PROFESSOR HUTTER ON EVIDENCE: Using Expert Testimony as a Basis for the Invocation of Res Ipsa Loquitur

By Professor Michael J. Hutter, Jr.

Res ipsa loquitur is a rule of evidence which under appropriate circumstances allows a jury in a negligence action to infer the defendant's negligence from the mere occurrence of an accident and the defendant's relation to that accident. As a result, it is an important evidentiary tool in the trial of negligence actions. In States v. Lourdes Hospital the Court of Appeals held that expert testimony can be used as a basis for the invocation of res ipsa loquitur, a ruling which will inevitably expand the use of res ipsa in future litigation. While States was a medical malpractice action, there is nothing in the Court's decision which holds or indicates that its ruling therein is limited to such actions. This article will explore the States decision and its implications in negligence litigation.

The Doctrine

In a negligence action the plaintiff must ordinarily produce specific proof of the defendant's allegedly negligent conduct in order to prevail. Proof that an accident happened and that as a result the plaintiff was injured is not enough by itself to establish liability for negligence, since, as courts say, "negligence is not presumed" Actions that fit within the res ipsa loquitur doctrine constitute an exception to this rule.

The doctrine of res ipsa loquitur permits an inference of negligence to be drawn by the jury from the very occurrence of a certain type of accident and the defendant's relationship to the accident, notwithstanding the absence of any specific proof of defendant's fault. The essence of the doctrine is that "among all the possible causes of the injury, those which point to the defendant's negligence are so probable, in view of the circumstances of the accident, and those which would exonerate him are so improbable, that it is unnecessary to specify the one that actually led to the occurrence." With this policy basis, res ipsa has traditionally been applied "when the plaintiff can establish three elements: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff."

As can be readily seen, res ipsa rests on an estimate of probabilities. Indeed, its overarching foundation and essential premise is one of probabilities, i.e., res ipsa may be invoked when an accident or injury is of such a nature that it can be said that it was probably the result of negligence by someone and that defendant is probably the one responsible.

Substance: Accident Is One Which Ordinarily Does Not Occur Without Negligence

Res ipsa loquitur's initial element, the accident is one which would ordinarily not occur without negligence, is also its most important element, one that is integral to its theory. Its establishment is necessarily one of proof.

The case law has historically recognized, starting with res ipsa's venerable ancestor, Byrne v. Boodle, and consistently thereafter, that a plaintiff may establish the condition by relying upon the common knowledge or experience of the jury, which is in essence an application of the process of the judicial notice of facts. In this situation, the jury is drawing on the common knowledge and experience it possesses and applying it to the circumstances of the accident for the conclusion of whether or not the accident ordinarily would not occur absent negligent conduct. The premise is that the juror's common knowledge and experience is sufficient to know that, using the facts of Byrne, if flour barrels fall out of a second-story window, striking a person below on the head, someone is probably negligent and that someone is the person controlling the barrels.

Notably, during the evolution of our society from an agrarian one to an industrial and technology-oriented one, the courts in applying res ipsa have likewise recognized the expansion of a juror's common knowledge and experience to encompass such developments. Such evolution has included medical malpractice actions based on the recognition that there are medical and surgical errors on which a juror is competent to pass judgment and conclude from common experience that such errors do not happen if there is no departure from accepted medical care.

With respect to this first condition, it is worthwhile to emphasize that the function of the trial court is to determine in the first instance whether a jury in fact possesses sufficient knowledge or experience to decide if a particular accident or injury would occur without negligence. If the trial court concludes that there is no fund of common knowledge or experience from which the jury could conclude that negligence was the probable cause of the accident, res ipsa is not available. Unlike the situation where the requisite probability of negligence is one within the common knowledge or experience of the jury, if a jury infers negligence on circumstances beyond its common knowledge or
experience, there is an unacceptable risk of injury in its conclusion.

Needless to say, attempting to draw a line between the presence or absence of the requisite juror common knowledge or experience is problematic, given the lack of a definitive standard that can be used to make the distinction. Equally problematic is that a plaintiff is faced with an all-or-nothing situation, i.e., if the trial court determines that it cannot say on the facts before it that the subject accident involves a matter of common knowledge or experience, the plaintiff’s action will invariably be dismissed.

Where it is determined that a juror lacks sufficient common knowledge or experience to make the assessment as to whether the accident in issue does not ordinarily occur without negligence, may res ipsa nevertheless be applied when there is expert proof available to provide for the jury the basis for concluding that the accident would not occur in the absence of negligence? Prior to States, decisions in the Appellate Divisions were in conflict.

Substance: Expansion by States

Plaintiff Kathleen States underwent surgery at Lourdes Hospital for the removal of an ovarian cyst. The cyst was successfully removed. However, plaintiff alleged that during the operation her anesthesiologist caused injury to her right arm.

Prior to the induction of anesthesia, when plaintiff was lying on her back on the operating table, her right arm was extended outward from the operating table upon an arm board at an angle described as "less than 90 degrees". The dorsal surface of her right hand as the site of the intravenous tube used to introduce the anesthesia. Following the induction of the anesthesia, plaintiff was placed in the lithotomy position, prepped, and draped. She was then placed in a steep Trendelenburg position by the anesthesiologist.

It was not disputed that with prolonged stretching muscle or nerve damage with complications may occur, including injury to the brachial plexus. It was also not disputed that the mechanics of plaintiff’s operation were such that, conceivably, the injury could have been produced in the course of that operation. However, there was no specific proof that any such stretching occurred during the operation, as none of the participants had any present recollection of any untoward event which occurred, and none of the medical records disclosed any such occurrence.

Post-surgery, plaintiff awoke, complaining of extreme pain in her right hand, arm, shoulder and side, which intensified in the days following the operation. Plaintiff is now permanently disabled. Physicians examining and treating the plaintiff concluded that plaintiff’s condition is a result of an injury, which they diagnosed as a right thoracic outlet syndrome (a brachial plexus traction injury) and a reflex sympathetic dystrophy, which they concluded occurred during the course of the surgery. Prior to her surgery, plaintiff experienced no known neurological difficulties in her right side, shoulder or arm.

In her medical malpractice action against the anesthesiologist, plaintiff alleged that prolonged extension or hyperabduction or other lack of care for her right arm was the cause of her injury, which has produced a painful and permanent disability affecting her right upper arm. She further alleged that the anesthesiologist, and not the surgeons or the hospital, had the responsibility to observe plaintiff’s right arm during the operation and the duty to protect the arm from harm, including a brachial plexus traction injury. While the anesthesiologist did not dispute this responsibility on his part, he denied that plaintiff’s right arm had become hyperabducted or stretched at any time during the surgery.

Upon the close of discovery, the anesthesiologist moved for summary judgment. The basis for the motion was that there is an absence of evidence of any negligent act on his part, i.e., that plaintiff’s arm became hyperabducted or was otherwise stretched. He further argued that res ipsa was unavailable to plaintiff. In opposition, plaintiff submitted affidavits from four physicians. It was their expert medical opinion that the injuries that plaintiff sustained do not occur during the type of surgical procedure she underwent without a deviation from accepted medical care, which would be the failure of the anesthesiologist to maintain and protect the position of plaintiff’s right arm during the surgery. Plaintiff contended that this testimony could be used by a jury in support of the application of the doctrine of res ipsa. Notably, plaintiff did not dispute that the jury did not have sufficient knowledge or experience to determine on its own whether her injury was one that would not occur absent negligence on the part of the anesthesiologist.

Supreme Court denied the anesthesiologist’s motion for summary judgment. In its view, plaintiff properly invoked the res ipsa doctrine. Supreme Court specifically found that plaintiff could rely upon her expert medical testimony to establish that her injury would not have occurred in the absence of the anesthesiologist’s malpractice.

On appeal to the Appellate Division, Third Department, Supreme Court’s order was reversed, and defendant’s motion for summary judgment granted. In a 3-2 decision,
the majority held that plaintiff could not rely upon the doctrine because the jury could reasonably draw upon its past experience for the conclusion that it would not have occurred absent negligence and thus satisfy res ipsa's first element. In reaching that conclusion, the majority specifically rejected the contention by plaintiff that her medical testimony could be utilized to establish that first element. The dissenters were of the view that plaintiff could properly rely upon expert testimony to establish the doctrine's first element. In their view, as the expert testimony established that it is common knowledge within the medical community that the type of injury sustained by plaintiff does not occur in the absence of malpractice, there was no basis in the policy underlying res ipsa to require its rejection.

The Court of Appeals reversed, rejecting the Third Department's majority's argument that expert testimony has no place in a res ipsa case because the res ipsa inference must be based on the juror's own life experience. Instead, the Court held that whether the requisite proof required to evaluate the probability of negligence inferred from an accident comes from the juror's own common knowledge or experience or from expert testimony is irrelevant for the purposes of the invocation of res ipsa. The issue is whether that accident would ordinarily occur in the ordinary course of events.21 The Court explained:

In an increasingly sophisticated and specialized society such as ours, it is not at all surprising that matters entirely foreign to the general population are commonplace within a particular profession or specially trained segment of society. The fact that the knowledge is specialized, however, does not alter its pervasive nature among those with the proper training and experience. As the New Jersey Supreme Court stated, the expert testimony to the effect that those in a specialized field of knowledge or experience consider a certain occurrence as indicative of the probable existence of negligence is at least as probative of the existence of such a probability as the 'common knowledge' of lay persons.22

Lest there be any doubt as to its holding, the Court concluded: "[E]xpert testimony may be properly used to help the jury 'bridge the gap' between its own common knowledge, which does not encompass the specialized knowledge and experience necessary to reach a conclusion that the occurrence would not normally take place in the absence of negligence, and the common knowledge of physicians, which does."23

The Court of Appeals in its decision in States has squarely resolved the issue that had divided the Appellate Divisions, and that had been specifically left open in its own decision in Kambat v. St. Francis Hospital.24 The Court also aligned New York with the majority of jurisdictions considering the issue and with the position of the Restatement (Second) of Torts Section 328D, comment d.25 Most importantly, it is consistent with the view that res ipsa is nothing more than a way of allowing a plaintiff to establish negligence by circumstantial proof; in cases like States, the factual assumption connecting the accident, to the negligence, is provided by expert, rather than lay, i.e., juror, knowledge or experience.26

Aftermath of States

There can be no doubt that States has provided the basis for a wider and more expansive use of res ipsa in negligence litigation. Several aspects of this broader use can be noted.

First, obviously, the States holding is applicable in all medical malpractice litigation. It should make no difference whether the complained of injury occurred during surgery or post surgery, or in non-surgical situations.27

Secondly, there is nothing in States which suggests that the Court of Appeals is limiting its holding to medical malpractice actions. Indeed, since its holding is that expert testimony is admissible to establish the first condition so long as the expert testimony establishes that it is common in the respective field that the accident would not happen in the absence of negligence, there is no reason to limit the holding to medical malpractice actions. Thus, there should be no reason why the States holding could not be applied in, for example, products liability actions.

Lastly, the decision in States could lead to the Court of Appeals revisiting the two other elements of the doctrine.28 In that regard, the element of "exclusive control" and "absence of contributory negligence" have been questioned, as well as criticized.29 To be sure, the Court in States cautioned that even under its holding, the plaintiff "must still establish the other requirements of res ipsa loquitur -- exclusive control and absence of contributory negligence -- before the inference will be permitted."30 However, this language is dictum, and should not bar in future cases a critical analysis of those two other elements of res ipsa.

Procedure

Notably, the procedural effect of res ipsa when invoked, the creation of an inference rather than a presumption, was left intact in States.31 This point had clearly been established by the Court of Appeals in Foltis, Inc. v. City...
of New York. There the Court held that the invocation of res ipsa was prima facie evidence of negligence, requiring denial of the defendant's motion to dismiss the complaint, but that the plaintiff was not thereby entitled to a directed verdict if the defendant failed to contradict or rebut the prima facie case presented. In other words, "Submission of res ipsa loquitur merely permits the jury to infer negligence from the circumstances of the occurrence. The jury is thus allowed -- but not compelled -- to draw the permissible inference." Thus, res ipsa neither imposes a burden of production on the defendant nor shifts the burden of persuasion to the defendant.

Defendant may, of course, offer evidence to controvert the plaintiff's proof on any of res ipsa's three elements. It will be for the jury, and not the court, to find whether those elements are present. The jury will be charged that if it credits the plaintiff's proof on these elements, it may, but is not required, to infer negligence. Similarly, the defendant may offer evidence to rebut the inference of negligence upon plaintiff's proof invoking res ipsa. In such situation, the jury will then be charged that it should consider that evidence, together with the plaintiff's evidence and the permissible inference provided by res ipsa, to determine whether the plaintiff has met its burden of proving by the preponderance of the evidence that defendant's negligence caused plaintiff's injury. It is only where the defendant's evidence conclusively establishes that it is improbable that plaintiff's injury was sustained through negligence of the defendant that the case is taken away from the jury.

While there is no per se bar to the utilization of res ipsa on summary judgment motions by a plaintiff, the inference of negligence created by its application, even when not rebutted by defendant, ordinarily is insufficient to warrant the establishment of liability as a matter of law on the motion. However, where the inference of negligence is "inescapable" from the application of res ipsa, summary judgment establishing liability as a matter of law may be granted.

Conclusion

The Court of Appeals decision in States is an important and significant one. The decision is important because it allows expert testimony to be used to provide a basis for the jury to determine that an accident would normally not occur in the absence of negligence, thus allowing res ipsa to be invoked. In recognizing that the admissibility of expert testimony does not fit within the res ipsa doctrine as originally formatted in 1863 hardly compels now the rejection of the use of expert testimony to aid a jury in determining whether an accident would normally not occur in the absence of negligence. This is clearly indicates the willingness of the Court of Appeals to reshape its common law rules to deal with changing circumstances in society as a whole.

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Notes

1. See, e.g., Kambat v. St. Francis Hosp., 89 NY2d 489, 494, 655 NY2d 844, 846 (1997); Dermatossian v. New York City Trans. Auth., 67 NY2d 219, 226, 501 NYS2d 784, 788 (1986); Richardson, Evidence (10th ed) §3-142; Restatement (Second) of Torts §328D.
3. 100 NY2d 208, 762 NYS 1 (2003).
9. See, Martin, Capra & Rossi, NY Evidence Handbook (2d ed) §3.2.7 at pp.81-84; Morris, Res Ipsa Loquitur in Texas, 26 Tex. C. Rev. 257, 260 (1948).
12. Id.
13. See, Moore, supra n. 2 at §20.3 (collecting cases); Prosser and Keeton, Torts (5th ed.) at pp. 246-247.
the rear area of the plaintiff’s right upper thigh during orthoscopic knee surgery); Fogal v. Genesee Hosp., 41 AD2d 468, 344 NYS2d 552 (4th Dept. 1973) (frostbite and subsequent amputation of part of both feet due to malfunction of cooling blanket during operation).


17. Compare, Kambat v. St. Francis Hosp., 89 NY2d 489, 655 NYS2d 844, supra, with Kambat v. St. Francis Hosp., 226 AD2d 1059, 641 NYS2d 943, [4th Dept. 1996]; see also 4 Harper and James, Law of Torts, Sec. 19.6A, at 42 ["this general test is capable of flexibility, for who can delimit with certainty the fee in which a layman is capable in making the required judgment"]


21. 100 NY2d at 212-213, 762 NYS2d at 3-4, supra.

22. Id. at 213, 762 NYS2d at 4 (citations omitted).

23. Id. at 212, 762 NYS2d at 3-4.

24. 89 NY2d at 497, 655 NYS2d at 847, supra.

25. 100 NY2d at 212n., 762 NYS2d at 4n., supra.


27. See, Rogak, supra n. 18 at 31.

28. Id.

29. See, Martin, supra, n. 26 at p.5.

30. 100 NY2d at 123, 762 NYS2d at 4-5, supra.

31. 100 NY2d at 214, 762 NYS2d at 5, supra.

32. 287 NY 108, 38 NE2d 455 (1941).

33. Id. at 117-118, 122, 38 NE2d at 461, 463.

34. Kambat v. St. Francis Hosp. 89 NY2d at 495, 655 NYS2d at 846, supra.

35. See, Martin, Capra & Rossi, supra n.9, at p. 83.


37. Id. See also Fogal v. Genesee Hosp. 41 AD2d 468, 476, NYS2d (4th Dept. 1973) (Simons, J.).

38. Ibid.
