1024 PROFESSIONAL NEGLIGENCE: MEDICAL: RES IPSA LOQUITUR

If you find that (name the part of the body that was injured) of (plaintiff) was injured during the course of the operation performed by (doctor) and if you further find (from expert medical testimony in this case) that the injury to the (name the part of the body that was injured) of (plaintiff) is of a kind that does not ordinarily occur if a surgeon exercises proper care and skill, you may infer, from the fact of surgery to the (name the part of the body that was injured) of (plaintiff), that (doctor) failed to exercise that degree of care and skill which reasonably prudent surgeons would exercise. This rule will not apply if (doctor) has offered an explanation for the injury to the (name the part of the body that was injured) of (plaintiff) which satisfies you that the injury to (plaintiff) did not occur through any failure on (doctor)'s part to exercise due care and skill.

COMMENT

The instruction and comment were originally published in 1967. This revision was approved in 1980. The comment was updated in 1997, 2010, and 2017.

Kelley v. Hartford Casualty Ins. Co., 86 Wis.2d 129, 271 N.W.2d 676 (1978); Hoven v. Kelble, 79 Wis.2d 444, 256 N.W.2d 379 (1977); Trogun v. Fruchtman, 58 Wis.2d 569, 207 N.W.2d 297 (1973); Burnside v. Evangelical Deaconess Hosp., 46 Wis.2d 519, 175 N.W.2d 230 (1970); see also Lecander v. Billmeyer, 171 Wis.2d 593, 492 N.W.2d 167 (Ct. App. 1992); Petzel v. Valley Orthopedics Ltd., 2009 WI App. 106, 320 Wis.2d 621, 770 N.W.2d 787.

Whether the evidence presented warrants the giving of a res ipsa loquitur instruction always presents a question of law for the trial court. Fehrman v. Smirl, 20 Wis.2d 1, 28b, 121 N.W.2d 255 (1963).

Res ipsa loquitur was first applied to medical malpractice actions in 1963. Fehrman v. Smirl, 20 Wis.2d 1, 121 N.W.2d 255 (1963). In this case, the supreme court loosened the rule that a physician's negligence could only be proven by expert testimony in situations where the errors were of such a nature that a layperson could conclude from common experience that such mistakes do not happen if the physician had exercised proper skill and care. Res ipsa loquitur is a rule of evidence that permits the jury to draw a permissible inference of the physician's negligence without any direct or expert testimony as to the physician's

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conduct at the time the negligence occurred. Hoven v. Kelble, 79 Wis.2d 444, 256 N.W.2d 379 (1977). The doctrine can be involved in a medical malpractice action when: (1) there is evidence that the event in question would not ordinarily occur unless there was negligence; (2) the agent or instrumentality that caused the harm was within the defendant's exclusive control; and (3) the evidence allows more than speculation but does not fully explain the event. See Lecander v. Billmeyer, 171 Wis.2d 593, 601-02, 492 N.W.2d 167 (Ct. App. 1992); Walker v. Sacred Heart Hospital, Appeal No. 2015AP805 (decided January 4, 2017). In Richards v. Mendivil, 200 Wis.2d 665, 548 N.W.2d 85 (Ct. App. 1996), the court of appeals noted that there is a danger that when a plaintiff relies upon expert testimony that the evidence of negligence will be so substantial that a full and complete explanation of causation is provided and res ipsa loquitur will not be applicable.

The third element discussed above that the evidence allows more than speculation but does not fully explain the event was set forth in Fiumefreddo v. Mclean, 174 Wis.2d 10, 496 N.W.2d 226 (Ct. App. 1993). See also Lecander v. Billmeyer, supra.

In Kelley, the court stated, at 132:

> Before a res ipsa loquitur instruction can be given to a jury, the evidence must conform to these requirements:
>
> (1) The event in question must be of the kind which does not ordinarily occur in the absence of negligence; and (2) the agency or instrumentality causing the harm must have been within the exclusive control of the defendant. Trogun v. Fruchtman, 58 Wis.2d 569, 590, 207 N.W.2d 297 (1973).

With respect to these two conditions, the court in Hoven v. Kelble, supra at 451-52, stated:

> When these two conditions are present, they give rise to a permissive inference of negligence on the part of the defendant which the jury is free to accept or reject. It is settled that the doctrine may be applied in medical malpractice cases and that the likelihood that negligence was the cause may be shown by expert medical testimony in cases where it may not be so inferred on the basis of common knowledge. Fehrman v. Smirl, 20 Wis.2d 1, 21, 22, 25, 26, 121 N.W.2d 255, 122 N.W.2d 439 (1963); Trogun v. Fruchtman, supra.

Need for Expert Testimony. If the jury may be permitted to infer negligence on the basis of layman's knowledge (as whether the plaintiff's shoulder was injured during an appendectomy), omit the phrase in lines two and three "from expert medical testimony in this case."

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