

5.50B COMMON KNOWLEDGE MAY FURNISH STANDARD OF CARE (Approved 3/02)

Negligence is the failure to comply with the standard of care to protect a person from harm. Negligence in a doctor's medical practice, which is called malpractice, is the doctor's failure to comply with the standard of care in the care and treatment of his/her patient. Usually it is necessary to establish the standard of care by expert testimony, that is, by testimony of persons who are qualified by their training, study and experience to give their opinions on subjects not generally understood by persons who lack such special training or experience. In the usual case the standard of care by which to judge the defendant's conduct cannot be determined by the jury without the assistance of expert medical testimony.

However, in some cases, such as the case at hand, the jury may determine from its common knowledge and experience the standard of care by which to judge the defendant's conduct. In this case plaintiff contends that the defendant violated the duty of care he/she owed to the plaintiff by doing _____ [*or by failing to do the following* _____]. In this case, therefore, it is for you, as jurors, to determine, based upon common knowledge and experience, what skill and care the average physician practicing in the defendant's field would have exercised in the same or similar circumstances. It is for you as jurors to say from your

common knowledge and experience whether the defendant deviated from the standard of care in the circumstances of this case.

NOTE TO JUDGE

Where there has been expert medical testimony as to the standard of care, but the standard is one which can also be determined by the jury from its common knowledge and experience, the jury should determine the standard of care after considering all the evidence in the case, including the expert medical testimony, as well as its own common knowledge and experience.

After determining the standard of care required in the circumstances of this case, you should then consider the evidence to determine whether the defendant has complied with or departed from that standard of care. If you find that defendant has complied with that standard of care he/she is not liable to the plaintiff, regardless of the result. If you find that defendant has not complied with that standard of care, resulting in injury or damage to the plaintiff, then you should find defendant negligent and return a verdict for plaintiff.

Cases and Notes:

a) Common Knowledge

The common knowledge doctrine was applied in *Martin v. Perth Amboy General Hospital*, 104 N.J. Super. 335 (App. Div. 1969), where a laparotomy pad was left in plaintiff's body during an operation; *Tramutola v. Bortone*, 63 N.J. 9 (1973), where plaintiff discovered that a needle had been left in her chest during surgery; *Steinke v. Bell*, 32 N.J. Super. 67 (App. Div. 1954), where a dentist removed the wrong tooth; *Becker v. Eisenstodt*, 60 N.J. Super. 240 (App. Div. 1960), where the

defendant used a caustic substance instead of an anesthetic; *Terhune v. Margaret Hague Maternity Hospital*, 63 N.J. Super. 106 (App. Div. 1960), where plaintiff was burned as a result of the improper administration of an anesthetic during childbirth; *Nowacki v. Community Medical Center*, 279 N.J. Super. 276 (App. Div. 1995), where plaintiff alleged that she fell while attempting to lift herself onto a treatment table; *Tierney v. St. Michael's*, 214 N.J. Super. 27 (App. Div. 1986), *certif. den.* 107 N.J. 114 (1987), where plaintiff's infant crawled out of a crib while hospitalized at the defendant hospital; *Winters v. Jersey City Medical Center*, 120 N.J. Super. 129 (App. Div. 1972), where the court held that one does not need an expert witness to testify that the bed rails should have been in the up position for an elderly person who fell out of bed. The common knowledge doctrine was applied to a failure to communicate an abnormal finding and the signing of an incorrect discharge summary in *Jenoff v. Gleason*, 215 N.J. Super. 349 (App. Div. 1987). In *Rosenberg by Rosenberg v. Cahill*, 99 N.J. 318 (1985), the common knowledge doctrine was not applied to the failure to observe a tumor in an x-ray.

The court rejected the plaintiff's reliance on the common knowledge doctrine in *Posta v. Chueng-Loy*, 306 N.J. Super. 182 (App. Div. 1997), involving hernia surgery.

See also, Sanzari v. Rosenfeld, 34 N.J. 128 (1961), *Jones v. Stess*, 111 N.J. Super. 283 (App. Div. 1970), *Klimko v. Rose*, 84 N.J. 496 (1980).

b) *Res ipsa loquitur*

There are three requirements which must be demonstrated in order to apply the doctrine of *res ipsa loquitur*:

- (1) The occurrence must be one which ordinarily bespeaks negligence;
- (2) The instrumentality causing the injury must have been within defendant's exclusive control; and
- (3) There must be no indication that the plaintiff's injury was in any way the result of his or her own voluntary act or neglect.

A detailed analysis of the doctrine of *res ipsa* is found in *Gould v. Winokur*, 98 N.J. Super. 554 (Law Div. 1968), *aff'd.*, 104 N.J. Super. 329 (App. Div. 1969), *certif. den.* 53 N.J. 582 (1969). *See also*, *Buckelew v. Grossbard*, 87 N.J. 512 (1981).

The difference between the *res ipsa* doctrine and the common knowledge doctrine is that the *res ipsa* doctrine requires expert testimony to prove the first element, *i.e.*, that the occurrence does not usually happen in the absence of negligence. *Smallwood v. Mitchell*, 264 N.J. Super. 295 (App. Div. 1993), *certif. den.* 134 N.J. 481 (1993).

The logical extension of the *res ipsa* and common knowledge doctrines is the conclusion that there are cases where the facts are such that at least one defendant must be liable as a matter of law. The genesis of this concept in New Jersey is found in *Anderson v. Somberg*, 67 N.J. 291 (1975), *cert. den.* 423 U.S. 929 (1975). *See also*, *Chin v. St. Barnabas Medical Center*, 160 N.J. 454 (1999).

The doctrine of *res ipsa loquitur* was deemed applicable in *Yerzy v. Levine*, 108 N.J. Super. 222 (App. Div. 1970), *aff'd.* 57 N.J. 234 (1970), where the common bile duct had been completely severed during gall bladder surgery; *Pearson v. St. Paul*, 220 N.J. Super. 110 (App. Div. 1987), where plaintiff's sixteen year old daughter died after arthroscopic knee surgery.

The doctrine of *res ipsa loquitur* was deemed inapplicable in *Toy v. Rickert*, 53 N.J. Super. 27 (App. Div. 1958), where plaintiff alleged that the defendant negligently administered a shot of penicillin into plaintiff's right buttock causing nerve damage; in *Renrick v. Newark*, 74 N.J. Super. 200 (App. Div. 1962), where plaintiff alleged that the defendant negligently injected a drug resulting in severe burning of both forearms and widespread scarring; *Posta v. Chueng-Loy*, 306 N.J. Super. 182 (App. Div. 1997), involving hernia surgery.

- c) Common knowledge can be employed in some cases although expert medical testimony is also offered as to the standard of care and defendant's alleged departure therefrom. *See Sanzari v. Rosenfeld*, *supra*, 34 N.J. at 138 and 143.