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TORT LAW—Res Ipsa Loquitur in Medical Malpractice Actions:

Mireles v. Broderick

I. INTRODUCTION

In *Mireles v. Broderick*,¹ the New Mexico Court of Appeals was presented with the difficult question of what role, if any, the doctrine of res ipsa loquitur should play in the context of medical malpractice actions. Although the court did not find it necessary to resolve the question of whether the doctrine of res ipsa loquitur could be used in medical malpractice,² whether expert testimony may be used to support the doctrine, or how much specific evidence of negligence may be offered, the court did offer guidance on how properly to frame a res ipsa loquitur jury instruction in medical malpractice cases. The court held that, when using the doctrine in this context, a plaintiff will negate the doctrine by offering evidence that specific acts fell below the standard of care and by stating those acts in a res ipsa loquitur instruction³ because this type of evidence is beyond the scope of the circumstantial evidence requirement of res ipsa loquitur.⁴ Once this type of evidence is offered, no res ipsa loquitur inference is needed to make a determination of negligence.⁵ This Note provides an overview of the use of res ipsa loquitur in medical malpractice cases,⁶ examines the rationale of *Mireles*, and explores the implications of the decision.

1. 113 N.M. 459, 827 P.2d 847 (Ct. App. 1992). The New Mexico Supreme Court granted certiorari on February 27, 1992. As of this writing, no decision has been made by the supreme court.

2. *Id.* at 465, 827 P.2d at 853. Judge Hartz, writing for the majority, left the question of when, if ever, res ipsa loquitur is applicable in a medical malpractice case. Judge Hartz did suggest that "the uniform instruction [on res ipsa loquitur] would need to be revamped if res ipsa doctrine were to be used in medical malpractice cases." *Id.* However, see *Schmidt v. St. Joseph's Hosp.*, 105 N.M. 681, 736 P.2d 135 (Ct. App. 1987), wherein the court stated that "[a]lthough res ipsa loquitur may apply to medical malpractice actions as one form of circumstantial evidence, the doctrine does not relieve plaintiff from making a prima facie case." *Id.* at 683, 736 P.2d at 137. This comment was made in the context of reviewing the appropriateness of a summary judgment. See also *Smith v. Klebanoff*, 84 N.M. 50, 499 P.2d 368 (Ct. App.), *cert. denied*, 84 N.M. 37, 499 P.2d 355 (1972), wherein the court stated that "New Mexico decisions discussing res ipsa loquitur in malpractice cases have not applied the doctrine. These decisions have not held the doctrine could not be applied in an appropriate case. Rather, the decisions are to the effect that facts for application of the doctrine were lacking." *Id.* at 55, 499 P.2d at 373 (citations omitted). Both *Schmidt* and *Smith* fail to decide directly whether res ipsa loquitur is applicable in a medical malpractice action in New Mexico.

3. *Mireles*, 113 N.M. at 464, 827 P.2d at 852.

4. *Id.*

5. *Id.*

6. This Note will be limited to a discussion of the type of evidence that may be offered in support of res ipsa loquitur in medical malpractice cases and the use of expert testimony in these cases. Although the use of expert testimony was not discussed in the majority opinion, it was discussed in a dissent written by Judge Pickard. *Id.* at 470, 827 P.2d at 858 (Pickard, J., dissenting).

II. STATEMENT OF THE CASE

Thomas Broderick served as anesthesiologist during a bilateral mastectomy performed on Mary Ann Mireles. After the surgery, Ms. Mireles was diagnosed as having ulnar neuropathy causing the degeneration of the fourth and fifth fingers of her right hand.⁷ Ms. Mireles sued for medical malpractice.

During the trial, Ms. Mireles' expert witness, Dr. Randall Waring, testified that the injury must have occurred during the surgery and was due to Dr. Broderick's improper positioning, cushioning, or monitoring (what the court labelled "Waring protective procedures") of Ms. Mireles' arm.⁸ Dr. Waring further testified that the failure to follow these protective procedures was negligent. Dr. Broderick asserted that he maintained proper Waring protective procedures throughout the surgery and that Ms. Mireles' injury could have occurred after the surgery. Ms. Mireles requested that her case be submitted to the jury on the theory of *res ipsa loquitur*. The district court refused to give her tendered instruction on *res ipsa loquitur*.⁹ Ms. Mireles appealed the adverse verdict, claiming that the refusal to give her *res ipsa* instruction was reversible error.¹⁰

III. HISTORICAL AND CONTEXTUAL BACKGROUND

It is generally believed that the doctrine of *res ipsa loquitur* developed from an argument made by Baron Pollock in 1863.¹¹ The doctrine has

7. *Id.* at 460, 827 P.2d at 848. The parties did not agree as to how long after the surgery the injury occurred. *Id.*

8. *Id.* Dr. Waring testified that the ulnar nerve, which passes by the elbow, can be injured during surgery if it is subjected to excessive stretching or compression that compromises the blood supply to the nerve. He further testified that an anesthesiologist should properly position the patient's arm to avoid excessive stretching or compression and should monitor the arm's position throughout the surgery. *Id.*

9. *Id.* at 460-61, 827 P.2d at 848-49. The district court refused her *res ipsa loquitur* instruction, stating that she failed to establish that Dr. Broderick had exclusive control and management. The court also stated that the injury could have occurred after the surgery and could have occurred in the absence of negligence. *Id.* at 461, 827 P.2d at 849. Ms. Mireles' proposed instruction was as follows:

In support of her claim that Dr. Broderick was negligent, Plaintiff relies in part upon the doctrine of "res ipsa loquitur [sic]" which is a Latin phrase and means "the thing speaks for itself." To rely on this doctrine, Plaintiff has the burden of proving each of the following propositions:

1. That the injury to Plaintiff was proximately caused by inadequate protection of Plaintiff's extremities during anesthesia while her condition was under the exclusive control and management of Dr. Broderick.
2. That injury to Plaintiff was of the kind which does not ordinarily occur in the absence of negligence on the part of the person in control.

If you find that Plaintiff proved each of these propositions, then you may, but are not required to, infer that Dr. Broderick was negligent and that the injury or damage proximately resulted from such negligence.

If, on the other hand, you find that either one of these propositions has not been proved or, if you find, notwithstanding the proof of these propositions, that Dr. Broderick used ordinary care for the safety of others in his control and management of the Plaintiff, then the doctrine of *res ipsa loquitur* [sic] would not support a finding of negligence.

Id. at 460, 827 P.2d at 848. This instruction in large part comes from N.M. UNIF. JURY INSTRUCTION Civ. 13-1623.

10. *Mireles*, 113 N.M. at 459, 827 P.2d at 847.

11. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39 (5th ed. 1984).

now been accepted and applied in all jurisdictions.¹² In its most basic form, the doctrine is merely one type of circumstantial evidence which allows a jury reasonably to infer both negligence and causation from the mere occurrence of an event and a defendant's relation to that event.¹³ Since its inception, the doctrine has been a source of considerable trouble to the courts.¹⁴ The confusion surrounding the doctrine is only compounded when it is applied to medical malpractice cases. In particular, much confusion is added in these cases when expert witnesses are used and evidence of specific acts of negligence are introduced.

A. *The Use of Expert Testimony*

There are two opposing theories on the use of expert medical testimony in support of *res ipsa loquitur* in medical malpractice cases: (1) the use of such testimony is fatal to the doctrine; or (2) the use of such testimony is permissible and, in some cases, crucial to the doctrine.

In *LePelley v. Grefenson*,¹⁵ the Idaho Supreme Court ruled that, if expert testimony is used to support a claim of *res ipsa loquitur* in the context of medical malpractice, the claim of *res ipsa loquitur* cannot stand and the case must revert to a traditional negligence claim.¹⁶ In so ruling, the *LePelley* court reasoned that *res ipsa loquitur* must be utilized only in those cases where a lay person is able to rely upon common knowledge and observation in determining negligence.¹⁷

12. *Id.*

13. RESTATEMENT (SECOND) OF TORTS § 328D (1965). The great majority of American jurisdictions state the doctrine as follows:

(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when

(a) the event is of a kind which ordinarily does not occur in the absence of negligence;

(b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

(c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

(2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.

(3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.

Id. For New Mexico's wording of *res ipsa loquitur*, see N.M. UNIF. JURY INSTRUCTION CIV. 13-1623.

14. KEETON ET AL., *supra* note 11, § 39.

15. 614 P.2d 962 (Idaho 1980), *superseded by statute as stated in* *Sherwood v. Carter*, 805 P.2d 452 (Idaho 1991). Plaintiffs, Lee and Eileen LePelley, brought an action against defendant Dr. Grefenson claiming that Lee LePelley lost use of his left ear due to Dr. Grefenson dropping a small bone fragment in his ear during surgery. *LePelley*, 614 P.2d at 964. The LePelleys also claimed breach of warranty and lack of informed consent. *Id.*

16. *LePelley*, 614 P.2d at 966. In 1976, the State of Idaho enacted a statute, Idaho Code section 6-102, requiring the use of expert testimony in a medical malpractice action. However, the *LePelley* court did not base its decision upon that statute. The court stated that the doctrine would not be applicable based upon prior case law. *LePelley*, 614 P.2d at 966. Even though the case has been superseded by statute, it still provides a good analysis for those states without such a statute.

17. *LePelley*, 614 P.2d at 966. It must be noted that Idaho's doctrine of *res ipsa loquitur* is significantly different than the general doctrine previously stated. Idaho's doctrine requires that "the circumstances were such that common knowledge and experience would justify the inference that

The prevalent view, however, appears to be that expert testimony may be used in support of *res ipsa loquitur* in medical malpractice actions.¹⁸ In *Morgan v. Children's Hospital*,¹⁹ the Ohio Supreme Court specifically rejected the common knowledge argument and held that the use of expert testimony does not disqualify a case from the application of the doctrine of *res ipsa loquitur*.²⁰ The court found the common knowledge rule to be too rigid and also believed expert testimony was permissible since numerous other jurisdictions allow such testimony.²¹

New Mexico has yet to decide definitively whether an expert may be used for *res ipsa loquitur* in medical malpractice actions. In *Schmidt v. St. Joseph's Hospital*,²² the New Mexico Court of Appeals confronted facts substantially similar to those in *Mireles*.²³ In *Schmidt*, the court stated that, in order to rely on *res ipsa loquitur*, the plaintiff must prove that "the injury was of a kind which does not ordinarily occur in the absence of someone's negligence and that the agent or instrumentality causing the injury was within the exclusive control of defendants."²⁴ There is no mention of the common knowledge requirement in the above elements.²⁵ The court later stated that it was not persuaded that the type

the accident would not have happened in the absence of negligence." *Id.* (quoting *Hale v. Heninger*, 393 P.2d 718, 722 (Idaho 1964)). This common knowledge and experience requirement is absent from the general doctrine.

18. *E.g.*, *Jones v. Harrisburg Polyclinic Hosp.*, 437 A.2d 1134, 1138 (Pa. 1981) ("Even where there is no fund of common knowledge, the inference of negligence should be permitted where it can be established from expert medical testimony that such an event would not ordinarily occur absent negligence."); *Taylor v. City of Beardstown*, 491 N.E.2d 803, 809 (Ill. App. Ct. 1986) (negligence required for *res ipsa loquitur* can be established by expert testimony); *Schaffner v. Cumberland County Hospital System*, 336 S.E.2d 116, 118 (N.C. Ct. App. 1985), *rev. denied*, 341 S.E.2d 578 (N.C. 1986) (plaintiff's failure to present expert testimony in *res ipsa loquitur* not fatal); *Hoven v. Rice Memorial Hosp.*, 386 N.W.2d 752, 755 (Minn. Ct. App.), *rev'd*, 396 N.W.2d 569 (Minn. 1986) (expert's testimony allowable in *res ipsa loquitur* case). The RESTATEMENT (SECOND) OF TORTS states that:

expert testimony that such an event usually does not occur without negligence may afford a sufficient basis for the inference. Such testimony may be essential to the plaintiff's case where, as for example in some actions for medical malpractice, there is no fund of common knowledge which may permit laymen reasonably to draw the conclusion.

RESTATEMENT (SECOND) OF TORTS, *supra* note 13, § 328D cmt. d.

19. 480 N.E.2d 464 (Ohio 1985). Plaintiff, Jerome Morgan, had surgery performed in order to remove his thymus gland. During the surgery, plaintiff's respiration rate doubled and he required assisted breathing. While his chest was being closed, plaintiff also suffered bradycardia and required both open and closed cardiac massage. Following surgery, while in the intensive care unit, plaintiff suffered grand mal seizures and never awoke from the anesthesia administered during the surgery. At the time of the action, plaintiff was in a comatose, vegetative state. *Id.* at 464-65.

20. *Id.* at 466-67.

21. *Id.* at 466. The court cited cases from nineteen other jurisdictions that allowed the use of expert testimony in support of *res ipsa loquitur* claims in medical malpractice actions. *Id.* at 466-67 n.2.

22. 105 N.M. 681, 736 P.2d 135 (Ct. App. 1987).

23. In *Schmidt*, the plaintiff awoke from surgery with pain in his left hand and arm. The condition was later diagnosed as ulnar neuropathy. Coincidentally, the attending anesthesiologist was Dr. Broderick. *Id.* at 682, 736 P.2d at 136.

24. *Id.* at 683, 736 P.2d at 137.

25. The court is somewhat ambiguous as to whether these are the elements required for *res ipsa loquitur* in medical malpractice cases. When stating these elements, the court speaks only of *res ipsa loquitur* generally.

of injury present in this case was within a lay person's common knowledge.²⁶ However, nowhere in the opinion did the court directly answer the question of whether an expert may be used. As of the date of *Mireles*, no clear and direct answer had been given regarding the use of expert testimony in support of a *res ipsa loquitur* argument in medical malpractice actions.

B. Specific Evidence of Negligence

In determining whether specific evidence of negligence negates the use of *res ipsa loquitur*, courts traditionally look to the amount of evidence offered.²⁷ Three categories are generally considered when determining the applicability of *res ipsa loquitur* when specific evidence is offered: (1) a plaintiff can offer little or no evidence of negligence; (2) a plaintiff can offer some evidence of negligence; or (3) a plaintiff can offer substantial evidence of negligence.

Generally, when a plaintiff offers little or no evidence of negligence, the doctrine is still applicable.²⁸ When a plaintiff offers some evidence of negligence, a court may still allow the application of *res ipsa loquitur*.²⁹ When a plaintiff offers substantial evidence of negligence, courts generally tend to prohibit the use of the doctrine.³⁰

In *Brown v. Meda*,³¹ the Maryland Court of Special Appeals had occasion to determine the applicability of *res ipsa loquitur* in a medical malpractice action when specific acts of negligence were asserted. Dorothy Brown alleged that she sustained ulnar nerve injury after undergoing

26. *Mireles*, 113 N.M. at 684, 736 P.2d at 138. This would indicate that expert testimony would be permissible in these types of cases (and in *Mireles* since the facts are significantly similar). However, caution should be used when using this court's language since it is likely only dicta.

27. For a general discussion of the effect that introduction of specific evidence of negligence has on *res ipsa loquitur*, see KEETON ET AL., *supra* note 11, § 40.

28. *Smith v. City of Chester*, 515 A.2d 303 (Pa. Super. Ct. 1986). When plaintiff brings in no evidence of specific acts of negligence, he must rely on the *res ipsa loquitur* inference alone. *Id.* at 306.

29. *Id.*

While it is true that a *res ipsa loquitur* instruction is not warranted in the face of clear and indubitable proof of negligence, it is also true that a *res ipsa loquitur* charge is appropriate where the facts of a case lie somewhere in a grey zone between the case in which the plaintiff brings in no evidence of specific acts of negligence . . . and the case in which the defendant's negligence "can be clearly and indubitably ascertained" from the plaintiff's evidence

Id. (citing *Farley v. Philadelphia Traction Co.*, 18 A. 1090 (1890)); see also *Marrero v. Goldsmith*, 486 So. 2d 530, 532 (Fla. 1986) ("If a case is a proper *res ipsa* case in other respects, the presence of some direct evidence of negligence should not deprive the plaintiff of the *res ipsa* inference.").

30. See *Malloy v. Commonwealth Highland Theatres, Inc.*, 375 N.W.2d 631, 637 (S.D. 1985) ("When there is direct evidence concerning the cause of the incident and all the facts and circumstances surrounding it, the *res ipsa loquitur* rule is inapplicable."). A plaintiff cannot say to the jury: "I have shown you exactly how this [incident] occurred but you are, nevertheless, still at liberty to speculate and presume that it may have happened some other way." *Id.* at 637 (quoting *Rea v. St. Louis-San Francisco Ry. Co.*, 411 S.W.2d 96, 99 (Mo. 1967)); see also *State Farm v. Municipality of Anchorage*, 788 P.2d 726, 730 (Alaska 1990) ("Uncontradicted proof of specific acts of negligence which completely explain the circumstances and cause of the accident renders the doctrine [of *res ipsa loquitur*] superfluous and inapplicable.").

31. 537 A.2d 635 (Ct. App.), *aff'd*, 569 A.2d 202 (Md. 1990).

bilateral breast biopsy surgery.³² Mrs. Brown filed an action against Dr. Meda, the anesthesiologist,³³ claiming that the injury was a result of the improper positioning of her arm during the surgery.³⁴ During trial, Mrs. Brown offered the testimony of two experts who concluded that Dr. Meda departed from the appropriate standard of care.³⁵ The court concluded that this testimony supported the theory of *res ipsa loquitur* since it implied negligence.³⁶ The *Brown* court ruled that a jury could find a standard of care without drawing any inferences.³⁷ Nevertheless, the court determined that a jury could still draw inferences as to breach and causation.³⁸ Thus, the doctrine of *res ipsa loquitur* was still applicable since inferences could still be drawn.

Pennsylvania has added another twist to the applicability of *res ipsa loquitur* when specific facts of negligence are introduced. In *Hollywood Shop, Inc. v. Pennsylvania Gas & Water Co.*,³⁹ the court held that *res ipsa loquitur* is still applicable when a plaintiff's "specific evidence of negligence is directly disputed by the defendant . . ."⁴⁰ However, the Pennsylvania court did caution that its holding was limited to the facts of the case before it.⁴¹

32. *Id.* at 636.

33. *Id.* at 636-37. Mrs. Brown also named several other defendants who were subsequently dismissed by either Mrs. Brown or by the Health Claims Arbitration Office. *Id.* at 636.

34. *Id.*

35. Dr. Gary Belaga, a neurologist, testified that he ruled out other possible causes of ulnar nerve damage and concluded that the injury must have occurred during the surgery. *Id.* at 638. His opinion was that "[Mrs. Brown] suffered a compression injury to the nerve at the time of the operation; that there was a departure from the appropriate standard of care in that there was a failure adequately to protect that part of her right arm to prevent damage to the nerve; and that departure from the standard of care caused the injury." *Id.* Dr. John Rybock, a neurological surgeon, had almost identical testimony to that of Dr. Belaga. *Id.* at 639.

36. *Id.*

37. *Id.* at 641.

38. *Id.* at 642. The court reasoned that:

[A]lthough Drs. Belaga and Rybock pointed to a specific act of alleged negligence—the positioning of the arm—they could not testify precisely how the arm was positioned. We believe, however, their testimony showed bases for the formation of rational conclusions much more than mere conjecture. They testified they had ruled out other possible causes and that the injury could have been caused only by the negligent positioning of the arm. If the jury believed that testimony, that evidence was such as to make the plaintiffs' theory reasonably probable, not merely possible, and more probable than any other hypothesis, supporting an inference that the harm resulted from defendant's negligence rather than from some other cause.

Id.

39. 411 A.2d 509 (Pa. Super. Ct. 1979). This case does not deal with *res ipsa loquitur* in the context of medical malpractice but rather in its general form.

40. *Id.* at 513. The court did condition this upon the plaintiff being otherwise entitled to the doctrine. *Id.* In this case, the Hollywood Shop was flooded due to a break in the defendant's water line. In support of its case, Hollywood Shop called Julius Pfau, an expert in civil engineering. Mr. Pfau testified that the line would not have broken had it been properly maintained, installed, and inspected; that the break was caused by corrosion due to electrolysis; and that the continued use of the line was inconsistent with good industry standards. Defendant called one of its employees who was qualified as an expert in civil engineering. This employee disputed a great majority of Mr. Pfau's testimony. *Id.* at 510.

41. *Id.* at 513.

New Mexico has not yet directly set guidelines as to the relation between specific evidence of negligence and *res ipsa loquitur* in medical malpractice cases. *Harless v. Ewing*⁴² is considered the leading case in New Mexico regarding the relation of specific evidence and the general doctrine of *res ipsa loquitur*.

In *Harless*, the New Mexico Court of Appeals held that the doctrine of *res ipsa loquitur* is inapplicable when there is "no want of evidence as to the cause [of the accident]"⁴³ [and/or]⁴⁴ plaintiff has established "all the facts"⁴⁵ so that no inference of negligence is left.⁴⁶ In *Harless*, plaintiff's employer had rented several trucks from the defendant. While using one of these trucks, the dual wheels came off the right rear. Plaintiff's employer proceeded to repair the wheels. Air escaped between the rim and the tire of one of the wheels plaintiff's employer was repairing. Due to this escape, the wheel flew through the air and struck the plaintiff in the face.⁴⁷

During the trial, plaintiff introduced evidence that the defendant's truck driver failed to check the wheels of the truck after each load and that this failure constituted negligence. The court found that this specific evidence of negligence was not enough to prevent application of *res ipsa loquitur*.⁴⁸

IV. RATIONALE OF THE *MIRELES* COURT

The *Mireles* court determined that the sole purpose of a *res ipsa loquitur* instruction in New Mexico is to allow a jury to draw a certain type of inference that may otherwise be considered too speculative.⁴⁹ The inference of negligence made from the *res ipsa loquitur* doctrine does not establish a standard of care.⁵⁰ The doctrine merely allows a factfinder to infer that the likely causes of the injury involved negligence.⁵¹

42. 81 N.M. 541, 469 P.2d 520 (Ct. App. 1970).

43. *Id.* at 545, 469 P.2d at 524 (quoting *Zanolini v. Ferguson-Steere Motor Co.*, 58 N.M. 96, 265 P.2d 983 (1954)).

44. The court did not use "and/or." In fact, the court used neither "and" nor "or." The opinion lacks any conjunction whatsoever. Thus, this writer is not certain as to whether it is or, and, both, or neither.

45. *Id.* at 545, 469 P.2d at 524 (quoting *Tuso v. Markey*, 61 N.M. 77, 294 P.2d 1102 (1956)).

46. *Id.* at 545-46, 469 P.2d at 524-25.

47. *Id.* at 543, 469 P.2d at 522.

48. *Id.* at 545, 469 P.2d at 524.

49. *Mireles*, 113 N.M. at 462, 827 P.2d at 850. The court termed this the "res ipsa bridge"—allowing a jury to go from the predicate facts to a speculative conclusion about causation. *Id.* at 463, 827 P.2d at 851.

50. *Id.*

51. *Id.* The court also expressed concern with the wording of New Mexico's *res ipsa loquitur* jury instruction. *Id.* at 460-61 n.1, 827 P.2d at 848-49 n.1. The court believed that the language "does not ordinarily occur in the absence of negligence" was misleading and may allow a jury to find negligence any time an injury rarely occurs when the defendant is careful. *Id.* The court offered an alternative test: "The test is not whether a particular injury rarely occurs, but rather, when it occurs, is it ordinarily the result of negligence." *Id.* (quoting David Kaye, *Probability Theory Meets Res Ipsa Loquitur*, 77 MICH. L. REV. 1456 (1979)).

The court found that Ms. Mireles' *res ipsa loquitur* instruction went too far by including the words "inadequate protection of Plaintiff's extremities"⁵² in the first element of the instruction.⁵³ These words, when viewed in light of the testimony of Ms. Mireles' expert (Dr. Waring), did not allow a *res ipsa loquitur* inference to be made.⁵⁴ In other words, once the jury has found that there was inadequate protection of Ms. Mireles' extremities, the jury need only rely upon Dr. Waring's testimony to find that such a failure constitutes negligence.⁵⁵ This finding does not require any type of *res ipsa loquitur* inference.⁵⁶ It would not be based upon circumstantial evidence, but rather upon direct testimony of an expert.⁵⁷

The court concluded that a proper *res ipsa loquitur* inference in Ms. Mireles' case would be "from (1) the occurrence of Plaintiff's ulnar nerve injury during anesthesia, that (2) Defendant had been negligent in protecting Plaintiff's arm."⁵⁸

V. ANALYSIS AND IMPLICATIONS

The *Mireles* decision does little, if anything, to resolve the questions surrounding the use of *res ipsa loquitur* in medical malpractice cases. Although the court seemingly has offered guidance on how to frame a proper *res ipsa loquitur* instruction, it fails to address many of the difficulties that may arise with the doctrine before it has ever reached the stage of framing an instruction.⁵⁹ It is imperative that either this

52. *Mireles*, 113 N.M. at 464, 827 P.2d at 852. Ms. Mireles' entire instruction is contained in note 9, *supra*.

53. The placement of these words is important. Once the jury finds that inadequate protection occurred, it has found the first element of the instruction to be true. After that finding, no inference is needed to find the other subsequent elements of the instruction. The court thought that the second element stated in the instruction looked like *res ipsa loquitur* language. However, the damage was already done by the inappropriateness of the first element. When read literally, the second element states that the first element (inadequate protection) does not occur in the absence of negligence. The second element is established through expert testimony, not a *res ipsa loquitur* inference. *Mireles*, 113 N.M. at 464-65, 827 P.2d at 852-53.

54. *Id.* at 464, 827 P.2d at 852. Dr. Waring testified at trial as follows:

Q. . . . Assuming that it was proven to your satisfaction that the injury occurred during surgery, that the ulnar nerve injury occurred during surgery, is an ulnar nerve injury, in a healthy patient, the kind of injury that normally occurs in the absence of a failure of care by the anesthesiologist?

A. [By Dr. Waring] I believe the answer is no My feeling is that if I exercised due diligence in positioning and padding the patient, that I will not have a nerve injury.

Id. at 463, 827 P.2d at 851.

55. *Id.* at 464, 827 P.2d at 852.

56. *Id.* Judge Bivins, in his concurring opinion, summed Ms. Mireles' case as follows: "Here, Plaintiff wanted the court to tell the jury that the act of negligence, 'inadequate protection of Plaintiff's extremities during anesthesia,' does not ordinarily occur in the absence of negligence." *Id.* at 468, 827 P.2d at 855 (Bivins, J., concurring).

57. *Id.*

58. *Id.* at 465, 827 P.2d at 853. In concluding that this would be a proper inference, the court analogized to the inference created in *Harless*. *Id.*

59. The court failed to address many of these issues even though they were raised in each party's briefs.

court or the New Mexico Supreme Court issue an opinion on when and how the *res ipsa loquitur* doctrine may be used in medical malpractice cases.

When the court of appeals found the language in Ms. Mireles' jury instruction to be improper, it did so in light of Dr. Waring's testimony.⁶⁰ In reading the language in this light, the court concluded that the instruction "was, at best, an 'unnecessary crutch' that set forth an obvious proposition for which no additional instruction was necessary."⁶¹ This conclusion was directly related to the question of how much evidence of specific negligence a party may offer in these cases—a question upon which the court failed to offer any substantial guidance.⁶²

Without directly commenting upon the evidence offered in *Mireles*, it appears that the court implied that the evidence, including the testimony of Dr. Waring, was not substantial enough to negate the doctrine of *res ipsa loquitur*.⁶³ However, there is not a shred of guidance in this opinion as to how much evidence may be offered in support of specific allegations of negligence.

The court mentioned *Harless v. Ewing*⁶⁴ in order to indicate the type of *res ipsa loquitur* inference Ms. Mireles should have made.⁶⁵ To find guidance on how much evidence of specific negligence may be offered in *res ipsa loquitur* cases, the court had to look no further than *Harless*. The *Harless* court held that *res ipsa loquitur* is inapplicable when "there is no want of evidence as to the cause" and/or the plaintiff has "established 'all the facts' so there is no room for an inference of negligence"⁶⁶ The *Harless* court allowed the plaintiff to proceed on the theory of *res ipsa loquitur* even though he introduced evidence that the defendant "was negligent in failing to check the wheels of the truck after each load."⁶⁷ The court believed that this evidence did not establish what the true cause was and, thus, inferences could still be made.⁶⁸

60. *Mireles*, 113 N.M. at 464, 827 P.2d at 852. "[T]he most natural interpretation [of inadequate protection of Plaintiff's extremities] in the context of this trial derives from Dr. Waring's testimony." *Id.*

61. *Id.* at 465, 827 P.2d at 853.

62. However, Judge Pickard's dissent offers substantial guidance on this question. Regarding the appropriate framing of a jury instruction in this case, Judge Pickard believes that the instruction should have been denied only if the first element contained *all* the facts necessary for a finding of traditional negligence. Judge Pickard did not read the first element as requiring the jury to find all the elements of the specific negligence asserted. She would deny *res ipsa loquitur* to plaintiffs only where a plaintiff *proves* specific acts of negligence. *Id.* at 468, 827 P.2d at 856 (Pickard, J., dissenting) (citing *Tuso v. Markey*, 61 N.M. 77, 294 P.2d 1102 (1956) and *Harless v. Ewing*, 81 N.M. 541, 469 P.2d 520 (Ct. App. 1970)). *Res ipsa loquitur* may still be relied upon even when specific acts of negligence are introduced. *Id.*

63. The court "assumed, without deciding, that [Dr. Waring's] testimony would support application of the doctrine of *res ipsa loquitur*." *Id.* at 463, 827 P.2d at 851. In this case, "[p]erhaps a true *res ipsa* instruction would have been appropriate" *Id.* at 465, 827 P.2d at 853.

64. 81 N.M. 541, 469 P.2d 520 (Ct. App. 1970).

65. *Id.* at 545, 469 P.2d at 524.

66. *Id.* at 545-46, 469 P.2d at 524-25.

67. *See id.* at 545, 469 P.2d at 524.

68. *Id.* at 546, 469 P.2d at 525. The court stated:

Certainly we cannot say as a matter of law what caused the wheels to come off.

In view of *Harless*, it appears that Ms. Mireles' evidence was perfectly acceptable. Ms. Mireles' evidence, that Dr. Broderick was negligent in failing to position properly, pad, or monitor her arm, is substantially similar to the evidence offered in *Harless* (negligence in failing to check the wheels). Furthermore, Ms. Mireles was not able to offer any more evidence of the actual cause of her injury than was the plaintiff in *Harless*.⁶⁹ What actually caused the compression of her ulnar nerve? Was it the improper positioning? The improper cushioning? The improper monitoring? Was it the heavy pain medication after surgery? Was it Ms. Mireles' own fault? Was it some other cause? There is no evidence of the true cause,⁷⁰ just as there was no evidence in *Harless*.⁷¹

There is a major policy consideration in favor of allowing a plaintiff such as Ms. Mireles to rely on *res ipsa loquitur* while still presenting specific evidence of negligence.⁷² A plaintiff should not be penalized by a court's refusal to apply the *res ipsa loquitur* doctrine merely because she has tried to find the actual explanations for her injury.⁷³ Justice is best served in this manner since the ultimate goal of the judicial system is the determination of truth. If a plaintiff is fearful of losing a right to compensation merely because she has attempted to find the true cause of her injury, has not the purpose then been defeated?

Was it because the truck driver failed to tighten the wheels? Was it because there was dirt in the wheel that did not permit the wheel to be tightened? Was it because the wheels loosened on rough roads and there was insufficient checking for this condition? Was it some other cause? We do not know.

Id.

69. For some discussion on this, see Judge Pickard's dissent in *Mireles*. 113 N.M. at 467, 827 P.2d at 855 (Pickard, J., dissenting).

70. Indications in the medical record, actual witnesses, admissions, etc.

71. If there are "conflicting inferences to be drawn from plaintiff's own evidence, the applicability of the doctrine [of *res ipsa loquitur*] is for the jury." *Harless*, 81 N.M. at 546, 469 P.2d at 525.

72. Clearly, if a plaintiff is able to establish negligence through her evidence, then *res ipsa loquitur* is indeed inappropriate.

73. See *Harless*, 81 N.M. at 469 P.2d at 525. The *Harless* court stated:

We think that in cases in which a plaintiff is entitled to rely on the doctrine of *res ipsa loquitur*, he ought not to be penalized by the loss of the presumption because he has been willing to go forward and do the best he can to prove specific acts of negligence. On the contrary he ought to be encouraged to give the court, the jury, and even the defendant the benefit of whatever facts, if any, his effort may develop toward revealing the specific causes of the mishap. And of course if a plaintiff should not be penalized for making the effort, he ought not to be later penalized for succeeding.

Id. (citing *Dallas Ry. & Terminal Co. v. Clayton*, 274 S.W.2d 422 (Tex. Civ. App. 1954)); see also, *Hollywood Shop, Inc. v. Pa. Gas & Water Co.*, 411 A.2d 509, 512-13 (Pa. Super. Ct. 1979). The *Hollywood* court stated:

If, because of the circumstances of the case and the probabilities, an inference of negligence is raised, the doctrine should be applied, it is difficult to see why its application should be denied merely because plaintiff proves specific acts of negligence. There is no reason why such proof should wholly dispel the inference any more than it would in any other case. The plaintiff is penalized for going forward and making as specific a case of negligence as possible. If he endeavors to make such a case he runs the risk of losing the benefits of the doctrine to which the circumstances entitle him. Rather than place him in such a position he should be encouraged to prove as much as possible. The end result is not injurious to the defendant.

Id. (quoting *Leet v. Union Pac. R.R. Co.*, 155 P.2d 42, 51 (Cal. 1944)).

When a plaintiff in New Mexico wishes to rely on the doctrine of res ipsa loquitur in medical malpractice cases, this decision provides some guidance on how to frame an appropriate instruction. Other than this, the decision does little to alter the existing law of res ipsa loquitur in New Mexico.

VI. CONCLUSION

Mireles offers beneficial guidance on how to frame an appropriate res ipsa loquitur jury instruction in medical malpractice cases. The case also offers guidance on the relation of evidence to an appropriate instruction. Other than this guidance, the decision does not substantially change the law of res ipsa loquitur in medical malpractice cases. If anything, *Mireles* adds further confusion to the doctrine due to the variance of the opinions in the case.⁷⁴

The application of res ipsa loquitur to medical malpractice cases has lacked definitive guidance in New Mexico for too long. Up to this date, courts in this state have simply failed to directly address the problems and questions surrounding the doctrine in these cases. *Mireles* serves as an example of the difficulty encountered in New Mexico when res ipsa is used in medical malpractice cases. The case should serve as an illustration to the New Mexico Supreme Court that an appropriate jury instruction needs to be drafted for these situations and that appropriate guidelines and rules governing the doctrine's use in these situations need to be developed. Only when such measures are taken can the doctrine be clearly understood and utilized in medical malpractice cases in New Mexico.

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74. See *Mireles*, 113 N.M. 459, 827 P.2d 847; *id.* at 466, 827 P.2d at 854 (Bivins, J., concurring); *id.* at 467, 827 P.2d at 855 (Pickard, J., dissenting).