

LAW AND MEDICINE

The Thing Speaks for Itself (*Res Ipsa Loquitur*)

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The doctrine of *res ipsa loquitur* assists the Plaintiff to prove negligence.

CASE 1: In 2001, a patient underwent laparoscopic abdominal surgery and discharged home the same day. Later that day, she returned to the Hospital complaining of pain in her right shoulder. The diagnosis was Type II posterior labral tear injury to her shoulder. She sued the Hospital for malpractice claiming that she had sustained the shoulder injury during the surgery, while she was unconscious, and as a result of Hospital's negligence.¹

At trial, in 2006 and 2007, the patient, Plaintiff, testified that she had sustained no pre-operative injury, had no pre-operative pain in the shoulder, and doctors had examined her shoulder four days before the surgery and found no injury, swelling, or tenderness. However, she presented no direct evidence that any Hospital employee dropped her arm during the surgery or otherwise caused her injury and that her injury was caused to a reasonable degree of medical certainty by Hospital negligence.

The Hospital denied negligence and claimed that it used due care to prevent such an injury. The Hospital expert witness testified that the evidence relating to the patient's shoulder injury was inconsistent with an arm dropping injury during surgery, and that her shoulder pain was a classic referred pain from the surgery itself.

At the conclusion of the trial, the Judge found in favor of Hospital and stated that, "As of this time, the plaintiff has come nowhere close to persuading the trier of fact (Jury) that an accident occurred while Ms. Norman was under the defendant's control."

On Appeal, the Oklahoma Court of Civil Appeals stated that "the doctrine of *res ipsa loquitur* was designed to aid plaintiffs in making a *prima facie* case of negligence where direct proof was beyond their power and control, but within the power of the defendant. This is precisely the type of case for which the rule was designed: Plaintiffs presented proof that Rhonda was unconscious when she sustained her injury, and direct proof of the event was solely within the power and control of Hospital. Common knowledge infers negligence from these facts. The Court reversed and remanded the case for a new trial.

CASE 2: In 1999, Plaintiff Parris was discovered to have a positive prostate specific antigen (PSA). Needle biopsy of his prostate revealed adenocarcinoma and high-grade prostatic

intraepithelial neoplasia, and underwent a radical prostatectomy. Five-year follow-up with frequent PSA tests were negative.

On September 2, 2004, the patient obtained his medical records and found a report dated October 26, 1999, from the surgical pathologist advising the urologist that he had examined patient's removed prostate three days after the prostatectomy and found no sign of cancerous cells in the prostate. The report indicated that the pathologist had discussed his findings with the urologist on the day of his original examination and, again, on the day he issued his written report. According to patient, the urologist never advised him of the pathology findings.

The patient sued the doctors and the hospital malpractice.² He alleged that the Defendants were negligent in conducting the biopsy and examination which resulted in the diagnosis of cancer, that the pathology slides of the biopsy were in the exclusive custody of the defendants, that these slides were "negligently mismarked, misidentified or misread which ordinarily does not occur in the absence of negligence," and that the urologist had intentionally concealed the information that Plaintiff's prostate was cancer-free, thereby preventing Plaintiff from discovering Defendants' negligence until September 2004.

During the course of the litigation, the Plaintiff filed a motion requesting to proceed without a medical expert, citing the doctrine of *res ipsa loquitur* as authority. The trial court denied the motion and ordered the Plaintiff to name an expert within 30 days. The Plaintiff responded that an expert witness was not necessary to make a prima facie showing of Defendants' negligence, but, if it was, then the pathologist would be his expert. The Defendants obtained an affidavit from the pathologist stating that he had not agreed to be the Plaintiff's expert, and that "[i]t is known and reported in the pathology literature that a needle biopsy will demonstrate cancer but a later surgical prostate specimen could show little or no signs of the malignancy." The trial court granted the motions to dismiss.

On appeal, the case was reversed and remanded for further proceedings, because an expert witness was not necessary for Plaintiff to prove malpractice, and in this particular situation the surgical pathologist may be compelled to testify on behalf of Plaintiff.

¹ *Norman v. Mercy Memorial Health Center, Inc.*, 2009 OK CIV APP 55 (Okla. Civ. App., 2009)

² *Parris v. Limes*, 2009 OK CIV APP 19 (Okla. Civ. App., 2009)