence invoking the maxim of res ipsa loquitur. The court held that the fact of the car having run down the hill of itself was sufficient evidence of negligence and that although the defendant was not in control of the car when the accident happened. In Mulco Textiles v. Yonasani, (17) the respondent, an employee of the appellant factory was injured by an object thrown by a fellow employee at a period when the lights failed. on the issue of control, LAW, J.A., said:

> "The "subject-matter" which caused the accident in this case was an unidentified object wantonly thrown by a workman during a stoppage of work caused by a temporary lighting failure. It was not something under the control of the appellants." (18)

In the case of Morris v. Winsbury-White, (19) the defendant was a surgeon who had been hired by the plaintiff to perform a surgical operation

upon the plaintiff. The defendant performed the surgical operation. After the operation, the plaintiff remained in the hospital and was attended by nurses and medical officers of the hospital staff. During this time the resident surgeons and nurses inserted tubes into the body of the plaintiff and made frequent replacements of these tubes where necessary. Shortly afterwards he was discharged. Due to the severe pains he suffered he came back to the hospital and an X-ray photograph was taken. This revealed a portion of a tube in his bladder. He then brought an action against the defendant relying on the maxim of res ipsa loquitur. It was held that the tube got into his body at the time he was at the hospital while he was being dealt with and treated by numerous nurses and surgeons. The defendant was by no means in control of these nurses and surgeons and therefore the maxim was inapplicable.

II - THE NATURE OF THE ACCIDENT.

The nature of the accident must be such that in the ordinary course of things, it does not happen if those who have the management or control use proper care. It is generally agreed upon that, it is the common experience of mankind that if those who have control are exercising reasonable care, it is not usual, for example, to have bags of flour fall from warehouses, (20) or for a swab to be found in the abdomen after a patient has undergone operation - (21) to mention only a few of the many cases where the maxim has been held to apply. (22)

It is vitally important that the evidence of the plaintiff must create no room for another probable explanation of the accident apart from that of implicating the defendant of the negligence alleged. The reason being that res ipsa loquitur which literally means, the thing speaks for itself cannot be applied on such facts. (23) Moreover, in such a situation the case still remains unproved up to the standard required of civil cases of "balance of probabilities." (24)

The maxim does not apply in cases where the material facts about the injury are known to the plaintiff. LORD NORMAND in Barkway v. S.W. Transport Co. emphasised this when he observed: (25)

> " It (res ipsa loquitur) is based on common sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within, the knowledge of the defendant" (Emphasis, mine).

III - ABSENCE OF EXPLANATION

If the defendant can explain to the satisfaction of the jury as to how the particular accident has occurred and from the explanation it is clear that the defendant is not negligent usually the maxim does not come into operation. (26)

FOOTNOTES TO CHAPTER 1

1. S.107 (1) of Kenya Evidence Act, Cap 80 of the laws of Kenya. S.110 of Tanganyika Evidence Act No. 6 of 1967 and S. 100 of Ungnda Evidence Act, Cap 43 of Laws of Uganda.
2. BEST, EVIDENCE p. 263 8th Edition
3. SALMOND, TORTS, P. 306 (15theEdition)., WINFIELD, TORTS P. 73 (1975).
4. (1863) 2 H.&.C 722. Th s case has been applied and followed in Mwamugang Njanji v. Vipingo Estatee Ltd (1971) K.H.C.D. No. 45.
5. (1865) 3 H&C 596.
6. ibid.
7. The maxim is categorised under the law of Evidence because it operates as one of the means of 'proving' negligence.
8. Another way of referring to burden of proof is "onus probandi". The two, "burden of proof" and "onus probandi" are always used interchangeably. See: DURAND, P.P. - Evidence for Magistrates, p. 24 (1969).
9. (1950) 1 All E.R. 390 at 399. Stoney v. Eastbourne R.D.C. (1927) 1 ch. 367 at 397 as per LORD HANNORTH.
10. 53. A.L.R. 1494; 167 A.L.R. 658.
11. STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES, 3rd Edition, Vol. 3 (1953)
12. WOODROFFE & AMEER ALIS', LAW OF EVIDENCE OF INDIA, 13th Edition, Vol. 3 at p . 2099-2100.
13. ibid.
14. (1914) N.J.L. 212.
15. See WINFIELD, TORT, 7th Edition. pp 197-198 and STREET, TORTS, 5th Edition pp. 132-136.
16. (1926) 42 T.L.R. 408.
17. (1973) E.A. 380 (C.A.).
18. ibid. at p. 382.
19. (1937) 4 All E.R. 494. In Walsh v. Holst & CO. Ltd. It was held that the maxim applies even against both occupier and his independent contractor. In es ence, it implies that one can be held liable for

the acts of his independent contractor, which is an ovestretching of degree of control or management.

20. Scott v. London and St. Katherine Co.(1865) 3 H.& C. 596.

21. Mahon v. Osborne (1939) A.C. 562 and Narsing Pal Vohra v. Cadbury Schweppes Ltd (1973) K.H.C.D. No. 86 are also good examples of cases where the nature of accident leaves little doubt as to the applicability of maxim.

23. A "thing speaks for itself" means that the most logical and reasonable conclusion to be reached from given facts is that the defendant was negligent i.e. the thing (its happening) speaks of the defendant's negligence

24. MORRIS, H.F., Evidence in East Africa. p. 150 (1968).

25. ibid, at 399.

26. Barkway v. S.W. Transport co. Ltd. (1950) 1 All E.R. 392. Bolton v. Stone (1951) A.C. 850, 859, per LORD PORTER.

(1)

CHAPTER 2

APPLICATION OF RES IPSA LOQUITUR TO HOSPITAL CASES

HISTORICAL DEVELOPMENT OF HOSPITAL LIABILITY.

The liability of hospitals can be discussed under two phases:(1)

1. The Period before 1936
2. The Period after 1936.

1. The Period before 1936.

In Hall v. Rees,(2) when the court was faced with the issue of hospital liability for the negligence of its nurse, it held that a hospital only undertook to supply a competent nurse and did not undertake to nurse the patient and so, the hospital was not held liable. And in Evans v. Liverpool Corporation (3) a medical officer had been negligent in discharging the plaintiff's son before he had fully recovered and this resulted in the rest of the plaintiff's children contracting the same disease. One of the issues for the court's determination was also whether the hospital would be liable for the negligence of its medical officer. The court held that the medical officer was only acting on an advisory capacity and always offered his services as a medical man and the hospital would not therefore be liable for his acts. A similar view was also expressed in Hillyer v. Governor of St. Bartholomew Hospital (4) where the servant whose negligence was in question was a surgeon.

From all these cases one thing emanates and, this is the position of the law as it stood during the period before 1936. The position was that a hospital would not be liable for the negligence of its servants with professional skills like doctors and nurses. Two arguments were advanced in favour of non-liability of hospitals. They were:-

1. Doctors, nurses and other professional servants of a hospital are independent experts who perform services for the patient and therefore, not in the service of the hospital.
2. When a patient is received by the hospital, he enters into an implied contract with the hospital that he will not hold it liable for the negligence of its servants when acting in their professional capacities.

(2)

Hence, it was conceded that a hospital would not indemnify them for their negligence.

2. The Period after 1936

In Strangways - Lesmere v. Clayton, (5) the hospital was held not liable for the negligence of a nurse in misreading certain instructions and omitting to make a proper check whereby a patient was given a considerably greater dose of a drug than her surgeon had prescribed and in consequence, died. Commenting on this judgment WRIGHT M.R. observed: (6)

> "..... those who engage in an undertaking the actual conduct of which involves expert scientific or professional skill and knowledge which the principals do not possess cannot escape liability to outsiders who are injured by the negligence of those who advise or act for the principals, on theground, they, as principals, are laymen and must necessarily be guided by or act through experts. Most big concerns are managed by committees of businessmen who neither have nor profess expert knowledge: if this contention were to prevail in general, it would practically nullify liability of principals for their agents over a large area."

It may well be questioned, as a matter of principle why hospital authorities and their employees should stand outside the rules as to the liability of a master for acts of his servant which are applied in respect of other employments of skilled persons, was his main argument!

In Gold v. Essex C.C. (7) It was held that a hospital would be liable for the negligence of its servants. The court upheld the same view in Cassidy v. M.O.H., (8) and it is here DENNING L.J. (9) said:

> " who employs the doctor or surgeon ....? where the doctor or surgeon, be he a consultant or not, is employed and paid, not by the patient but by the hospital authorities, I am of the opinion that the hospital authorities are liable for his negligence in treating the patient. It does not depend on whether the contract under which he was employed was a contract of service or a contract for service."

It is clear from these three cases that hospitals are held liable for the negligence of their servants, both professionals and non-professionals; and hence the importance of discussion of the discussion of the application of maxim of res ipsa loquitur to hospital cases.

whether hospitals should be held liable for the negligence of their servants is a very fundamental question. The importance of the issue is that the hospitals if held liable, are viewed generally as other commercial institutions. Hospital practice was started as a noble profession and

profit-element was totally absent. It is the duty of every enlightened government to provide as many hospitals as the country needs. In fact, it is viewed as one of the governmental functions as opposed to commercial functions. with the same noble sentiment many charitable institutions also came to run hospitals, but one can easily notice the change in the circumstances.

The modern governments are not normally limited governments. They are discharging not only the limited sovereign functions but also undertaking to discharge a number of commercial activities. As a result, the government has become the master of so many servants. And the modern governments do get a lot of money by way of various taxes and so, the question of payment of damages does not arise, in tortious or other liabilities. The recent development is that the government should be liable to its subjects just like any other private individual. The Government Proceedings Act(10) under its section 4 provides that ".... the government shall be subject to all liabilities in tort to which if it were a private person of full age and capacity, it would be subject -

(a) torts committed by servants or agents.

(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer ....."

On the same analogy, hospitals run by local authorities, should also be held liable for the acts of their servants. This means that the local authorities themselves shall incur liability.

Hospitals run by charitable organisations do get some funds and donations from various members of the public. These can also keep aside a certain amount of fund to pay as damages for their unfortunate victims of the hospitals they run.

Private surgeons can very well protect themselves by making use of insurance schemes. After all, they are a profit-making class of professions and so the problem of paying damages to their patients does not arise.

On the whole therefore it is desirable to commit to the broad policy of hospital's liability in cases of negligence. This is a healthy approach which certainly, may lead to the greater happiness to a maximum number of people. Grunfield (10) advocates for hospital's liability. He observes:

> " Employers' vicarious liability today rests surely on the social principle that, in the overcrowded mechanised and complex life of a commercial and industrial society the employer should bear the occasional losses that result from injury suffered by a member of public whose path has been crossed by the servant pursuing his employer's business. It is the employer who puts the servant in the position to inlict the injury, it is the employer who otherwise derives profit from the activities of his servant, and in any case, it is the employer who is far better able to bear such occasional losses by assimilating them into the overheads of his business or into the the overheads of commerce generally through insurance."

In brief, the position of the law as from 1936 has been that a hospital is liable for the acts of its servants.

DEFINITION AND FUNCTION OF HOSPITAL.

A hospital is "any institution for the reception and treatment of persons suffering from illness, any maternity home, and any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation, and includes clinics, dispensaries and out-patient departments maintained in connection with any such institution or home as aforesaid ....." (12) From this definition, it can be said that the essential functions of the hospital are:-

1. Reception.
2. Admitting patients into wards.
3. Diagnosis of patients' illnesses.
4. Treatment.
5. Operation.
6. After-care attention.
7. Discharge of the patients.

It may however be noted that a hospital may also perform the function of providing preventive medicine services by taking all the necessary measures to prevent and guard against the introduction of infections

diseases, promote public health by prevention, delimitation and suppression of communicable but preventable diseases. (13) where possible, a hospital may also promote or carry out researches and investigations into in connection with the prevention and treatment of human diseases. (14) A hospital uses vaccination - and - Eradication - of - disease campaigns method, in discharging this function of providing preventive medicine services which contribute to the noble goal of maintaining public health (15) The maxim of res ipsa loquitur can be invoked against the hospital while it is discharging any of the above functions. However, there is no case-law on some of the functions mentioned. So the discussion is necessarily limited to only certain functions in the following pages.

1. WRONG DIAGNOSIS.

Diagnosis of the patient's disease is a very important aspect of a hospital's work because it is through it that a scientific and successful treatment is possible. This being a scientific enquiry and investigation, it is not possible for an average patient to know what it constitutes, and if, by any chance it is negligently done, the patient has every right of claiming damages for any injury he may suffer as a result. Reliance upon the maxim is very helpful to the patient. In Wood v. Thurston (16) for example, a casualty officer was misled by a patient's dull reaction to pain due to alcohol and failed to use a stethoscope. As a result, he failed to diagnose the fractured ribs. The patient died soon afterwards due to having not been given due attention because of the wrong diagnosis. The court held, the plaintiff here was entitled to rely upon the maxim.

This is a clear case of negligence and so the court was right in allowing the plaintiff to rely upon the maxim.

In Crivon v. Barnet H.M.C (17) a pathologist went wrong in his diagnosis of carcinoma. The plaintiff tried to invoke the maxim by saying that a different pathologist would have come to a different result and so the court should hold the defendant liable. But the court rightly relying upon Rich v. Pierpont (18) held the defendant not liable. The cardinal

Principle to apply in cases where the issue in ~~this case~~ has been raised is that laid down by TINDAL C.J. in Lanphier v. Phipos: (19)

> " Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of skill and care. He does not undertake, if he is an attorney, that at all events he shall gain Your case, nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest degree of skill. There may be persons who have higher education and greater advantages than he has but he undertakes to bring a fair, reasonable and competent degree of skill."

2. TREATMENT.

Black's medical Dictionary (20) does not define what treatment is, but says that the treatment appropriate to each patient and his disease will be found under the headings of each disease. Treatment varies from disease to disease and from patient to patient, in some cases. Cases of treatment where the maxim has been relied upon are considered below.

In Roe v. Ministry of Health (21), there was a leakage of phenol through invisible cracks in ampoules used for spinal anaesthetics which resulted in paralysis. The plaintiff in an action for negligence relied upon res upsa loquitur. The court discussed the maxim and hospital's liability in the light of risks involved in the use of drugs. The plaintiff's action did not succeed. DENNING L.J. holding that we must not condemn as negligence that which is only a misadventure, observed: (22)

> " It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially in cases against the hospitals and doctors. Medical science has conferred great benefits on mankind but these benefits are attended by unavoidable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks . Doctors, like the rest of us, have to learn by experience, and experience often teaches the hard way. Something goes wrong and shows up a weakness and then it is put right."

In Henson v. Board ofManagement of Perth Hospital, (23) the plaintiff attended a hospital where a doctor verbally instructed a student nurse to give the plaintiff glycerine and acid carbol drops as treatment for his sick ear. The student nurse went to the pharmacy and found a bottle labelled acid carbol. The student nurse being uncertain went to one of the staff nurses who was also uncertain over the matter but, poured some of the

acid carbol into a small bottle and gave it to the student nurse, who in turn gave it to the plaintiff with instructions to use some drops in the ear. During that evening the plaintiff had some drops put into his ear by a friend, with the result that the fluid destroyed part of plaintiff's ear-drum and his hearing was permanently impaired. The plaintiff was allowed to invoke the maxim successfully.

The patient is not supposed to doubt the medicine given by the hospital His work is to take the medicine according to instructions given to him by the hospital. In this case, that is exactly what the plaintiff did and so the maxim could be applied without any further proof.

In Gold v. Essex C.C. (24) the plaintiff had gone to the hospital for treatment of warts on his face. The dermatologist instructed the radiographer to give him the treatment of Grenz rays while his face was covered with a lead-linen rubber. The radiographer, instead of using a lead-linen rubber, used a lint in covering the face of the plaintiff. As a result, the plaintiff's face was disfigured permanently. Here again, the maxim was successfully invoked.

It is very difficult to decide beforehand the application of the maxim to treatment cases. If the hospital people are thoroughly careless and indifferent to the line of treatment which the doctors usually follow then the maxim can be sussessfully invoked, as it was the case in Gold v. Essex C.C. (25) and Henson v. Board of Management of Perth Hospital. (26) Otherwise the court should be careful in applying the maxim incase of treatment that skilled persons may go wrong. In fact, this carefulness that the court should exercise when applying the maxim to cases of treatment appears in the case of Cassidy v. M.O.H. (27) The plaintiff had two of his left hand fingers suffering from a contraction. After receiving the treatment in the hospital he found that his left hand was to all intents and purposes useless. Both the fingers which had been treated were bent and stiff and th trouble had affected two other fingers. The hospital was held liable. In the judgement of SOMERVELL L.J. (28) the court's carefulness is seen:-

" In my opinion, ... the result seems to raise a case of res ipsa loquitur. The jury would have been entitled to find negligence on the facts as stated. I agree it is a difficult case. It seems to me impossible on the evidence to come to any clear conclusion as to why this happened. If as I think, the result is prima facie evidence of negligence at some stage, the defendants have failed to rebut this inference." (Emphasis, mine)

3. OPERATIONS.

An operation involves surgical activities of either opening up the body, removing the diseased organs and tissues or, amputating particular organs or parts of the body that have been diseased. This is an area where the maxim of res ipsa loquitur may be heavily relied upon. The reason being that operations are done under the influence of anaesthetics. In such circumstances the patient rightly relies upon the maxim because it would be unreasonable to expect the patient to adduce sufficient evidence to establish his case. Nevertheless each case must be decided on its own merits. By all means the court has to take into account what takes place in the theatre.

The court cannot ignore the implications of the operation, the circumstances under which the operation takes place and theprocedure in the operation. (29) Many times the doctors are under a pressure to perform a number of operations within a very limited time. On one hand, they cannot refuse to perform operation and on the other hand, they cannot be equally active in all the operations. This is unavoidable in countries where the number of surgeons is very much limited. Many times the surgeon while operating are also involved in teaching (demonstrating) to students who are attached to them. (I have in mind the hospitals which are attached to Universities and Medical Colleges).

Operations are not usually done single-handed. The surgeons usually take the help of a team of their fellow doctors or surgeons. Nurses' help is quite unavoidable. Usually some of the things before the operation or after the operation are done by nurses or some other persons.

Many things are needed in the operation theatre: scissors and swabs, are only a few to mention. The tragedy may happen either because the thing that is needed is not placed in the theatre before the operation or, what has been used in operation must have been forgotten in the body itself.

Sometimes the doctors may find something unwanted to their surprise when the body is opened. It is not always that things go according to expectation. Just like in a court of law where evidence is being adduced either for or against, the lawyer is helpless what takes place during deposing evidence. So is the case with the doctors. They have got to handle the situation then and there.

All these things necessarily call for very careful decisions when the maxim is invoked by the plaintiff. As indicated elsewhere, each case must be decided on facts and merits. By all means the court has to take into account what takes place in the theatre and also the totality of the circumstances.

In the light of all that takes place in the theatre and the totality of the circumstances the case of Mahon v. Osborne (30) was decided. In this case, at the end of an operation, a swab which had been used by the surgeon to pack off adjacent organs from the area of the operation was left in the plaintiff's body. The plaintiff died three months later. In an action for negligence against the defendant hospital, the maxim was relied on. It was held that there was no general rule of law which required a surgeon at the end of the operation such as the one in question, after removing all swabs of which he was aware, to make sure that no swabs had been left in the patient's body by a search of theabdomen directed specifically for that purpose. Secondly, the question whether or not the omission by a surgeon to remove a swab constitutes failure by him to exercise reasonable skill and care, must be decided on the evidence given in each particular case.

In the instant case although the surgeon was not negligent, the hospital was held liable due to the teamwork nature of operation work in the theatre. The hospital was also held liable on the basis, without somebody in the hospital being negligent the plaintiff would not have been injured.

In cases of this nature, if the plaintiff sues only the surgeon involved and the hospital and if the surgeon was found not negligent it woul be technically wrong to hold the master liable. But, from the plaintiff's point of view, it would be difficult for him to locate negligence on a particular servant. In such cases an opinion is being expressed if from the nature of the act it would not have happened without anybody's negligence the hospital may be held liable as it has been done in this particular case, ignoring this technicality. It would be really unfortunate if the plaintiff had been advised to sue only the surgeon.

In the East African case of Rosetta Nevil v. Cooper (31) a swab had been left in the body of the plaintiff. Since the facts and circumstances of this case are similar to those of Mahon's case, (32) the court did not hestitate to apply the decision in Mahon's case (33) here. Judgment was given in favour of the plaintiff.

In Fish v. Kapur, (34) the plaintiff when he went to the dentist for th extraction of his wisdom tooth, a part of the root of the tooth was left and also, her jaw was fractured. She, in action for negligence invoked the maxim. But the court on expert evidence found that both the things are possible though the dentist is not negligent and therefore, the plaintiff's action had to fail.

It may be noted that on a superficial understanding of the case one may likely think that the maxim can be successfully invoked. But the court has rightly given the due importance of the expert's evidence. If what has happened to the plaintiff is something which happens without negligence itwould be unreasonable and unjust to hold the hospital liable.

In determining the application of the maxim to operation cases is not easy to say when it can be invoked. It is undisputable that the nature of the action is one which the courts are least familiar and, no doubt, it raises questions for the consideration of a jury which are difficult. All these contribute to the courts having least confidence in their deliberation of meting out justice in these cases.

FOOTNOTES TO CHAPTER 2.

1. This is an issue which has concerned itself with whether or not a hospital should be held liable for the negligence of its servants both professionals and non-professionals.
2. (1904) 2 K.B. 602.
3. (1906) 1 K.B. 160.
4. (1909) 2 K.B. 820. Following this decision and others Wardell v. Kent C.C. (1938) T.L.R. was decided. LORD GREER in his judgment ruled that nurses, matrons and doctors were not servants of the hospital. He went further to introduce the concepts of "contract of service" and "contract for service" in hospital employees. Those employed under "contract of service" were those subject to the command of the hospital as to the manner in which they had to do the work, which class the nurses, matrons, doctors and others with professional skills did not form part. They were servants employed under "contract for service" because their employer, the hospital, had only the power to order or require what had to be done and nothing more. And for those the hospital would not be held liable for their acts or omissions done in the course of their employment (work).
5. (1936) 2 K.B. 11
6. Quoted in vol. 10 A.L.J.- liabilities for Hospital Authorities, at P. 319
7. (1942) 2 K.B. 293
8. (1951) 2 K.B. 343
9. ibid at p. 362.
10. Cap 40 of the Laws of Kenya.
11. Recent Developments in Hospital cases 17 M.L.R. 547 at pp. 555-556.
12. S. 74, National Health service Act, 1946.
13. S.13 of Public Health Act Cap. 242 of the laws of Kenya.
14. S. 10 Supra
15. SS. 73 and 104 Supra. A number of subsidiary legislations to the same also provide for similar measures that hospitals should take. Notable among these are the Small Pox regulations.

16. (1951) The Times, 25th May.

17. (1958) The Times, 19th Nov.

18. 3F. & F. 35.

19. 8 C. & P. 475.

20. THOMSON, W.A.R., BLACK'S MEDICAL DICTIONARY 29th Edition.

21. (1954) 2 Q.B. 66,

22. ibid at p. 83.

23. (1939) W.A.L.R. 15.

24. Supra.

25. Supra

26. Supra.

27. Supra

28. Supra at p. 349.

29. LORD GODDARD in Mahon v. Osborne (1939) 2 k.B. 15 at pp. 44 and 45-47 has made a detailed description of procedure in the operation theatre although restricted to the case under consideration.

30. (1939) 2 K.B. 15

31. (1961) E.A. 63 (P.C.)

32. Supra.

33. Supra.

34. (1948) 2 All E.R. 176.

(1)

CHAPTER 3.

A CASE FOR THE HOSPITALS IN GENERAL.

Hospitals are liable for the negligence of their servants vicariously. (1) In Weld-Blundell v. Stephens LORD SUMNER observed: (2)

> " The whole object of civil liability is to fix liability on some responsible person and to give reparation for damage done, not to inflict punishment for duty disregarded."

Salmond says that when the courts are not fettered by any precedent they may have sympathy for the victim. (3) And so, it is proper to consider the hospital stand. Unless and until their stand is properly appreciated it is not possible to do justice. This is what has been attempted in this chapter.

It is wrong to presume that a hospital as a whole is composed of "wise men and wise women." (4) The men and women manning our hospitals are people of ordinary standards. In Lanphier v. Phipos TINDALL C.J. observed:

> (5) "every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake it he is an attorney, that at all events he shall gain your case, nor does a surgeon undertake to use the highest degree of skill. There may be persons who have higher education and greater advantages than he has but he undertakes to bring a fair, reasonable and competent degree of skill."

A hospital can therefore only be held liable if a "fair, reasonable and competent degree of skill" has not been exercised in discharging the duty of care it owes its patients. Even then, each case must be considered on its own merits because justice must not only be done but must also be seen to be done.

The following discussion will make out a case for reconsideration of the maxim of res ipsa loquitur so far as it is made applicable to hospital case.

USE OF DRUGS

In the recent times the use of drugs is very common. New and powerful drugs are being introduced almost everyday. The effect of modern drugs on the patients is not uniform. It is difficult even for the doctors to predict how a particular patient will react to these drugs. Henry Miller (6) has precisely but, forcefully advanced the argument that in such cases, the doctors can validly rely upon the defence of consent. He observes;

" today's physicians must steel themselves to affirm in coroners courts that treatment with effective modern drugs very often implies a small calculated risk of more or less side-effects - and that the risk is consciously and tacitly accepted because it is enormously outweighed by much greater chance that the drug will restore health and actually save life." The most persuasive part of his work on this, is, where he asserts that there is scarcely a drug that has not been known to produce an occasional skin rash, and the result may vary from a transient blush to complete shedding of skin toxic illnesses. Antibiotics and drugs and even pills, have also been known to lead to fungus infections. All these side-effects are both unpredicable and uncertain in many respects. The modern treatment necessarily involves the use of various drugs and doctors are helpless so far as the side-effects are concerned. It is too much to expect from the doctors whose main business is to administer drugs, to get themselves into research activity.

That being the position, when the patient rushes to court, invoking res ipsa loquitur - all, in a bid to enforce his rights, courts should not readily uphold the plaintiff's contention.

In some cases hospitals can also raise the defence of inevitable accident. (7) In order to successfully shelter under this defence the defendant must show what was the cause of the accident, and show that the result of that cause was inevitable, or must show all the possible causes, one or other of which produced the effect, and must further show, with regard to every one of these possible causes, that the result could not be avoided. (8) In the absence of the learned men in medicine on the bench it is very difficult and usually not possible to decide the effect of drugs on a patient, which is likely to differ from patient to patient and also to decide a particular casualty is the result of an inevitable accident. Without a thorough insight into the course of treatment it is not desirable to uphold the maxim which the plaintiff usually relies upon in such cases.

APPLICATION TO OPERATIONS

While deciding the application of maxim to operations, courts usually rely upon the observations of SCOTT L.J. in Mahon v. Osborne:[9] It is subjectively of supreme importance that the surgeon's mind should be free throughout the operation to concentrate on his main task with all its difficulties, problems, surprises and risks, and that it should not be disturbed or diverted. Of equal importance is that the patient should not be kept under operation a moment longer than is necessary. Added to that, there should be no pause in the continuity of the operation, even at the time of the count of swabs and forceps, and the organs of the patient should be moved and touched as little as possible. Any extension of the field of operation should be avoided because of the risks of not only increasing surgical shock which may cause subsequent adhesions and abdominal sepsis spreading.

All these things as enumerated do not only appear complicated but beyond the "comprehension" of a reasonable man - the jury. Courts find themselves confused for everything here is just too technical. As indicated elsewhere [10] in this dissertation courts are ill-equipped in deciding cases on operations. This also calls for a reconsideration of the application of the maxim of res ipsa loquitur in these cases.

It is now well-settled that where the maxim is invoked, the surgeon can only avoid liability by offering an explanation acceptable to the jury. In the light of what has been discussed above it is not all that easy to do. DENNING L.J's observation in Cassidy v. M.O.H [11] " I went into the hospital to be cured .... I have come out with my four stiff fingers and my hand is useless. That should not have happened if due care had been used. Explain it if you can" (Emphasis, mine) is, for example, based upon the assumption that the whole hospital administration, use of drugs, treatment and general work is easy to understand. What a misdirection!

6. SUGGESTIONS TO IMPROVE THE SITUATION.

Hospital negligence cases are different from other cases of negligence. The difference here is that the patient goes into a hospital, gets the treatment he requires and is thereafter discharged. It is only then or soon after that, the negligence is labelled on the hospital. The negligence on roads for example, where the maxim of res ipsa loquitur has been extensively applied is far different. In road cases very little is concealed from the outsiders and the jury does not find it difficult tofollow the whole mechanism. In fact, the court does not find them complicated as it does in hospital cases. By all means therefore, they should be treated differently.

The other reason which calls for a different treatment of hospital cases from other cases of negligence is that courts have to decide the application of the maxim on not only what has happened that day but in the light of a long course of treatment. And in many cases the surgeons act upon the decisions taken by different individuals like the X-ray expert, Laboratory Technicians etc.

Hospital cases of negligence are essentially different from other cases of negligence. At all times, the interests of the hospitals and their patients should be properly balanced. (12) On the one hand, the hospitals' interest in freedom of action and on the other hand, the interest of their patients in their security should be safeguarded. A good policy of law should therefore be devised to meet these conflicting interests. A too lenient view will mean creating a climate favourable to the irresponsibility on the part of hospitals and their staff. If the interests of their patients are rigorously enforced it will mean deteroriating the efficiency of hospitals and their staff. Standards of care and treatment will fall, all, because the hospitals and particularly their staff will be more interested in their welfare than that of their patients.

Because of these immense and weighty reasons highlighting the difficulties of the application of res ipsa loquitur to hospital cases, it is not desirable to leave the matter for the determination of ordinary courts. Independent tribunals consisting of learned men in medicine and law may be better arbiters.(13)

In addition to the independent tribunals, another body; investigating agency(14) may also be set up to investigate into hospital malpractices and res ipsa loquitur cases inclusive. In this way, respect for principles of natural justice is complied with, i.e. the arbiter should also not do the work of investigation.

It is hoped that by setting up independent tribunals and the investigating agencies the hospital stand shall be given its due consideration and justice will therefore be done.

FOOTNOTES TO CHAPTER 3.

1. See chapter 2. especially Gold v. Essex C.C. (1942) 2 K.B. 293 and Cassidy v. M.O.H. (1951) 2 K.B. 343.
2. (1920) A.C. 956 at p. 986.
3. SALMOND, THE LAW OF TORTS P. 36, 13th Edition.
4. Marshall v. Lindsey County Council (1935) 1 K.B. 516 at p. 540 as per MAUGHAM L.J.
5. 8 C & P. 475.
6. MILLER, HENRY, MEDICINE AND SOCIETY at pp. 6-7 (1973).
7. The Merchant Prince (1892) p. 179.
8. ibid at p. 182 as per FRY L.J. see also Dewshi v. Kuldip's Touring Co. (1969) E.A. 189.
9. (1939) 2 k.B. 15 at pp. 28-29.
10. ibid. Judgment of GODDARD L.J. is more explicit on this .
11. (1951) 2 K.B. 343 at 362.
12. Hatcher v. Black (1954) The Times, 2nd July as per DENNING L.J - "

"It would be wrong and indeed bad law .... to say that simply because of a misadventure or mishap occurred, thereby the hospitals and doctors are liable. Indeed it would be disastrous to the community if it were so. It would mean that a doctor examining a patient, or a surgeon operating at a table, instead of getting on with his work, would forever be looking over his shoulder to see if someone were coming up with a dagger. For an action for negligence against the doctor is for him like a dagger..... You should only find him guilty of negligence when he falls short of standards of a reasonable skilful medical man. In short, when he is deserving of censure - for negligence in a medical man is deserving of censure."

13. STRAUSS, A.S. - The Physician's liability for malpractice - (1967) 84 S.A.L.J. 419 at p. 426-427.
14. Straus prefers to call such agencies - "Medical Ombudsmen" - ibid at p. 427.

CONCLUSION

The utility of the maxim was never doubted. It is invaluable to the plaintiff in certain cases. In cases like lorry hitting a pedestrian on the pavement, flour bags falling upon the plaintiff from defendant's window or snail in a ginger bottle etc., it is quite reasonable to expect the ~~plaintiff~~ defendant to prove that ~~the defendant~~ he was not negligent.

The maxim is a part of evidence. To arrive at the truth, courts under certain circumstances may be right in drawing some inferences. It is futile to discuss whether the maxim operates as an inference or as a presumption of law. It is, in fact an attempt by the court to shift the burden of proof from one party to the other party in the light of the facts.

So far as the application of the maxim is concerned, hospitals stand in a different footing. First thing to note is that the doctors profession is a liberal one. The plaintiff is injured when the defendant was discharging his noble profession. It is certainly different from ordinary cases of negligence where the defendant may be acting in his own selfish interest. Diagnosing a disease, treating a patient or performing an operation is a complicated phenomena. Success depends not entirely on the care of the doctor. The constitution of the patient, effect of drugs and the carefulness of the whole staff or team involved are but a few to mention.

Science of this branch is not so well developed to accept for example that " I went into the hospital to be cured .... I have come out with my four stiff fingers and my hand is useless. That should not have happened if due care had been used ..... " [1] explain or be held liable. The implication applying this maxim to hospital cases as is done to read accidents will have far reaching consequences. The noble profession itself will be affected.

However, it is very well recognised that a hospital is almost an industry. Everyday so many are treated and discharged, and so many operations take place. And preventive steps are very much in vogue. It will be unjust to say that the unfortunate patient has no remedy. What has been said in this work is not to deny the liability of the hospitals.

But, when the maxim is invoked in a suit of negligence, the judge not being equipped with the special knowledge (in medicine) cannot do justice. Imposing liability on hospitals as discussed earlier has far reaching consequences. And so what has been suggested is that the court should take the help of the men learned in medicine before the maxim is held to apply. Cases of conflict of opinion between the judge and learned men in medicine are likely to arise at least in a few cases. The writer of this dissertatio does not take sides as to who should prevail. A hope is being entertained that men occupying such posts, and being responsible to the well-being of society can come to a reasonable compromise. The higher courts are always there to set right if an obvious error is committed.

FOOTNOTES

1. Cassidy v. M.O.H. 91951) 2 K.B. 243 at 362. as per DENNING L.J.

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