[J-60-2021][M.O. – Wecht, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ELIZABETH H. LAGEMAN, BY AND THROUGH HER POWER OF ATTORNEY AND DAUGHTER, ADRIENNE LAGEMAN,	:	No. 21 MAP 2021
Appellees	:	Appeal from the Order of the Superior Court dated 7/20/20 at No. 756 MDA 2018, reconsideration denied on 9/22/20, vacating the judgment of the York County Court of Common Pleas, Civil Division, dated 5/10/18 at No. 2014-SU-000846-82 and remanding for a new trial
v.	:	
JOHN ZEPP, IV, D.O.; ANESTHESIA ASSOCIATES OF YORK, PA, INC.; YORK HOSPITAL; AND WELLSPAN HEALTH, T/D/B/A YORK HOSPITAL,	:	
Appellants	:	ARGUED: September 23, 2021

DISSENTING OPINION

JUSTICE SAYLOR **DECIDED: December 22, 2021**

This Court recently explained, in the context of a medical professional liability case, that negligence "may not be inferred merely from the occurrence of a complication when such complication is known to occur without negligence." *Mitchell v. Shikora*, 653 Pa. 103, 124 n.11, 209 A.3d 307, 319 n.11 (2019).

There are very good reasons why this principle should be maintained in the common law, in the absence of legislative intervention and adjustment.[1] As I previously have posited:

> The medical malpractice arena is a unique area of litigation in which it is necessary to balance the interests of physicians and injured patients. On the one hand, physicians, by virtue of their occupation, are required to lay hands on patients, and medical decision-making may be complex and some procedures carry high risks. In their efforts to help others, physicians' personal assets are potentially at risk. Some patients who face an inevitable decline in their health, or who suffer setbacks after making informed choices, may nevertheless look for a source of blame. The phenomena of frivolous lawsuits and professional witnesses increase the cost and potential exposure for physicians and insurers. *See, e.g., Cooper v. Schoffstall,* 588 Pa. 505, 522–25, 905 A.2d 482, 493–95 (2006). Although medical malpractice litigation may be steeped in science, physicians are exposed to a "more-likely-than-not" determination by five-sixth of twelve lay jurors who need not necessarily even agree on the ultimate question of liability. *See Fritz v. Wright,* 589 Pa. 219, 223, 907 A.2d 1083, 1085 (2006) (adopting the "any majority" rule governing jury verdicts).
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> On the other hand, injured patients also have substantial, constitutionally protected, interests. Medical negligence does occur, and where the requirements of tort law are met, injured patients are entitled to just compensation. *See* PA. CONST. art. I § 11 (embodying the right a remedy). Injured patients may face difficulties in obtaining expert witnesses, particularly in specialty areas, on account of a reluctance on the part of other practitioners to judge a peer negatively. In cases in which evidence of negligence is not readily available or where the amount of potential recovery is not substantial, injured patients may have difficulty obtaining representation

[1] The Court has frequently recognized the superior tools and resources available to the Legislature in making difficult social policy decisions involving sharply-competing interests. *See, e.g.*, *Seebold v. Prison Health Servs., Inc.*, 618 Pa. 632, 653, 57 A.3d 1232, 1245 (2012).

> and advancing a lawsuit. Litigation phenomena such as that of the professional witness work in both directions. *See Cooper,* 588 Pa. at 522–25, 905 A.2d at 493–95. More generally, plaintiffs face many of the same unavoidable uncertainties inherent in the justice system as do defendants.
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> In light of such important, conflicting interests, and the impact of malpractice litigation on access to and quality of medical care, it is very clear that the necessary regulation of the medical malpractice litigation arena requires difficult social policy judgments appropriate to the legislative branch.

Freed v. Geisinger Med. Ctr., 607 Pa. 225, 249–51, 5 A.3d 212, 227–28 (2010) (Saylor, J., dissenting).

The majority, however, proceeds to employ its common-law power to adopt an expansive mandate for instructions authorizing jurors to infer negligence without specific proof, while sometimes referring to the inference as an alternate "theory of liability." Majority Opinion, *slip op.* at 35.[2] The majority, however, doesn't ground its approach in any empirical information, for example, assessing the effects of such instructions on jury verdicts. Indeed, the concerns of the medical community that judicial authorization of the inference will foster confusion among jurors, unduly increase the cost of medical services, and serve to undermine the quality of health care in the Commonwealth, *see, e.g.*, Brief for Appellants at 31-32; Brief for *Amici* Am. Med. Ass'n & Pa. Med. Soc'y at 16-18, do not seem to me to have been assessed in any meaningful fashion. Rather, the majority relies

[2] I realize that the majority hasn't required the instruction to be given in *all* medical malpractice cases in which it is requested. But the threshold seems to be quite low, since all the plaintiff needs to do is to adduce expert testimony that an injury ordinarily does not occur in the absence of negligence (which addresses and excludes other causes), notwithstanding that such testimony may be sharply disputed. *See* Majority Opinion, *slip op.* at 37. I find resonance in the concern of Appellants and their *amici* that this sort of opinion testimony can be presented in a broad range of professional liability cases. *See, e.g.*, Brief for Appellants at 27; Brief for *Amici* Am. Med. Ass'n & Pa. Med. Soc'y at 17.

largely on the abstract assertion that it would constitute "punishment" to require plaintiffs to be put to their proofs, where they have presented an expert to render an opinion simply about what is ordinary. *See, e.g.*, Majority Opinion, *slip op.* at 36.[3]

But, as this Court has previously explained, the doctrine of *res ipsa locuitur* should maintain limited application, "because it is in derogation of the general principle underlying the law of negligence, to wit: that the negligence charged must be established by the evidence." *Norris v. Phila. Elec. Co.*, 334 Pa. 161, 163, 5 A.2d 114, 115 (1939).[4] Consistent with the approach of several other jurisdictions and the plurality opinion in

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[3] In this portrayal of punitiveness, I believe the majority overstates the ostensible unfairness involved. For example, according to the majority: "[*R*]*es ipsa loquitur* boils down to this: Under certain circumstances a plaintiff may turn to the jury and ask, 'What else could this be *but* malpractice?'" Majority Opinion, *slip op.* at 29 (emphasis in original). I am aware of nothing in this case, however, that would have prevented the plaintiff from turning to the jury and asking precisely that question, grounded on the expert testimony she had presented.

What actually was foreclosed was a charge from the trial court specifically sanctioning an inference of negligence extrinsic to the discrete proof of negligence that Appellee had adduced onto the record. The concern maintained in the medical community -- which the majority has done little to dispel -- is that the court's imprimatur on such an inference tips the scales too far in one direction and will have deleterious collateral consequences in the larger scheme. *See, e.g.*, Brief for *Amici* Am. Med. Ass'n & Pa. Med. Soc'y at 4 ("Giving the jury license to infer, rather than carefully consider the proofs at trial, will significantly expand a plaintiff's ability to convince a jury of the defendant's negligence and unfairly lower the bar to liability for unsuccessful medical treatment, making physicians guarantors of a good outcome.").

[4] Although *Norris* concerned the stronger form of *res ipsa* in the nature of a presumption, as opposed to the inference presently in issue, other jurisdictions have recognized that the potential strength that may be accorded by lay jurors to such an inference also is in derogation of the law of negligence. *See, e.g.*, *Curtis v. Lein*, 239 P.3d 1078, 1081 (Wash. 2010) (explaining that the doctrine -- even in the weaker form in which it "provides nothing more than a permissive inference" -- is "ordinarily sparingly applied, in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential." (citations omitted)).

Toogood v. Rogel, 573 Pa. 245, 824 A.2d 1140 (2003), I agree with the position that this limitation should be accorded special force in medical malpractice cases. *See id.* at 264, 824 A.2d at 1151 ("Public policy reasons exist for . . . limiting *res ipsa loquitur* inferences in medical cases[]."). [5]

For example, in a hypothetical scenario in which it could be established that a particular adverse result occurs after negligence in 60 percent of cases and idiopathically (*i.e.*, without any known cause) in 40 percent of cases, a plaintiff's expert may readily testify that the result does not "ordinarily" occur in the absence of negligence. If jurors are overtly instructed that they are authorized to disregard the absence of any evidence of actual negligent conduct in such scenarios, there is a substantial -- if not high -- risk that defendant health-care providers would be held to account in many cases where there was, in fact, no negligence. [6]

It is precisely on account of the high social utility of medical treatment and the many uncertainties involved in the underlying science – including the prevalence of inherent risks, known complications, side-effects, idiosyncratic patient responses, and idiopathic results – that a substantial number of jurisdictions continue to carefully restrain

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[5] *Accord, e.g.*, *Tappe v. Iowa Meth. Med. Ctr.,* 477 N.W.2d 396, 399 (Iowa 1991) ("Because the doctrine [of *res ipsa loquitur*] creates an inference of negligence without specific proof, it traditionally has been applied sparingly in medical malpractice cases."); *Fleege v. Cimpl*, 305 N.W.2d 409, 413 (S.D. 1981) (same); *Gushlaw v. Roll*, 735 N.Y.S.2d 667, 669–70 (App. Div. 2002) ("While the doctrine of *res ipsa loquitur* has been applied to medical malpractice cases, it has been done so sparingly in recognition of the fact that much of the medical treatment rendered to patients involves inherent risks which, even with adherence to the appropriate standard of care, cannot be eliminated.").

[6] The degree of risk, of course, depends on how likely jurors will be to rely on the permissive inference of negligence. Again, no empirical data has been presented to the Court in this respect, but all parties appear to believe that a *res ipsa* charge could have altered the outcome in the present case.

the application of the *res ipsa loquitur* doctrine in the medical professional liability arena. *See supra* note 5.

In the present case, I believe that Appellee had a full and fair opportunity to make her case of medical negligence to the jury, supported by the creditable expert testimony that she offered. I do not see that she is any way being punished by the recognition that the medical malpractice field is a particularly inapt one in which to judicially mandate jury instructions, on an expansive basis, that alleviate the obligation to prove negligence to support liability.