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Personal Injury

Res Ipsa Revisited

It's often been misunderstood and misapplied in malpractice cases

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The res ipsa loquitur (literally "the thing speaks for itself") Doctrine has often been misunderstood and misapplied in malpractice cases. However, the doctrine has been part of the legal landscape for a long time. See, e.g., *Sanzari v. Rosenfeld*, 34 N.J. 128 (1961). The last significant Supreme Court case explaining this doctrine is over 25 years old. See *Bucklew v. Grossbard*, 87 N.J. 512 (1981). In the recent case of *Khan v. Singh*, 397 N. J. Super. 184 (App. Div. 2007), appeal pending N. J. (2008), the Appellate Division affirmed a trial judge's refusal to charge the res ipsa loquitur Doctrine in a medical malpractice case. There was a vigorous dissent, and the Supreme Court will have the chance to clarify and update the application of the res ipsa loquitur doctrine.

The facts of *Khan* are illuminating. Mr. Khan had been diagnosed by an orthopedist with an acute herniation of the disc at L4-5, resulting in a partial foot drop. Mr. Khan then consulted with the defendant, Dr. Singh, who is board-certified in internal medicine and neurology, and who held himself out as a specialist in "pain medicine." Dr. Singh prescribed various therapies, including medication, physical

therapy, traction, and epidural injections. Although these therapies provided relief from the pain, the plaintiff continued to experience partial foot drop.

Dr. Singh then performed an "endoscopic discectomy with thermal annuloplasty." This procedure involved the insertion of a radio-frequency needle to heat and shrink the internal contents of the disc, thereby relieving pressure on the nerve root. The plaintiff returned to Dr. Singh's office two days after the procedure with a complete foot drop. Thereafter, the plaintiff was examined by a neurosurgeon who determined that the plaintiff had sustained "complete damage to the L5 nerve root."

The plaintiff's orthopedic expert opined that presurgical testing revealed an extruded disc fragment at L4-5, and that the defendant should have terminated the procedure "because the extruded disc fragment could cause a burn injury to the nerve." This expert also testified that the nerve root had been "burnt and destroyed." The plaintiff's neurological expert also opined that the radio-frequency procedure was contraindicated because of the extruded disc fragment. The neurologist concluded that the plaintiff's condition was the result of a thermal injury to the nerve that occurred during the operation.

The defendant conceded that it would be malpractice if he caused thermal damage to the nerve while performing the procedure. The defendant's orthopedic expert opined that the procedure caused "chemi-

cal irritation to the nerve" and that the nerve root had been damaged from long-standing disc disease which was the cause of the plaintiff's foot drop.

However, on cross-examination the defendant's expert conceded that "it would be a deviation from the standard of care if the defendant performed the procedure in a manner that caused thermal damage to the nerve root." This expert also conceded that "it would be a deviation from the standard of care for the disc material to become overheated to the point where it caused thermal injury." Given these facts, the plaintiff contended that the trial court should have charged the doctrine of res ipsa loquitur.

In *Bucklew*, *supra*, the court created a three-pronged test for the application of res ipsa loquitur:

- The occurrence must bespeak negligence;
- The instrumentality must be within the defendant's exclusive control; and
- The injury must not be the result of the plaintiff's own negligence.

The court explained the res ipsa doctrine should be utilized where expert testimony establishes that the medical community recognizes the injury would not have occurred in the absence of negligence. However, the *Khan* majority opinion noted that res ipsa will not apply merely because an expert says the injury would not have occurred in the

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absence of negligence. Rather, "there must be some evidential support, experiential or the like, offered for the expert's conclusion that the medical community recognized that the mishap in question would not have occurred but for the physician's negligence." *Khan*, 195, quoting *Buckelew*, at 529.

The majority noted that the all of the experts had testified that it was recognized in the medical community that the nerve will not be burned if the procedure is performed properly. However, without actually using the term "net opinion," the majority opinion concluded that neither of plaintiff's experts offered "evidential support" sufficient to apply the *res ipsa* doctrine. "Although the experts and defendant may have agreed that it would be malpractice to touch or burn the nerve during the radiofrequency procedure, this is not the same as saying that the medical community recognizes that plaintiff's injury would not have occurred in the absence of negligence."

In a persuasive dissent, Judge Winkelstein observed that the defendant and all of the experts agreed that if the procedure was performed in a way so as to "cause thermal damage to the nerve root," the defendant committed malpractice. The dissent took note of the defense argument that a *res ipsa loquitur* charge was not proper "because both defendant and his expert testified that the procedure was properly performed, raising disputed issues of fact." However, Judge Winkelstein explained that in such cases "the court should give a 'conditional' *res ipsa loquitur* instruction, under which the jury is directed first to decide how the accident hap-

pened and to consider *res ipsa loquitur* only if it finds that the accident occurred in a manner which fits the doctrine."

Judge Winkelstein buttressed this conclusion by referring to the testimony of the defendant and his experts. The dissent explained that all of the experts as well as the defendant testified that "if defendant burned or touched plaintiff's nerve during the operative procedure, he would have deviated from the standard of care." In fact, the defendant conceded that if he overheated the nerve root to the point where there was a complete radiculopathy, his conduct would have violated the standard of care. Indeed, the defendant testified, "if somebody did, that person has to be drunk to do it." The defense expert testified that "the procedure was not supposed to be anywhere near the nerve" and that "it would be a deviation of the standard of care if the defendant performed this procedure in a way that caused thermal damage to the nerve root." Given this testimony, "[I]f the jury found that defendant burned plaintiff's nerve, it could have inferred that the defendant was negligent."

The dissent also responded to the majority conclusion that plaintiff's experts did not provide the appropriate foundation to support their opinions. Judge Winkelstein observed that all of the experts and defendant himself conceded that burning the nerve was a deviation from the standard of care. "Under those circumstances, no additional foundation or evidential support for plaintiff's experts' opinions was necessary." Additionally, Judge Winkelstein

observed that the plaintiff's experts had based their opinions on medical literature, including text books, "medical internet sites," and consultations with colleagues. Furthermore, the plaintiff's orthopedic expert had examined both the plaintiff and the pre- and post-operative MRIs and explained how the radio-frequency procedure burned the plaintiff's nerve. The plaintiff's neurological expert also testified as to the "mechanics of the radio frequency procedure and explained why the injury was a result of thermal damage during surgery, Judge Winkelstein concluded."

In sum, plaintiff's experts' opinions are more than simply 'net opinions' based on their own intuitive feelings. The evidence falls squarely within the holding in *Buckelew, supra*, that "expert testimony to the effect that the medical community recognizes that an event does not ordinarily occur in the absence of negligence may afford a sufficient basis for the application of the doctrine of *res ipsa loquitur*." Judge Winkelstein therefore concluded that the failure to give a conditional *res ipsa* charge constituted reversible error and urged that the case be remanded for a new trial.

The doctrine of *Res Ipsa Loquitur* has been rarely applied in malpractice cases. Hopefully, the Supreme Court will utilize the case of *Khan v. Singh* to explain and clarify the *res ipsa* doctrine and provide guidance to the bench and bar as to when and how this important doctrine should be utilized. ■