Medicolegal aspects—gossypiboma

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Dear Editor,

It was interesting to read the case report titled “An interesting case of lump abdomen—gossypiboma,” published in April 2011 (MJAFI 2011;67:157–158).

The fact that such cases still do occur highlights the need of reporting them so as to educate the medical fraternity about all aspects of the case. I appreciate the effort taken by the authors.

However, the medicolegal aspects of such a case should have been discussed. I am enclosing a brief note on the medicolegal aspects hoping that it will be of some use to the medical officers of AFMS and the other readers of MJAFI.

MEDICOLEGAL ASPECTS—GOSSYPIBOMA

“Retained surgical swab” obviously leads to an allegation of medical negligence. The patient can sue the surgeon for civil negligence.

Despite all the awareness created about the occurrence of such incidences and measures adopted like careful counting of the number of retrieved swabs, applying a radiopaque tag to swabs, etc. cases still occur and the phrase “The eternal swab” was coined by *Lancet* in 1961 while reporting the case *Cooper vs Nevill*.

The situation is often quoted as the ideal example of “*Res Ipsa Loquitur*” meaning “the thing speaks for itself,” “the mishap would not have occurred but for negligence on the part of the surgeon.”

However, the following argument can be put forward by the doctor in his defence:

- a) The swab was intentionally left behind as a part of the treatment, e.g. to control the bleeding which could not be controlled by any other means, and he planned to take it out at a later date. This can be an acceptable plea if supported by expert medical opinion.
- b) Efforts by surgeons to shift the onus onto the nurse assisting in the operation have not been accepted by the courts, as the surgeon, being the team leader, is considered responsible. However, if the circumstances during the surgery were of such nature that the surgeon could not carry out a thorough search for the swabs without endangering the life of the patient then he is justified in relying fully upon the assisting nurse's count.

The application of the legal principle of *Res Ipsa Loquitur* means that the judge has accepted:

- i) the nature of injury suggests even by common knowledge that without negligence it could not have occurred;

- ii) the patient himself, in no way, has not contributed to the injury;

- iii) the doctor was in exclusive control of the circumstances under which the act has been committed, i.e. the injury was not due to circumstances beyond his control.

Now, it is for the doctor (defendant) to rebut (disprove) this inference. If he cannot then the patient has been successful in establishing negligence on the part of the doctor.

Since a layman's knowledge, and not expert medical opinion, is being applied to accept that medical negligence has occurred, judges have to be careful to apply the principle to cases of medical negligence. There may be a technical reason for the mishap, other than negligence.

The principle can be applied only to prove civil negligence and not criminal negligence as every fact has to be proven beyond reasonable doubt in criminal proceedings.

The principle of *Res Ipsa Loquitur* can only be applied in cases where the patient is unable to identify the exact nature of negligent act on the part of the doctor which caused the injury and the doctor has been unable to explain (the technical reason) for its occurrence. If the doctor can explain the same, then the plea of *Res Ipsa Loquitur* may be dropped as the damage then becomes one of the recognised risks inherent to the modality of treatment adopted. The nature of injury itself must be of the type “which does not normally occur in the circumstances” unless there has been negligence.

The application of the principle though may make things difficult for the doctor, need not make him loose hope. He can still provide successful rebuttal. Acceptance of the plea by the judge only establishes a prima facie case of negligence against the doctor. It does not conclude the proceedings.

Some other examples of *Res Ipsa Loquitur* are:

- i) Volkmann's ischaemic contracture following the application of plaster cast (however, since it has become established that the same can result due to spasm of the artery as a part of the injury, the doctor can successfully defend himself).
- ii) Administration of wrong drug/dose.
- iii) Breaking of needle while giving intramuscular injection.

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