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WHAT IS MEDICAL MALPRACTICE?

MEDICAL MALPRACTICE is professional negligence. When a doctor consents to treat a patient he obligates himself to use his best judgment and to use reasonable care in the exercise of his skill and the application of his learning. A doctor does not guarantee a good result. If his patient sustains injury because of the physician's lack of knowledge or skill, or because of his failure to exercise reasonable care, or because of his failure to use his best judgment, he is liable to the patient for his conduct. He is, however, not liable for a mere error of judgment.[1]

Dean Prosser has written that the formula under which the theory of malpractice is presented is that the physician must have exercised that skill and have that knowledge which is commonly possessed by members of the profession in good standing.[2] Therefore, many malpractice cases fail simply because the injured patient is unable to produce evidence which demonstrates a departure from accepted standards of the medical profession. Thus, mistaken diagnosis alone is not sufficient to establish a case,[3] nor is it sufficient to show the mere occurrence of an undesirable result.[4]

It becomes at once obvious that the medical profession itself sets

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[1] Pike v. Honsinger, 155 N.Y. 201, 49 N.E. 760 (1898) contains a complete statement of the law with respect to the obligation of physicians to conform to community standards. *See also* 41 AM. JUR. *Physicians and Surgeons* § 90; 70 C.J.S. *Physicians and Surgeons* § 41 (1951). These articles explain the requirement that physicians holding themselves out as specialists must conform to the standards of specialists in their community.

[2] PROSSER, TORTS 165 (3rd. ed. 1964).

[3] Meador v. Arnold, 264 Ky. 378, 94 S.W.2d 626 (1936).

[4] Mogensen v. Hicks, 253 Iowa 139, 110 N.W.2d 563 (1961).

the standards to which its members must adhere. It is a departure from those standards that forms the basis of the lawsuit.[5]

THE EFFECT OF THE CONCEPT OF MEDICAL MALPRACTICE UPON THE APPLICATION OF RES IPSA LOQUITUR

Historically, it has been the rule that res ipsa loquitur will be applied in medical malpractice cases only where the negligence of the physician may be inferred from facts which laymen can understand from their common experience. This is to say that the errors complained of would not occur if the physician had exercised care, and that these errors are of such a nature as can be fully understood by laymen. As early as 1912 the doctrine of res ipsa loquitur was applied where a drainage tube was left in a body after the wound had healed.[6] A decade later the doctrine was applied in dealing with injury to a portion of the body remote from the site of the operation.[7] Another early application of this doctrine is found in a case where a patient's jaw was fractured during a tonsillectomy operation.[8]

However, in view of the law which postulates that medical malpractice is to be found only where there is a departure from the standards set by the medical profession itself, there must, perforce, be few situations indeed where lay people can be said to have the requisite knowledge necessary to infer professional negligence. Since mere mistakes in diagnosis or treatment or disastrous results without more do not constitute prima facie evidence of malpractice, it becomes evident that certain dramatic and tragic consequences which befall innocent victims of professional negligence must often go uncompensated in courts of law. Prosser has summed up the situation as follows: "[Court] decisions, together with the notorious unwillingness of members of the medical profession to testify against one another, may impose an insuperable handicap upon a plaintiff who cannot obtain the proof."[9]

[5] As to the necessity of expert evidence to support an action for malpractice, *see* Annot., 81 A.L.R.2d 597 (1962).

[6] Evans v. Munro, 83 A. 82 (R.I. 1912).

[7] Vergeldt v. Hartzel, 1 F.2d 633 (8th Cir. 1924).

[8] Brown v. Shortlidge, 98 Cal. App. 352, 277 P. 134 (1929). *See also* Annot., 162 A.L.R. 1265 (1946); Annot., 152 A.L.R. 638 (1944) (which compiles malpractice cases in which res ipsa loquitur has been applied); Lambert, *Res Ipsa Loquitur as Applicable in Cases of Injury by X-ray*, 24 NACCA L.J. 31 (1959) (which collects these cases and explains their significance); PROSSER, *supra* note 2, at 231-32.

[9] *Supra* note 2, at 231.

Therefore, in the vast majority of cases, it is necessary to procure expert evidence to establish a departure from the standards set by the medical community, since the average layman is hardly in the position to infer such negligence without a demonstration of what the standard is.

THE NECESSITY FOR EXPANDING THE CONCEPT OF RES IPSA LOQUITUR IN MEDICAL MALPRACTICE CASES

Both courts and astute commentators have taken note of the "conspiracy of silence" that prevails in the medical profession with regard to the procurement of expert testimony to prove medical malpractice.[10] The reluctance of physicians to testify in medical malpractice cases may be generally categorized into two specific areas: a reluctance of physicians to testify in any kind of case, and a reluctance of physicians to testify in medical malpractice cases. As to the first category, such elements as loss of time and income, and unwillingness to take time from patients who require care, the irritating and frustrating experience of cross-examination, and the unwanted burden of explaining technical data in lay terms are some of the factors which have been mentioned.[11] The factors which militate to the reluctance of physicians to testify in medical malpractice cases are: fear and self-interest, reluctance to hurt fellow physicians, pressures from within the medical profession and from insurance companies, and animosity toward lawyers and patients who attack physicians' competency.[12]

It becomes at once apparent that by reason of this understandable reluctance to testify, rather than any conspiracy of silence, it is necessary for the courts to assist the victim who presents himself to a physician with a comparatively limited disability and thereafter undergoes medical care and treatment, with the end result of a permanent, crippling disability. Recognizing that it is not always a simple matter to procure a doctor to testify and condemn in open court the practice of another, New York's high court, in *McDermott v. Manhattan Eye, Ear and Throat Hospital*, has recently joined the courts of a growing number of states which permit the plaintiff to examine the defendant's

[10] *See* Reynolds v. Struble, 128 Cal. App. 716, 18 P.2d 690 (1933); McDermott v. Manhattan Eye, Ear & Throat Hosp., 15 N.Y. 2d 20, 203 N.E.2d 469 (1964); LOUISELL & WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES 422-24 (1966).

[11] LOUISELL & WILLIAMS, *supra* note 10.

[12] LOUISELL & WILLIAMS, *supra* note 10.

doctor not only on "facts," but, in addition, on the defendant doctor's concepts of accepted standards of medical practice in the community.[13] It is, therefore, now possible in many jurisdictions to conduct pretrial depositions of the defendant doctor in order to ascertain the accepted medical practice and deviation therefrom. Thereafter, upon the trial of the action, it is likewise possible to cross-examine the defendant doctor with respect to the standards of the profession. In summarizing the status of the law in the various jurisdictions, the *McDermott* court concluded:

> While recognizing the right of a plaintiff in a malpractice action to call as a witness the defendant doctor, the courts of several States have sought to limit the type of questions which the plaintiff may put to him. Specifically, it has been held that a defendant physician may be required to testify to "facts within his knowledge"—that is, "what [he] actually saw and did"—but not as to whether his actions deviated from the accepted standard of medical practice in the community, a matter deemed to call for "expert opinion." (Hull v. Plume, 131 N.J.L. 511, 516-517, 37 A.2d 53; see, also, Osborn v. Carey, 24 Idaho 158, 168, 132 P. 967; Hunder v. Rindlaub, 61 N.D. 389, 406-410, 237 N.W. 915; Forthofer v. Arnold 60, Ohio App. 436, 441-442, 21 N.E.2d 869; cf. Ericksen v. Wilson, 266 Minn. 401, 123 N.W.2d 687.) Other courts, however, permit the plaintiff to examine his doctor-opponent as freely and fully as he could any other qualified witness. (See Lawless v. Calaway, 24 Cal. 2d 81, 90-91, 147 P.2d 604; State for Use of Miles v. Brainin, 224 Md. 156, 167 A.2d 117, 88 A.L.R.2d 1178; cf. Snyder v. Pantaleo, 143 Conn. 290, 122 A.2d 21).[14]

Under the more enlightened decisions it is possible to use standard medical texts and treatises on a given subject to great advantage. By use of such material the trial lawyer may test the defendant's knowledge with regard to the standard procedures accepted and adopted in the medical profession as indicated in the various texts on the subject. While decisions such as *McDermott* tend to ameliorate the problem, they do not cure it. As the court in *McDermott* stated, it would be the height of optimism to expect that the plaintiff would gain very much from calling and questioning the very doctor he is suing with respect to medical standards. Perhaps that small group of attorneys who have

[13] McDermott v. Manhattan Eye, Ear & Throat Hosp., 15 N.Y. 2d 20, 203 N.E.2d 469 (1964).

[14] *Id.* at 26-27, 203 N.E.2d at 473. It should be noted that before medical textbooks may be used on cross examination, a foundation must be made to show that the witness recognizes the authoritativeness of the texts. *See* Annot., 60 A.L.R.2d 77 (1958); 7 AM. JUR. PROOF OF FACTS, *Medical Books As Used in Cross Examination, Proof I* (1960); RICHARDSON, RICHARDSON ON EVIDENCE § 391(b) (9th ed. 1964); KRAMER, MEDICAL MALPRACTICE 50-53 (1965). *See also* St. Petersburg v. Ferguson, 193 So. 2d 648 (Fla. 1967); Superior Ice v. Belger, 337 S.W.2d 897 (Mo. 1966); Hastings v. Chrysler Corp., 273 App. Div. 292, 77 N.Y.S.2d 524 (1948); Roveda v. Weiss, 11 App. Div. 2d 745, 204 N.Y.S.2d 699 (1960); Dinner v. Thorp, 54 Wash. 2d 90, 338 P.2d 137 (1959).

themselves become proficient in medicine may achieve this desired result. However, the rationalizations and explanations of the defendant doctor will normally overwhelm the plaintiff who is unable to procure independent expert testimony.

It therefore becomes quite apparent that the courts must go much further in assisting the victim of the "bad result." The layman, be he attorney or client, is not the equal of the specialist whose treatment and care resulted in crippling deformities. It is, therefore, more urgent that the doctrine of res ipsa loquitur be used in medical malpractice cases than in almost any other kind of legal action. It should be remembered that this doctrine does not assure victory in every case for the plaintiff. Rather, upon establishing certain of the requisites which will be dealt with later, the plaintiff is merely afforded an opportunity to have the case decided by a jury. To be sure, the defendant has every right to come forward with his own evidence as well as that of his colleagues in order to demonstrate that the treatment accorded the plaintiff was in no way lacking and did, in fact, conform with the standards which the medical profession has itself determined. By operation of the doctrine of res ipsa loquitur the burden of explanation is thus shifted to the party best able to provide a full explanation and to render a full accounting.

It is necessary, however, to expand the concept of res ipsa loquitur in medical malpractice cases in order to afford an opportunity for the community to determine whether or not the standards adopted by the medical profession fulfill the obligations which the community places upon it. Abortive legal actions and dismissals of cases which involve serious crippling and impairment cannot be tolerated by the public indefinitely. The legal community must grow with the needs of the times and cannot remain passive in the face of the obvious injustice which results not from a lack of merit, but from a lack of proof.[15]

THE ELEMENTS OF RES IPSA LOQUITUR ARE UNIQUELY APPLICABLE TO MEDICAL MALPRACTICE

The phrase res ipsa loquitur is not a magic maxim. It is merely a form of circumstantial evidence which depends upon the common un-

[15] *See* PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 346 (1953), commented upon in Lambert, *Comments on Recent Important Personal Injury (Tort) Cases*, 24 NACCA L.J. 46, 76 (1959): "The courts are not reluctant to use res ipsa loquitur as a deliberate instrument of policy to even the balance against the professional conspiracy of silence. . . ."

derstandings of mankind for its application. It has been said that the doctrine is properly applicable in those situations which "contain within themselves a sufficient basis for an inference of negligence."[16] Where the instrumentality or agency which caused the injury is in the exclusive control of the defendant, and the occurrence is not one which ordinarily occurs in the absence of negligence, then the conditions for the application of the doctrine are fulfilled, provided that the damage was not caused by any voluntary action or contribution on the part of the plaintiff.[17]

Perhaps the greatest impetus for the application of this doctrine to medical malpractice is found in *Ybarra v. Spangard*,[18] the landmark case in this field. In the course of an appendix operation, the plaintiff, while unconscious, suffered paralysis of the right shoulder and neck. He sued the surgeon, anesthetist, hospital, nurses and diagnostician. Despite the absence of any proof with regard to the negligence of any single defendant, the court nevertheless applied the doctrine of res ipsa loquitur against all of the defendants, stating: "[P]roof of the receipt of a traumatic injury during the unconsciousness of anesthesia was sufficient to make a prima facie case against all the defendants under the rule of res ipsa loquitur."[19]

Ybarra recognized the need to apply the doctrine because of the greater accessibility of the facts to the defendants as compared to the plaintiff.[20] Thus, the traditional elements of res ipsa loquitur are now being considered against the background of the patient-physician relationship. This relationship is unique in that there are few other situations where human beings are more dependent on others, more at their mercy and less likely to be sufficiently informed.[21] Translated into

[16] Foltis v. City of New York, 287 N.Y. 108, 38 N.E.2d 455 (1948).

[17] *See* HARPER AND JAMES, TORTS 1081 (1956); RICHARDSON, *supra* note 14, at 67; LOUISELL & WILLIAMS, *supra* note 10, at 425; Galbraith v. Busch, 267 N.Y. 230, 196 N.E. 36 (1935).

[18] 25 Cal. 2d 486, 154 P.2d 687 (1944), *appealed again*, 93 Cal. App. 44, 208 P.2d 445 (1949).

[19] Ybarra v. Spangard, 93 Cal. App. 44, 45, 208 P.2d 445, 446 (1949). *See* Lambert, *Review of Leading Current Cases*, 17 NACCA L.J. 255 (1956); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 291 (1936); 24 So. Cal. L. Rev. 324 (1951); 26 NOTRE DAME LAW. 756 (1951); 3 WYO. L. REV. 230 (1949).

[20] LOUISELL & WILLIAMS, *supra* note 10, at 427.

[21] LOUISELL & WILLIAMS, *supra* note 10, at 426. *See also* Seneries v. Haas, 45 Cal. 2d 811, 291 P.2d 915 (1955).

concrete terms, what have the courts been saying and doing with respect to this doctrine in medical malpractice cases?

In *Matlick v. Long Island Hospital*, the New York Supreme Court recently held that both a hospital and doctor could be found guilty of malpractice upon the application of the doctrine of res ipsa loquitur where the doctor and other employees of the hospital were present in the operating room, and the patient, while under anesthesia, developed a nervous condition specifically attributed to trauma by external force to a part of the body unrelated to the area of injury.[22] This case serves to demonstrate the application of the traditional criteria to the specific medical malpractice situation. There are, of course, modifications which are required in order that the doctrine be applied. Thus, in *Matlick*, the patient was not under any single individual's exclusive control. The patient was under the control of various employees of the hospital and a doctor who was not on the hospital staff. Nevertheless, the concept of exclusive control is satisfied since it is shared by all of the defendants. Noteworthy is the undeniable truth that these defendants alone have within their power the ability to come forward and explain what was done during the operation, how it was done, and in what manner the injury to a remote portion of the body took place. Surely a patient under anesthesia could only come to court with a big zero on any of these matters. The next element is that the event would not usually occur without negligence. The injury here was to a part of the body remote from the operative site. It might well be argued that surgeons who operated in a bloody field and under extremely difficult conditions might slip from time to time in accordance with the rules of normal human frailty. Thus, certain hazards might inhere every time a person is placed under anesthesia and subjected to the scalpel. This is and should be beside the point. Let the doctors come forward and establish these facts to the satisfaction of a jury, and let a jury decide whether or not a given untoward result is a consequence of professional negligence, or whether it is merely an incident of the risk assumed by the procedures adopted by the medical profession. Courts should cease their speculation as to whether or not an injury is remote, or outside of the field of the operation, and such other considerations as limit the application of this doctrine. One doctor might well say that anything within a radius of "X" centimeters is in the operative field;

[22] 25 App. Div. 2d 538 (N.Y. 1966).

another might say that a given surgical procedure exposes a greater or lesser area to the possibilities of trauma, but the point is: Let them tell it to the jury! As matters now stand, the law is entirely too restrictive in this regard.

Finally, the *Matlick* case demonstrates the last criterion for the application of the doctrine of res ipsa loquitur, to wit: that the plaintiff shall not have contributed to the occurrence and shall not have participated therein. Certainly, while under anesthesia, the participation of the patient must of necessity be wholly lacking.

A common situation which also necessitates the application of the doctrine of res ipsa loquitur is one in which the doctor prescribes medication which is contraindicated by reason of the patient's history. Suppose the evidence shows that the doctor never asked the patient certain questions regarding the patient's prior physical condition. Thereafter that patient develops certain side effects from the drug administered by the doctor. In one case it was held that the common knowledge of the jury combined with the information in the drug manufacturer's brochure was sufficient to avoid dismissal. Under such circumstances, the jury should be able to decide whether the doctor should have known that the drug was contraindicated for this particular patient.[23]

It should be noted that since the right to rely upon res ipsa loquitur is lost only if the evidence fully explains the negligence, it is wise to plead general negligence with reliance upon res ipsa loquitur as well as specific negligence.[24]

A review of factual situations where the doctrine of res ipsa loquitur has been applied in medical malpractice cases amply demonstrates the applicability of this doctrine to this area of law. Thus, where a patient under sedation fell out of bed and suffered a fractured jaw, it was held to be error to refuse to give a charge on res ipsa loquitur.[25] The doctrine was also held applicable where a piece of gauze was left in a wound resulting in an abscess,[26] and where a patient at a health resort was injured when an examination table gave way.[27] In another case it

[23] Sanzari v. Rosenfeld, 34 N.J. 128, 167 A.2d 625 (1961).

[24] *See* Voss v. Bridwell, 188 Kan. 643, 364 P.2d 955 (1961); Mitchell v. Robinson, 334 S.W.2d 11 (Mo. 1960).

[25] McDonald v. Foster Memorial Hosp., 170 Cal. App. 2d 85, 338 P.2d 607 (1959).

[26] Young v. Fishback, 262 F.2d 469 (D.C. Cir. 1959). *See also* Annot., 54 A.L.R.2d 200 (1957).

[27] Davison v. Bernard McFadden Foundation, 4 App. Div. 2d 978, 167 N.Y.S.2d 784 (1957).

was found that a prima facie case was established upon testimony that a doctor administered a drug to a patient notwithstanding the patient's warning that he was allergic to this drug.[28]

As to the present status of the law, it is worth repeating that res ipsa loquitur is applicable to medical malpractice cases which involve foreign objects left in a person's body and in cases involving traumatic injury during surgery to an area of the body remote from the operative site, as where a portion of the body not intended to be removed is negligently removed.[29] And, as to all these areas, it need no longer be shown that the plaintiff was in the exclusive and individual control of the defendant.

The doctrine of willful abandonment of a patient is a companion doctrine which may establish liability without the need for expert medical evidence. Thus one court has stated:

> At least, the jury might have found that the defendants had prematurely and willfully discharged themselves from attention to the case while the patient was desperately ill and before he was cured without giving information or advice as to subsequent treatment or the desperate and dangerous condition and character of the disease, all of which led to aggravation of his condition and illness. Common sense and ordinary experience and knowledge, such as is possessed by laymen, without the aid of medical expert evidence might properly have suggested to the jury that the condition of the boy at the time that he was left without hospitalization and abandoned by the defendants was not compatible with skillful treatment.[30]

Another doctrine, informed consent, may also be utilized. Where a physician fails to disclose possible dangers in the course of the therapy, his failure to make a reasonable disclosure to his patient of these known dangers may render him liable in malpractice. Thus, in one case where a patient was being treated for arthritis by injection of gold, the physician was held liable for having failed to disclose to his patient the possibility of dermatitis which could result from these injections.[31]

Throughout this line of cases, it is clear that the courts have been struggling to find ways in which the common understandings of the

[28] Stokes v. Dailey, 85 N.W.2d 745 (N.D. 1957). *See also Res Ipsa Loquitur—Liability Without Fault*, 163 J. AMER. MED. ASS. 1055 (1957).

[29] *See* Griffin v. Norman, 192 N.Y.S. 322 (App. Div. 1922).

[30] Meiselman v. Crown Heights Hosp., 285 N.Y. 389, 395-96, 34 N.E.2d 367, 370 (1941).

[31] DiRosse v. Wein, 24 App. Div. 2d 510 (N.Y. 1965). *Cf.* Natanson v. Klein, 186 Kan. 393, 350 P.2d 1093 (1960); Mitchell v. Robinson, *supra* note 24.

community might be utilized to determine whether the conduct of a physician or hospital is reasonable under all of the circumstances.

CONCLUSION

As has been demonstrated, there are already recognized categories of malpractice cases wherein the doctrine of res ipsa loquitur will be applied. It can be assumed with some certainty that where the left leg is removed instead of the right, where lysol is injected instead of glucose, where an eye is enucleated during surgery on the left toe, the doctrine will be applied. But, how does the law deal with a case where a normal childbirth in a normal mother results in total paralysis of the mother; where, after spinal anesthesia, the patient becomes palsied or crippled; where an operative incision opens up after a patient leaves her bed under orders of her physician? Such concepts as informed consent and willful abandonment do not suffice to cover the vast category of cases involving persons with comparatively minor conditions who, during or after a prescribed course of treatment, become crippled for life.

It is here advocated that the correct rule should be: Where the result of treatment is to render the patient substantially worse than before treatment was begun, the doctor should be compelled to come forward and explain to the community the whys and wherefores of the occurrence. It should be remembered that res ipsa loquitur is no panacea for the plaintiffs. The defendant doctor or hospital has every opportunity to come forward with all the teaching of the medical profession: with professors and their citations of authority, with medical treatises, with diplomates and specialists, colleagues and superiors.

If there is a normal incident and risk to the use of a given procedure, then in the end, the community should decide whether or not the medical profession can justify this risk in terms of its incidence and severity.

It is certainly possible that the rebutting evidence of the defendant might be so conclusive and complete as to foreclose any possibility of going to the jury, notwithstanding the fact that the doctrine of res ipsa loquitur had been originally pleaded. Thus, for example, where a clamp is found in the body of a person who has had prior surgery, and it is conclusively demonstrated that the operation which was performed by the defendant did not utilize clamps of this nature, there

might well be a conclusive rebuttal. One can, of course, envision any number of situations where the doctrine might fail upon submission of proper rebuttal evidence.

Thus a more universal application of this doctrine would not be "unfair" to the medical profession at all. A more widespread application of the doctrine would perform the useful function of bringing the community closer to the work of the medical profession by securing for that community an opportunity to judge whether the standards adopted by the medical profession are justifiable.[32]

[32] Some useful authorities in this field include: LOUISELL & WILLIAMS, *supra* note 10, at chs. 14 & 15; Pound and Lambert, *Personal Injury (Tort) Law; Comment on Recent Important Personal Injury (Tort) Cases*, 16 NACCA L.J. 336 (1955); *Recent Important Tort Trends: Res Ipsa Locquitur Applicable to Hospital*, 31 J. AM. TRIAL LAW. 151 (1965) (reviewing fall-out-of-bed-cases); Note, *Malpractice and Medical Testimony*, 77 HARV. L. REV. 333 (1963); Annot., 82 A.L.R.2d 1262 (1962).