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Torts - Res Ipsa Loquitor in Medical Malpractice Actions in Wyoming - Keller v. Anderson

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TORTS—Res Ipsa Loquitor in Medical Malpractice Actions in Wyoming. Keller v. Anderson, 554 P.2d 1253 (Wyo. 1976).

Plaintiff was involved in an automobile accident and sustained an injury to his leg. Despite the care and treatment of his physicians for the fractured femur, his leg became gangrenous and had to be removed. Plaintiff sued the doctors, alleging negligence as the cause of his loss. The defendants moved for summary judgment. In order to overcome his lack of supporting expert testimony plaintiff sought to invoke the doctrine of res ipsa loquitur. He requested that the district court take judicial notice of the fact that treatment of a leg fracture does not ordinarily result in the loss of the limb and that an inference of negligence is proper. Summary judgment for defendants was granted. On appeal, the Wyoming Supreme Court affirmed and held that although the particular injury involved in this case is not commonplace, the doctrine of res ipsa loquitur is inapplicable where based solely on an unfavorable result of treatment and that the acts of the doctors were not negligent within the common knowledge of laymen.

This case note discusses Wyoming's traditional application of res ipsa loquitur as compared to more liberal applications elsewhere.

BACKGROUND

Res ipsa loquitur is a Latin maxim meaning "the thing speaks for itself." The label is attached to a certain kind of circumstantial evidence which permits the jury to infer defendant's negligence where the exact cause of the injury is unknown.[1] Originally the doctrine meant that where peculiar circumstances surrounded an accident, it was reasonable to say that the defendant was probably at fault.[2] Much of the confusion as to the doctrine's procedural effect today is attributable to the inter-weaving of the doctrine with the public policy involved in common carrier cases.[3] After a passenger showed he was injured while riding a common carrier, the

1. Weggeman v. Seven-Up Bottling Co., 5 Wis.2d 503, 93 N.W. 2d 467 (1958).
2. Byrne v. Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (1863).
3. PROSSER, LAW OF TORTS § 39, at 213 (4th ed. 1971) [hereinafter cited as PROSSER].

burden of proof shifted to defendant-carrier who was in a better position to explain the cause.

In Wyoming,[4] as elsewhere, the doctrine only applies where certain conditions are present: specifically, where the instrumentality causing the injury was under the exclusive control of the defendant, the plaintiff was free of contributory negligence[5] and the accident occurred under such circumstances that in the ordinary course of events, it would not occur if ordinary care were observed. Dean Prosser has said that the rule amounts to no more than common sense[6] and one jurisdiction has recently summarized the rule in these words:

> Res ipsa loquitur applies where the occurrence of the injury is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible.[7]

There are differing views as to the procedural effect of the doctrine. The United States Supreme Court[8] and a majority of jurisdictions[9] hold that the doctrine allows the jury to draw a permissible inference of negligence, should it so desire. A few jurisdictions, including Colorado, extend the scope of the doctrine and hold that its effect is to shift the burden of proof to defendant.[10] Other jurisdictions hold that a mandatory presumption is created which, as a rule of law, enables a court to direct the jury to find negligence where the defendant has not entered sufficient exculpatory evidence to rebut the presumption. A practical consequence in any of these jurisdictions is that application of the doc-

4. Corson v. Wilson, 56 Wyo. 218, 108 P.2d 260 (1940).
5. *See* Comment, *Comparative Negligence in Wyoming*, 8 LAND & WATER L. REV. 600, 625 (1973), where the author contends that due to Wyoming's new comparative negligence statute, WYO. STAT. § 1-7.2(a) (Cum. Supp. 1975), this element is no longer required in Wyoming.
6. 1 SPEISER, THE NEGLIGENCE CASE—RES IPSA LOQUITUR § 1:2 (1972).
7. Clark v. Gibbons, 58 Cal. Rptr. 125, 132, 426 P.2d 525, 532 (1967).
8. Sweeney v. Erving, 228 U.S 233 (1913)
9. Fehrman v. Smirl, 20 Wis.2d 1, 121 N.W.2d 255, 266 (1963).
10. Johnson v. Coca Cola Bottling Co., 239 Miss. 739, 125 So.2d 537 (1960); Weiss v. Axler, 137 Colo. 544, 328 P.2d 88 (1958); Jones v. Shell Petroleum Corp., 185 La. 1067, 171 So. 447 (1936).

trine gets plaintiff's case past a directed verdict[11] or nonsuit[12] and to the jury.

MALPRACTICE INSURANCE

In 1970, aggrieved patients filed approximately 13,000 suits against their doctors and by 1975, the figure was over 20,000.[13] It may be reasonably assumed that the doctrine of res ipsa loquitur has played some part in this recent increase in medical malpractice actions. The cost of malpractice insurance has consequently increased, triggering a controversy over the causes of the rise in the number of malpractice suits. By 1976 thirty-one states had enacted corrective legislation aimed at alleviating the problem of burdensome insurance premiums.[14] Some of these laws substitute binding arbitration in place of trials, while others put attorney contingency fees on a sliding scale by which the percentage-fee decreases as the size of the award increases. The Wyoming Medical Association drafted a proposed bill which included several fundamental alterations in the legal system, including elimination of the use of res ipsa loquitur against doctors.[15] Although the bill was not passed, the Wyoming legislature did take some action in this field when it enacted a bill[16] establishing a medical liability compensation fund. The state fund is designed to supplement the physician's insurance by paying that part of a judgment which exceeds fifty thousand dollars, up to a limit of one million dollars.

During the last century, the use of liability insurance in most areas of human enterprise has become widespread. Insurance plays an important role in modern living and a brief review of the theories of insurance is warranted. Insurance is said to be a "loss-distributing device"[17] which

11. Comment, *The Application of Res Ipsa Loquitur in Medical Malpractice Cases*, 60 NW. L. REV. 852, 854 (1965).
12. Moore v. James, 5 Utah2d 91, 297 P.2d 221 (1956).
13. ATLANTIC MONTHLY, April 1976, at 11.
14. *Id.* at 16.
15. *See Minutes of the Annual Meeting of the Wyoming State Bar*, 11 LAND & WATER L. REV. 307, 311 (1976).
16. Enrolled Act No. 78, 44th State Legislature (1977).
17. PROFESSIONAL NEGLIGENCE 73 (Roady & Anderson ed. 1960).

facilitates the distribution of losses suffered by a few among the much larger group of premium-payers. This theory applies equally to malpractice insurance where the losses suffered by a few doctors in the form of unfavorable malpractice judgments can be distributed and absorbed by the whole class of premium-paying physicians. Another theory is that insurance is a means to shift losses from an inferior risk-bearer to a superior one.[18] Patients suffering serious injuries caused by the negligence of their physicians usually are not able to withstand the resulting financial loss. They are poor risk-bearers, whereas physicians who treat fifty patients a day or perform frequent surgery may anticipate the possibility of causing serious injury. They can protect themselves against a possible ruinous judgment by the fixed cost of liability insurance. The physician is in a position to pass this additional cost along to his patients in the form of slightly higher fees. Insurance is thus viewed as a means to shift the loss to the superior risk-bearer.

RES IPSA LOQUITUR IN MEDICAL MALPRACTICE

A plaintiff encounters special problems when he sues a physician for professional negligence or malpractice. As in other negligence actions, the plaintiff must show that the doctor owed him a duty which was breached, causing his injury.[19] The duty of a physician is to possess and exercise the skill and learning commonly possessed by members of his profession in good standing.[20] A jury composed of laymen will not know that standard and will require the instruction of experts to explain it.[21] If the plaintiff is unable to find doctors willing to testify, his case must fail.

For a variety of reasons, doctors are seldom willing to testify against a fellow doctor.[22] The advantage of res ipsa loquitur is that the plaintiff does not need expert testimony

18. MORRIS, MORRIS ON TORTS 248 (1953).
19. RESTATEMENT (SECOND) OF TORTS § 281 (1965).
20. Kelly v. Carroll, 36 Wash.2d 482, 219 P.2d 79 (1950).
21. Govin v. Hunter, 374 P.2d 421, 422 (Wyo. 1962).
22. Salgo v. Leland Stanford, Jr. University Board of Trustees, 154 Cal. App.2d 560, 317 P.2d 170 (1957).

to support his claim of negligence where the doctrine applies.[23] However, the doctrine is of limited application in medical malpractice actions.[24] The general rule is that res ipsa loquitur can be involved only where a layman is able to say as a matter of common knowledge that the consequences of the professional treatment were not such as ordinarily would have occurred unless the doctor had been negligent.[25] Wyoming shares the majority view.[26]

EXPANSION OF COMMON KNOWLEDGE

The doctrine of res ipsa loquitur has not remained static over the years.[27] As technology advances and our knowledge increases, a jury is capable of knowing in more situations that an accident does not ordinarily occur unless there has been negligence. Accidents in the field of air travel are one example. Whereas crashes were once commonplace, today they do not ordinarily occur unless there has been negligence.[28] In the malpractice field, the concept of common knowledge of laymen has expanded in scope. Laymen realize that it is negligent for a doctor to leave a sponge in the body

23. Comment, *The Application of Res Ipsa Loquitur in Medical Malpractice Cases, supra* note 11, at 852.
24. Dodson v. Pohle, 73 Ariz. 186, 239 P.2d 591 (1952).
25. Annot., 82 A.L.R.2d 1262, 1274 (1962).
26. McCoy v. Clegg, 36 Wyo. 473, 257 P. 484 (1927).
27. One facet of the doctrine which has undergone significant change in some jurisdictions is that of exclusive control. It is essential to the application of the doctrine that plaintiff show that the instrumentality or agency which produced the injury was under the sole and exclusive management or control of the defendant at the time of the injury. California, a leader in the liberalization of the doctrine in the malpractice field, made a radical departure from the traditional notions of control in the famous case of *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944). A patient who underwent surgery for appendicitis suffered a traumatic injury to his shoulder. None involved would explain. The court held that res ipsa loquitur could be applied against all the doctors and nurses involved, although none of them had exclusive control. The case illustrates a basic reason for liberalizing the doctrine: to force the defendants to either explain or pay. Wyoming has not departed from the stricter notions of control, although Justice Blume, in *Stanolind Oil & Gas Co. v. Bunce*, 51 Wyo. 1, 62 P.2d 1297 (1936), argued in his dissent that the concept of control should be given a broader interpretation. The plaintiff had sued his employer for injuries from an explosion which occurred while plaintiff was trying to light a company gas water heater. Justice Blume thought that where the plaintiff is using the apparatus for the purpose for which it was intended, the doctrine of res ipsa loquitur should be applied. The majority disagreed on the basis that the defendant had not been in exclusive control of the water heater because plaintiff had been manipulating it at the time of the explosion.
28. PROSSER, *supra* note 3, at 216.

of a patient following an operation.[29] A physician's failure to warn a patient who had a portion of her femur removed that she should not lift her leg was held to be negligent and within the common knowledge of the jury.[30]

Idaho and California have been willing to expand or even supplement the common knowledge concept. Concerning injuries from syringe injections, both states have been willing to permit the doctrine even where common knowledge is not enough for the lay jury to know that the accident does not ordinarily occur in the absence of negligence.[31] It was held that the evidence produced may be sufficient for the jury to "learn" that the accident is of a type that ordinarily does not occur without negligence.

An even more notable development has occurred in jurisdictions, such as Wisconsin, which allow the jury's "common knowledge" to be bolstered by the inferences it can draw from expert testimony to the effect that the consequences of treatment are such as would not ordinarily occur if due care had been exercised.[32] The expert does not testify that the specific acts constituted negligence, but only that the injury is of a type which ordinarily does not occur in the exercise of due care.[33]

THE *Keller* DECISION

In *Keller v. Anderson*, the plaintiff sought to invoke res ipsa loquitur. He asked the court to take judicial notice of the fact that when continuous medical treatment is obtained for a broken leg, the result is not amputation unless the physicians failed to exercise ordinary care. The plaintiff argued that an inference of negligence was proper, thus creating a material issue of fact and that it was error for the district court to grant the summary judgment. The

29. Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409, 418 (1936).
30. Kerr v. Bock, 5 Cal.3d 321, 486 P.2d 684 (1971).
31. Clark v. Gibbons, *supra* note 7; Walker v. Distler, 78 Idaho 38, 296 P.2d 452, 458 (1956).
32. Fehrman v. Smirl, *supra* note 8.
33. Comment, *The Application of Res Ipsa Loquitur in Medical Malpractice Cases*, *supra* note 11, at 865.

Wyoming Supreme Court rejected this argument and expressed its desire to follow the general rule in malpractice cases that the plaintiff must prove by expert testimony that the injury was caused by negligence.[34] Where the alleged act is negligent within common knowledge of man, the courts have recognized an exception to this rule. However, the court held that an injury of this nature cannot be understood by laymen; that is, it would not be within the common knowledge of laymen to say that negligence resulted in the amputation. To a certain extent, the *Keller* decision may well recognize the availability of medical experts and the plaintiff attorney's effective use of them.

Another reason given by the court for not allowing the application of res ipsa loquitur was that the plaintiff failed to show a causal connection between the treatment and the bad result.[35] The court had previously held that the doctrine of res ipsa loquitur is not allowed where it is equally reasonable to infer a cause other than defendants' actions.[36] The court in *Keller* also stated that no inferences arise from a bad result alone.[37] It is generally held that res ipsa loquitur has no application when based solely on a bad result.[38] A few jurisdictions have made inroads on this general rule. The Washington Supreme Court held that some results of medical treatment exhibit negligence so plainly that expert testimony was not needed and res ipsa loquitur applied.[39] The injury was due to an improper reduction of a forearm fracture. The California Supreme Court held the doctrine was properly applied based on the bad result when there was evidence of improper treatment as well as a failure to consider alternatives.[40] Tennessee applied the doctrine where the bad result was the loss of an eye during an appendectomy;[41] demonstrating the greater willingness by some courts

34. Keller v. Anderson, 554 P.2d 1253, 1260 (Wyo 1976).
35. *Id.* at 1261.
36. York v. North Central Gas Co., 69 Wyo. 98, 237 P.2d 845 (1951).
37. Stundon v. Stadnik, 469 P.2d 16 (Wyo. 1970).
38. Annot., 82 A.L.R.2d 1262, 1288 (1962).
39. Olson v. Weitz, 37 Wash.2d 70, 221 P.2d 537 (1950).
40. Clark v. Gibbons, *supra* note 7, at 551.
41. Meadows v. Patterson, 21 Tenn. App. 283, 109 S.W. 417 (1937).

to allow the doctrine where the injury was to a portion of the body remote to the area under treatment.[42]

THE *Keller* DECISION: AN OPPORTUNITY LOST?

The doctrine of res ipsa loquitur is undergoing substantial change in some parts of the country. As a result of this change, the doctrine is being applied in a greater variety of factual situations.[43] There is evidence that the proportion of cases in which the doctrine was rejected to the total number of cases in which it was sought did not change significantly between 1951 and 1961.[44] However, it has been more recently said:

> The res ipsa loquitur doctrine in recent years has had a wider and more frequent application in the medical malpractice field. The courts have not only found sufficient facts to meet the special requirements of the doctrine, but have manifested acute awareness of the need to protect an injured patient by requiring the physician to explain the reason for the injury or suffer the penalty of an adverse inference in the absence of such an explanation.[45]

Many courts will today apply the doctrine where traditionally they would not.[46] There are several explanations for this marked expansion of the doctrine. Where res ipsa loquitur applies, the plaintiff need not obtain expert medical testimony to support his claim. If a plaintiff is unable to enlist the support of experts, the application of the doctrine is essential for him to prevail. The doctrine relieves plaintiff of his inability to explain the causes of his injury and, in effect, places the burden of explanation on the defendant. Some courts apply it more frequently where they believe the defendant has more access to information concerning the injury and that he should be required to explain.[47]

42. 2 SPEISER, *supra* note 6, at § 24:1 (1972).
43. Morris, *"Res Ipsa Loquitur"—Liability Without Fault*, 25 INS. COUNSEL J. 97, 118-25 (1958).
44. Comment, *Negligence—Res Ipsa Loquitur—Application to Medical Malpractice Actions:* 1951-1961, 60 MICH. L. REV. 1153 (1962).
45. 2 SPEISER, *supra* note 6, at § 24:1, at 198 (1972).
46. Comment, *The Application of Res Ipsa Loquitur in Medical Malpractice Cases*, *supra* note 11, at 864.
47. *Id.* at 852.

The Wyoming court has rejected the broad judicial expansion of res ipsa loquitur that is occurring elsewhere. There are sound legal principles and policies to justify Wyoming's holding to the stricter view. The practice of medicine is an imperfect art. Medicine has been popularly glamorized and the public tends to overvalue it, holding unfounded expectations as to its abilities. Many medical procedures have inherent risks, including conditions within the body which cannot be detected in advance.[48] It bears repeating that a lack of care is not shown by an accident which occurs in spite of all reasonable precautions.[49] The policy underlying the minority view that defendant has greater access to information is often an erroneous assumption. Often the injury is truly inexplicable, so where the defendant has the burden of explanation he probably will not be able to convince the jury that he was not somehow at fault.

The Wyoming court's view of res ipsa loquitur is consistent with the basic concepts of fault liability, which hold that plaintiff has the burden of proving fault. It is folly to employ procedural devices to shift the burden to defendant because in many cases it will have the effect of creating a "rule of sympathy" and subject the doctor to liability without fault.[50] Allowing the doctrine where there has been an unexpected result would have the effect of stifling the advance of medicine as doctors would not risk innovative procedures where injury would subject them to prima facie liability for negligence.[51] The doctors may come to not only consider the best course of action for their patients but also the procedure that they can most easily justify to a jury. As Chief Justice Traynor of the California Supreme Court said:

> The Latin words cannot obliterate the fact that much of the functioning of the human body remains a mystery to medical science and that risks inherent in a given treatment may occur unexplainably though the treatment is administered skillfully.[52]

48. Clark v. Gibbons, *supra* note 7, at 541.
49. PROSSER, *supra* note 3, at 226.
50. Morris, *"Res Ipsa Loquitur"—Liability Without Fault, supra* note 43.
51. Carpenter v. Campbell, 149 Ind. App. 189, 271 N.E.2d 163 (1971).
52. Clark v. Gibbons, *supra* note 7, at 541.

Wyoming may also have regional reasons for not expanding the doctrine. In a state which has an acute shortage of doctors, there may be public policy reasons for not jeopardizing the medical profession through increased exposure to liability. The expansion and liberalization of the doctrine is a marked departure from traditional legal concepts. To remedy the plight of victimized plaintiffs, a number of jurisdictions have imposed an unfair burden on physicians, distorting the doctrine beyond its original purpose.[53]

CONCLUSION

In *Keller v. Anderson*, the Wyoming Supreme Court reaffirmed its commitment to strictly limit the application of res ipsa loquitur in medical malpractice actions. Plaintiff must prove the negligence of his physician by expert testimony unless it is so obvious as to be within the common knowledge of laymen. The court has indicated no willingness to expand the scope of common knowledge and continues to adhere to the traditional rule that res ipsa loquitur is not applicable when based solely on a bad result.

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53. Ayers v. Parry, 192 F.2d 181, 184 (3d Cir. 1951).