**Pope John’s Hospital and another v Kasozi**

**Division:** Court of Appeal at Kampala

**Date of judgment:** 26 April 1974

**Case Number:** 56/1973 (72/74)

**Before:** Sir William Duffus P, Law Ag V-P and Mustafa JA

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**Appeal from:** High Court of Uganda – Wambuzi, C.J

*[1] Negligence – Res ipsa loquitur – Not applicable where all facts are known.*

*[2] Negligence – Res ipsa loquitur – Surgeon – Whether applicable to error or misjudgement in difficult*

*operation.*

**JUDGMENT**

The following considered judgments were read.

**Sir William Duffus P:** This is an action brought by an infant through his father as next friend for damages done to his eye during birth. The action is brought against the doctor who effected his delivery, a Dr. Barbleri, and Pope John’s Hospital where his birth took place. The birth was a difficult and prolonged affair and the delivery was eventually carried out by forceps and it was in the course of this delivery that the baby’s left eye was so badly injured as to cause complete blindness in that eye. The Chief Justice who tried the case with his usual care delivered a full and considered judgment and found that the second appellant, Dr. Barbleri, had caused the injury to the eye through his negligence when delivering the baby with forceps, and that both the Hospital and the doctor had further been negligent in not referring the injury to an eye specialist for treatment. The Chief Justice correctly directed himself as to the law when he quoted from the judgment of Scott, L.J. in *Mahon v. Osborne*, [1939] 1 All E.R. 535 at p. 548, also approved by this Court in *Nevill v. Cooper*, [1958] E.A. 594 at p. 603: “Before I discuss the judge’s summing up, it is desirable to recall the well-established legal measure of a professional man’s duty. If he professes an art, he must be reasonably skilled in it. There is no doubt that the defendant surgeon was that. He must also be careful, but the standard of care which the law requires is not insurance against accidental slips. It is such a degree of care as normally skilful member of the profession may reasonably be expected to exercise in the actual circumstances of the case in question. It is not every slip or mistake which imports negligence, and, in applying the duty of care to the case of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention.” In examining and arriving at his conclusions in this case the Chief Justice was venturing into fields on which he had to rely largely on the opinions and experience of the expert medical witnesses who gave evidence. In this case he was assisted by the evidence of two highly qualified gynaecologists and obstetricians. These witnesses were Mr. Nsibirwa, a lecturer at Makerere Medical School and the senior Consultant Gynaecologist and Obstetrician at Mulago Hospital, and Mr. Edwin Grech also a lecturer at Makerere University and Consultant at Mulago Hospital. He also had the benefit of a full and apparently honest account from the second appellant, Dr. Barbleri, who described how he delivered the baby Kasozi and the subsequent treatment. The Chief Justice appears to have accepted Dr. Barbleri’s account of the delivery and the difficulty he encountered on baby Kasozi’s entry into the world. The evidence given by the two experts was also based on Dr. Barbleri’s account, except that Mr. Nsibirwa’s evidence was based on a written report whereas Mr. Grech had the advantage of listening to the evidence of Dr. Barbleri when he went into full details of his examination, delivery and further care of baby Kasozi. It is the duty of this Court on the first appeal to itself consider and evaluate the evidence and decide whether the judge has come to a correct decision. The trial court has advantage of seeing and hearing the witnesses but in this case there has been hardly any conflict on the facts nor in the experts’ evidence as to the practice and method to be followed in a difficult delivery of this nature. A short summary of the facts show that the mother had been in labour for some time and attended to by the midwife in the hospital. The midwife found that there were complications and she called in the doctor, the second appellant, and reported that the case was serious and abnormal. Dr. Barbleri examined the mother and found that it was an abnormal case. The foetus was in the “right occipito-posterior” position and apparently had been in that position without change for over half an hour. There was foetal distress and it was a case of obstructed labour. He tried to rotate the head to the “occipito-anterior” position but he did not succeed so he put it to the straight occipital position and tried to use the forceps. He described how he placed the forceps on the head and how he then delivered the baby by traction. The baby was delivered successfully except as to the injury to the eye, and both the mother and the baby spent ten days in the hospital during which time the baby’s eye was treated. Nine days after their discharge, baby Kasozi was taken to the eye specialist in Kampala where the eye specialist found that it was too late to do anything to save the sight in the left eye. The Chief Justice found that Dr. Barbleri had been negligent in the application and use of the forceps and that this caused the injury and subsequent blindness of baby Kasozi’s left eye and further that both Dr. Barbleri and the hospital were negligent in their subsequent treatment of the eye and in not referring the injury to an eye specialist for treatment. The Chief Justice appears to have based his finding of negligence under four heads: (i) The delay of Dr. Barbleri in that after he had diagnosed the foetal distress and bad position of the baby he left the mother in that condition for over half an hour before using the forceps. ( ii) That Dr. Barbleri did not properly apply the blades of the forceps and that “probably the second blade was left to meander through the canal on its own. Whether injury was caused by an oblique grasp or by poking into the baby’s eye was not due to mischance, misadventure or an error of judgment but was due to malpractice”. (iii) That Dr. Barbleri failed to make a second check of the forceps after it was applied to the head and before traction was started. (iv) That the principle of res ipsa loquitur applied in this case. I will consider each of these findings in some detail as, with respect, I find it difficult to agree with the Chief Justice. First I would consider the question of the delay in the application of the forceps to deliver the baby. This question arose when the doctor was explaining why he had decided to use the forceps and he said: “Sometimes there are deliveries in this position. In this case it was not possible because the woman was in this position without change for over half an hour.” This was all the evidence he gave on the matter. He was not cross-examined and was never asked to explain why there was this delay. It was certainly never suggested that this delay was improper or wrong. All the experts and the doctor agree that a forceps delivery is a difficult and dangerous operation both to the woman and to the baby. It has not been shown or suggested that this delay in any way contributed to the injury of the baby’s eye. In stating that there had been a delay of half an hour the doctor really appears to have been justifying his eventual use of the forceps. The court does not even know if this delay of half an hour was after the doctor had checked, or whether it included the time that the midwife had herself been trying to effect delivery. With respect, I do not in the circumstances see how this period of delay could possibly justify a finding of negligence in the second appellant. The crux of this case relates to the application and use of the forceps. The Chief Justice was satisfied on the evidence that the second appellant acted properly and professionally when he decided to have a forceps delivery and not do a caesarean section Both the expert witnesses described the essentials of a birth by the use of forceps. Forceps are apparently used in a case like this of an obstructed birth when, as Mr. Grech simply described it, the head of the baby gets stuck in descent. In this case the second appellant also diagnosed “foetal distress”, that is that the baby’s life was in danger and this necessitated quick action in order to save the baby’s life. Another complication in this case was that the baby’s head was swollen. Both the experts agree that this can happen and this would further complicate the doctor’s difficulty in effecting a safe forceps delivery. A further difficulty in this case was the position of the foetus. The best position for the delivery was the “occipito-anterior” position but the position in this case was “occipito-posterior” and the second appellant said he tried but did not succeed in rotating the head to the “occipito-anterior” position so he rotated the head which was “right occipital” to “straight occipital” which he said was a classic position for delivery. According to Mr. Grech this position, although not the best position is a correct position for delivery. As Mr. Nsibirwa, the other expert said, each case must be considered on its own facts and the court here has to depend on the evidence of Dr. Barbleri to decide what was the position of the foetus and how he effected delivery and it has not been suggested that he was mistaken or lied in any portion of his evidence. There has also been no suggestion that he was negligent or incompetent in the fact that he could not turn the foetus to the “occipito-anterior” position or that he was wrong in applying the forceps in the position which he eventually did. The question of negligence depends on his manner of applying the forceps to the head and in the subsequent treatment. The judge has found that the forceps were incorrectly applied and that no check was made after the application to ensure that the forceps were in the correct position before starting traction. In using forceps both experts agree that the obstetrician should first establish the position of the head and that this should be done by finding the posterior and anterior fontanelles and the saggital suture on the head. The fontanelles are the areas in the skull of the baby where the bones have not yet joined together. The suture is the joint or place in the skull where two bones join up. I gather that these positions in the skull would give the exact position of the head. Mr. Nsibirwa says that if the head is swollen, as it was in this case, then it may be difficult to locate the fontanelles and in that case the obstetrician tries to locate the ears to find the exact position of the head. In his evidence Dr. Barbleri said that he located and checked the suture and also the occipital bone, that is the bone at the back of the head. He did not mention and was not asked if he checked the fontanelles but he did say that the skull was swollen so I think it must be accepted that he did not, and then he tried to locate the ears and also the suture. He does not state definitely if he found the ears but he does state definitely that he found the suture and also the occipital bone and as he had rotated the head and stated that he was satisfied that he had correctly placed the blades of the forceps, I think it must be accepted that he had to the best of his ability located the position of the head. It must be remembered that at this state there was an obstructed delivery with the body of the foetus in the wrong position. The head was swollen and with the foetal distress there was the need of urgency in carrying out the operation. Mr. Grech, the second expert to give evidence, had the advantage over the other expert Mr. Nsibirwa in that he had heard Dr. Barbleri give evidence and, both in examination and cross-examination, give full details of what had taken place at the birth. Mr. Grech’s definite opinion was that Dr. Barbleri had acted correctly in all the circumstances. His evidence is that with the head in the occipital-posterior position the head would not be fully flexed and so a forceps blade might, despite the fact that the forceps were properly applied, reach and injure the eye. He stated that Dr. Barbleri had adopted the correct procedure and had acted exactly as he himself would have done but despite this that the eye was injured by the forceps. He also said that with the baby in that position the forceps blades would be nearer the eyes and might reach the eye without the doctor’s knowledge. The effect of his evidence is that Dr. Barbleri had acted properly and that the injury to the eye was due to mishap without any negligence on the doctor’s part. The Chief Justice’s conclusion was that the injury to the eye could have been caused by an oblique grasp of the forceps and probably by the second blade of the forceps being “left to meander through the canal on its own.”. With respect, I do not consider that the Chief Justice was justified in his conclusion. Dr. Barbleri described how he fitted the blades with his hands one after the other. It was never suggested to him that he had not guided the second blade to its proper position on the head or that he had left it to meander through the canal on its own and that he had pushed it down without guidance. I would consider here the question as to whether the doctrine of res ipsa loquitur could be applied to this case. The Chief Justice fully considered this question and as he remarked this principle arises on the question of the onus of proof and it depends on the facts of each particular case. It has, in cases concerning the medical profession been applied to a surgeon or the theatre staff when swabs have been left behind in the abdomen during an operation. See *Cooper v. Nevill*, [1961] E. A. 63 and *Mahon v. Osborne*, [1939] 1 All E. R. 535. See also *Cassidy v. Ministry of Health*, [1951] 2 K. B. 343, where a man went into hospital with two stiff fingers and came out with four stiff fingers. I have not however, come across a case where it has been applied to a mistake or error of judgment by a surgeon in a difficult and tricky operation and the forceps delivery of a baby according to the evidence in this case clearly comes within that description. It would be placing an impossible burden on a surgeon if the doctrine applied and the surgeon, in any operation not entirely successful, had the onus of justifying every movement in his operation. It would hamper the exercise of initiative and skill in the surgeon. Apart from that, this doctrine could not apply here, as, in my view, the evidence established what occurred. This was a case of urgency and the court decided that the forceps delivery was justified. Dr. Barbleri has given an apparently full and honest account of his procedure. The operation was successfully performed, in that the child was delivered alive and the mother had a full recovery, and the only incident was the injury to the eye. Dr. Barbleri had explained what he did and the expert, Mr. Grech has explained how the injury to the eye could have occurred despite the fact that the forceps had been properly fixed and without any negligence on the part of Dr. Barbleri.

The Chief Justice did not accept this evidence of Mr. Grech that the injury could have happened even if the forceps had been properly fitted but with respect, I can find no basis for the Chief Justice’s view and for his not accepting the expert evidence of Mr. Grech. There are so many possibilities and factors to be taken into account in a case like this. For example the position of the head and foetus generally, the size and the shape of he head, the extent of the swelling the possibility of a slight movement of the forceps as traction took place, and also remembering that both the mother and the baby would in the process of birth be endeavouring to assist and hasten delivery. All these are factors on which admittedly there is no evidence but are such as the learned specialist with his expert and specialist knowledge would consider in arriving at his opinion. The Chief Justice himself said he had great respect for the opinion of Mr. Grech as a specialist in gynaecology and obstetrics. I am of the view that the Chief Justice was not justified in applying the doctrine of res ipsa loquitur in the circumstances of this case. What the court had to do was to decide on the facts before it whether the second appellant had as a medical practitioner undertaking delivery of this child exercised such a standard of care as a normally skilled member of his profession may reasonably have been expected to exercise in the particular circumstances of this case. In finding the second appellant negligent the Chief Justice also found that he had failed to re-check the position of the forceps once these have been fixed and before he started traction. With great respect the Chief Justice appears to have misdirected himself on the evidence here. As quoted in the judgment the second appellant did say: “ ‘Before applying forceps I tried to feel the ears. I looked for the suture. It was not easy to check because of the swelling I referred to. After applying forceps you cannot check that again. There are two many things in the vagina. I checked the suture again before traction, but this was not easy. The skull was corrugated’.” and then further in cross examination the second appellant further said: “You must check head by suture before traction. I did this. Injury to eye was done by blade of forceps. Before traction I took all precaution to the best of my experience. I deny that I was negligent.” It appears to me that this witness was definitely saying that he checked the suture again after he had applied the forceps but before starting traction. He said that this was difficult to do on account of the swelling of the head but he did say he did so despite the difficulties. I am of the view that the Chief Justice did not give sufficient weight to the various difficulties that arose in this case, i. e. the awkward position of the head, the obstructed birth, the swollen head, the foetal distress and the previous delay, all of which made this a matter of urgency. It would also appear that the Chief Justice did not bear in mind the fact that the expert Mr. Grech gave evidence after he had had the advantage of hearing the evidence of the second appellant. He did not give sufficient weight to Mr. Grech’s expert evidence and opinion that the second appellant had acted properly and without negligence. On all the evidence it appears to me that the plaintiff had not discharged the onus of establishing negligence in the second appellant but rather that the evidence establishes that he had acted with the care and skill to be expected from an ordinary competent medical practitioner and in accordance with the general and approved practice. The Chief Justice also found negligence in both the hospital and the second appellant in not referring the injured eye to an eye specialist. The evidence shows that the eye was swollen and closed on birth and that baby Kasozi was treated with antibiotics. The mother and the baby stayed ten days in the hospital during which time the eye was treated and apparently not only seen by the second appellant but by other doctors in the hospital. The mother had to have an incision made during the course of the birth and would also have been treated. The Chief Justice found that the second appellant should have referred the baby to an eye specialist and that the second appellant failed to diagnose the injury to the eye and had given the wrong treatment as the ruptured cornea of the eye should have been sutured. I agree that clearly the second appellant should have advised the mother to take the baby to an eye specialist but the question is whether this neglect and the treatment that he and the hospital gave in any way contributed to the injured eye. The evidence shows that there was no eye specialist attached to the hospital or anywhere nearby. The nearest specialist was at Kampala some three hundred kilometres away, and the question arises whether the baby should have been sent to Kampala and when. Apparently the initial and subsequent treatment at Pope John’s Hospital was correct except that the cornea was not sutured. Dr. Otiti, the eye specialist saw the baby Kasozi on 31 January, when 19 days old. He said that it was then too late to operate and his evidence is that it was difficult to say whether the eye could have been saved if he had seen it earlier, but there is a possibility that he could have sutured the cornea. This however, only becomes a possibility and nowhere does the evidence show how soon the baby should have been brought to him for the suture to be of any assistance. The baby was in the Pope John’s Hospital and being treated for 10 days and there is no evidence that this treatment was in correct or that the hospital or the second appellant were negligent in the treatment, nor has it been shown that this treatment caused or contributed to the loss of sight. The evidence shows that the sight was lost through the damage done during the delivery and not to the subsequent treatment. It is, therefore, with great respect that I differ from the Chief Justice’s finding of negligence against both the appellants and I would have dismissed the action with costs to the appellants and as both the learned Ag. Vice-President and Mustafa, J. A. agree, the appeal is allowed and the judgment of the High Court set aside, and the action is dismissed with costs to the defendants. The appellants are allowed the costs of the appeal.

**Law Ag V-P:** I have read in draft the judgment prepared by the President with which I agree. Out of respect for the Chief Justice of Uganda, with whose judgment we are disagreeing, I feel I should comment on two aspects of this appeal. The first is the standard of proof to be applied in cases charging negligence against a medical man. The Chief Justice accepted the proposition enunciated in *Hucks v. Cole* (1968), 118 New L.J. 469 by Lord Denning that: “A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motor car. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater.” Any pronouncement falling from the lips of so distinguished a judge as Lord Denning is entitled to be treated with the greatest of respect, but with all due deference I have not been able to find any other authority for the proposition that the burden of proving negligence against a professional man is greater than the burden of proving negligence in other cases. The proper test is, in my opinion, that laid down in Halsbury, 3rd Edn., Vol. 26, at page 17: “The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care.” I think that in *Hucks v. Cole*, Lord Denning was doing no more than sounding a warning that, in cases charging medical negligence, a court should be careful not to construe everything that goes wrong in the course of medical treatment as amounting to negligence. This is in line with what the same learned judge said in *Roe v. Ministry of Health*, [1954] 2 All E.R. 132 at p. 139: “But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure.” To that extent, of not confusing misadventure with negligence, clear proof of negligence is necessary in cases involving medical men, but I cannot agree that the burden of proving such negligence is higher than in ordinary cases. The burden is to prove that the damage was caused by negligence and was not a question of misadventure, and that burden must be discharged on a preponderance of evidence. In this case, for the reason given by the President, I am satisfied that the burden was not discharged. The second matter to which I wish to refer is the Chief Justice’s finding that the doctrine, or rule of evidence, of res ipsa loquitur applied in this case. In the case to which I have already referred, that of *Roe v. Ministry of Health*, Somervell, L.J. said in this connection: “In medical cases the fact that something has gone wrong is not in itself any evidence of negligence. In surgical operations there are, inevitably, risks. On the other hand, of course, in a case like this, there are points where the onus may shift, where a judge or jury might infer negligence, particularly if available witnesses who could throw light on what happened were not called.” Here the available witnesses were called, and threw all possible light on what happened. Experts were called on both sides, and the second appellant Dr. Barbleri gave evidence at length. Dr. Grech deposed that an injury similar to that suffered by baby Kasozi could happen if the forceps were correctly applied. Res ipsa loquitur applies only when the causes of the accident are unknown but the inference of negligence is clear from the nature of the accident, and the defendant is therefore liable if he does not produce evidence to counteract the inference. It does not apply where from the nature of things the probability that the accident is due to negligence is no greater than that it is not so due. To hold that res ipsa loquitur applied in the circumstances of this case would be tantamount to holding that in every case in which a baby is damaged in the course of a forceps delivery, negligence will be presumed. I cannot accept such a proposition. Damage caused in the course of a forceps delivery can result from misadventure as well as from negligence. It is one of the risks attendant upon such an operation. The doctor concerned is not to be held liable except on proof that he was negligent in some way. That proof, in my opinion, was not forthcoming in this case. I would accordingly also allow this appeal. I concur in the order proposed by the President.

**Mustafa JA:** I have read the judgments prepared by the President and the Vice-President and I agree that the appeal must be allowed. I have nothing useful to add.

*Appeal allowed.*

For the appellants:

*J Kateera* (instructed by *Hunter & Greig*, Kampala)

For the responden