Surgical Sponge Left After Hysterectomy

In January 2009, an Alabama woman with multiple sclerosis visited Dr T., the defendant ob-gyn, for severe pelvic pain. Dr T. made a diagnosis of a fibroid uterus and ovarian cysts. The patient underwent a transvaginal hysterectomy, but her pain persisted after the surgery.

After being discharged, she discovered a long strip of packing protruding from her vagina, which Dr T. instructed her to extract herself. After doing so, however, the patient continued to have pain, bleeding, and a foul-smelling vaginal discharge. Dr T. diagnosed urinary tract infection and bacterial vaginosis. Antibiotics and pain medication were prescribed, but the patient's pelvic pain persisted.

In April 2009, Dr T. ordered CT to rule out an abscess or a foreign body. A gauze surgical sponge, left at the conclusion of the patient's hysterectomy, was detected. Surgery was performed to remove the sponge.

The plaintiff alleged negligence in the sponge's retention, maintaining that not only was a second surgery required, but that her multiple sclerosis was exacerbated as a result of the entire situation.

The defendant claimed that tests had been performed to investigate the possibility of a foreign body, and that as soon as the surgical sponge was detected, it was removed.

OUTCOME

According to a published report, a defense verdict was returned.

COMMENT

The defense verdict here is surprising. In most cases in which surgical instruments are left in patients, plaintiffs prevail by using a legal doctrine known as *res ipsa loquitur*—a Latin legal term of art meaning "the thing speaks for itself." This is generally requested as a jury charge, wherein the plaintiff asks the judge to explain to the jury that they may find negligence from a certain unusual fact that cannot have occurred without negligence (eg, a sponge left in a patient after surgery).

The history of *res ipsa loquitur* dates back to 1863 in the case of Byrne v Boadle, in which a barrel of flour rolled from a second-story window and struck a pedestrian below, causing serious injury. The defendants' claim was that the plaintiff (who had no recollection of the event) was unable to show evidence of negligence. The court created the doctrine, holding that the fact of the accident itself provided ample evidence of negligence, excusing the plaintiff from the burden of proving that negligent acts (eg, inadequate harnessing of the barrels) led to the accident.

Why is this important? The concept of *res ipsa loquitur* is commonly invoked in medical malpractice actions. It generally requires three elements: the plaintiff suffers an unusual injury, the plaintiff was under the exclusive control of the medical defendants, and the plaintiff did not contribute to the injury.

In a leading malpractice case, Ybarra v Spangard (1944), a plaintiff awoke after undergoing an appendectomy with difficulty moving his arm as a result of reflex sympathetic dystrophy. The plaintiff alleged negligence stemming from the intraoperative positioning of his body, but he could not show the specifics of positioning during surgery. The court held that the patient's body was under the exclusive control of the team of medical professionals, and that negligence could be inferred because loss of an arm's function following an appendectomy is unusual and cannot occur without some negligent action involved.

When successfully used in malpractice cases, *res ipsa loquitur* relieves the plaintiff of the need to prove by a preponderance of the evidence the actions that led to the breach of the standard of care. In order to prevail, she must show the injury, the defendants' exclusive control, and no contribution on her part. Practically, this permits the case to withstand defense motions for summary judgment and to be brought before a jury with scant to no evidence on the purported negligent act itself—merely the unusual injury and the defendants' exclusive control.

Traditional application of the doctrine was limited to cases in

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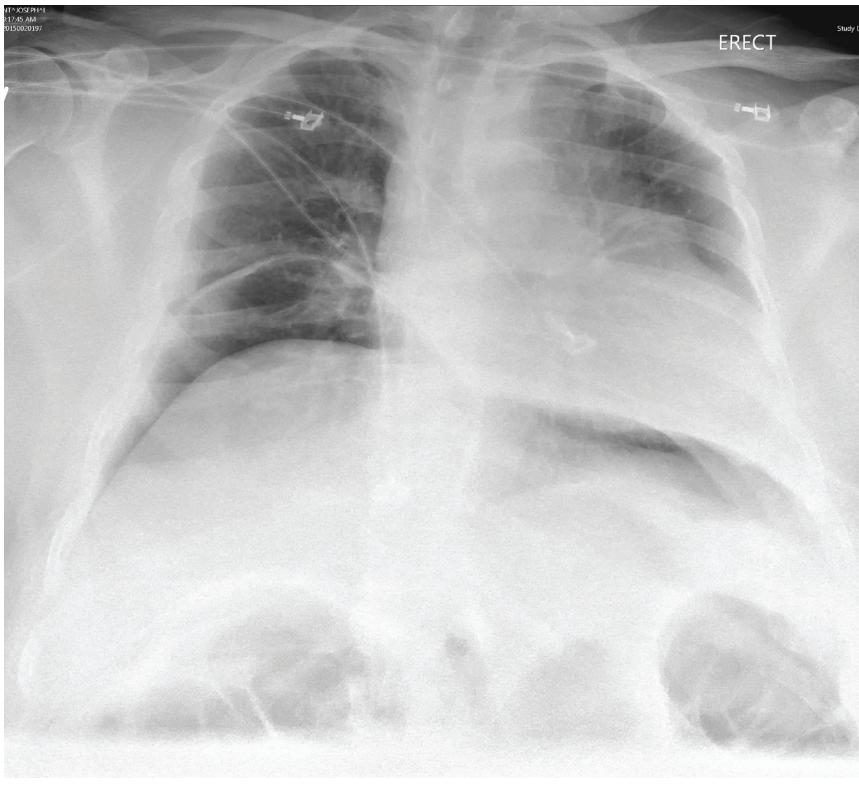
Postoperative Patient Suddenly Worsens



A 55-year-old man undergoes an elective craniotomy for tumor resection, with uneventful preoperative and intraoperative stages. Immediately postoperative, however, he experiences seizures. Noncontrast CT of the head is negative except for postoperative changes.

The patient is placed in the ICU for close monitoring. He is slowly improving when, on the fifth postoperative day, tachypnea and dyspnea are observed.

The patient is afebrile. His blood pressure is 116/70 mm Hg; pulse, 90 beats/min; respiratory rate, 30 breaths/min; and O_2 saturation, 98%.

A stat portable chest radiograph is obtained. What is your impression?

see answer on page 22 >>

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which negligence was obvious to a layperson: for example, instruments left in patients or amputation of the wrong leg—the thing that "speaks for itself." Newer evolution of the doctrine is problematic when extended to cases in which expert testimony should be required to demonstrate the standard of care and the defendant's breach of it. When courts are willing to extend the doctrine, the plaintiff is awarded the presumption of negligence, which the defendant(s) must now come forward to rebut. For example, in a 2010 case in Illinois, a jury returned a $3.6 million verdict following the death of a 2-year-old who had had a seizure. The child's seizure was reportedly controlled, but he was allegedly hypoventilated while undergoing CT and unfortunately died. The plaintiff was permitted to invoke the doctrine of *res ipsa loquitur* and was allowed the presumption that medical negligence was responsible for the outcome.

Unlike the surgical sponge left in a patient, matters of central nervous system status, monitoring during CT, airway and ventilation status, hypoxemia, and postictal states are not within the experience of the typical juror. The negligent "thing" is not a sponge that "speaks for itself," but a course of actions that requires expert testimony precisely because it does not "speak for itself." In cases in which an injury is beyond the average juror's realm of experience, courts should require the plaintiff to prove her case. The doctrine should not "evolve" to excuse a plaintiff from the burden of producing evidence and persuading a jury. This forms the foundation of our civil law system. **—DML** **CR**