

1989

# Lynn Nielsen v. Pioneer Valley Hospital, D.M. Dickson : Brief of Appellant

Utah Supreme Court

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Daniel Darger; Attorney for Plaintiff/Appellant; David Slagle; Attorney for Pioneer Valley Hospital.  
Gary Stott; Attorney for D.M.; Dickson, M.D..

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UTAH SUPREME COURT  
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BRIEF

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IN THE SUPREME COURT FOR THE STATE OF UTAH

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LYNN NIELSEN, :  
 :  
Plaintiff and Appellant, : Case No. 890247  
 :  
vs. : Priority No.: 16  
 :  
PIONEER VALLEY HOSPITAL, :  
D.M. DICKSON, and :  
DOES I THROUGH V, :  
inclusive, :  
 :  
Defendant and Appellee.

---

BRIEF OF APPELLANT

---

Appeal from Judgment on Verdict of the  
Third Judicial District Court of Salt Lake County  
Honorable Homer R. Wilkinson

---

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**FILED**

JUL 6 1990

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT FOR THE STATE OF UTAH

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LYNN NIELSEN, :  
Plaintiff and Appellant, : Case No. 890247  
vs. : Priority No.: 16  
PIONEER VALLEY HOSPITAL, :  
D.M. DICKSON, and :  
DOES I THROUGH V, :  
inclusive, :  
Defendant and Appellee. :

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Third Judicial District Court of Salt Lake County  
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Exhibit A	Trial Court's Order of Dismissal re: Veasey
Exhibit B	Plaintiff's Complaint
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Exhibit D	Plaintiff's Docketing Statement on appeal from Summary Judgment
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### JURISDICTION

This Court has jurisdiction over this appeal pursuant to § 78-2-2(3)(j) Utah Code Annotated (1968).

### ISSUES PRESENTED FOR REVIEW

Is jury instruction No. 16, which states that "no presumption of negligence arises from the fact of an adverse event occurring during a defendants treatment." improper and reversible error in a res ipsa loquitur case?

Is Jury Instruction No. 19, which prohibits the jury from relying upon their own experience and knowledge in determining the standard of care, the breach thereof, and proximate cause, improper and reversible error in a res ipsa loquitur case based upon the "common Knowledge" exception to the rule requiring expert testimony?

Whether the trial court properly instructed the jury is a question of Law. Therefore, this Court should review the trial

court's instructions for correctness only, giving them no particular deference. (Knapstad v. Smith's Management Corporation, 774 P. 2d, 1 [Ut. 1989])

#### DETERMINATIVE STATUTES

The following rule of civil procedure may be controlling and determinative of the issues presented in this appeal.

Rule 51 of the Utah Rules of Civil Procedure, (amended 1987) Provides as follows:

At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in said requests. The court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally or otherwise waive this requirement. If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise, objections may be made to the instructions after they are given to the jury, but before the jury retires to consider its verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice, may review the giving of or failure to give an instruction. Opportunity shall be given to make objections, and they shall be made out of the hearing of the jury.

Arguments for the respective parties shall be made after the court has instructed the jury. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.

### STATEMENT OF THE CASE

Plaintiff-Appellant Lynn Nielsen filed this action against Pioneer Valley Hospital and Dr. D. M. Dixon, an anesthesiologist, for damages she suffered when she entered the Defendant hospital for a Knee operation and, after surgery, regained consciousness in the recovery room with several teeth knocked out and her bridgework damaged.

She sued both Defendants on the theory of ordinary negligence as well as the theory of *res ipsa loquitur*. Prior to trial, the Defendants moved for summary judgment on all causes of action on the grounds that Plaintiff did not intend to present expert testimony as to the issues of standard of care and causation. The trial judge granted the motion.

Plaintiff appealed the dismissal of her *res ipsa loquitur* claim to this Court, arguing that the "common knowledge" exception to the rule requiring expert testimony applied. She then moved for summary disposition. This Court summarily reversed the trial court's ruling as it pertained to the *res ipsa loquitur* claim, holding that the "common knowledge" exception did apply and that expert testimony was not necessary.

Plaintiff thereafter proceeded at trial on the *res ipsa loquitur* theory and did not present expert evidence to support a theory of ordinary negligence. Defendants offered jury instructions numbered 16 and 19 which pertained to an ordinary negligence theory and which required the jury to rely only upon expert testimony, rather than their own knowledge and experience in determining the

standard of care, whether it had been breached and proximate cause. Over Plaintiff's objections, the Trial Court instructed the jury as set forth in Instructions 16 and 19. The jury found no negligence on the part of either defendant.

Plaintiff appeals on the grounds that the above instructions are contrary to the law of this case as set forth in this Court's previous order of summary disposition and tended to mislead and confuse the jury to Plaintiff's prejudice. This constitutes reversible error.

#### STATEMENT OF FACTS

On February 27, 1985, Plaintiff Lynn Nielsen was admitted to Pioneer Valley Hospital to undergo surgery on her left Knee. During the previous year, she had undergone substantial bridgework and other dental work on her teeth and on the date of admission, her teeth were in good condition and were intact in her mouth. (Trial Transcript, p.86, 87, 166, 167, 168, 173, 174, 235)

At approximately 8:40 a.m. on that day, Plaintiff was interviewed by agents of Pioneer Valley Hospital and thereafter by Dr. Dixon, the anesthesiologist. They were informed of her dental work and Plaintiff's concern that the defendants take proper care to protect her teeth during surgery. (Trial Transcript, P. 91, 92, 93, 149, 150, 319)

She was thereafter admitted to surgery during which she was placed under general anesthesia. (Trial Transcript, P.93, 94, 238, 239, 319, 325, 334)



At approximately 11:35 a.m. on February 27, 1985, while Plaintiff was returning to consciousness in the recovery room of the Hospital, Joanne Henschke, the Recovery Room nurse discovered that several of Plaintiff's teeth had been broken out and her bridgework damaged. (Trial Transcript, p. 95, 276;)

All parties agree that the damage occurred at some time between the time Plaintiff entered the Defendant's care for surgery and the time the damage was discovered in the recovery room. (Trial Transcript, P.60, 65, 69, 318, 319, 505, 506, 528)

Plaintiff was not conscious and has no direct knowledge of how her injury happened, nor could she negligently or intentionally contribute to the cause of her injury. (Trial Transcript, P. 94, 95, 275, 276, 277)

On October 9, 1986, Plaintiff filed this action against the Hospital, Dr. Dixon and Dr. Veasey, the knee surgeon. Dr. Veasey was subsequently dismissed from the suit. (Trial Court's Order of Dismissal 2/24/87, attached hereto as Exhibit A)

The complaint alleged four causes of action against Defendants. The first cause of action was based upon the theory of ordinary negligence and malpractice against Dr. Dickson; the second was based on the theory of ordinary negligence and malpractice against Pioneer Valley Hospital, the third was based on the theory of res ipsa loquitur against both Dickson and the Hospital and the fourth was based on the theory of failure to obtain informed consent by both Defendants. (Plaintiff's Complaint, attached hereto as Exhibit B)

On February 17, 1988, Defendants moved the trial court for summary judgment on all causes of action based upon the fact that Plaintiff did not intend to provide expert testimony at trial as to the duty of care, its breach and causation. (Trial Court's Order of Summary Judgment, attached as Exhibit C.)

On April 4, 1988, the Trial Court granted Defendant's motion for summary judgment, ruling in part: "that the facts of the case, without the benefit of expert testimony on behalf of the Plaintiff, did not establish the requisite elements for submission of the case to the jury under the doctrine of *res ipsa loquitur*." (Trial Court's Order of Summary Judgment, attached as Exhibit C.)

Plaintiff thereafter appealed the summary judgment to this court on the issues of *res ipsa loquitur* and informed consent, and moved for summary disposition. (Plaintiff's Amended Docketing Statement, attached as exhibit D)

On September 16, 1988, this Court reversed the trial court's summary judgment as it pertained to the theory of *res ipsa loquitur*, ruling in part: "Expert evidence is not necessary to establish the applicable standard of care in this case, as it appears no medical technicalities are involved." The case was remanded to the trial Court for further proceedings. (Utah Supreme Court's Order of Summary Disposition, attached as Exhibit E)

At trial, Plaintiff proceeded only on the theory of *res ipsa loquitur* and did not present expert testimony on the issues of ordinary negligence or informed consent. (Trial Transcript, P.56, 57, 58, 59)

Prior to closing argument, the trial judge instructed the jury as to the law. Two of the instructions proposed by Defendants and given to the jury were instructions numbered 16 and 19. (Trial Transcript, P. 475, 477)

Plaintiff advised the judge and counsel of objections to these instructions prior to the time they were given to the jury, but Plaintiff's objections were overruled. Thereafter, Plaintiff's counsel was given the opportunity to put his objections on the record. (Trial Transcript, P. 540, 541, 542)

The Trial Court instructed the jury by way of Instruction No. 16 that no presumption of negligence arises from the fact of an adverse event occurring during the Defendant's treatment of Plaintiff. Instruction No. 19 instructed the jury that they were not permitted to use their own experience or any standard of their own in determining the standard of care and further instructed them that they must determine the proper standard of care only from medical expert testimony. (Instruction No. 16 attached hereto as Exhibit F; Instruction No. 19 attached hereto as Exhibit G)

These instructions were given to the jury prior to closing argument and Plaintiff's counsel was required to attempt to explain to the jury in closing argument how these instructions might be reconciled with Plaintiff's *res ipsa loquitur* "common knowledge" theory. (Trial Transcript, P. 475, 477, 478, 479, 480)

In closing argument, Counsel for Dr. Dixon read Instructions numbered 16 and 19 in their entirety to the Jury. (Trial Transcript, P. 526, 527, 528, 529)

By way of special verdict, the jury found that Plaintiff had failed to prove negligence on the part of either Defendant and never reached the issue of damages. (Amended Judgment on Verdict, attached as Exhibit H)

#### SUMMARY OF ARGUMENT

##### POINT I.

PLAINTIFF'S FIRST, SECOND AND FOURTH CAUSES OF ACTION WERE DISPOSED OF BY THE TRIAL COURT'S SUMMARY JUDGMENT ON APRIL 4, 1988 AND THE ONLY CAUSE REMANDED BY THE SUPREME COURT AND TRIED TO THE JURY WAS THE THEORY OF RES IPSA LOQUITUR.

A. The trial court's Order of Summary Judgment, entered on April 4, 1988 disposed of all of Plaintiff's causes of action. . . . . 11

B. Plaintiff appealed this summary judgment only on the issues of the res ipsa loquitur claim and the informed consent claim. . . . . 11,12

C. On September 16, 1988 the Utah Supreme Court summarily reversed the trial court's summary judgment as it pertained to the res ipsa loquitur theory. . . . . 12

D. Res ipsa loquitur was the only theory tried to the jury. . . . . 12

E. The trial court's instructions to the jury on law related to the theory of ordinary negligence was not supported by Plaintiff's theory of the case nor the evidence presented by Plaintiff at trial. . . . . 12

##### POINT II.

INSTRUCTIONS NUMBERED 16 AND 19 WERE IMPROPER AND RESULT IN REVERSIBLE ERROR BECAUSE THEY TEND TO MISLEAD THE JURY TO THE PREJUDICE OF PLAINTIFF BY IMPROPERLY STATING THE LAW APPLICABLE IN A RES IPSA LOQUITUR CASE BASED UPON THE "COMMON KNOWLEDGE" EXCEPTION TO THE RULE REQUIRING EXPERT TESTIMONY.

A. Once the requisite foundation for application of the res ipsa loquitur theory is established, a rebuttable inference of negligence arises as a matter of law. . . 13

B. One of the foundational requirements is that the instrument or thing causing the injury was at the time of the accident under the management and control of the defendant. . . . . 14

C. Plaintiff established the requisite foundation at trial. . . . . 14

D. Therefore, a presumption of negligence was established from the fact that Plaintiff's injury occurred during the time she was in Defendant's care and control for treatment. . . . . 14

E. Instruction No. 16 advises the jury that "no presumption of negligence arises from the fact of an adverse event occurring during a defendant's treatment." It is therefore erroneous, confusing, prejudicial to Plaintiff and reversible error. . . . . 14

F. The Utah Supreme Court established the law of this case by holding that the "common knowledge" exception to the rule requiring expert testimony applies. . . . . 14,15

G. Instruction No. 19 prohibits the jury from using a standard of care derived from their own experience but requires them to rely only upon expert testimony in determining the standard. It is therefore erroneous, confusing, prejudicial and reversible error. . . . . 15,16

#### ARGUMENT

I. PLAINTIFF'S FIRST, SECOND AND FOURTH CAUSES OF ACTION WERE DISPOSED OF BY THE TRIAL COURT'S SUMMARY JUDGMENT ON APRIL 4, 1988 AND THE ONLY CAUSE REMANDED BY THE SUPREME COURT AND TRIED TO THE JURY WAS THE THEORY OF RES IPSA LOQUITUR.

There is no question that the trial court's order of summary judgment granted judgment on all causes of action. (Exhibit C) As can be seen by Plaintiff's docketing statement on appeal from that order (Exhibit D), specifically the ISSUES PRESENTED ON APPEAL, Plaintiff appealed only the issues of res ipsa loquitur and informed consent. Plaintiff did not appeal the trial court's ruling that she

would need expert testimony to prove the standard of care under Plaintiff's first and second causes of action.

The Supreme Court's order reversing summary judgment is clearly limited to the issue of res ipsa loquitur. (Exhibit E) It could hardly be argued that this order was intended to reverse the Trial Court's ruling that expert testimony would be required under Plaintiff's first and second causes of action based upon ordinary negligence. As a result, Plaintiff's causes of action based upon ordinary negligence were disposed of by the Order of Summary Judgment and Plaintiff was allowed by way of the Supreme Court's reversal to proceed to establish negligence without expert testimony on the theory of res ipsa loquitur.

In sum, the issues of ordinary negligence having been disposed of by way of summary judgment, the Plaintiff proceeded at trial on the theory of res ipsa loquitur only. (Trial transcript P. 56, 57, 58, 59) The Court's instructions to the jury on issues of ordinary negligence were therefore not justified by the theory of Plaintiff's case nor the evidence presented by Plaintiff at trial, and, as set forth below, tended to confuse and mislead the jury as to the law to be applied to this case.

II. INSTRUCTIONS NUMBERED 16 AND 19 WERE IMPROPER AND RESULT IN REVERSIBLE ERROR BECAUSE THEY TEND TO MISLEAD THE JURY TO THE

PREJUDICE OF PLAINTIFF BY IMPROPERLY STATING THE LAW APPLICABLE IN  
A RES IPSA LOQUITUR CASE BASED UPON THE "COMMON KNOWLEDGE" EXCEPTION  
TO THE RULE REQUIRING EXPERT TESTIMONY.

Utah law is clear that once the foundation for res ipsa loquitur is established, a rebuttable inference of negligence arises as a matter of law (See Nixdrof v. Hicken, 612 P. 2d 348 [Ut. 1980]; Dalley v. Utah Valley Regional Medical Center, 132 Ut. Adv. Rep. 17, [Ut. 1990]). The foundation required is:

- (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 by the Plaintiff. (Virginia S. v. Salt Lake Care Center, 741 P.2d 969 (Utah 1987))

Once this foundation is established, a rebuttable inference of negligence arises from the very fact that the adverse event occurred during the Defendants care and treatment.

As to the first requirement, that the injury was of a kind which in the ordinary course of events would not have happened had defendants used due care, Plaintiff presented uncontroverted evidence that all of her teeth were in place when she entered Defendant's care for a knee operation (Trial Transcript, P. 86, 87, 166, 167, 168, 173, 174, 235), and that several were found to be broken out when she regained consciousness in the recovery room. (Trial Transcript, P. 95, 276) As to the requirement that the injury happened irrespective of Plaintiff's participation, she presented uncontroverted evidence that from the time she entered surgery until

the time the injury was discovered in the recovery room, Plaintiff was under general anesthesia and not in a position to negligently or intentionally knock her own teeth out. (Trial Transcript, PP 94, 95, 275, 276, 277) Plaintiff met the third and final requirement by presenting uncontroverted evidence that the defendants were in complete control of the environment and procedures of the operation and recovery and were therefore responsible for all reasonably probable causes to which the injury could be attributed. (Trial Transcript, PP. 60, 65, 69, 270, 318, 319, 505, 506, 528) Having established this foundation, a presumption that defendant's were negligent was established as a matter of law. This presumption is established primarily upon the fact that Plaintiff's injury happened while she was in the control and care of Defendants.

Yet Instruction No. 16 advises the jury that "no presumption of negligence arises from the fact of an adverse event occurring during a Defendant's treatment." Clearly this instruction is contrary to the law as set forth in Nixdrof, supra, in a res ipsa loquitur case such as the instant case. And when given in addition to the res ipsa loquitur instruction which advises the jury that exactly the opposite is true (Attached as Exhibit I) it would certainly tend to mislead the jury and confuse them to Plaintiff's prejudice.

Instruction 19 serves to further compound the jury's confusion. As this Court indicated in its order reversing the trial court's summary judgment: "expert evidence is not necessary to establish the applicable standard of care in this case, as it appears no medical technicalities are involved." (Exhibit E). In making this ruling



the Supreme Court referred to Nixdrof, supra, which sets out the common knowledge exception to the general rule that expert testimony is required. The Nixdrof Court stated

...however, in certain situations, the medical procedure is so common or the outcome so affronts our notions of medical propriety that expert testimony is not required to establish what would occur in the ordinary course of events. In this type of situation the Plaintiff can rely on the common knowledge and understanding of laymen to establish this element (Nixdrof v. Hicken, supra at page 353 [emphasis added]) (Also see Dalley v. Utah Valley Regional Medical Center, supra)

However, the trial court's jury Instruction No. 19 instructs the jury exactly the opposite. It states: "you are not permitted to use a standard derived from your own experience with physicians, nor any other standard of your own". It further goes on to state: "the only way you may properly learn such standard and thus determine whether or not the physician in this case conformed to it, is through evidence presented during this trial by physicians in the same field of practice testifying as expert witnesses who knew of that standard as it existed at that time." This instruction is clearly contrary to the law as set forth in Nixdrof and as applied to this case by the Utah Supreme Court in its order reversing the trial court's summary judgment. Thus, the trial court has erroneously advised the jury as to the law which applies to this case, and defendants have accomplished by jury instructions what they attempted to do by way of summary judgment. That is to deny Plaintiff a full and fair hearing of her claim.

In the case of Knapstad v. Smith Management Corporation, 774 P. 2d, 1 [Utah 1989]) the Utah Court of Appeals noted as follows:

An instruction is improper and results in reversible error if "it tends to mislead the jury to the prejudice of the complaining party or insufficiently or erroneously advises the jury on the law" (citing Steele v. Brienholt, 747 P.2d 433-435)

The Knapstad case applies directly to the instance case. For the fact that the instructions complained of tend to mislead and confuse the jury to the prejudice of Plaintiff is obvious. Plaintiff outlined her theory of res ipsa loquitur and the "Common knowledge" exception to the rule requiring expert testimony in her opening statement. She thereafter proceeded to present evidence in support of this theory and did not present expert evidence to support a theory of ordinary negligence. Under these circumstances, instructions 16 and 19 resulted in reversible error consistent with the guidelines set out in the Knapstad case.

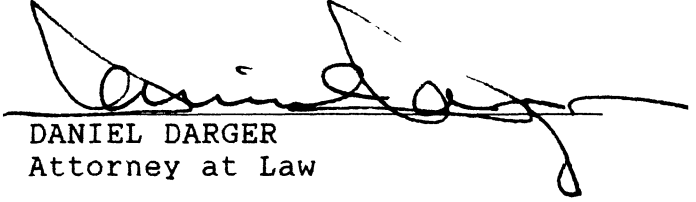
#### CONCLUSION

In sum, Defendants Instructions No. 16 and 19 constitute reversible error in that they improperly advise the jury as to the law applicable in a res ipsa loquitur case based upon the "common knowledge" exception to the rule requiring expert testimony, and misinformed and confused the jury to Plaintiff's prejudice. The

trial court's verdict should be reversed and Plaintiff should be granted a new trial as a result.

Dated this 3rd day of July, 1990.

Respectfully submitted,

  
DANIEL DARGER  
Attorney at Law

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant has been mailed, postage prepaid to:

David Slagle  
Attorney for Pioneer Valley Hospital  
10 Exchange Place, Suite 1100,  
P.O. Box 45000,  
Salt Lake City, Utah 84145

and

Gary Stott  
Attorney for Dickson, M.D.  
Key Bank Tower, Suite 700  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110

this 5<sup>th</sup> day of July, 1990.

  
Kristine Evans

CLERK OF DISTRICT COURT  
Salt Lake County, Utah

FEB 24 1987

H. Dixon Hindley, Clerk of Dist. Court  
By [Signature] Deputy Clerk

GARY D. STOTT (A3130)  
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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LYNN NIELSEN,

Plaintiff,

vs.

PIONEER VALLEY HOSPITAL,  
D. M. DICKSON, GEORGE D.  
VEASY and DOES I through  
V inclusive,

Defendants.

ORDER OF  
DISMISSAL

Civil No. C86-7731  
Judge Homer F. Wilkinson

The Court, based upon the stipulation of counsel  
for the plaintiff, does hereby

ORDER that the above-entitled matter as to the  
claim against the defendant, George D. Veasy, M.D., is

000072

dismissed with prejudice, each party to bear its own costs and fees.

DATED this 24 day of Feb., 1987.

BY THE COURT:

ATTEST  
H. DIXON HINDLEY  
Clerk

B.A. Shills  
Deputy Clerk

Homer F. Wilkinson  
HOMER F. WILKINSON, JUDGE  
THIRD JUDICIAL DISTRICT COURT

VAN COTT, BAGLEY, CORNWALL & McCARTHY  
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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LYNN NIELSEN,

Plaintiff,

vs.

PIONEER VALLEY HOSPITAL,  
D. M. DICKSON, GEORGE D.  
VEASY and DOES I THROUGH  
V inclusive,

Defendants.

COMPLAINT

Civil No.

Honorable

The plaintiff, Lynn Nielsen, hereby complains of  
defendants Pioneer Valley Hospital; George D. Veasy; D. M.  
Dickson; and Does I through V inclusive, and alleges as follows:

*P.A.*

1. Plaintiff is now, and at all times herein  
mentioned was, a resident of Salt Lake County, Utah.

*P.V. A.A.*

2. Defendant D. M. Dickson is now, and at all times  
herein mentioned was, a physician and anesthesiologist duly  
licensed to practice under the laws of the State of Utah, with  
offices for practice located at Pioneer Valley Hospital, 3460  
South Pioneer Parkway, West Valley City, Utah.

*Denied*

AL-AD 3. Defendant George D. Veasy is now, and at all times herein mentioned was, a physician and orthopedic surgeon duly licensed to practice under the laws of the State of Utah, and practicing at Pioneer Valley Hospital, 3460 South Pioneer Parkway, West Valley City, Utah.

pu/AR 4. Defendant Pioneer Valley Hospital is now, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of Utah, and engaged in the business of operating a hospital for profit in West Valley City, Salt Lake County, Utah.

AL-D 5. The true names and capacities, whether as individuals, corporations, or otherwise, of defendants Does I through V inclusive are unknown to plaintiff at this time. Plaintiff therefore sues these defendants by such fictitious names. When plaintiff has learned the true names and capacities of these defendants, or any of them, plaintiff will seek leave of the court to amend this Complaint in order to set forth such true names and capacities.

pu-D 6. Plaintiff hereby also reserves the right to add such other parties as discovery may show to have been involved in the acts and occurrences alleged herein.

AL-X 7. On or about December 6, 1985, plaintiff gave defendant Pioneer Valley Hospital notice of intent to commence this action for malpractice by certified mail, return receipt

requested, as required by the Utah Health Care Malpractice Act, Utah Code Ann. §78-14-8 (Supp. 1985).

*P-8* 8. On or about May 29, 1986, plaintiff gave defendants D. M. Dickson and George D. Veasy notice of intent to commence this action for malpractice by certified mail, return receipt requested, as required by the Utah Health Care Malpractice Act, Utah Code Ann. § 78-14-8 (Supp. 1985).

*P-9* 9. Plaintiff has complied with all statutory requirements of the Utah Health Care Malpractice Act concerning prelitigation panel review, Utah Code Ann. § 78-14-12 et seq., as evidenced by the Affidavit of David E. Robinson, Director, Utah Division of Occupational & Professional Licensing, attached hereto as Exhibit "A".

#### FIRST CAUSE OF ACTION

*P-10* 10. On March 27, 1985, plaintiff Lynn Nielsen was admitted to defendant Pioneer Valley Hospital for microsurgery on her left knee. The surgery was performed by defendant Veasy. The anesthesia was administered to plaintiff by defendant Dickson.

*P-11* 11. Prior to the administration of anesthesia to plaintiff, plaintiff informed defendant Dickson and/or persons under defendant Dickson's control of her sensitivity to anesthesia and of the fact that she had 22 capped teeth and extensive bridgework which had recently been installed.



Plaintiff so informed said persons because she was aware of the need to provide special protection for that type of dental work when being placed under general anesthesia.

P.D. 12. At some time during the preparation of plaintiff for surgery or during the course of such surgery or immediately thereafter, and during such time that plaintiff was under general anesthesia, several of plaintiff's teeth were damaged and broken and her bridgework was severely damaged.

P.D. 13. Said damage was a direct and proximate result of the negligence and carelessness of defendant Dickson in that defendant Dickson failed to exercise the degree of skill and care ordinarily exercised in similar situations by other physicians and anesthesiologists engaged in his type of practice in Salt Lake City, Utah in similar locations.

P.D. 14. As a direct and proximate result of the negligence of defendant, plaintiff was forced to endure great pain, suffering, discomfort, inconvenience and humiliation in that her teeth were broken and she had to have them recapped and other extensive dental work performed.

P.D. 15. As a further direct and proximate result of the negligence of defendant, plaintiff has incurred substantial expenses related to the dental work she has had to have performed.

#### SECOND CAUSE OF ACTION

16. Paragraphs 1-15 hereinabove are realleged.

*P-A* 17. At all times during the preparation of plaintiff for surgery, the course of such surgery, and the care of plaintiff after such surgery, defendants Dickson and Veasy were assisted by certain nurses and other personnel, whose names are currently unknown, who were employed by defendant Pioneer Valley Hospital and acting within the scope of their duties as employees of defendant Pioneer Valley.

*P-A* 18. Prior to the administration of anesthesia to plaintiff, plaintiff informed said employees of defendant Pioneer Valley of her sensitivity to anesthesia and of the fact that she had 22 capped teeth and extensive bridgework which had recently been installed. Plaintiff so informed said persons because she was aware of the need to provide special protection for that type of dental work when being placed under general anesthesia.

*P-A* 19. At some time during the preparation of plaintiff for surgery or during the course of such surgery or immediately thereafter, and during such time that plaintiff was under general anesthesia, several of plaintiff's teeth were damaged and broken and her bridgework was severely damaged.

20. Said damage was a direct and proximate result of the negligence and carelessness of nurses and other personnel employed by defendant Pioneer Valley and acting within the scope of their employment.

21. As a direct and proximate result of the negligence of said employees of defendant Pioneer Valley, plaintiff was forced to endure great pain, suffering, discomfort, inconvenience and humiliation in that her teeth were broken and she had to have them recapped and other extensive dental work performed.

22. As a further direct and proximate result of the negligence of said employees of defendant Pioneer Valley, plaintiff has incurred substantial expenses related to the dental work she has had to have performed.

### THIRD CAUSE OF ACTION

23. Paragraphs 1 through 22 hereinabove are realleged.

*R-D* 24. Plaintiff was in the exclusive care and control of defendants Veasy, Dickson and Pioneer Valley during the period immediately prior to, during, and immediately after the performance of surgery upon her on March 27, 1985.

*R-D* 25. Plaintiff's injuries occurred while she was under the exclusive care and control of defendants.

*R-D* 26. Defendants held themselves out as experts in the provision of medical care, including but not limited to the performance of surgery and the administration of anesthesia, and plaintiff relied upon them as experts.

*R-D* 27. The injuries suffered by plaintiff could not have occurred in the absence of negligence.

28. Therefore, under the doctrine of res ipsa loquitur defendants are liable to plaintiff for the injuries as alleged herein.

29. As a direct and proximate result of the negligence of defendants, plaintiff was forced to endure great pain, suffering, discomfort, inconvenience and humiliation in that her teeth were broken and she had to have them recapped and other extensive dental work performed.

30. As a further direct and proximate result of the negligence of defendants, plaintiff has incurred substantial expenses related to the dental work she has had to have performed.

#### FOURTH CAUSE OF ACTION

31. Paragraphs 1 through 30 hereinabove are realleged.

32. Defendants Veasy, Dickson and Pioneer Valley were further negligent in that they failed to inform plaintiff that an injury of the type she incurred could or might occur in connection with her knee surgery.

33. As a result of defendants' failure to warn plaintiff, she was forced to endure great pain, suffering, discomfort, inconvenience and humiliation in that her teeth were broken and she had to have them recapped and had to have extensive additional dental work performed.

34. As a further direct and proximate result of defendants' failure to warn, plaintiff has incurred substantial


expenses related to the dental work she has had to have performed.

WHEREFORE, plaintiff prays for judgment in her favor and against the defendants for such damages as are alleged herein, and for such other relief as the Court shall deem reasonable and proper.

Dated this 9 day of October, 1986.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By

  
John W. Andrews  
Attorneys for Plaintiff  
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Telephone: (801) 532-3333

Plaintiff's Address:  
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South Jordan, Utah 84065

9209M

160 East 300 South, Box 45802  
Salt Lake City, Utah 84145  
Telephone: (801) 530-6730

EXHIBIT "A"

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING

STATE OF UTAH

LYNN NIELSEN

Petitioner

-vs-

D. M. DICKSON, M.D., GEORGE VEASY, M.D.,  
and PIONEER VALLEY HOSPITAL

Respondent(s)

Case No. PR-86-023

A F F I D A V I T

I, David E. Robinson, Director, Division of Occupational & Professional Licensing, Department of Business Regulation, hereby certify that the petitioner has complied with the filing requirements as set forth in Section 78-14-12, Utah Code Ann., 1953 as amended. However, due to the backlog of existing cases, a hearing was not held within the 90-days a panel retains jurisdiction. Additionally, a stipulation extending jurisdiction was not extended by all parties.

The initiation of any further proceedings in district court is left for subsequent action by the parties involved.

Dated this 15th day of September, 1986.

  
David E. Robinson  
Director

S T A T E   S E A L

APR 4 1988

H. Dixon Hixley, Clerk 3rd Dist. Court  
By D. A. Shields  
Deputy Clerk

DAVID W. SLAGLE  
No. A2975  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Defendant  
Pioneer Valley Hospital  
Eleventh Floor, Newhouse Building  
10 Exchange Place  
P. O. Box 45000  
Salt Lake City, Utah 84145  
Telephone: 521-9000

---

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

LYNN NIELSEN,

Plaintiff,

vs.

PIONEER VALLEY HOSPITAL,  
D. M. DICKSON, GEORGE D.  
VEASY and DOES I THROUGH  
V, inclusive,

Defendants.

---

ORDER AND SUMMARY  
JUDGMENT

No. C-86-7731  
Judge Homer F. Wilkinson

The Motions of defendants, Pioneer Valley Hospital, and D. M. Dickson, M.D., came on regularly for hearing before the Honorable Homer F. Wilkinson on Friday, March 18, 1988. The plaintiff was represented by Daniel Darger, the defendant Pioneer Valley Hospital was represented by David W. Slagle, and the defendant D. M. Dickson, M.D., was represented by Gary D. Stott. The Court heard argument of counsel, considered

the files and records of the Court herein, reviewed the Memoranda of the parties, and considered the Affidavit of Dr. Lawrence E. Reichmann. Having taken into consideration all of the above, the Court found:

1. That the evidence before the Court at the time of the hearing did not establish a prima facie case of negligence or causation against either of the defendants; and

2. That the facts of the case, without the benefit of expert testimony on behalf of the plaintiff, did not establish the requisite elements for submission of the case to the jury under the doctrine of res ipsa loquitur.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of the defendants, Pioneer Valley Hospital and Dr. D. M. Dickson, and against the plaintiff, no cause of action, with costs awarded to the defendants.

DATED this 4 day of April, 1988.

BY THE COURT:

ATTEST  
H. L. ENGEL  
Clerk  
By S. A. Shills  
Deputy Clerk

Homer F. Wilkinson  
HOMER F. WILKINSON  
DISTRICT JUDGE



1. The first part of the exhibit is a list of the names of the persons who have been identified as having been in contact with the subject of the investigation, and the names of the persons who have been identified as having been in contact with the persons who have been identified as having been in contact with the subject of the investigation.

DANIEL DARGER (0815)  
Attorney for Appellant  
100 Commercial Club Building  
32 Exchange Place  
Salt Lake City, Utah 84111  
Telephone: (801) 531-6686

IN THE SUPREME COURT OF THE STATE OF UTAH

---

LYNN NIELSEN,	:	
	:	
Appellant,	:	AMENDED DOCKETING
	:	STATEMENT
vs.	:	(Subject to Assignment
	:	to the Court of Appeals)
	:	
PIONEER VALLEY HOSPITAL,	:	
D.M. DICKSON, and DOES	:	Case No. 880170
I THROUGH V, inclusive,	:	
	:	
Respondents.	:	

---

Appellant, Lynn Nielsen, pursuant to Rule 9 of the Rules of the Utah Supreme Court hereby submits the following docketing statement.

I.

JURISDICTION

This Court has jurisdiction over this appeal pursuant to §78-2-2(3)(i), Utah Code Annotated (1988).

II.

NATURE OF THE PROCEEDING

This is an appeal from a final order of summary judgment entered against the Appellant on the 4th day of April, 1988, by the Third District Court, the Honorable Homer F. Wilkinson

presiding. Notice of Appeal was filed on the 28th day of April, 1988.

#### FACTS

On February 27, 1985, Appellant Lynn Nielsen entered Respondent Pioneer Valley Hospital to undergo surgery on her left knee. During the previous year, she had undergone substantial bridgework and other dental work on her teeth.

At approximately 8:40 a.m. on February 27, 1985, Appellant was interviewed by agents of Respondent Pioneer Valley Hospital as well as Respondent Dickson, the anesthesiologist. They were informed of her dental work. She was thereafter admitted to surgery during which she was placed under general anesthesia. All parties agree that when Appellant went into surgery for her knee, her dental work was in place and in good condition.

At approximately 11:35 a.m. on February 27, 1985, while Appellant was semi-conscious in the recovery room of Respondent Pioneer Valley Hospital and under the exclusive care and control of the Respondents, a nurse discovered that Appellant's teeth were broken and damaged. All parties agree that it was sometime between the time Appellant entered the Respondent's care for surgery and the time she left the recovery room that her dental work was broken and damaged. Appellant was not conscious and has no direct knowledge of how her injury happened.

On or about October 9, 1986, Appellant filed a complaint against Respondents Pioneer Valley Hospital and Dr. Dickson among others, alleging that her teeth and bridgework had been damaged

due to their negligence, either before, during or after the operation on her knee. As one of her causes of action, Appellant alleged that the Respondents should be deemed presumptively negligent under the Doctrine of Res Ipsa Loquitur.

On February 24, 1987, the District Court entered an order dismissing George D. Veasy as a Defendant, thus leaving only Respondents Dickson and Pioneer Valley Hospital as Defendants in the case. (See Exhibit C Attached hereto)

On or about February 17, 1988, Respondent Dickson filed a Motion for Summary Judgment which was thereafter joined by Respondent Pioneer Valley Hospital. The grounds for the motion were that Plaintiff could not prove negligence at trial as a matter of law because she did not plan to present medical expert testimony to support her claim that Respondents Pioneer Valley Hospital and Dr. Dickson breached their duty of reasonable care in their treatment of Appellant. Respondents argued the general rule in most medical malpractice cases, that expert testimony is required because the technical nature of the issues remove the particularities of its practice and the requisite standard of care from the knowledge and understanding of an average citizen.

Appellant responded by arguing that the instant case falls within the exception to the general rule requiring expert testimony because the propriety of the treatment received by Appellant is within the knowledge and experience of the layman. It is Appellant's position that the cause of her injury was so obviously the result of negligence that negligence should be

inferred as a matter of law. Appellant further argued that the testimony of her treating dentist to the effect that Appellant's teeth were in good shape and of such nature that it would take a significant blow or unusual impact to damage them, was competent, expert testimony to prove the issue of negligence.

These issues were argued before Judge Wilkinson, who ruled that Appellant needed to provide expert testimony to prove that the damage to Appellant's teeth while under the exclusive care and control of the Respondents was the result of negligence. (See Exhibit A Attached hereto)

Judge Wilkinson's order and summary judgment constituted a final judgment of all claims of all parties hereto.

#### ISSUES PRESENTED ON APPEAL

1) Do the issues to be determined in establishing the standard of care and breach thereof in this case involve medical technicalities requiring expert testimony or are they within the common knowledge and experience of layman so that negligence may be inferred as a matter of law pursuant to the Doctrine of Res Ipsa Loquitur.

2) If expert testimony is required to establish negligence, does the testimony of Plaintiff's treating dentist qualify as such expert testimony to establish that negligence was most likely the cause of Appellant's injury.

#### DETERMINATIVE STATUTES AND CASES

Appellant dose not rely upon statutes in this case. The following cases are relied upon in support of this appeal.

- a. Nixdorf v. Hicken, 612 P.2d 264, 348, 351 (Utah 1980);
- b. Hoopliaina v. Intermountain Health Care, 740 P.2d 270  
(Utah App. 1987)
- c. Robinson v. Intermountain Health Care, Inc., 740 P.2d  
262, 264 (Utah App. 1987)
- d. Fredrickson v. Maw, 277 P.2d 772 (Utah 1951)
- e. Virginia S. v. Salt Lake Care Center 741 P.2d 969 (Utah  
1987)

#### PRIOR APPEALS


There have been no prior appeals in this matter.

#### ATTACHMENTS

To clarify the record, attached hereto are the following:

- a. The Third District Court's order and Summary Judgment  
from which Appellant appeals herein;
- b. The Notice of Appeal filed herein;
- c. Order of Dismissal (George D. Veasy).

Dated this 20<sup>th</sup> day of June, 1988.

  
DANIEL DARGER  
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Amended Docketing Statement (Subject to Assignment to the Court of Appeals) was mailed, this 20th day of June, 1988, to:

Gary D. Stott  
Michael A. Peterson  
Richards, Brandt, Miller  
& Nelson  
Key Bank Tower, Suite 700  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110

and

David W. Slagle  
Snow, Christensen & Martineau  
P.O. Box 45000  
Salt Lake City, Utah 84145

Kristine Salzman





APR 4 1988

H. Dixon Hindley, Clerk 3rd Dist Court  
By D. W. Slagle  
Deputy Clerk

DAVID W. SLAGLE  
No. A2975  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Defendant  
Pioneer Valley Hospital  
Eleventh Floor, Newhouse Building  
10 Exchange Place  
P. O. Box 45000  
Salt Lake City, Utah 84145  
Telephone: 521-9000

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

LYNN NIELSEN,

Plaintiff,

vs.

PIONEER VALLEY HOSPITAL,  
D. M. DICKSON, GEORGE D.  
VEASY and DOES I THROUGH  
V, inclusive,

Defendants.

-----

ORDER AND SUMMARY  
JUDGMENT

No. C-86-7731  
Judge Homer F. Wilkinson

The Motions of defendants, Pioneer Valley Hospital, and D. M. Dickson, M.D., came on regularly for hearing before the Honorable Homer F. Wilkinson on Friday, March 18, 1988. The plaintiff was represented by Daniel Darger, the defendant Pioneer Valley Hospital was represented by David W. Slagle, and the defendant D. M. Dickson, M.D., was represented by Gary D. Stott. The Court heard argument of counsel, considered

the files and records of the Court herein, reviewed the Memoranda of the parties, and considered the Affidavit of Dr. Lawrence E. Reichmann. Having taken into consideration all of the above, the Court found:

1. That the evidence before the Court at the time of the hearing did not establish a prima facie case of negligence or causation against either of the defendants; and

2. That the facts of the case, without the benefit of expert testimony on behalf of the plaintiff, did not establish the requisite elements for submission of the case to the jury under the doctrine of res ipsa loquitur.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of the defendants, Pioneer Valley Hospital and Dr. D. M. Dickson, and against the plaintiff, no cause of action, with costs awarded to the defendants.

DATED this 4 day of April, 1988.

BY THE COURT:

ATTEST  
H. D. ...  
S. A. Shultz  
Deputy Clerk

HOMER F. WILKINSON  
DISTRICT JUDGE



RECEIVED SEP 20 1988

STATE OF UTAH

SALT LAKE CITY, UTAH

September 16, 1988

OFFICE OF THE CLERK

---

Daniel Darger, Esq.  
100 Commercial Club Building  
32 Exchange Place  
Salt Lake City, Utah 84111

Lynn Nielsen,  
Plaintiff and Appellant,  
v. No. 880170  
Pioneer Valley Hospital,  
D.M. Dickson, George D. Veasy  
and Does I Through V, inclusive,  
Defendants and Appellee.

Appellant's motion for summary disposition of this matter is hereby granted. The trial court was manifestly in error in granting summary judgment since material facts are in dispute.

Nixdorf v. Hicken, 612 P.2d 348 (Utah 1980) is controlling on the issue of res ipsa loquitur. Expert evidence is not necessary to establish the applicable standard of care in this case, as it appears no medical technicalities are involved.

The summary judgment is reversed and this case is remanded for further proceedings.

Geoffrey J. Butler, Clerk



INSTRUCTION NO. 16

A physician is not a guarantor of successful results, and therefore, no presumption of negligence arises from the fact of an adverse event occurring during a defendant's treatment. The measure of duty owed by the defendant physician to the patient is that degree of care, skill and diligence ordinarily possessed and exercised, under similar circumstances, by other physicians in the same practice and profession. The physician must use ordinary and reasonable care and diligence in providing medical care to the patient. If you find from the evidence in this case that the doctor provided care in compliance with the standard as defined in these instructions then you must find for the defendant physician.

If complications or adverse results occur in connection with a doctor's treatment of a patient, such facts, in and of themselves, do not prove that the doctor was negligent.



INSTRUCTION NO. 49

In determining whether the physician properly fulfilled his duty imposed upon him as a physician, in his treatment and care of plaintiff, you are not permitted to use a standard derived from your own experience with physicians, nor any other standard of your own.

The standard of professional care by which the physician is to be judged by you is that degree of learning, care and skill ordinarily possessed and used by other physicians undertaking the care of a patient under similar circumstances in the same field of practice at the time such treatment and care was rendered.

The only way you may properly learn such standard and thus determine whether or not the physician in this case conformed to it, is through evidence presented during this trial by physicians in the same field of practice testifying as expert witnesses who knew of that standard as it existed at that time.

A - 1 -





RECEIVED JUN 0 5 1989

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& NELSON  
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Telephone: (801) 531-1777

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

LYNN NIELSEN,	)	
	)	
Plaintiff,	)	AMENDED
	)	JUDGMENT ON VERDICT
vs.	)	
	)	
PIONEER VALLEY HOSPITAL,	)	
D. M. DICKSON, GEORGE D. VEASY	)	
and DOES I through V	)	
inclusive,	)	
	)	
Defendants.	)	Civil No. C86-7731
	)	Judge Homer F. Wilkinson

---

The Court, upon receiving a unanimous verdict from the jury of no cause of action in favor of the defendants and against the plaintiff, does hereby enter judgment on the verdict dismissing the above-entitled action with prejudice, costs being awarded to the defendant, Pioneer Valley Hospital,

in the amount of \$ -0-, and costs being awarded to  
the defendant, D. M. Dickson, M.D., in the amount of  
\$ 144.50, together with interest as allowed by law.

DATED this 11th day of May, 1989.

BY THE COURT:

15/ Homer F. Wilkinson  
HON. JUDGE HOMER F. WILKINSON  
Third Judicial District Court  
Salt Lake County

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the  
foregoing instrument was mailed, first class, postage prepaid  
this 27 day of April, 1989, to the following counsel of  
record:

Daniel Darger, Esq.  
100 Commercial Club Building  
32 Exchange Place  
Salt Lake City, Utah 84111  
Attorney for Plaintiff

David W. Slagle, Esq.  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, Suite 1100  
P. O. Box 45000  
Salt Lake City, Utah 84145  
Attorneys for Defendant Pioneer Valley Hospital

Pager. Hay



INSTRUCTION NO. 22

The Court instructs you that in certain situations it is not necessary for the plaintiff in a medical malpractice action to present evidence of the defendants' negligence by expert testimony. Specifically, where the propriety of the treatment received is within the common knowledge and experience of the layman, expert testimony is unnecessary to establish the standard of care owed to the plaintiff. The plaintiff must, however, establish by the evidence that:

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 the plaintiff.

If you find from a preponderance of the evidence that all three of the above criteria have been met, then you may find an inference of negligence from those circumstances. This does not mean that negligence is necessarily established, it merely creates an inference which may be rebutted by the defendant or defendants.