Pleading med mal: Rule 9(j), res ipsa loquitur, and a new Court of Appeals opinion

Rule 9(j)'s special pleading requirement

Rule 9(j) of the North Carolina Rules of Civil Procedure requires plaintiffs filing medical malpractice complaints to include a specific allegation not required in other types of negligence suits. The plaintiff must allege that the medical care and records have been reviewed by an expert who meets certain qualifications and who is willing to testify that there was a breach of the standard of care. The rule is very strict, and if a plaintiff fails to include the Rule 9(j) language before the underlying statute of limitations expires, the complaint "shall be dismissed." *See, e.g*., *Vaughan v. Mashburn*, 795 S.E.2d 781 (N.C. App. 2016) (acknowledging the harshness of the result).

The (rarely successful) exception for *res ipsa loquitur*

The certification is not required, though, in cases in which expert testimony would not be necessary to demonstrate a breach of the standard of care – that is, when the doctrine of "*res ipsa loquitur*" applies. Latin refresher: "*Res ipsa loquitur*" means "the thing speaks for itself." (Think scalpels left inside the body after surgery.) Rule 9(j)(3) expressly carves out an exception for this type of situation.

Time and again, however, the Court of Appeals has held that *res ipsa loquitur* ("*res ipsa*") rarely applies in the context of medical negligence. As discussed below, the court has rejected it once again in an opinion issued yesterday.

For *res ipsa* to apply, "an average juror must be able to infer, through…common knowledge and experience and without the assistance of expert testimony, whether negligence occurred." *Hayes v. Peters*, 184 N.C. App 285, 287–88 (2007). Because "most medical treatment involves inherent risk and is of a scientific nature," the doctrine has had very limited application to medical malpractice actions. *Id.* at 288. The Court of Appeals has encouraged courts to "remain vigilant and cautious about providing res ipsa loquitur as an option for liability in medical malpractice cases other than in those cases where it has been expressly approved." *Id.* (quotation omitted).

In each of the following cases, courts have rejected the doctrine as an excuse for not complying with Rule 9(j)'s pleading requirement:

- Stevenson v. North Carolina Department of Correction, 210 N.C. App. 473, 477 (2011): Skin condition after alleged "cursory" glance of infected area rather than thorough review
- Rowell v. Bowling, 197 N.C. App. 691, 697 (2009): Incisions in opposite knee during arthroscopic surgery (where direct cause was alleged)
- McGuire v. Riedle, 190 N.C. App. 785, 788-90 (2008): A fragment of a surgical screwdriver

was damaged and remained in a screw during arthroscopic-assisted ACL reconstruction in a knee
- Hayes v. Peters, 184 N.C. App. 285, 288 (2007): Stroke occurring after air emboli entered nervous system during esophagastroduodenoscopy.
- Anderson v. Assimos, 146 N.C. App. 339, 342-43 (2001), rev'd in part on other grounds, 356 N.C. 415 (2002): Equilibrium problems, nausea, and dizziness caused by drug after alleged failure to warn of side effects and to monitor patient
- Cartrette v. Duke University Medical Center, 189 N.C. App. 403, *3-4 (2008) (unpub'd): Pain in head after neurosurgery started on incorrect side of head but was performed and completed on correct side.
- Moore v. Gaston Memorial Hospital, Inc., 172 N.C. App. 592, *3 (2005) (unpub'd): Perforation of esophagus during endoscopic examination and dilation procedure
- Frazier v. Angel Medical Center, 308 F.Supp.2d 671, 677 (M.D.N.C. 2004): Pain in ankle after orthopedic treatment and consultation for car crash injury
- Moore v. Pitt County, 139 F.Supp.2d 712, 713 (E.D.N.C. 2001): Hepatitis contraction after blood transfusion (where no allegation of exclusive control)
- Littlepaige v. United States, 528 Fed. Appx. 289, 296 (4th Cir. 2013) (unpub'd): Injury upon falling to the floor after a "falls precaution" and alleged failure to diagnose thereafter.
- Jenkins-Bey v. Land, 2010 WL 3672285, *6-7 (E.D.N.C.) (unpub'd): Gastric ulcer resulting from alleged indifferent treatment of STD
- Hairston v. Gonzalez, 2008 WL 2761315, *5 (E.D.N.C. 2008) (unpub'd): Back pain and injury after alleged delayed examination and intervention

In fact, the only published case to date in which the court accepted a *res ipsa* argument in the Rule 9(j) context was in *Robinson v. Duke University Health Systems, Inc.*, 229 N.C. App. 215, (2013). In a surprising result (at least to me), the court held that the doctrine was appropriately invoked in a case of a surgical colectomy during which the small intestine was mistakenly reattached to the vagina rather than the rectum (but soon corrected!). The court determined that no "understanding of the requisite techniques" was necessary for the jury to determine that negligence occurred. Perhaps swayed by the rather unsavory consequence of the mistake, the panel was unpersuaded by the complexities of surgical procedures and the lack of expertise of laypeople in assessing the details of human anatomy in a surgical field. *Id.* at 229–30. *But see Cartrette v. Duke University Med. Ctr.*, 189 N.C. App. 403 (2008) (unpublished) (noting that "a layperson would have no common knowledge or experience to determine that [defendants were] negligent in the way a complicated, technical neurosurgery was initiated, performed, or completed").

In any event, Robinson continues to stand alone. The *Bluitt* opinion, issued yesterday, resumes the prior run of cases rejecting *res ipsa* in the medical negligence context.

The latest opinion: Bluitt v. Wake Forest University Baptist Medical Center

Ms. Bluitt underwent a cardiac ablation at Wake Forest to correct an irregular heartbeat. She was

under general anesthesia (and thus was unconscious) during the procedure. She awoke from surgery to tremendous pain in her lower back, later diagnosed as a third-degree burn. She was treated for the burn with a skin graft. Exactly three years later she sued Wake Forest and the physician for negligence. She did not include a Rule 9(j) certification and instead relied on the doctrine of *res ipsa loquitur*. The trial judge granted summary judgment in favor of defendants due to Ms. Bluitt's failure to comply with Rule 9(j). (Defendants' motion had been supported by four affidavits from cardiac electrophysiologists explaining the risks of the procedure.) The Court of Appeals affirmed the trial court's order. The court explained that the doctrine cannot apply when expert testimony is necessary to permit a layperson to evaluate whether the facts establish a breach of the standard of care. Here, the defendants demonstrated through testimony of specialists that burns to the back are an "inherent risk of a cardiac ablation, and can occur without negligence on the part of the physician performing the procedure." The court concluded that the procedures in question were

"outside of common knowledge, experience, and sense of a layperson; thus, without expert testimony, a layperson would lack a basis upon which to make a determination as to whether plaintiff's back injury was an injury that would not normally occur in the absence of negligence, or was an inherent risk of a cardiac ablation."

The takeaway

As *Bluitt* shows, lawyers continue to face an uphill climb if they want to avoid Rule 9(j)'s special pleading requirement by alleging *res ipsa*. The risk of being wrong is a dismissed action that cannot be remedied once the statute of limitations has run.