SURGICAL ERRORS – THE DIFFERENCE

BETWEEN A RECOGNIZED COMPLICATION AND MALPRACTICE

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Terrance C. Sullivan

Leigh H. Martin

Butler, Wooten, & Fryhofer

2719 Buford Highway

Atlanta, Georgia 30324

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Terrance C. Sullivan
Leigh M. Martin

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I. Introduction

When a patient's surgery results in an undesired outcome, lay persons immediately suspect medical malpractice as the culprit. In reality, surgery carries with it certain risks, and it is impossible to guarantee that it will produce perfect results without complications. Any physician will tell you that complications can occur in even the most carefully executed surgeries. However, the modern trend of minimizing risks raises expectations sometimes unrealistically (i.e., "piece of cake, nothing to it, you'll be good as new, you'll be home by this afternoon"). Even with that acknowledgment, certain complications do not usually occur unless the surgery was performed in a manner below the standard of care. In every surgery, some likelihood exists that certain bad outcomes are more likely to occur than others. In fact, certain "complications" may be difficult for even the most experienced surgeon to protect against while others might be complications which only rarely occur in the absence of physician negligence. In other words, a known complication of surgery may be that the surgeon makes a longer cut than is desired. The question is then whether this longer cut occurred because the surgeon was negligent or imprecise or whether other factors, such as anomalies in anatomy came to bear.

In a more exacting world, medical malpractice liability would be attached to those bad surgical outcomes occurring only when a particular physician performs a particular surgery in a manner violating the standard of care. The difficulty with appropriately determining liability is that this question requires exact answers from a science which is anything but exact. The courts, not trained in medicine, don't apply brightline tests which set out clear guidelines.

When a plaintiff suffers from a surgical complication, it is then necessary for this

individual to be able to isolate his or her particular bad outcome from a whole myriad of potential bad outcomes as something not occurring in the absence of negligence. Is the injury a rare surgical complication that occurred even though the surgeon was operating in a skillful manner or is the injury the result of a negligence occurring during the operation that rarely occurs because competent surgeons do not commit the type of error that caused the particular injury?

One question persists: Do certain bad surgical outcomes carry enough evidentiary weight to be presented to the jury which will ultimately determine whether that act or omission violated the standard of care? Also, consider this question in regard to surgical outcomes which are only expected if the surgeon does not perform the particular operation in a skillful manner. Can evidence of this particularly egregious surgical outcome be enough for the plaintiff to establish a prima facie case of medical malpractice (even without expert testimony)? In the alternative, is it more logical always to require a plaintiff to prove that the particular surgeon's own actions violated the standard of care irrespective of an outcome when the particular bad result to the patient rarely occurs when a physician performs within the appropriate standard of care?

Georgia courts struggling with this issue have not specifically framed the questions as explained above. Instead, they have issued a collage of opinions seeking to grapple with these difficult questions. In some cases, the courts expressly disclaim that they are not applying the principle of *res ipsa loquitur* to medical cases but then they allow evidence of a bad outcome to provide sufficient evidence to go to a jury. The jury is then instructed to determine whether the circumstantial evidence demonstrates that the physician's actions violated the applicable standard of care. In other cases, Georgia courts have strictly scrutinized plaintiff's expert testimony and

have required plaintiffs to explicitly demonstrate that the physician's actions, irrespective of any bad outcome, have violated the standard of care.

In seeking to understand Georgia law in this area, it is instructive to examine Georgia cases explicitly rejecting the principle of *res ipsa loquitur* for imposing tort liability in medical malpractice. In Part II, *Res Ipsa Loquitur* and the Presumption that Physicians Are Skillful, the reasoning of these cases is analyzed in an effort to understand the courts' evidentiary requirements for establishing and overcoming the presumption that physician's typically operate in a skillful manner.[1] Part III, Bad Surgical Outcome as Circumstantial Evidence of Negligence, provides Georgia cases which often times explicitly reject the principle of *res ipsa loquitur* but then allow circumstantial evidence sufficient for a jury to infer that a physician was negligent to overcome the defendant's own testimony that he or she operated in a manner consistent with the appropriate standard of care.[2] In Part IV, Bad Surgical Outcome as Insufficient Evidence of Negligence, cases focus on examples in which Georgia courts have evaluated the plaintiff's submitted evidence of a bad surgical outcome which the plaintiff contends does not typically happen absent negligent conduct.[3] In contrast with Part III, these Georgia courts have intensely scrutinized plaintiff's evidence and determined that evidence of a bad outcome is not sufficient to meet the plaintiff's burden of proof. In Part V, The Approach from Other States, a brief analysis of the law in other states is provided.[4] Part V is not intended to be a comprehensive survey of

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[1] See infra Part II, p. 4.

[2] See infra Part III, p. 8.

[3] See infra Part IV, p. 16.

[4] See infra Part V, p. 22.

other state courts' analysis of this issue. Instead, the section provides a sample of alternative approaches that other courts in other jurisdictions have employed.

II. *RES IPSA LOQUITUR* AND THE PRESUMPTION THAT PHYSICIANS ARE SKILLFUL

In some respects, medical malpractice cases are no different than other tort suits. At trial, the plaintiff will have the burden of proof. If the plaintiff fails to meet her burden, the defendant will triumph. Georgia courts, however, have chosen to apply different rules for most species of malpractice actions. In addition to those statutory protections given to physicians as part of several legislative attempts at "tort reform," many courts have also given physicians greater protections and made it more difficult for plaintiffs to succeed in medical malpractice cases.

One of these protections is usually urged as a jury charge by defense counsel: "Our law presumes that a physician and surgeon performs his healing art in an ordinarily skillful manner and the burden is on the one who denies it to show the lack of due care, skill, and diligence."[5] At first glance, it could be argued that this presumption is merely a restatement of the plaintiff's burden of proof in any tort case.[6] In other words, if a plaintiff fails to establish the physician's negligence, it follows as a matter of no great surprise that the law would presume that the physician is not negligent.

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[5] Shea v. Phillips, 213 Ga. 269, 271, 98 S.E.2d 552 (1957).

[6] See Eaton, Thomas A., Res Ipsa Loquitur and Medical Malpractice in Georgia: A Reassessment, 17 **Ga. L. Rev.** 33, 38-42 (1982).

Georgia courts, however, have taken this statement and extended its original meaning. Instead of reading it as a basic statement of the burdens of proof at trial, these courts have chosen to interpret this statement as providing physicians with greater protections than other tortfeasors would have. In fact, Georgia courts have used this presumption to negate many plaintiffs' attempt at using the principle of *res ipsa loquitur* in medical malpractice actions.

In typical tort cases, plaintiffs are able to use *res ipsa loquitur* to create a rebuttable presumption of negligence where "(1) the injury is of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff."[7] Plaintiffs primarily rely on this principle when the facts and circumstances make it possible for a jury to infer negligence, "thereby filling the evidentiary gap."[8]

"Georgia courts have expressly ruled, however, that the doctrine of res ipsa loquitur does not apply in a malpractice suit. An unintended result does not raise an inference of negligence."[9] In early cases where Georgia courts first rejected the principle of *res ipsa loquitur* in medical malpractice cases, they usually returned to the presumption that medical professionals are presumed to operate in a skillful manner. The courts then go on to conclude that *res ipsa*

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[7] KMart Corp. v. Larsen, 240 Ga. App. 351, 352, 522 S.E.2d 763, 765 (1999).

[8] Id.

[9] Hayes v. Brown, 108 Ga. App. 360, 366, 133 S.E.2d 102, 107 (1963).

loquitur is inconsistent with that assumption.

This position is not without its detractors. In 1998 in the case of Hardy v. Tanner Medical Center, Inc., the plaintiffs were the parents of a child who died after she was seen by physicians at the emergency room and then sent home. They had appealed a jury verdict for the defendants.[10] The Court of Appeals affirmed the jury verdict in favor of the defendants. Judge Blackburn filed an opinion concurring in the result and acknowledging that Georgia law prohibits *res ipsa loquitur* from applying in medical malpractice cases.[11] In that concurring opinion, however, Judge Blackburn argued that *res ipsa loquitur* should be applied in medical malpractice cases. Specifically, Judge Blackburn wrote that "Georgia has improperly immunized medical professionals from assuming the burden of explaining their actions in appropriate cases where *res ipsa loquitur* would normally apply. The cost of this gratuitous benefit to the medical profession is being paid by the victims of medical malpractice, who are uniquely penalized, unlike any other category of tortious conduct."[12] In his concluding sentence, Judge Blackburn advocated for the legislature to treat victims of medical malpractice the same as other tort victims and to withdraw the presumption that medical or surgical services are performed in an ordinarily skillful manner.[13]

In surgery cases, this intellectual discussion gains importance. Typically, surgery patients do not have access to information about exactly what went wrong during their surgery.

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[10] 231 Ga. App. 254, 258, 499 S.E.2d 121, 125 (1998).

[11] Id. at 258, 499 S.E.2d at 125.

[12] Id. at 259, 499 S.E.2d at 125.

[13] Id. at 259, 499 S.E.2d at 126.

Patients are given the broad consents required by the applicable statute. Specifically, O.C.G.A. § 31-9-6.1 requires "any person who undergoes any surgical procedure under general anesthesia, spinal anesthesia, or major regional anesthesia or any person who undergoes an amniocentesis diagnostic procedure or a diagnostic procedure which involves the intravenous or intraductal injection of a contrast material" to consent to the procedure after being informed of the

> material risks generally recognized and accepted by reasonably prudent physicians of infection, allergic reaction, severe loss of blood, loss or loss of function of any limb or organ, paralysis or partial paralysis, paraplegia or quadriplegia, disfiguring scar, brain damage, cardiac arrest, or death involved in such proposed surgical or diagnostic procedure which, if disclosed to a reasonably prudent person in the patient's position, could reasonably be expected to cause such prudent person to decline such proposed surgical or diagnostic procedure on the basis of the material risk of injury that could result from such proposed surgical or diagnostic procedure.

During most surgeries, patients are under heavy anesthetics. Even when a patient is conscious during surgery, it is unlikely that the patient is able to carefully observe the surgeon during the surgery. Additionally, most patients do not have the medical knowledge to distinguish a negligently performed surgery from a surgery performed without deviation from the standard of care. Further, it may be difficult for an expert witness to understand exactly what wrong during the surgery if the expert is only allowed to study the patient's medical records before the surgery and the patient's medical condition after the completion of the surgery. This is particularly true if the patient’s records are sketchy and incomplete. If the surgery causes the patient some negative outcome, it may be difficult for the patient or an expert witness to understand how this outcome occurred.

Georgia courts have struggled with this evidentiary difficulty. Faced with a patient who has suffered an injury from surgery which the patient did not expect to occur, courts, expert

witnesses, and juries are often required to distinguish between complications which can be expected even in a flawlessly performed surgery and complications which ordinarily do not occur in the absence of negligence. It is then necessary to try as best as possible to recreate what occurred during the patient's surgery and determine what likely occurred and how the physician's performance measured up against the appropriate standard of care. As can be expected, Georgia courts have had a difficult time resolving these types of cases in a consistent manner. Instead, the cases reveal an inconsistent treatment of the plaintiff's evidentiary burden.

III. BAD SURGICAL OUTCOME AS CIRCUMSTANTIAL EVIDENCE OF NEGLIGENCE

In the first group of cases, plaintiffs seek to rely on evidence of bad outcomes and circumstantial evidence as to why the bad outcome demonstrates that the defendant committed malpractice. In these particular cases, Georgia courts have allowed the plaintiffs to survive summary judgment and to present their cases to juries by relying on the bad outcome and circumstantial evidence from which a jury might infer that the physician committed malpractice. In some of these cases, courts have even allowed the plaintiffs to go to the jury without expert testimony establishing that the defendant violated the standard of care.

In Kapsch v. Stowers, the plaintiff sued the defendant for injuries she received during a left subclavian bypass and left carotid endarterectomy which were needed to relieve blockages in her sublavian artery and left internal carotid artery.[14] The day after the surgery, the plaintiff reported pain, loss of sensation, and loss of use in her left neck, shoulder, and arm. When the

[14] 209 Ga. App. 767, 434 S.E.2d 539 (1993).

plaintiff's symptoms did not abate, a neurological surgeon performed exploratory surgery on her. The exploratory surgery revealed scarring and a kink in the nerves running out of the spinal column to the arm.[15] Plaintiff's expert neurological surgeon testified that although the surgery the defendant performed was "successful," his failure to protect other areas of the patient's body during the surgery, including the brachial plexus, violated the standard of care. Plaintiff also offered expert testimony that the kink in the brachial plexus was "most likely" caused by a retractor placed on the nerves and that the retractor was "most likely" used in that area to expose other structures during the operation.[16] Although the plaintiff's expert could not be sure what caused the injury, the court ruled that the plaintiff offered sufficient circumstantial evidence of malpractice to reach the jury. Specifically, the Court of Appeals held that

> Although expert opinion testimony may be required in a medical malpractice case to prove the applicable standard of care and breach thereof, we are aware of no rule which prevents circumstantial evidence from being used to prove those facts upon which the expert relies in formulating his opinion that such negligence occurred . . . . And where, measured by the method shown by medical witnesses to be negligence, the evidence shows a bad outcome, it is the province of the jury to say whether the result was caused by negligence."[17]

In other words, the court allowed the jury to determine if they believed that it was malpractice to receive this type of injury to the neck, shoulder, and arm when undergoing a heart operation. The plaintiff provided sufficient expert testimony by establishing that this type of complication ordinarily did not occur without negligence. Even if the plaintiff's expert could not be sure as to exactly how the plaintiff received her injury, the court determined that the jury was

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[15] Id. at 768, 434 S.E.2d at 541.

[16] Id.

[17] Id. at 769, 434 S.E.2d at 541-42.

capable of determining whether or not they believed that the defendant violated the standard of care during this particular procedure.

In Killingsworth v. Poon, the plaintiff's lung collapsed immediately after she received two injections to alleviate muscle pain.[18] The plaintiff provided expert testimony that "the only apparent cause of her punctured lung was the injections she received on the previous day."[19] The plaintiff failed to provide, however, expert testimony that the defendant had failed to "exercise a reasonable degree of care and skill required under the circumstances."[20] The court first stated that ordinarily the plaintiff was required to present expert testimony that the defendant violated the standard of care to overcome the presumption that physicians operate with due care.[21]

The court then sought to determine whether this case was the type of medical malpractice case where it was not necessary for the plaintiff to present expert testimony. The court then held that expert witness testimony is not required in actions which although related to medicine, "are so well known as not to require expert testimony to place them before the jury, or where the case concerns matters which juries must be credited with knowing by reason of common knowledge."[22] The court reasoned that this is not the type of case where the plaintiff "is alleging negligence in the diagnosis of or the method, but negligence in the performance of that

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[18] 167 Ga. App. 653, 307 S.E.2d 123 (1983).

[19] Id. at 654, 307 S.E.2d at 124.

[20] Id.

[21] Id. at 655, 307 S.E.2d at 125.

[22] Id.

treatment." The court held that "[i]t is widely known and generally understood by laymen that subcutaneous injections ostensibly given only for the relief of muscular pain should not, if administered correctly, result in the puncture of internal organs." Accordingly, the court held that this case fell within the exception and did not require expert testimony. The jury could properly determine the issue of negligence without expert testimony. The court discounted the defendant's own expert opinion by holding that "what is in essence his own opinion that he did not negligently puncture [the plaintiff's] lung" was insufficient to grant the defendant judgment as a matter of law.[23]

The court essentially made a determination that even an ordinary person would know that this type of complication would not occur unless the standard of care was violated. Rather than relying on the plaintiff's expert witness to unequivocally establish the standard of care and to conclude that it had been violated, the court was satisfied with the severity of the bad outcome. The jury was essentially left with the job of determining whether the injection caused the punctured lung.

Judge Deen filed a separate opinion concurring specially and comparing the "common knowledge" doctrine with *res ipsa loquitur*.

> The courts rationalize that some case situations even in malpractice claims are so plain and palpable that the common knowledge and experience of the jury form a sufficient basis for the jury to determine the reasonableness of the defendant's act. The common knowledge doctrine merely allows submission of the case to the jury (and would authorize a verdict for the plaintiff). The jury, of course, could still resolve the question in favor of the defendant by considering the presumption of due care in his favor as well as other evidence submitted. The common knowledge doctrine is closely related to that of res ipsa loquitur. The common

[23] Id. at 658, 307 S.E.2d at 127.

> knowledge doctrine usually involves a known act, e.g., while stitching up a patient's cheek a physician pierces his eye with the needle, while res ipsa often is applied where it is unclear what the actual alleged negligent act was (but the injury is such that it (1) does not ordinarily occur in the absence of negligence, (2) is caused by agency within exclusive control of defendant, and (3) is not due to voluntary action of plaintiff). But that is certainly not an absolute distinction. One evidentiary difference is that, while the common knowledge doctrine results in the submission of the case to the jury, successful invocation of res ipsa not only gets the case to the jury but shifts the burden of persuasion to the defendant, requiring some explanation that the injury did not result from his negligence. Res ipsa thus would be of greater benefit to a plaintiff in a medical malpractice case. The latter evidentiary device has been sparingly used in Georgia but can require expert testimony to lay the foundation of probability that the injury is attributable to negligence. The reluctance of our courts to use this rule seems to be a fear of weakening of the finding of fault based theory of malpractice plus destruction of the presumption of due care of the professional.

This quotation provides a clear articulation of the court's allowance of a bad outcome and circumstantial evidence to meet the plaintiff's evidentiary burden without using *res ipsa loquitur*. It neglects, however, to discuss whether even this bad outcome could be seen as an expected complication with this type of injection. The defendant in this case is seemingly not given an opportunity to demonstrate that even a carefully made injection could have resulted in this type of injury. Instead, the defendant's expert testimony is rejected in an offhand manner.

In Austin v. Kaufman, the plaintiff underwent surgery for the correction of a herniated disk.[24] During this surgery, the defendant severed the plaintiff's left iliac artery and extensively injured the left iliac vein. During the trial, the plaintiff's expert witness offered testimony that there is an "implied requirement that a surgeon confine himself to the operative field and not stray from the field of surgery into a body cavity where he has no business being." The Court of Appeals distinguished this case from one in which a plaintiff seeks to rely on the doctrine of *res*

[24] 203 Ga. App. 704, 417 S.E.2d 660 (1992).

ipsa loquitur.

Instead, the court held that the plaintiff's expert witness properly established the parameters of acceptable professional conduct for the procedure and that the defendant violated this standard. Although injury to the iliac vein is a recognized complication from this type of procedure, a factual question existed as to whether the plaintiff's injury and death were "merely expected complications of the procedure which under any set of circumstances could not have resulted from the [defendant's] negligence or whether her injury resulted, in this instance, from the [defendant's] failure to conform to the applicable standard of care for this procedure."

The court further reasoned that

> [n]egligence, like any other fact, may be proved by circumstantial evidence as well as by direct testimony. Although expert opinion testimony may be required in a medical malpractice case to prove the applicable standard of care and a breach thereof, we are aware of no rule which prevents circumstantial evidence from being used to prove those facts upon which the expert relies in formulating his opinion that such negligence occurred. It is for the jury to determine whether the facts upon which the expert bases his opinion do exist and, if so, whether the expert's opinion that those facts constituted medical malpractice should be accepted. In determining medical malpractice, the jury may consider all the attendant facts or circumstances which may throw light on the ultimate question. . . . And where, measured by the method shown by medical witnesses to be negligence, the evidence shows a bad result, it is the province of the jury to say whether the result was caused by negligence.[25]

The court disagreed with the trial court's conclusion "that because Dr. Kaufman and the other expert witnesses testifying on his behalf agreed that injury to the iliac vein and artery is a recognized complication of this procedure, Dr. Kaufman could not, as a matter of law, have been negligent in causing Mrs. Austin's injury." The court indicated that it was improper to rely on the testimony of the plaintiff's expert witness in which he stated that "he could not teach the

[25] Id. at 706, 417 S.E.2d at 663 (internal quotations and citations omitted).

defendant how to avoid the injury, this injury could be caused by a careful neurosurgeon, and he had never caused such an injury because he had been lucky" where other testimony established that "this kind of injury to the vascular system was extremely rare, and in most instances, a lumbar diskectomy is performed without any injury occurring to a patient's iliac vein or artery."

This case is important because it does not rely on a novel theory of law to allow the plaintiff to meet her burden. Instead, the court determines that the plaintiff's evidence and expert testimony is sufficient even when it is shown that this type of complication can occur in the absence of negligence. The court did not require the plaintiff's expert to testify that this particular physician was negligent in this particular operation. The court held that a question of fact was created by the testimony that this type of bad complication did not ordinarily occur in the absence of negligence.

In Horney v. Lawrence, the plaintiff underwent a gastroscopy.[26] After the operation, the plaintiff's hand was significantly swollen. The nurse treating the plaintiff concluded that the swelling was caused by Valium escaping from the I.V. needle into the tissue of the hand. This condition can cause local tissue to die.[27] The plaintiff was later required to have surgery on his hand which only partially corrected his problem. The Court of Appeals ruled that even though the plaintiff did not offer expert testimony that the defendant violated the standard of care, the defendant's testimony established that the standard of care required observing the vein every time you inject it with valium.[28] Because the plaintiff offered circumstantial evidence from

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[26] 189 Ga. App. 376, 375 S.E.2d 629 (1988).

[27] Id. at 376, 375 S.E.2d at 629-30.

[28] Id. at 377, 375 S.E.2d at 630.

which the jury could infer that the appellant did not visually inspect or observe the injection site at the time of the injection, the court determined that the case was properly submitted to the jury.[29]

Again, the court allowed the plaintiff to proceed to trial without expert testimony that the physician violated the standard of care. Instead, the plaintiff was able to create a factual question as to the type of procedure the defendant used in making the injection without direct evidence that the defendant actually violated the standard of care in this instance. It was sufficient to show that this type of injury did not normally occur and for the defendant to demonstrate the applicable standard of care. The jury was able to determine the facts necessary to conclude whether this standard of care was violated in this particular case.

[29] Id.

In Messex v. Lynch, the plaintiff brought a medical malpractice action after her spinal accessory nerve in her neck was severed during a posterior cervical node biopsy.[30] The defendant responded by providing an affidavit stating that the plaintiff's injury "does occur and is a recognized complication associated with this type of surgical procedure."[31] The plaintiff's expert responded with an affidavit concluding that this type of injury was not a common occurrence and that "usually such injury occurs because the surgeon failed to use that reasonable degree of care and skill that is ordinarily employed by the medical profession under similar circumstances."[32] The Georgia Supreme Court held that "it is asking too much of an expert witness to expect him to state point-blank about a medical colleague, 'he was negligent.'" Instead, the plaintiff's expert properly created a factual question as to whether the defendant had violated the degree of care and skill ordinarily employed which was all that was required to overcome the defendant's motion for summary judgment.[33]

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[30] 255 Ga. 208, 336 S.E.2d 755 (1985).

[31] Id. at 209, 336 S.E.2d at 756.

[32] Id. at 210, 336 S.E.2d at 757.

[33] Id.

This particular decision did not provide much reasoning supporting the court's decision. Instead, the court seemed to have no problem accepting the premise that certain bad outcomes do not ordinarily occur in the absence of a violation of the standard of care. The court reasoned that the plaintiff's expert witness properly created a question of fact and that summary judgment was inappropriate because it did not "appear, without dispute, that the case could have but a single outcome after all inferences have been construed against the movant."[34]

IV. BAD SURGICAL OUTCOME AS INSUFFICIENT EVIDENCE OF NEGLIGENCE

Seemingly inconsistent with the cases analyzed above, the following cases impose much more stringent evidentiary burdens on plaintiffs in medical malpractice cases. These cases require the plaintiffs to provide expert testimony establishing unequivocally that the particular defendant violated the clearly articulated standard of care in regard to that particular plaintiff.

In Smith v. Luckett, the plaintiff contended that the defendant negligently performed a venogram, a test the defendant was using to determine the source of the plaintiff's back problems.[35] It was undisputed that the venogram caused the plaintiff to suffer from a complication known as phlebitis. The Court of Appeals affirmed the trial court's directed verdict in the defendant's favor reasoning that the defendant's testimony established that phlebitis is a known complication to a venogram and that the "patient developed a known complication is not

[34] Id.

[35] 155 Ga. App. 640, 271 S.E.2d 891 (1980).

proof of negligence."[36] The Court of Appeals held that the plaintiff did not successfully rebut the testimony that phlebitis is a known complication. In the absence of such testimony, the defendant was entitled to the presumption that "the medical or surgical procedures were performed in an ordinarily skillful manner."[37]

In this case, the trial court directed a verdict in the defendant's favor. Although the plaintiff provided depositions of two expert witnesses regarding the standard of care, the court determined that it was not sufficient to reach the jury. Because expert witnesses testifying for both the plaintiff and defendant testified that the plaintiff's injury was a known complication with this type of procedure, the court evidently did not believe that any discussion as to whether this was a rare complication was needed. The court did not provide any sort of analysis as to whether this known complication normally occurred even in the absence of negligence.

[36] Id. at 641, 271 S.E.2d at 893.

[37] Id.

In Fox v. Cohen, the plaintiff sought to recover for two burns she received on the midportion of her back on either side of her spinal column that occurred while she was undergoing a tonsillectomy and an adenoidectomy.[38] The defendant testified that burns were a rare but not unheard of complication from electrosurgery.[39] In this case, the plaintiff's burns were located at the site where two electrodes were placed to facilitate the electrosurgical unit used to coagulate bleeding at the surgical site. The Court of Appeals affirmed the trial court's grant of summary judgment for the defendant reasoning that the "fact that a patient develops a known complication to surgery is not proof of negligence."[40] The court further reasoned that "[t]here is nothing in the record to dispute the physician's testimony that the use of an electrosurgical unit was an accepted medical practice, that the unit gave no indication of malfunction, that the burns were not at the site where the electrosurgical unit was used, that the device was properly attached to the patient and that his use of the machine and the surgery he performed was consistent with the standard of care and skill employed by other physicians in the profession."[41]

Even though the court affirmed the grant of summary judgment for the defendant, it indicated that the plaintiff could have used *res ipsa loquitur* to meet her evidentiary burden if she had satisfied the appropriate standard. Specifically, the court provided the following standard for applying *res ipsa loquitur*: "(1) injury of a kind which ordinarily does not occur in the

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[38] 160 Ga. App. 270, 287 S.E.2d 272 (1981).

[39] Id. at 270, 287 S.E.2d at 273.

[40] Id. at 271, 287 S.E.2d at 273.

[41] Id. at 271, 287 S.E.2d at 274.

absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." After the court held that the "first two requirements of this test plainly have not been met," the court warned that "res ipsa loquitur should be applied with caution and only in extreme cases; that it is not applicable when there is an intermediary cause which produced or could produce the injury, or where there is direct unambiguous testimony as to the absence of negligence by the defendant, or where there is no fair inference that the defendant was negligent."[42]

[42] Id. at 271, 287 S.E.2d at 273.

In Hooker v. Headley, the decedent underwent gastroplasty to relieve her obesity.[43] She died from complications from that surgery. The plaintiff contended that the defendant was liable because the patient died from known complications from the surgery. The plaintiff argued that the defendant should not have performed this particular elective surgery because the patient was a candidate who was known to be at high-risk for complications because of her prior medical problems.[44] The Court of Appeals reasoned that because the decedent was informed that she was a high-risk candidate, the defendant physician could not be held accountable for known complications from that surgery.[45]

In this case, the court was seemingly reluctant to impose liability on the physician for the known complications because it believed that the patient had been adequately informed about the risks of the surgery. It summarily dismissed the argument that the defendant could be liable for injuries caused by known complications if those complications were more likely to cause serious injury to the patient.

In Chavous v. Richmond County Hospital Authority, the plaintiff underwent an operation to have two discs removed from his spine.[46] After his surgery, the plaintiff developed a staphylococcus infection at the surgical incision. The defendant testified that although an infection of this nature was an infrequent outcome in surgical cases, occurring in approximately

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[43] 192 Ga. App. 629, 385 S.E.2d 732 (1989).

[44] Id. at 630, 385 S.E.2d at 733.

[45] Id.

[46] 169 Ga. App. 473, 313 S.E.2d 492 (1984).

one out of every thousand cases, removing all staph germs was impossible.[47] The defendant also testified that he believed that the infection came from germs on the plaintiff's own skin.

[47] Id. at 473, 313 S.E.2d at 493.

The plaintiff offered no expert testimony but relied on the fact that he developed a rare complication from his surgery and argued that *res ipsa loquitur* should be applied.[48] Rather than rejecting the plaintiff's argument outright, the court analyzed the factors required to present a prima facie case using the principle of *res ipsa loquitur* and then concluded that the plaintiff failed to present sufficient evidence to utilize this theory of tort. Specifically, the court determined that "[r]es ipsa loquitur should be applied with caution and only in extreme cases" and that it should not be applied if "there is an intermediary cause which produced or could produce the injury, or where there is direct unambiguous testimony as to the absence of negligence by the defendant, or where there is no fair inference that the defendant was negligent."[49] The court then held that because there was no evidence that the plaintiff's infection does not ordinarily occur without negligence and evidence was presented that the bacteria could have come from the defendant's own skin with complete removal of the bacteria impossible, *res ipsa loquitur* should not be applied in this case.[50]

In McClure v. Clayton County Hospital Authority, the plaintiff's back was injured during surgical treatment for his left arm.[51] Before the surgery commenced, a nurse improperly placed a hand board directly against the plaintiff's back. The plaintiff offered expert testimony that the board was not properly placed and that its improper placement violated the standard of care.[52]

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[48] Id. at 474, 313 S.E.2d at 493.

[49] Id.

[50] Id.

[51] 176 Ga. App. 414, 336 S.E.2d 268 (1985).

[52] Id. at 417, 336 S.E.2d at 271.

The court held, however, that the plaintiff's expert failed to show any causation as to the plaintiff's injuries. In other words, the plaintiff did not meet his burden to show that the defendant's violation of the standard of care caused the plaintiff's injury.[53]

[53] Id. at 417, 336 S.E.2d at 272.

The court also noted that expert testimony was not necessary in cases where it "would appear to be so clear from the evidence then of record that expert testimony would, at that point, otherwise be unnecessary to establish a prima facie case of malpractice" but that "placement of a hand board underneath a patient" is not "such an obvious act of negligence, or is so gross or clear and palpable act of negligence, to obviate the necessity for expert testimony to refute a defendant's expert opinion."[54] The court was not persuaded by the fact that the plaintiff underwent surgery for his arm but received an additional injury to his back. Instead, the court required testimony linking the plaintiff's injury to a specific violation of the standard of care in this particular case.

[54] Id. at 416, 336 S.E.2d at 271.

In Terrell v. West Paces Ferry Hospital, the plaintiff sued the defendant after suture lines which were placed during surgery for removal of a part of his duodenum began to leak, discharging intestinal material into his abdomen.[55] The defendant submitted an expert affidavit arguing that "the leaking duodenal suture line and the abscesses are known complications of the surgical procedures performed in the plaintiff's case and occur despite the exercise of the utmost care and skill by the surgeon performing the operation."[56] The plaintiff failed to provide any expert testimony but did provide evidence that "the leak which developed in the suture line was three centimeters in length, that this was the length of certain wire staples used in addition to the sutures, and that some of the wire material was found in the cut-off portion of the duodenum."[57] The court noted that the defendant provided an explanation for the wire in the removed tissue and further testified that the suture line was intact when he closed the plaintiff's abdomen. The Court noted that the plaintiff was required to offer expert testimony in support of his case. Accordingly, the court affirmed the grant of summary judgment in the defendant's behalf.[58] The court also held that "[w]e must similarly reject the plaintiff's contention that a prima facie case is created by the doctrine of res ipsa loquitur" without providing any explanation as to why it was not applicable in this case.

V. THE APPROACH FROM OTHER STATES

[55] 162 Ga. App. 783, 292 S.E.2d 433 (1982).

[56] Id. at 783, 292 S.E.2d at 434.

[57] Id. at 784, 292 S.E.2d at 434.

[58] Id. at 784, 292 S.E.2d at 435.

Other states besides Georgia have struggled with this problem. They have been forced to balance the complexity of the surgical procedures involved with the difficulties plaintiffs have in determining exactly what caused their surgical complication. The majority of states have used the doctrine of *res ipsa loquitur* to lessen the plaintiff's evidentiary burden. These states allow plaintiffs to provide expert testimony to establish the elements of *res ipsa loquitur*. In other words, they allow plaintiffs to proceed with a prima facie case of medical negligence if the expert testimony establishes that the undesired outcome the plaintiff experiences does not ordinarily occur in the absence of negligence. This is also a trend that is gaining popularity with other states which have previously only allowed *res ipsa loquitur* to be applied if the surgical procedure can be understood without the assistance of expert testimony or if an ordinary reasonable person would be able to infer negligence from the undesired outcome without the aid of expert testimony. Several cases employing these different approaches follow.

In a Texas case, Haddock v. Arnspiger, the plaintiff was injured by an x-ray burn over an area that was not under treatment.[59] The defendant had performed a proctological examination which involved the use of a flexible colonoscope. The plaintiff sought to rely on expert testimony that the plaintiff's injuries would not have occurred in the absence of negligence.[60] The court concluded, however, that *res ipsa loquitur* is only allowed in medical malpractice cases "when the nature of the alleged malpractice and injuries are plainly within the common knowledge of laymen, requiring no expert testimony."[61] The court reasoned that because "the

[59] 793 S.W.2d 948 (Tex. 1990).

[60] Id. at 949-50.

[61] Id. at 951.

flexible colonoscope is a sophisticated medical instrument which requires extensive training and experience for proper use" the "use of a flexible colonoscope for a proctological examination is not a matter plainly within the common knowledge of laymen." [62] Accordingly, the court held that *res ipsa loquitur* should not have been applied in this case because the use of the mechanical instrument is not a matter within the common knowledge of a layperson.[63]

[62] Id. at 954.

[63] Id. at 955.

In Orkin v. Holy Cross Hospital of Silver Spring, a Maryland case, the plaintiff sought to recover for nerve damage she suffered during surgery to repair a perforated ulcer.[64] Although the plaintiff could not ascribe a particular negligent act to the defendants, she offered expert testimony that this type of complication does not ordinarily occur in the absence of negligence.[65] The court held that although *res ipsa loquitur* did not apply to this case, the plaintiff could proceed to the jury if her circumstantial expert testimony was sufficient.[66]

In Walker v. Rumer, an Illinois case, the plaintiff suffered injuries to her both of her hands after undergoing a bilateral palmar fasciectomy.[67] The plaintiff was not able to offer evidence establishing exactly why the defendant negligently performed the surgery. Instead, the plaintiff sought to offer expert testimony to establish that the plaintiff's injuries were unexpected unless the defendant was negligent.[68] The defendant argued that the doctrine of *res ipsa loquitur* was not appropriate in this case because the type of surgery the defendant performed was not a commonplace surgical procedure. The defendant maintained that the surgery must be of the type which the average person is familiar and able to understand.[69] The court rejected the defendant's argument and held that the application of the doctrine of *res ipsa loquitur* is not dependent on the fact that the surgical procedure is "commonplace" or that the "average person" be able to

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[64] 569 A.2d 207 (Md. 1988).

[65] Id. at 209.

[66] Id.

[67] 381 N.E.2d 689 (Ill. 1978).

[68] Id. at 690.

[69] Id.

understand what is involved. Instead, "the determination which must be made as a matter of law is whether the occurrence is such as in the ordinary course of things would not have happened if the party exercising control or management had exercised proper care."[70] "[E]xpert testimony that such an event usually does not occur without negligence may afford a sufficient basis for the inference."[71]

[70] Id. at 691.

[71] Id.

In Massachusetts, in the case of Edwards v. Boland, the plaintiff underwent surgery to replace a ligament in her leg.[72] This surgery required the defendant to drill a hole through the plaintiff's tibia and femur bones. During the surgery, the defendant severed an artery and the tibial nerve.[73] At trial, the plaintiff's expert witness testified that there are "readily available and virtually foolproof ways of preventing that injury from taking place" and that severing the artery and the tibial nerve is "an event that would not take place without a departure from the normal standard of care on behalf of the surgeon or a member of the operating team."[74] The defendant criticized the plaintiff's expert for not explaining the cause of the accident and equating injury with "negligence automatically." The court held that the jury should have been instructed on *res ipsa loquitur* because they "could reasonably have found on the evidence that the plaintiff's nerve and artery would not have been severed if not for some negligence on the part of the defendant." [75]

[72] 670 N.E.2d 404 (Mass. App. Ct. 1996).

[73] Id. at 405.

[74] Id.

[75] Id. at 407.

In Kambat v. Saint Francis Hospital, a New York case, the plaintiff filed a medical malpractice action after an 18-by-18-inch laparotomy pad was discovered in the abdomen of plaintiff's decedent following a hysterectomy.[76] At trial, the defendants introduced evidence that "standard procedures were followed during the operation, and that the number of sponges, medical instruments and laparotomy pads used and removed were counted several times, carefully and accurately."[77] The defendants' experts also testified that they believed that the pad had not been left inside decedent but, rather, that she had swallowed it. The trial court denied plaintiffs' request to charge the jury on the principle of *res ipsa loquitur*, and the jury returned a defense verdict. The appellate court ruled that the jury should have been instructed on the doctrine of *res ipsa loquitur*. The court noted that the "modern trend tends toward allowance of experts to bridge the gap between the jury's common knowledge and the uncommon knowledge of experts by testifying in medical malpractice cases as to what is common knowledge within their specialized fields.[78] The court also quoted Restatement [Second] of Torts § 328 D, [comment d] which provides that "expert testimony that such an event usually does not occur without negligence may afford a sufficient basis for the necessary inference."[79]

VI. CONCLUSION

Although these cases are only a sample of those involving medical negligence, they

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[76] 678 N.E.2d 456 (N.Y. 1997).

[77] Id. at 457.

[78] Id. at n* 459.

[79] Id. at 459.

demonstrate the difficulties the courts in differentiating negligence versus recognized complications in surgical cases. Although the courts recognize that physicians are called upon to perform tasks with no guaranteed results, they must still determine which patients have been injured by physicians who violated the standard of care.

As always, plaintiffs involved in medical malpractice litigation should seek to get expert testimony which clearly and unequivocally establishes the appropriate standard of care and concluded that the defendant violated that standard. If the injury is the result of a known complication, the plaintiff should provide expert testimony that the complication typically occurs only when a physician violates the standard of care. If plaintiffs are unable to present such testimony, they should try to take advantage of precedent allowing evidence of a bad outcome and circumstantial evidence to provide a sufficient prima facie case of negligence. Although application of rules such as *res ipsa loquitur* and the common knowledge doctrine are infrequently applied, precedent supports their application in certain types of cases. If the plaintiff has good expert testimony that this type of bad outcome is not an expected complication in the absence of negligence, it should be sufficient to survive summary judgment, even in the absence of expert testimony that the defendant's specific actions violated the standard of care.

After all, physicians and their counsel can be expected to argue that any untoward outcome is a “complication of the procedure.”

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