The limited use of inferred negligence in medical cases

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With the doctrine *of res ipsa loquitur,* negligence can be inferred in situations in which there is no direct evidence of negligence or wrongdoing. In the context of health care liability claims, a *res ipsa loquitur* allegation may cause a health care provider some degree of anxiety because expert testimony on the applicable standard of care and a breach of that standard of care is not necessary. Concern about *res ipsa loquitur* allegations in a health care liability claim is often needless, given that this doctrine has limited applicability in such circumstances.

Res ipsa loquitur is not a cause of action but a rule of evidence (1). For *res ipsa loquitur* to be applicable, the claimant must produce evidence from which a lay jury could conclude, by a preponderance of evidence, that the incident resulted from negligence and was the responsibility of the defendant (2–4). The Texas Pattern Jury Charge, which is used by lawyers and judges to determine the appropriate submission of issues to a jury at trial, proposes the following model instruction to assist the jury in answering whether there was negligence in a *res ipsa loquitur* case:

> In answering this question, you may infer negligence by a party but are not compelled to do so if you find that 1) the character of the occurrence is such that it would ordinarily not happen in the absence of negligence and 2) the instrumentality causing the occurrence was under the management and control of the party at the time the negligence, if any, probably occurred (5).

While *res ipsa loquitur* eliminates the need for expert testimony on the standard of care and the fact that the standard of care was breached, it does not eliminate the claimant's need to establish causation (6). As discussed in previous articles, causation must be shown through expert testimony. Additionally, while the likelihood of other potential causes of the injury does not have to be completely ruled out, it must be "so reduced that the jury can reasonably find by a preponderance of the evidence that the negligence, if any, lies at the defendant's door" (7). Thus, while expert testimony as to negligence is not necessary, the claimant must still provide evidence that establishes the factual requirements already discussed, as well as proximate cause (8).

Application of *res ipsa loquitur* in medical negligence actions is governed by Section 7.01 of Article 4590i of the *Texas Revised Civil Statutes Annotated*. While Section 7.01 recognizes that *res ipsa loquitur* can be used in a health care liability claim, the statute limits the application of this doctrine to those instances in which it had been applied in medical negligence cases by Texas appellate courts up to August 29, 1977 (9). In review of Texas authority before August 1977, as a general rule, *res ipsa loquitur* was not applicable in medical malpractice cases (10) except in those in which the physician left surgical instruments or supplies inside a patient's body or operated on the wrong part of the patient's body (11).

In 1990, the Texas Supreme Court addressed the applicability of *res ipsa loquitur* in medical malpractice cases. The court held that in order for *res ipsa loquitur* to apply, "unaided laymen must be able to determine that negligence must have occurred from their common knowledge, and not solely through the aid of an expert" (12).

For *res ipsa loquitur* to apply to a claim that the physician operated on the wrong part of the patient's body, the evidence must establish that the doctor intentionally operated on the wrong part of the body under the mistaken impression that he or she was operating on the correct part of the body. For example, *res ipsa loquitur* was found applicable in a situation in which the surgeon specifically identified a symptomatic lipoma he was to remove but instead removed a different lipoma (13). *Res ipsa loquitur* is not applicable to a situation in which damage was done during surgery to structures or tissues that were in the area of the surgery performed. Specifically, *res ipsa loquitur* did not apply in a case of injury to the iliac artery and vein adjacent to where disk surgery was being performed (14).

Most of the reported health care cases that reviewed possible application of *res ipsa loquitur* involved patients who sustained injuries due to the alleged misuse of mechanical instruments. *Res ipsa loquitur* applies to these situations only if a lay person could determine the existence of negligence from his or her common knowledge. If proper use of the instrument in question requires special training and experience, the use is not considered lay knowledge, and the doctrine of *res ipsa loquitur* is not applicable.

As a practical matter, the use of medical equipment almost always requires special knowledge and training. For example, in *Wendenberg v. Williams*, the court held that using an instrument known as a pituitary rongeur to "grip" and "bite" tissue during back surgery required extensive training and was not within the common knowledge of a lay person. Thus, *res ipsa loquitur* was not applicable (15). Similarly, courts have held that *res ipsa lo-*

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quitur does not apply to the use of a flexible colonoscope (16), use of a phacoemulsification machine (17), administration of anesthetics by hypodermic needle (18), administration of contrast dye for arteriogram and aortogram by hypodermic needle (19), utilization and placement of an arterial line (20), use of a high-speed rotary dental instrument (21), and use of an intravenous line to administer therapy to an infant (22).

Res ipsa loquitur has been found to apply in circumstances in which a surgical sponge or other operative equipment has been left inside the patient. *Schorlemer v. Reyes* involved a sponge left in the patient's abdomen during surgery to remove an ovary, fallopian tube, and appendix. Despite the testimony of 2 assisting nurses that the sole responsibility for removal of surgical sponges rested with them, the court held that *res ipsa loquitur* applied against the surgeon. This decision was based on 3 factors. First, the surgeon testified that the sponges were under his management and control during the surgery. Second, the plaintiffs' expert testified that the surgeon had control of the sponges during the procedure; that, even though nurses perform the ancillary function of sponge counting, ultimate responsibility for sponge removal lies with the surgeon; and that the surgeons generally follow a personal routine of insertion and removal to ensure that no sponge is left behind. Third, the defense expert testified that it was the responsibility of the surgeon to make sure that everything was removed from the patient (23).

In *Schorlemer,* the defendant argued that a previous Texas Court of Appeals held that *res ipsa loquitur* did not apply to a similar situation in which a sponge was left in the patient (24). The court in *Schorlemer* held that this other case was distinguishable, since the only evidence was affidavit testimony that the nurses bore responsibility for counting the sponges, pursuant to hospital policy, and that the surgeon was not even in the operating room when the patient's incision was closed. Since the patient produced no evidence to controvert the surgeon's proof and show his responsibility, the court found that the plaintiff had not met her burden to establish that *res ipsa loquitur* was applicable. In *Schorlemer,* the surgeon admitted that the sponges were under his management and control, that he put them in and removed them, and there was expert testimony that the surgeon was ultimately responsible for ensuring that the sponges were removed. Thus, there was some evidence that he maintained control of the sponges, which rendered submission of an instruction on *res ipsa loquitur* appropriate (23).

Another circumstance in which *res ipsa loquitur* applies is when a broken piece of a mechanical instrument is left inside the patient's body. In *Steinkamp v. Caremark,* the court held that *res ipsa loquitur* applied to a situation in which a nurse inserted into the patient's arm a catheter that began to disintegrate into the vein. The patient then had to undergo surgery to remove the catheter fragments. The court held that this case differed from the cases cited above that involve the use of mechanical instruments and that it did not take a medical expert to know that a piece of medical equipment is not supposed to break and remain inside the patient's body (25).

The defense in the *Steinkamp* case argued that previous case law precluded application of *res ipsa loquitur* to this circumstance. The defense cited the case of *Arguello v. Gutzman* as support for its position. In that matter, while the patient's knee was being operated on, one of the surgical instruments broke and dropped into the patient. The surgeon was unable to locate that broken piece through arthroscopic visualization or x-rays and, therefore, had to perform an arthrotomy to find and retrieve the broken instrument (26). The court of appeals in *Steinkamp* held that the claim in *Arguello* pertained only to the physician's use of a mechanical instrument and not to the additional assertion that the physician's act of leaving a foreign object in the patient was the basis of a request for *res ipsa loquitur* instruction. Thus, in *Steinkamp,* since the catheter was undisputedly under the nurse's management and control when it broke off, and since expert testimony was not needed to establish that a surgical instrument should not remain inside the body, *res ipsa loquitur* could be utilized to establish that claim (25).

Review of the case law that pertains to *res ipsa loquitur* clearly shows that *res ipsa loquitur* is applicable only to specific circumstances in health care liability claims. From the current case law, its use appears to be limited to situations in which the wrong part of the body is operated on or surgical equipment is left in the patient. While the fact that expert testimony is not necessary to establish negligence in these circumstances might appear to be concerning on its surface, as a practical matter, it would probably not be difficult to obtain a credible expert to testify as to negligence in those circumstances. Moreover, in those circumstances an experienced and competent lawyer would probably obtain an expert witness anyway. Thus, the inclusion of the *res ipsa loquitur* instruction is probably not of much consequence to the defense of the case.

1. *Haddock v. Arnspiger,* 793 S.W.2d 948, 950 (Tex. 1990).
2. *Honea v. Coca Cola Bottling Co.,* 183 S.W.2d 968, 969 (Tex. 1894).
3. *Haddock,* 793 S.W.2d at 950.
4. *Soto v. Texas Industries, Inc.,* 820 S.W.2d 217, 219 (Tex. App.—Fort Worth 1991, no writ).
5. Texas Pattern Jury Charges, Malpractice, Premises and Products, PJC, Section 51.9 (2000).
6. See *Roark v. Allen,* 663 S.W.2d 804, 811 (Tex. 1982).
7. *Porterfield v. Briengar,* 719 S.W.2d 558, 559 (Tex. 1986) (citing *Mobil Chemical Co. v. Bell,* 517 S.W.2d 245, 251 [Tex. 1974]).
8. *Rayner v. John Buist Chester Hospital,* 526 S.W.2d 637, 639 (Tex. Civ. App.—Waco 1975, writ ref'd nre).
9. Tex. Rev. Civ. Stat. Ann., Article 4590i, Section 7.01 (Vernon's Supp. 2000).
10. *Harle v. Krchnak,* 422 S.W.2d 810, 815 (Tex. Civ. App.—Houston [1st District] 1967, writ ref'd nre).
11. *Sullivan v. Methodist Hospital of Dallas,* 699 S.W.2d 265, 267 (Tex. App.—Corpus Christi 1985, writ ref'd nre).
12. *Farr v. Wright,* 833 S.W.2d 597, 600 (Tex. App.—Corpus Christi 1992, writ denied) (citing *Haddock,* 793 S.W.2d at 951).
13. *Manax v. Ballew,* 797 S.W.2d 71, 72–73 (Tex. App.—Waco 1990, writ denied).
14. *Wendenberg v. Williams,* 784 S.W.2d 705, 707 (Tex. App.—Houston [14th District] 1990, writ denied).
15. *Wendenberg,* 784 S.W.2d at 707.
16. See *Haddock,* 793 S.W.2d 954.
17. *Arlington Memorial Hospital Foundation, Inc. v. Baird,* 991 S.W.2d 918 (Tex. App.—Fort Worth 1999, writ denied).
18. *Southwest Texas Methodist v. Mills,* 535 S.W.2d 27, 30 (Tex. Civ. App.—Tyler 1976, writ ref'd nre).
19. *Hamilton v. Sowers,* 554 S.W.2d 225, 228 (Tex. Civ. App.—Fort Worth 1977, writ dismissed).
20. *Schorp v. Baptist Memorial Health System,* 5 S.W.3d 727 (Tex. App.—San Antonio 1999, no writ).

21. *Williford v. Banowsky*, 563 S.W.2d 702, 706 (Tex. Civ. App.—Eastland 1978, writ ref'd nre).
22. *Odak v. Arlington Memorial Hospital Foundation*, 934 S.W.2d 868 (Tex. App.—Fort Worth 1996, writ denied).
23. *Schorlemer v. Reyes*, 974 S.W.2d 141, 145 (Tex. App.—San Antonio 1998, writ denied).
24. *Rogers v. Duke*, 766 S.W.2d 547–548 (Tex. App.—Houston [1st District] 1989, no writ).
25. *Steinkamp v. Caremark*, 3 S.W.3d 191, 197 (Tex. App.—El Paso 1999, no writ).
26. *Arguello v. Gutzman*, 838 S.W.2d 583, 585 (Tex. App.—San Antonio 1992, no writ).