Chicago-Kent Law Review

Volume 44 | Issue 2 Article 9

October 1967

Proving a Malpractice Case

Howard M. Hoffmann

Gerald J. Smoller

PROVING A MALPRACTICE CASE

An action for malpractice begins with an election between one of two alternatives. The plaintiff will ordinarily have the option of proceeding in an action founded on contract or one sounding in tort. The action in contract is predicated upon the defendant's failure to perform an implied promise to treat the patient with care and skill. The action sounding in tort, on the other hand, is based upon the defendant-physician's negligence, irrespective of a promise, express or implied.

The classic difference between contract and tort is the amount of damages allowable for each cause of action. In an action based on contract, the plaintiff's recovery is restricted to actual costs and expenses, such as for nurses, hospital bills and medicines, all of which have been incurred by the plaintiff by reason of the defendant's breach.[1] However, if the cause of action sounds in tort, the plaintiff has the opportunity to seek added indemnification for pain and suffering and mental distress, damages which are unavailable in a contract action.[2]

It is obvious that the suit brought in tort holds a promise of greater financial reward than one based upon a breach of contract. This is evidenced by the fact that only one case based on contract has been found in the appellate reports of Illinois.[3] This article will therefore analyze the necessary requirements for establishing a malpractice case sounding in tort.

The elements necessary to establish a malpractice case are the basic elements of any negligence suit. The plaintiff must prove (1) that the defendant owed him a duty, (2) that the defendant failed to perform or breached that duty, (3) that the breach was the proximate cause of the plaintiff's injuries and (4) damages.

DUTY

A physician or surgeon must use that degree of skill and care that a good practitioner under like circumstances would use, but not the highest degree of care.[4] The court in *Holtzman v. Hoy*[5] summarized the degree of care necessary as follows:

> The duty which the defendant, as a physician and surgeon, owed to the plaintiff was to bring to the case . . . that degree of knowledge . . . . which a good physician and surgeon would bring to a similar case under like circumstances . . . . [T]his rule . . .

1 Zostautas v. St. Anthony De Padua Hosp., 23 Ill. 2d 326, 178 N.E.2d 303 (1961).
2 *Ibid.*
3 Stanley v. Chastek, 34 Ill. App. 2d 220, 180 N.E.2d 512 (2d Dist. 1962).
4 Ritchey v. West, 23 Ill. 329 (1860). An interesting sidelight to this case was that Abraham Lincoln was counsel for the defense. He lost at both the trial and appellate level.
5 118 Ill. 534, 8 N.E. 832 (1886).

> does not exact the highest degree of skill and proficiency attainable in the profession, [but] it does not . . . contemplate merely average merit.[6]

The surgeon, physician or specialist who heralds himself as being possessed of unusual, extraordinary, unparalleled skills is required to possess higher skills from the average physician. This is the majority rule and the one recognized by Illinois Pattern Jury Instructions.[7]

Although, the courts of Illinois do not recognize the "schools of medicine" approach in ascertaining what standard of care must be used as a measure of the defendant's conduct,[8] they, however, still follow the "locality rule." Under the operation of this rule, the defendant is bound to exercise such care and diligence as a good practitioner practicing in a same or similar community or hospital.[9] The "locality rule" has been severely criticized for imposing too low a standard on the small town doctor. The Committee that drafted the Illinois Pattern Jury Instructions responded to the criticism of the locality rule by stating that the rule should only be applied in Illinois where a physician of a small community is faced with an emergency situation.[10] In such a situation, that physician will be relieved from the use of appliances and treatment employed by the physician in a larger community.

Breach of Duty

When the physician falls below the standard of conduct required of him—when he fails to "possess and apply the knowledge and skill and care that is ordinarily used by reasonably well qualified doctors . . . in similar cases and circumstances,"[11] the physician breaches his duty to his patient. Such breach may occur in one of two ways, by omission or commission. The failure to do a professionally required act can be as serious as doing it badly.

The plaintiff has the burden of proof in demonstrating that the physician breaches the duty owed. This must be shown by affirmative evidence that the defendant was unskillful or negligent.[12] Furthermore, as in all civil actions in Illinois, the plaintiff must plead his freedom from contributory negligence.[13]

As a general rule, the defendant's negligence is not a matter which ought to be presumed.[14] Also, mere proof that a good result was not achieved

6 *Id.* at 536, 8 N.E. at 832.

7 I.P.I. § 105.02 (1961). See p. 108 and p. 114 of this symposium for a further discussion of the duty of a specialist.

8 Holden v. Stein, 312 Ill. App. 260, 38 N.E.2d 378 (1st Dist. 1941).

9 *Ibid.*

10 See comment, I.P.I. § 105.01 (1961). See also Annot., 8 A.L.R.2d 772 (1949) and p. 109 of this symposium for further discussion.

11 I.P.I. § 105.01 (1961).

12 Scardina v. Colletti, 63 Ill. App. 481, 211 N.E.2d 762 (1st Dist. 1965).

13 Wesley v. Allen, 235 Ill. App. 322 (4th Dist. 1925).

14 Olander v. Johnson, 258 Ill. App. 89 (2d Dist. 1930).

is not proof of negligence. Instead, the plaintiff must be prepared to show what the average reasonable physician in good standing would have done in a similar case and under like circumstances, and that the defendant failed to conform his conduct to the norm expected. Thus, in *Quinn v. Donovan*,[15] the court held that the plaintiff failed to sustain his burden of proof merely by showing that his arm was still not healed after treatment by the defendant-physician. As stated in the recent case of *Scardina v. Colletti*,[16] "proof of a bad result or mishap is no evidence of lack of skill or negligence."

What is sometimes alleged to be malpractice is often an affair of judgment where even two equally eminent practitioners may differ. Therefore, the courts have come to recognize that if the defendant has given the plaintiff the benefit of his best judgment (assuming it to be medically sufficient) he is not liable for negligence, even if that judgment be erroneous.[17] In *Wade v. Ravenswood Hosp. Ass'n.*,[18] the patient suffered from a cervical fracture and cord injury. One of the procedures generally used in diagnosing such injuries is the taking of X-rays or spinal punctures and after discovery of the injury placing the patient in traction. The defendant failed to perform any of these procedures for fear of moving the patient. The court said that the physician was not negligent for selecting one of the different methods of treatment, even though it later developed that his choice was not the best. As long as the patient was the recipient of the physician's best judgment, and one of the recognized methods of treatment was utilized, the physician cannot be negligent.

Likewise, in *Stapler v. Brownstein*,[19] an iodine solution was applied to the plaintiff's leg prior to surgery. This caused the plaintiff's leg to erupt into blisters at the places where the solution had made contact with the skin. However, at the subsequent action for malpractice, it was proven by the defendant that his method of treatment was a standardized technique, approved by more than a majority of surgeons, and could not therefore constitute negligence.

There are two types of professional misconduct, the defendant's *lack of skill* and the *propriety of the treatment*.[20] Although, the two types of misconduct are not the same, they have been used interchangeably without due regard to their differences. *Lack of skill* involves the defendant's general ability, competence or professionalism. If *lack of skill* be the primary issue of the suit, the physician's reputation as a "bad" or "unskillful" practitioner is probative. If possible, the plaintiff can show that the defendant has at

15 85 Ill. 194 (1877).
16 63 Ill. App. 2d 481, 488, 211 N.E.2d 762, 765 (1st Dist. 1965).
17 *Ibid.*
18 3 Ill. App. 2d 102, 120 N.E.2d 345 (1st Dist. 1914).
19 261 Ill. App. 57 (1st Dist. 1931).
20 I.P.I. § 105.01 (1961) states the physician must possess a certain "skill and knowledge" and second must "use that skill and knowledge"—thus the possibility of two types of misconduct.

various times lost his license, is without a license now, has been censured by his colleagues, or has been banned from one or more hospitals.[21]

However, if such general reputation as to competency is not at issue, then the plaintiff is, in effect, conceding that the defendant is an otherwise capable practitioner and is, instead, contesting or questioning the method of the treatment used on the patient. To put it another way, in the first instance, the plaintiff is actually contending that the defendant is no healer at all, but more in the image of a quack, irrespective of whether or not he holds a license. In the second instance, the plaintiff is not questioning the defendant's professional esteem, but merely alleging that at least this one time the defendant erred and he must be made to pay for that error. When the issue is the propriety of the treatment, evidence as to the defendant's reputation is not admissible, whether offered by the plaintiff or the defendant.[22] However, when lack of skill is the issue, lack of a license, at least at the time of misconduct, is admissible.[23]

Proximate Cause

Proximate cause is best defined by "that cause which in natural or probable sequence, produced the injury complained of. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury."[24]

The plaintiff must show the same result would not have followed if proper care had been used, or in the converse, if the defendant shows that if he treated the plaintiff properly, the same injury suffered from would have occurred, then the plaintiff has failed to prove the element of proximate cause. For example, if there was improper treatment of a tumor, but the defendant shows that the patient would have died no matter what the treatment, there is no "natural or probable sequence [that] produced the injury complained of."

If the plaintiff is going to have difficulty in proving proximate cause, it will probably be because of the intervention of another act. This interceding force may be supplied by the plaintiff himself or by a stranger to the litigation. However, the intervening cause may not be sufficient for the defendant to raise the defense of lack of proximate cause. Thus, in *Murdock v. Walker*,[25] the father of the deceased infant brought a wrongful death action against the defendant-physician. The cause of death was a lethal dosage

21 See dicta, Holtzman v. Hoy, 118 Ill. 534, 8 N.E. 832 (1886).

22 Holtzman v. Hoy, 118 Ill. 534, 8 N.E. 832 (1886).

23 Hubbard v. Martin, 184 Ill. App. 534 (1st Dist. 1914).

24 I.P.I. § 15.01 (1961). The last two sentences of the definition are only required in the jury instruction when there is evidence of a concurrency or contributing cause to the injury or death.

25 43 Ill. App. 590 (1st Dist. 1892).

of the wrong medication. The physician, however, argued that the blame should be placed on the druggist filling the prescription. The physician had recommended one druggist and the patient used another. The general rule is that where a patient or those in charge fail to follow instructions of the physician and injury results, the physician is not liable.[26] However, the court in finding for the plaintiff, held that in this case the druggist's intervening negligence did not relieve the defendant-physician from liability, as at most the druggist's negligence concurred with that of the defendants, which is not a defense.

Proving the all-important element of proximate cause is not simple, as evidenced by *Chase v. Nelson.*[27] In that case, the plaintiff claimed that the defendant-physician introduced a catheter into the deceased patient's urinary tract. Thereafter, the catheter broke off with a part remaining in the tract. Eventually the broken stub worked its way into the bladder, an infection ensued, and the patient died. The plaintiff charged that the defendant negligently failed to remove the part of the catheter implanted in the tract. The trial judge instructed the jury, that if "by reason of the want of the exercise of ordinary care and skill the broken part of the catheter was allowed to remain in the urethra . . . and that disease was thereby created . . ." then the jury shall find for the plaintiff. The jury found for plaintiff and, predicated on the erroneous nature of the instruction, the defendant appealed.

The Illinois Appellate Court reversed for the defendant, holding the trial court erred in charging the jury. The court said that the instruction given was erroneous because it failed to link the defendant directly with the contributing cause of the patient's death. Under the instruction given, no matter how remote the defendant's negligence, the jury was empowered to find him liable.

Damages

The last indispensable element of the tort is damages. The concern for recovery initiates the dispute and it is here where it ends. It must be first noted that no matter how flagrant a violation of misconduct the defendant-physician has committed, unless the patient suffers damages no cause of action exists.

Assuming damages do exist, what are the elements? First, the patient may recover for the physical pain suffered and reasonably certain to be suffered in the future. Taken into consideration will be the nature, extent, and duration of the injury and any disability or disfigurement suffered. The pain and physical suffering caused in the ordinary course of this physician or any other physician treating the patient is not recoverable and must be

[26] Wesley v. Allen, 235 Ill. App. 322 (4th Dist. 1925).
[27] 39 Ill. App. 53 (2d Dist. 1890).

separated from the additional pain and suffering caused by the defendant-physician's negligence.[28]

Secondly, the plaintiff will be able to recover for mental suffering; that is, he can recover for all suffering that is not physical. For example, fear of disfiguration is a proper element to be considered by the jury.[29] Also, increased nervousness, and loss of sleep could be included as damages.

Reasonable expenses of medical care incurred and reasonably certain to occur in the future is a proper element of damages. For example, if the patient is forced to incur expense in having other physicians correct the error of the defendant, or if he becomes legally obligated to pay hospital bills which result as a proximate cause of defendant's negligence, then, as in any personal injury action, the defendant is liable for them.

Also, elements of damage are the value of the plaintiff's time lost and his impaired earning capacity. Time lost refers to the wages the plaintiff would have received if he had not been injured by the defendant. Impaired earning capacity refers to the plaintiff no longer being able to handle the same work once he recovers. In claiming damages for time lost, the patient may not claim the time off which was a result of his original illness or malady, but only the added time off resulting from the defendant's negligence.

If the patient dies as a result of the defendant-physician's breach of duty owed, the action will be one for wrongful death. The basis of damages when the suit is for wrongful death is the pecuniary loss to the spouse and next of kin.[30] This is measured by the beneficiary's financial dependency upon the decedent and may not be measured by the physical or mental suffering of the decedent or any of the other elements provable in an ordinary personal injury action. Some of the considerations in determining damages in a wrongful death action are: How greatly the survivor depended upon the deceased for his maintenance? What the deceased had earned, was earning and could reasonably be expected to earn in the future? What was decedent's age, his health, his occupation and personal traits, such as thrift and sobriety?[31]

In all types of medical malpractice suits filed against him, the defendant may attempt to mitigate his liability. One method of doing this is by showing an aggravation of the injury by the patient's own conduct. Thus, in *Jenkins v. Charleston Gen. Hosp. and Training School*,[32] where the patient's arm was set incorrectly and the patient was advised to return to the hospital but failed to do so, the court held that the plaintiff could only re-

28 Wenger v. Calden, 78 Ill. 275 (1875).

29 Simon v. Kaplan, 321 Ill. App. 203, 52 N.E.2d 832 (1st Dist. 1944).

30 Ill. Rev. Stat. ch. 70, § 2 (1965).

31 See I.P.I. § 31.02 (1961).

32 90 W. Va. 230, 110 S.E. 560 (1922). See also dicta, in Wesley v. Allen, 235 Ill. App. 322 (4th Dist. 1925).

cover to the extent that his injury was attributable to defendant's lack of care, but not to the extent that he contributed to his own injury.

In order to mitigate damages, the defendant-physician may also show that other doctors operated on or treated the plaintiff and that they either caused or contributed to his death or injury.[33]

The Need for the Expert Witness[34]

It is almost impossible for a plaintiff to successfully litigate a malpractice suit without the use of expert testimony. In most cases, it will take another physician to illuminate the standard of conduct the average physician in good standing would follow in the same or similar circumstances. The reason the expert is such a necessity is that the jury could not ordinarily be expected to possess knowledge of the scientific intricacies around which the dispute will center. A juror would not ordinarily appreciate what techniques are outdated, too progressive, or merely ill-advised. If a juror was so gifted he would almost certainly be excused so as to avoid the so-called "one-man jury." Thus, unless the issues involved would ordinarily be considered within the framework of common knowledge of the jurors,[35] the expert is indispensable in proving the first element of a malpractice case, duty.

The expert may also testify as to whether the defendant-physician breached the duty owed, that is, whether the defendant fell below the standard of conduct required of him.[36] It should be noted that the expert is only of practical usefulness in this stage of the proof. Once the qualified expert has delineated what the standard of conduct should have been, the jurors can judge for themselves whether the defendant-physician was in conformity with that standard.

Third, the expert is necessary in showing the injury complained of was the proximate cause of the negligence of the defendant; that is, that the cause was a natural or probable sequence producing the injury. The plaintiff must show that the injury would not have occurred if he was treated properly. For that purpose, he can call the expert to the stand to testify as to the normal expectations of this type of treatment when done properly, thus leaving it to the jury to decide whether the method used by the defendant directly produced the injury.

Lastly, the expert is helpful in informing the jury as to the damages the plaintiff has suffered. Where the injury suffered is internal, the expert can testify as to the physical pain the plaintiff has suffered. The expert can also testify as to the extent and duration of the injury caused by defendant's negligence.

33 *Cf.* Peters v. Howard, 206 Ill. App. 610 (3d Dist. 1917).
34 For a general discussion on the need for an expert see, Annot., 81 A.L.R.2d 597.
35 Lucarelli v. Winters, 320 Ill. App. 359, 51 N.E.2d 205 (1st Dist. 1949) (abstr.).
36 Gorman v. St. Francis Hosp., 60 Ill. App. 2d 440, 208 N.E.2d 653 (1st Dist. 1965).

Who is qualified to be an expert? Generally, in order to qualify a witness to give an opinion in a malpractice case, it need only be established that one is a licensed practicing physician of the state in which trial is being held, and that he is a graduate of a regular medical college. However, it is also helpful to show that he has practiced for a number of years, that he is a diplomat of the American Board in the appropriate specialty and that he has written widely. It should be noted, however, that to give an expert opinion, one need not have had personal observation or experience, but his information can be derived solely from medical textbooks. A doctor who has retired, or who is a medical researcher, or the competent, but untried and youthful physician all could be qualified and used as an expert. Often it is only the latter group that is available to the plaintiff.[37]

Although Illinois follows the locality rule in having an expert qualify, the rule does not appear to be strictly adhered to. The locality rule prescribes that the expert witness be familiar with the medical procedures of the defendant's locale. However, in *Holcomb v. Magee,*[38] an expert from another city was premitted to testify as to the operation of an X-ray machine. In that case, the plaintiff claimed to have suffered burns from defendant's negligent operation of such machine. The court felt that merely because the expert was from another city, he was not disqualified as an expert when there is a showing that he was familiar with this type of X-ray machine.

The "Conspiracy of Silence"

The "conspiracy of silence" is a label which has been given to a situation which is best defined as the conscious or tacit refusal by physicians, surgeons, or specialists to testify against their colleagues who are defendants in a malpractice action.[39] The natural result of this refusal to testify is that a defendant with a meritorious cause of action is unable to acquire expert witnesses, without whose testimony he cannot establish his case.

Before developing this area any further, it would be wise to note that not every refusal by a physician to testify against a fellow physician is a result of the "conspiracy." Such refusal may be because the physician feels that the plaintiff's case is without merit, fears courtroom drama, or fears the stigma of being typed as a professional witness. Or the physician's refusal to testify may be merely because he has no time or values his time beyond what the plaintiff can afford.

Since Illinois does not yet appear to be plagued greatly with the so-called "conspiracy of silence," it is necessary to look at a recent New Jersey case to best demonstrate how the conspiracy operates. In *Steiginga v.*

37 See Am. Jur., Proof of Facts, Vol. 9, p. 247 for the questions to be asked in qualifying an expert.

38 217 Ill. App. 272 (2d Dist. 1920). See also, Hundley v. Martinez, — W. Va., 158 S.E.2d 159 (1967) for recent rejection of locality rule in qualifying an expert.

39 See Belli, "Ready for the Plaintiff!" 30 Temp. L.Q. 408 (1957).

Thron,[40] the plaintiff in a malpractice action sought adjournment of the trial because of the sudden refusal by an expert to testify. The reluctant expert had previously consented to testify and then, suddenly, and without apparent motive, gave notice of his refusal on the Saturday before trial. The trial court refused to delay the trial and the plaintiff appealed his denied motion. The appellate court in reversing for the plaintiff criticized the expert who "declined (on second thought) to testify against a brother practitioner." The court said, "[I]t is a shocking unethical reluctance on the part of the medical profession to accept its obligation to society and its profession in an action for malpractice."[41]

In another case from the same jurisdiction,[42] the plaintiff sued the defendant-doctor after the defendant treated the plaintiff for a compound fracture and negligently left a piece of straw in the injured region. Within three months, the plaintiff suffered from a tetanus infection. The plaintiff's only medical expert was an eighty-two year old physician who he had brought from New York for the sole purpose of testifying. The trial court refused to permit the expert and dismissed the plaintiff's malpractice case when he did not bring forward any other experts.

The appellate court, in reversing for the plaintiff, stated that the mere fact that an expert is from another state does not disable him from testifying if he is otherwise qualified by his knowledge and experience. The court recognized the problems a plaintiff has in getting experts and declared as dictum:

> [T]here is a well-known reluctance of members of the medical profession to testify against fellow practitioners . . . [which] confronts plaintiff with a serious problem of proof . . . . [and] trial judges of this state are not unfamiliar with the fact that malpractice actions often fail for lack of medical expert testimony . . . .[43]

However, the court also pointed out that the mere inability of the plaintiff to procure an expert will not serve as a reason for accepting a witness not otherwise qualified.

One of the adverse side effects of the dilemma of the "conspiracy of silence" is the growing number of professional witnesses. To combat this problem, an attorney who suspects that the witness he is confronting has testified regularly may cross-examine that expert to establish how often in the past he has been a witness for the attorney calling him to the stand.[44]

Overcoming the "Conspiracy"

Fortunately, there are alternatives available to the harrassed plaintiff in overcoming the "conspiracy of silence." Not only are there some currently existent, but more are being created constantly.

40 30 N.J. Super. 423, 105 A.2d 10 (1954).
41 *Id.* at 424, 105 A.2d at 11.
42 Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953).
43 *Id.* at 484, 94 A.2d at 684.
44 Plambeck v. Chicago Ry. Co., 294 Ill. 302, 128 N.E. 513 (1920).

Subpoena of Experts

Of those alternatives currently available, there is one that has dubious merit. The plaintiff may subpoena anyone to appear as a witness, including an expert.[45] However, one who is a stranger to the case who is served with compulsory process in the hope that he will shed favorable light on the case can be a dangerous witness. It is doubtful that such an unwilling witness would be desirous of aiding the litigant who has caused his inconvenience. In this instance, to have no witness might be better than to have a reluctant one.

Section 60 of the Illinois Civil Practice Act[46]

The "adverse party" rule, Section 60 of the Illinois Civil Practice Act, is another of the alternatives which plaintiff may invoke in combating the "conspiracy of silence," aiding him to prove his case. As has been previously established, the plaintiff, in most instances, requires the aid of a qualified expert witness in order to prove a prima facie case. As has also been previously established, it is difficult to obtain testimony of such expert. However, the defendant being a doctor is himself an expert on the issues being litigated. Section 60 provides a method by which the plaintiff can call the defendant as an expert witness. It provides:

> Upon the trial of any case any party thereto or any person for whose immediate benefit the action is prosecuted or defended, or the officers, directors, managing agents or foreman of any party to the action, may be called and examined as if under cross-examination at the instance of any adverse party. The party calling for the examination is not concluded thereby but may rebut the testimony thus given by countertestimony and may impeach the witness by proof of prior inconsistent statements.[47]

The purpose of the "adverse party" rule is to permit production of all pertinent and relevant evidence and information. The defendant, in a civil action, has no inherent right to remain silent and must, if called as a witness, respond to inquiries aimed at eliciting information, even if it will further his opponent's case and hinder his own. The utility of the rule was best summarized by one court when it stated:

[45] Ill. Rev. Stat. ch. 110 § 62 (1965). It should be noted, however, that all jurisdictions do not permit the subpoena of an independent, disinterested witness. An Indiana court remarked, "[T]o compel a person to attend [a trial] merely because he is accomplished in a particular science, art or profession, would subject the same individual to be called upon . . . in every cause. . . . Thus, the most eminent physicians might be compelled . . . to attend from the remotest part of the district, and give his opinion in every trial in which a medical question should arise." Buchman v. State, 59 Ind. 1, 6 (1877), cited with approval in Kraushear Bros. & Co. v. Thorpe, 296 N.Y. 223, 72 N.E.2d 165 (1947).

[46] Ill. Rev. Stat. ch. 110, § 60 (1965).

[47] *Ibid.* This statutory provision is available to either the plaintiff or the defendant. Experience, however, has proven to be of greater utility to the plaintiff. This is logical. He has the task of producing evidence and this represents one means by which he can achieve this end.

> Plaintiff, in a malpractice case, may call defendant and ask him both as to his factual knowledge of the case and, if he is so qualified, as an expert for the purpose of establishing generally accepted medical practice in the community.[48]

Thus, the primary use is to have the defendant establish the standard of care that an average physician in good standing would use in the same or similar circumstances. The recent Texas case, *Wilson v. Scott*,[49] best illustrates this use. In that case, the patient suffered a hearing defect caused by a bony growth on the stapes bone. The physician recommended a stapedectomy with a vein graft, a relatively new and complicated operation. After the operation, the patient lost all hearing in the treated ear. The patient contended that the defendant-doctor failed to disclose all risks of the surgery. The defendant contended he did make sufficient disclosure. The court stated that the plaintiff had "the burden to prove by expert medical evidence what a reasonable medical practitioner of the same school and same or similar community under the same or similar circumstances would have disclosed to his patient about the risks incident to a proposed diagnosis or treatment."[50] However, the court said that when the defendant-physician was called as an adverse witness and testified that it was proper to inform a patient that a total hearing loss could result, he had established the standard.

One of the secondary uses of Section 60 is to get the defendant to testify as to what procedure he followed, thus possibly establishing the breach. Closely connected to this use of the "adverse party" rule is having the defendant make admissions against interest on the stand, by which the jury could infer that a breach of the duty owed was committed. One recent Illinois case[51] that might have been brought under Section 60, arose out of injuries suffered due to an overexposure to X-rays. The factual issue was whether a ten minute exposure to 2,050 roentgens would conform to proper medical practice. An expert for the defendant stated that it would be proper medical procedure and not harmful. However, the defendant himself made a damaging admission on cross-examination. He confessed that the administration of such dosage would be taking "an undue chance." The jury found that the defendant breached the standard of care to be followed and held for the plaintiff. The appellate court affirmed, stating that although defendant's testimony was favorable to the plaintiff, it was admissible.

Although Section 60 may be used to attempt to get an admission from the defendant, it should be noted that it is highly improbable that the defendant-doctor will harm his own case by a ruinous slip of the conscience. As the court said in one New York case:[52]

[48] McDermott v. Manhattan Eye, Ear, Throat Clinic, 15 N.Y.2d 20, 255 N.Y.S.2d 65 (1964).

[49] 412 S.W.2d 299 (Tex. Sup. Ct. 1967).

[50] *Id.* at 302.

[51] Gorman v. St. Francis Hosp., 60 Ill. App. 2d 440, 208 N.E.2d 653 (1st Dist. 1965).

[52] *Supra* note 49, at 30, 255 N.Y.S.2d at 73.

> While it may be the height of optimism to expect that such a plaintiff will gain anything by being able to call and question the very doctor he is suing, the decision whether or not to do so is one which rests with the plaintiff alone.

The Pima County Plan

The need for the plaintiff having to search for his experts with the hope that he can find a doctor to testify against his colleagues could be eliminated by the greater use of the Pima County Plan. Named after Pima County, Arizona, where it originated, the Pima County Plan consists of a joint panel of an equal number of doctors and lawyers. The plaintiff, after unsuccessfully looking for an expert, comes before the panel and pleads his case. The panel after hearing the case deliberates together. The lawyers weigh the legal merits of the case, while the doctors weigh the medical merits. The panel then presents its findings. If the findings are favorable, to the plaintiff, the panel then undertakes to appoint a qualified doctor to assist the plaintiff in court. If the panel holds adversely to the plaintiff's contention, the plaintiff is honor bound to abide by the panel's consensus, unless there exists compelling overriding reasons to the contrary.

The Pima County Plan ranks as the most realistic and reasonable plan for combating the "conspiracy of silence."

Textbooks

In some progressive jurisdictions,[53] textbooks can be substituted for the use of experts as the method of proving the plaintiff's case. The impetus to add this method of proof probably arose out of the realization that the "conspiracy of silence" needed a counter-force.

The Nevada statute[54] provides that upon the giving of thirty day notice, a party may offer into evidence the contents of a textbook written by a recognized authority in the profession as an alternative for expert testimony. The striking feature of this method of proof is that the evidence provided by this textual matter is a substitute for and not merely a corroborating source for the live expert witnesses. The statute applies to issues where expert testimony would be ordinarily required.

It should be noted that textbooks may also be used in Illinois, not expressly for the purpose of proving the facts they set forth, but for the purpose of cross-examination. The older rule in Illinois[55] was that if an expert admits that he bases his opinion on certain textbooks, he may be interrogated and impeached as to those authorities. This rule has been modified and broadened by the recent case of *Darling v. Charleston Memo-*

[53] Nevada and Massachusetts. Nev. Rev. Stat. § 51.040 (1900). Mass. Ann. Law, ch. 233 § 79C (1956).

[54] Nev. Rev. Stat. § 51.040 (1900).

[55] Ullrich v. Chicago City Ry., 265 Ill. 338, 106 N.E. 828 (1914).

rial Hosp.[56] The court in that case stated that the rule that an expert can be impeached *only* as to texts he had admitted reading, is not supported by sound reason. The court while declaring that the physician may be questioned on well-known medical authorities in the field stated:

> To prevent cross-examination upon the relevant body of knowledge [i.e., other than those texts the expert had admitted to have read] serves only to protect the ignorant or unscrupulous expert witness. In our opinion expert testimony will be a more effective tool in the attainment of justice if cross-examinations are permitted as to the views of recognized authorities, expressed in treatises or periodicals written for professional colleagues.[57]

Admittedly, the plaintiff could only use the textbooks for cross-examination. However, if the defendant-physician had testified that he used one type of procedure, and then was questioned as to another type of procedure followed by an eminent textbook authority, might not the jury accept the latter procedure as the proper standard of care? Would not this be true despite the limiting jury instruction that the textbook may not be used to prove the plaintiff's case?

As welcome as the method of the use of textbooks is, it is not a panacea, standing alone. It has shortcomings. The most a plaintiff can hope to prove by using a textbook is what leading authorities, at the time of publication of their text, recommend as the medical procedures to be followed. Even outstanding textbooks may become outdated soon after publication and they are therefore subject to the threat of impeachment. Furthermore, the textbook is only useful in showing what the standard of care is in the field generally. It does not contemplate the exigencies of the moment or the particular case. Nor does it show how the defendant deviated from the standard, and either an expert witness or a lay witness must be relied upon to supply that information.

Res Ipsa Loquitur

Res ipsa loquitur is an important weapon in combating the "conspiracy of silence." However, it is much more. It can be an important tool of the plaintiff in some situations where he has difficulty in limelighting or focusing on the specific negligent act or acts complained of. If the requirements for res ipsa loquitur are present, it can be of use regardless of whether or not a "conspiracy" is shown. It is an important method of presenting proof.

The doctrine of res ipsa loquitur is based on the persuasiveness of circumstantial evidence. It allows the jury to raise an inference of negligence by proof of general circumstantial evidence. The basic ingredients of res ipsa loquitur are that: (1) the event complained of ordinarily does

[56] 33 Ill. 2d 326, 211 N.E.2d 253 (1965). Affirming 50 Ill. App. 2d 253, 200 N.E.2d 149 (1964). Cert. den., 383 U.S. 964, 86 Sup. Ct. 1204 (1965).

[57] *Id.* at 335, 211 N.E.2d at 259.

not occur in the absence of someone's negligence; (2) the injury complained of was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) that the plaintiff was free from contributory negligence.[58]

In Illinois one begins with the basic premise that res ipsa loquitur does not automatically apply in malpractice cases.[59] This is true because the law presumes that as the doctor enters the courtroom he has acted skillfully, and even the death of the patient does not raise a presumption of negligence.[60] The doctrine is inapplicable also when it is being used merely because the treatment was unsuccessful.[61]

What then is the essential usefulness of the doctrine? First, the doctrine may be invoked where the patient's injury or malady is one which ordinarily would not occur without negligence. Thus, in the California case of *Gerhardt v. Fresno*,[62] the plaintiff suffered from paralysis of the trapezius which resulted from a crushing of the spinal accessory nerve by a hemostat (clamping device) during surgery. It was testified to that the cause of injury, was extremely rare and was not an inherent risk of the operation if due care was used. The court said that the injury was "more probably than not the result of the negligence . . . ." The inference of negligence in the plaintiff's favor, which thus arose under the doctrine of res ipsa loquitur, required the defendant to explain why or how the nerve was clamped.[63]

Thus, in the first use of res ipsa loquitur doctrine, expert testimony must be relied upon to determine that the injury ordinarily does not occur in the absence of negligence. At this point, an inference is raised that the defendant was negligent and the plaintiff need not go further in establishing by expert testimony what the standard of care required is.[64]

The doctrine may also be invoked where it is within the common knowledge of both the expert and laymen alike that the results of the treatment do not ordinarily occur in the absence of negligence. The typical type of case where the res ipsa loquitur doctrine is used is when a surgical sponge is discovered in the patient's body. The courts have found this to be prima facie evidence of negligence.[65] It is within the common knowledge of everyone that sponges do not appear inside a patient, absent someone's negligence.

58 See, Prosser, Torts § 39 (3d ed. 1964).
59 Graham v. St. Luke's Hosp., 46 Ill. App. 2d 147, 196 N.E.2d 355 (1964).
60 Hoover v. Backman, 194 Ill. App. 308 (1st Dist. 1915) (abstr.).
61 Graiziger v. Henssler, 229 Ill. App. 365 (1st Dist. 1923).
62 217 Cal. App. 2d 353, 31 Cal. Rptr. 633 (1963).
63 *Id.* at 360.
64 See also, Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W.2d 255 (1963) for a medical malpractice action relying on res ipsa loquitur and using expert testimony to show that an injury to the external sphincter during suprapubic prostatectomy does not ordinarily occur in the absence of negligence.
65 Hall v. Grosvenor, 267 Ill. App. 119 (1st Dist. 1932).

Another example of the "common knowledge" use of res ipsa loquitur is found in the California case of *Bauer v. Otis.*[66] That case involved a "wrist drop" which occurred immediately following a needle injection of a vitamin complex. The court, in holding the doctrine applied, declared:

> Needle injections of cold shots, penicillin, and many other serums have become commonplace today. Hardly a man, woman or child . . . exists in this country who has not had injections of one kind or another . . . . So the giving and receiving of injections and the lack of nerve injury therefrom ordinarily has become a matter of common knowledge."[67]

The third use that has been made of res ipsa loquitur is when the defendant had greater knowledge of the facts which caused the *injury* than did the plaintiff. The use of the doctrine is exemplified best by the California case of *Ybarra v. Spangard.*[68] In the case, an appendectomy was performed on the plaintiff. During the operation, as in any usual operation, there were several members of the operating team present, including surgeons, nurses and the anesthetist. Subsequent to the operation the defendant suffered from pain in his right shoulder. This pain grew worse and developed into a paralysis and atrophy of the muscles around the shoulder. The plaintiff sued the defendant-surgeon and the rest of the operating team. He founded his case on the doctrine of res ipsa loquitur as he could not identify the exact cause of his injury. The court held that since the evidence that would explain the paralysis was within the knowledge of the defendants having control over the plaintiff's body, they may be called upon to meet the inference of negligence by giving an explanation of their conduct.

Illinois has not permitted, as of yet, this application of the doctrine of res ipsa loquitur. Illinois still requires that the plaintiff show that the defendant charged with negligence had exclusive control over the instrumentalities that could have caused the injury. In *Ybarra*, several defendants could have been the cause. However, as a practical solution to determining who caused the injury, the plaintiff should join all parties even remotely responsible for the cause of injury. So as to relieve themselves of liability, the parties themselves, without application of the doctrine of res ipsa loquitur, will come into court and explain their conduct.

The Lay Witness

Although much has been said of the indispensability of the expert witness, there are instances where the expert witness can be substituted by a lay witness. The use of the lay witness in no way detracts from the manifest need for the expert, but in a few situations a lay witness will suffice.

The role the lay witness may best play in aiding the plaintiff in proving

66 133 Cal. App. 2d 439, 284 P.2d 133 (1955).
67 *Id.* at 444, 284 P.2d at 136.
68 25 Cal. 2d 486, 154 P.2d 687 (1944).

his case was best expressed by an Illinois appellate tribunal[69] when it stated:

> While with reference to diseases in the human body, only men versed in the science of surgery or medicine are qualified to pass judgment on treatment given in a particular case, it does not need the aid of expert testimony for any intelligent person to form an opinion as to the impropriety of leaving a foreign object in a wound.

Thus, when the standard of care required of the physician is obvious to the average juror, a non-expert, lay witness can testify. The most frequent type of case which the court would hold that a lay witness can be used to testify to the standard of care required is when there is an external injury observable by anyone.[70]

When a more complicated issue on the standard of care required is involved, the standard must be established by an expert-physician. However, in case of gross negligence, the departure from such standard may be shown by the testimony of a lay witness. Once the expert has established what the standard should have been, the lay witness may tell what actually transpired, that is, what techniques the defendant did use. The jury may then ascertain whether the conduct described by the lay witness was at variance with what the expert declared ought to have been done.[71]

HOWARD M. HOFFMANN
GERALD J. SMOLLER

CONTRIBUTORY NEGLIGENCE AS A DEFENSE IN MALPRACTICE LITIGATION

The gist of an action against a physician or surgeon for malpractice is usually negligence rather than breach of contract.[1] Thus, in Illinois, the plaintiff must allege in his complaint that he was in the exercise of due care or was free from contributory negligence at the time of the injury.[2] Once the issue of contributory negligence has been raised by the pleadings, the plaintiff has the burden of proving that he was in the exercise of due care at the time.[3]

69 *Supra* note 66.

70 Richisen v. Nann, 340 P.2d 793 (Wash. 1959). See also, Annot., 81 A.L.R.2d 637 (1962).

71 See Annot., 81 A.L.R.2d 637 (1962).

1 26 I.L.P. *Medicine and Surgery* § 36 (1956); 70 C.J.S. *Physicians and Surgeons* § 57 (1951). A charge of negligence is grounded on a failure to use due care. However, arising out of the doctor-patient relationship is a contractual duty, express or implied, to use due care; thus a breach of contract.

2 *Ibid.*

3 McIlvain v. Gaele, 128 Ill. App. 209 (4th Dist. 1906).