

## Medico-Legal

### A MISSING SWAB: NEW TRIAL ORDERED

Surgeons and others were deeply interested and not a little concerned at the result of the recent action, *Mahon v. Osborne*, heard by Mr. Justice Atkinson and a special jury at Manchester Assizes last April.<sup>1</sup> By some mischance a large swab was left in the body of a patient after Mr. Osborne had operated on him for a perforated duodenal ulcer. The jury found that the surgeon did not make a reasonably sufficient search for the swab, and that if he had the search would have disclosed the missing swab. They awarded £616 damages. The surgeon appealed, and Mr. John Morris, K.C., argued for him that the hospital had an elaborate system of counting swabs; a miscount was made at some time but the surgeon had done nothing wrong; if he had searched all round the abdomen for swabs he would have prolonged the operation and endangered the patient's life. He had no reason to suppose that a swab had been left in. Lord Justice Scott, in giving the judgment of the court, said that the case for the widow of the patient had been wrongly presented as one of *res ipsa loquitur*. This phrase refers to a class of cases in which the circumstances of the injury raise a presumption that the defendant was negligent: "the accident speaks for itself," and negligence will be presumed unless the defendant can put forward an innocent explanation. The maxim will apply when it is so improbable that the accident would have happened without negligence that a reasonable jury could find without further evidence that it was so caused.<sup>2</sup> The accident must be one which in the ordinary course of things does not happen if those who have the management use proper care.<sup>3</sup> Scott, L.J., found it difficult to see how the principle of *res ipsa loquitur* could apply generally to swab cases. The very essence of the rule, he said, is that on the mere fact of the event happening there arise two presumptions: that the event was caused by somebody's negligence, and that the defendant was that somebody. The presumption of fact only arises because it is an inference which the reasonable man would naturally draw. The nature of abdominal operations, he pointed out, varies widely and many considerations enter in. In the present case a state of things was presented of which the ordinary experience of mankind knows nothing, and it was unsafe to beg the question of proof. Lord Justice Goddard disagreed, saying that he thought the evidence might warrant the jury in finding that the surgeon did not make a sufficiently careful search for swabs. Lord Justice MacKinnon, however, agreed with Lord Justice Scott, and the Court by a majority allowed the appeal and ordered a new trial. They gave leave to the widow, however, to appeal to the House of Lords against their decision, and so the new trial will perhaps not be held until their Lordships have reviewed the case.

An interesting feature of the appeal was that counsel cited at considerable length the unreported case of *James v. Dunlop*<sup>4</sup> from a verbatim report of the judgment. In that case Lord Justice Scrutton is reported to have said that the doctor who put the swabs in ought to take them out, but the majority of the present Court indicated that they would prefer to look at the facts of every case and not formulate a general rule of law. The medical view of these cases is well known: that the principle of teamwork ought to be recognized. The legal view is still very vague. The House of Lords may perhaps say something to clarify it if the case comes before them.

<sup>1</sup> *British Medical Journal*, 1938, 1, 1073.

<sup>2</sup> *Salmond on Torts*, 8th ed., p. 467.

<sup>3</sup> *Scott v. London and St. Katherine's Docks Co.*, 1865, 3 H. & C., p. 596.

<sup>4</sup> *British Medical Journal*, 1931, 1, 730.

## The Services

### ROYAL VISIT TO CANADA

The names of the members of the suite to accompany the King and Queen on their visit to Canada next May were announced from Buckingham Palace last week. Surgeon Captain H. E. Y. White, C.V.O., M.D., F.R.C.S.Ed., R.N., Honorary Surgeon to the King, will be in attendance as medical officer. Surgeon Captain White has served in the Royal yacht *Victoria and Albert* since 1927; he accompanied the Prince of Wales on his Empire tours in H.M.S. *Renown* and H.M.S. *Repulse*, and also their present Majesties on the visit to New Zealand and Australia in 1927. The battle cruiser *Repulse*, carrying the King and Queen and their suite, sails from Portsmouth for Canada on May 8 and is due back at the same port on June 22.

### R.A.M.C. SUPPLEMENTARY RESERVE

The War Office draws attention to the fact that medical practitioners up to 32 years of age, who would have a preference in times of national emergency for army work, can, with practically no inconvenience to themselves, place their services with the Regular Army by joining the Royal Army Medical Corps, Supplementary Reserve of Officers. Many members of this reserve are commissioned in the rank of lieutenant, and are eligible for promotion to the rank of captain after one year's service. Their obligations are to be available for service with the regular forces in any part of the world when the Army Reserve is called out by proclamation.

### MILITARY CROSS

Captain A. F. H. Keatinge, R.A.M.C., has been awarded the Military Cross for gallant and distinguished services in Palestine.

### DEATHS IN THE SERVICES

#### MAJOR-GENERAL H. E. M. DOUGLAS, V.C.

Major-General Henry Edward Manning Douglas, V.C., C.M.G., D.S.O., late R.A.M.C., died at Droitwich on February 14, aged 67. He was born on July 11, 1871, the son of Mr. George Alexander Douglas of Kingston, Jamaica, educated at Edinburgh, and took the Scottish triple qualification in 1898. Entering the R.A.M.C. on July 27, 1899, he became lieutenant-colonel in the long war promotion list of March 1, 1915, brevet colonel on January 1, 1918, colonel on March 27, 1926, major-general on October 12, 1929, and retired on October 13, 1933. He had a long, brilliant, and successful career in the R.A.M.C., during which he saw much war service. It was at Magersfontein, where General Wauchope was killed, that he gained the Victoria Cross while still a lieutenant. Though wounded himself early in the engagement, he went out under heavy fire to help the wounded, dressing the wounds of Captain Gordon of the Gordon Highlanders, of Major Robinson, and of several wounded soldiers, and brought them out to safety under a heavy fire. His war services comprise the South African War, where he took part in the advance on Kimberley, including the action at Magersfontein, where he was wounded, and in operations in the Orange River Colony and in Cape Colony, was mentioned in dispatches in the *London Gazette* of March 16, 1900, and received the Queen's medal with five clasps, the V.C., and the D.S.O.; East Africa, 1904, operations in Somaliland, including the action at Jidballi, receiving the medal with two clasps; the Balkan campaign of 1913, as British Red Cross Commissioner with the Greek forces; and the war of 1914-18, when he served for over four years in France, most of the time as A.D.M.S. of the 29th Division, then as A.D.M.S. at Archangel of the British troops in Russia, and finally for a short time in Iraq, was mentioned in dispatches in the *London Gazette* of January 12, 1916, and of December 21, 1917, and received a brevet as colonel and the C.M.G. In addition to the V.C., C.M.G., and D.S.O., General Douglas had received several foreign decorations—three Serbian (the Red Cross, Samaritan, and St. Sava), and the French Croix de Guerre with palms. On attaining administrative rank in 1926 he was appointed D.D.M.S. of the Scottish Command