December 28, 2021

QUIS CUSTODIET IPSOS CUSTODES

Quis custodiet ipsos custodes? Or "who will guard the guards themselves?" Who protects us against those who are supposed to protect us? Who will ensure that the medical healers who are supposed to help are not in fact the agents of harm? In this case, it may very well be the Pennsylvania Supreme Court and one of its most eloquent writers, Justice David Wecht. Thanks to the Pennsylvania Supreme Court Opinion in *Lageman vs. Zepp*, 2021 Pa. LEXIS 4314, 2021 WL 6067509 (S. Ct. December 22, 2021), the "thing that speaks for itself" may be the obviousness of negligence, even where the actor whose conduct was deficient, can articulate what on its face may sound like a reasonable explanation.

The Court in *Lageman,* a medical malpractice case*,* noted that it granted review to clarify whether resort to the *res ipsa loquitur* doctrine is precluded when the plaintiff has introduced enough "direct" evidence that *res ipsa* doctrine is not the only avenue to a finding of liability. The *Lageman* decision affirms the Superior Court, which held that more than one approach to establishing liability, *res ipsa loquitur*, and a specific theory are not mutually exclusive. The Supreme Court endorsed the intermediate appellate tribunal's analysis in this medical malpractice case, and in doing so, reviewed the evolution of *res ipsa* in the context of medical malpractice.

Section 328D of the Restatement provides as follows:

(1) It may be inferred that harm suffered by a plaintiff is caused by negligence of the defendant when:

   a) the event is of a kind which ordinarily does not occur in the absence of negligence;

   b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

   c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

(2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.

(3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.

RESTATEMENT (SECOND) OF TORTS §328D.

The *res ipsa* doctrine, as set forth in the Restatement formulation, was first extended to medical malpractice cases in *Jones v*. *Harrisburg Polyclinic Hospital*, 496 Pa. 465, 437 A.2d 1134 (Pa.1981). The rationale for this change was that expert medical evidence could establish that an event would not ordinarily occur in the

absence of negligence, such that there was no reason to preclude application of *res ipsa* merely because the subject matter involved complex medical facts.

Next came *Hightower-Warren vs. Silk*, 548 Pa. 459, 698 A.2d 52 (Pa. 1997). There, a routine medical examination of the plaintiff revealed an enlarged thyroid lobe. During a thyroidectomy, the laryngeal nerve, which is critical to the vocal cords, must be protected. During (or after) her procedure, plaintiff suffered a paralyzed vocal cord and sued the physician. The trial court rejected the videotaped testimony of the plaintiff's expert on the basis that it was too speculative as to both the standard of care and causation, entered a non-suit, and denied the plaintiff's post-trial motion seeking to proceed to a jury on *res ipsa loquitur*. The Superior Court affirmed, concluded that the *res ipsa* doctrine was not available to the plaintiff because the expert's testimony "failed to indicate that [her] injury would not have occurred absent negligence or that other responsible causes had been eliminated."

The Supreme Court reversed. It discussed favorably and at length the Superior Court's contrary decision in *Sedlitsky vs. Pareso*, 400 Pa. Super. 1, 582 A.2d 1314 (Pa. Super. 1990), another case involving thyroid surgery gone awry in much the same way. There, the Superior Court found the expert testimony sufficient to support instructing the jury on *res ipsa loquitur*, identifying aspects of the plaintiff's expert's testimony that enabled a jury to infer the presence of the two relevant factors. In *Hightower-Warren,* although the plaintiff's expert conceded that the injury can occur without negligence, he stated that would happen only under dissimilar circumstances. The expert also opined that all other possible causes could be excluded. Therefore, the Supreme Court found the case to be more like *Sedlitsky*, and concluded that the expert testimony was sufficient to support the instruction.

Thereafter, various Superior Court cases muddied the waters. The Superior Court alluded to a "grey zone" – circumstances in which the plaintiff has adduced less than overwhelming direct evidence, but enough to submit to a jury nonetheless – while creating a body of circumstantial evidence warranting the Instruction. In *Lageman*, the Supreme Court noted that it had "yet to address the circumstance squarely, save for suggestions and broadly-stated principles." *Lageman, supra*, 2021 Pa. LEXIS 4314, at *25.

> In a case like this, where the evidence available to the plaintiff is equivocal and less than conclusive on the elements of negligence, asking the plaintiff to choose which evidentiary approach to pursue is manifestly unfair.
>
> This is not analogous to submitting two incompatible claims to a jury. *Lageman* has stated one straightforward claim and has submitted evidence in an effort to meet her burden of proof. The evidence that does not establish a basis for the Instruction cannot simply cancel out the evidence that does. Nor should plaintiff's presentation of conflicting categories of evidence – not evidence that is inconsistent, but merely qualitatively different – force her to abandon any evidentiary approach to proving her claim as to which she has made out a *prima facie* case.

Id. at *45-46.

The Court concluded that if there is first-hand evidence to support a negligence claim, the jury should be so charged. If there is indirect, circumstantial evidence to cover gaps in the (more) direct evidence, and that evidence constitutes a *prima facie* showing under §328D, the jury should be so charged. "This will only disadvantage a defendant as to whom the claim becomes more facially meritorious as more competent evidence emerges – as, perhaps, it should." *Id*. at *47

The analysis of the Court left it only with the question whether *Lageman* made out a *prima facie* case to support a *res ipsa loquitur* instruction. Like the Superior Court, the Pennsylvania Supreme Court concluded that she did meet her burden. Pepple, a qualified and credible expert for the plaintiff, testified in no uncertain terms that the event described cannot ordinarily happen without negligence on the part of the provider. Thus, Pepple's testimony by itself comprised *prima facie* evidence as to that proposition.

It is plain that the trial court must yield to the jury as soon as the plaintiff makes a threshold showing. With both experts acknowledging the association between arterial cannulation and stroke, there can be no serious question that *Lageman* succeeded, entitling her to a jury determination.

The question that must drive when the instruction is warranted hinges entirely upon whether the plaintiff has made out a *prima facie* showing as to the §328D factors, not whether the defense has a credible counternarrative, in this case the suggestion of a cardiac event causing the stroke, or plaintiff also has made out a plausible basis for recovery without resort to that doctrine. "In effect, the two run in parallel toward the same destination, and if either arrives, with the sum of the available information, a jury of the parties' peers has rendered a just verdict." *Id.* at *50. For the foregoing reasons, the Superior Court correctly vacated the trial court's refusal to charge the jury on *res ipsa loquitur* and remanded for a new trial. The Supreme Court affirmed.

The bullet point takeaways are found below:

- Both experts acknowledge association between arterial cannulation and stroke.
- Plaintiff had a qualified and credible expert who testified in no uncertain terms that stroke ordinarily could not happen without the negligence on the part of the provider.
- The expert's testimony, by itself, comprised *prima facie* evidence as to that proposition.
- Defense acknowledge that arterial cannulation has been associated with stroke because of the potential penetration of air, fluids or medication entering the artery or due to the creation of blood clot or the dislodgement of arterial plaque which then travels to the brain.
- Careful technique, said defendant, can avoid but not eliminate these complications, and the defense expert testified that the standard of care had been met in this instance.

- It seems to have been very important that both experts acknowledge the association between arterial cannulation and stroke. Would the result have been different if the experts did not agree on that?
- The court went on to say whether the instruction is warranted hinges entirely upon whether plaintiff has made a *prima facie* showing as to the §328D factors, not whether the defense has a credible counternarrative or whether plaintiff has made out a plausible basis for recovery without resort to the doctrine.
- Restatement (Second) of torts §328D provides that it may be inferred that the harm suffered was caused by negligence when:

    (1) The event is of the kind which ordinarily does not occur in the absence of negligence;
    (2) Other responsible causes, including the conduct of the plaintiff and third persons are sufficiently eliminated by the evidence; and
    (3) The indicated negligence is within the scope of the defendant's duty to the plaintiff.

- It is the function of the court to determine whether the inference may reasonably be drawn by the jury or whether it must necessarily be drawn.
- It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.
- The trial court must yield to the jury as soon as the plaintiff makes a threshold showing of the *res ipsa* elements.
- Superior Court sustained and the matter was properly remanded for new trial because the trial court did not charge on *res ipsa loquitur*.

Clifford A. Rieders, Esquire
Rieders, Travis, Dohrmann, Mowrey
Humphrey & Waters
161 West Third Street
Williamsport, PA 17701
(570) 323-8711 (telephone)
(570) 323-4192 (facsimile)

Cliff Rieders is a Board-Certified Trial Advocate in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a past member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.