

1988

Jeanna M. Dalley v. Utah Valley Regional Medical Center; IHC Hospitals, Inc., dba Utah Valley Regional Medical Center; Howard R. Francis, M.D.; Kent R. Gammett, M.D.; Provo Obstetrics And Gynecology Clinic; And James P. Southwick, M.D. : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Dalley v. Utah Valley Regional Medical Center*, No. 880360.00 (Utah Supreme Court, 1988).
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DOCKET NO.

BRIEF

880360

IN THE SUPREME COURT OF THE STATE OF UTAH

JEANNA M. DALLEY,

Case No. 880360

Plaintiff-Appellant,

vs.

Category 14b

UTAH VALLEY REGIONAL MEDICAL
CENTER; IHC HOSPITALS, INC.,
dba UTAH VALLEY REGIONAL
MEDICAL CENTER; HOWARD R.
FRANCIS, M.D.; KENT R. GAMMETT,
M.D.; PROVO OBSTETRICS AND
GYNECOLOGY CLINIC; and JAMES P.
SOUTHWICK, M.D.,

Defendants-Respondents.

BRIEF OF RESPONDENT

APPEAL FROM THE SUMMARY JUDGMENT OF THE
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH
THE HONORABLE GEORGE E. BALLIF, PRESIDING

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FEB 13 1990

Clerk, Supreme Court, Utah

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SOUTHWICK, M.D.,

Defendants-Respondents.

BRIEF OF RESPONDENT SOUTHWICK

JURISDICTION AND NATURE OF PROCEEDINGS

The trial court dismissed plaintiff's complaint on the defendants' motions for summary judgment. The order of dismissal was entered on August 18, 1988 and plaintiff filed her notice of appeal on August 30, 1988. (R. 223-25, 228-29.) This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(i) (1987).

ISSUES PRESENTED

1. Whether plaintiff may apply the doctrine of res ipsa loquitur to multiple defendants, including Dr. Southwick who was not in a position to cause or prevent the kind of injury the plaintiff alleges.

2. Whether plaintiff's claims for medical malpractice fail as a matter of law without expert testimony establishing that defendant's conduct more probably than not caused plaintiff's injuries.

3. Whether a patient alleging medical negligence may recover for emotional distress unrelated to any personal injury.

STATEMENT OF THE CASE

This is a medical malpractice action arising out of care rendered to plaintiff Jeanna Dalley at Utah Valley Hospital on February 5, 1985. The plaintiff, in her complaint filed January 28, 1987, claims she was burned on her right leg while she was anesthetized for an elective caesarian section.

(R. 1-3.) Each of the individual defendants moved for summary judgment alleging plaintiff could not prevail on her medical malpractice claim without either expert testimony regarding negligence and causation or a sufficient evidentiary foundation to support the doctrine of res ipsa loquitur and also on the basis that the claims for emotional injury were not recognized in Utah. (R. 69-71, 100-02, 160-62.)

On June 14, 1988, plaintiff filed a motion in limine asking for judicial notice of a question of law. (R. 172-73.) Defendants filed reply memoranda in opposition to plaintiff's motion in limine and the court heard argument on both the motion in limine and the motions for summary judgment on

July 22, 1988. (R. 178-88, 301-7, 232-33.) On August 1, 1988, the trial court concluded the **evidentiary** foundation for the application of **res ipsa loquitur** **was** not met. In its ruling the court stated:

Here, plaintiff has failed to establish sufficient foundation for the application of **res ipsa loquitur** and has failed to produce expert medical testimony and since this is not an exceptional case, **res ipsa loquitur** does not apply. Even assuming the jury would infer negligence by some body [sic], if they believed plaintiff had no burn when she arrived at the hospital, the failure to show **what** instrumentality caused the burn and which defendant(s) controlled that instrumentality would still leave us without any specific culpable party or parties. Therefore, the application of **res ipsa loquitur** in this matter is inappropriate. (R. 220-21; copy attached in Appendix "A.")

Judge Ballif signed the order granting defendants' motions and denying plaintiff's motion in limine on August 18, 1988. (R. 223-25.) Plaintiff filed her notice of appeal on August 30, 1988. (R. 228-29.)

The facts of this case with regard to defendant Dr. Southwick, are undisputed: (1) Dr. Southwick was the anesthesiologist; (2) his sole function was to administer and to monitor anesthesia during surgery; (3) he performed his responsibilities competently; (4) at no time was Dr. Southwick near the patient's legs; and (5) at no time was Dr. Southwick in "control" of any "instrumentality" which could possibly have caused burns on the patient's calf. (See Affidavit of Dr. Southwick attached as Exhibit "B.")

SUMMARY OF ARGUMENT

Plaintiff may not rely on the doctrine of *res ipsa loquitur* to create an inference of negligence absent a showing that the accident was of a kind which in the ordinary course of events would not have happened had the defendant(s) used due care, that the instrument or thing causing the injury was at the time of the accident under the management and control of the defendant(s), and that the accident happened irrespective of any participation at the time of the plaintiff. In this case, neither plaintiff nor defendants can identify the offending instrumentality and there is no evidence regarding management or control thereof. To apply the doctrine of *res ipsa loquitur* to the scant facts of this case would contradict established Utah case law and create strict liability without fault for the named physicians. In addition, even if this case justified application of the doctrine of *res ipsa loquitur*, plaintiff would still be required to produce expert testimony regarding causation. Without such expert testimony, plaintiff has failed to establish the *prima facie* elements of a claim for medical malpractice and defendants are entitled to summary judgment as a matter of law.

Further, plaintiff cannot recover for negligent infliction of emotional distress that is not related to any physical injury.

ARGUMENT

POINT I

THE DOCTRINE OF RES IPSA LOQUITUR CANNOT BE APPLIED TO THIS DEFENDANT.

In order to rely upon res ipsa loquitur a plaintiff must first establish a sufficient evidentiary foundation to support application of the doctrine and its inference of negligence. The circumstances supplying that foundation have been enumerated by the Utah courts as follows:

The rule . . . is applicable when: (1) the accident was of a kind which, in the ordinary course of events would not have happened had the defendant used due care; (2) the instrument or thing causing the injury was at the time of the accident under the management and control of the defendant; and (3) the accident happened irrespective of any participation of the plaintiff.

Robinson v. Intermountain Health Care, 740 P.2d 262, 265 (Utah App. 1987) citing Moore v. James, 5 Utah 2d 91, 96, 297 P.2d 221, 224 (1956). Clearly, in the present case, plaintiff has failed to establish the necessary evidentiary foundation to support application of the doctrine of res ipsa loquitur.

The case at bar is directly analogous to Talbot v. Groves Latter-day Saints Hospital, 21 Utah 2d 73, 440 P.2d 872 (1968), (copy attached as Exhibit "C") which involved a patient who discovered an arm injury once he recovered consciousness after a back operation. The physician did not recall the particular

surgery and the record in the Talbot case "was silent as to what, if anything, went on while the patient was in the recovery room and the length of time the plaintiff was there and who was in charge during that period." Id. at 873. After it was discovered that Talbot was having some difficulty with his right arm, he was referred to a neurologist who testified the probable cause of the damage to the nerves could have been caused by a lack of blood supply to the nerves. The neurologist was unable to arrive at any definitive cause for the impairment of the blood supply in this case and none of the physicians involved could explain the cause of the plaintiff's disability.

The plaintiff in the Talbot case did not claim that the defendants were guilty of specific acts or omissions amounting to negligence, but he did contend that he was entitled to the benefit of the doctrine of res ipsa loquitur on the basis that his injury would not have occurred without negligence on the part of someone and that he was within the control of the defendants when he suffered the injury. The defendants claimed that the foundational facts were insufficient to permit application of the doctrine.

The Utah Supreme Court held:

In examining the facts of the case before us, we are of the opinion that there is insufficient foundation on which to base the doctrine of res ipsa loquitur. The fact plaintiff's disability resulted from an uncommon or rare occurrence does not release him from the burden of establishing causation. An inference of

negligence cannot be permitted solely upon the basis that the plaintiff developed a rare complication while undergoing medical and surgical treatment. The doctrine of res ipsa loquitur has no application unless it can be shown from past experience that the occurrence causing the disability is more likely the result of negligence than some other cause.

Id. at 873.

In Talbot, as in the case at bar, the plaintiff sought to recover against each of the defendants by showing that at one time or another during his treatment at the hospital one or the other of the defendants was in charge of him. However, the plaintiff did not attempt to show that the injury to his arm occurred while he was in the care of a particular defendant or defendants. Further, the testimony produced by the plaintiff failed to show the thing, instrument or occurrence which caused the plaintiff's disability. In addition, there was no testimony establishing which of the defendants had the responsibility for the instrumentality which caused plaintiff's disability. The Court held:

The plaintiff's case in [the foregoing respects] fails to meet the standards for the application of the doctrine as set forth in prior decisions of this Court. In this case the plaintiff asked the court to extend the doctrine of res ipsa loquitur to a situation where a number of people had control or partial control of the plaintiff during surgery and thereafter, and where his injury may have occurred by the act or omission of any one of them, and outside the observation of the others. It would seem to us that such an extension to the doctrine would be

unwarranted and it would be using the doctrine to accomplish a result without regard to its limitations.

Id. at 874, footnotes omitted.

It is interesting to note that appellant attempts to rely on the dissenting opinion in the Talbot case rather than the majority or the concurring opinion. Specifically, Justice Henriod in his concurring opinion disagreed with the dissent and its reliance on Ybarra v. Spangard, "which has been honored only for its dissonance with common law fundamentals" and "which has been followed only by emotion, - not reason, logic or the application of legal principles." 440 P.2d at 874.

Further, Justice Henriod's concurring opinion specifically distinguishes Beaudoin v. Watertown Memorial Hospital, a case relied upon in appellant's brief, as a case in which the "focal point was not so much *res ipsa loquitur*, but stated that the facts indicated that laymen could decide the matter without expert opinion and that the defendants had complete control."

Id. at 875. He went on to state:

That is not the case here, where the facts did not reflect who had control, but guessed about that phase of the case by simply saying somebody had control and that everybody joined in the action should pay.

Id.

Justice Henriod warned that application of such "dichotic, disarming and dissonant dictum" as relied on in the dissenting opinion would result in "liability without fault." Id.

The precedent established in Talbot has never been altered and the decision has been cited frequently since its publication. See, for example, Vanderwater v. Hatch, 835 F.2d 1035, 1038 (10th Cir. 1987) (applying Utah law); Robinson v. Intermountain Health Care, Inc., 740 P.2d 262, 265, 266 (Utah App. 1987); Ballow v. Monroe, 699 P.2d 719, 721, 722 (Utah 1985); Allen v. United States, 588 F.Supp. 247, 407 (D. Utah 1984); Schmidt v. St. Joseph's Hospital, 736 P.2d 135, 138 (N.M. App. 1987) Nixdorf v. Hicken, 612 P.2d 348, 352, 353 (Utah 1980).

In sum, here, as in Talbot, plaintiff has failed to prove the existence of essential facts necessary to bring the rule into operation as to this defendant; specifically, plaintiff has presented no evidence of exclusive control and management of an instrumentality which caused the injury complained of by the patient. Similarly, in Barrett v. Emanuel Hospital, 669 P.2d 835 (Or. App. 1983) a surgical patient brought an action against the surgeons, anesthesiologist, hospital and professional corporation to recover damages allegedly suffered as a result of knee surgery. The Court addressed the identical issue presented here: whether res ipsa loquitur can permit an inference of negligence against all defendants notwithstanding plaintiff's stated inability to prove that the negligence of any particular defendant or defendants was the probable cause of the patient's injuries and notwithstanding plaintiff's

failure to show which of the several possible instrumentalities caused the injury and which of the several defendants had exclusive control over any particular instrumentality.

The Barrett court concluded:

[T]he availability of the res ipsa loquitur inference is contingent on the plaintiff's showing that the injury was probably caused by some negligent conduct of a particular defendant or defendants. . . . The requirement of the defendant's connection with the harm is fundamental in any decision of the element of "control" in res ipsa loquitur . . . The second requirement for res ipsa loquitur is commonly stated in terms of defendant's exclusive control of the injuring agency. The logical basis for this requirement is simply that it must appear that the negligence of which the thing speaks is probably that of defendant and not of another. . . .

Reduced to essentials, the rule adopted in Ybarra and the rule plaintiffs urge us to adopt is simply that anything a plaintiff cannot prove about a defendant's conduct in an operating room should be inferable. In our view, that rule is contrary to what the Oregon cases have consistently and correctly stressed: the only inference res ipsa loquitur permits is the ultimate fact of negligence, and that inference is permitted only when the plaintiff is able to establish by proof, inter alia, the probability that a particular defendant's conduct was the cause of the plaintiff's harm.

669 P.2d 839-840, cites omitted, emphasis in original.

Based on the lack of evidence presented by plaintiff, a jury could only speculate as to causal negligence, as to who, as to what, as to how, and as to when the alleged injury may have occurred. Further, there is absolutely no reason to hold Dr. Southwick in this case as there is no evidence that the

requisite standard of care was not met nor any evidence that Dr. Southwick's conduct caused injuries to the plaintiff. He cannot be held liable for plaintiff's injuries simply because he was in the same room for a short period of time. Consequently, there is no evidence creating a genuine issue of any material facts on the elements of plaintiffs negligence claim and the trial court's decision to grant defendant's Motion for Summary Judgment should be affirmed. Robinson v. Intermountain Health Care, 740 P.2d at 264, citing Celotex Corp. v. Catrett, ___ U.S. ___, 106 S. Ct. 2548, 2553, 91 L. Ed.2d 265 (1986).

POINT II

THE DOCTRINE OF RES IPSA LOQUITUR DOES NOT OBVIATE THE NEED FOR EXPERT TESTIMONY REGARDING CAUSATION.

To establish a prima facie claim for medical malpractice, plaintiff must prove, through competent expert testimony, the defendant deviated from recognized and accepted medical standards and that such a deviation caused plaintiff's injuries. Hoopiiaina v. Intermountain Health Care, 740 P.2d 270 (Utah App. 1987). Thus, even if "exceptional circumstances" justify an inference of negligence, plaintiff still must produce competent expert testimony regarding causation.

As the Utah Appellate Court recently noted in Chadwick v. Nielsen, 94 Utah Adv. Rep. 45, 47 (1988):

The Utah Supreme Court [in Nixdorf] held that jurors could determine the standard of care the doctor was required to follow without expert medical testimony because it is common knowledge that reasonable medical practitioners do not leave surgical instruments inside their patients' bodies and then keep it a secret.

However, the Court noted the scope of the Nixdorf exception is often misinterpreted; plaintiff must still produce competent expert testimony that the negligence complained of proximately caused the injuries.

Th[e] Nixdorf exception expressly obviates the need for expert testimony only in establishing the standard of care and breach of that standard by the doctor. The medical malpractice plaintiff must still ordinarily provide expert testimony, as did the Nixdorf plaintiff, to establish that the doctor's negligence proximately caused plaintiff's injury.

94 Utah Adv. Rep. at 47 citing Nixdorf, 612 P.2d at 354 n. 17; Anderson v. Nixon, 139 P.2d 216, 220 (Utah 1943).

Thus, such expert testimony is critical on the issue of causation, an element which must be separately established by the plaintiff in order to prevail in a medical malpractice case.

Res ipsa loquitur is an evidentiary doctrine aiding in the proof of negligence; it has no bearing on the issue of causation, which must be separately and independently established. As in any negligence action, a legally-recognizable causal link must be established between defendant's act or omission and plaintiff's injury. Absent such a causal relationship, defendant's conduct, negligent or otherwise, gives rise to no liability. Res ipsa loquitur does not

relieve plaintiff of this obligation; rather, it permits him, in lieu of linking his injury to a specific act on defendant's part, to causally connect it with an agency or instrumentality, under the exclusive control of the defendant, functioning in a manner which, under the circumstances, would produce no injury absent negligence. However, where the agency or instrumentality is not established to be the cause of plaintiff's injury, or where it is not shown to be under the exclusive control of the defendant, the causal connection is not established, and inference of negligent conduct giving rise thereto is nullified.

Anderton v. Montgomery, 607 P.2d 828, 834 (Utah 1980),
footnotes omitted, emphasis added.

Thus, even if the doctrine of res ipsa loquitur were to apply, plaintiff would still be required to produce competent expert testimony regarding causation. This, she has failed to do. Consequently, the second tenet of a medical malpractice claim has not been established and the granting of defendant's Motion for Summary Judgment should be affirmed.

POINT III

PLAINTIFF CANNOT RECOVER FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

Plaintiff claims to have sustained "severe emotional distress" for complaints unrelated to any personal injury resulting from care rendered by the defendants. The Utah Supreme Court has never recognized a cause of action for the negligent infliction of emotional distress under the

circumstances presented in this case. The case most directly on point, Reiser v. Lohner, 641 P.2d 93 (Utah 1982), involved an appeal of the trial court's ruling in favor of defendant's motion for summary judgment as to plaintiff's cause of action for emotional distress. In holding that the grant of summary judgment was proper, the Utah Supreme Court stated:

It is well established in Utah that a cause of action for emotional distress may not be based upon mere negligence. In Samms, this Court held as follows:

Our study of the authorities, and of the arguments advanced, convinces us, that conceding such a cause of action, may not be based upon mere negligence, the best considered view recognizes an action for severe emotional distress, though not accompanied by bodily impact or physical injury, where the defendant intentionally engaged in some conduct toward the plaintiff . . . ; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality. (Citing § 46, 1948 Supplement to the Restatement of Torts.)

641 P.2d at 100; citing, Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961); Jeppsen v. Jensen, 47 Utah 536, 155 P. 429 (1916).

Plaintiff attempts to rely on the recent case of Johnson v. Rogers, 90 Utah Adv. Rep. 3 (1988) in an attempt to support her claim for recovery based on emotional distress. While it is true the Johnson court "deliberately departed" from the approach taken in Reiser v. Lohner and "chose to address the

question anew," the facts and conclusions reached by the Johnson court are inapposite to the facts of this case. 90 Utah Adv. Rep. at 8.

In the Johnson case, plaintiffs sought compensatory damages for the wrongful death of their child, as well as for emotional distress and physical injury to the father. The facts of that case differ significantly from the present case in that the father and son were standing on a curb, waiting for the "walk" signal when defendant's truck crossed the intersection and jumped the curb hitting the boy and injuring the father. The Court focused on the "zone of danger" line of cases and concluded:

I would hold that one may recover for the negligent infliction of emotional distress when one was in the zone of danger created by the negligence and suffered a physical impact.

Id. at 10.

Thus, the Johnson decision does nothing to support plaintiff's attempt to recover for emotional distress absent any showing of outrageous, intolerable or deliberate misconduct on the part of any of the defendants as required by prior case law.

Furthermore, at the time plaintiff filed her complaint in January of 1987, there was no recovery for alleged emotional distress recognized in the State of Utah. The Johnson Court

did not give its holding retroactive effect; therefore, Reiser would apply and bar plaintiff's claim.

CONCLUSION

Under Utah law, in order for the doctrine of res ipsa loquitur to apply, plaintiff must show how the injury occurred and who controlled the instrument causing the injury. Absent such a showing, plaintiff cannot rely on the doctrine of res ipsa loquitur to create an inference of negligence. Further, even if the facts were sufficient to warrant application of the doctrine, plaintiff would still be required to produce competent expert testimony that the cause of plaintiff's injuries were more likely than not due to the negligent conduct of the defendant. Without a sufficient evidentiary framework and alternatively without expert testimony regarding causation, the lower court's ruling granting defendant James P. Southwick's motion for summary judgment should be affirmed.


DATED this 10th day of February, 1989.

SNOW, CHRISTENSEN & MARTINEAU

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APPENDIX

EXHIBIT A

1993 AUG 7 1:55 PM


IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

JEANNA M. DALLEY,)	Case Number: CV 87-206
Plaintiff,)	
vs.)	RULING
UTAH VALLEY REGIONAL)	
HOSPITAL, et al.,)	
Defendants.)	

This matter is before the court on defendants' motions for summary judgment. Plaintiff opposes the motions, and all parties have filed memo of points and authorities in support of their respective positions. The court having carefully considered the motions and the accompanying memo, and having heard oral argument, now enters its:

RULING

Defendants' motions for summary judgment are well taken and are hereby granted.

The motions are based on two grounds: First the doctrine of res ipsa loquitur does not apply here; second, there is no cause of action for negligent infliction of emotional distress.

To apply the doctrine of *res ipsa loquitur* requires the establishment of evidentiary foundation. The elements of the evidentiary foundation are: (1) the accident was of a kind which, in the ordinary course of events, would not have happened had the defendant(s) used due care, (2) the instrument or thing causing the injury was at the time of the accident under the management and control of the defendant(s), and (3) the accident happened irrespective of any participation at the time by plaintiff.

Nixdorf v. Hicken, 612 P.2d 352-53 (Utah 1980). It is undisputed that plaintiff, nor defendant(s), cannot identify the offending instrumentality to say nothing of management or control thereof.

In addition, in medical malpractice cases, plaintiff is required to produce expert medical testimony, except in exceptional cases (of which this may be one if an instrumentality could be found) to establish that the outcome was more likely the result of negligence than some other cause. Robinson v. Intermountain Health Care Inc., 740 P.2d 262 (Utah App. 1987).

Here, plaintiff has failed to establish sufficient foundation for the application of *res ipsa loquitur*, and has failed to produce expert medical testimony, and since this is not an exceptional case, *res ipsa loquitur* does not apply. Even assuming the jury would infer negligence by some body, if they believe that plaintiff had no burn when she arrived at the hospital, the failure to show what instrumentality caused the

burn, and which defendant(s) controlled that instrumentality would still leave us without any specific culpable party or parties. Therefore, the application of res ipsa loquitur in this matter is inappropriate.

The failure to show what caused the injury also precludes maintaining an action for negligent infliction of emotional distress.

Based on the foregoing analysis, defendants' motions for summary judgment are hereby granted.

DATED in Provo, Utah this 1st day of August, 1988.



GEORGE E. BALLIF, JUDGE.

EXHIBIT B

ELLIOTT J. WILLIAMS (A3483)
ELIZABETH KING BRENNAN (A4863)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
James P. Southwick, M.D.
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

JEANNA M. DALLEY,

Plaintiff,

vs.

AFFIDAVIT OF JAMES P.
SOUTHWICK, M.D.

UTAH VALLEY REGIONAL MEDICAL
CENTER, I.H.C. HOSPITALS, INC.,
dba UTAH VALLEY REGIONAL
MEDICAL CENTER, HOWARD R.
FRANCIS, M.D., KENT R.
GAMMETTE, M.D., PROVO
OBSTETRICS & GYNECOLOGY CLINIC,
and JAMES P. SOUTHWICK, M.D.,

Civil No. 87-206

Judge George E. Ballif

Defendants.

STATE OF UTAH)
 : ss.
COUNTY OF UTAH)

James P. Southwick, M.D., being first duly sworn, deposes
and states as follows:

1. My name is James P. Southwick, and the information contained in this Affidavit is true and is based on my personal knowledge.

2. That I am a medical doctor with a specialty in anesthesiology. I am licensed to practice medicine in the State of Utah, with my offices located in Provo.

3. That I was involved in the practice of medicine as an anesthesiologist in the State of Utah during 1985, the time in question in the Complaint of Jeanna M. Dalley.

4. That I am familiar with the standards of professional care, learning, skill and treatment ordinarily possessed and used by anesthesiologists in this and similar communities in 1985. Specifically, I am familiar with the standards of appropriate medical practice served and followed by anesthesiologists in the evaluation and treatment of patients presenting for repeat elective low transverse cervical c-section.

5. That I have been board certified by the American Board of Anesthesiology. My education and training are outlined in my curriculum vitae attached hereto.

6. That my opinions set forth in this Affidavit are based upon my review of:

(a) The Complaint filed in this matter;

(b) The medical records of Jeanna M. Dalley; and

(c) My personal contact with and recollection of this patient.

7. That the medical records set forth above in paragraph 6(b) are the type of records generally relied upon by physicians in their day-to-day practice to determine the history, care and treatment of patients.

8. That from my total review of the medical records and other information received, and based upon my experience and expertise as an anesthesiologist, it is my opinion that the medical care and treatment rendered by myself to Jeanna Dalley complied in all respects with the standards of professional care, learning, skill and treatment ordinarily possessed and used by anesthesiologists in good standing in this and similar communities in 1985.

9. That at no time whatsoever during the course of Jeanna Dalley's treatment, surgery and hospitalization in February 1985 did I have control of any instrumentality which could have possibly caused a burn on the patient's lower right leg.

10. That at no time during the course of Jeanna Dalley's surgery was I near the patient's legs.

11. That based upon my review of the medical records as previously referenced, the allegations of medical negligence and malpractice against me are not supported by the documentation.

DATED this 17th day of March, 1988.

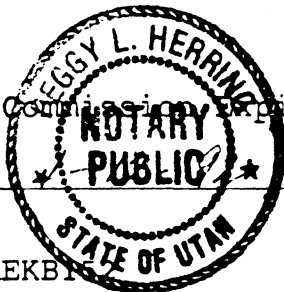
James P. Southwick, M.D.
James P. Southwick, M.D.

SUBSCRIBED AND SWORN to before me this 31st day of March,
1988.

Reggie L. Herring
NOTARY PUBLIC

Residing at: State of Utah

My Commission Expires:



SCMEKBY

EXHIBIT C

efficient evidentiary foundation for application of the doctrine, but that the doctrine was not applicable in the present case where the patient did not attempt to show that his arm injury occurred while he was in the care of a particular defendant or defendants, and testimony produced by patient failed to show the thing, instrument, or occurrence which caused the arm injury, and the testimony did not show which of the defendants had the responsibility for the instrumentality which caused the arm injury.

Judgment affirmed.

Ellett, J., and Crockett, C. J., dissented.

CROCKETT, C. J., and CALLISTER, TUCKETT and HENRIOD, JJ., concur.



21 Utah 2d 73

Elden R. TALBOT, Plaintiff and Appellant,
v.

DR. W. H. GROVES' LATTER-DAY SAINTS HOSPITAL, INC., and the Estate of Burke M. Snow, M.D., By and Through Its Administrators, Zions First National Bank, Melba B. Smith, Pamela B. Snow and Phyllis K. Snow, and Grant M. Reeder, M.D., Defendants and Respondents.

No. 10970.

Supreme Court of Utah.

May 2, 1968.

Patient, who discovered arm injury when he recovered consciousness in his hospital room after back operation, brought a malpractice action against hospital, doctor who performed back operation, and doctor who administered anesthetic. The Third District Court, Salt Lake County, Leonard W. Elton, J., entered a judgment adverse to the patient, and the patient appealed. The Supreme Court, Tuckett, J., held that res ipsa loquitur may be applicable in a malpractice case if there is suf-

1. Physicians and Surgeons §18(6)

Res ipsa loquitur doctrine may be applied in a malpractice case if there is sufficient evidentiary foundation for application of the doctrine.

2. Hospitals §8

Physicians and Surgeons §18(6)

Res ipsa loquitur was not applicable in action by patient, who discovered injury of his right arm when he regained consciousness in hospital room after back operation, against hospital, doctor who performed operation, and doctor who administered anesthetic, where patient did not attempt to show that his arm injury occurred while he was in the care of particular defendant or defendants, and testimony produced by patient failed to show thing, instrument, or occurrence which caused arm injury, and testimony did not show which defendant had responsibility for instrumentality which caused disability.

3. Negligence §121(2)

Res ipsa loquitur has no application unless it can be shown from past experience that occurrence causing disability is more likely the result of negligence than some other cause.

Joseph S. Knowlton, of Wilkinson, Wilkinson & Knowlton, Salt Lake City, for appellant.

Albert R. Bowen, John H. Snow, Jay E. Jensen, Salt Lake City, for respondents.

TUCKETT, Justice:

The plaintiff, Elden R. Talbot, filed this action against the defendants wherein he seeks to recover for an injury suffered by him while undergoing treatment of his lower back.

Talbot, a 39-year-old carpenter, suffered an injury to his lower back in an industrial accident in October 1963. Talbot was admitted to the defendant hospital for treatment of his back injury, and on January 9, 1966, Dr. Burke M. Snow operated on his back to repair a herniated disc with a spinal fusion. The anesthetic was administered by Dr. Grant M. Reeder, one of the defendants. Dr. Owen Smoot assisted Dr. Snow in the surgical procedure but he was not made a party to this action.

After the operation Talbot was removed to the recovery room and after a period of time he was taken to his own room. Talbot had been in his own room for a period of approximately 30 minutes and had sufficiently recovered from the effects of the anesthetic to notice that his right arm felt numb. Before Talbot's awakening there was a period when he was lying on his right side with his arm under him, and during one period his forearm and hand were hanging over the side of the bed. Prior to surgery Dr. Reeder administered the anesthetic through a needle inserted in Talbot's right arm. Dr. Reeder testified as to his usual practice in placing padding under various bony prominences in order to avoid problems caused by weightbearing at such points. Dr. Reeder did not recall this particular operation. The record is silent as to what, if anything, went on while the plaintiff was in the recovery room and the length of time the plaintiff was there and who was in charge of him during that period.

After it was discovered that Talbot was having difficulty with his right arm, Dr. Snow referred him to a neurologist, Dr. Garth G. Myers. Dr. Myers testified that

the probable cause of the damage to the nerves of the plaintiff's lower arm could have been caused by a lack of blood supply to those nerves. Dr. Myers further testified that this type of nerve injury was uncommon but that he was unable to arrive at any definitive cause for impairment of the blood supply in this case. Neither Dr. Myers nor Dr. Reeder, who also testified as an adverse party had an explanation for the cause of the plaintiff's disability.

The plaintiff does not claim that the defendants were guilty of specific acts or omissions amounting to negligence, but he does contend that he is entitled to the benefit of the doctrine of *res ipsa loquitur* on the basis that his injury would not have occurred without the negligence on the part of someone, and that he was within the control of the defendants when he suffered the injury. The defendants claim that the foundational facts are insufficient to permit application of the doctrine.

[1] Our examination of the decisions of this court would indicate that the doctrine of *res ipsa loquitur* has not been applied in a malpractice case of this nature in this jurisdiction. However, prior decisions do not indicate that the doctrine has no application in this type of case, and we are of the opinion that if there is sufficient evidentiary foundation the doctrine should be applied.

[2,3] In examining the facts of the case before us we are of the opinion that there is insufficient foundation on which to base the doctrine of *res ipsa loquitur*. The fact that plaintiff's disability resulted from an uncommon or rare occurrence does not relieve him of the burden of establishing causation. An inference of negligence cannot be permitted solely upon the basis that the plaintiff developed a rare complication while undergoing medical and surgical treatment. The doctrine of *res ipsa loquitur* has no application unless it can be shown from past experience that the occurrence causing the disability is more likely the result of negligence than some other cause. In the state of Cali-

fornia where the courts have applied the doctrine of *res ipsa loquitur* in a number of mal practice cases,¹ the decisions have laid down a requirement that the proof must show acts of negligence which could have caused the injury or disability. In the latest California case brought to our attention, *Tomei v. Henning*,² the Supreme Court of that State had this to say:

Since the *res ipsa loquitur* instruction permits the jury to infer negligence from the happening of the accident alone, there must be a basis either in common knowledge or expert testimony that when such an accident occurs, it is more probably than not the result of negligence.

The plaintiff seeks to recover as against each of the defendants by showing that at one time or another during his treatment at the hospital Dr. Snow, Dr. Reeder and the personnel of the hospital were in charge of him. The plaintiff does not attempt to show that the injury to his arm occurred while he was in the care of a particular defendant or defendants. The testimony produced by the plaintiff fails to show the thing, instrument or occurrence which caused the plaintiff's disability. Neither does the testimony show which of the defendants had the responsibility for the instrumentality which caused plaintiff's disability. The plaintiff's case in this respect fails to meet the standards for the application of the doctrine as set forth in prior decisions of this court.³ In this case the plaintiff asks the court to extend the doctrine of *res ipsa loquitur* to a situation where a number of people had control or partial control of the plaintiff during surgery and thereafter, and where his injury may have occurred by the act or omission of any one of them, and outside

the observation of the others. It would seem to us that such an extension to the doctrine would be unwarranted and it would be using the doctrine to accomplish a result without regard to its limitations.⁴

Our review of the evidence indicates that the trial court was correct in directing a verdict in favor of the defendants. The judgment of the lower court is affirmed. Costs to the defendants.

COLLISTER, J., concur.

HENRIOD, Justice (concurring).

I concur. In doing so I dissent from the dissent of Mr. Justice Ellett's thesis about multiple defendants in *res ipsa loquitur* cases.

In the first place, the dissent leans almost entirely on *Ybarra v. Spangard*,¹ which has been honored only for its dissonance with common law fundamentals. The other cases cited in the dissent either rely on such dissonance by citing this case, or have no pertinency here. That case, almost humorously referred to as the father of the "California *res ipsa*" rule² has been followed only by emotion,—not reason, logic or the application of legal principles. At best, and in all fairness it should be dubbed the father of a yet unborn child, conceived to father another unborn child,—liability without fault.

The dissent cites *Horner v. No. Pac. Ben. Assn.* in support of its position. It truly is not in support of *Ybarra* at all, since it did not involve multiple defendants, but only one,—alleged to have had complete control. The decision admitted the cause "could readily be proved," and that the doctrine of *res ipsa loquitur* did not apply.

1. *Ybarra v. Spangard*, 25 Cal2d 486, 154 P.2d 687, 162 A.L.R. 1258.

2. Cal., 62 Cal.Rptr. 9, 431 P.2d 633.

3. *Barnhill v. Young Electric Sign Co.*, 13 Utah 2d 347, 374 P.2d 311; *Wightman v. Mountain Fuel Supply Co.*, 5 Utah 2d 373, 302 P.2d 471.

4. *Funk v. Bonham*, 204 Ind. 170, 183 N.E. 312; *Wolf v. American Tract Soc.*, 164

N.Y. 30, 58 N.E. 31, 51 L.R.A. 241; *Actieselskabet Ingrid v. Central R. Co. of New Jersey*, 2 Cir., 216 F. 72.

1. 25 Cal2d 486, 162 A.L.R. 1258, 154 P.2d 687 (1944).

2. See Adamson, "Medical Malpractice: Misuse of *Res Ipsa Loquitur*," 46 Minn. Law Review (1962).

The dissent then cites *Meyer v. St. Paul Mercury Indemnity Co.*,³ which relied on *Ybarra*, compounding the latter's error. It follows with *Voss v. Bridwell*,⁴ which case with great largess, latitude and longitude had to do with the "entire, complete and exclusive supervision and control" of *all* of said defendants,—not the case here. The court said "We have not overlooked *Ybarra* * * *. There some of the language used in discussing *res ipsa loquitur* as applicable to medical malpractice cases is inconsistent with Kansas law and the case cannot be cited with full approval." In *Beaudoin v. Watertown Memorial Hosp.*,⁵ the focal point was not so much *res ipsa loquitur*, but stated that the facts indicated that laymen could decide the matter without expert opinion, and that the defendants had complete control. That is not the case here, where the facts did not reflect who had control, but guessed about that phase of the case by simply saying somebody had control and that everybody joined in the action should pay. The other cases cited have similar infirmities that do not apply to the facts in the instant case.

One need only to read "*Res Ipsa Loquitur: Tabula in Naufragio*" by Seavey in 63 *Harvard Law Review* 643, 1950, and "*Medical Malpractice: Misuse of Res Ipsa Loquitur*" by O. C. Adamson, 46 *Minnesota Law Review* 1962, to catch the vulnerability of Mr. Justice Ellett's dissent and the inept citations mentioned.

Furthermore, I would like someone to tell me how the so-called *res ipsa loquitur* rule, which requires the defendant to come forward and explain his doings, can apply when the defendant is dead and buried,—as is the case here. I have apprehension in visualizing the omniscience of the Zions First National Bank's explaining how the sponge or something else innocently stayed in a patient's gullet.

Also, I would like to know how justifiably you can sue only five of ten known participants in a surgery, thereby relieving

the other five, any of whom could have been the negligent one, and then get a judgment against the five multiple defendants who, possibly having the means financially to respond, are summoned as "multiple" defendants and *all* of whom get stuck for a money judgment, because it is out of their power or ability to explain. That was what happened in this case. The doctor, who apparently had an estate of substance, was sued in his casket. His assistant, apparently one without substance, was not joined as a defendant. In my humble opinion, if *res ipsa loquitur* is used to stagger a few it should stagger the whole caboodle,—not just the named joined participants,—and certainly not corpses that can't explain anything, including their own demises. All of which is reminiscent of Shakespeare's aside that what good men do is interred with their bones, but the evil they do lives on (with a paraphrase apology to the Bard).

Byrne v. Boadle, sired by one Pollock, was nothing but a dichotic, disarming and dissonant dictum that has led us to what many would hope to be retirement at birth and liability without fault. Freedom from fear, want, worry and woodser, here we come, if the dissent in this case later should adhere. At the time of *Byrne v. Boadle*,—I think,—common law pleading was in effect. But now, any plaintiff, through counsel, can find all the facts under the discovery process and no longer is there any need for the doctrine of "Speak for yourself, John," except in an unusual case.

I say all this knowing that there are cases where the doctrine may be applicable,—but not here.

3. 61 So.2d 901 (La.App.1952).

4. 188 Kan. 643, 364 P.2d 955 (1961).

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to each of the following, postage prepaid, this 10th day of February, 1989.

S. Rex Lewis and Leslie W. Slaugh for
Howard, Lewis and Peterson
120 East 300 North
Provo, Utah 84601

Charles W. Dahlquist and Sherene T. Dillon
for Kirton, McConkie & Bushnell
330 South 300 East
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William W. Barrett
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Elizabeth King Brennan

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