1986

Amy G. Robinson v. Intermountain Health Care, Inc. : Brief of Appellant

Utah Supreme Court

Jeffrey Weston Shields; Shields, Shields & Holmgren; Attorneys for Plaintiff-Appellant Amy G. Robinson.
Charles W. Dahlquist, II; Kirton, McConkie & Bushnell; Attorneys for Defendant-Respondent
Jeffrey Weston Shields; Shields, Shields & Holmgren; Attorney for the Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

AMY G. ROBINSON,

Plaintiff and Appellant,

vs.

INTERMOUNTAIN HEALTH CARE, INC., A Utah Corporation, d/b/a LATTER-DAY SAINTS HOSPITAL; and JOHN DOES I through XX inclusive,

Defendants and Respondents.

860063-CA

CASE NO. 20204

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
HONORABLE JAMES S. SAWAYA, JUDGE

Jeffrey Weston Shields
SHIELDS, SHIELDS & HOLMGREN
Valley Tower, Ninth Floor
50 West Broadway
Salt Lake City, Utah 84101
Attorney for the Appellant

Charles W. Dahlquist, II
KIRTON, McCONKIE & BUSHNELL
330 South 300 East
Salt Lake City, Utah 84111
Attorney for Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

AMY G. ROBINSON, Plaintiff and Appellant, vs. INTERMOUNTAIN HEALTH CARE, INC., A Utah Corporation, d/b/a LATTER-DAY SAINTS HOSPITAL; and JOHN DOES I through XX inclusive, Defendants and Respondents.	CASE NO. 20204

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
HONORABLE JAMES S. SAWAYA, JUDGE

Jeffrey Weston Shields
SHIELDS, SHIELDS & HOLMGREN
Valley Tower, Ninth Floor
50 West Broadway
Salt Lake City, Utah 84101
Attorney for the Appellant

Charles W. Dahlquist, II
KIRTON, McCONKIE & BUSHNELL
330 South 300 East
Salt Lake City, Utah 84111
Attorney for Respondents

TABLE OF CONTENTS

AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

AMY G. ROBINSON, Plaintiff and Appellant, vs. INTERMOUNTAIN HEALTH CARE, INC., A Utah Corporation, d/b/a LATTER-DAY SAINTS HOSPITAL, and JOHN DOES I through XX inclusive, Defendants and Respondents.	CASE NO. 20204

BRIEF OF APPELLANT

STATEMENT OF ISSUES PRESENTED ON APPEAL

Plaintiff/Appellant herewith submits to this Court the following issues for disposition upon this appeal:

1). Whether a Plaintiff, claiming negligence under the theory of res ipsa loquitor, need only present evidence that the defendant's negligence was the most likely cause of the injury rather than to show such negligence is the only possible cause or that no other explanations are available in order for the case to go to the jury with an appropriate res ipsa loquitor instruction;

2). Whether the District Court, by dismissing the Plaintiff's res ipsa loquitor cause of action as a matter of law, by the grant of defendant's Motion for Summary Judgment, has thereby improperly

invaded the province of the jury;

3). Whether sufficient genuine issues of material fact were remaining in the case to preclude the District Court's grant of the Defendant's Motion for Summary Judgment as a matter of law;

4). Whether the dismissal of the Plaintiff's medical negligence case pleaded under the doctrine of res ipsa loquitor prior to trial, by motion for summary judgment, was improper and procedurally immature;

5). And, whether strong public policy considerations exist requiring the application of the doctrine of res ipsa loquitor as an appropriate theory of negligence in medical negligence cases involving the probable infection of the Plaintiff by a hypodermic needle administered by a health care provider.

STATEMENT OF THE CASE

Plaintiff instituted the instant action by filing her Complaint with the Third Judicial District Court, in and for Salt Lake County, on the 25th day of January 1983 to recover damages from the defendants for damages allegedly received when she developed acute septic shock following the administration of an intramuscular injection by the defendant hospital's nurse employee, while a patient at said hospital, stating a cause under the doctrine of res ipsa loquitor (Record on Appeal at 2-6). Plaintiff had previously served upon the defendant her ninety-day notice of intent to sue giving jurisdiction to the District Court (Record on Appeal at 3).

DISPOSITION IN THE LOWER COURT

The Third Judicial District Court, In and For Salt Lake County, the Honorable James S. Sawaya presiding, granted defendants' Motion for Summary Judgment dismissing, as a matter of law, Plaintiff's res ipsa loquitor theory of negligence, and allowing Plaintiff thirty (30) days to secure and identify for the record an expert witness or face dismissal, following hearing before the Court on May 22, 1984 and by minute entry of that same date. Plaintiff subsequently identified to the defendants an expert witness but later withdrew that designation and entered into a Stipulation with the defendants to make the previous Order final for purposes of appeal of the dismissal of Plaintiff's res ipsa loquitor theory of negligence, the same being reduced to Order of the Court on August 27, 1984.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks to have the Order of the Third District Court dismissing Plaintiff's res ipsa loquitor theory of negligence reversed and to have the case remanded to the Court for trial on the merits on that theory of negligence.

STATEMENT OF FACTS

On or about March 18, 1982, the Plaintiff, a 38-year-old woman, was admitted to defendant Latter-Day Saints Hospital to undergo a routine tonsillectomy due to a diagnosis by her family

physician, Elvon G. Jackson, M.D., of recurrent tonsillitis (Record on Appeal at 107; Record on Appeal hereinafter designated as "R.").

Dr. Jackson performed the tonsillectomy the following day, March 19, 1982 (R. at 108). Previous to this time, the Plaintiff's general health was considered good and unremarkable, all signs of infection in the tonsils had subsided prior to the tonsillectomy, and the procedure was performed without incident and complication and the post-operative course was unremarkable (R. at 108).

The Plaintiff was discharged by Dr. Jackson from the defendant hospital on March 20, 1982 (R. at 108). Dr. Jackson ordered an intra-muscular injection of a pain relieving drug, Demerol, which was injected into the Plaintiff's hip area as she was leaving the hospital on March 20, 1982 (R. at 108).

The Plaintiff was readmitted to the defendant hospital's Emergency Room on March 21, 1982 at 1900 hours with severe pain over the left hip/buttock area wherein the injection of the pain relieving drug had been administered (R. at 108).

The Plaintiff was subsequently admitted to the 4-South Intensive Care Unit due to the fact that she was "acutely ill" due to acute septic shock (bacterial poisoning of the blood stream) (R. at 108).

The Plaintiff was suffering from fever, rapid pulse, and prostration (R. at 108). The internist on call, Harold S. Cole, M.D., took charge of the case and consulted with Dr. Jackson

(R. at 108).

The events of pain and other symptoms preceded the appearance of fever or signs of infection in any other place and furthermore, there were no other pains in other areas of the Plaintiff's body (R. at 108).

The evening of Plaintiff's admission to defendant hospital's Emergency Room on March 21, 1982, all of the consulting physicians, consisted of Dr. Elvon G. Jackson, Dr. Harold S. Cole, Dr. John P. Burke (defendant hospital's staff Infectious Diseases Consultant) and a Dr. Alhoy, were in agreement that the most likely event was that the infection suffered by the Plaintiff was introduced by the needle employed in administration of the Demerol injection rather than it came from any other source (R. at 109).

Despite the previous tonsillectomy procedure, the Plaintiff's throat did not show signs of infection, and in fact tested negative for the type of organism that was found to be present in her hip abscess (R. at 109).

The area of Plaintiff's hip/buttocks was aspirated and tested and shown to be infected with Beta Hemolytic Strep, Group "A" (R. at 109). Again, her throat culture, relative to the tonsillectomy procedure, did not show the presence of that organism (R. at 109).

Due to the severity of the infection at the hip/buttock injection site, Plaintiff's physicians surgically removed, en bloc,

a portion of the gluteal muscle and tissue down through the fat and subcutaneous tissue to the deep fascia and muscle, excising the entire area in one elliptical piece (R. at 109).

At that time, the Plaintiff suffered from a fever of 104 degrees Farenheit and required the drug Dopamine to sustain her pulse and blood pressure (R. at 109).

Plaintiff remained in the defendant hospital for a continuous period of twenty-one days and incurred hospital costs alone of $11,295.46.(R. at 110).

Plaintiff prepared and served her ninety-day notice of intent to sue in accordance with the Utah Health Care Malpractice Act and, being unable to reach a resolution with the defendants, filed her Complaint in the Third Judicial District Court, In and For Salt Lake County, on or about January 25, 1983 (R. at 2).

Defendants answered the Plaintiff's Complaint and the parties commenced extensive discovery on the issues; Plaintiff did not identify and expert witness to the record and proceeded on the theory of res ipsa loquitor (See Record on Appeal generally).

There is no dispute evident on the record that the injection in issue in the action was administered by an employee of the defendant hospital and that the instrumentality employed to administer the same was in the exclusive control of that employee (R. at 101-102).

On or about March 20, 1984, Defendants filed their Motion for Summary Judgment and supporting affidavits and memoranda

seeking primarily to dismiss Plaintiff's cause of action based upon the legal theory of res ipsa loquitor and compelling Plaintiff to produce expert testimony to establish negligence and the standard of care (R. at 87-106).

Plaintiff filed responsive memoranda and the Motion was noticed for hearing before the Court, the Honorable James S. Sawaya, for May 22, 1984 (R. at 154).

The Motion was argued before the Court on May 22, 1984 and taken under advisement by the Court. The decision was rendered by Minute Entry of May 22, 1984, which ruled, in pertinent part, as follows:

> The Court feels that the infection could have been caused other than by the negligence of defendants. Res Ipsa Loquitor is not an appropriate theory. Defendants' Motion is granted with to to plaintiff to provide an expert and establish a standard of care and theory of negligence within thirty (30) days. (R. at 157).

The Plaintiff subsequently identified an expert witness to the Defendants but later withdrew that designation and entered into a Stipulation with the Defendants giving finality to the Court's May 22, 1984 Order to facilitate appeal on the issue of applicability of the res ipsa loquitor doctrine (R. at 164). That Stipulation resulted in a final order of August 27, 1984 (R. at 166).

Plaintiff represents to this Court for explanatory purposes that the expert witness designation was withdrawn as the expert could not definitively testify on issues of negligence without the instrumentality, i.e. the needle and syringe. It was a fact established on this record that the needle employed in the injection in question was a pre-packaged, single lot injection which is disposed of after use (see e.g., R. at 101-102).

Plaintiff filed her Notice of Appeal with the Salt Lake County Clerk on September 21, 1984 (R. at 167).

Many of the record references made above are to the factual statement of Plaintiff's Memorandum in Opposition to Motion for Summary Judgment; that Memorandum contains within it further references to the depositions of the medical personnel designated to this record as R. at 174, 175, 176, 177 and 178 respectively, and being a part of this record. Appellant urges a complete review of these depositions by this Court for a complete understanding the the attenuating medical circumstances involved.

SUMMARY OF ARGUMENT

The District Court erred by dismissing Plaintiff's cause of action under the legal theory of res ipsa loquitor by summary judgment for several reasons. First, a Plaintiff need only present evidence that the defendant's negligence was the most likely cause of the Plaintiff's injury; it is not necessary that it is the only possible cause or that no other explanations are available.

However, the District Court, by its decision of May 22, 1984, rendered a finding that the Plaintiff must rule out all other possible causes, without opportunity for a trial, in order to proceed on the theory.

To grant such a Motion without trial improperly invades the province of the jury as it is the duty of the jury to consider the defendant's negligence in a case under res ipsa loquitor; once a Plaintiff has merely established the elements of the theory, the Plaintiff is entitled to an instruction to the jury on the theory.

Dismissal of a medical negligence case for failure to provide expert testimony prior to trial is improper and premature in any event as a Plaintiff has until the close of the case in chief to present such testimony and it is unknown to the Court until that time whether such testimony is forthcoming. The District Court in the instant case knew only that Plaintiff was proceeding under res ipsa loquitor and improperly assumed the lack of expert medical testimony.

Disposing of the instant case under its res ipsa loquitor theory by summary judgment was in error as sufficient genuine issues of material fact were present before the trial court to preclude the grant of a Motion for summary judgment as a matter of law.

Strong considerations of sound public policy exist to require the application of res ipsa loquitor as an appropriate theory of negligence in the instant case. The instrumentality of damage, the needle and syringe, are disposed of immediately after use such that the same is not available to a plaintiff or a plaintiff's expert and unfairly disables a Plaintiff's cause of action against a health care provider for damages precipitated by a needle. Without application of res ipsa loquitor as an appropriate theory of negligence, a health care provider need only dispose of the instrumentality in the normal course of operations to shield itself from any actual negligence.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S CAUSE OF ACTION UNDER THE THEORY OF RES IPSA LOQUITOR BY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

A. A Plaintiff Need Only Present Evidence That The Defendants' Negligence Was The Most Likely Cause of Plaintiff's Injury--Not That It Is The Only Possible Cause Or That No Other Explanations Are Available.

In order to submit a case to the jury on the theory of res ipsa loquitor, a Plaintiff needs to meet the requisite elements of the theory, specifically that 1). the accident was of a kind which, in the ordinary course of events, would not have happened

if due care had been observed; 2). that the Plaintiff's own use of the agency or instrumentality was not primarily responsible for the injury; and 3). that the agency or instrumentality was under the exclusive management and control of the defendant. Kusy v. K-Mart Apparel Fashion Corp., 681 P. 2d 1232, 1235(Utah 1984).

One of the purposes of the res ipsa instruction is to "cast the burden upon the person who controlled the agency or instrumentality causing the injury to make proof of what happened." Id.,

Once the plaintiff makes a prima facie showing of the elements, he is entitled to a res ipsa instruction. The trial court should not weigh the conflicting evidence of the elements; this is the jury's function. Id.

In order to determine the appropriateness of a res ipsa instruction, the court must view the evidence in a light most favorable to the Plaintiff. Id.

Although the Plaintiff in the instant case was not even granted the opportunity to present her evidence at trial under her res ipsa theory, the record as constituted at the time defendant's Motion for Summary Judgment was heard contained sufficient proof of the elements of res ipsa loquitor as stated in Kusy to require submission of the case on the theory to a jury at trial, particularly if the facts were viewed in the light most favorable to the Plaintiff.

However, Judge Sawaya's decision on the Motion was clearly in error as it required a much more stringent quality of evidence to support the theory of res ipsa loquitor than the law of Utah requires. The minute entry of May 22, 1984 states that the reason the Court ruled that res ipsa loquitor was not an appropriate theory of negligence was because "...The Court feels that the infection could have been caused other than by the negligence of the defendants..." (R. at 157; emphasis added).

The Restatement (Second), at comment (e), provides an excellent statement of the quality of evidence required:

> The Plaintiff's burden of proof (in a res ipsa case) requires him to produce evidence which will permit the conclusion that it is more likely than not that his injuries were caused by the defendant's negligence. . . The Plaintiff need not, however, conclusively exclude all other possible explanations, as so prove his case beyond a reasonable doubt. . . It is enough that the facts proved reasonably permit the conclusion that negligence is the more probable explanation. 2 Restatement (Second) of Torts, §328D, comment (e)(Emphasis added).

The District Court's decision, however, requires the Plaintiff to exclude any an all other possible causes, and therefore imposes upon her the obligation to prove her case beyond a reasonable doubt, rather than by a preponderance of the evidence. Further, what becomes clear is the error made by the Court in ruling by summary judgment; the Court heard no evidence--therefore, how is the Court to conclude that there might have been another cause of injury?

The error in ruling on the issue by summary judgment will be treated in more detail below at Point I(B) and I(D).

Even in cases wherein the application of the doctrine of res ipsa loquitor is clearly appropriate, there are always other possible causes of injury, no matter how remote, as there exist other possibilities in all human affairs.

The California Court of Appeals in Mittelman v. Seifert, 94 Cal. Rptr. 654 (Cal. App. 1971), recognized that after the Plaintiff meets the conditions for applying the doctrine of res ipsa loquitor, a presumption of negligence arises which imposes upon the defendant the obligation of rebutting the inference. The rebuttal, the court noted at page 674, must be by substantial evidence and must offer a definite cause for the injury in which the defendant's negligence does not inhere apart from mere speculation or conjectural evidence. (Emphasis added).

Likewise, the California Supreme Court speaks in terms of probability of cause in Newing v. Cheatham, 124 Cal. Rptr. 193 (1975), when it describes the standard of evidence required of the plaintiff in res ipsa loquitor cases:

> . . .the doctrine of res ipsa loquitor is applicable where the accident is of such a nature that it probably was the result of negligence by someone and that the defendant is probably the one responsible. . .It need not be concluded that negligence is the only explanation of the accident, but merely the most probable one.
> 124 Cal. Rptr. at 198-99 (Emphasis added).

The defendant in Newing v. Cheatham advanced the identical theory propounded by the Court in the instant case that "...the crash could have resulted from causes other than the negligence of the decedent." (Emphasis in original). The Court rejected this defense as inadequate and held that "...Mere speculation of this sort is insufficient to discharge defendant's burden of explanation." 124 Cal. Rptr. at 203.

In Spidle v. Stewart, 402 N.E. 2d 216 (Ill. 1980), the plaintiff brought a medical malpractice action against her physician alleging negligence in performing surgery based on the theory of res ipsa loquitor. The trial court refused to give a res ipsa instruction to the jury. The Illinois Supreme Court reversed, concluding that viewing the evidence in a light most favorable to the plaintiffs, a jury could have determined that a foundation for res ipsa loquitor had been made and that the defendant had been negligent. 402 N.E. 2d at 221. The Court held that the Plaintiff had to prove that the result ordinarily had negligent antecedents but did not have to prove that the result always had negligent antecedents. 402 N.E. 2d at 219. (Emphasis added).

In Cummins v. City of West Linn, 536 P. 2d 455 (Or. 1975), the Plaintiff relied on the theory of res ipsa loquitor to establish the defendant's negligence because the Plaintiff lacked any other evidence. The trial court entered an involuntary non-suit against the Plaintiff and denied a motion for new trial. The Oregon Supreme Court reversed holding the the application of the doctrine was

proper:

> The application of res ipsa loquitor is based upon probabilities, i.e., if a probability of a negligent cause of the accident exceeds the probability of a non-negligent cause, then this condition is met. . . It is a question of probabilities, not certainties. It is also unnecessary for the plaintiff to eliminate with certainty all other possible causes or inferences. 536 P. 2d at 458-9.

The doctrine of res ipsa loquitor is applicable to medical negligence cases in Utah in certain circumstances; however, the tenor of Judge Sawaya's ruling in the instant case would lead one to believe that the doctrine has no application in the medical negligence context.

Expert testimony is not necessary to establish the standard of care in a medical negligence case and res ipsa may be applied when the propriety of the treatment received is within the common knowledge and experience of laymen. Nixdorf v. Hicken, 612 P. 2d 348 (Utah 1980); Kim v. Anderson, 610 P. 2d 1270 (Utah 1980) (both cases reversing the trial judge in the instant case, Judge James S. Sawaya, on the application of the doctrine in medical negligence cases). In Kim v. Anderson, this Court defined the application of the doctrine as follows:

> ...when the impropriety of treatment complained of is of such nature that lay persons could judge from common knowledge and experience that such an injury would not happen if there had been proper skill and care, expert testimony is not necessary. 610 P. 2d at 1271.

Appellant contends that the fact that the same trial judge who dismissed her res ipsa theory has been reversed at least twice before on the identical issue should immediately call into question the legal sufficiency of the order appealed from in the instant case. It is interesting to note that in both Kim v. Anderson and Nixdorf v. Hicken, the Plaintiffs were at least afforded the opportunity to present their evidence prior to having the door slammed on their theory of negligence, Plaintiff in the instant case was not even afforded the opportunity to present her evidence at trial.

In Wolfsmith v. Marsh, 337 P. 2d 70 (Calif. 1959), the Court held that incidents of infection following a hypodermic needle injection are the types of incidents within the common knowledge of laymen as to whether they occur ordinarily in the absence of negligence. The Plaintiff in that case received an anesthetic injection into her knee. Following the injection, she realized severe pain in her leg and a small raised bubble at the injection site and the tissue at the injection site was firmer than the surrounding tissue. Eventually the Plaintiff developed a slough ulcer at the needle site which required muscle and tissue excision. It was determined that the drug injected had not caused the reaction and therefore the query was focused upon the injection itself. Plaintiff sued on a res ipsa loquitor theory and at trial the Court directed a verdict against her, refusing to give a res ipsa instruction. The appellate Court reversed, and in employing

the identical requisite elements of the doctrine stated by this Court in Kusy v. K-Mart, held as follows:

> It is a matter of common knowledge among laymen that injections into the arm, as well as other portions of the body, do not ordinarily cause trouble unless unskillfully done or there is something wrong with the serum. 337 P. 2d at 72.

Therefore, the District Court erred, inter alia, by dismissing Plaintiff's res ipsa theory on the basis that there "could be" other causes of the injury; the District Court has clearly imposed an excessive burden of proof upon the Plaintiff not required under Utah law or other authorities interpreting the doctrine, and did so without hearing any of the Plaintiff's evidence. The authorities hold that the doctrine is, in fact, directly applicable to the facts of this case and has application in this jurisdiction and others to medical negligence cases.

B. By Dismissing Plaintiff's Res Ipsa Loquitor Cause of Action As a Matter Of Law, the District Court Has Improperly Invaded The Province Of the Jury.

By granting the Defendants' Motion for Summary Judgment, the District Court ruled that the theory of res ipsa loquitor was inapplicable to the type of case before it without hearing any evidence. As the record indicates, the Motion was heard on the Court's regular Law and Motion Calendar and was not heard in the context of an evidentiary hearing or trial. The application of the

doctrine cannot be determined in this fashion or in the same manner that such legal issues as jurisdiction, constitutionality or other such issues of law can be determined, simply by virtue of the nature of the doctrine of res ipsa loquitor.

"Res ipsa loquitor is an evidentiary rule that permits an inference of negligence on the part of a defendant under well-defined circumstances." Kusy v. K-Mart Apparel Fashion Corp., supra, at 1235. (Emphasis added).

The applicability of the doctrine, and hence whether the proponent is entitled to an instruction on the theory, depends entirely upon the proponent's evidence at the close of his presentation thereof which is before the Court. The application is not a matter of law to the extent that an issue such as governmental immunity is, but depends entirely upon a determination made after the evidence is in. To decide the applicability of the doctrine at a pre-trial stage is to ignore what the doctrine is--a rule of evidence.

This Court made it clear that a decision on the applicability of the doctrine by the trial court invades the province of the jury to determine the weight and sufficiency of the evidence:

> The trial court should not weigh conflicting evidence of the elements (of res ipsa); this is the jury's function. Kusy v. K-Mart, supra at 1235 (parenthetical comment added).

The Restatement(Second) provides as follows:

> The conclusion (of defendant's negligence in a res ipsa case) is not for the Court to draw, or to refuse to draw, in any case where either conclusion is reasonable; and even though the Court would not itself find negligence, it must still leave the question to the jury if reasonable men might do so. 2 Restatement (Second) of Torts, §328D, comment (e) (1965). (Parenthetical comment added).

In Spindle v. Stewart, supra, a medical negligence case brought under theory of res ipsa loquitor, the Court held:

> Factual disputes presenting credibility questions or requiring evidence to be weighed should not be decided by the trial judge as a matter of law. 402 N.E. 2d at 220.

Stating the error quite simply, the District Court rendered a decision on a rule of evidence without having heard any evidence. The District Court has therefore rendered a decision without any foundation in the record--virtually from "thin air"--stating sufficient grounds for reversal standing alone.

C. Sufficient Genuine Issues of Material Fact Were Present in This Action to Preclude the Grant of Defendants' Motion For Summary Judgment as a Matter of Law.

It is essential to observe in this action that Plaintiff is before this Court appealing the granting of a Motion for Summary Judgment; a trial was not held nor evidence taken. An analysis of the grounds necessary to award a summary judgment of dismissal to a moving defendant exposes yet another gross error committed by the District Court.

A summary judgment motion must be supported by evidence, admissions, and inferences which, when viewed in the light most favorable to the opposing party, establishes that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Bihlmaier v. Carson, 603 P. 2d 790 (Utah 1979).

A motion for summary judgment is a harsh measure, and for this reason a plaintiff's contentions must be considered in a light most to his advantage and all doubts resolved in favor of permitting him to go to trial; and only if when the whole matter is so viewed, he could, nevertheless, establish no right to recovery, should the motion be granted. Controlled Receivables, Inc. v. Harman, 413 P. 2d 807 (Utah 1966).

In negligence cases, summary judgment is appropriate only in the most clear-cut cases. Bowen v. Riverton City, 656 P. 2d 434 (Utah 1982).

Many issues of fact remained for resolution at the time of hearing on defendants' Motion for Summary Judgment. The instant case, as is true with most medical negligence cases, contained many factual issues. These issues were plain on the record and framed by the depositions of three (3) physicians, one nurse practitioner, and the Plaintiff, and the affidavits filed in support of the Motion. As argued above, there was a substantial factual issue as to whether the doctrine of res ipsa loquitor was approriate under the facts of this case. Several other issues remained, including, but certainly not limited to, the following:

Source of the Infection; In support of its Motion, the defendants filed the Affidavit of John P. Burke, M.D., the defendant hospital's Infectious Disease Consultant, who raised the issue of whether the infection migrated to the injection site from the Plaintiff's tonsil area incident to the previous tonsillectomy. (R. at 97-100). However, Plaintiff cited to the Court deposition testimony taken from Dr. Elvon G. Jackson, the physician in charge of the tonsillectomy case and the shock case, in her Memorandum in Opposition to Motion for Summary Judgment suggesting that this migration process did not occur, as follows:

> Q: (By Mr. Shields): Dr. Jackson, concerning the tonsillectomies, and particularly in Amy's case, was there a clinically signficant risk that this procedure (the T & A) would cause the bacteria giving rise to the tonsillitis to be seeded into her bloodstream?
>
> A: I--I don't believe so. (R. at 113; see also, (R. at 174, page 26 (Jackson Deposition)).

Additional deposition testimony taken from the defendants' Infection Control Practitioner, one Julie Jacobsen, was cited to the Court in Plaintiff's opposing memorandum regarding the source of the infection, as follows:

> Q: (By Mr. Shields): As I understand it, Mrs. Robinson was diagnosed as having hospital-acquired beta strep, Lancefield Group "A" on the hip injection site.
>
> A: That's correct.
>
> Q: Any question about that?
>
> A: None at all.
> (continued following page)

Q: This occurred in her left buttock, where that was injected?

A; Uh-huh (affirmative).

Q: Is this type of infection what's called "nosocomial?" Is that the name of it?

A: Hospital-acquired, uh-huh (affirmative). (R. at 115; see also R. at 176, page 20).

Testimony from the internist on call the evening of the second admission, Dr. Harold S. Cole, cited to the Court in the opposing memorandum raised additional issues of fact and credibility of witnesses, as follows:

A: (By the Witness): Well, the evening of admission, all of us were in agreement that the most likely event was that the infection was introduced with that needle rather than it came from somewhere else. Now, I -- and I concurred in that opinion. We were sufficiently concerned about that that we sent her to surgery to have the area removed, which we would not have done had we felt an infection from somewhere else had migrated there. (R. at 116; see also R. at 178, page 14).

The citations to the record above, all of which were before the District Court at the May 22, 1984 hearing, clearly show there is an issue as to the exact source of the infection and/or whether multiple sources existed, framed by evidently conflicting testimony from the physicians involved in the treatment of the Plaintiff.

The defendants, in their Reply Memorandum, raised an explanation to the testimony of Julie Jacobsen, suggesting that Plaintiff's interpretation of the meaning of that testimony was incorrect, raising a further issue of fact. (R. at 126).

Contribution by Plaintiff to Injury: Defendant raised the issue in its Reply Memorandum that the infection could have been precipitated, in whole or in part, by the conduct of the Plaintiff and/or her husband touching the needle injection site by citing to page 57 of the Plaintiff's deposition wherein she stated that at one point prior to her discharge from the hospital her husband climbed into bed with her and "touched her all over." (R. at 124). Plaintiff contended and does now contend that the assertion of contribution is without merit based on the testimony of the treating physicians cited hereinabove and as cited to the District Court; nonetheless, the same raises genuine issues of material fact which impact on the third key element of the res ipsa loquitor doctrine, and perhaps other aspects of the lawsuit.

The record in this action as a whole, and the citations of factual matters contained hereinabove demonstrate clearly that there were genuine issues of material fact remaining in the case relative to the res ipsa loquitor issue and other material issues precluding summary judgment as a matter of law under the standards regarding such motions stated in Bihlmaier v. Carson, Controlled Receivables, Inc. v. Harmon, and Bowen v. Riverton City, all supra.

D. Dismissal of a Medical Negligence Case Pleaded Under the Doctrine of Res Ipsa Loquitor Prior to Trial is Improper and Procedurally Premature.

In making its ruling as it did, the District Court flatly refused to apply the doctrine of res ipsa loquitor to the facts

of the instant case merely because it was a medical negligence case where the Plaintiff had not already produced an expert witness to support a theory of "straight" medical negligence.

However, to dismiss a medical negligence case pleaded under res ipsa loquitor at any time prior to trial is improper and procedurally premature. This is because a Plaintiff has until the close of his case-in-chief to attempt to make a case under res ipsa loquitor and to produce expert testimony if he chooses to do so. As argued under Point I, subpoint (B) above, res ipsa loquitor is a doctrine of evidence and logically cannot be applied or refused until some evidence is heard; and in the instant case, the Court took no evidence but ruled on the issue as a matter of law. It is not a matter of law, but a matter of evidence.

Even in medical negligence cases, where expert testimony is always an issue, the cases recently before this Court have not been ruled upon by the trial court until the Plaintiff's case-in-chief was in. See, e.g., Nixdorf v. Hicken, supra, and Kim v. Anderson, supra. In fact, none of the cases cited above involving application of the doctrine were resolved without trial.

Further, under the Utah Rules of Civil Procedure, an expert does not have to be produced or made available until time of trial, unless "exceptional circumstances" are demonstrated. Utah Rule of Civil Procedure 26(b)(4). In the instant case, the sum total of discovery propounded by the defendants was the taking of the Plaintiff's deposition; never at any time was the identity of any

expert retained by the Plaintiff sought by discovery nor was any appropriate motion brought by the defendants. Therefore, the District Court concluded without any basis in fact whatsoever that the Plaintiff either did not or could not obtain and present expert testimony on the issue.

Further, by requiring the Plaintiff to present expert testimony in some form within thirty (30) days of the granting of the Defendants' Motion for Summary Judgment, the Court far exceeded its authority under Rule 26(b)(4), Utah Rules of Civil Procedure. The District Court took upon itself the task of conducting discovery that the Defendants themselves could not conduct in such manner under Rule 26(b)(4). As argued above, this Court has attempted repeatedly to inform this particular trial judge on the appopriate application of the doctrine of res ipsa loquitor to medical negligence issues, but evidently to no avail; this Court needs to again undertake that task by reversing the Order rendered by the District Court in this case.

POINT II

STRONG PUBLIC POLICY CONSIDERATIONS EXIST REQUIRING THE APPLICATION OF RES IPSA LOQUITOR AS AN APPROPRIATE THEORY OF NEGLIGENCE IN NEEDLE INFECTION CASES.

As this Court stated in Kusy v. K-Mart Apparel Fashion Corp., supra, the purpose of application of the doctrine of res ipsa loquitor is to "...cast the burden upon the person who controlled the agency or instrumentality causing the injury to make proof

of what happened." 681 P. 2d at 1235.

Implicit in that definition of purpose of the doctrine is the inherent conclusion that the person having control of the instrumentality of damage has a distinct and inequitable advantage over the Plaintiff relative to the burden of proof, and therefore, such person should then bear the burden of showing what really occurred.

The doctrine of res ipsa loquitor is founded upon sound principals of public policy and justice. Although a Plaintiff generally does and should bear the burden of proof, the circumstances of a case should not be allowed to make that burden an impossibility; and when it is the defendant who has the exclusive control of the instrumentality, which is always a critical item of evidence, the Plaintiff's burden of proof does in fact become an impossibility unless somepresumption evens out the odds.

The sound principals of public policy and justice supporting the doctrine have a very pronounced presence in the instant case.

As the deposition exerpts quoted above clearly state, the physicians involved in the treatment of the Plaintiff felt that the needle introduced this severe and debilitating infection into her body rather than it came from somewhere else. Whether or not these physicians could reach a conclusion of negligence is not the point; the point is that the needle was the most likely source of the infection. Thus, the question becomes, whose instrumentality was the needle? Who controlled it? And, finally, where is the instrumentality now? All of these questions are answered in the

record and were not significant issues of fact in the case before the District Court. The needle belonged to the defendant hospital, was administered by its nurse and employee, Joyce Harbrecht, RN, and was disposed of immediately after use as it is a single-dose disposable needle. Therefore, the instrumentality, a key piece of evidence, is not and never was available to the Plaintiff or any expert retained thereby for testing and other evidentiary purposes. It is therefore the defendant hospital that had, at all times, the custody and control of the instrumentality and could do with it as it wished. Is it not then appropriate to shift the burden to this defendant to make proof as to what occurred? Without this shift in the burden of proof, all that a defendant needs to do is to dispose of the instrumentality, whether by standard operating procedure or deliberate concealment, to defeat a Plaintiff's cause of action. In the instant case, the record indicates that disposal of the needle is standard policy and consistent with the employment of singe-dose injectables; however, the situation remains: the instrumentality is no longer available as evidence. Permitting the burden of proof to remain entirely on the Plaintiff in these circumstances is clearly inequitable and unjust and serves to defeat any remedy and right which Plaintiff may have.

The application of the doctrine of res ipsa loquitor in this case would not unfairly burden the defendants' defense; the defendant hospital may still attempt to make proof that the infection migrated from some other situs, that the Plaintiff caused it

or that she otherwise brought it with her, or that the infection is unavoidable despite the best of sanity measures being taken. However, it is they who controlled and disposed of this instrumentality of damage and it is they who should bear the burden.

The unfairness of the burden imposed upon a Plaintiff to make proof without the presumptions of the doctrine being applied to "even things up" is most distinct in the medical negligence context. The health care industry has protections against litigation afforded to it not enjoyed by other groups of litigants; the frequent requirement of expert testimony in view of the well-known and well documented "conspiracy of silence;" the legislative barriers imposed to discourage litigants (e.g., Utah Health Care Malpractice Act); and the factual complexity inherent in such cases. This area of law is where the doctrine of res ipsa loquitor should find its most widespread application. There is no logical reason, in law or in fact, why the Latter-Day Saints Hospital in the instant case should be afforded any greater protection than the K-Mart Apparel Fashion store in Kusy v. K-Mart Apparel Fashion Corp., supra. What vaunted pedestal does the health care industry occupy that would make it more legally protectable than a K-Mart store?

The simple fact to be derived from the instant case is that a severly injured Plaintiff has no access to the apparent instrumentality of damage due to the exclusive control exercised over it by the defendant and is thereby deprived of substantial rights and

remedies for redress of her injuries unless able to apply the doctrine of res ipsa loquitor to shift the burden of proof to these defendants.

Aside from the numerous errors committed by the District Court in dismissing the caused pleaded under the doctrine as argued above, the basic conclusion is that this is a case where the doctrine is appropriately applied and the case should go to a jury on the doctrine for final disposition. The Plaintiff demonstrated the elements of res ipsa loquitor and the circumstances of this case provide numerous policy reasons favoring the application of the doctrine in this case.

CONCLUSION

The District Court erred as a matter of law in dismissing the Plaintiff's causes of action pleaded under the doctrine of res ipsa loquitor on the grounds, as stated in its Minute Entry, that the injury "could have" been caused by other factors. The doctrine does not require the Plaintiff to rule out other causes with certainty, but requires only that the negligence of the defendant be the most likely cause of the injury. Further, by dismissing the Plaintiff's res ipsa causes as a matter of law, the Court has improperly invaded the province of the jury as the doctrine is a rule of evidence and cannot be ruled upon as a matter of law; the District Court took no evidence in respect to its ruling and had no cognizable basis upon which to so rule.

The issue was improperly decided by summary judgment as many genuine issues of material fact were present in the record to preclude the granting of a motion for summary judgment. The facts of this case must be viewed in the light most favorable to the Plaintiff on both the trial court and appellate court levels under the law of Utah, and when so viewed, obvious genuine issues of material fact remain. Under Utah law, a summary judgment should be granted only in the most clear-cut negligence cases.

The District Court further erred in ruling as it did on the basis that the Plaintiff had not provided expert testimony and was entirely premature in doing so. A Plaintiff has until the close of his case in chief to so produce expert testimony, and by compelling the Plaintiff to locate an expert within thirty (30) days of the date of ruling, the Court took it upon itself to conduct discovery in advance of trial to an extent not permitted even to the parties under Utah Rule of Civil Procedure 26.

Sound considerations of public policy further exist requiring the application of the doctrine of res ipsa loquitor to the facts of the instant case. The doctrine is designed to shift the burden to show what occurred to the party in control of the instrumentality of damage, and inherent in that definition is the fact that the person having control of the instrumentality possesses an unfair and inequitable advantage over a Plaintiff due to its ability to make free disposition of the key item of evidence. These considerations are pronounced in the instant case as it is clear

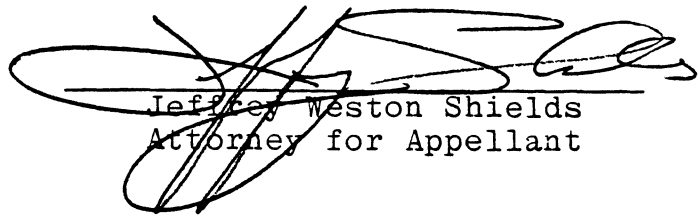
that the needle was the property of defendant and in the exclusive control of the defendant and the injection was administered by the defendant's nurse and employee; thereafter, the same was disposed of and not available to the Plaintiff as a necessary and key item of evidence. The doctrine should have its most widespread use in the medical negligence context due to the special privileges and protections in litigation afforded to the health care industry not afforded to other groups of litigants; special legislation, the well-known and well documented "conspiracy of silence," and the inherent factual complexity of the cases.

WHEREFORE, Appellant prays for an Order of this Court finding that res ipsa loquitor is an appropriate theory of negligence in this case, and reversing the Order of the District Court and remanding this matter for trial by jury on the merits thereof.

DATED this 14th day of January, A.D. 1985.

Respectfully submitted,

SHIELDS, SHIELDS & HOLMGREN



Jeffrey Weston Shields
Attorney for Appellant

A D D E N D U M

Minute Entry of
May 22, 1984

C[illegible]nty of Salt Lake - State of U[illegible]h

FILE NO. 183-575

LE: (✓ PARTIES PRESENT)	COUNSEL. (✓ COUNSEL PRESENT)
Terry D. Robinson	: Jeffrey ~~Ted~~ Shields
v.	:
Intermountain Health Care, et. al	: Charles W. Dahlquist II
	:

CLERK

REPORTER

BAILIFF

HON. J. Sawaya JUDGE

DATE: May 22, 1984

Matter heard — Defendants' Motion for Summary Judgment.

Court's ruling - The court finds that the injuries could have been caused either through the negligence of Defendants. Res Ipsa Loquitur is not an appropriate theory. Defendants Motion is granted with leave to plaintiff to provide an expert and establish a standard of care and theory of negligence within thirty (30) days.

J. S.

Copies to counsel — mailed May 29, 84

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be delivered by hand four (4) true and complete copies of the foregoing BRIEF OF APPELLANT to the following, this 19th day of January, 1984:

Charles W. Dahlquist, Esq.
KIRTON, McCONKIE & BUSHNELL
Attorneys for Defendants
and Respondents
330 South 300 East
Salt Lake City, Utah 84111