

## Medical Malpractice Update

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### The Thing Speaks for Itself and to the Standard of Care

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Medical malpractice litigators are presented with the uniquely challenging task of defending against the doctrine of *res ipsa loquitur* (the thing speaks for itself). Unlike specific claims of negligence, *res ipsa loquitur* is an evidentiary framework that allows a jury to draw an inference that a defendant was negligent and shifts the burden of proof to the defendant to prove he was not negligent. For *res ipsa loquitur* to apply in a medical malpractice setting, the plaintiff must prove they 1) suffered an injury that was an expected complication of medical care that does not normally occur unless someone was negligent (the probability element) and 2) the defendant was responsible for or in control of the instrumentality (the control element). *Res ipsa loquitur*, because of the use of circumstantial inferences and a burden shift, has always posed a challenge in defending certain medical cases, particularly those in the surgical setting. The plaintiffs often argue that expert testimony is not necessary to prove their cause of action.

In the recent decision of *Johnson v. Armstrong*, 2022 IL 127942, the Illinois Supreme Court does not assist defense counsels' efforts to defend against *res ipsa loquitur* claims. In *Johnson*, the court directly addressed the issue of standard of care and whether additional expert testimony is required under the doctrine of *res ipsa loquitur*. In *Johnson*, the defendant performed a left total hip replacement on the plaintiff with the assistance of two surgical technicians. After the surgery, the plaintiff suffered permanent nerve damage to his leg. Counts I and II of the plaintiff's complaint alleged specific negligence against the defendant surgeon, Dr. Armstrong and his corporation. Counts III and IV alleged negligence against Dr. Armstrong and the surgical technicians based on the doctrine of *res ipsa loquitur*, specifically stating that the injury to the plaintiff's femoral nerve occurred while the "retractors, scalpel, electrocautery device and other surgical instruments were under the control" of the three defendants and that in the ordinary course of events, the plaintiff's injury would not have occurred in the absence of negligence by the defendants. *Johnson*, 2022 WL 2284320, ¶ 1.

#### Evidence Presented

During the course of discovery, each defendant was deposed and questioned regarding their individual roles during the surgery. Stating that Dr. Armstrong was the only one authorized to position or move any instrument in contact with the plaintiff's body and to actually have done so, the defendants all testified consistently. *Id.* ¶ 7. Testimony showed that the "first scrub" was primarily tasked with handing surgical instruments to Dr. Armstrong. The plaintiff thereafter voluntarily dismissed the first scrub assistant. *Id.* Sarah Harden, the "second scrub," was responsible for holding certain instruments, including the retractor, while the instruments were in contact with the plaintiff's body.

The plaintiff's lone expert, Dr. Sonny Bal, an orthopedic surgeon, opined that nerve palsies are known complications of hip replacement surgery, that did not *per se* indicate a breach of the standard of care. *Id.* ¶ 8. However, Dr. Bal testified that Mr. Johnson's nerve injury would not have occurred absent negligence and was "most likely" caused by improper

use of the retractor. *Id.* ¶ 8. Notably, Dr. Bal testified that Dr. Armstrong did not deviate from the standard of care in making the incision and management of the retractor. Dr. Bal offered no opinion as to the standard of care for the surgical assistant. *Id.* ¶ 8.

After the defendant assistant, Harden, moved for summary judgment on the *res ipsa loquitur* count, the circuit court granted the motion, stating that 1) no qualified expert had established the standard of care for the assistant, 2) there was no evidence of negligence on her part, and 3) the assistant did not control the retractor for purposes of *res ipsa loquitur*. *Id.* ¶ 9. Two months later, the circuit court also granted Dr. Armstrong’s oral motion for summary judgment on the *res ipsa loquitur* count. Plaintiff filed a notice of appeal pursuant to Ill. S. Ct. R. 304(a). *Id.* ¶¶ 10-13.

The Illinois Appellate Court Fourth District reversed the circuit court’s decision as to both defendants, holding that *res ipsa loquitur* applied. *Id.* ¶ 14. The Fourth District found that the assistant controlled the retractor and that no additional expert testimony was needed to establish defendant assistant’s standard of care, holding, “[i]n essence, the control element of the *res ipsa* doctrine is sufficient to establish a duty of care.” *Id.* (emphasis original). The Fourth District declined to follow its own prior decision in *Taylor v City of Beardstown*, 142 Ill. App. 3d 584 (1986), which required testimony regarding the standard of care and deviation from that standard to invoke the *res ipsa loquitur* doctrine. 2021 IL App (4th) 210038, ¶ 69.

### Proofs for *Res Ipsa Loquitur*

The supreme court then examined the unique evidence involving probability, control and standard of care proofs of *res ipsa loquitur* and whether it could be applied solely to the assistant in a situation where she was exercising joint control, when generally the doctrine requires exclusive control. The court found that if it were to determine that *res ipsa loquitur* could not be applied to the assistant in the absence of Dr. Armstrong, the plaintiff would be precluded from obtaining meaningful relief. *Johnson*, 2022 WL 2284320, ¶ 7. Analyzing the probability element of *res ipsa loquitur*, the court noted that the plaintiff has to establish that the nerve damage suffered ordinarily does not occur in the absence of negligence. Given the nature of this type of injury, expert testimony is required. *Id.* ¶ 38. The court found the testimony from expert Dr. Bal was sufficient evidence to satisfy the probability element as he distinguished “unequivocally” that the plaintiff’s complete nerve injury does not occur absent negligence. *Id.* ¶ 39.

The court took a much more “flexible” view of the control component, first finding that the plaintiff had identified all the parties who were potentially responsible for injury and therefore met the control element. The plaintiff was not required to specifically identify which or what “instrumentality” may have been the cause of his injury to satisfy his *res ipsa loquitur* count. *Id.* ¶ 43. The court went on to recognize that assuming the retractor was the cause, the surgical assistant, even if she had no independent authority to place it, was holding the instrument inside the plaintiff’s body and could have moved or mismanaged the retractor. *Id.* ¶ 48.

The court next analyzed the issue of the standard of care principle in the context of both common law negligence and *res ipsa loquitur*. The elements of common law negligence are “a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by the breach.” *Id.* ¶ 51 (internal citation omitted). The standard of care under common law negligence falls under the duty element. *Id.* ¶ 51. Under Illinois law, *res ipsa loquitur* is not an alternative theory of liability—the theory, or cause of action, remains negligence. Instead, *res ipsa loquitur* is a species of circumstantial evidence that allows the trier of fact to draw an inference that a duty was breached. *Id.* ¶ 55. The *Johnson* court summarized the issue before it as “whether the standard of care portion of the duty element of negligence has been satisfied where the two elements of *res ipsa loquitur* have been satisfied.” *Id.* ¶ 56. The court answered this question in the affirmative, and found that, where both *res ipsa loquitur* elements (probability and control) were met, the standard of

care does not need to be established separately. *Id.* ¶ 58. Based on the facts before it, the court did not “determine which of the two *res ipsa loquitur* elements, taken alone, might satisfy the standard of care requirement because both elements are satisfied here.” *Id.* Here, because the plaintiff does not allege the precise individual or instrumentality which caused his injury, he cannot and does not need to establish an individual standard of care for either Dr. Armstrong or Harden under *res ipsa loquitur*. By establishing the element of *res ipsa loquitur*, the court found the plaintiff provided the legally applicable standard of care from which negligence may be found since a hip replacement does not normally result in permanent leg nerve damage. *Id.*

The court outright rejected the defendant Harden’s argument that competent testimony as to the standard of care for a surgical technician was required. The court found that since *res ipsa loquitur* was proven, no separate standard of care expert was needed. *Id.* at ¶ 59.

### *After Johnson v. Armstrong*

In light of the supreme court’s decision in *Johnson*, defense practitioners should prepare early arguments against *res ipsa loquitur*. Because the standard of care may be satisfied where *res ipsa loquitur* elements of probability and control are met, plaintiffs may have an advantage, particularly in a surgical medical malpractice case, and perhaps in other settings as well. In medical malpractice cases, it is crucial that the defense isolate and identify the instrumentality, if possible. If the instrumentality is known, *res ipsa loquitur* likely may not apply. Further pursuit of establishing the exact (non-negligent) cause of the injury is also key. Lastly, since *res ipsa loquitur* requires that all participants be named for the doctrine to be successfully invoked, defense counsel must, as always, zealously defend their individual client and their role, but also consider the need for a cohesive, joint defense in light of the issues surrounding with multiple defendants and allegations, including *res ipsa loquitur* at play.

Attorneys defending medical practitioners should pay particular attention to *Johnson*, as their clients may face a jury even where no expert evidence about the defendant’s alleged negligence is offered. The thing may speak for itself, but the defense needs to be aware of the need to “speak back” when encountering *res ipsa loquitur*.

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