
Legal Briefs

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***Res ipsa loquitur*: Dental damage during anesthesia**

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While there may be arguments as to the how or why, almost everyone seems to agree that anesthesia has become much safer over the past 25 years. Ironically, one of the byproducts of safer anesthesia is an increase in the likelihood of a lawsuit when something does go wrong. Since so few people are hurt by anesthesia, juries may feel that *someone* should be liable when they are.

Proving negligence

Terrible outcomes do not necessarily mean that there has been negligence. Patients react in different and unexpected ways, and when a patient is hurt in the course of an anesthetic, the patient usually may recover damages only if the patient can prove that the anesthetist was negligent. Proving negligence, that the anesthetist failed to meet the standard of care, can be difficult and expensive. Plaintiff's lawyers must obtain testimony as to the standard of care, must obtain and present evidence that the standard of care was breached, and must be able to present this to a jury in a way that will be understandable. This makes the trial of malpractice cases difficult and demanding for plaintiffs' lawyers.

In the past, we have pointed out that the economics of litigation pushes plaintiffs' lawyers to look for "magic bullets" which allow plaintiffs to

recover when there is no clear evidence of negligence. One magic bullet is the doctrine of *res ipsa loquitur*, "the thing speaks for itself," which holds that under certain circumstances the mere fact that damage occurs is sufficient proof of negligence without requiring the plaintiff to have to prove it. If the plaintiff is able to use the doctrine of *res ipsa loquitur*, it is not necessary to show specific evidence of negligence.

To take advantage of the doctrine of *res ipsa loquitur*, the plaintiff must be able to show three things:

1. The injury occurred under circumstances such that in the ordinary course of events the injury would not have occurred if someone had not been negligent.
2. The injury must be caused by something in the exclusive control of the defendant.
3. The injury must not have been due to any voluntary action or contribution on the part of the plaintiff.

If the plaintiff's lawyer can show that these conditions have been met, the plaintiff's lawyer need not prove negligence at all.

Chism v Campbell

In *Chism v Campbell*, (250 Neb. 921, 553 N.W. 2d 741, 1996), the plaintiff was admitted for a cholecystectomy. She received a general anesthetic by means of an endotracheal intubation. Chism testified that after the surgery she noticed that the in-

side of her lower lip was cut and that a tooth was loose. She saw a dentist who found that a tooth had been broken inside the gum area. Chism testified that her tooth eventually had to be removed along with some bone. Chism sought damages from the surgeon, the anesthesiologist, and the hospital. Her lawyer relied solely on the doctrine of *res ipsa loquitur* and introduced no evidence of negligence. The defendants moved for "summary judgment."

Summary judgment is available to any party in a lawsuit. The court assumes that the facts alleged in any pleading or presented in any deposition, affidavit, or stipulation relied upon by the opposing party are correct but, that nonetheless, the party seeking summary judgment is still entitled to judgment as a matter of law. For example, let us assume that a nurse anesthetist is working in a hospital with an anesthesiologist when the anesthesiologist, working alone, makes a mistake and injures a patient. The patient sues both the nurse anesthetist and the anesthesiologist. If there are no facts as to the nurse anesthetist's negligence except for the fact that both the nurse anesthetist and the anesthesiologist work in the same hospital, the nurse anesthetist would move for and be entitled to "summary judgment." Without some proof as to the nurse anesthetist's involvement in the case, there is no theory of law by which the nurse anesthetist would be liable.

In the *Chism* case, the defendants' motion for summary judgment was designed to test whether Chism had produced enough evidence. At the point where summary judgment was requested, the anesthesiologist and the hospital had introduced signed affidavits from the anesthesiologist involved in the case and another anesthesiologist acting as an expert witness that there was an "inherent risk" that a patient's teeth may be damaged when using general anesthesia and that damage to the teeth occurs in a "fixed percentage" of patients even when the appropriate standard of care has been met. In other words, the affidavits from the anesthesiologists stated that the fact that a patient suffers a chipped tooth is not necessarily evidence of negligence. A nurse anesthetist who had been involved in the case and was also employed by the hospital also submitted an affidavit which stated that even when no one is negligent, it is impossible to know if or when a patient will bite down on a mouth piece and that there is no way to prevent this occurrence. The plaintiff also introduced affidavits but not from an anesthetist.

Chism produced an affidavit from her dentist who stated that Chism should not have been damaged during gallbladder surgery unless there were some "extraordinary circumstances." Moreover,

the dentist was not aware of any "fixed percentage" of patients who might receive injury to their teeth while undergoing a general anesthetic. The plaintiff, herself, introduced an affidavit in which, among other things, she stated that from her "lifetime experiences," she would not expect to receive a broken tooth or to have her mouth damaged as a result of instruments being placed in her mouth by an anesthesiologist.

In ruling on the defendants' motion for summary judgment, the court had to determine whether this was an appropriate case for *res ipsa loquitur*. The affidavits of the defendants stated that there always exists an inherent risk of tooth damage even without negligence. If this were true, then *res ipsa loquitur* could not be used by the plaintiff because *res ipsa loquitur* only applies when the damage would not ordinarily occur without negligence. The court found that the plaintiff's affidavits did not refute the statements made by the defendants' affidavits. Therefore, the only evidence available on the question of negligence was the defendants' affidavits stating that the damage could have occurred without negligence. *Res ipsa loquitur* was not available and because Chism and her lawyer had not offered any proof of negligence, summary judgment was granted for the defendants.

Chism case dismissed

There are several interesting things about this case but the first one is that the case was dismissed. Despite the fact that anesthesia has become so safe, it is still possible to convince a court that things can go wrong without anyone being at fault. While some people may feel that if anything goes wrong in anesthesia someone should be liable, *Chism v Campbell* is one case where something went wrong and no one was liable.

A second matter to be noted about the case is how easy it was for the defendants to offer evidence that they were not negligent. The defendants offered only three affidavits, two of the affidavits were from the anesthesiologist and nurse anesthetist who were involved in the surgery and only one was from an independent expert. The plaintiff offered affidavits only of the plaintiff and the plaintiff's dentist and not from an anesthetist. The plaintiff and her lawyer may well have simply thought they had offered as much evidence as the court would require.

The dentist's affidavit stated that, in his opinion, Chism's tooth would not have been damaged during gallbladder surgery unless there were some "extraordinary circumstances" and he was not aware of any "fixed percentage" of patients who might receive injury to their teeth while under

general anesthesia. While it is not clear from the appellate opinion as to how much experience the dentist had, Chism's lawyer may have felt that the court could infer that an experienced dentist would know if a logical result of anesthesia was damage to the teeth. After all, for summary judgment, the court does not have to find that the facts are in a party's favor, it only has to find that there is a possibility that the jury will find the facts in the party's favor. The appellate court in the *Chism* case, however, interpreted the dentist's remarks very narrowly by stressing that the dentist had said he was not aware that a fixed percentage of individuals suffer damage to their teeth, not that it was untrue (but isn't it a logical inference that that is what he meant?).

Although the dentist had said that Chism would not have suffered damage to her tooth unless there were some extraordinary circumstances, the court says that technically the dentist was not necessarily saying that these damages resulted from negligence. Therefore, the court finds there was no conflict between the expert testimony that the plaintiff offered and the expert testimony that the defendants offered. The appellate court was not unanimous. The Chief Judge of Nebraska agreed with the plaintiff. "It can be argued in this case [that the plaintiff's affidavits] refuted the statements made by the defendant's affidavits."

There was another interesting aspect of the case. The appellate court either did not know or was not interested that courts in other jurisdictions had also considered the application of *res ipsa loquitur* to dental damage during anesthesia. Of course, if the court had looked, the results would not have been very helpful. Courts have found the area confusing and have rendered inconsistent opinions.

Nielsen v Pioneer Valley Hospital

In *Nielsen v Pioneer Valley Hospital* (830 P.2d 270, Utah, 1992), a patient, admitted for knee surgery, had several broken teeth and damaged bridgework. The Utah court, unlike the Nebraska court, found this a suitable case for *res ipsa loquitur*. "Indeed, this is a textbook *res ipsa loquitur* case. Nielsen was unconscious the entire time her teeth and bridgework were being broken. She did not know who caused the damage or how it occurred." (830 P.2d at 273)

In the *Nielsen* case, the plaintiff had pursued two theories of recovery. One was a negligence theory, and the other was *res ipsa loquitur*. The trial court had given instructions to the jury on what they had to find in order to come to a conclusion of negligence. The jury rendered a verdict in favor of

the hospital and anesthesiologist. The plaintiff claimed that the trial court's instructions were inconsistent with and confused the jury on the plaintiff's alternative *res ipsa loquitur* theory. The court had instructed the jury that to find negligence, there had to be evidence of more than just adverse results. Although that is true of negligence, under the theory of *res ipsa loquitur*, the adverse result "speaks for itself." The Utah Supreme Court agreed with the plaintiff that the instructions might have confused the jury and reversed the case for a new trial. Interestingly, just as in the *Chism* case, the anesthesiologist and his expert witness testified that teeth can be broken when a patient bites down on an airway and that this damage can occur without negligence. Nonetheless, on virtually the same facts as *Chism*, the Utah Supreme Court called dental damages during anesthesia a "textbook *res ipsa loquitur* case."

Kerber v Sarles

In *Kerber v Sarles* (542 N.Y.S. 2d 94, 151 A.D. 2d 1031, 1989), the court held that *res ipsa loquitur* was applicable to a case where a patient's teeth were damaged during foot surgery. *Kerber v Sarles* is another case, to the extent that more evidence is needed, that the claim "you do not have to worry about what goes on at the head of the table when you work with an anesthesiologist" is wrong. Expert testimony was presented that the injury to the teeth was caused by excess force administered by an anesthesiologist who was not under the control of either the podiatrist or the hospital. Nonetheless, the patient proceeded with a lawsuit against the podiatrist and the hospital, but not against the anesthesiologist, on the theory of *res ipsa loquitur*.

The appellate court ruled that the trial court had erroneously granted summary judgment to the podiatrist based on the trial court's belief that evidence showed the injury was caused by the anesthesiologist, not "something in the exclusive control of the defendant" as required for the application of *res ipsa loquitur*. The appellate court held that the plaintiff had no way of knowing what had happened while she was anesthetized, and she could bring her suit, under the doctrine of *res ipsa loquitur*, against the podiatrist and hospital.

Conflict in Illinois

The difficulty the courts have with these cases can perhaps best be seen in the state of Illinois. In *Sawicki v Kim*, (112 Ill. App. 3rd 641, 445 N.E. 2d 63, 67 Ill. Dec. 771, 1983), the Second District of the Appellate Court of Illinois was faced with a case where a patient undergoing surgery for a breast biopsy suffered damage to her teeth. The court

had no problem with the application of *res ipsa loquitur* but reversed the case because the plaintiff's attorney in her opening argument had referred to the anesthesiologist's offers to reduce his bill. The attorney thought this offer was an admission of guilt. However, the court held that this was an attempt to settle. As a matter of policy, courts encourage parties to settle rather than litigate, and anything said as part of settlement discussions cannot be introduced as evidence.

Six years later, the First District of the same Appellate Court of Illinois came to the opposite conclusion about the applicability about *res ipsa loquitur* to broken teeth in *Piquette v Midtown Anesthesia Associates* (192 Ill. App. 3rd 219, 548 N.E. 2d 659, 139 Ill. Dec. 274, 1989). The court said *res ipsa loquitur* did not apply when the defendant anesthesiologist introduced evidence that broken teeth are a normal risk of a laryngoscopic procedure.

Conclusion

The inconsistent outcomes in these cases are interesting but do not suggest any unifying principle. It can be seen that when dental damage occurs (or any other damage, for that matter) and a patient brings suit on a theory of *res ipsa loquitur*, it is sometimes possible to obtain a defendant's verdict if there is evidence that the damage occurs even without negligence. It is especially important in these cases to mention the risk of dental damage as part of the informed consent process. In fact, if anything, these cases suggest the importance of disclosing during the informed consent process the wide range of things which can go wrong in anesthesia without negligence.