

**OF SURGICAL SPONGES AND FLOUR BARRELS, AND
WHY MEDICAL EXPERTS ARE NEEDED EVEN WITH A
RES IPSA LOQUITUR INSTRUCTION**

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INTRODUCTION

Lady Justice, with her blindfold and gilded scales, is likely the most common image conjured by attorneys in the midst of their opening and closing statements before juries. The image is evoked to illustrate the standard used in civil trials: the plaintiff must prove his or her

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case by a preponderance of the evidence, equating “preponderance” with a greater than 50% chance of the plaintiff’s claims being true.

The legal doctrine *res ipsa loquitur* employs a similar metric when it comes to allowing an event that does not ordinarily occur in the absence of negligence to serve as circumstantial evidence of the plaintiff’s claim. In Pennsylvania, as in many other states, the doctrine relies on an abstract probability found in the phrase “the event is of a kind which ordinarily does not occur in the absence of negligence.”¹ From there, if a *res ipsa* instruction is permitted by the judge, the jury may string together the conclusion that the harm is due to negligence because the harm would not “ordinarily” occur in the absence of negligence. Although a plaintiff must prove the elements of a negligence claim by a preponderance of the evidence, the causation linking the harm and the breach of duty may be replaced by this logical conclusion.² *Res ipsa* is thus a doctrine that permits “a generalization that negligence is the best explanation for a given category of events.”³

This article describes the current application of *res ipsa* in Pennsylvania, focusing particularly on medical malpractice cases. It explores why expert testimony is still critical to articulate specific parameters of the *res ipsa* analysis despite both the conclusions supporting causation that may be drawn under the *res ipsa* doctrine in cases that are lacking direct or circumstantial evidence and the fact that there is no *per se* rule requiring expert testimony to prove malpractice cases.⁴ Fi-

1. RESTATEMENT (SECOND) OF TORTS § 328D(1)(a) (1965); *see also* § 328D(1)(c) cmt. k, illus. 12 (outlining *prima facie* case for *res ipsa loquitur*).

2. *See* Daniel J. Pylman, Note, *Res Ipsa Loquitur in the Restatement (Third) of Torts: Liability Based upon Naked Statistics Rather than Real Evidence*, 84 CHI.-KENT L. REV. 907, 916 (2010) (explaining that *res ipsa* exists because cases may not have circumstantial or direct evidence supporting negligence allegations).

3. Aaron D. Twerski, *Negligence Per Se and Res Ipsa Loquitur: Kissing Cousins*, 44 WAKE FOREST L. REV. 997, 1003 (2009).

4. *See* *Jones v. Harrisburg Polyclinic Hosp.*, 437 A.2d 1134, 1138 (Pa. 1981) (stating expert testimony should no longer be a *per se* requirement in all cases of alleged medical malpractice except where necessary due to no “fund of common knowledge”); *see also* RESTATEMENT (SECOND) OF TORTS § 328D(a)(1) cmt. d (suggesting that expert testimony is useful for proving negligence where common knowledge may not encompass issues at bar). Pennsylvania requires a plaintiff to file a certificate of merit at the onset of a medical malpractice case. PA. R.C.P. 1042.3(a) requires that the plaintiff demonstrate either that (1) a medical professional “supplied a written statement that there exists a reasonable probability that the . . . treatment subject to the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm” or (2) that the plaintiff’s claim “that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed profes-

nally, this article questions modifications and alternatives to the current Pennsylvania interpretation of the Restatement (Second) of Torts' *res ipsa* standard.

I. SETTING THE STAGE: BUT DOES THE THING SPEAK FOR ITSELF?

Originally, *res ipsa* was a rule of evidence that allowed juries to draw conclusions from the occurrence of unusual events that a defendant allowed to take place.⁵ Though juries may typically rely on circumstantial evidence to find negligence and causation, *res ipsa* is a type of circumstantial evidence that permits a jury to connect harm with a defendant's alleged negligence without further proof of causation.⁶ Classic examples include a horse running loose in the street being circumstantial evidence of its owner's negligence in locking the paddock gate,⁷ or the problem of a surgical sponge left inside a patient, as nearly all first-year law students encounter in their torts class. The phrase itself originated in a 19th century English case in which a barrel of flour fell from the defendant's warehouse and onto the head of the plaintiff pedestrian walking beneath the window.⁸ The English Court of Exchequer articulated this theory two years later in *Scott v. London & St. Katherine Docks Co.* with Chief Justice Erie writing,

There must be reasonable evidence of negligence. But where the thing is sh[o]wn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant that the accident arose from want of care.⁹

sionals for whom this defendant is responsible deviated from an acceptable professional standard." The latter typically applies with hospitals or healthcare practices. See PA. R.C.P. 1042.3(a)(1)-(2). Finally, a third option allows a plaintiff to certify that "expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim." PA. R.C.P. 1042.3(a)(3).

5. RESTATEMENT (SECOND) OF TORTS § 328D cmt. a.

6. See Alan H. Konig, *Tort Law – Res Ipsa Loquitur in Medical Malpractice Actions*: Mireles v. Broderick, 23 N.M. L. REV. 411, 413 (1993).

7. RESTATEMENT (SECOND) OF TORTS § 328D cmt. b.

8. See *Byrne v. Boadle*, 159 Eng. Rep. 299 (Ex. 1863) (holding act demonstrated negligence itself, thus coining phrase "the thing speaks for itself" or *res ipsa loquitur*); see also *Toogood v. Owen J. Rogal, D.D.S., P.C.*, 824 A.2d 1140, 1146 (Pa. 2003) (quoting Chief Baron Pollock's phrasing of accident speaking for itself).

9. 159 Eng. Rep. 665, 667 (Ex. 1865).

Accordingly, *res ipsa* is a doctrine that serves as circumstantial evidence to prove the causation element of a negligence claim, but it may only be used in situations in which a lay jury may infer that one thing led to another, thus, giving rise to an inference of negligence.¹⁰ *Res ipsa* and circumstantial evidence, however, are not one and the same. Rather, circumstantial evidence is more specific to a particular case — skid marks, ownership of a gun, or a pasture gate left open and a loose cow, for example. *Res ipsa* relies more on abstract notions of what ordinarily happens in a situation similar to the case being tried.¹¹ This is signified by the word “ordinarily” as used in the Restatement (Second) of Torts’ formulation of the doctrine, which is used in Pennsylvania.¹²

Although intended as an evidentiary shortcut, *res ipsa* has created confusion by allowing juries to make logical conclusions of causation without direct evidence.¹³ The confusion stemmed from the intermingling of the sufficiency of circumstantial evidence with a defendant’s burden of showing that he or she had not been negligent.¹⁴ Additional perplexity arose from the need to define a defendant’s scope of duty and control of a situation to allow for an inference of negligence.¹⁵ Dean William Prosser, the famous legal co-author of *Prosser and Keeton on Torts* and the Reporter for the Second Restatement of Torts, even suggested that the Latin name obfuscated clear thought on the subject.¹⁶ Specifically, in Pennsylvania, the courts applied *res ipsa* to cases where the defendant owed a person the highest level of care, such as with common carriers, elevator operators, and public

10. See König, *supra* note 6.

11. See Richard W. Wright, *Liability for Possible Wrongs: Causation, Statistical Probability, and the Burden of Proof*, 41 LOY. L.A. L. REV. 1295, 1337 (2008) (differentiating between circumstantial evidence as a concrete tool and *res ipsa loquitur* as relying on abstract concepts or assumptions).

12. *Id.*

13. See, e.g., *Gilbert v. Corvette’s Inc.*, 327 A.2d 94 (Pa. 1974) (describing confusion stemming from proper application of *res ipsa loquitur* and prior understanding of burden of proof); see also König, *supra* note 6 (citing conflict and confusion, especially when applying *res ipsa loquitur* to medical malpractice cases).

14. *Gilbert*, 327 A.2d at 97 (chronicling issues arising from *res ipsa loquitur* as originally cited by Dean Prosser).

15. *Id.*

16. *Id.* (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 39, at 213 n.72 (1971)); see also RESTATEMENT (SECOND) OF TORTS § 328D cmt. a, b (1965) (discussing confusion arising from common carrier negligence cases).

utility companies.¹⁷ In such cases, although *res ipsa* may have been appropriate for assuming causation, its application should not have been tied to the level of duty, but rather the set of facts.¹⁸ This led the Pennsylvania Supreme Court in *Gilbert v. Korvette's Inc.* to set the record straight, clarifying that the doctrine "is neither a rule of procedure nor one of substantive tort law. It is only a shorthand expression for circumstantial proof of negligence—a rule of evidence."¹⁹

Gilbert also officially adopted the Restatement (Second) of Torts' formulation of *res ipsa*, finding this articulation of the evidentiary rule to be a "far more realistic, logical, and orderly approach to circumstantial proof of negligence than the multiple doctrines formerly employed in Pennsylvania."²⁰ Section 328D of the Restatement (Second) of Torts states:

- (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
 - (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
 - (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
 - (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.
- (2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.

17. *Gilbert*, 327 A.2d at 97; see also *Ambrose v. Western Md. Ry. Co.*, 81 A.2d 895 (Pa. 1951); *McKnight v. S.S. Kresge Co.*, 132 A. 575 (Pa. 1926); *Alexander v. Nanticoke Light Co.*, 58 A. 1068 (Pa. 1904).

18. See *Gilbert*, 327 A.2d at 97-99 (explaining improper application of *res ipsa* in older cases in which courts conflated duty owed with allowing circumstantial evidence to prove negligence and causation).

19. *Id.* at 99. In writing for the majority, Justice Roberts devoted several sections of the opinion to explain the history of *res ipsa loquitur* as well as its close cousins, exclusive control, highest degree of care, presumption, inference, and others, to delineate *res ipsa* specifically as just one set of tools a jury may employ. *Id.* at 96-100. *Contra Pylman*, *supra* note 2, at 912-13 (differentiating between circumstantial evidence and *res ipsa loquitur*, stating *res ipsa* allows a finding of negligence *absent any* evidence and therefore is not synonymous with circumstantial evidence).

20. *Gilbert*, 327 A.2d at 100.

- (3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.²¹

With this framework in place, a plaintiff may only avail his or her self of *res ipsa* upon making out the three prongs listed in section 328D(1) if the court determines that such an inference of negligence is permissible.²² And while textbooks and hornbooks have described many straightforward instances of findings of negligence where no direct evidence of negligence exists, the application of *res ipsa* becomes more difficult with complex issues that often require a special type of knowledge, such as medical malpractice. In such cases, the plaintiff still attempts to show that the harm incurred does not ordinarily occur absent negligence; however, what negligence is and how a duty of care is defined demands the guidance of an expert to explain what a breach of duty is.

II. MEDICAL MALPRACTICE CASES AND A PLAINTIFF'S BURDEN: WHY RES IPSA LOQUITUR STILL DEMANDS EXPERT TESTIMONY

For decades, *res ipsa* could not apply to medical malpractice cases in Pennsylvania due to the complexity involved in medicine.²³ The hesitancy to apply *res ipsa* in such cases was widespread, culminating in a 1993 Second Circuit decision that held that the instruction should be permitted to "'bridge the gap' between the jury's common knowledge and the uncommon knowledge of experts."²⁴ Although *res ipsa* should be applied in limited cases, the assumptions involved in a medical malpractice case and the type of knowledge necessary for determining the standard of care and causation further hinder the doctrine's application to these matters.²⁵

21. RESTATEMENT (SECOND) OF TORTS § 328D.

22. *Id.*

23. *Toogood v. Owen J. Rogal, D.D.S., P.C.*, 824 A.2d 1140, 1146–47 (Pa. 2003) (citing *Salgo v. Stanford Univ. Bd. of Trs.*, 317 P.2d 170 (Cal. Dist. Ct. App. 1957)); *see generally* Karyn K. Ablin, Note, *Res Ipsa Loquitur and Expert Opinion Evidence in Medical Malpractice Cases: Strange Bedfellows*, 82 VA. L. REV. 325 (1996) (arguing that *res ipsa* is inappropriate for complex medical cases).

24. *Connors v. Univ. Assocs. in Obstetrics & Gynecology*, 4 F.3d 123, 128 (2d Cir. 1993).

25. *See id.* (explaining that *res ipsa* must be carefully limited due to complexity involved in understanding doctors' procedures and responsibilities); *see also* *Woods v. Brumlop*, 377 P.2d 520, 523 (N.M. 1962) ("[T]he cause and effect of a physical condition lies in a field of knowledge in which only a medical expert can give a competent opinion.").

The Pennsylvania Supreme Court accepted *res ipsa* in medical malpractice cases in 1981 in *Jones v. Harrisburg Polyclinic Hospital*.²⁶ In *Jones*, the court held that, “[s]ection 328D is fashioned to reach all instances where negligence may properly be inferred and its applicability is not necessarily precluded because the negligence relates to a medical procedure. . . . [C]ertain factual situations demand such an inference.”²⁷ The court was further “satisfied that expert testimony should no longer be a *per se* requirement in proof of negligence in all cases of alleged medical malpractice.”²⁸ Accordingly, since 1981, Pennsylvania courts have permitted circumstantial proof “in medical malpractice cases where the nature of the evidence provides the requisite reliability of the inference sought to be drawn.”²⁹

To make out a *prima facie* claim for medical malpractice, a plaintiff must prove that “1) the medical practitioner owed a duty to the plaintiff; 2) the practitioner breached that duty; 3) the breach was the proximate cause of, or a substantial factor in, bringing about the harm the plaintiff suffered; and 4) the damages suffered were the direct result of the harm.”³⁰ Additionally, a “plaintiff must offer an expert witness who will testify ‘to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered.’”³¹ This is separate from the causation prong. To establish the causation element, “the plaintiff must introduce sufficient

26. *Jones v. Harrisburg Polyclinic Hosp.*, 437 A.2d 1134, 1138 (Pa. 1981); *see also Toogood*, 824 A.2d at 1148–49 (outlining *Jones*’s acceptance of *res ipsa loquitur* in medical malpractice cases).

27. *Jones*, 437 A.2d at 1138.

28. *Id.* Justice Nix further opined,

[e]xpert medical testimony only becomes necessary when there is no fund of common knowledge from which laymen can reasonably draw the inference or conclusion of negligence. Even where there is no fund of common knowledge, the inference of negligence should be permitted where it can be established from expert medical testimony that such an event would not ordinarily occur absent negligence.

Id.

29. *Id.*

30. *Carrozza v. Greenbaum*, 866 A.2d 369, 379 (Pa. Super. Ct. 2004) (citing *Montgomery v. S. Phila. Med. Grp.*, 656 A.2d 1385, 1390 (Pa. Super. Ct. 1995); *see also Toogood*, 842 A.2d at 1145 (stating that expert testimony is required to establish each element of a *prima facie* medical malpractice case).

31. *Eaddy v. Hamathy*, 694 A.2d 639, 642 (Pa. Super. Ct. 1997) (quoting *Mitzelfelt v. Kamrin*, 584 A.2d 888, 892 (Pa. 1990)); *Montgomery*, 656 A.2d at 1390; *see also Vazquez v. CHS Prof’l Practice, P.C.*, 39 A.3d 395, 399 (Pa. Super. Ct. 2012) (finding *res ipsa loquitur* inapplicable because the standard of care required when removing catheter is “beyond the ken of the average layperson” and thus requires expert testimony).

evidence that the defendant's conduct increased the risk of the plaintiff's harm."³² If the plaintiff fails to present expert testimony, stated to a reasonable degree of medical certainty, that the defendant breached the standard of care *and* that the deviation caused the plaintiff's injuries, then the trial court should enter judgment in favor of the physician-defendant.³³

It therefore follows that a plaintiff will always need to present at least a standard of care expert to testify at trial to set the parameters of what a certain physician would be expected to do in a situation similar to the issue at trial.³⁴ Indeed, such testimony is required by the Medical Care Availability and Reduction of Error Act ("MCARE"), instituted in 2002, which requires expert testimony in medical malpractice cases involving allegations of failure to obtain informed consent.³⁵ Even if a factual scenario warranted *res ipsa* treatment, a medical malpractice case necessitates expert testimony to explain the applicable standard of care to a layperson jury and to define the scope of that defendant's duty.³⁶ Once given the applicable standard of care parameters, a plaintiff may "rely on the jury to fill in the missing pieces of causation and negligence, inherent in [the case], with the jury's common experience."³⁷ The necessity of expert testimony despite the use of *res ipsa* to prove negligence is even contemplated by the Second Restatement, which states that the basis of a juror's conclusion may:

[B]e supplied by the evidence of the parties; and *expert testimony that such an event usually does not occur without negligence may afford a sufficient basis for the inference. Such testimony may*

32. *Hatwood v. Hosp. of the Univ. of Pa.*, 55 A.3d 1229, 1241 (Pa. Super. Ct. 2012) (quoting *Winschel v. Jain*, 925 A.2d 782, 788–89 (Pa. Super. Ct. 2007)) (internal quotation marks omitted).

33. *Hoffman v. Mogil*, 665 A.2d 478, 481 (Pa. Super. Ct. 1995); *see Smith v. Grab*, 705 A.2d 894, 899 (Pa. Super. Ct. 1997).

34. *See Ablin*, *supra* note 23, at 337 ("[P]laintiffs must, almost universally, introduce expert evidence as to the appropriate standard of care.").

35. 40 PA. CONS. STAT. § 1303.504(c) (2002).

36. *See Toogood v. Owen J. Rogal, D.D.S., P.C.*, 824 A.2d 1140, 1149 (Pa. 2003) (stating courts require detailed expert testimony for a layperson jury). Although a physician owes a duty to his patient, "[t]here is no requirement that he be infallible, and making a mistake is not negligence as a matter of law. In order to hold a physician liable, the burden is upon the plaintiff to show that the physician failed to employ the requisite degree of care and skill." *Id.* at 1150 (citing *Brannan v. Lankenau Hosp.*, 417 A.2d 196 (Pa. 1980)); *Bierstein v. Whitman*, 62 A.2d 843 (Pa. 1949); *see also Ablin*, *supra* note 23 (advocating strict *res ipsa* use in medical malpractice cases and comparing doctrine use in a variety of professional malpractice suits).

37. *Toogood*, 824 A.2d at 1149.

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be essential to the plaintiff's case where, as for example in some actions for medical malpractice, there is no fund of common knowledge which may permit laymen reasonably to draw the conclusion. On the other hand there are other kinds of medical malpractice, as where a sponge is left in the plaintiff's abdomen after an operation, where no expert is needed to tell the jury that such events do not usually occur in the absence of negligence.³⁸

For example, in *Leone v. Thomas*, the Pennsylvania Superior Court held that the trial court improperly denied a res ipsa jury instruction when requested by the plaintiff.³⁹ *Leone* involved a woman who suffered an injury during a surgery, and she and her husband produced an expert who, although not using the precise terminology from section 328D, testified that Mrs. Leone's injury "was not a usual complication from the surgical procedure performed and that the care given by [the defendant] to his patient fell below the standard expected of a reasonable surgeon in that community."⁴⁰ A jury instruction regarding res ipsa was accordingly appropriate because the expert testimony established the standard of care and allowed for a lay jury to connect the dots between the substandard performance and the actual injury sustained.⁴¹ Thus, the court ruled that "when expert testimony indicates that a certain procedure performed by a surgeon is evidence of substandard care, that statement is the equivalent of a statement indicating that an event would not occur in the absence of negligence."⁴²

Leone clarifies a plaintiff's burden of proof. To meet this burden under section 328D, a plaintiff is "not required to exclude all other possible explanations for the injury."⁴³ Rather, "[t]he plaintiff's burden of proof . . . 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."⁴⁴ In *Leone*, the expert's testimony was

38. RESTATEMENT (SECOND) OF TORTS § 328D(a)(1) cmt. d (1965) (emphasis added).

39. 630 A.2d 900, 903 (Pa. Super. Ct. 1993).

40. *Id.* at 901–02.

41. *Id.* at 902.

42. *Id.* (citing *Clemons v. Tranovich*, 589 A.2d 260 (Pa. Super. Ct. 1991)).

43. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 328D(a)(1) cmt. e).

44. RESTATEMENT (SECOND) OF TORTS § 328D(a)(1) cmt. e. This comment continues to say:

Where the probabilities are at best evenly divided between negligence and its absence, it becomes the duty of the court to direct the jury that there is no sufficient proof. The plaintiff need not, however, conclusively exclude all other possible explanations,

“sufficient to establish the elements of section 328D such that a *res ipsa loquitur* instruction [was] warranted even when a quantity of contrary evidence [had] been produced by the defendant.”⁴⁵ With that evidence in place, a jury could reasonably infer that the defendant’s negligence was the more probable explanation of why Mrs. Leone suffered an injury.⁴⁶ Additionally, although the presiding judge may not find the defendant liable for the injury, so long as there is sufficient evidence that it was the probable cause, a *res ipsa* instruction is appropriate.⁴⁷ The judge decides whether the instruction is appropriate, and the jury has the duty to draw or not draw the inference.⁴⁸ Accordingly, once a plaintiff meets all three elements outlined in section 328D(1), a court may provide the jury with a *res ipsa* instruction, and then the jury must decide whether to make the inference of negligence and causation.⁴⁹

In the seminal case *Toogood v. Owen J. Rogal, D.D.S., P.C.*, the Pennsylvania Supreme Court used section 328D to prescribe three conditions that must be met in order for *res ipsa* to apply.⁵⁰ These three requirements are:

- (a) either a lay person is able to determine as a matter of common knowledge, or an expert testifies, that the result which has occurred does not ordinarily occur in the absence of negligence; (b) the agent or instrumentality causing the harm was within the exclusive control of the defendant; and (c) the

and so prove his case beyond a reasonable doubt. Such proof is not required in civil actions, in contrast to criminal cases. It is enough that the facts proved reasonably permit the conclusion that negligence is the more probable explanation. This conclusion 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.

Id.

45. *Leone*, 630 A.2d at 902.

46. *Id.*

47. *Id.*

48. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 328D(a)(1) cmt. e).

49. See *MacNutt v. Temple Univ. Hosp. Inc.*, 932 A.2d 980, 987 (Pa. Super. Ct. 2007) (using *Leone* to explain plaintiff’s burden in establishing medical negligence to warrant request of *res ipsa* instruction); see also RESTATEMENT (SECOND) OF TORTS § 328D(2) (stating it is the court’s function to determine whether inference may reasonably be drawn by the jury, or whether inference must necessarily be drawn).

50. 824 A.2d 1140, 1149–50 (Pa. 2003).

evidence offered is sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event.⁵¹

While describing when *res ipsa* may be used, the court also admonished that the doctrine should be used with care in medical cases and cited public policy concerns supporting its reluctance to spread *res ipsa* beyond its three-pronged criteria.⁵² The court explained that:

[D]octors hold an important place in our society due to the role that they play in the health and even survival of the peoples of [the United States]. For that reason, society should not allow a doctor's actions to be second-guessed at trial without a clear understanding of the standards required.⁵³

Moreover, the court cautioned that the doctrine must be "carefully limited" and that determining "negligence demands a complete understanding of the procedure the doctor is performing and the responsibilities upon him at the moment of injury."⁵⁴

The Pennsylvania Superior Court most recently addressed *res ipsa* in the case *Fessenden v. Robert Packer Hospital*.⁵⁵ In *Fessenden*, a patient underwent an esophagogastrectomy in 2004, during which a laparotomy sponge was left inside his abdomen.⁵⁶ Mr. Fessenden began experiencing intermittent abdominal pain shortly after the procedure; however, it took four more years before the pain warranted a CT scan to determine the cause.⁵⁷ In 2008, physicians discovered the laparotomy sponge in the right upper quadrant of Mr. Fessenden's abdomen, necessitating an exploratory laparotomy for its removal.⁵⁸ The surgeons also drained an adjacent abdominal abscess and removed Mr. Fessenden's gallbladder and a portion of his small bowel.⁵⁹ Mr.

51. *Id.*

52. *Id.* at 1149-51.

53. *Id.* at 1151; see also Justin J. Landfair, *In Proving a Physician's Negligence, Reliance on the Doctrine of Res Ipsa Loquitur Must Be Accompanied by Expert Testimony Regarding a Physician's Applicable Standard of Care and the Breach of that Standard: Toogood v. Rogal*, 42 DUQ. L. REV. 395 (2004) (outlining *Toogood* case and highlighting necessity of protecting inexact science of medicine).

54. *Toogood*, 824 A.2d at 1149.

55. 97 A.3d 1225 (Pa. Super. Ct. 2014).

56. *Id.* at 1227.

57. *Id.*

58. *Id.*

59. *Id.*

Fessenden later sued for the surgeons' failure to remove the sponge during his 2004 surgery and averred that expert testimony would be unnecessary for the prosecution of their claim in his certificate of merit.⁶⁰ Defendants filed a motion for summary judgment, arguing that *res ipsa* did not apply to this case and thus expert testimony would be necessary to formulate both the standard of care and causation.⁶¹ The trial court granted the motion and in its order stated that its decision was premised on plaintiffs' failure to provide any evidence that the damages sought were a result of the laparotomy sponge.⁶² The plaintiffs appealed.⁶³

On appeal, the court recited the general need for medical malpractice cases to be proven by expert testimony for duty, breach, and causation, except for the narrow set of circumstances that arise when the issues may be presented in a way that a lay juror "could recognize negligence just as well as any expert."⁶⁴ The court further noted the evolution of *res ipsa* in Pennsylvania, explaining that, since *Jones*, expert testimony was no longer a *per se* requirement to establish medical negligence but rather is only necessary "when there is no 'fund of common knowledge' from which nonprofessionals reasonably could infer negligence in a given case."⁶⁵ Both parties acknowledged that a sponge was left inside Mr. Fessenden's abdomen during the esophagogastrectomy and that removing the sponge prior to closing his cavity fell within the surgeon's scope of his duty owed to Mr. Fessenden.⁶⁶ Rather, the crux of the appellant's arguments fell on causation and whether the plaintiffs could prove that there were no other causes of Mr. Fessenden's alleged injuries.⁶⁷

Indeed, Mr. Fessenden underwent subsequent, invasive procedures and appellees noted his "numerous other health issues."⁶⁸ The court, however, reasoned that these other potential causes did not

60. *Id.* at 1228; *see also* PA. R.C.P. 1042.3 (setting forth necessity of certificate of merit to establish a reasonable probability that medical malpractice case is based on meritorious claim).

61. *See Fessenden*, 97 A.3d at 1228.

62. *Id.*

63. *Id.*

64. *Id.* at 1229–30 (citing *Jones v. Harrisburg Polyclinic Hosp.*, 437 A.2d 1134, 1137 (Pa. 1981)).

65. *Id.* at 1230 (quoting *Jones*, 437 A.2d at 1138).

66. *Id.* at 1231.

67. *Id.* at 1231, 1231 n.6.

68. *Id.* at 1231 (internal quotation marks omitted).

prevent plaintiffs from availing themselves of *res ipsa* to prove medical negligence.⁶⁹ The court stated, “section 328D does not require that a plaintiff present direct evidence that the defendant’s conduct was the proximate cause of the plaintiff’s injury. Instead, *res ipsa loquitur* allows a plaintiff to eliminate other responsible causes”⁷⁰ Comment f to Section 328D specifically addressed appellees’ contention that other potential causes had not been eliminated. It states, “the plaintiff is not required to exclude all other possible conclusions beyond a reasonable doubt, and it is enough that he makes out a case from which the jury may reasonably conclude that the negligence was, more probably than not, that of the defendant.”⁷¹ The record clearly established that a sponge was left inside Mr. Fessenden in 2004 and that he experienced abdominal pain shortly thereafter, leading up to his second surgery in 2008.⁷² The court thus found that appellees’ argument that appellants were required to demonstrate that the retained sponge was the one and only cause of Mr. Fessenden’s injuries was meritless.⁷³ Finally, the court disposed of appellees’ argument that the Fessendens’ case was not the type of action that the courts envisioned would be submitted to a jury without an expert because, although there are not many similar cases, the Pennsylvania courts “long have cited the proverbial ‘sponge left behind’ case as a prototypical application of *res ipsa loquitur*.”⁷⁴

The current body of Pennsylvania medical malpractice law demonstrates *res ipsa*’s evolution into a clearer concept of an evidentiary mechanism representing the logical connection one could make when presented with a specific set of facts. However, allowing *res ipsa* to step in when a plaintiff does not have evidence supporting his or her theory, or when such evidence does not exist, appears to lower the evidentiary standard traditionally applied to civil cases.⁷⁵ Such a claim is only one criticism of *res ipsa loquitur*.

69. *Id.*

70. *Id.* at 1232.

71. RESTATEMENT (SECOND) OF TORTS § 328D(b)(1) cmt. f (1965).

72. *Fessenden*, 97 A.3d at 1232.

73. *Id.*

74. *Id.* at 1233.

75. See Pylman, *supra* note 2, at 916–17 (arguing courts should apply looser evidentiary standard and permit abstract probabilities to support causation and negligence issues in *res ipsa* scenarios).

III. DELVING DEEPER: THE RESTATEMENT (THIRD) OF TORTS AND ANALYZING RES IPSA LOQUITUR INSTRUCTIONS

While the current case law explains Pennsylvania's interpretation and application of res ipsa, the Pennsylvania Supreme Court's position is not without criticism, and the doctrine will continually be perfected as cases come before it. Section 328D was published in 1965.⁷⁶ The American Law Institute ("ALI") published the final version of its new formulation of res ipsa in 2005,⁷⁷ which Pennsylvania has not adopted—nor should it. The Third Restatement combines the requirement of an event that does not ordinarily occur absent negligence with the second prong's requirement for exclusive control, arguably lessening the plaintiff's burden further and equating it to only one probability analysis.⁷⁸ A jury

may infer that the defendant has been negligent [and that the negligence caused the accident] when the accident causing the plaintiff's physical harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member.⁷⁹

A defendant must therefore produce alternative theories demonstrating why the defendant is not liable in order to defeat the plaintiff's claim, as other theories would likely undermine the availability of a res ipsa instruction for the fact finder.⁸⁰ If the defendant cannot demonstrate alternative theories, and the plaintiff cannot produce direct or circumstantial evidence illustrating a causal nexus between the harm sustained and the defendant's claims, then the fact finder may be allowed to infer that negligence must be the source of harm.

This broad application of res ipsa makes the theory more difficult to digest because there is no longer a limiting subsection (b), as in the Second Restatement, to make the plaintiff's allegations of negligence more probable.⁸¹ Whereas the Second Restatement requires at least some showing of factual evidence to demonstrate control and the

76. RESTATEMENT (SECOND) OF TORTS § 328D (1965).

77. RESTATEMENT (THIRD) OF TORTS § 17 (2005).

78. See Wright, *supra* note 11, at 1339-40 (describing the Third Restatement's articulation of res ipsa loquitur).

79. RESTATEMENT (THIRD) OF TORTS § 17.

80. See Twerski, *supra* note 3, at 1004 (citing RESTATEMENT (THIRD) OF TORTS § 17 cmt. d) (explaining consequence of defendant producing alternative-cause theories).

81. See generally Pylman, *supra* note 2 (criticizing RESTATEMENT (THIRD) OF TORTS § 17 for oversimplifying the res ipsa standard).

possibility that harm resulted at the hand of a defendant, the Third Restatement “if applied literally, can be completely satisfied by way of non-specific, ex ante, abstract probabilities.”⁸² While *res ipsa* was intended to aid injured plaintiffs when concrete evidence was lacking, the Third Restatement creates an overreliance on what “ordinarily” would not occur absent negligence and what statistically happens when a certain surgery is performed or a product is assembled a certain way, without requiring as much evidence to back up the plaintiff’s theory.

The comments in the Third Restatement rely on the preponderance standard and equate it to more than 50%, as is heard in courtrooms across the country during closing statements.⁸³ While that illustration helps plaintiffs and defendants show the small amount that the evidence must fall one way or the other, the Third Restatement’s reliance on only one generalization about what occurred creates a lesser burden for the plaintiff than the Second Restatement, as there is only one element to fulfill as opposed to two.⁸⁴ While the Second Restatement allows for ambiguity, the proposed Third Restatement allows for even more.

A. What Does “Ordinarily” Mean?

While a preponderance has been interpreted to mean more than 50%, the word “ordinarily” as found in the first prong of the Second Restatement test for *res ipsa* applicability also may carry the same connotation.⁸⁵ One could argue that since a plaintiff is afforded the lower standard of allowing *res ipsa* to stand in for evidence of negligence, “ordinarily” should stand for something greater: an event that *rarely* happens or an event that *never* happens outside of negligence.

82. *Id.* at 934.

83. *Id.* at 935–36 (denouncing drafters’ misunderstanding of nature of proof demonstrated in RESTATEMENT (THIRD) OF TORTS § 17).

84. *See id.* (criticizing commenters’ misinterpretation of “preponderance” and flawed understanding of how probabilities are calculated when using *res ipsa* instruction). The RESTATEMENT (THIRD) OF TORTS § 17 sets forth the following: “The factfinder may infer that the defendant has been negligent when the accident causing the plaintiff’s physical harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member.” RESTATEMENT (THIRD) OF TORTS § 17. The Third Restatement thus collapses the three-pronged approach illustrated by the Second Restatement. *See Pylman, supra* note 2, at 933 (illustrating RESTATEMENT (THIRD) OF TORTS § 17).

85. *See Wright, supra* note 11, at 1337 (equating abstract statistic data on what usually has happened 50+ percent of the time); *see also Ablin, supra* note 23, at 338 (commenting that probabilistic language implies a mathematical certainty that does not exist).

In thinking about classic cases, a sponge is *only* left inside a human following surgery when negligence occurs, and a barrel of flour *only* falls out of a window if it is negligently handled.⁸⁶ When a court employs the Second Restatement with its reliance on “ordinarily” in a *res ipsa* case, the defendant would be found “negligent in the absence of any evidence that the defendant (or anyone else) was negligent on the particular occasion, merely because in most situations like this there is negligence (by someone).”⁸⁷

In medical malpractice cases, “ordinarily” implies “only that when the physician has exercised due care, the occurrence of the injury will be rare. . . . [It] does not mean, however, that once an injury has actually occurred, the injury was more likely than not caused by the physician’s negligence.”⁸⁸ Accordingly, analysis of a medical malpractice claim should focus on whether the defendant physician is liable as opposed to the probability of the injury occurring generally.⁸⁹ Rarity of a specific harm alone is not necessarily probative of a physician’s mistake or breach in the duty of care; a court would err by allowing the mere rarity of a specific harm to invoke *res ipsa*.⁹⁰ Such a possibility underscores the necessity for expert witnesses to explain not only how specific harms and complications arise, but also the applicable standard of care and whether the physician defendant adhered to such a standard. Of course, juries are nonetheless permitted to make inferences from circumstantial evidence in reaching their conclusion as to whether a party was negligent.⁹¹

In Pennsylvania, courts interpret §328D(1)(a) to require that “a plaintiff must produce some evidence that would permit the conclusion that the injury sustained does not occur absent someone’s negligence and that the injury was more probably than not caused by the

86. See Wright, *supra* note 11, at 1337 (referencing *Byrne v. Boadle*, 159 Eng. Rep. 299 (Ex. 1863)); see also *Fessenden v. Robert Packer Hosp.*, 97 A.3d 1225, 1233 (Pa. Super. Ct. 2014).

87. Wright, *supra* note 11, at 1338.

88. Ablin, *supra* note 23, at 339.

89. See *id.* at 339–40 (arguing that emphasis should be placed on liability as opposed to statistics; the general assumption already exists that harm does not ordinarily arise absent negligence).

90. *Id.* at 340 (referencing *Quintal v. Laurel Grove Hosp.*, 397 P.2d 161, 167 (Cal. 1964) (en banc)). The author notes that such presumption could potentially make a physician “the insurer for rare injuries that are unavoidable even when he or she exercises the utmost care.” *Id.*

91. See, e.g., *Cohen v. Albert Einstein Med. Ctr.*, N. Div., 592 A.2d 720, 728 (Pa. Super. Ct. 1991) (explaining that a circumstantial evidence instruction is necessary when requested to explain permissible inferences to the jury).

defendant's negligence."⁹² The conclusion is based on a layperson's "fund of common knowledge," and where that does not exist, such as in medical malpractice cases, an expert witness can be helpful in explaining what "ordinarily" occurs and what does not, based on the expert's qualifications and experience.⁹³

B. *Should Res Ipsa Loquitur Be Permitted in Overly Complex Cases?*

Res ipsa illustrations typically involve straightforward scenarios that are easily understood, even when they step into the realm of medical malpractice. For example, lay jury members can apply the three-pronged test in instances where a quadriplegic falls from an examination table while in the care of a hospital,⁹⁴ or when pain follows a laparotomy sponge being left in an abdominal cavity.⁹⁵ During trials, experts elucidate complex care and areas of science, and juries may infer what they will based on the evidence presented. However, there may be instances where allowing res ipsa to provide a logical framework for determining whether a plaintiff met her burden may place unwarranted demand on a layperson and lead to additional confusion in an already complex case.

Particularly in fact-sensitive medical malpractice cases in which juries serve as the fact finder, providing a res ipsa instruction may lead jury members to rely on feelings of sympathy and misinterpret the instruction as an allowance to equate injury with negligence.⁹⁶ While erroneous negligence findings are always a possibility, the judge

92. *Weaver v. Pa. Elec. Co.*, No. 1999-3051, 2002 WL 34097652 (Pa. Ct. Com. Pl. May 23, 2002) (citing *Micciche v. E. Elevator Co.*, 645 A.2d 278, 281 (Pa. Super. Ct. 1994)); *see also* *Leone v. Thomas*, 630 A.2d 900, 901-02 (Pa. Super. Ct. 1993).

93. *Jones v. Harrisburg Polyclinic Hosp.*, 437 A.2d 1134, 1138 (Pa. 1981) ("[Section 328D] establishes criteria for determining circumstances wherein the evidentiary rule of res ipsa loquitur may become operative in providing the inference of negligence."); *see also* *Quinby v. Plumsteadville Family Practice, Inc.*, 907 A.2d 1061, 1072 (Pa. 2006) ("[W]hen common knowledge or medical evidence can be established that the event would not ordinarily occur without negligence, there is no basis for refusing to draw an inference of negligence in accord with res ipsa loquitur.").

94. *See Quinby*, 907 A.2d 1061, 1070-71 ("With all but the most self-evident medical malpractice actions there is also the added requirement that the plaintiff must provide a medical expert who will testify as to the elements of duty, breach, and causation.").

95. *See Fessenden v. Robert Packer Hosp.*, 97 A.3d 1225, 1227 (Pa. Super. Ct. 2014).

96. *See Ablin*, *supra* note 22, at 348-49 (discussing jury sympathy generally in medical malpractice cases and potential for a res ipsa instruction to allow jury members' feelings to lead their deliberation as opposed to facts and testimony only).

serves as a gatekeeper of these issues and in her discretion may determine whether *res ipsa* is an appropriate instruction based on whether the plaintiff proved all three prongs of the Second Restatement. Section 328D contemplates that possibility, as it explains that it “is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.”⁹⁷

C. *Increased Risk Standard: An Alternative for Complex Medical Malpractice Cases*

Although *res ipsa* serves to fill in the gap between available evidence and the plaintiff’s harm, there is another slightly similar alternative for plaintiffs who lack evidence necessary to demonstrate causation. A similar gap-filler doctrine is the increased risk of harm theory in which a plaintiff must establish a *prima facie* case through expert testimony to the effect that the defendant’s conduct did, within a reasonable degree of medical certainty, increase the risk that the plaintiff’s harm would occur.⁹⁸ This standard is criticized for appearing to increase the duty owed to a patient by a physician while relaxing the causation element of a negligence claim.⁹⁹ This is not unlike *res ipsa* in that regard, and may accordingly be more appropriate in complex cases where *res ipsa* would create too much of a logical leap to be applicable.

CONCLUSION

There is no doubt that *res ipsa* is clouded in confusion and differs greatly in practice from the doctrine’s first appearances in legal texts that reference *Byrne*. This is particularly true with medical malpractice cases, which introduce science, emotions, and complicated procedures to the courtroom. While expert testimony is not necessary in traditional *res ipsa* scenarios, and there is no *per se* requirement to make out a *res ipsa* claim using expert testimony, the logical obstacles in play demand—at minimum—a standard of care expert to articulate the duty owed to a plaintiff by a medical professional because the

97. RESTATEMENT (SECOND) OF TORTS § 328D(2) (1965).

98. Tory A. Weigand, *Loss of Chance in Medical Malpractice: A Look at Recent Developments*, 70 DEF. COUNS. J. 301, 303 (2003) (citing *Beswick v. City of Philadelphia*, 185 F. Supp. 2d 418, 433 (E.D. Pa. 2001) (reciting *prima facie* case for increased risk standard)).

99. See *id.* at 312.

emphasis should be placed on determining whether the defendant is liable. Although Pennsylvania's certificate of merit rule permits plaintiffs to attest that a case is so simple that expert testimony is unnecessary, as demonstrated in *Fessenden*,¹⁰⁰ the bar is set high: plaintiffs who certify that their case does not require expert testimony are not permitted to change their mind and offer expert testimony at trial absent exceptional circumstances.¹⁰¹

Expert testimony use in *res ipsa* cases began with a shaky start, with some arguing that if the case requires expert testimony because of its complexity, then perhaps *res ipsa* should not be allowed at all.¹⁰² Indeed, the doctrine was intended for more simplistic scenarios where logic could save the day. At this juncture, however, Pennsylvania courts have demonstrated a consistent application of *res ipsa* in medical malpractice cases and what burden a plaintiff must satisfy for such an instruction to be warranted. Of course, there are only limited cases where such an instruction should be allowed—medicine and surgery are difficult and complicated subjects.¹⁰³ Due to that complexity, experts on both standard of care and causation are necessary to shepherd the jury through an explanation first of what the standard of care is and then how that breach of care led to an injury. That way, should a judge find that a plaintiff has not satisfied his section 328D requirement, the plaintiff may still be able to make out a claim for negligence based on the testimony provided in conjunction with the other evidence.

By submitting a certificate of merit stating that the case does not require expert testimony, the plaintiff is placed in a precarious situation. Even if a case can be proven without causation testimony, the stakes seem too high should the case go to trial. Moreover, when an attorney goes before a jury and begins describing the golden scales of justice, the definition of preponderance, and the importance of “fifty-one percent,” the weight of expert testimony can only help prove negligence; it cannot hurt it. The scales of justice theme even ties in well with articulating the three-prong test for showing that *res ipsa* applies to the case, highlighting phrases like “ordinarily does not occur” and “more often than not” to verbally illustrate scales falling to one side,

100. *Fessenden*, 97 A.3d. at 1228.

101. PA. R.C.P. 1042.3(a)(3) explanatory cmt.

102. See generally Ablin, *supra* note 23 (arguing against use of *res ipsa* in medical malpractice cases).

103. See *Connors v. Univ. Assocs. in Obstetrics & Gynecology, Inc.*, 4 F.3d 123, 127–28 (2d Cir. 1993) (explaining need for expert clarification when *res ipsa* is invoked in medical malpractice cases due to complex nature of medicine).

even if only slightly. For that reason, *res ipsa* and expert testimony may not be misaligned partners, but rather go hand-in-hand in medical malpractice matters.