RES IPSA LOQUITUR: ALLOWING EXPERT TESTIMONY TO "BRIDGE THE GAP" IN THE JURY'S KNOWLEDGE

by John P. McCahey

Res ispa loquitur is an evidentiary doctrine that permits a jury to infer from the circumstances of the plaintiff's injury and without direct proof of negligence that the defendant has been negligent. It derives from the premise that jurors share a common knowledge and experience from everyday life that reasonably permits them to conclude that some events do not ordinarily occur unless someone has been negligent. In some cases, particularly those alleging medical malpractice, the jurors will not have a sufficient familiarity with the subject matter to draw a conclusion on their own that the plaintiff's injury "bespeaks negligence". The issue thus arises whether in those cases the knowledge and experience necessary to infer negligence may be supplied to the jury by expert testimony.

A growing majority of courts have adopted the approach espoused by the Restatement (Second) of Torts and permit expert testimony in medical malpractice cases to assist the jury in its decision whether negligence should be inferred under the res ipsa loquitor doctrine. *See e.g., States v. Lourdes Hospital*, 792 N.E.2d 151, 154 (N.Y. 2003) (listing those courts that permit expert testimony to inform the jury's decision and those that do not); *see also Restatement (Second) of Torts*, § 328D, comment (d) (1965). These courts have concluded that expert testimony serves to "bridge the gap" between the jurors, who do not possess the specialized knowledge and experience necessary to reach a conclusion that the plaintiff's injury would not normally have occurred in the absence of negligence, and the expert, who does possess the specialized knowledge and experience necessary to reach such a conclusion. *See States*, 792 N.E.2d at 154; *Connors v. University Assoc. in Obstetrics & Gynecology, Inc.* 4 F.3d 123, 127-128 (2d Cir. 1993) (applying Vermont law). There still remains, however, a minority of courts that limit res ipsa loquitor to a narrow category of medical malpractice cases that require no expert testimony for the jury to conclude that the plaintiff's injury would not have happened without negligence. *Id.* These conflicting views and the doctrine of res ipsa loquitor are discussed below.

RES IPSA LOQUITUR

Res ipsa loquitur is a shorthand expression for a rule of evidence which allows but does not require a jury to infer the existence of negligence and causation where the injury or accident at issue is one that does not ordinarily occur in the absence of negligence. *See Gilbert v. Korvette, Inc.*, 327 A.2d 94 (Pa. 1974). Literally translated, res ipsa loquitor is latin for "the thing speaks for itself" and was first applied in a nineteenth-century English case to allow the inference of negligence where a flour barrel rolled out of a warehouse window. *See Byrne v. Boadle*, 159 Eng. Rep. 222 (1863). Its application neither alters the nature of a plaintiff's claim as one for negligence nor provides an independent ground for relief. *See Morgan v. Children's Hospital*, 480 N.E.2d 464, 465 (Ohio 1985).

Whether res ipsa loquitur applies in a particular case is a question of law to be decided by the trial court. *See*

Continued on page 4

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(Res Ipsa Loquitur continued)

Walker v. Rumer, 381 N.E.2d 689, 691 (Ill. 1978). The court need not conclude that the evidence compels an inference of negligence but only that "it cannot say that reasonable [jurors] could not draw that inference". See *Mayers v. Litow*, 316 P.2d 351, 355 (Cal. App. 1957). When reasonable minds could reach different conclusions, the trial court will put the issue of res ipsa loquitur to the jury. *See Cangelosi*, 564 So.2d 654. It is then for the jury to decide from the evidence before it whether or not the inference of negligence should be drawn. *See Id*; *States*, 792 A.2d at 154.

MEDICAL MALPRACTICE AND RES IPSA LOQUITUR

Medical malpractice cases typically involve allegations that the plaintiff's injury was the result of a lack of proper care or skill in making a diagnosis, providing treatment or performing a procedure. Negligence in those cases is never presumed and a "bad" or "unsuccessful" result of itself does not establish negligence. *See e.g., Savina v. Sterling Drug, Inc.* 795 P.2d 915, 932 (Kan. 1990). That is because the lack of success or risk of injury is innate to the science of medicine and may occur notwithstanding the exercise of proper skill and due care. *See e.g., Wasem,* 274 N.W.2d at 224. Issues of negligence, such as the appropriate standards of skill and care, defendant's deviation from those standards and causation, must therefore be proven by the plaintiff. Proof as to those issues in most cases will require expert testimony as to technical matters of medical science. *See e.g., Wilkinson v. Vesey*, 295 A.2d 676, 682 (R.I. 1972).

Many courts permit the application of res ipsa loquitor in those factually simple medical malpractice cases where the absence of due care and causation are obvious and requires no expert testimony for the injury to comprehend. *See e.g., Anderson*, 334 So.2d at 109; *see also Kambat v. St. Frances Hospital*, 678 N.E.2d 456 (N.Y.1997). In those cases the jury is permitted to infer negligence based upon their knowledge and experience of everyday life. *See e.g., Haddock v. Arnispiger*, 793 S.W.2d 948 (Tex. 1990); *also see Connors*, 4 F.3d at 127 (citing additional courts that have so held). Commonly cited examples of when a jury is capable of inferring negligence without expert testimony include a sponge being left in the body following surgery; performing surgery on the wrong part of the body; or a resulting injury to a body part remote from area of treatment. *See Haddock*, 793 S.W.2d at 950; *Todd v. Eitel Hospital*, 237 N.W.2d 357, 361 (Minn. 1975).

RES IPSA LOQUITUR IS A SHORT-HAND EXPRESSION FOR A RULE OF EVIDENCE WHICH ALLOWS BUT DOES NOT REQUIRE A JURY TO INFER THE EXISTENCE OF NEGLIGENCE AND CAUSATION WHERE THE INJURY OR ACCIDENT AT ISSUE IS ONE THAT DOES NOT ORDINARILY OCCUR IN THE ABSENCE OF NEGLIGENCE.

In most medical malpractice cases, however, the facts are not simple and the issue as to whether negligence may be inferred lies outside the jury's ken but within that of those having specialized training and experience. A split exists among courts whether in those cases expert testimony may be offered to support an inference of negligence under res ipsa loquitor. A minority of courts will not permit the jury to infer negligence when it is unable to do so without expert testimony. A majority of courts, on the other hand, allow expert testimony to "supplement a jury's understanding of whether an injury would normally occur in the absence of negligence". *See States*, 792 N.E.2d at 154 and *Connors*, 4 F.3d at 127-128 (listing courts that have adopted the majority and minority view).

EXCLUDING EXPERT TESTIMONY

Res ipsa loquitur will not be applied by some courts where "expert medical evidence is required to show not only what was done, but how it and why [plaintiff's injury] occurred since" any inference of negligence therefrom "is outside the realm of the laymen's experience". *See Anderson*, 334 So.2d at 109. That is because "the doctrine of res ipsa loquitor is based upon general familiarity with the subject matter rather than unfamiliarity". *See Perkins v. Park View Hospital, Inc.*, 456 S.W.2d 276, 285 (Tenn. App. 1970); *see also Fosmark v. State of*

Continued on page 5

(Res Ipsa Loquitur continued)

Iowa, 349 N.W.2d 763 (Iowa 1984). The doctrine, therefore, only applies "to those cases where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had not been exercised". *See LePelley v. Grefenson*, 614 P.2d 962, 966 (Id. 1980); *see also Larsen v. Zarrett,* 498 N.W.2d 191 (N.D. 1993). If expert testimony is needed to infer negligence, it follows then that the inference comes not from the jury, but from the experts. *See e.g., Haddock*, 793 S.W.2d 948. Simply put, "non-medically trained" jurors are not "competent" to infer negligence where the issues are complex and expert testimony is needed to understand those issues. *See Todd*, 237 N.W.2d at 361. As a result, res ipsa loquitor is precluded in medical malpractice cases whenever expert testimony is needed to establish its applicability. *See e.g., Orkin*, 569 A.2d 429.

BRIDGING THE GAP THROUGH EXPERT TESTIMONY

The growing consensus among courts is that the foundation for the application of res ipsa loquitur may rest upon the common knowledge and experience of either the jury or experts. *See States*, 792 A.2d at 154; *Seavers v. Methodist Medical Center of Oak Ridge,* 9 S.W.3d 86 (Tenn. 1999); *Mireles v. Broderick*, 872 P.2d 863 (N. M. 1994). These courts conclude that a restrictive view of res ipsa loquitor, barring expert testimony to inform the jury whether the occurrence bespeaks negligence, "overlooks the value of expert testimony in medical malpractice cases" and unnecessarily restricts the doctrine's application in medical malpractice cases. *See Seavers,* 9 S.W.3d at 95. Just as average people share a common knowledge and experience that flour barrels do not in the ordinary course of events fall out of windows, so do to experts within a specialized field share a common knowledge that certain events within their field do not normally occur absent negligence. *See Connors*, 4 F.3d at 128.

These courts further conclude that allowing expert testimony is consistent with the underlying premise of res ipsa loquitur. "Whether the knowledge required to evaluate the likelihood of negligent conduct inferred from an accident comes from common or specialized knowledge, the key question is still whether the accident would normally occur in the ordinary course of events". Id.; *see also Walker*, 381 N.E.2d at 691. That the knowledge or experience necessary to infer negligence is specialized does not detract from the fact that it "is at least as probative of the existence of such probability [of negligence] as is the 'common knowledge' of lay persons". *See Buckelew*, 435 A.2d at 1156.

Permitting expert testimony as to the applicability of res ipsa loquitur in medical malpractice cases is not intended to "negate the jury's ultimate responsibility as the finder of fact" to conclude that the inference should be drawn. *See States*, 792 A.2d at 154. Rather, those experts will serve "to educate the jury", thereby "enlarging its understanding of the fact issues it must decide". Id. That education, including the testimony of defendant's experts, will make the jury "new initiates into a different, higher level of common knowledge". *See Connors*, 4 F.3d at 128. It is then for the jury "to determine whether its newly enlarged understanding supports" an inference of negligence. *See States*, 792 A.2d at 154.

The experts who testify in res ipsa loquitur cases must meet the court's standards for the admission of expert testimony. There "must be evidential support, experimental or the like, offered in the expert's conclusion that the medical community recognized that the mishap in question would not have occurred but for the physician's negligence". *See Buckelew*, 435 A.2d at 1159. The experts "must confirm their opinion to the matter at issue which are certain and should not testify as to mere possibilities". *See Savina,* 795 P.2d at 936. In other words, the testimony must be more than the expert's "intuitive feeling". *See Buckelew*, 435 A.2d at 1159.

CONCLUSION

Many courts now permit expert testimony in medical malpractice cases to "inform" the jury in making a decision whether or not the defendant's negligence should be inferred. Those courts have concluded that the application of res ipsa loquitur should not be denied simply because the knowledge and experience necessary to infer negligence lies only with experts. Those experts, they conclude, can "educate" the jury and therefore "bridge the gap" between the jury's common knowledge and the expert's uncommon knowledge.

Some may view expert testimony to establish res ipsa loquitur in medical malpractice cases as nothing more than a means for the plaintiff to prove negligence through inference. Others may view such a use of expert testimony as nothing less than a means for the plaintiff to prove negligence where none exists. The "battle of the experts" is now part of res ipsa loquitur.