MEDICAL MALPRACTICE SUIT AND THE APPLICABILITY OF THE DOCTRINE OF RES IPSA LOQUITUR: HOW FAR TO GO?

Written by **Dr Rajib Majumdar* & Abhishek Majumdar****

* Medico Legal Consultant Amity Institute of Advanced Legal Studies Amity University Noida

** Symbiosis Law School Noida, Symbiosis International (Deemed) University

Abstract

According to Black's Law Dictionary[1] Res Ipsa Loquitur, a Latin maxim implies "the thing speaks for itself". This is an important doctrine of Tort Law, wherein the factual aspects of a happening are so evident so as to speak for itself. When this is extended and applied to a case of a medical negligence in certain very obvious cases whereby the negligence glaringly speaks for itself, substantiates this maxim.

Key Words: Medical, Negligence, Tort Law, Res Ipsa Loquitur.

Introduction

Medical Malpractice is professional negligence.[2] 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[3]. 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

[1] Bryan A. Garner, Black's Law Dictionary, Thomson Reuters, Tenth Edn., 2014, pp. 1503.
[2] Camps F Eed Gradwohl, Legal Medicine, John Wright & Sons Ltd., Bristol 3rd ed., 1976.
[3] Pike v. Honsinger, 155 NY, 201, 49 N.E. 760 (1898).

patient for his conduct[4]. He is, however, not liable for a mere error of judgment.[5] 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[6]. 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[7]. Thus, mistaken diagnosis alone is not sufficient to establish a case, nor is it sufficient to show the mere occurrence of an undesirable result.[8]

Applicability of Res Ipsa Loquitur

Studying the past events it can be inferred that the precept in Res ipsa loquitur can be applied in medical malpractice suits only where the carelessness of the qualified medical practitioner is based upon the common facts as understood by a person of common intellect[9]. 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. The fact that res ipsa loquitur was applied in Surgical cases where initially to drain a fluid or pus, a drainage tube was inserted in the body, and was accidentally left behind, dated back to the year 1912[10]. A decade later the doctrine was applied in dealing with injury to a portion of the body remote from the site of the operation.[11]

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.[12] It is often seen that common errors of diagnosis or treatment leading to unforeseen results actually cannot be construed on first instance as an obvious indication of malpractice.[13] This may lead to a very unfortunate incidence where an unsuspecting victim of professional negligence may not be compensated in a Court of Law. Prosser has summed up the situation as follows: "[Court]

[4] J Hureau and P Hubinois, Medical Liability Compensation for personal injury in Europe, 189(5), Bull Acad Med 815-28, 2005.
[5] Mongensen v. Hicks, 253 Iowa 139, 110 N.W. 2d 563, 1961.
[6] Hazelwood v. Adams, 245 N.C. 398, 1957.
[7] Prosser, Torts, 264 Ky. 378, 94, S.W. 2d 626, 1936.
[8] State of Punjab v. Shiv Ram , 2005 7 SCC.
[9] Evans v. Munro, 83 A. 82 (R.I. 1912).
[10] Brown v. Shortlidge, 98 Cal. App 352, 277 P.134, 1929.
[11] Vergeldt v. Hartzel, 1 F, 2d 633, 8th Cir, 1924.
[12] M Mello Michelle, The Medical Liability Climate and prospects for reforms, 312 JAMA, 2146-55, 2014.
[13] ibid.

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."[14]

Expert Testimony and a Gap in Evidence

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.[15] 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.[16] 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."[17] 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, 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.[18] Recognizing that it is not always a simple matter to procure a doctor to testify and condemn in open court the practice of another.[19] New York's high court, in McDermott v. Manhattan Eye, Ear and Throat Hospital[20], has recently joined the courts of a growing number of states which permit the plaintiff to examine the defendant's doctor not only on "facts" but, in addition, on the defendant doctor's concepts of accepted standards of medical practice in the community.[21]

[14] Supra note 7.
[15] Prosser, Selected Topics on the Law of Torts 346, 1953.
[16] Lambert, Res Ipsa Loquitur As Applicable in Cases of Injury by X-Ray, 24 NACCA L.J. 31, 1959.
[17] Dayal Singh v. State of Uttaranchal, 2012 8 SCC 263.
[18] Reynolds v. Struble, 128 Cal. App. 716 18 P. 2d 690, 1933.
[19] Supra note 16.
[20] McDermott v. Manhattan Eye, Ear and Throat Hospital, 15 N.Y. 2d 20, 203 N.E. 2d 469, 1964.
[21] R M Veatch, Professional Medical Ethics: The grounding of its principles, 4, The Journal of Medicine and Philosophy, 1-19, 1979.

Pre-Trial Depositions and Deviation from Accepted Practices

It is, therefore, now possible in many jurisdictions to conduct pre-trial depositions of the defendant doctor in order to ascertain the accepted medical practice and deviation there from.[22] 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.[23] Under the more enlightened decisions it is possible to use standard medical texts and treatises on a given subject to great advantage.[24] 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.[25] While decisions such as McDermott[26] tend to ameliorate the problem, they do not cure it. As the court in McDermott[27] 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. It therefore becomes quite apparent that the courts must go much further in assisting the victim of the "bad result."[28] The layman, be he attorney or client, is not the equal of the specialist whose treatment and care resulted in crippling deformities. It is, in this way, more pressing that the convention of res ipsa loquitur be utilized as a part of therapeutic negligence cases than in some other sort of legitimate activity.[29] It ought to be recalled that this regulation does not guarantee triumph for each situation for the offended party.[30] Rather, upon establishing certain of the requisites which will be managed later, the offended party is simply managed a chance to have the case chose by a jury.[31] 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 to the plaintiff was in no way lacking and did, in fact, conform with the standards which the medical profession has itself determined.[32] By the way of functioning of the principle of Res Ipsa Loquitur, the onus of description, existentially is made expedient to the party which is in the best position to furnish

[22] Louisell & Williams, Trial of Medical Malpractice Cases, 424-24, 1966.
[23] Supra note 20.
[24] Richardson, Richardson on Evidence, 391(b), 9th Edn., 1964.
[25] Supra note 4.
[26] Supra note 20.
[27] Supra note 20.
[28] Petersburg v. Ferguson, 193 So. 2d 648, Fla, 1967.
[29] Res Ipsa Loquitur-Liability without Fault, 163 J. Amer. Med. Ass 1055, 1957.
[30] Supra note 29.
[31] Supra note 28.
[32] Supra note 21.

a complete detailing of the fact as it exists and to give a complete description of the happening.[33]

Enlarging the Horizon of Res Ipsa Loquitur in Medical Malpractice Case

It has now become expedient to enlarge the horizon of the doctrine of Res-Ipsa-Loquitur in cases of medical negligence so that the society at large is in a position to judge whether the quality check by the medical fraternity upon itself is congruent to the one which the society has entrusted it to be.[34] Abortive legal actions and dismissals of cases which involve serious crippling and impairment cannot be tolerated by the public indefinitely.[35] 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.[36] "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."[37] 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.[38] 'Perhaps the greatest impetus for the application of this doctrine to medical malpractice is found in Ybarra v. Spangard,'[39] 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, anaesthetist, 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: "Proof of the receipt of a traumatic injury during the unconsciousness of anaesthesia was sufficient to make a prima facie case against all the defendants under the rule of res ipsa loquitur."[40]

Application of Traditional Criteria to a Specific Medical Malpractice Situation

[33] Hastings v. Chrysler Corp., 273 App. Div. 292, 77 N.Y. S.2d S24, 1948.
[34] Dinner v. Thorp, 54 Wash, 2d 90, 338 P. 2d 137, 1959.
[35] Supra note 24.
[36] Supra note 24.
[37] Supra note 4.
[38] Darshan Singh v. Pawan Bansal, 2012 (2) CPJ 643 (NC).
[39] Ybarra v. Spangard, 93 Cal. App. 44, 45, 208 P.2d 445, 446, 1940.
[40] ibid.

In Matlick v. Long Island Hospital[41], 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 physician and other co-workers while present in the same operation theatre as where the patient is in attendance for undergoing surgery under anaesthesia and the latter develops a neurological injury by the application of an extraneous force which is not at tandem with the trauma in force[42]. This case serves to demonstrate the application of the traditional criteria to the specific medical malpractice situation.[43] 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.[44] 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.[45] Surely a patient under anaesthesia 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.[46] Thus, certain hazards might arise every time a person is placed under anaesthesia and subjected to the scalpel. This is and should be beside the point, an important consideration wherever and whenever a patient under treatment is subjected to a certain risk and the comparative benefit that the patient is likely to get out of such an endeavour. 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.[47]

[41] Matlick v. Long Island Hospital, New York Supreme Court, 25 App. DW 2d 538 (N.Y. 1960).
[42] Supra note 41.
[43] Supra note 41.
[44] Supra note 41.
[45] Maynard v. West Midlands Regional Health Authority, 1 All ER 635 (1985).
[46] Donald Schon, The Reflective Practitioner: How Professionals think in action, Basic Books New York 66, 69 (1983).
[47] Code of Ethics of Medical Council of India.

Remote Cause Doctrine versus Res Ipsa Loquitur

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.[48] One doctor might well say that anything within a radius of "X" centimetres is in the operative field. A typical circumstance which additionally requires the utilization of the doctrine of res ipsa loquitur is one in which the specialist sanctions an erdain which is contradictory to the patient's history of tolerance of a medication.[49] 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.[50] 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.[51] 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 " It should be noted that since the right to rely upon res ipsa loquitur is lost just if the confirmation completely clarifies the carelessness, it is astute to argue general carelessness with dependence upon res ipsa loquitur and in addition particular carelessness.[52]

Factual Situations where Res Ipsa is Evident

A formal examination of true circumstances where the precept of res ipsa loquitur has been connected in therapeutic negligence cases abundantly exhibits the appropriateness of this regulation to this territory of law. Along these lines, where a patient under sedation dropped out of bed and broke jaw, it was held to be a mistake to decline to give a charge on res ipsa loquitur. [53] The precept was additionally held pertinent where a bit of bandage was left in an injury bringing about an abscess. With regards to the present status of the law, it merits rehashing that res ipsa loquitur is material to medical negligence cases which include outside articles left in a man's body and in cases including awful damage amid surgery to a region of the body remote from the agent site, as where a segment of the body not expected to be removed

[48] McDonald v. Foster Memorial Hospital, 170 Cal. App 2d 85, 338 P.2d 607 (1959).
[49] Avadh Hospital and Art Centre and another v. Mrs. Mugdha Paul, 2005 CTJ 1130 (NC).
[50] Achutrao Haribhan Khodwa and Others v. State of Maharashtra & Others, 996 CTJ 950 AIR 1996 SC 2377.
[51] Foltis v. City of New York, 287 N.Y. 108, 38 N.E. 2d 455 (1948).
[52] Supra note 51.
[53] Ganta Mohana Laxmi v. Dr C. V. Ratnam and another, 2002 (2) CPJ (144) (NCDRC).

is negligently removed.[54] 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.

Informed Consent and Res Ipsa Loquitur

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.[55] As has been illustrated, there are as of now perceived classifications of medical negligence cases wherein the precept of res ipsa loquitur will be connected. 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.[56] 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 anaesthesia, the patient becomes palsied or crippled; where an operative incision opens up after a patient leaves her bed under orders of her physician?[57] Such concepts as informed consent and wilful 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.[58] 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 diplomats and specialists, colleagues and superiors.[59]

Conclusion

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

[54] Galbraith v. Busch, 267 N.Y. 230, 196 N.E. 36 (1935).
[55] Stokes v. Dailey, 85 N.W. 2d 745 (N.D. 1957).
[56] Supra note 55.
[57] Griffin v. Norman, 192 N.Y.S 322.
[58] Bolam v. Friern Hospital Management Committee (1957) 1 W.L.R. 582,586.
[59] Supra note 58.

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.[60] 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, the application of res ipsa loquitur would be a prevarication of law and may heap upon the defendant an uncanny burden of unfounded guilt which actually does not exist. It is therefore, to be submitted that the doctrine of res ipsa loquitur as applied in a case of medical malpractice suit should be a last resort of proving the actual or intended negligence because the evidentiary value of a fact or a testimony needs to withstand a standard scientific reasoning and not just a frivolous justification in favour of the plaintiff.

[60] Davidson v. Bernard McFadden Foundation, 4 App. Div. 3d 978, 167 N.Y.S 2d 784 (1957).