4-1-1958

Torts -- Res Ipsa Loquitur -- Malpractice Cases

Jean M. Luck

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol36/iss3/16

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
when we adapt and alter decisional law to produce common-sense jus-
tice.\textsuperscript{26}

The court cast aside the ancient technical distinctions between libel
and slander based upon permanence of form and based its decision on
the capacity for harm. In so doing, the court has taken a great stride
forward in adapting the common law to the changing nature of human
affairs.

\textbf{Max D. Ballinger}

\textbf{Torts—Res Ipsa Loquitur—Malpractice Cases}

The plaintiff’s arm was fractured during electro-shock treatment ad-
ministered by the defendant psychiatrist. His suit for damages was on
two different theories: breach of warranty and negligence. Defendant
psychiatrist moved for summary judgment. The court in \textit{Johnston v.
Rodis}\textsuperscript{1} granted the motion.

The court disposed of the breach of warranty theory by saying, “An
expression of opinion on the part of a physician that a particular course
of treatment is safe, does not constitute a warranty . . . . [H]e is
answerable only for negligence.”\textsuperscript{2}

The negligence theory also failed as the court also held that no spe-
cific negligence was charged and that \textit{res ipsa loquitur} was inapplicable.
In order to have the doctrine of \textit{res ipsa loquitur} applied, the plaintiff
must show the existence of three conditions.\textsuperscript{3} The accident or injury
must be of a kind which ordinarily does not occur in the absence of
someone’s negligence,\textsuperscript{4} there must be a reasonable inference that the
defendant is responsible for the negligence which caused the injury,\textsuperscript{5}
and it must not have been due to any voluntary action or contribution on
the part of the plaintiff.\textsuperscript{6} The malpractice cases in which plaintiffs

\textsuperscript{26}Ibid., quoting from Woods v. Lancet, 303 N.Y. 349, 354-55, 102 N.E.2d 691,
694 (1951).

\textsuperscript{1}151 F. Supp. 345 (D.C. 1957), \textit{rev’d}, --F.2d -- (D.C. Cir. 1958). The court
reversed on the warranty theory but upheld the district court on the negligence
theory and agreed that \textit{res ipsa loquitur} was inapplicable.

\textsuperscript{2}Id. at 348.

\textsuperscript{3}PROSSER, \textit{TORTS} \S 42 (2d ed. 1955).

\textsuperscript{4}Mitchell v. Saunders, 219 N.C. 178, 13 S.E.2d 242 (1941) (\textit{res ipsa loquitur}
applied where gauze sponge was left buried in plaintiff’s hip).

\textsuperscript{5}“The control at one time or another of one or more of the various agencies
or instrumentalities which might have harmed the plaintiff was in the hands of
every defendant or of his employees or temporary servants. This we think places
on them the burden of initial explanation.” Ybarra v. Spangard, 25 Cal. 2d 486,
492, 154 P.2d 690 (1944) (non-suit reversed); Ybarra v. Spangard, 93 Cal.
App. 2d 43, 208 P.2d 445 (1949) (on re-trial judgment for plaintiff against all
defendants affirmed, defendants offered no explanation of injury). See also Arm-
strong v. Wallace, 8 Cal. App. 2d 429, 47 P.2d 740 (1935) (gauze sponge left in
abdominal cavity following Caesarean section); PROSSER, \textit{TORTS} \S 42 (2d ed.
1955).

was unconscious).
have relied on *res ipsa loquitur* divide into two main groups. There are "those in which the action is based solely upon the unsuccessful or bad result of the diagnosis or treatment," and those in which the action is based on specific acts by or omission of the physician or surgeon." In the former group there is generally no recovery, while in the latter, *res ipsa loquitur* is frequently applied by the courts.

Within the latter group, the application of *res ipsa loquitur* is generally limited to some variation of two basic fact situations. One situation arises where a foreign object left in the body of the plaintiff causes the injury. The other is where there is a "distinct injury to a healthy part of the body not the subject of treatment nor within the area covered by the operation."

In the principal case the court, in following the common law of Maryland, stated that "the doctrine of *res ipsa loquitur* may not be invoked in an action for malpractice against a physician or surgeon," and that the only exception to the above rule "consists of cases where the undesirable result is such that it is evident even to a layman and could not have occurred except for the doctor's negligence." The stated exception is a not uncommon test used by those courts which ostensibly support the doctrine in malpractice cases to determine whether *res ipsa loquitur* will apply in the particular case. It seems on close analysis that the court in the principal case, while outwardly rejecting the doctrine in actions for malpractice, might actually apply it: (1) where a foreign object left in the body caused the injury, and (2) where the injury was to a healthy part of the body not involved in treatment.

In addition to *Bettigole v. Diener,* on which the court relied in the instant case as stating the law in Maryland, the court also leaned heavily on two cases with the principal case. In *Farber v.*

---

7 Lippard v. Johnson, 215 N.C. 384, 1 S.E.2d 889 (1939) (administration of local anesthetic); Davis v. Pittman, 212 N.C. 680, 194 S.E. 97 (1937) (X-ray burn); see Annot., 27 A.L.R. 1250 (1923), stating that "the general practitioner of medicine or of surgery does not, in the absence of his special contract, impliedly warrant the success of his treatment or operation, but does guarantee to possess and carefully to apply such professional skill and learning as are ordinarily possessed by general medical practitioners in the locality in which he practices."


11 151 F. Supp. at 347.

12 Id. at 348.


14 210 Md. 537, 124 A.2d 265 (1956) (plaintiff suffered facial paralysis due to nerve damage following a mastoidectomy in which the facial nerve was exposed, verdict directed for defendant).
Olkon and Quinley v. Cooke, electro-shock treatment resulted in fractures and res ipsa loquitur was held inapplicable. In considering these two cases, the reason for not applying the doctrine becomes apparent. In both cases defendant introduced evidence on trial tending to negate the condition that the accident must be of a kind which ordinarily does not occur in the absence of someone’s negligence. In both cases expert testimony brought out the fact that fractures were “calculated risks of the treatment” which involved the entire body, and that such accidents do happen without negligence. It is worthy of mention that the Bettigole case and all the cases therein cited as authority to support the result involved fact situations falling within the first general group of cases where the action was based solely on the bad result of treatment and in which it is doubtful that any court would apply the doctrine.

It appears that no malpractice case has reached the North Carolina Supreme Court since 1941 in which res ipsa loquitur was relied on and applied. To date, this bears out the prediction in this Law Review that the formula announced in Covington v. James probably would not be widely extended. This formula would allow the application of res ipsa loquitur “in any case where the result reached was ‘grotesquely contrary to all human experience.’” Since then, the doctrine has been mentioned in several opinions involving malpractice, but in none of these opinions does it appear that the plaintiff expressly relied on it, and it was ruled inapplicable in all cases.

Jean M. Luck